Beyond High Hopes and Unmet Expectations: Judicial Selection Reforms in the States

Rebecca D. Gill
University of Nevada, Las Vegas, rebecca.gill@unlv.edu

Follow this and additional works at: https://digitalscholarship.unlv.edu/political_science_articles

Part of the American Politics Commons, Legal Studies Commons, Policy Design, Analysis, and Evaluation Commons, and the Policy History, Theory, and Methods Commons

Citation Information

This Article is brought to you for free and open access by the Political Science at Digital Scholarship@UNLV. It has been accepted for inclusion in Political Science Faculty Publications by an authorized administrator of Digital Scholarship@UNLV. For more information, please contact digitalscholarship@unlv.edu.
Beyond High Hopes and Unmet Expectations

Judicial Selection Reforms in the States

Public debate on state judicial elections versus merit selection spans more than a century. The empirical evidence suggests there is no "best" system for selecting judges; all systems have advantages and disadvantages. The relative merit of the various systems depends on the goals we wish to maximize.

by REBECCA D. GILL

The scholarly debate about how to select state judges has been ongoing for decades; the public debate on the issue spans more than a century. Proponents on each side seem confident that their preferred method of judicial selection is the best. Reformers have argued that "judicial elections deserve the limelight in the variety show of threats to judicial independence."1 Defenders of judicial elections have countered that judicial reformers are "waging war on democratic processes and the rights of citizens to maintain control over government."2 The empirical evidence to date, however, has largely resulted in a draw. The more we learn about the actual performance of these systems, the more difficult it becomes to declare one or the other system the winner. The purpose of this article is not to settle this debate, but neither will I shy away from it. Instead, I discuss what we currently know about judicial selection in the


The author would like to thank Mary S. Wood for invaluable research assistance.
American states and what it means for the future.

**How States Choose Judges**

At the heart of it, there are really just two main mechanisms for choosing and retaining judges: appointment and election. The large variety of systems in use in the American states comes from differences in who does the appointing or electing. This is important, of course, because the decisions judges make "reflect both the process by which the judges are chosen and the values of those who choose them." A place on the bench is a desirable job; a judgeship is one of the most secure political positions there is, and it is highly prestigious. Attorneys are also attracted to the bench by certain intangible benefits, such as the opportunity to reform the judicial system and a sense of personal and professional accomplishment. As a result, often there is a sizeable pool of attorneys interested in becoming judges. States need to determine how to select judges from this list of potential candidates.

Early on, most American states chose their judges through appointment by the governor or the legislature. The resulting judges often served for life. These appointment systems fell out of favor in the nineteenth century. Of those states that maintained appointive systems, the tenure of the judges was generally reduced to a relatively short term of office. In order to stay on the bench, judges needed to be reappointed by the legislature or the governor. Several states currently use appointive systems. Of these, many have instituted a judicial nomination committee to select and screen candidates for the bench. Some of these systems are statutory, while others are the result of executive orders enacted by governors.

By the middle of the nineteenth century, the populist sentiment associated with the Jacksonian Era led many states to abandon appointive systems in favor of partisan elections. These systems generally allow each political party to select its own candidate through a primary process. The candidates then square off against each other in contested elections, where the candidates are identified by party affiliation on the ballot. Although these partisan elections had the potential to be highly competitive and acrimonious, historically this was rarely the case. Partisan elections were generally relatively low-key affairs, with few candidates willing to take on incumbent judges.

Part of the impetus for the move to partisan elections was to give judges independence from the other branches of government. Many populist reformers were disappointed with the results of this reform. Instead of being beholden to the political elites who appointed them, these new elected judges were often beholden to the party bosses who essentially secured their positions. At the turn of the twentieth century, the progressive movement sought new reforms to rid the judiciary of these ties to partisan politics. The result was the nonpartisan election. These elections were quite similar to the partisan ones, except that judges were selected in nonpartisan primaries, and their names appeared without the party designation on the ballot. The hope was that voters would select judges on the basis of their qualifications and suitability for office instead of their party affiliation.

When nonpartisan elections failed to deliver the high quality, depoliticized courts the reformers had hoped for, a new system was created that uses a combination of features to maximize judicial quality while minimizing the influence of political concerns on the judiciary. This plan is called the merit plan, or alternatively the Missouri Plan after the first state to enact it. The merit plan for selecting state judges has been "one of the key features of judicial reform" since the early twentieth century. In this plan, a nominating commission made up of lawyers and laypeople selects and evaluates potential judicial candidates. They narrow the field down to a short list of candidates, which is presented to the governor. The governor appoints one of the candidates from the list to a short term in office. After this, the judge faces the voters in an uncontested retention election. In most merit plan states, the judge must get at least 50 percent plus one vote in favor of retention in order to stay on the bench. The incumbent judge then stands for periodic retention elections.

The four main types of judicial selection systems are general models. Each state has its own unique version. Because few states fit the models exactly, there are almost as many ways to classify state judicial selection systems in America as there are researchers classifying them. Figure 1 is just one way of categorizing them. Despite all of the caveats at the bottom of the chart, it remains an oversimplified accounting of the status quo in the states. I have arranged the states based on the overall character of their selection systems, understanding that the details of many state systems would qualify for inclusion in several different categories.

For example, many people would place states like Connecticut in the merit plan column because the governor uses a nomination commission to recommend candidates for appointment. I call this an appointive system, however, because the judge is retained through reappointment instead of through retention elections. I take retention elections to be "an essential element" of the merit selection system. I also have listed Michigan and Ohio under the partisan election category even though the candidate's party affiliation does not appear on the ballot; I do...
this because judges in both of these states are subject to partisan primaries, which makes them quite similar to partisan elections.9

By my count, 17 states currently use the classic merit system that generally includes a nominating commission, gubernatorial appointment, and retention elections. This is a plurality. Nonpartisan elections are used in 13 states, while nine states use at least one partisan election in their selection process. An additional 11 states plus the District of Columbia use some type of appointment system.

But Figure 1 is just a snapshot in time of a dynamic process of reform. Not too long ago, many scholars were convinced that the momentum was on the side of the merit plan. One author in the 1980s wrote that the chances are "overwhelming that any state that decides to change its method of choosing judges will move to the Missouri [P]lan, not to any other selection system."10 Since then, only about half of the states that have changed systems have chosen the merit plan.

The trend of formal judicial selection reforms since 1900 is represented in Figure 2. In this chart, I have created hybrid categories representing modifications of existing selection systems that fall short of wholesale adoption of other existing systems. This helps to illustrate the fact that many states were motivated enough to make substantial changes to their selection systems, but declined to adopt the popular reform of the day. While many states had moved from appointive systems to partisan elections in the Jacksonian Era, a good number of Eastern states kept the appointment systems.

Mississippi was an early adopter of partisan elections, perhaps in part due to its exuberant embrace of Andrew Jackson's governing philosophy. The state abandoned legislative appointment in favor of partisan elections in 1832; it was the first state to do so. The state moved back to an appointment system—this time by the governor—with the passage of the Reconstruction Constitution in 1868, just as the trend toward partisan elections was gaining momentum elsewhere. The movement we see in Figure 2 is Mississippi moving back to partisan elections in 1914.

The rest of the top section of the chart shows the general trend away from Jacksonian-Era partisan elections toward the reform favored by the Progressives: nonpartisan elections. The other major exception to this trend is the 1921 repeal of Pennsylvania's 1913 change to nonpartisan elections. In advance of the 1940 enactment of the first merit plan, California moved from nonpartisan elections to what might be considered a precursor to the merit plan.

This system initially selects judges by gubernatorial appointment; for subsequent terms, the judges stand for retention elections. In the time between 1940 and 1970, most states making changes to their election systems opted for nonpartisan elections instead of the newly minted merit plan. However, the 1970s saw a large movement toward the merit plan; in that decade alone, nine of the 14 judicial selection system changes were to the merit plan. Since the merit plan was first adopted, only Tennessee has abandoned it in favor of partisan elections.

---

10. Supra n. 5 at 76. [emphasis removed].

**Figure 2: Judicial Selection Systems in the American States as of 2013**

<table>
<thead>
<tr>
<th>Partisan Election</th>
<th>Nonpartisan Election</th>
<th>Merit Plan</th>
<th>Appointment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Arkansas</td>
<td>Alaska</td>
<td>Connecticut</td>
</tr>
<tr>
<td>Illinois§</td>
<td>Georgia</td>
<td>Arizona†</td>
<td>Delaware</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Idaho</td>
<td>California‡</td>
<td>District of Columbia</td>
</tr>
<tr>
<td>Michigan‡</td>
<td>Kentucky</td>
<td>Colorado</td>
<td>Maine</td>
</tr>
<tr>
<td>New Mexico$</td>
<td>Minnesota</td>
<td>Florida*</td>
<td>Massachusetts**</td>
</tr>
<tr>
<td>Ohio‡</td>
<td>Mississippi</td>
<td>Hawaii</td>
<td>New Hampshire§</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Montana</td>
<td>Indiana*</td>
<td>New Jersey</td>
</tr>
<tr>
<td>Texas</td>
<td>Nevada</td>
<td>Iowa</td>
<td>New York*</td>
</tr>
<tr>
<td>West Virginia</td>
<td>North Carolina</td>
<td>Kansas*</td>
<td>Rhode Island§</td>
</tr>
<tr>
<td></td>
<td>North Dakota</td>
<td>Maryland*</td>
<td>South Carolina</td>
</tr>
<tr>
<td></td>
<td>Oregon</td>
<td>Missouri*</td>
<td>Vermont</td>
</tr>
<tr>
<td></td>
<td>Washington</td>
<td>Nebraska</td>
<td>Virginia</td>
</tr>
<tr>
<td></td>
<td>Wisconsin</td>
<td>Oklahoma*</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>South Dakota*</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Tennessee*</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Utah</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Wyoming</td>
<td></td>
</tr>
</tbody>
</table>

* System used for appellate courts, with other system used in at least some trial courts
† Uses a variant of the merit plan which includes retention elections
‡ Partisan primary for at least some of the judgeships
§ Hybrid system with partisan elections first and retention elections for subsequent terms.
** Does not require reappointment; term for life or until mandatory retirement age

Data derived from the American Judicature Society's "Judicial Selection in the States" (http://www.judicialselection.us).
FIGURE 2. Formal Changes of Judicial Selection Systems Since 1900

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1907</td>
<td>WA</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1908</td>
<td>MO</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1910</td>
<td>MS*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1912</td>
<td>OH</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1913</td>
<td>PA*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1914</td>
<td>KS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1915</td>
<td>WV</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1934</td>
<td>CA*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1934</td>
<td>ID</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1937</td>
<td>MT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1937</td>
<td>OR</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1939</td>
<td>MI</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1940</td>
<td>MD*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1942</td>
<td>UT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1943</td>
<td>MO</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1944</td>
<td>MD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1945</td>
<td>UT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1946</td>
<td>KS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1947</td>
<td>KS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1948</td>
<td>KS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1962</td>
<td>IA</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1964</td>
<td>CO*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1966</td>
<td>CO</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1962</td>
<td>WI*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1963</td>
<td>MD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1965</td>
<td>FL</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>FL</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>AZ*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>NE*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>TN*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>VT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>NY</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>KY</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td>KY</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td>KY</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td>HI</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td>HI</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1979</td>
<td>SC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>WI*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>CT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td>CT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>MD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>MD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td>NC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td>NC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td>NC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td>NC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1994</td>
<td>RI*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1994</td>
<td>RI*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1996</td>
<td>TN*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1996</td>
<td>TN*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>AR</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>NC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>NC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>NC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Indicates that the state made the change for a subset of their judges.
It appears that the momentum toward the merit plan has stalled. Despite enthusiastic, aggressive campaigns in favor of the merit plan in a number of states, voters appear to be increasingly unwilling to cede their power to select and retain judges through competitive elections. Americans hold seemingly conflicting opinions about what they want out of their judicial system. A 2008 poll found that, while 55 percent of respondents think judges should be elected, the vast majority of respondents were concerned about the effect of electoral campaigns and fundraising on the impartiality of state judges. This apparent incoherence makes more sense in light of the inherent tensions between the need for judicial independence and accountability.

We must go back to Alexander Hamilton and Thomas Jefferson to discover the roots of the debate about the proper balance of judicial accountability and judicial independence. This debate remains a central feature of the current debate about judicial selection systems. Much of the divide between advocates of traditional elections and advocates for appointments or merit-based reform hinges on different assumptions about the appropriate levels of accountability and independence. There is a long tradition of pessimism when it comes to finding an acceptable balance. How do we choose among all possible judicial selection options? As one scholar recently put it, “[t]he answer logically turns on which selection option under consideration optimizes ‘good’ independence that enables judges to follow due process, administer pragmatic justice, and uphold the rule of law, while minimizing ‘bad’ independence that liberates judges to disregard these same three objectives.”

Institutional legitimacy is particularly important for courts, as this is one of the few sources of political capital for these “weak institutions.” Courts have a tradition of establishing the acceptability of their role in making politically charged decisions by emphasizing the differences between judges and the politicians. This focus on the different role of the judge implies the importance of impartiality to the legitimacy of the courts. By jealously guarding the independence of the judges on the bench, impartiality is maintained. Indeed, the impetus for each of the major reform efforts outlined above was to protect judicial independence.

The job of the judge is certainly different enough from that of a legislator to require the freedom to diverge from public opinion to some extent; this is the only way to facilitate the protection of due process and justice. The independence of our judiciary—as well as the perception that our judiciary is independent—is critical for the protection of our government against “greed, mendacity, brutality, moral arrogance, prejudice, and petty hatreds.” But judges do engage in policymaking, especially in state courts of last resort. Calls that judges be insulated from the wishes of the community run afoul of the idea that the rule of law requires policymakers to be accountable to the citizens for their actions. Some argue that the role of the state judge is qualitatively different from that of a federal judge, who is well protected from public opinion to some extent; as such, it may be more appropriate to encourage judicial accountability “at the state level where we would expect a close connection between public preferences and public policy.”

The story of former California Chief Justice Rose Bird is the classic example of the need for judicial independence. Appointed in 1977, Rose Bird, the first woman to sit on the California Supreme Court, was the target of criticism. During her time on the bench, she heard 61 death penalty appeals, and she voted to overturn every single one of them. Conservative interest groups, displeased by her decisions unfriendly to business interests, capitalized on the dissonance between Bird’s stance on the death penalty and the widespread public support for the practice. She withstood a blistering campaign against her in her first retention election and a number of recall attempts. She was ultimately ousted from the bench after being targeted by one of the most expensive and notorious judicial campaigns in history.

But some argue that Chief Justice Bird and the rest of the California Supreme Court had “sowed some of the seeds of [their] own undoing” by reading into California’s Constitution “values not widely shared by the people of California.” Her removal was an exercise in holding accountable judges who, “although they may not have violated a judicial canon or engaged in conduct that would result in impeachment, have displayed a continuous course of conduct that shows a disregard for precedence and the law.”

---


16. Supra n. 14 at 630.


18. Id.


22. Supra n. 2.

23. Id., at 2.


26. Supra n. 21, at 86.

WE NEED TO MAKE TWO DISTINCTIONS: WHO JUDGES SHOULD BE ACCOUNTABLE TO, AND FOR WHAT JUDGES SHOULD BE ACCOUNTABLE.
may be less independent than elected judges. The pressure may be stronger for appointed judges to conform to the wishes of the other branches than for elected judges to bend to the will of the people. The empirical evidence shows that politicians who select judges hold them accountable. Therefore voters have a hard time keeping up with the outcomes of all but the most highly publicized and sensationalized cases. In addition, the individual voter rarely has a personal stake in any cases before the courts. By contrast, political elites are much more likely to be following the intricacies of the judges’ work. They are also more likely to have a professional stake in any number of cases before the courts. Accountability to politicians may not shield appointed judges from additional public pressure. Appointing judges is sometimes touted as a solution to protect judicial independence; it likely does not provide as much insulation as we might think.

**The Voters**

We generally think of elective systems as providing unmatched judicial accountability to the voters. Research shows that voters expect a degree of political accountability from judges, and accountability does not necessarily damage the legitimacy of the courts as institutions. Judicial elections are “democracy-enhancing institutions” that serve to “create a valuable nexus between citizens and the bench.” In elective systems, “the political and judicial processes are...inexorably intertwined,” causing problems for judges who do not represent a constituency as other elected officials do.

There is agreement between reformers and supporters of elections that some level of accountability to the people is desirable. The conventional argument is that contested elections are the most efficient way to hold judges accountable to the public. Elective systems allow the voters to choose judges who agree with public sentiment on important political and legal issues like the death penalty and abortion. There is also circumstantial evidence that elected judges follow the wishes of their constituents more reliably than other types of judges. Overall, litigation rates are lower where judges are elected suggesting that electoral pressure will reduce uncertainty about likely judicial decisions. But litigation rates in a subset of case types are higher, including employment discrimination claims, again suggesting that plaintiffs have greater confidence in the popular pro-employee disposition of elected judges and a greater expectation of accountability.

Partisan elections often are thought to be better than nonpartisan elections at securing judicial accountability, but the evidence is far from clear. Some studies have suggested that partisan-elected judges are less likely to dissent in controversial cases. Other studies show that nonpartisan elections do pressure judges to confront the wishes of the public on salient issues. In fact, nonpartisan judges may be more influenced by public opinion on controversial issues than partisan judges. This may be related to the fact that nonpartisan elections are not as different in practice as they seem on paper. Often, party involvement in nonpartisan elections is significant, helping voters glean the party affiliation of the nominally nonpartisan candidates.

The existence of partisan cues is not as problematic in today’s judicial elections as it was in the past. The Jacksonian-era partisan elections yielded judges whom the public viewed as incompetent stooges of the political party bosses. Today the role of the political party in vetting and promoting candidates is different. Party bosses have given way to party primaries, diminishing the ability of party leaders to choose candidates unilaterally. This characteristic distinguishes today’s judicial elections from their historical counterpart that once spurred the Progressives’ push for nonpartisan elections.

In the merit plan, the accountability mechanism is the retention election. The role of the voters in retention elections has been described as “very small and generally insignificant.” The retention election is intended to limit accountability by making it decidedly difficult to remove any but the most egregiously terrible judges. However, recent empirical evidence suggests that retention elections no longer protect judges from pressure to conform to the wishes of the electorate on hot-button issues like abortion. The public has very little information save for whatever they learn from advertising campaigns that are sometimes waged against judges who buck public opinion.

Judges facing retention have a strong incentive to avoid being targeted by these campaigns.

Critics of the merit plan complain...
that retention elections are insufficient for promoting accountability. Despite several high-profile defeats for incumbent judges in retention elections, the vast majority of judges are retained. The affirmative retention vote has drifted slightly downward since the 1960s, but has remained high and relatively stable since then.\textsuperscript{58} As of 2006, in "only 56 of the 6,306 judicial retention elections were judges not retained."\textsuperscript{59} Retention elections show a "pronounced tendency against incumbent defeat relative to other types of elections."\textsuperscript{60} A study of state supreme court elections from 1980 to 2000 showed that incumbents' defeat rates were 23 percent in partisan elections, seven percent in nonpartisan elections, and only two percent in retention elections.\textsuperscript{61} The defeat rates for partisan and nonpartisan elections in intermediate appellate courts differed little between 2000 and 2005—they are seven percent and nine percent, respectively—but only two of 524 judges facing retention elections were defeated during this same time span.\textsuperscript{62}

Some merit plan states, like Illinois, have tried to combat these high retention rates by setting supermajority requirements for retention. After an initial partisan election, incumbent judges stand for uncontested retention elections. However, Illinois requires a 60 percent affirmative vote to win. About half of all incumbents defeated in retention elections between 1964 and 2006 were from Illinois; only one of the 29 judges defeated in Illinois failed to get a 50 percent affirmative vote total.\textsuperscript{63}

Retention rates tell only part of the story. Merit plan judges, at least at the state supreme court level, respond to eroding support by retiring in lieu of standing for retention.\textsuperscript{64} Thus the affirmative vote totals do not reflect the true level of accountability retention elections provide—a judge who declines to stand for retention will not be counted among the ousted merit plan judges.

Each of the judicial selection systems used in the states provides at least some accountability to voters, even in appointive systems.\textsuperscript{65} Partisan elections yield more competition in state supreme court races than nonpartisan elections, making it easier for voters to remove judges.\textsuperscript{66} The differences between nonpartisan and partisan elections are smaller for lower courts. The lowest incumbent defeat rate by far is for retention elections. Although these judges may not act as though they are more independent than other judges, voters rarely remove them from office.

**Quality of Performance**

Supporters of the merit plan argue that low non-retention rates are, in part, a function of the initial merit-based process. The nominating commission system focuses on qualifications instead of politics, and the low non-retention rate is a consequence of the selection of mostly high-quality judges in the first place.\textsuperscript{67} That good judges remain on the bench does not demonstrate a lack of judicial accountability, especially if one believes that judges should not be removed for reasons other than their competence on the bench.

This leads to the second major question in the independence-accountability debate: For what should judges be held accountable? As illustrated earlier, there is general consensus that judges need to be held accountable for at least some types of behavior. Indeed, some judges need to be removed from the
bench, whether for reasons of utter incompetence, corruption, or other unethical behavior. Of course, the more independence judges have, the less simple a task it is to remove even the very worst offenders.

There are mechanisms outside of the selection and retention provisions of selection systems that help to maintain the quality of the bench. Some states have chosen to enforce a mandatory retirement age on their state judges. The assumption implicit in these requirements is that it is desirable to remove older judges from the bench once they reach a particular age. Often, this means that elderly judges are deemed "too old and unfit to serve" on the bench after a certain age, usually age 70.68

Nearly all states have a mechanism for impeaching judges who have committed crimes,69 though judges are rarely removed using this process.70 Most states have created special ethics or disciplinary commissions that are charged with reviewing evidence and making determinations about allegations of unethical behavior. These institutions "are designed to establish standards and ethical guidelines for judicial elections and monitor whether candidates comply with those practices."71 Unfortunately, these commissions are largely seen as weak and ineffective, especially when they are underfunded.72 Still, disciplinary commissions can remove those judges who have committed crimes or who have otherwise violated the public trust in significant ways.

While helpful, judicial disciplinary mechanisms are an insufficient condition for ensuring a competent bench. It is important to establish a higher standard for judicial quality than just failing to break the law. Discipline commissions and mandatory retirement cannot provide this service; we must rely on the retention component of the judicial selection system to remove judges whose poor skills on the bench fall outside the jurisdiction of judicial discipline committees.

An important rationale for adopting the merit plan is the claim that the system of nomination commissions will do a superior job of vetting judges and choosing the highest quality candidates for the bench.73 Potential candidates are evaluated on the basis of their legal skills, not their political credentials, as is common in the elective systems.74 The lawyers on these commissions play an important role in this regard, as they "are most familiar with the skills, experience, and personality characteristics necessary for a qualified judge."75 In addition, they are much more likely to have professional relationships with members of the community who would meet these standards.

The hope of reformers was that the use of nonpartisan, disinterested nominating commissions would remove political considerations from the process. While voters at large cannot reasonably be expected to comb through the résumés of potential candidates and compare their relative merits, nominating commissions can. However, wherever the allocation of positions of political power is at stake, removing politics from the process is not easy to accomplish, as early evaluations of the merit system attest.

The politics involved in nominating commissions is different qualitatively, and perhaps quantitatively, than what is involved in picking a judge in a contested election. Most of the more natively political initial selection systems motivate the selectors to choose judges who will support their ideological views. In contrast, the lawyers on nominating commissions have an interest in supporting "judges who they believe will lean toward the kinds of clients the lawyers regularly represent in court."76

The lay members of the commission may also have particular interests to pursue. Sometimes the politics is among different constituencies in the legal profession, each vying for seats on the commissions to sway the process in their favor. Where these members are appointed by the governor, "they are likely to support the governor's preferences for judges,"77 governors provide their lay members with acceptable names that subsequently appear on the final list.78 With governors dominating the process, early observers of the Missouri Plan argued forcefully that the system had devolved into an appointment system.80

At the end of the day, the important question is whether merit selection—or any of the other systems—yields and retains judges of significantly higher quality. It is difficult to measure judicial quality. It is a challenge to determine which components should be emphasized in the selection of "quality" candidates.81 Early research showed little evidence that the merit plan selected more qualified judges than the other selection systems.82 One scholar noted that "the popular prejudice against election as a system producing poorly trained officials is...

---

68 Supra n. 4, at 111.
69 The exceptions are Hawaii, Oregon, Washington, and the District of Columbia.
70 Only one state judge has been removed from office through impeachment in the last 15 years—Associate Justice Rolf Larsen of the Pennsylvania Supreme Court. See American Judicature Society, Methods of Removing State Judges, American Judicature Society (2012), available at www.ajs.org/ethics.
73 Supra n. 5.
74 Supra n. 54.
75 Supra n. 5.
77 Supra n. 5, at 84.
78 Id., at 85.
80 Supra n. 76.
81 Supra n. 19.
unfounded. Subsequent research seems to confirm that the quality of judges on the bench varies little by selection system. Judicial discipline commissions do not sanction elected judges more often than appointed or merit plan judges. A study comparing the perceived quality of legal liability systems finds that partisan elections yield poorer results than other systems. But a study evaluating the opinions of state supreme courts found that while appointed judges write opinions that are cited more often, elected judges write more opinions overall; the authors conclude that "the large quantity differences makes up for the small quality difference."

Perhaps the most common proxy measure for judicial quality is previous judicial experience. Having some previous judicial experience may be an important predictor of quality since the job of the judge is highly technical and requires a great deal of academic and practical knowledge about the law. On state supreme courts, the majority of judges have at least some previous judicial experience on the bench. Evidence about whether voters are influenced by a candidate's previous judicial experience is mixed. One early study found evidence of this influence in nonpartisan trial court elections, another study of nonpartisan supreme court elections found no such evidence. A more recent study, which controls for election effects, demonstrates that previous judicial experience helps predict outcomes in state supreme court elections.

On balance, it is difficult to conclude that these judicial selection systems are substantially different from each other in terms of the quality of judges they yield. Although the merit plan features a nomination committee tailored to maximize judicial quality, given current measures of quality, this system does not produce measurably better judges than those systems without such a feature. A big part of the problem is the fact that we have been unable to decide on a quantifiable metric of what constitutes a high-quality judge.

The studies presented here do not speak directly to the ability of the various systems to remove judges who fail to meet the basic standards of competence. Judges who face retention elections report that these do encourage improvement, and that maintaining competency is the key to being retained. While it is important to weed out as many incompetent judges as possible at the initial selection stage, judicial selection systems must also foster an accountability mechanism that is strong enough to remove those who do make it to the bench. The comparative performance of the judicial selection systems on this metric has not been well established in the empirical literature and should be a focus for the future.

**Decision Outcomes and Trends**

One of the major disagreements between reformers and those who support judicial elections has been the propriety of holding judges accountable for the popularity or policy content of their decisions. The merit system implies a restrained judicial role, where judges strive to be neutral arbiters of existing policies. Inspired by the legal realists, judicial behavior researchers have long accepted the idea that judges have significant discretion, and that the zone in which strict legalism survives is quite small. They argue that who is on the bench has important implications for the policymaking in our court system.

Research suggests that American citizens are also starting to think of judges as policy makers in their own right. Reformers acknowledge the policymaking role of judges but also argue that judges should be held accountable for the quality of their performance and not for the policy content of their decisions. So, while there is a broad consensus on the importance of maximizing judicial quality through selection and retention efforts, there is no corresponding consensus over whether it is desirable to hold judges accountable for their policy preferences.

This is an important question, and it is largely a normative one. In order to win the debate on this account, reformers will need to change public perceptions about the desirability of holding judges accountable for policy positions. Reformers intended that the merit plan would provide accountability for issues of judicial quality while protecting independence on matters of case outcomes and policy-related matters. How well it does this is an empirical question, and recent research gives some important insight on how each of the judicial selection systems performs in terms of promoting accountability.

Contestation by a quality candidate is an important way that elections allow citizens to hold judges accountable. Retention elections do not provide any contestation; similarly, a good portion of the incumbency advantage in judicial elections stems from the lack of challengers. Unlike merit system judges who can actually lose their seats in uncontested elections, most elected judges who run unopposed are guaranteed victory.

---

84. Supra n. 72.
86. Supra n. 38, at 290.
87. Carp, et al., *Judicial Process in America*. 2014. However, as of 2000, 28 percent of state supreme court judges had no previous judicial experience.
90. Supra n. 2.
91. Supra n. 27.
93. Supra n. 27.
94. Supra n. 14.
96. Supra n. 5.
97. Supra n. 17.
99. Supra n. 2. 
Low rates of contestation may come from some “unwritten legal custom [that] brands the activity as improper.” Practicing lawyers may be unwilling to challenge a sitting judge for professional and practical reasons. But contestation rates in state supreme court elections have risen such that most incumbent judges seeking reelection will face a challenger. Statewide partisan races seem to be the most effective at attracting challengers. This may be especially true in states that are not dominated by a single political party. Challengers do act strategically when deciding whether to run for judge; vulnerable incumbents are the most likely to draw challengers. This helps to enable voters to hold the weakest judges accountable.

Another important way to measure the ability of elections to promote accountability is to consider ballot roll-off. This is the percentage of voters in the top of ticket race who fail to cast a ballot in the judicial race. Although ballot roll-off in retention elections has declined over time, about a third of voters still fail to vote at the bottom of the ticket. This is quite a bit higher than in other types of judicial elections. Research suggests that the presence of competition and a party label both reduce roll-off significantly in state supreme court and intermediate appellate court races. Partisan elections increase voter participation, and increase accountability for the quality of service, policy positions, or both.

North Carolina recently moved from partisan to nonpartisan elections, and there was a significant increase in ballot roll-off after the change, indicating a decline in voter participation. One of the reasons voters cite for failing to vote in judicial elections is a lack of information about the candidates. In order for elections to serve their accountability purposes, voters must have enough relevant information about the candidate or candidates. The little information that existed in the past came from local newspapers. Nonpartisan judicial elections receive less newspaper coverage than do the top-billed races, and, where there is coverage, it is less helpful to voters. The coverage does not include the high-information cues that voters need to make decisions. In this regard, nonpartisan judicial campaigns are more like the other bottom of ticket races. Political parties are involved in many aspects of nonpartisan judicial elections, and this involvement can sometimes help voters guess the party affiliation of the candidates. Indeed, candidates in nonpartisan elections see political parties as an important component of their campaign and fundraising strategies.

In partisan elections with more high-quality cues available to voters, voters with limited political knowledge vote in higher numbers. The presence of the party label on the ballot is one of the most helpful heuristic devices and the single most salient cue that helps voters distinguish among candidates, judicial or otherwise. One of the important similarities between nonpartisan elections and retention elections is the lack of a party label on the ballot. Indeed, the desire to keep party politics out of the selection process was the impetus for both of these reforms. Where the party label is absent, there is some evidence that voters will rely on subtle party cues. Information about ideology
or endorsements from politicians or interest groups can serve as a proxy for political party.119

Relying on the party label as a voter cue is not an ideal answer to low voter information. It is clear that the party label helps voters make reasonable assumptions about the policy stance of the judge. Removing party labels removes information, but keeping party labels diminishes the relative importance of judicial performance and fitness. There is no clear answer, and judicial reformers and social scientists need to continue exploring voting behavior as it relates to the goals of reform.

Voter information guides have been promoted as a way to combat the information problem, but such guides are not a solution. Voters in many states already have access to such guides. Interest groups often produce the guides, and reliable ones often come from nonpartisan legal reform groups.120 Thus far, evidence suggests that voters fail to utilize this kind of information when it is available.121 Such guides do not help, but they do not hurt either.

One problematic version of a voter guide is the publication of recommendations from state-sponsored judicial evaluation committees. These publications typically provide a narrative assessment of the judge's performance on the bench, along with a recommendation about whether voters should retain the judge. Although judicial performance evaluations have an important place in the promotion of judicial self-improvement,122 the distribution of the results in the name of voter information essentially amounts to campaign propaganda coming directly from the state.123 In addition, research has identified evidence of significant problems of gender and race bias in the attorney survey results that feature prominently in the committee recommendations.124

The lack of voter information seems to lead to the dismal voter participation rates in judicial elections. Partisan elections tend to do better at engaging the voters, but the presence of the party label on the ballot entices voters to evaluate judges based on the political fortunes of their co-partisans in government rather than on the judges' own merits. Informing the voters will not be as simple as providing voter guides, either. Government sponsorship of such guides is ethically problematic. We need to put a lot of thought into devising a solution to this information problem.

Judicial Election Campaigns

At present, the one real mechanism filling the information gap is the judicial campaign. For a slew of reasons, these have traditionally been very low-profile affairs. Judges avoided campaigning, save for the occasional public appearance, graduation speech, and the like. Some of this may be a matter of judicial culture, but it is also true that "judicial candidates have been restricted in what they can say on the campaign trail" as a matter of both the judicial ethical canons and the laws of the various states.125 Such rules and laws have targeted what have been called high-information cues like issue positions or ideology,126 leaving voters with precious little information.

Changes are afoot. A "new-style" judicial campaign has permeated all types of judicial elections, mimicking other elections.127 State courts are more important players in the American legal landscape than they once were.128 The recent U.S. Supreme Court decision in Republican Party of Minnesota v. White129 invalidated some restrictions on judicial campaign activities. The post-White freedom of judicial candidates to announce their positions on controversial issues raises a related problem. Although "active politicking by judges" used to be "regarded as demeaning,"130 there is some fear that the White decision will unleash a flurry of naked partisanship into judicial election campaigns.131 This is especially disconcerting since the decision in White called into question the constitutionality of a number of other special regulations for judicial elections.132

Yet, experimental evidence suggests "even promises to decide cases in specific ways have no consequences at all for the legitimacy of the institution."133 Despite being given the green light by the Supreme Court to announce positions, judges are not particularly interested in taking advantage of this freedom.134 It seems likely that the bigger threat to the legitimacy of the courts will come from the proliferation of attack ads, as well as the money needed to wage the large-scale advertising campaigns necessary to secure or protect judgeships today. The rise of television advertising has no doubt precipitated this problem, as it "has multiplied the cost of campaigning and made defamation a central...
feature of the activity." The fear is that the use of attack ads will diminish the public perception that the judicial candidates are apolitical.

The concern about attack ads is not unfounded. There is evidence that attack ads can cause some damage to the institutional legitimacy of state supreme courts, just as they damage the legitimacy of state legislatures. This is particularly problematic when the ads are sponsored by someone other than one of the candidates on the ballot, as they usually are. "The campaigns paid for by independent expenditures in recent years have often amounted to rank character assassination against sitting judges." Attacks from special interests are often ambush attacks; unlike challengers in elections, outside interest groups do not need to declare their candidacy by a particular date. Instead, they can swoop in at the last minute when the judge has no chance of mounting a counter attack before the election.

The problem may be even more serious in retention and nonpartisan elections. The party label is a high-quality information cue that tends to trump any case- or judge-specific information that voters hear in an advertising campaign. In retention elections, where the incumbent judge faces no competitor but still stands a chance of losing the seat, the need to assemble a fundraising strategy may not become apparent until it is far too late.

As spending on television ads continued its meteoric rise in 2010, it seems that the Supreme Court’s decision in White may have had some effect on the content of campaign advertising in judicial elections. It is not yet clear that it has led to more attack ads. Although states that interpreted White broadly had more ads drawing distinctions between candidates, the number of attack ads was not significantly different even though almost two-thirds of the attack ads on the airwaves come from independent expenditures by political parties or other groups. The ads paid for by these independent expenditures—often funded by groups outside the state—have tended to be particularly nasty and damaging.

The intuitive reaction to the increased cost of judicial campaigns is concern that the influx of money into these races will damage the independence of the judiciary and the appearance of judicial impartiality. The fear is that as campaign contributions become more necessary, judicial candidates will need to do more to attract donors and ever higher sums of money. This could keep judges beholden to the campaign donors who helped them get on or stay on the bench. At the very least, the high cost of these campaigns may create the appearance that the courts are no longer staffed with independent judges. Experimental evidence confirms that this can damage the legitimacy of the courts as institutions.

The chances of any particular state supreme court candidate succeeding in an election is closely tied to that candidate’s campaign expenditures. Partisan races are more expensive than nonpartisan ones, but recent evidence suggests that nonpartisan races are actually more expensive than partisan elections after controlling for the factors that significantly influence candidate spending. The most expensive races are those in states with supreme courts that are closely divided on party or ideological lines—most notably Illinois, Michigan, and Pennsylvania. Political parties are often heavily involved in raising money and coordinating fundraising efforts for judicial campaigns, even in nonpartisan races.

Lawyers continue to lead the charge in terms of campaign contributions to judicial candidates. It is often assumed that the increased role of lawyers in the process of selecting judges "suggests a corresponding decline in the power of political parties, voters, and other competing groups that represent the idea of popular political culture in the judiciary." A number of studies have found a connection between campaign contributions from lawyers and later judicial decisions favorable to these contributing lawyers. Such a correlation has been established in tort cases and arbitration decisions, although other studies have failed to find evidence of a relationship.

The causal link between campaign contributions and decisions is difficult to establish, as strategic campaign donors will choose to contribute to judges they think likely to support their interests to begin with. Some recent single-state studies deal with this problem, and they find some evidence that contributions and decisions are linked causally. However, a broader study finds mixed results, with only one of three states investigated showing "evidence of correlation and suggestions of causality." The increases in campaign spend-
ing, especially independent expenditures, seem to disadvantage judges facing retention elections most of all. Few judges standing for retention elections solicit copious campaign contributions; retention elections are usually quite inexpensive. Candidate fundraising is higher in contested elections, so judges in contested elections are more likely to have the means to fight back against interest group campaigns.

Interest groups have long recognized that retention elections provide an opportunity to remove judges unfriendly to their policy goals. On occasion, merit plan judges have amassed significant war chests to combat these attacks, sometimes just in anticipation of such attacks. But even when merit plan judges raise little money, they often do find ways to combat interest group-sponsored "vote no" campaigns. For example, although the three Iowa justices who were unseated in the 2010 elections raised no money of their own, the "vote yes" group, Fair Courts for Us, spent nearly $400,000 in independent expenditures in an attempt to counter the attack. The failure of this group to save the jobs of the three incumbent judges is only partially attributable to their having been significantly outspent; as a recent Justice at Stake report admits, the group "struggled to gain traction in a state where anger over the court's ruling on same-sex marriage remained intense."

Higher levels of candidate spending in state supreme court elections may decrease the legitimacy of courts; it also serves to increase voter participation in those races. As voters gain more information through the fruits of campaign expenditures, they become more likely to cast a vote in these elections. This may serve to strengthen the democratic link between the citizens and their state court judges, thereby mitigating some of the damage to legitimacy.

It is clear that much of the increase in spending is driven by the need for incumbent judges to counter the aggressive advertising campaigns mounted through independent expenditures. Today's threat of politicization of the campaigns comes not from the parties, but from outside interest groups, and retention elections do not seem to be immune to these threats. There is reason to suspect that the trend toward ever-increasing expenditures from outside interests will continue, especially in the wake of the U.S. Supreme Court's decision in Citizens United, which held restrictions on electioneering communications by corporations and unions unconstitutional.

In judicial elections, the sources of money for these independent advertising campaigns are often hidden. Although the Court in Citizens United stressed the need to promote transparency in the money trail for these types of expenditures, states have been slow to implement the robust disclosure systems necessary to keep track of who is paying for what. This is a particularly promising avenue for improving judicial elections of all types, and reformers should push for commonsense legislation in those states that continue to drag their feet.

Even if the public does not see campaign finance issues to be more problematic for judges as compared with legislators, there is good reason to be more vigilant when it comes to campaign donations to judges. The legislator's role is to respond to the needs of constituents, but the "rule of law interposes legal text between the choices judges make and the public preferences." It is not clear that even eliminating judicial elections altogether would remove the problem of interest group influence; the experience of recent federal appellate nominees shows that even appointment systems are also heavily influenced by interest groups.
Diversity on the Bench
The discussion of selection systems and spending ignores another component of legitimacy. The presence of nontraditional judges can help to build public support and confidence in our courts. As U.S. Supreme Court Justice Ruth Bader Ginsburg put it, "a system of justice is the richer for the diversity of background and experience of its participants." It is important to understand the effect different judicial selection systems have on the diversity of the judiciary, then, if we wish to understand fully the components of institutional legitimacy. Because of differences in the constituencies involved in the selection processes, we need to know whether "different selection systems establish varying informal requirements for office, give access to different groups, [or] grant special advantages to some aspirants."  

Although the situation has improved significantly, women and minorities are still underrepresented in our state judiciaries. Today, nearly a third of lawyers are women; this percentage is likely to go up, given that men and women are about equally represented in America's law schools. As of 2012, there were a total of 4,711 female judges serving on American state courts—27 percent of the total; the American Bar Association reports that members of minority racial and ethnic groups constitute just over 12 percent of the judges on the state courts.  

Reformers had high hopes that the merit plan would encourage diversity by allowing candidates to sidestep traditional barriers to entry into the profession and stand on their qualifications alone. Evidence linking particular judicial selection methods to increased diversification of the bench is mixed. Some research suggests that it is variation in the diversity of the legal profession and not the type of judicial selection system that drives the representation of women and minorities on state benches. A recent study of contested intermediate appellate court races found that there was no systematic bias against female candidates in these elections. Early research suggests that elective systems were associated with higher rates of female and minority judges in the 1980s, but that these differences had evaporated by the end of the century.  

When there is an all-male state supreme court bench, however, the story changes a bit. Research suggests that, in this situation, appointment-based systems, including merit plan appointments, are more likely to place a woman on that bench.  

This may be a result of the tendency of governors to make symbolic appointments to the bench, at least in part because such appointments can serve as "opportunities to hold political coalitions together and to reinforce group support for particular parties and candidates." Gov- ernors, legislatures, and nominating commissions are also in a better position to coordinate the elevation of the first woman or minority to a bench than are voters, who do not get an opportunity to strategize in pursuit of such goals.  

The Future of Judicial Selection
As this article demonstrates, there is no one best system for selecting judges. Reformers have long been chasing the ideal, hoping to find a way to balance accountability and independence while increasing the quality (and more recently the diversity) of the bench. At each stage, however, the high expectations of reformers have led to disappointment in the modest results of the reforms. This does not mean partisan elections are superior or preferable. On the contrary, current empirical evidence simply shows the difficulty in escaping the problems inherent in partisan elections. Nonpartisan and retention elections are coming to look more and more like the partisan elections they were meant to improve upon. Appointment-based systems have their own problems; at least some of the lack of independence from the political elite that caused reformers to move away from the system in the nineteenth century remains today. The situation is not hopeless, and the empirical evidence does not require a dire conclusion. The relative merit of the various systems depends on the goals we wish to maximize. Decades of research attempts to find significant differences between the systems, but what we have ended up with is evidence that is mixed at best. However, we do have evidence about how each of these systems works in practice and which goal each favors.  

The elimination of contested judicial elections in favor of merit selection remains one of the most popular reform proposals. The list of organizations supporting the elimination of judicial elections is long. It includes such prestigious groups as the American Bar Association, the American Judicature Society, the National Center for State Courts, the Institute for the Advancement of the American Legal System, Justice at Stake, the Brennan Center, and more. It seems, however, that movement toward merit selection has lost its momentum. A majority of Ameri-

---

170. Supra n. 83 at 106.  
171. Supra n. 4.  
173. Supra n. 4.  
174. Supra n. 19.  
180. Supra n. 5, at 82.  
can citizens today thinks that judges ought to be elected. This makes it difficult to achieve the electoral majorities needed to abandon elections. As such, a reform strategy that focuses single-mindedly on adopting the merit plan is probably doomed to failure in today's political climate.\footnote{182 Id.} A move to nonpartisan elections, the American Bar Association's second choice reform,\footnote{183 Supra n. 71.} is probably more feasible politically, but the evidence does not show that this would fix the most pressing problems.

Short of eliminating judicial elections altogether, a number of other reforms have been proposed. These reforms all seek to combat the major shortcomings of the existing judicial selection systems. This is likely a more promising avenue for addressing the specific problems that social scientists have identified. While the specific reforms vary in terms of their usefulness, they all attempt to provide creative solutions short of making costly and controversial overhauls in the system of judicial selection. Instead, these reforms are adjustments to the existing systems.

As this article emphasizes, the most pressing problem with judicial selection in the American states involves the conduct and financing of judicial campaigns. Campaigns serve the important task of providing information to voters, but the cost of these campaigns has soared out of control, placing enormous pressure on judicial candidates to assemble huge stockpiles of campaign donations. Campaign rhetoric has gotten nasty. Much of this is due to the ability of outside groups to use independent expenditures to conduct virtually anonymous attack ads campaigns against candidates in all kinds of judicial elections. Voters are troubled by this, and with good reason.

The American Bar Association, among other groups, has pushed for the public financing of judicial elections. Even strong supporters of judicial elections have favored well-designed public financing programs.\footnote{184 Supra n. 2.} One promising example of such a system has recently been implemented in North Carolina.\footnote{185 Supra n. 71.} Spending decreased in appellate court races since the new system was implemented, and a large proportion of judicial candidates are participating in the program.\footnote{186 Bonneau & Hall, In Defense of Judicial Elections. 2009.}

The consequences of having an underfunded public financing system are being felt in Wisconsin, where few candidates bother to participate in the system.\footnote{187 Id.} Lack of funding undermines the purpose of the system and does little to reduce the disparity in campaign spending between candidates. Limiting the fundraising abilities of candidates could make the independent expenditures even more powerful,\footnote{188 Owen G. Abbe & Paul S. Herrnson, Public Financing for Judicial Elections? A Judicious Perspective on the ABA's Proposal for Campaign Finance Reform, 35 POLITY 535(2003).} given that it is relative spending that seems to drive the effects of spending on electoral success.\footnote{189 Supra n. 2.} Some limits could also increase the incumbency advantage, since challengers usually need to spend more than incumbents.

One of the more promising components of North Carolina's system was the provision of rescue funds for candidates who accept public financing and face opponents who have outspent the public financing limits. This could have mitigated both the incumbency advantage and the related problem of spending disparities,\footnote{190 Id.} but the Supreme Court in Arizona Free Enterprise Club v. Bennett\footnote{191 Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. ///. (2011).} invalidated a similar rescue-funds scheme. Even had it been upheld, the provision would not have mitigated the relative increase in influence of independent expenditures. With state governments facing record budgetary shortfalls, there is little political will to commit adequate funding for such a system.

North Carolina's system is funded by voluntary donations, and this is working well so far; however, the proportion of taxpayers, lawyers, and businesses currently contributing is worryingly low.

A majority of Americans are concerned about threats to the impartiality of our courts, but they are unwilling to go as far as giving up their right to participate in the selection process via popular elections. Perhaps the most promising reform is the development of creative public financing systems for judicial campaigns. Another high priority is rigorous disclosure systems for campaign donations and independent expenditures. Together, these reforms can address the major concerns about judicial independence without forcing states to abandon the competitive elections the public seems to favor.

As with all such reforms, it will be necessary to develop well-crafted policies that set up appropriate incentives for all who are involved in the process. It will also be necessary to hold costs down. If scholars, practitioners, and reformers work together to build smart fixes to the problems identified in the literature, it is my sincere belief that we can mitigate some of the most pressing problems. Instead of pursuing ambitious overhauls, we should focus our efforts on practical adaptations of existing judicial selection institutions. I do not believe that this requires across-the-board agreement on which system is the best; instead, we can put our heads together to make each of these existing systems the best they can be.\footnote{*}

REBECCA D. GILL
Is Assistant Professor of Political Science at the University of Nevada Las Vegas. (rebecca.gill@unlv.edu)
1906 Roscoe Pound addresses the ABA on "the causes of popular dissatisfaction with the administration of justice."

1912 Herbert Harley distributes his "circular letter concerning the administration of justice."

1913 First Meeting of the American Judicature Society is held in Chicago

1913 AJS is incorporated on July 15

1913 Charles Ruggles donates $40,000 to support the Society

1914 *Bulletins I-VII* are published covering a wide range of topics, including a model state judicial act, a model metropolitan court act, and other functions

1917 Volume one of the *Journal* is published

1918 Model Bar Association Act is published in the *Journal*

1919 *Bulletin XIV*, model rules of civil procedure, is published

1921 North Dakota becomes the first state to integrate its bar

1925 Charles Ruggles discontinues support for the Society

1928 The Society is reorganized; readers of the *Journal* are asked to become members

1929 Charles Evans Hughes becomes the first AJS president

1931 The Society moves from Chicago to Ann Arbor, Michigan

1940 Missouri adopts the AJS plan for the nonpartisan selection of judges, today called the Missouri Plan

1945 Herbert Harley retires and is replaced by Glenn Winters

1954 The Society moves into the ABA center in Chicago

1959 National Conference on Judicial Selection and Court Administration is held in Chicago, the first nationwide event of its kind, giving rise to the Citizen's Conferences

1969 First National Conference on Judicial Retirement and Disability Commissions, later becoming Conference on Judicial Conduct

1973 First educational program for nominating commissioners is held in Missouri

1974 *The Key to Judicial Merit Selection: The Nominating Process* is published

1975 *A Handbook for Judges* is published

1976 National Citizen's Conference on improving courts and justice is held in Philadelphia

1977 President Carter implements a nominating commission for federal circuit courts after an AJS recommendation

1977 AJS Center for Judicial Conduct Organizations is established

1979 Volume 1 of the *Judicial Conduct Reporter* is published

1980 *American Trial Judges: Their Work Styles and Performance* is published
A Brief Chronology

1981 Judicial Discipline and Disability Digest is first published

1984 Beyond Reproach: Ethical Restrictions and Extrajudicial Activities of State and Federal Judges is published

1985 Conference on the American Jury and the Law is held in Wisconsin

1985 Reporting on the Courts and the Law, a series of workshops for journalists, begins

1987 Conference on Child Abuse and the Courts is held in Wisconsin

1990 National "the Future and the Courts" conference is held in San Antonio, organized alongside the State Justice Institute

1991 Elmo B. Hunter Center for Judicial Selection is formed

1992/1993 Annual Citizens Conferences on Merit Selection – 2nd in Hawaii

1994 Model Provisions for Judicial Selection is revised

1997 National Symposium on Sentencing

1997 Forum "Improving Access to the Courts for People Who are Deaf or Hard of Hearing" held in Miami, Chicago, and other locations

1997 Center for Judicial Independence is formed

1998 First local/state chapter of the American Judicature Society is created in Hawaii

1998 Meeting the Challenge of Pro Se Litigation—A Report and Guidebook for Judges and Court Managers is published

1999 Judges in the Classroom project is organized by AJS

1999 National Conference on Pro Se Litigation Issues is held in Scottsdale, Arizona; AJS partners with State Justice Institute and the Open Society

1999 Ethics Standards for Judges by Cynthia Gray is published

2001 Judicial Independence at the Crossroads, a conference organized alongside the Brennan Center, is held at the University of Pennsylvania

2003 National Conference on Preventing Conviction of Innocent Persons

2003 AJS Moves Headquarters to the Opperman Center at Drake University in Des Moines, Iowa

2006 Center for Forensic Sciences and Public Policy formed, located in Greensboro, NC

2007/2008 Judicial Selection in the States website is launched

2011 Report on the National Eye-Witness Identification Field Studies is released

2012 JNC Survey is published