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Judicial Selection Reform: All Over the Map

States are unlikely to reach consensus, so they should aim to reduce role of money, regardless of selection method.

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This past March, four former Pennsylvania governors drafted a letter urging the state legislature to amend the state's constitution to replace partisan election of state Supreme Court judges with so-called "merit selection," whereby a nonpartisan judicial nominating commission recommends a slate of qualified nominees, from which the governor makes an appointment.

They argued that "if we embrace merit selection, we will get the most qualified, fair and impartial judges to serve our residents." Meanwhile, Kansas Governor Sam Brownback signed legislation replacing the state's "merit-selection" system for intermediate appellate judges with the federal model of executive appointment and Senate confirmation. Brownback said the merit-selection system "fails the democracy test" by assigning too much influence to the nonpartisan judicial nominating commission, and voiced support for a constitutional amendment to replace merit selection for the state Supreme Court as well.

The process by which states select the judges of their highest courts has never been uniform, and change has been nearly constant. In fact, only a handful of states have stuck with their original method of selection. But the most recent reform efforts stand out because they come at a time when increasing amounts of money are pouring into judicial elections, at least where the balance of power on a high court is at stake. In response, some states are considering more modest reforms, aimed at reducing the role of money in judicial selection, regardless of the method employed.

Broadly speaking, states initially select their high court judges either by election (21 states) or appointment (29 states), with distinct variations in each category. Of the states that elect their high court judges, six hold partisan elections with nominees endorsed by the major parties, while 15 have nonpartisan elections. (In some states, political parties still play a large role in selecting candidates for nonpartisan elections, through primaries (Ohio) or party conventions (Michigan).) Among states that appoint their high court judges, 25 follow some variation of merit selection. There are some exceptions, like New Jersey and Maine, which follow the federal model without the input of a judicial selection commission; Virginia, where the Legislature selects judges without the assistance of a selection commission; and California, where the governor's nominee must be confirmed by a commission comprised of the chief justice, the attorney general and the senior most judge on the courts of appeal.

States also vary significantly in how they determine whether high court judges should keep their seats after their initial appointment or election. Most merit-based states employ "retention" elections, in which a sitting judge appears on the ballot alone facing an up-or-down retention vote. Illinois and Pennsylvania, two states that employ partisan elections as an initial matter, also use retention elections for incumbent judges. In the remainder of the states where judges are popularly elected, they tend to be retained by popular election.

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WAVES OF REFORM EFFORTS

The variation in methods of initial selection and retention of state high court judges tends to reflect which of several waves of reform had taken shape when the state adopted or revisited its selection procedures. Those states that adopted judicial selection methods

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at the nation's founding embraced appointment, either by the governor or legislature. The first wave of reform came during the populist Jacksonian era, when several states adopted popular election of high court judges. Later came a movement toward nonpartisan elections, coinciding roughly with the Progressive Era. Finally, beginning with Missouri in 1940, many states began adopting merit-based selection, an option that some states, like Pennsylvania, continue to pursue today and that prominent leaders such as former Justice Sandra Day O'Connor continue to advocate.

In recent years, however, and particularly since the 2010 election cycle, some observers have noted an increase in proposals to move away from merit-based selection, or at least to dilute the influence of the independent judicial nominating commissions. Proponents of these efforts stress the need for judicial accountability and argue that merit-based systems place too much power in the hands of state bar associations and other "elite" interests.

Efforts to eliminate or weaken merit selection have taken foot in at least seven states since the 2010 election cycle, according to the Brennan Center for Justice at New York University School of Law. Arizona alone considered 10 proposed constitutional amendments in 2011, including one that would have replaced a merit-based system with the federal model of executive appointment and legislative confirmation. Similar proposals, calling for replacement of merit selection with either the federal model or contested elections, have been made in Florida, Iowa, Kansas, Oklahoma and Tennessee. Even in Missouri, the birthplace of merit selection, two constitutional amendments have been proposed to reduce the influence of the nonpartisan judicial-selection commission.

THE INFLUENCE OF MONEY

States have recently confronted a steep rise in campaign spending in judicial elections. According to the Brennan Center, the amount of spending on judicial campaigns more than doubled in the first decade of the 21st century. Much of this increase in spending has occurred in states with partisan elections and in races where the balance of power on the high court is at stake. However, the 2010 election cycle also witnessed a large spike in spending on retention elections, even in merit-selection states. Spending in high court retention elections in 2010 shot up to 12.7 percent of total judicial election spending, from an average of 1 percent during 2000-2009, according to the Brennan Center.

While it's not yet clear whether 2010 was an aberration or the beginning of a trend, it does seem that interest groups have taken an interest in holding judges politically accountable for controversial decisions by campaigning for their ouster. In Iowa in 2010, for example, three of the six Supreme Court justices who voted in favor of gay marriage in *Varnum v. Brien*, 763 N.W.2d 862 (2009), were ousted in the first post-decision retention elections. They faced a well-organized campaign that was largely funded by anti-gay-marriage groups outside Iowa. Similar, but unsuccessful, challenges were made by conservative groups in retention elections in Alaska, Colorado, Florida and Kansas, focusing on issues such as abortion, tort reform, property taxes, eminent domain and congressional redistricting. Liberal interest groups have also spent unprecedented amounts in retention elections. In Illinois, for example, a coalition of unions and plaintiffs lawyers contributed $2.8 million to the 2010 retention of Justice Thomas Kilbride, who was challenged by business groups.

In response to this "new politics"—and perhaps wary that the U.S. Supreme Court decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), might lead to even more independent expenditures in judicial elections—some states have taken up a new mantle of reform, aimed at reducing the risk that increased spending may result in actual or perceived bias on the part of high court judges.

This concern was highlighted in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 858 (2009), in which the Supreme Court held that due process required a West Virginia Supreme Court of Appeals justice to recuse himself from a case involving a party who had contributed more than $3 million to his election. In *Caperton*, the court set a constitutional floor for recusal standards, but invited states to set higher standards. A 2011 study commissioned by the California Assembly Judiciary Committee found that 13 states took up that invitation, implementing heightened recusal standards, often through their high courts' rule-making power. At least eight states have entertained proposals limiting contributions to judicial candidates while 27 states proposed improved disclosure laws.

The Caperton and Citizens United decisions have also prompted some states to reconsider public financing of judicial elections. West Virginia became the fourth state to provide for public financing of judicial elections in 2012, joining New Mexico, North Carolina and Wisconsin. At least 10 other states have considered such proposals over the past three years. On the other hand, the governor of North Carolina, which pioneered public financing of judicial elections in 2002, has proposed eliminating its program, and Wisconsin, another early adopter, effectively ended its program by eliminating funding in the state's most recent budget.

Given the history of judicial selection reform in the United States, it appears unlikely that the states will reach a consensus on best practices and still less likely that judicial elections will fall by the wayside. This underscores the importance of state reform efforts that aim to ensure that, no matter how judges are selected or retained, they are not, and do not appear to be, beholden to the parties in front of them.

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