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Rethinking Judicial Selection

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> "Judges are not politicians, even when they come to the bench by way of the ballot."—*Williams-Yulee v. The Florida Bar* (Roberts, C.J.)[1]

> "Everyone interested in contributing [in a judicial election] has very specific interests. . . .They mean to be buying a vote." —Justice Paul Pfeifer, Supreme Court of Ohio[2]

> "[T]he public's confidence in the judiciary must be earned."—Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense and Educational Fund[3]

In North Carolina, a state supreme court justice is attacked as "sid[ing] with child predators." In Illinois, plaintiffs' lawyers spend millions in an effort to unseat a justice who is hearing their appeal of a multi-billion dollar verdict. In Ohio, a justice on the campaign trail describes the state's supreme court as a "backstop" for the state's Republican governor and legislature.[4]

These are just a few examples of how the selection of state court judges has become increasingly politicized, polarized, and dominated by special interests—particularly in the 39 states that use elections as part of their system for choosing judges. These trends put new pressures on state court judges, with the potential to impact the everyday lives of people across the country.

Ninety-five percent of all cases are filed in state court, with more than 100 million cases coming before nearly 30,000 state court judges each year. State courts have a profound impact on a state's legal and policy landscape and, in turn, on people's lives. In just the past few years, state supreme courts, which are the final word on questions of state law, have struck down tort reform legislation in Arkansas, ordered Kansas's state legislature to equalize funding for public schools, and declared Connecticut's death penalty law unconstitutional. The question of who sits on the bench has high stakes, and judicial elections are increasingly indistinguishable from the rough-and-tumble of ordinary politics, with troubling implications for the integrity of state courts.

But there is far more agreement on the problems associated with judicial elections than on potential reforms.

Debates over judicial selection are often framed as a choice between contested elections and "merit selection," in which a nominating commission vets potential candidates who are appointed by the governor and then typically stand for periodic yes-or-no retention elections. Yet merit selection as it is commonly structured raises its own problems, from the use of retention elections, which are increasingly costly and politicized, to inadequate processes for recruiting diverse judicial candidates.

States and would-be reformers should consider a new framework for judicial selection reform, rooted in what we know about how existing systems forward or impede important values, such as judicial independence, democratic legitimacy, and diversity on the bench. In particular, empirical evidence

suggests that "reselection" pressures pose unique and serious threats to the fairness of courts. Yet, this is an area where the safeguards are almost uniformly weak—in all but three states, judges are periodically reconsidered for their jobs, whether through elections or reappointment, putting job security pressures front-and-center. Moving past existing debates opens up the possibility of new selection models better suited to addressing the challenges facing state courts today.

I. The Problem: Broken Judicial Selection Systems Threaten the Fairness of State Courts

Across the country, state courts are facing challenges to their basic fairness and legitimacy, many of which are tied to states' systems for choosing judges. Several of the most serious threats to equal justice stem from the growing politicization of judicial elections. Recent research suggests, for example, that campaign spending affects judges' decisions on the bench.[5] Yet other problems cut across selection methods, including a lack of diversity on the bench and evidence that concerns about job security impact judges' decisions in controversial cases.

In recent decades, and particularly since 2000, state supreme court elections have become increasingly costly and politicized. Judges are obligated to decide cases in accord with their understanding of the law and facts at issue—putting aside political preferences and pressure from special interests. But there is growing evidence that money not only helps shape the ideological composition of courts but also puts direct pressure on the decisions judges make.

Between 2000 and 2009, 20 of the 22 states that use contested elections to choose their supreme courts set spending records. Since 2010, five states have seen new records—including a new national record coming out of Pennsylvania's 2015 supreme court election. Retention elections, where judges are unopposed and face a "yes-or-no" vote, have started to show similar patterns: average spending per seat increased ten-fold from 2001-08 to 2009-14 (from $17,000 per seat to $178,000 per seat). In recent years,

Citizens United v. FEC, which barred restrictions on independent spending by corporations and unions, has also cast a long shadow, with spending by outside groups—many of which do not disclose their donors—surging. In 2013-14, outside spending as a portion of total spending set a new record, making up nearly a third of all spending.[6]

Campaigning has likewise been transformed. Ads routinely use political signals, such as touting a judge's "conservative values" or identifying endorsements from groups like the National Rifle Association. Criminal justice issues are particularly salient: in 2013-14, a record 56 percent of all ad spots either praised or attacked a candidate's criminal justice record, often singling out individual decisions for criticism.[7] In recent years, judges have been attacked for "expressing sympathy for rapists" and "protect[ing] . . . sex offenders,"[8] and have touted their own record in upholding "nearly 90% of all death sentences." [9]

One impact of these trends is an increase in conflicts of interest for judges, with judges routinely hearing cases involving major campaign spenders. A study of the Nevada Supreme Court found that in 60 percent of civil cases decided in 2008-09, at least one of the litigants, attorneys, or firms involved in the case had contributed to the campaign of at least one justice.[10] Weak recusal rules mean that judges face few barriers in hearing cases involving major financial supporters, particularly when that support takes the form of independent expenditures, which are less regulated. As Ted Olson, the former Solicitor General and a prominent litigator, observed: "The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today."[11]

These conflicts may also extend beyond appearances. In a 2001 survey of state supreme court, appellate, and trial judges, 46 percent said they believed campaign contributions had at least some impact on judges' decisions.[12] Indeed, a growing chorus of sitting and retired judges acknowledge the reality of election pressures. In the words of Richard Neely, a retired chief justice of the West Virginia Supreme Court of

Appeals, "It's pretty hard in big-money races not to take care of your friends. It's very hard not to dance with the one who brung you."[13]

Another threat to the fairness of courts is rooted in pressures around the reselection of judges currently on the bench—a concern not only in states that use elections, but also in appointment systems. Judges often hear cases relating to high-profile issues—from reproductive rights to the death penalty. While judicial rulings have always been—and should be—fair game for criticism, courts are not meant to be governed by majority preferences. Judges must follow their understanding of what the law requires, even if it is unpopular. Yet in all but three states, judges can serve multiple terms and must stand for election or reappointment, potentially putting their judicial records up for scrutiny.

Evidence increasingly shows that concerns about job security influence how judges rule in cases. In the words of the late California Supreme Court Justice Otto Kaus, deciding controversial cases when you know you will be facing an election is like "finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[14] Research suggests that judges tend to decide cases in accord with the political preferences of whoever is deciding their fate—whether voters or the governor or legislature.[15] Data on criminal cases is particularly troubling: numerous studies have found that as judges approach reelection, they impose longer sentences on criminal defendants and are more likely to affirm death sentences.[16]

State supreme courts also suffer from a lack of diversity on the bench. Diversity—including racial, gender, socioeconomic, and professional diversity—is vital to a well-functioning court system, one that draws from as broad a pool of talented lawyers as possible, fosters robust deliberation that reflects different life perspectives, and engenders confidence within the communities it serves. Recent data from the American Constitution Society shows a troubling "gavel gap" along race and gender lines: While people of color make up 40 percent of the population, they represent only 20 percent of state judges.[17] Women, who make up

half the population, are less than a third of all state judges.[18] State benches also fail to represent the diversity of the legal profession, with individuals with prosecutorial or corporate backgrounds dominating state (and federal) courts.[19]

Research suggests that "both elective and appointive systems are producing similarly poor outcomes in terms of the diversity of judges."[20] Money, old-boy networks, biases—both explicit and implicit—and inadequate pipelines for diverse candidates are all contributing factors. For example, while there is evidence that diverse nominating commissions are more likely to suggest a diverse slate of judicial candidates,[21] in practice, many nominating commissions continue to be dominated by white men.[22] On the election front, fundraising pressures can be a barrier to a more diverse bench, as can racial and gender bias. Indeed, scholarship suggests that when voters face low-information elections—as judicial elections typically are—they may, consciously or unconsciously, rely on racial and gender stereotypes as "shortcuts" in determining their choice.[23]

II. Limits of Existing Reforms

In the face of mounting evidence that courts' capacity to provide basic fairness is at risk in many states, a host of bar associations, scholars, task forces, and legislators have suggested reforms.[24] Yet these proposals have both struggled to gain traction and failed to address many of the most troubling aspects of how judicial selection is currently functioning.

Most proposals fall into two categories. One set of reforms focuses on mitigating the impact of money and special interests in judicial elections, typically through public financing systems and stronger recusal rules, which govern when judges have to step aside from cases. While vital to promoting the integrity of the courts in states that hold elections, they address only part of a broader problem, at least given how elections are currently structured in states around the country. For example, when a judge faces a million-

dollar campaign attacking a decision on the bench, neither public financing nor recusal can remedy the pressure on this and other judges worrying about similar attacks during the next election.

States have also lagged in adopting either reform. Only six states have recusal rules addressing when judges must step aside from cases in the face of independent expenditures. Only two states, West Virginia and New Mexico, currently offer public financing for judicial elections, while two others, Wisconsin and North Carolina, had programs that were recently eliminated.

The second set of proposals has focused on judicial selection reform, typically urging states to replace contested elections with a merit selection system. While there is significant variation in merit selection systems, states generally utilize nominating commissions to screen candidates and present a slate to the governor, who must select from among the nominees. Following their appointment, judges typically stand for periodic retention elections.

Merit selection went through a period of broad adoption in the 1960s and 1970s. Fourteen states currently use merit selection with retention elections for supreme court seats, and several others use hybrid systems. But no state has moved from contested elections to a merit selection system in more than 30 years. Nor has any other judicial selection reform gained traction. While a handful of states moved from partisan to nonpartisan contested elections over the past decade, few states have adopted major changes in how they choose judges since the 1980s, and recent changes have not reflected any consistent trends.[25]

Even more importantly, merit selection raises its own problems. Merit selection systems typically call for the use of retention elections, which have become increasingly high-cost and politicized and put troubling pressures on judges deciding controversial cases. There are also unanswered questions about how nominating commissions function in practice—particularly whether some committees have been subject to "capture," either by special interests or the political branches, in ways that may undermine their

legitimacy or effectiveness. Nor have states that use merit selection generally had success in ensuring a diverse bench, raising questions about their processes for recruiting and vetting judicial candidates.[26]

III. Rethinking Judicial Selection

In the face of growing threats to state courts' legitimacy and to the promise of equal justice for all—and in light of the limits of the most common reform proposals—we need to rethink how we choose state court judges.

This is no easy task. Any alternative system of choosing judges will have its own advantages and disadvantages, and may advance or impede important values related to the selection of judges—including judicial independence, judicial accountability and democratic legitimacy, judicial quality, public confidence in the courts, and diversity on the bench.[27] There are important empirical questions about the likely impact of different systems on these values. There are also normative questions about how to balance these values when they come into tension.

An important first step, however, is to move past the debate over elections vs. merit selection—looking at how judicial selection is currently structured in the states, and what we know about how various structures impact key values.

One striking factor is that while elective and appointive systems are often described in opposition to each other, the majority of states have elements of both systems. Thirty-eight states use elections as part of their selection process at the supreme court level. This includes 22 states that use elections for a judge's initial term on the bench, and 38 states that use elections for subsequent terms on the bench. Retention elections, where a sitting judge is unopposed and faces an up-or-down vote, are the most common reselection method (used in 19 states), suggesting the importance of understanding how retention elections operate and the incentives they create.[28]

At the same time, almost every state gives the governor the power to make appointments for interim vacancies, which occur when a seat opens before the end of a judge's term. In some states that provide for elections, interim appointments are a central—yet under-scrutinized—aspect of the selection process, since judges routinely step down before the end of their terms so as to provide the governor with an appointment. In Minnesota, North Dakota, and Georgia, for example, all current supreme court justices were initially appointed to the bench.

Focusing on judicial selection as reflecting different "phases"—initial terms on the bench, subsequent terms, and interim appointments—also makes clear that selection methods may operate differently, and create different incentives, depending on the *phase* in which they are utilized.

Importantly, some of the strongest empirical evidence about how judicial selection impacts judges' independence suggests that *reselection* pressures—whether through elections or appointments—pose severe challenges to fair courts.[29] Yet, this is an area where the safeguards are consistently weak. Only three states—Massachusetts, New Hampshire, and Rhode Island—have life tenure (with or without a mandatory retirement age) for judges. More attention needs to be paid to protecting judges from the "crocodile in the bathtub"—the effect job security can have on decision-making in high-salience cases. Surprisingly, relatively little attention has been paid to reselection as such, and how these unique pressures might be mitigated, regardless of how a judge initially made it onto the bench.

On the question of the initial or interim selection of judges to fill vacant seats, here, too, those considering reform should look at a wide range of options, considering the likely impact, and tradeoffs, associated with different selection options.

In particular, while judicial selection debates are most often framed as a struggle between judicial independence and accountability, these terms obscure more complex questions. For example, as legal

historian Jed Shugerman has observed, "In the switch from one form of selection to another, judges become more independent from one set of powers but more accountable to another."[30] The switch in many states from appointments to elections in the nineteenth century, for example, gave judges more independence from the governor and state legislatures, but less independence from majoritarian politics and party bosses. Thus, the question is not only how to best insulate judges from political forces, but also which political forces—including the political branches, special interests, political parties, and majority rule—pose the gravest threat to judicial independence. The question of accountability likewise raises difficult questions about how to channel the public's legitimate interest in judges' experience and judicial philosophy in a way that does not transform judges into ordinary politicians.

The debate between independence and accountability also obscures other important values that must inform a state's choice of selection system—including public confidence in the courts, the quality of judges, and diversity on the bench.

Considering these values offers new potential paths for reform. For example, can nominating commissions be structured in a way that more effectively promotes democratic legitimacy and diversity? Would electing judges to a single fixed term better promote judicial independence and public confidence? These are difficult questions—and areas for further research—but they highlight that there may be opportunities to truly rethink how states choose their judges and develop models that better respond to today's needs.

IV. Conclusion

The way we select judges has a profound impact on the kinds of courts, judges, and, ultimately, justice that we have in our country. In many states today, judicial selection is not working. While there is growing recognition of the problems facing state courts, many of the proposed solutions have not been fully responsive to these challenges. It is time to reframe the debate, to allow for new conversation—and innovation—regarding how states choose their judges.

Endnotes

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