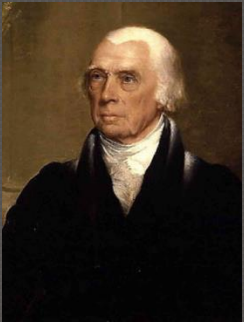


Senate Select Committee on Judicial Reform and Redistricting: Judicial Selection Methods

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Judicial Selection: Guarding the Guardians

- ◉ James Madison, Federalist No. 51:



- “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

- ◉ “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” Federalist No. 47.

The Special Role of the Courts

- Since *Marbury v. Madison*, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” 5 U.S. 137, 177 (1803).
- The judiciary as a “check” on other branches.
- Who checks the judiciary?
 - The integrity and self-restraint of judges.
 - Impeachment.
 - The selection and retention of judges.



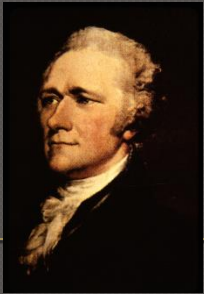
The Special Role of the Courts

- Key values related to the judicial function:
 - Independence
 - Accountability
 - Qualifications
 - Legitimacy of the courts



The Federal Model

- ◉ Declaration of Independence: “[King George] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”
- ◉ Key features of the federal model:
 - President nominates with the Senate’s advice and consent.
 - No reduction in pay while in office.
 - Lifetime appointment during “good Behavior.”
 - Impeachment.



States Initially Followed the Appointment Model

- All States adopted **appointments** for judicial selection, most with life tenure.
 - N.C. Const. § 13 (1776): “That the General Assembly shall, by joint ballot of both houses, appoint judges of the Supreme Courts of Law and Equity, ... and hold their offices during good behavior.”
- The judiciary was viewed as the “least dangerous” branch because it had “neither FORCE nor WILL but merely judgment.” Federalist No. 78 (Hamilton).
- John Jay: the Court was “so defective it would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government.”

States Initially Followed the Appointment Model

- ◉ States used impeachment, removal by address, short terms, and “ripper” bills to hold judges accountable.
- ◉ Today, five States use some form of democratic appointment:
 - Gubernatorial (California, Maine, and New Jersey).
 - Legislative (South Carolina and Virginia).
- ◉ Ten States use a “hybrid” appointment method—governor appoints after nomination by a commission, and a democratic body confirms.
 - Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Utah, and Vermont.

The Shift to Judicial Elections

- Jacksonian democracy.
- By the 1840s, people began to see the legislature and the executive as bigger threats to judicial independence.
 - The financial crises in the late 1830s led to a depression in the 1840s.
 - Legislatures had spent freely on public works projects, amassing debt without any check or balance.
 - The movement towards fiscal restraint and limited government required stronger courts and fewer partisan appointments.
- Between 1846 and 1860, 23 States adopted **popular elections** for some judges, and 18 States used elections for appellate judges. See Shugerman, *The People's Courts: Pursuing Judicial Independence in America* 105 (2012).

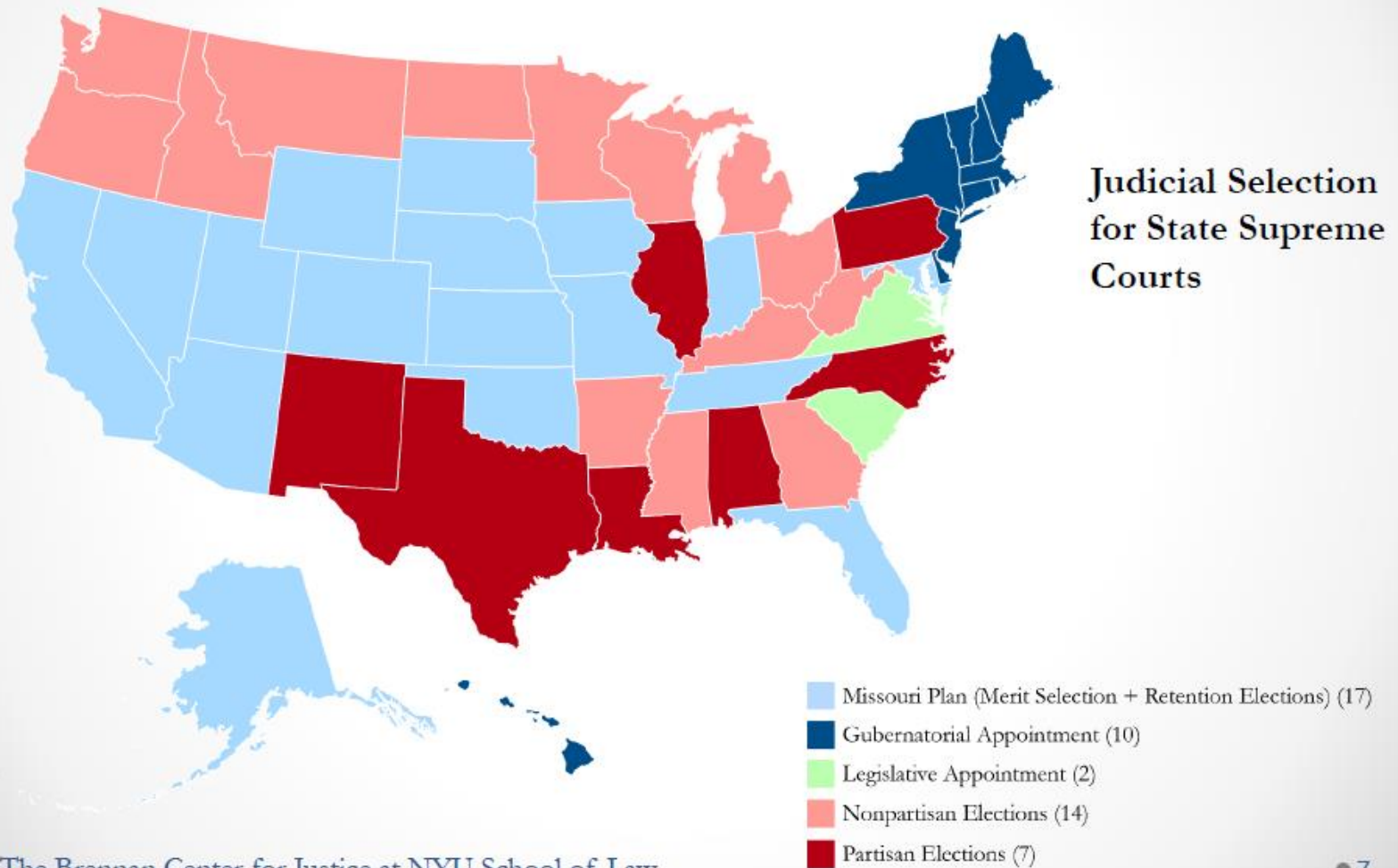
In Search of Independence, Accountability, and Legitimacy

- In the mid-19th century, judicial independence involved independence from the other branches of government—**separation of powers**.
- Accountability to the people was viewed as a way to empower the courts and to remove behind-closed-doors partisan politics—**separation of law and politics**.
- Twenty-two States currently use elections to select members of their highest courts:
 - Partisan (7)
 - Nonpartisan (15)
- Sixteen more States use retention elections.

If **Not** the Executive, Legislature, or the People, then

- The Progressive reform movement and **merit selection**.
- ABA endorsed such reforms in 1937 and continues to advocate for merit-based selection.
- In 1940, Missouri became the first State to adopt merit selection.
 - Governor appoints from a list of candidates selected by a nominating commission.
 - Judge serves for a specified period and then stands for a retention election.
- Thirteen States currently use some form of the Plan.

Judicial Selection in the States



The *Political* Dimension of the Judiciary

- “Not only do state-court judges possess the power to ‘make’ common law [like a legislator], but they have the immense power to shape the States’ constitutions as well.” *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002).
- Judges are **not politicians**, but they **are political** (making common law and adopting differing jurisprudential views).
 - Judge Garland and Justice Gorsuch.
 - Justice Kennedy and 5-4 decisions.
 - Views on statutory construction, originalism, federalism, separation of powers, and judicial restraint affect decisions.

The *Political* Dimension of the Judiciary

- “[I]t is virtually impossible to find a judge who does not have preconceptions about the law.... ‘Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of a lack of qualification, not lack of bias.’” *White*, 536 U.S. at 777-78.
- Judicial selection methods do not remove the “political” nature of the judicial function but seek to limit politics by balancing independence, accountability, and legitimacy in different ways.

The Need to Balance Competing Values: the Missouri Plan

- The alleged benefits of the Missouri Plan:
 - Experts select nominees based on “merit” not politics.
 - No need for expensive campaigns.
 - Combats voter apathy and inattention.
 - Secures independence and accountability.
- Politics may shift to the selection of members of the nominating committee and the committee’s selection of the judicial nominees.

The “Merit” Decision

- **Experts** are needed because voters cannot properly assess who are the “best” judicial candidates.
 - In 2009, 16 of the 25 States with nominating commissions required that at least half of the members be lawyers or judges.
 - Committee members should determine whether a nominee is a “good” judge, based on “[i]ndependence, integrity, reverence for the rule of law, courtesy and patience, dignity, open-mindedness, impartiality, thorough scholarship, decisiveness and, not least, an understanding heart.” Greensboro News & Rec., May 1, 2011, at H1.
- “‘Merit selection’ is seen by many as a masquerade to put political power in the hands of the organized bar and other members of the elite.” Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, Law and Contemp. Probs., at 79 (Summer 1998).

The Accountability Problem

- Committee members usually are **unelected**, so voters have no way to affect partisan selections.
 - The judiciary may come to reflect the political ideology of state bars.
 - A 2009 study found that, since 1995, 87% of appellate court nominees in Missouri who made campaign contributions gave more money to Democrats than Republicans, only 13% gave more to Republicans, and only 7% in total went to Republicans. Brian Fitzpatrick, *The Politics of Merit Selection*, 74 Mo. L. Rev. 675 (2009).
 - Missouri Plans “may simply move the politics of judicial selection into closer alignment with the ideological preferences of the bar.” *Id.* at 676.
- The electorate cannot serve as a check because the governor typically is required to choose one of the committee’s nominees, and the legislature does not confirm.

The Accountability Problem

- **Retention elections** provide a de facto lifetime appointment.
 - From 1980 through 2000, incumbents in retention elections were retained 98.2% of the time. Bonneau and Hall, *In Defense of Judicial Elections* 9 (2009).
 - Incumbents in contested partisan elections were defeated roughly 23% of the time. Hall, *Competition as Accountability in State Supreme Court Elections*, in *Running for Judge* 165, 177 (Streb ed., 2007).
 - “Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents.” Geyh, *Why Judicial Elections Stink*, 64 Ohio St. L.J. 43, 55 (2003).
- Michael Dimino, *The Futile Quest for a System of Judicial ‘Merit’ Selection*, 67 Alb. L. Rev. 803, 811 (2004) (“[R]etention elections seek to have the benefit of appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy.”).

The Accountability Problem

- Before adopting nominating commissions, legislatures also should consider the appropriate **level of transparency**.
 - Confidential process.
 - Names only.
 - Confidential deliberations.
 - Open.
- Consider the best way to promote accountability, attract qualified candidates, foster candid appraisals, and avoid possible embarrassment to individuals who are not selected.



Elections and the Missouri Plan

- Retention elections suffer from (and exacerbate?) the alleged problems with contested elections.
 - Voters are at least as uninformed and unmotivated, possibly more.
 - There are no opposition candidates to highlight weaknesses.
 - Judges still must worry about how their opinions are viewed.
 - Judges must raise money.
 - If the bar or any other group issues a report on the judge, then she may feel pressure to rule in a certain ways that help the group or to espouse a judicial view with which the group agrees.
 - Retention elections are non-partisan, so voters may learn even less about a candidate than in a contested election.

The Quality of Judges under the Missouri Plan

- Recent studies suggest that **there is not a significant difference in the quality of judges** between and among different systems of judicial selection.
 - These studies have “failed to detect any statistically discernable differences in various measures of quality across selection systems in the states.” Bonneau and Hall, *In Defense of Judicial Elections* at 136.
 - “[M]erit selection judges do not possess greater judicial credentials than judges in other states.” Glick and Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 *Judicature* 233 (1987) (comparing the undergraduate and law schools attended, years of legal experience, and years of experience in government, the judiciary, and private practice).
 - Choi, Gulati, and Posner, *Which States Have the Best (and Worst) High Courts?* at tbl. 11 (finding no appreciable difference in productivity, opinion quality, and independence between appointment methods).

The Need to Balance Competing Values: Judicial Elections

- The alleged problems with judicial elections:

- Lack of independence from the electorate.
- Judges are not political.
- Voter ignorance and apathy.
- Excessive spending and the legitimacy of the courts.

- The return to partisan elections in North Carolina.

Independence and Accountability under Judicial Elections

- Elections ensure **independence** from the legislative and executive branches.
 - The longer the term, the greater the (objective) independence.
 - High standard for removal during term (e.g., impeachment).
- Judges are directly **accountable** to the voters.

Judicial Elections Legitimize the Courts

- The “Court’s power lies in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.” *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).
 - Need to rely first and foremost on the integrity of judges.
 - Any retention process makes a judge dependent on others and, consequently, may influence her decision-making.
- Increased spending “substantially enhanc[es] citizen participation in these races” and “it is reasonable to postulate that by [increasing] participation and giving voters greater ownership in the outcomes of these races, expensive campaigns significantly strengthen the critical linkage between citizens and courts and enhance the quality of democracy.” Hall and Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 Am. J. Pol. Sci. 457, 468 (2008).

Judicial Elections Legitimize the Courts

- Voters are better able to accept decisions—even controversial or unpopular ones—when they are directly involved in and responsible for the selection of judges.
 - Judges remain accountable to the electorate for decisions that are not grounded in the law or are too political.
 - Judicial elections “tap the energy and the legitimizing power of the democratic process.” *White*, 536 U.S. at 788.
- “Given the notable absence of any identifiable crises of legitimacy in the states that have hosted competitive judicial elections for decades, we wonder if the real crisis is not the unrelenting assaults on the democratic process by judicial reform advocates and the never-ending cries that elections are poisoning the well of judicial independence and legitimacy.” Bonneau and Hall, *In Defense of Judicial Elections* at 5.