Selection and Retention of Judges: Is There One "Best" Method?

The Honorable Peter D. Webster
1@1.com

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Law Commons

Recommended Citation
https://ir.law.fsu.edu/lr/vol23/iss1/1

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.
SELECTION AND RETENTION OF JUDGES:
IS THERE ONE "BEST" METHOD?

The Honorable Peter D. Webster

Volume 23    Summer 1995    Number 1
SELECTION AND RETENTION OF JUDGES: IS THERE ONE "BEST" METHOD?

PETER D. WEBSTER

I. INTRODUCTION .................................................... 2

II. JUDICIAL THEORY AND JUDICIAL SELECTION/RETENTION 2

A. Varying Perceptions Regarding the Role of Courts in Our Society .................................................... 4

B. Independence vs. Accountability: The Arguments. 8

III. THE PRINCIPAL METHODS OF SELECTION/RETENTION: EXPECTATIONS AND REALITIES .................................. 11

A. Appointment ................................................ 12

B. Partisan Election ........................................... 16

C. Nonpartisan Election ....................................... 24

D. "Merit" Plans ............................................... 29

IV. SOME PROPOSALS FOR COMPROMISE ............................ 38

V. CONCLUSION ........................................................ 42

[1]Independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.¹

Alexander Hamilton

[O]ur judges are effectually independent of the nation. But this ought not to be. I would not, indeed, make them dependent on the Executive authority, as they formerly were in England; but I deem it indispensable to the continuance of this government, that they should be submitted to some practical & impartial control; and that this, to be imparted, must be compounded of a mixture of State and

* Judge, Florida First District Court of Appeal. B.S.F.S., 1971, Georgetown University; J.D., 1974, Duke University; LL.M., 1995, University of Virginia. This Article is adapted from a thesis submitted by the author in partial fulfillment of the requirements for the degree of Master of Laws in the Judicial Process at the University of Virginia.

Federal authorities. It is not enough that honest men are appointed judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence.  

Thomas Jefferson

I. INTRODUCTION

The debate over selection and tenure of judges has been ongoing since shortly after the founding of our nation. Although frequently not recognized as such, the debate is, in reality, but one manifestation of a much more fundamental philosophical and political disagreement regarding the role of judges in our political system. Should judges be nothing more than interpreters of the law, searching some “corpus juris” for the most appropriate rule, then applying that rule to the particular controversy; or should judges perform the role of lawmakers and, if so, what are the legitimate limits of that role to be? The response to this fundamental question will, to a major extent, dictate the answer to whether judicial independence or judicial accountability is viewed as a relatively more desirable and important goal. This will, in turn, determine one’s position in the debate regarding alternative methods of judicial selection and retention.

This Article will first discuss the relationship between judicial theory and choice of a method of judicial selection and retention. It will then address what each of the principal alternative methods of judicial selection and retention now in use does, and does not, accomplish. Finally, it will propose a compromise method which might prove more likely to satisfy all participants in the debate than does any of the current alternatives.

II. JUDICIAL THEORY AND JUDICIAL SELECTION/RETENTION

The debate over the proper role of the judiciary and, consequently, the appropriate method of judicial selection and retention, dates at least to the time of Hamilton and Jefferson. As reflected by the


quotations at the beginning of this Article, the focus of that debate has, since its genesis, been on the relative importance of the conflicting concepts of independence and accountability. Without doubt, it has been the inherent tension between these two discordant concepts which, since the eighteenth century, has configured the debate over the selection and tenure of judges. Interestingly, however, notwithstanding the much greater power wielded by federal courts than state courts and the clear intent by the Framers that the federal judiciary be shielded from virtually all methods of political accountability (except the relatively unwieldy impeachment mechanism),5 "[i]n [the last] 200 years, the nation has never seriously considered extending elections to the federal courts."6 Rather, for all practical purposes, the debate over the relative values of judicial independence and accountability has been limited to the states.7 Resolution of this tension involves choices essentially normative8 and political9 in nature. Those choices are, to a major extent, dictated by perceptions about what the role of courts in our society ought to be.10

4. See, e.g., RUSSELL WHEELER, JUDICIAL ADMINISTRATION: ITS RELATION TO JUDICIAL INDEPENDENCE 16 (1988); Dubois, supra note 3, at 34; Theodore McMillian, Selection of State Court Judges, 40 Sw. L.J. (Special Issue), May 1986, at 9, 9; William M. Pearson & David S. Castle, Alternative Judicial Selection Devices: An Analysis of Texas Judges' Attitudes, 73 JUDICATURE 34, 34 (1989); Charles H. Sheldon, Judicial Selection Reform: Some First Principles, WASH. ST. B. NEWS, July 1991, at 28, 28; Mary L. Volcansek, The Effects of Judicial-Selection Reform: What We Know and What We Do Not, in THE ANALYSIS OF JUDICIAL REFORM 79, 79 (Philip L. Dubois ed., 1982). One commentator has described the tension between the two concepts as follows:

On the one hand, an independent judiciary, unco-opted by the political aims of the ruling majority and willing to defend individuals' rights against government abuse, seems crucial to liberal democracy. . . . On the other hand, the ability of an elite corps of judges to wield enormous power that is unchecked by popular opinion and criticism seems to contradict liberal democracy's fundamental premise.


5. Such was the obvious intent behind the provisions in Article III, Section 1, of the Constitution assuring life tenure "during good behavior" and prohibiting diminution of salary. See THE FEDERALIST Nos. 78, 79, at 227-35 (Alexander Hamilton) (Roy. P. Fairfield ed., 2d ed. 1966). See also Seidman, supra note 4, at 1588.


8. See, e.g., Dubois, supra note 3, at 32-33; Pearson & Castle, supra note 4, at 34; Volcansek, supra note 4, at 79.

9. As one commentator has expressed it, "[t]he process of picking a person to be a judge is woven into the political fabric and is, by any definition, a political process." Daniel J. Meador, Some Yins and Yangs of Our Judicial System, 66 A.B.A. J. 122, 122 (1980).

10. See, e.g., PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF
A. Varying Perceptions Regarding the Role of Courts in Our Society

Today, one might be hard-pressed to find among those in legal academia anyone seriously advocating that the role of judges ought to involve nothing more than searching the corpus juris for the correct legal rule to apply to the facts of a particular dispute. Certainly, Blackstone's concept of judges as "living oracles" of the law has long been out of vogue. On the contrary, one would, in all likelihood, find many more proponents for the position found at the other end of the philosophical spectrum. Most notable at that end of the spectrum are the adherents of critical legal studies, who argue that law is nothing more than politics disguised, and that judicial decisions are, in fact, nothing more than political choices. I suggest that perceptions of the American electorate regarding the appropriate role of judges in society run along a similar, albeit frequently unrecognized, spectrum; and that where upon that spectrum the views of the electorate of any given state fall plays a significant role in where that electorate will align itself in the debate over the values of independence and accountability. Where that electorate stands in that debate will, in turn, have a major impact upon the choice in that state of the method of judicial selection and retention.

Logically, it would seem that one cannot begin to discuss in an intelligent manner whether it is more important to have judges who are independent—free not only from intimidation and control by the executive and the legislature, but from similar threats by the majority of the electorate as well—or judges who are accountable, either directly or indirectly, to the electorate until and unless one first decides what role judges are to play in the political and social spheres. Notwithstanding the apparent logic of such a proposition, however, there exists a considerable body of legal literature which discusses with much


14. See, e.g., John Bell, Principles and Methods of Judicial Selection in France, 61 S. Cal. L. Rev. 1757, 1757 (1988); Gavison, supra note 7, at 1619; McClellan, supra note 10, at 544. As one commentator has aptly put it, "before we can talk seriously about how to select and retain judges, we must have an idea of what they do and what they ought to do. As with any job, the job description logically precedes the determination of qualifications." Frederick Schauer, Judging in a Corner of the Law, 61 S. Cal. L. Rev. 1717, 1732 (1988).
passion the relative importance of independence and accountability, without considering either the role that judges play, or the role that they ought to play, in society.\textsuperscript{15}

If one believes that judges possess no real discretion but, rather, like Blackstone’s judges,\textsuperscript{16} must merely select the most appropriate rule from some corpus juris of which they have superior or peculiar knowledge, one might be less concerned with accountability, at least in the sense of direct accountability to the electorate.\textsuperscript{17} In such a judicial system, the critical concern would be whether a particular judge actually possesses such superior or peculiar knowledge regarding the corpus juris. Presumably, in such a system, only other judges would be competent to make that determination. Therefore, one would expect a greater willingness to involve judges in the selection and promotion of their brothers and sisters,\textsuperscript{18} and to permit lengthy terms subject only to some sort of peer review and critique. Fear of erroneous decisions would be minimal, because of the availability of appellate review.\textsuperscript{19}


16. See supra note 11 and accompanying text.

17. See, e.g., Dubois, supra note 3, at 36-37 (accountability becomes less of a concern “if judges exercise no discretion or independent power, but serve merely as the detached conscience of the society” and as the ‘passive vehicle of constitutional verities’ ” (footnote omitted)).

18. Although not explicitly based upon such a view of the role of judges, participation of judges in the selection and promotion of their brothers and sisters has been advocated on many occasions, premised upon the argument that judges know best what qualities make a good judge, and are best qualified to assess whether a given individual possesses those qualities. See, e.g., Harold J. Laski, The Technique of Judicial Appointment, 24 Mich. L. Rev. 529, 538 (1926). The precursor to what is today known as the “merit” plan of selection and retention, proposed by Albert M. Kales (a professor of law at Northwestern University and a founder of the American Judicature Society) included a provision that appointments be made by the state’s chief justice. Glenn R. Winters, The Merit Plan for Judicial Selection and Tenure—Its Historical Development, in SELECTED READINGS ON THE ADMINISTRATION OF JUSTICE AND ITS IMPROVEMENT 2, 3 (Glenn R. Winters & R. Stanley Lowe eds., 1971). Judges participate in selection of their brothers and sisters under both the “Missouri Plan,” as implemented in that state, see Richard A. Watson, Observations on the Missouri Nonpartisan Court Plan, 40 Sw. L.J. (Special Issue), May 1986, at 1, 2, and the “California Plan” in use in that state, see Joseph R. Grodin, Judicial Elections: The California Experience, 70 Judicature 365, 365 (1987).

19. See generally KAUFMAN, supra note 15, at 30-33 (arguing that the hierarchical and collective nature of appellate review, and peer pressure, are two strong internal mechanisms which ensure accountability).
At the other end of the spectrum, if one believes that the process of judging involves unbridled discretion—that it is based upon nothing more than the personal or political proclivities of each individual judge—direct accountability to the electorate becomes much more important, indeed, perhaps paramount. If judges are making decisions based upon such considerations, why should they not be required to submit themselves periodically to the electorate, for approval or disapproval of their record of decision-making, just as legislators are?20

Some, perhaps a majority, contend that the correct picture regarding what judges do in society, and the most desirable answer to the normative question of what they ought to do, lies somewhere between these two extremes; and that the precise position within that gray area depends upon the type of court being discussed.21 This group which, I submit, would likely include most judges, would probably argue that most of the work of trial and intermediate appellate courts, especially in state systems, consists of the mundane application of more-or-less well-established legal rules.22 Only a small portion of the work of such courts involves what might fairly be called the development of new law. They would argue that this development of new law is of two principal types. The first involves modification, extension or contraction of the common law. This is clearly nothing new—it has been going on for hundreds of years. The second, which is of more recent vintage, involves statutory interpretation. Here, the development of law consists essentially of a type of gap-filling procedure, by which courts attempt either to fill voids left by the legislature in a particular statutory scheme; or to determine whether, given a factual scenario not contemplated by the legislature, the legislature would have included that scenario within the ambit of the law. This group would probably assert that it is only in this latter and relatively infrequent area of statutory interpretation that the roles of judges and legislators have any real similarity. In their view, even the work of most of the states' highest appellate courts does not consist principally of the development of new law. Moreover, to the extent that the electorate

20. This concept of the role of judges has been expressed by a proponent of partisan election of judges as follows:

One cannot but conclude that judges are, in behavioral fact, partisan political officers vested with political authority whose use is affected by partisan dispositions. Because of the great authority vested in judges it must be accepted as a fact that they formulate public policy. It seems logical, therefore, that judicially determined political policies should and must conform to the will of the people.


21. See, e.g., Grodin, supra note 13, at 1974-76.

22. Id.
might be dissatisfied with the direction taken by a court in its development of new law, it frequently has the power to overrule the court's action. Thus, in their view, direct accountability to the electorate would not be particularly important.

Also to be considered is the view that one of the principal purposes of the judicial branch is to protect individuals and minorities from encroachments upon their rights, whether from one of the other branches of government or from the majority of the electorate. The importance of this counter-majoritarian role of the courts can, perhaps, best be perceived as running along another spectrum. At times, it acts as a confounder, blurring the clarity of the distinctions which generally characterize the opposite ends of the accountability-independence spectrum.

According to such a view, judges are expected (indeed, it is their duty) to make decisions which effectively change the law, even though the changes might prove to be unpopular with one of the other branches of government or with the majority of the electorate. Although particularly true in the constitutional arena, this view is by no means limited to constitutional issues. Rather, it is applicable whenever protection of individual or minority rights and the will of the majority are at odds.

Accordingly, proponents of this view assert that judges must be totally free, independent and shielded from reprisal, whether by threat

---

23. See Grodin, supra note 18, at 369 (arguing that decisions based upon the federal Constitution are subject to review by the United States Supreme Court; decisions based upon the state constitution can be overruled by constitutional amendment, for which initiative and referendum, as well as legislative proposal, are available; and decisions based either upon common law or statutory interpretation can be negated by the legislature or, in some cases, by citizen initiative).

24. See generally Lawrence A. Alexander, Legal Theory and Judicial Accountability: A Comment on Seidman, 61 S. Cal. L. Rev. 1601, 1605 (1988) ( positing that less accountability will be perceived as necessary, and greater independence will be tolerated, to the extent that the work of judges is uncontroversial, involving the application of more-or-less established legal rules, rather than the creation of new law); see also Dubois, supra note 3, at 36-37.


27. The view that such a counter-majoritarian role may be critical in the adjudication of certain types of constitutional issues is expressed in the famous footnote 4 of the Carolene Products opinion. United States v. Carolene Products, Co., 304 U.S. 144, 152-53 n.4 (1938). It is also the unexpressed basis for a great number of the decisions of the Warren Court in cases involving individual and minority rights. See generally John H. Ely, DEMOCRACY AND DISTRUST 73-75 (1980).

of removal or otherwise, because of popular discontent with their decisions.\textsuperscript{29} However, as others have quite correctly noted, while judges who are not subject to direct accountability to either of the other two branches or the electorate are free to act as the protectors of individual and minority rights, nothing guarantees that they will.\textsuperscript{30} Moreover, it has been argued that state judges do not require the same degree of independence as federal judges, because state judges are called upon less frequently to protect individual and minority rights—the federal judiciary already exists for that purpose.\textsuperscript{31}

\textbf{B. Independence vs. Accountability: The Arguments}

Any objective analysis of the two positions in this debate must begin with the recognition that, more often than not, the respective arguments involve a great deal more heat than light.\textsuperscript{32} Proponents of each position will frequently extol the virtues of the one quality, while

\begin{itemize}
\item \textsuperscript{29} Alexander Hamilton stated the proposition as follows:
\begin{quote}
That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.
\end{quote}

\textsc{The Federalist} No. 78, at 232 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1966). More recently, the concept has been expressed as follows:
\begin{quote}
[I]deally[,] public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection. Indeed, these views were generally shared by the States during the early years of the Republic.
\end{quote}

\begin{flushleft}
\end{flushleft}

\item \textsuperscript{30} See, e.g., Dubois, supra note 3, at 39; Seidman, supra note 4, at 1581-82; Mark Tushnet, Constitutiona Interpretation and Judicial Selection: A View from The Federalist Papers, 61 S. Cal. L. Rev. 1669, 1681 (1988).

\item \textsuperscript{31} See Robert S. Thompson, Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986, 61 S. Cal. L. Rev. 2007, 2055-56 (1988). However, it has been argued that the "suggestion that independence is not as essential for state judges because we have Article III judges to protect minorities in federal court is disingenuous [because t]he issues that state judges are most vulnerable on are issues that are, as a practical matter, immune from federal review." Gerald F. Uelmen, Commentary: Are We Reprising a Finale or an Overture?, 61 S. Cal. L. Rev. 2069, 2072 (1988).

\item \textsuperscript{32} See generally Kaufman, supra note 15; Dubois, supra note 3, at 31; Krivosha, supra note 15, at 18.
\end{itemize}
excoriating the dire consequences of elevating the other. More often than not, no empirical evidence is offered in support of the arguments.

Those who believe that independence is the more important quality base their position principally upon the argument that judges cannot make the hard decisions—particularly those in cases of great public interest—unless they are truly independent. According to this group, a judge who is dependent upon the continued approval of another, whether it be one of the other branches of government or the electorate, cannot reasonably be expected to decide cases in a way likely to provoke the disfavor of those who will decide whether that judge will remain on the bench. They also argue that it is important not only that judges be independent in fact, but also that they be perceived as independent by society.

The argument that it is important not only that judges be independent, but that they be perceived as independent as well, runs as follows. In our society, the power and authority of the judiciary depend upon the public's continued respect and support for that institution. One of the cornerstones of our system is respect for the "rule of law." Therefore, the public's degree of respect for the judiciary bears a direct correlation to the belief that judges will decide cases fairly and impartially, in accordance with the "rule of law"—that decisions will be reached based upon the facts and the applicable law, without regard to extraneous influences, whether in the form of special interest groups or popular opinion.

According to this view, even if one accepts the possibility that, despite their humanity, judges could somehow disregard the likely response to a decision unpopular with the entity holding the power to decide their continued tenure on the bench, the perception would still remain that such considerations do affect the outcome of

33. The elements generally associated with the concept of "true independence" include life tenure during good behavior, a prohibition against diminution of salary, and removal only for serious offenses by means of a procedure which ensures the safeguards associated with due process of law. See, e.g., Kautman, supra note 15, at 17; Wheeler, supra note 4, at 10-12.

34. As expressed by one commentator, "judges cannot be independent if they know that their decisions, irrespective of the way in which they reached and justified them, may cost them their job." Gavison, supra note 7, at 1657. Retired Judge Otto Kaus, of the California Supreme Court, has expressed this sentiment somewhat more colorfully: "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bath tub." Paul Reidinger, The Politics of Judging, A.B.A. J., Apr. 1, 1987, at 52, 58. See also Raven, supra note 15, at 66.

controversial cases. The inevitable result is a diminution of respect and support for the judiciary as an institution. Such a perception is especially likely in a system which requires judges periodically to submit themselves to popular election. The need to curry favor with those capable of influencing large numbers of voters, together with the concomitant need to raise funds, indubitably creates the impression of some sort of quid pro quo.

Finally, proponents of independence argue that judges are not like legislators. Judges are not politicians—they are charged with interpreting the law, not making it. Moreover, judges do not, and should not, have a constituency. They do not represent anyone. Rather, they represent the law. Accordingly, it makes no sense whatsoever to require that they be accountable to the electorate, like legislators and other politicians.

Those who believe that accountability is of paramount importance contend that judges are, indeed, just like legislators. According to them, judges make policy daily. In fact, with respect to some matters, judges have more political power than legislators, because they have the ability to thwart the will of the majority.

40. “Courts are not representative bodies. They are not designed to be a good reflex of a democratic society… Their essential quality is detachment, founded on independence.” Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). See also Hill, supra note 36, at 2065.
41. See Krivosha, supra note 15, at 15-18.
42. See supra note 20. See also Dubois, supra note 3, at 37-38; Sheldon, supra note 4, at 29; Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, 61 S. CAL. L. REV. 1735, 1735 (1988).
43. Theodore Roosevelt was a particularly vocal critic of what he perceived as conservative decisions by the courts, which repeatedly used the federal and state constitutions to thwart progressive social reforms supported by the overwhelming majority of the electorate and enacted by the legislature. See Michael R. Belknap, From Pound to Harley: The Founding of AJS, 72 JUDICATURE 78, 81 (1988).
In the minds of this group, ours is a nation founded upon the concept of representative democracy. If, in fact, judges routinely make policy decisions, a lack of electoral accountability runs counter to those democratic principles which we hold most dear. Moreover, judges, being human, are as likely to be fallible as anyone else. Therefore, it is imperative that they be accountable for their decisions.

Finally, there is the fear that judges who are not accountable pose a significant threat to society. This threat is manifested in the potential for the judiciary to become an anti-majoritarian, anti-democratic elite bent on pursuing goals which are not only inconsistent with those of the majority, but are also a real danger to the political foundation upon which this nation was built.

III. THE PRINCIPAL METHODS OF SELECTION/RETENTION: EXPECTATIONS AND REALITIES

Any discussion of the various current methods of judicial selection and retention must begin with recognition of the fact that all of those systems involve, in one form or another, political considerations. The degree to which partisan political considerations are implicated depends to a large extent upon where on the independence/
accountability spectrum the particular method falls. Another critical fact which must be kept in mind when discussing the various methods in use is that what the proponents of a particular method claim it accomplishes and what the empirical evidence suggests it accomplishes are often very different.\footnote{47} Although at times categorized somewhat differently,\footnote{48} for all practical purposes the various methods of selection and retention of judges currently in use in the states fall under one of the following general headings: appointment, partisan election, nonpartisan election and commission selection (commonly referred to as “merit” or “merit plan” selection). However, there are both variants and hybrids of these methods in use.\footnote{49} Moreover, an individual state will frequently employ different methods for different types of judges.\footnote{50} In addition, notwithstanding the method or methods in use in a particular state, the fact remains that most judges in most states initially reach the bench by appointment.\footnote{51} This fact makes it considerably more difficult to evaluate empirically the claims made regarding the respective methods. Each of the four methods will be discussed in turn.

A. Appointment

Appointment of judges was initially the prevalent method of selection in the states.\footnote{52} However, based upon their experiences while
English colonies, the original thirteen states were reluctant to place complete power regarding selection of judges in the hands of a single individual. Accordingly, eight of the thirteen placed the power to appoint judges in the hands of their legislatures, and the remaining five permitted the governor to make appointments, but the appointments were subject to approval by either the legislature or council. The majority of those states adopted the federal model of life tenure during good behavior.

Today, regardless of the method of selection generally in use in a given state, in the majority of states the governor, alone or with the advice or consent of some other body, initially appoints judges to fill unexpired terms. However, appointment is still employed as the principal method of selection in only six states, all of which lie along the east coast. The procedures are not uniform in those states.

Proponents of the appointive method of selection and retention argue that it is the best means available to ensure the independence of judges, because it insulates judges from periodically having to submit themselves (and their sometimes controversial decisions) to the


53. See Grodin, supra note 13, at 1970. The eight states were Connecticut, Rhode Island, New Jersey, Delaware, North Carolina, South Carolina, Virginia and Georgia. Id.; see also Roll, supra note 48, at 840.

54. See Grodin, supra note 13, at 1970. The five states were New Hampshire, Massachusetts, New York, Pennsylvania and Maryland. Id.; see also Roll, supra note 48, at 840.

55. See Grodin, supra note 13, at 1970.

56. See supra note 51.

57. The six states are Maine, New Hampshire, New Jersey, Rhode Island, South Carolina and Virginia. See McFadden, supra note 10, at 177; Mathias, supra note 50, at 142. Of course, appointment is also the method by which federal judges reach the bench. See U.S. CONST. art. II, § 2, cl. 2.

58. In Maine, supreme court and superior court judges are appointed by the governor for a 7-year term, and may be reappointed for like terms by the governor, subject to legislative confirmation. In New Hampshire, supreme court and superior court judges are appointed by the governor, subject to the approval of a 5-member executive council, after which they hold office until age 70. In New Jersey, supreme court, appellate division and superior court judges are appointed by the governor for a 7-year term, and may be reappointed until age 70 by the governor, subject to the advice and consent of the senate. In Rhode Island, supreme court judges are appointed by the legislature, and superior court judges are appointed by the governor, both for a life term. In South Carolina, supreme court judges, court of appeals judges and circuit court judges are appointed by the legislature, the former for a 10-year term and the rest for a 6-year term; all may be reappointed for like terms by the legislature. In Virginia, supreme court judges, court of appeals judges and circuit court judges are appointed by the legislature, the former for a 12-year term and the rest for an 8-year term; all may be reappointed for like terms by the legislature. See McFadden, supra note 10, at 181-87.
electorate for approval.59 In addition, they argue that the appointive method results in the selection of "better" judges. This argument is based upon the proposition that the electorate does not have the necessary background to comprehend what qualities make a "good" judge and that, as a result, voters are unqualified to make such decisions. Instead, they are more likely to be influenced by irrelevant considerations. Accordingly, it makes much more sense to place responsibility for such matters in the hands of an individual or group possessing adequate knowledge and understanding.60

Proponents argue that a degree of accountability to the electorate is still present, because the appointing authority, whether the chief executive officer or all or some part of the legislature, can be held to answer to the electorate for poor appointments.61 Appointment also avoids the unseemly aspects of participation by judicial candidates in contested elections.62 Finally, proponents argue that the appointive method is more likely to bring minorities and women to the bench than are contested elections.63

It is certainly true, as proponents of appointive methods of selection and retention contend, that, of the various methods in use in the United States today, appointment (coupled with long tenure) is most likely to ensure the independence of judges.64 But not everyone is an ardent supporter of a system in which judges are, for all practical purposes, free of all constraints upon their actions. For, while judges who are free of all meaningful constraints (truly independent) are, indeed, in a position to decide matters impartially and without concern for how their decisions will be received by the public, there is no guarantee that they will do so.65 Thus, "[t]he advantage of the appointment process is, depending on one's ideology, also its weakness. That is, the system promotes judicial independence by having no substantial check on the judge after the confirmation process."66 In return for true independence, one must face the rather substantial risk that judges will

59. This position is generally based upon the assumption that appointment is coupled with long tenure in office, preferably life. See, e.g., ABRAHAM, supra note 48, at 33, 39; Laski, supra note 18, at 531-33.
60. See, e.g., ABRAHAM, supra note 48, at 33; Laski, supra note 18, at 531.
61. See, e.g., ABRAHAM, supra note 48, at 33-34.
62. See, e.g., Laski, supra note 18, at 531-32.
64. See, e.g., Korzen, supra note 38, at 274.
65. See supra note 30.
66. Champagne, supra note 46, at 58.
pursue personal agendas, either political or otherwise, which are at odds with their responsibilities.67

The argument that those selected by the appointive method make "better" judges is a difficult one to address because of the subjective and normative considerations necessarily involved in any attempt to define the characteristics of a "good" judge.68 Empirical work suggests that the method of selection has little, if any, effect upon the overall quality of judges.69 However, the empirical evidence does suggest that more minorities and women have reached the bench by appointment than by election.70 In the case of minorities, it has been suggested that this phenomenon might be attributable to the prevalence of at-large judicial elections.71

The empirical evidence does suggest that voters generally do not possess the knowledge required for the intelligent selection of judges.72 However, there is nothing to suggest that governors or legislators

67. See generally Seidman, supra note 4, at 1572; Tushnet, supra note 30, at 1681.
69. See generally Commission on Government Integrity, State of New York, Becoming a Judge: Report on the Failings of Judicial Elections in New York State 7 (1988); Champagne, supra note 46, at 111; Henry R. Glick & Craig F. Emmert, Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges, 70 JUDICATURE 228, 233 (1987); Dunn, supra note 15, at 289. Notwithstanding the lack of empirical support, proponents of an appointive system argue that the "best" lawyers are more likely to make themselves available to become judges in a system which assures them life tenure during good behavior, without the need to campaign for election. See generally Dubois, supra note 37, at 9; W. St. John Garwood, Judicial Selection and Tenure—The Model Article Provisions, 47 JUDICATURE 21, 25 (1963).
70. See, e.g., Becoming a Judge, supra note 69, at 40-42; Barbara L. Graham, Do Judicial Selection Systems Matter?: A Study of Black Representation on State Courts, 18 AM. POL. Q. 316, 331 (1990); Minority Judges, A.B.A. J., Mar. 1, 1986, at 19, 19. But see Alozie, supra note 63, at 315-16, 321-24 (suggesting selection method has little effect on number of minorities and women on bench; most important correlate of representation on bench is number of lawyers in jurisdiction who are members of group); Champagne, supra note 46, at 106 (contending no method is clearly more successful in recruiting minorities and women).
71. See, e.g., Graham, supra note 70, at 331; Robert C. Luskin et al., How Minority Judges Fare in Retention Elections, 77 JUDICATURE 316, 316 (1994).
72. See, e.g., Anthony Champagne, Judicial Reform in Texas, 72 JUDICATURE 146, 151 (1988); Champagne, supra note 46, at 93-95; Marie Hojnacki & Lawrence Baum, Choosing Judicial Candidates: How Voters Explain Their Decisions, 75 JUDICATURE 300, 300 (1992); Nicholas P. Lovrich et al., Citizen Knowledge and Voting in Judicial Elections, 73 JUDICATURE 28, 28-29 (1989); Volcansek, supra note 4, at 80. A poll conducted in Oklahoma in 1966 disclosed that 74% of those asked could not name any of the six candidates for the supreme court. Oklahoma Poll Shows Court Voters in the Dark, 50 JUDICATURE 134, 134 (1966). A poll conducted in Pennsylvania "in 1983 revealed that 'fewer than one in ten voters knew the names of any appellate court candidates before going to the polls' and 'the vast majority of voters—more than 90%—spent little or no time studying the qualifications and background of appellate court candidates.' " Dunn, supra note 49, at 125 (footnote omitted).
necessarily possess such knowledge. Moreover, while judicial elections are becoming increasingly politicized, the evidence indicates that appointments are most often based principally upon political considerations, rather than qualifications. Clearly, the appointive method does nothing to lessen the effect of partisan politics upon the selection of judges. On the contrary, it would appear that, at the very least, there is significant potential for partisan politics to play the determinative role in the selection of judges in states using an appointive method.

B. Partisan Election

Partisan elections are generally perceived to be at the opposite end of the independence/accountability spectrum from appointive methods of selection and retention. Most commentators are of the view that partisan election of judges came into vogue as a part of the wave of popular democracy that engulfed the nation during the era of Andrew Jackson's presidency, as a response to the perceived abuses of the then prevalent appointive methods and the "elitist" judges those methods produced.

73. See, e.g., John L. Hill, Jr., A Time of Challenge: Judicial Reform in Texas, 52 Tex. B.J. 165, 165 (1989); Moog, supra note 37, at 69-70; Tom Watson, The Run for the Robes, GOVERNING, July 1991, at 50, 51; Korzen, supra note 38, at 254. Roy Schotland of Georgetown University Law Center, an expert in the area, has described the situation as follows: "Judicial elections have entered a new era, one which I like to characterize as noisier, nastier and costlier than ever before." Hansen, supra note 37, at 45.

74. See, e.g., Davidow, supra note 39, at 428. For instance, in California, roughly 80% of all judicial appointees came from the governor's party during the administrations of Edmund G. Brown, Sr., Ronald Reagan, and Edmund G. Brown, Jr. In general, those appointees also shared the ideology of the governor making the appointment. Dubois, supra note 51, at 25. Not surprisingly, in those states where judges are appointed by the legislature, former legislators are appointed to the bench in far greater numbers than elsewhere. See Glick & Emmert, supra note 69, at 232; Korzen, supra note 38, at 274.

75. See generally Dubois, supra note 3, at 49-50.

76. See, e.g., Champagne, supra note 46, at 64; Grodin, supra note 13, at 1971; Krivosha, supra note 52, at 128; Nejelski, supra note 3, at 453; Pearson & Castle, supra note 4, at 34; Korzen, supra note 38, at 258. But see Dubois, supra note 3, at 35 (arguing that the rise of partisan elections was primarily a result of actions by moderate lawyers and judges, wishing to provide the judiciary with an independent basis of legitimacy, rather than radical populists). Mississippi was the first state to adopt partisan elections as the method for selection of all judges, in 1832. See Anthony Champagne & Judith Haydel, Introduction, in JUDICIAL REFORM IN THE STATES 1, 6 (Anthony Champagne & Judith Haydel eds., 1993).

77. See generally Glenn R. WINTERS, SELECTION OF JUDGES IN NEW YORK AND IN OTHER STATES 2 (1946); WINTERS, supra note 52, at 1.

78. According to one commentator, many viewed appointed judges as not simply undemocratic but essentially anti-democratic—that is, they not only were not bound by the will of the people, but seemed willfully to go against it. This was the very evil that the Revolution had been fought to undue [sic]. In the popular mind,
Although employed by a majority of states at one time,\(^9\) today only eight states use partisan elections as the principal method of selecting judges for appellate and general jurisdiction trial courts.\(^8\) Of those eight, only six also use partisan elections for retention purposes.\(^1\)

The principal argument of proponents is that partisan elections is the only method by which accountability of judges can be ensured.\(^2\) Unless judges are periodically required to submit themselves to the electorate, there is no reliable means by which "bad" judges\(^3\) can be removed from office. Correlates to this argument are arguments that judges, like legislators, make law and, therefore, should be selected and retained in the same manner as are legislators;\(^4\) and that the right to vote is one of the most precious rights enjoyed by citizens of this country, and all attempts to circumscribe or diminish that right should be resisted.\(^5\)

\(^79\) At the beginning of the Civil War, . . . 24 of the 34 states provided for the election of judges." Champagne, supra note 46, at 64. See also Grodin, supra note 13, at 1971; Winters, supra note 52, at 1.

80. In Alabama, all judges must stand for election every six years. In Arkansas, supreme court and court of appeals judges must stand for election every eight years, chancery court judges must stand for election every six years and circuit court judges must stand for election every four years. In Illinois, supreme and appellate court judges must stand for election for an initial 10-year term, after which they are subject to retention elections at 10-year intervals; and circuit court judges must stand for election for an initial 6-year term, after which they are subject to retention elections at 6-year intervals. In Mississippi, supreme court judges must stand for election every eight years, and chancery and circuit court judges must stand for election every four years. In North Carolina, all judges must stand for election every eight years. In Pennsylvania, all judges must stand for election for an initial 10-year term, after which all are subject to retention elections at 10-year intervals. In Texas, supreme court, court of criminal appeals and court of appeals judges must stand for election every six years, and district court judges must stand for election every four years. In West Virginia, supreme court judges must stand for election every twelve years, and circuit court judges must stand for election every eight years. McFadden, supra note 10, at 178-87.

81. The six states are Alabama, Arkansas, Mississippi, North Carolina, Texas and West Virginia. See supra note 80.

82. See generally Champagne, supra note 46, at 64; Dubois, supra note 3, at 49-50; Felice & Kilwein, supra note 45, at 197; Dunn, supra note 15, at 285.

83. Not infrequently, the adjective "bad" is used to describe judges whose decisions are perceived as at odds with the views of the majority. See generally Harding, supra note 20, at 1163; Shapiro, supra note 38, at 1568-69; Korzen, supra note 38, at 260.

84. See Harding, supra note 20. See also Shapiro, supra note 38, at 1562; Thompson, supra note 31, at 2062.

85. See generally Chemerinsky, supra note 44, at 1988; John D. Felice et al., Judicial Reform in Ohio, in JUDICIAL REFORM IN THE STATES 51, 51-52 (Anthony Champagne & Judith Haydel eds., 1993); Felice & Kilwein, supra note 45, at 197.
Many commentators question the validity of the initial premise of proponents of partisan elections—that partisan elections ensure judicial accountability. Commentators point out that most judges in states which use partisan elections initially reach the bench by interim appointment to an unexpired term, and are then re-elected periodically, more often than not without opposition. In addition, most voters know virtually nothing about the qualifications of candidates for judicial office and, as a result, generally end up casting their votes based upon cues, such as party affiliation or name recognition. Moreover, they note that there is almost always a significant voter drop-off between more high-profile political races and judicial races—because voters are unable intelligently to cast their vote for judicial candidates, many simply do not vote in those races. As a result, the few races that are contested are generally decided by a very small minority of the electorate, most of whom have no rational basis for their vote.

While perhaps once accurate, portions of these arguments are beginning to be refuted by changes in the politics of judicial elections. In particular, in the last decade, the number of contested elections has

86. See generally Champagne, supra note 72, at 146; Glick, supra note 51, at 516-17; Hansen, supra note 37, at 45; Kaminsky, supra note 47, at 468-69; Dunn, supra note 15, at 286.

87. See, e.g., Champagne, supra note 46, at 95; Champagne, supra note 72, at 151; Dubois, supra note 3, at 43; Dunn, supra note 49, at 125; Johnson & Urbis, supra note 37, at 543-44; David Rohde, Critics Charge Pennsylvania Courts Are Stuck in “Judicial Dark Ages,” CHRISTIAN SCi. MON., Nov. 1, 1993, at 7. This appears to be more prevalent in urban areas than in rural. In the latter, there are far fewer candidates for judicial office, and voters tend to be more familiar with those who do run. See, e.g., Champagne, supra note 72, at 151. It has been suggested that one reason for such a low level of voter knowledge is the fact that judicial candidates are prevented by ethical constraints from intelligently discussing any issues. See, e.g., Hojnacki & Baum, supra note 72, at 301; Lovrich et al., supra note 72, at 33; Dunn, supra note 15, at 290-91.

88. See, e.g., Anthony Champagne, Judicial Reform in Texas, in JUDICIAL REFORM IN THE STATES 93, 97 (Anthony Champagne & Judith Haydel eds., 1993); Champagne, supra note 72, at 147; Hojnacki & Baum, supra note 72, at 306; Dunn, supra note 15, at 287; Rohde, supra note 87. But see Dubois, supra note 3, at 44 (arguing that voting cues based upon political party affiliation are relevant, to the extent that party affiliation provides some indication regarding candidates’ political, social and judicial leanings). See also Champagne, supra note 46, at 96-98 (discussing studies indicating Democratic judges may decide cases differently from Republican judges).

89. See, e.g., Dubois, supra note 3, at 45; Felice et al., supra note 85, at 57; Hojnacki & Baum, supra note 72, at 300-01; Rohde, supra note 87. This often results in votes based upon perceived ethnicity of the candidate. See Champagne, supra note 46, at 95.

90. See, e.g., Becoming a Judge, supra note 69, at 39-40; George E. Brand, Selection of Judges—The Fiction of Majority Election, 34 J. AM. JUDICATURE SOC'Y 136, 143 (1951); Dubois, supra note 3, at 45.

91. See generally Brand, supra note 90, at 143. But see Lovrich et al., supra note 72, at 33 (suggesting that empirical data indicates that those who do vote in judicial elections are likely to be atypical of the general electorate because of uncommon interest in public affairs and uncommon knowledge about local government).
increased fairly dramatically around the country. Moreover, those elections are becoming increasingly acrimonious, thereby generating greater voter interest.

Assuming for purposes of argument that periodic contested elections do have some impact on judicial accountability, an assumption as yet unproven empirically, the question remains whether the degree of additional accountability attained as a result of those elections is worth the price. Contested elections are expensive, and they are becoming more expensive every day. Moreover, in large states, they have become extraordinarily expensive.

In the past, judicial elections were low-key affairs, conducted with civility and dignity. As a result, they were relatively inexpensive. However, that is no longer the case. Today, in many jurisdictions, judicial elections have taken on all of the trappings of partisan politics, significantly increasing the resulting cost. Texas provides a particularly dramatic example of this development.

According to Anthony Champagne, a leading authority on Texas judicial elections, "[s]upreme court races began to get expensive" in

---

92. Thus, in North Carolina, the coming of age of a viable Republican Party is fast changing the past system, in which Democrats, once appointed by the governor to complete a term, seldom faced subsequent opposition. Korzen, supra note 38, at 265-66. The same phenomenon is occurring in Texas. See, e.g., Champagne, supra note 88, at 95-97; L. Douglas Kiel et al., Two-Party Competition and Trial Court Elections in Texas, 77 JUDICATURE 290, 291 (1994). See also Moog, supra note 37, at 69.

93. See, e.g., James C. Drennan, Judicial Reform in North Carolina, in JUDICIAL REFORM IN THE STATES 19, 28 (Anthony Champagne & Judith Haydel eds., 1993); Hill, supra note 73, at 165; Moog, supra note 37, at 70; Reidinger, supra note 34; Roy A. Schotland, 1986—A Historic Year for Judicial Elections, 70 JUDICATURE 246 (1987); Watson, supra note 73, at 50-51. One commentator has described the Texas situation as follows: "Judicial selection in Texas is interest group politics—behind the mask created by words like 'good government,' 'reform,' 'quality judges,' and 'democracy' is a bitter, partisan, high-stakes game for control of Texas' third branch of government." Champagne, supra note 88, at 94.

94. See, e.g., Dubois, supra note 3, at 43-44; Hojnacki & Baum, supra note 72, at 301-02. Increased voter interest may also be attributable, at least in part, to decisions invalidating judicial ethics provisions which prohibit discussion of issues during contested elections. See, e.g., American Civil Liberties Union v. The Florida Bar, 744 F. Supp. 1094 (N.D. Fla. 1990).

95. As one commentator has noted:

[T]he process of electing judges is ... an extremely inefficient method of selection. Indeed, much of the time, money, and energy expended under the elective system is minimally related, if related at all, to the selection of qualified judges. These wasteful externalities cause artificially high opportunity costs which have ramifications throughout the entire legal system.

Dunn, supra note 15, at 296.

96. This is generally true at all court levels, without regard to whether the elections are partisan or nonpartisan. See Johnson & Urbis, supra note 37, at 545.

97. See, e.g., Hansen, supra note 37, at 45.

98. See generally Hansen, supra note 37 (discussing recent nationwide developments); Moog, supra note 37, at 69-71 (discussing the situation in North Carolina).

99. See, e.g., Watson, supra note 73, at 50.
1980, by which time "the election of Texas Supreme Court justices had become a battleground for plaintiff and defense lawyers, each trying to elect candidates favorable to their perspective." In that year, candidates for three open seats on the court raised $1.8 million. In 1986, the "supreme court primary and general election contributions overall totaled $4,624,321 and the four winning candidates had a total of $2,954,280 in contributions. One winning candidate raised over $1.4 million for his 1986 contested race." In 1988, the twenty candidates for six seats on the court spent a total of $10,374,442 in the primaries and the general election. Two candidates raised over $2 million each, and a third raised almost as much. In 1990, six candidates for three seats on the court spent nearly $6 million. Although the numbers are not as great, the same trend is present in races for other judicial levels in Texas. Moreover, cost should not be measured only in dollars spent by candidates. As John L. Hill, Jr., a former Texas Supreme Court Chief Justice has aptly pointed out, an additional cost to the system is the time spent campaigning by incumbents—time which might be much better spent deliberating on and deciding cases.

Texas is but the most graphic example. The trend is equally visible elsewhere. In North Carolina, "[c]andidates for statewide judicial races in 1986 spent more than those in 1980, 1982, and 1984 combined." "In 1989, the winning candidate for a seat on Pennsylvania’s supreme court spent more than $1.4 million . . . ." The trend is even visible in relatively rural states. In 1990, campaign spending for a seat on the Arkansas Supreme Court exceeded $500,000 for the first time.

It is not merely the rapidly escalating cost of such elections that produces concern. One must also consider where the money comes from, and the perceptions created by such fund-raising activities.

Not surprisingly, lawyers have historically been the principal contributors to candidates for judicial office. As the cost of

100. Champagne, supra note 72, at 148.
101. Id.
102. Id. at 149.
103. Champagne, supra note 88, at 107.
104. Id.
105. Hansen, supra note 37, at 44.
106. Champagne, supra note 88, at 104-09.
107. Hill, supra note 73, at 165.
108. Korzen, supra note 38, at 266 (emphasis in original).
109. Hansen, supra note 37, at 44. A similar trend is evident with regard to other judicial levels in Pennsylvania. See Dunn, supra note 49, at 121.
110. Hansen, supra note 37, at 45.
111. See, e.g., Champagne, supra note 88, at 104; Anthony Champagne & Judith Haydel,
campaining escalates, so does the size of contributions. Individual contributions from lawyers have, in some cases, become staggering. Again using Texas as an example, large contributions from lawyers are relatively common.\(^{112}\) Historically, Texas judicial campaigns have seen plaintiffs' personal injury lawyers on one side, and lawyers representing the insurance defense bar on the other.\(^{113}\) This has been especially true with regard to supreme court races, because that is where the state's tort law is made and, consequently, to a large extent, where the fortunes of the plaintiffs' bar are made or lost.\(^{114}\) In 1982, a well-known plaintiffs' lawyer recruited a justice of the peace and financed his successful campaign against an 18-year veteran of the court of appeals because the lawyer was displeased over an adverse ruling by the incumbent judge, which had taken away a large jury verdict.\(^{115}\) In 1984, one candidate for a seat on the Texas Supreme Court received $1,043,879 in contributions. The list of contributors was 195 pages long. However, seventy-six donors, all of whom were either related or affiliated with the same law firm, accounted for more than half of the total.\(^{116}\) In 1986, lawyers contributed eighty, eighty-five and ninety percent, respectively, of the total funds raised in three of the four races for seats on the Texas Supreme Court.\(^{117}\) Individual contributions by plaintiffs' lawyers in amounts of $20,000 or more have not been uncommon.\(^{118}\)

Lawyers also represent the single largest source of contributions in Illinois.\(^{119}\) Between 1980 and 1990, "[m]ore often than not, candidates who ran in elections they could not lose received the most contributions."\(^{1120}\) This was true even for candidates who were unopposed.\(^{1121}\)

Although lawyers remain the principal source of funding in judicial campaigns, in recent years, individual litigants and special interest

---

112. See Champagne, supra note 46, at 88.
113. See, e.g., Champagne, supra note 72, at 148.
114. See, e.g., Champagne, supra note 88, at 105.
115. See Champagne, supra note 72, at 149.
116. Id.
118. See Champagne, supra note 46, at 90.
120. Id. at 294.
121. Id. at 297.
groups which represent the interests of regular litigants have begun to play a larger role in judicial campaign financing.\textsuperscript{122} Again looking to Texas for examples, one individual who frequently finds himself involved in court disputes "has given judicial campaign contributions to single judicial candidates of over $100,000."\textsuperscript{123} This same individual contributed over $200,000 to the unsuccessful campaign of a candidate for the Texas Supreme Court in 1982, which sum represented more than ninety percent of that candidate's total contributions.\textsuperscript{124} In 1988, for the first time, Texas saw the large-scale involvement of non-lawyer special interest groups in supreme court elections. The Texas Medical Association and others concerned with the direction of medical malpractice decisions formed a political action committee which became a major contributor to a number of candidates.\textsuperscript{125}

One need not be a rocket scientist to apprehend the impression created by such contributions. As one commentator has graphically expressed it, contributions create the impression "that modern justice may be going to the highest bidder."\textsuperscript{126} In addition to creating the impression that justice is for sale, the need to participate in large-scale fundraising is generally believed to discourage qualified individuals from running (or seeking re-election),\textsuperscript{127} and "inevitably [to] lead to heightened public distrust of the judicial process."\textsuperscript{128}

Notwithstanding the apparent problems associated with the method, efforts to do away with partisan elections have been notably unsuccessful in those states which continue to employ that method. In North Carolina, "[s]ince at least 1958, judicial selection has been an

\begin{itemize}
  \item \textsuperscript{122} See, e.g., Champagne & Haydel, supra note 111, at 184; Hansen, supra note 37, at 45; Hojnacki & Baum, supra note 72, at 302.
  \item \textsuperscript{123} Champagne, supra note 88, at 104.
  \item \textsuperscript{124} Champagne, supra note 72, at 149.
  \item \textsuperscript{125} Champagne, supra note 88, at 103-04. The increasing incidence of large contributions to judicial candidates by lawyers, litigants and special interest groups would appear clearly to suggest that those making the contributions perceive judges as capable of having a major impact upon public policy—that they make, rather than merely interpret, law.
  \item \textsuperscript{126} Hansen, supra note 37, at 45. Another commentator has described what might aptly be called "the paradox of judicial campaign financing" as follows:
    On the one hand, money makes possible the campaign activities which provide voters with the information they need about candidates and issues to make informed choices. On the other hand, there is a concomitant fear that the money spent by candidates will prove determinative in the outcome of election campaigns, thereby opening "the door to influence-peddling by those who command sufficient resources to bankroll campaigns."
  \item \textsuperscript{127} See, e.g., Dubois, supra note 37, at 9; Johnson & Urbis, supra note 37, at 541-42; Moog, supra note 37, at 70.
  \item \textsuperscript{128} Johnson & Urbis, supra note 37, at 542 (footnote omitted).
\end{itemize}
issue of regular public debate." Although reform has been urged by the governor, the chief justice and the state bar association, to date no proposal has managed to clear the legislature. The situation has been much the same in Pennsylvania. There, the state bar association has supported reform since as early as 1947. A poll taken in 1983 revealed that less than eighteen percent of those responding favored the status quo. Nevertheless, efforts to do away with partisan elections have been unsuccessful, largely because of the opposition of the Pennsylvania Trial Lawyers Association and organized labor, who have been joined more recently by "the pro-life movement."

The fight has been especially acrimonious in Texas. There, the legislature has frequently rejected proposals to do away with partisan elections. Champagne has described the situation thus:

If a political issue can be given individual characteristics, judicial reform in Texas would be the Harold Stassen of Texas politics. At least since 1946 major reform efforts have tried to change the Texas partisan election system for selecting judges to a commission selection system . . . . To date, these numerous proposals to adopt a commission selection [sic] share one fate—not a single one of these proposals over the past forty years has gotten out of legislative committee.

The numerous proposals have not succeeded notwithstanding the support of the state bar association, several chief justices, numerous commissions, civic groups, the insurance defense bar, business groups and at least one governor. The lack of success has been due to the opposition of members of the supreme court, the two major political parties, the plaintiffs' bar, organized labor, minorities and women, rural interests and the Texas Civil Liberties Union. Moreover, there is little evidence that the electorate of Texas is convinced that a change is needed. On the contrary,

129. Drennan, supra note 93, at 19.
130. See Moog, supra note 37, at 70.
131. See Drennan, supra note 93, at 43-45.
132. See Dunn, supra note 49, at 119.
133. Id. at 126.
134. Id. at 126-27.
135. Id. at 132.
136. See Champagne, supra note 46, at 55-57.
137. Champagne, supra note 88, at 93 (footnote omitted).
138. See, e.g., Champagne, supra note 88, at 93-94, 102-03; Hill, supra note 73, at 168-69.
[I]n a non-binding referendum held in 1988, 86 per cent of Democratic primary voters opposed merit selection and a probability sample of Texas public opinion conducted by The Texas Poll early in 1989 indicated that 71 per cent of Texans favor the election of judges and that 70 per cent of them thought the current Texas judicial system is fair.  

One recent development might potentially cause those states which still use partisan elections to switch to some other method of selection and retention that does not involve elections. That development is the Supreme Court’s decisions in Chisom v. Roemer and Houston Lawyers’ Ass’n v. Attorney General of Texas that section 2 of the Voting Rights Act of 1965 applies to judicial elections. It is clear that the effect of those decisions upon judicial elections will be significant. What remains to be seen is how significant.

C. Nonpartisan Election

Although generally treated as a separate method of selection and retention, for most practical purposes nonpartisan elections may best be understood as merely a subspecies of partisan elections. The concept of nonpartisan elections was developed as a response to concerns which arose in the mid- to late-nineteenth century over the facts that judicial candidates were selected by political machines and that,

140. Jackson & Riddlesperger, supra note 139, at 185 (footnotes omitted).
143. 42 U.S.C. § 1973 (1988) (prohibiting denial or abridgement (dilution) of the right to vote based upon race or color).
144. See, e.g., Johnson & Urbis, supra note 37, at 526-27. It has been argued that adoption of an election scheme involving subdistricts or single-member districts, such as were urged by the petitioners in Houston Lawyers Ass’n v. Attorney General of Texas, 501 U.S. 419, 423 (1991), would render judges “accountable to a smaller, more homogenous electorate,” thereby permitting special interest groups, by the prudent use of campaign contributions, to have a much greater impact upon judicial decisions. Champagne & Haydel, supra note 111, at 188-89.
145. According to Champagne, in Texas, application of section 2 of the Voting Rights Act to elected judges has caused “[t]he debate over judicial selection [to] enter[] a new phase where liberal Democrats and minorities see political gain in a system of single-member districts and where conservative Democrats and Republicans are increasingly moving toward support of merit selection . . . .” Champagne, supra note 88, at 112. But see Bradley v. Indiana State Election Bd., 797 F. Supp. 694 (S.D. Ind. 1992) (holding that section 2 of the Voting Rights Act applies to retention elections for judges initially appointed pursuant to a commission, or “merit,” selection plan). See also Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc) (holding that relief will not be granted under section 2 of the Voting Rights Act if the remedy would undermine the court’s ability to administer justice), cert. denied, 115 S. Ct. 1795 (1995).
146. See, e.g., Champagne, supra note 46, at 57; Pearson & Castle, supra note 4, at 34; Korzen, supra note 38, at 269.
as a result, judges were obligated to, and controlled by, those machines.\textsuperscript{147} As early as 1873, judicial candidates appeared on the ballot without party label in Cook County, Illinois.\textsuperscript{148} By the end of the first decade of the twentieth century, some fifteen states were using nonpartisan elections to select and retain judges.\textsuperscript{149}

Today, twelve states employ nonpartisan elections as the method by which all judges are selected and retained.\textsuperscript{150} In addition, five states use nonpartisan elections to select and retain some or all of their general jurisdiction trial judges.\textsuperscript{151} Finally, Ohio, which is in a category by itself, selects and retains all judges by nonpartisan election. However, candidates for the nonpartisan general election are chosen in partisan primary elections.\textsuperscript{152}

The principal argument of those who advocate nonpartisan election for the selection and retention of judges is that it removes partisan political considerations while ensuring the same type of judicial accountability as do partisan elections.\textsuperscript{153} Thus, so it is argued, judges are more likely to be selected based upon qualifications than upon political affiliation.\textsuperscript{154} Proponents of nonpartisan election also argue that such a system permits the people to retain their right to vote for judges, while at the same time reducing the frequent turnover on the bench that occurs in many partisan election states, because "'[i]n a nonpartisan election system, good judges are usually unopposed.'"\textsuperscript{155}

\begin{footnotes}
\item[147] See, e.g., BERKSON ET AL., supra note 49, at 4; Winters, supra note 52, at 1.
\item[149] See Winters, supra note 52, at 1.
\item[150] The twelve states are Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Oregon, Washington and Wisconsin. See MATIAS, supra note 50, at 142. The terms of office vary from four years for district court judges in Idaho and superior court judges in Georgia and Washington, to ten years for supreme court judges in North Dakota and Wisconsin and supreme court and court of appeals judges in Louisiana. In Montana, unopposed incumbents must stand for retention. See MCFADDEN, supra note 10, at 180-87.
\item[151] The five states are Arizona (counties with populations of less than 150,000 select and retain superior court judges by nonpartisan election), California (local option permits choice between gubernatorial appointment and nonpartisan election for selection of superior court judges), Florida (all circuit court judges are selected and retained by nonpartisan election), Oklahoma (all district court judges are selected and retained by nonpartisan election) and South Dakota (all circuit court judges are selected and retained by nonpartisan election). See MCFADDEN, supra note 10, at 178-88.
\item[152] Id. at 185, 188.
\item[153] See, e.g., Thomas E. Brennan, Nonpartisan Election of Judges: The Michigan Case, 40 Sw. L.J. (Special Issue), May 1986, at 23, 23-24; Champagne, supra note 46, at 63; Korzen, supra note 38, at 269. Of course, this argument has no application to the Ohio system, where candidates for the nonpartisan general election are chosen by partisan primary elections.
\item[154] See Champagne, supra note 46, at 63.
\item[155] Brennan, supra note 153, at 26.
\end{footnotes}
Most commentators contend that, far from being an improvement upon partisan elections, nonpartisan elections are an inferior alternative to partisan elections because they possess all of the vices of partisan elections and none of the virtues. As with partisan elections, most voters in nonpartisan elections know little about the qualifications of the candidates. However, because the party voting cue is not available in nonpartisan elections, even more voters are relegated to basing their vote upon irrelevant factors, such as ballot position and name. Moreover, the empirical evidence suggests that voter drop-off is even more significant in nonpartisan judicial elections—voter apathy is endemic in most nonpartisan races. Because of these factors, incumbents overwhelmingly win re-election, regardless of ability.

156. See, e.g., Winters, supra note 77, at 30; Jackson & Riddlesperger, supra note 139, at 189; Kaminsky, supra note 47, at 490; Dunn, supra note 15, at 292-93; Korzen, supra note 38, at 270.


158. See Jackson & Riddlesperger, supra note 139, at 189.

159. See, e.g., Felice et al., supra note 85, at 57; Kaminsky, supra note 47, at 492. See also Benjamin H. Hill, III, The Case for Merit Selection and Retention of Trial Judges, in MERIT SELECTION AND RETENTION OF TRIAL JUDGES: MATERIALS HANDBOOK 7 (Governmental Affairs Division, The Florida Bar ed., 1991) (noting that, in a recent trial court race, a candidate changed her name to appear first on the ballot); Benson, supra note 157, at 775 (noting that "some commentators felt that name recognition contributed to the successful candidacy of Alan Page" for a seat on the Minnesota Supreme Court). A reporter has described the practice in Dade County (Miami), Florida, trial court races as follows:

Judicial elections are a controversial exercise everywhere, but in Dade they aspire to tragicomedy.

This year . . . , as in all years, there are no issues, not even party labels to provide a helpful hint as to ideology. The candidates are prohibited by judicial canons from saying anything of interest . . . So . . . the average voter will look at the ballot and see all the names of people who want to be judge and the voter will make a mental association . . .

Names. Judicial elections are about names.


160. See, e.g., Champagne, supra note 46, at 63; Kaminsky, supra note 47, at 490-91; Korzen, supra note 38, at 270.

161. See, e.g., Korzen, supra note 38, at 270. The argument of proponents that nonpartisan elections are better than partisan elections because "good judges are usually unopposed" and,
These are not the only problems associated with nonpartisan elections. Like partisan elections, nonpartisan elections are becoming much more expensive. In fact, some argue that they are more expensive than partisan elections because, in the absence of party labels, it costs more to reach and inform the voters. Thus, the 1986 Ohio nonpartisan election for chief justice cost some $2.8 million, of which approximately $1.7 million was spent by the unsuccessful incumbent. This phenomenon is not limited to appellate court races. In South Florida trial court races, the cost of campaigns has, likewise, risen dramatically. One relatively recent circuit court race in Dade County (Miami) "was reported to have cost over $500,000, most of which was spent to purchase name identification." According to one commentator, in South Florida, "[c]ircuit court campaigns cost an average of $100,000, often reach $250,000 to $300,000, and one reported [sic] having spent $600,000."

As in partisan elections, contributions in nonpartisan elections come principally from lawyers who practice in the courts to which the candidates are seeking election, and from litigants in those courts. Also, as in partisan elections, in nonpartisan elections the inevitable impression created by such contributions is that justice is for sale.

Another interesting fact, based upon the experience in Florida with nonpartisan election of trial judges, suggests that nonpartisan election may be a less desirable system. In Florida, while trial judges are generally selected and retained by nonpartisan elections, as in most states, therefore, the frequent turnover of judges present in partisan election states is avoided, see supra note 155 and accompanying text, would seem to detract from the argument that nonpartisan elections ensure accountability because, if unopposed, judges would not appear on the ballot.

162. See, e.g., Benson, supra note 157, at 778.
163. See, e.g., Champagne, supra note 46, at 63; Korzen, supra note 38, at 270.
164. See, e.g., Felice et al., supra note 85, at 55-56.
165. See Hansen, supra note 37, at 44. Long-time justice of the Washington Supreme Court Robert F. Utter reportedly "twice . . . had to take out a second mortgage on his home to retire a campaign debt." Id.
169. See supra notes 126-28 and accompanying text. See also Benson, supra note 157, at 778-79. But see MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990) (holding that, notwithstanding undeniable perception that judge will be biased in favor of contributing attorney or litigant, given requirement that trial judges participate in contested elections, a legal contribution to a judge is not, itself, a sufficient ground to require recusal).
170. See supra note 56 and accompanying text.
interim appointments are made by the governor, pursuant to a "merit" system. Generally, what empirical work has been done on the subject indicates that the method of selection has little, if any, effect upon the overall quality of judges. However, remarkably, in Florida, since 1966, all trial judges removed for misconduct initially reached the bench by election.

As is true with partisan elections, notwithstanding the obvious problems associated with them, efforts to do away with nonpartisan elections have met with little success. Ohio, where judicial elections have been a subject of reform proposals since the late 1920s, provides an excellent example. In 1987, an initiative proposing that election of judges be discarded in favor of a "merit" system was defeated by a two-to-one vote, despite the support of the state bar association, the League of Women Voters, the business community, insurance companies and some forty other groups, including Common Cause, the PTA, the Council of Churches and various farm groups. The principal opponent was the Ohio chapter of the American Federation of Labor/Congress of Industrial Organizations. The chief justice was also a vocal opponent, and both major political parties also opposed the initiative, albeit less vocally. Efforts to do away with nonpartisan elections have also been unsuccessful in Washington and Louisiana. While the Chisom v. Roemer and Houston Lawyers' Ass'n v. Attorney General of Texas decisions will likely also have a significant effect upon nonpartisan elections, as with partisan elections, the extent of that effect remains to be seen.

172. See supra note 69 and accompanying text.
174. See Felice & Kilwein, supra note 45, at 194.
175. Id. at 194-95.
176. Id. at 197.
177. Id. Interestingly, although the initiative was soundly defeated, so was the chief justice. Id. at 200.
178. Id. at 197.
180. See Judith Haydel & Thomas Ferrell, Judicial Reform in Louisiana, in Judicial Reform in the States 73, 75 (Anthony Champagne & Judith Haydel eds., 1993). The authors' colorful explanation for the failure of reform efforts reads:
   With a political culture that is not especially concerned with ethical questions and that
   even finds misconduct by politicians entertaining, if carried out with style, it might be
   expected that more traditional governmental reforms, including reform of judicial se-
   lection procedures, would find no acceptance in Louisiana. So far, they have not.
183. In fact, Chisom v. Roemer arose in Louisiana.
184. See supra notes 141-45 and accompanying text.
D. "Merit" Plans

Commission selection, more commonly referred to as either "Missouri Plan" or "merit" selection, is generally perceived to be a compromise between appointive methods and elective methods. The system grew out of the Progressive Reform Movement shortly after the beginning of the twentieth century and, in particular, from the ideas of Roscoe Pound, then Dean of the University of Nebraska School of Law; John H. Wigmore, then Dean of Northwestern University School of Law; and Albert Kales, a colleague of Wigmore’s at Northwestern. The first concrete proposal regarding such a plan came from Kales in 1914. That initial proposal was further refined and embellished upon over the next twenty years.

In 1934, California voters became the first to adopt a commission method of selection. They approved a proposal calling for nominations of candidates to fill vacancies on the supreme court and the courts of appeal by the governor, subject to confirmation by a commission composed of the attorney general, the chief justice of the supreme court, and a presiding justice of the courts of appeal. Although not the first state to adopt a commission plan, see infra notes 192-94 and accompanying text, Missouri’s system has been the one most frequently looked to as a model.

It is unclear from where this label first came. However, what is clear is that this value-laden label is, today, a deliberate choice of most proponents of the system.

See, e.g., ABRAHAM, supra note 48, at 37-39; Pearson & Castle, supra note 4, at 34; Shapiro, supra note 38, at 1561. See, e.g., Belknap, supra note 43, at 81-82; Krivosha, supra note 52, at 128-29. See Belknap, supra note 43, at 82-84.

In 1913, the American Judicature Society was founded, and Kales accepted the position of Director of Drafting. Krivosha, supra note 52, at 128-29. The initial Kales proposal included the following components: (1) nomination of a list of candidates for judicial vacancies by a council, or commission, of presiding judges; (2) selection of individuals to fill judicial vacancies by the state’s chief justice, who would be chosen and retained by contested popular election; (3) a requirement that the chief justice select every second appointee from the list submitted by the judicial council; and (4) a requirement that all appointees stand periodically in retention elections, at which voters would decide whether they should continue in office, or the position be declared vacant. See, e.g., BERKSON ET AL., supra note 49, at 5; Krivosha, supra note 52, at 129; Roll, supra note 48, at 843.

See, e.g., BERKSON ET AL., supra note 49, at 5-6; Krivosha, supra note 52, at 129-30; Winters, supra note 18, at 3-5. In 1928, Herbert L. Harley, a founder of the American Judicature Society and its first secretary, proposed that the governor, rather than the chief justice, select appointees to fill vacancies on the bench from a list of eligible candidates named as the result of a plebiscite by bar members. See, e.g., BERKSON ET AL., supra note 49, at 5; Krivosha, supra note 52, at 129-30; Winters, supra note 18, at 4.

See, e.g., Culver & Wold, supra note 46, at 140-41; Grodin, supra note 13, at 1972; Grodin, supra note 18, at 365-66; Krivosha, supra note 52, at 130.
confirmed, the judge was required to stand for retention at the next gubernatorial election and, thereafter, at regular intervals. This method, now generally referred to as the "California Plan," remains in effect for supreme court and court of appeal judges today.

In 1940, Missouri voters adopted a commission plan for selection of judges of the supreme court, the courts of appeals and the circuit courts for Jackson County (Kansas City) and the city of St. Louis. The plan provided for the creation of nominating commissions composed of lawyers selected by the bar, lay persons selected by the governor, and a judge, who served as chair. Each of the commissions was to nominate three candidates for each vacancy, from which list the governor was to select the appointee. After a year, each judge was to stand for retention in the next general election. This method, now generally known as the "Missouri Plan," remains in effect today.

Since 1940, there has been a discernible trend toward adoption of some sort of commission, or "merit" plan. At present, some thirty-two states and the District of Columbia use some type of "merit" plan for selection of some judges. The variations among the components of the plans are myriad. "Merit" selection, coupled with

193. Each judge's name would be placed on the ballot, without opposition, and the question asked would be merely whether that judge should be retained in office for another term. See generally Thompson, supra note 31, at 2011.
194. See, e.g., Culver & Wold, supra note 46, at 142; Grodin, supra note 18, at 365.
195. See, e.g., McFadden, supra note 10, at 179; Thompson, supra note 31, at 2010-11. At present, after standing initially for retention, supreme court and court of appeal judges must again stand for retention at 12-year intervals. Id. at 2011. Local option permits a choice between gubernatorial appointment and nonpartisan election for selection of superior court judges. See supra note 151.
197. See generally Watson, supra note 18, at 2.
198. Id.
199. Id.
200. See id. It is now also used for selection and retention of circuit court judges in Clay, Platte, and St. Louis Counties. See Hunter, supra note 196, at 72. At present, after standing initially for retention, judges of the supreme court and the court of appeals must again stand for retention at 12-year intervals, and circuit court judges must again stand for retention at 6-year intervals. See McFadden, supra note 10, at 183.
201. According to the American Judicature Society:

A true merit selection plan consists of these basic elements: 1) a commission comprised of both lay and lawyer members to recruit, screen, investigate and evaluate judicial candidates; 2) nomination to the appointing authority of a limited number of candidates; and 3) appointment by the governor or other appointing authority.

202. See id. at 1-3.
203. Id.
retention elections, is applied to all judges in six states,\textsuperscript{204} and to some judges in an additional ten states.\textsuperscript{205}

The principal argument made by proponents of “merit” selection, regardless of the particulars of the given plan being discussed, is that it removes politics from the process of selecting judges.\textsuperscript{206} Almost always accompanying this argument is the correlative argument that, because politics is removed from the selection process, the result is selection of “better” judges.\textsuperscript{207} Proponents also frequently claim that more women and minorities reach the bench under “merit” selection systems than under systems based upon contested elections and that, therefore, the result in states using some form of “merit” system is a more diverse judiciary.\textsuperscript{208}

According to proponents, when coupled with a provision for periodic retention elections, “merit” selection permits an accommodation between the competing concepts of independence and accountability.\textsuperscript{209} Not infrequently, this argument will be accompanied by the argument that some form of “merit” selection, coupled with periodic retention elections, is preferable to contested elections because the former will generally ensure greater security of tenure, thereby encouraging “better” candidates to apply.\textsuperscript{210}

It is difficult to generalize regarding the validity of the claims made by proponents and opponents of a “merit” system because of the

\textsuperscript{204} The six states are Alaska, Colorado, Iowa, Nebraska, Utah and Wyoming. See McFadden, \textit{supra} note 10, at 178-87.

\textsuperscript{205} The ten states are Arizona, Florida, Indiana, Kansas, Maryland, Missouri, New York, Oklahoma, South Dakota and Tennessee. See \textit{id.}


\textsuperscript{207} See, e.g., Davidow, \textit{supra} note 39, at 450; Krivosha, \textit{supra} note 15, at 19; Liles, \textit{supra} note 206, at 6; O’Connell & Means, \textit{supra} note 15, at 1155-56; Overton, \textit{supra} note 39, at 19.

\textsuperscript{208} See, e.g., Johnson & Urbis, \textit{supra} note 37, at 559; Krivosha, \textit{supra} note 15, at 19.

\textsuperscript{209} The following quotation aptly sets forth this hypothesis:

The Missouri Plan was a practical compromise between the goals of judicial independence and public accountability. The combined system of initial merit selection and subsequent retention elections was designed to obtain quality judges, maintain their independence by insulating them from political influences, and provide public accountability through a mechanism for removal of judges.


\textsuperscript{210} See, e.g., Garwood, \textit{supra} note 69, at 21-22; Hunter, \textit{supra} note 196, at 70; O’Connell & Means, \textit{supra} note 15, at 1155; Stanton, \textit{supra} note 15, at 357; Dunn, \textit{supra} note 15, at 289. This argument would appear to be somewhat inconsistent with the argument that “merit” selection, coupled with retention elections, ensures some meaningful degree of accountability.
number of variations in the plans and the relative paucity of empirical research. However, those on both sides of the issue generally agree that one key to the success of any type of "merit" plan lies in the provisions regarding the composition and powers of the nominating commission.\(^{211}\) To have any hope of achieving its asserted goals, such a plan must be based upon provisions which ensure a truly independent,\(^{212}\) impartial,\(^{213}\) and diverse commission,\(^{214}\) with the power and resources to investigate thoroughly those who come before it as candidates.\(^{215}\) Most objective observers agree, further, that, in general, the plans currently in use have not included such provisions. The result has been that, while partisan political considerations may, to a certain extent, have been removed from the selection process, politics is still a factor.\(^{216}\) The forum for such political considerations has merely been shifted from the electoral arena to the commissions\(^{217}\) and the governor's mansion.\(^{218}\)


\(212.\) "Independent" is generally intended to mean independence from political control. See, e.g., Hunter, supra note 196, at 74; Roll, supra note 48, at 890.

\(213.\) "Impartial" is generally intended to mean free of prejudices, in whatever form, as well as cronyism. See, e.g., Hunter, supra note 196, at 74.

\(214.\) See, e.g., id. "Diverse" is generally intended to mean a commission which reflects the composition of the community at large in such matters as politics, sex, religion, ethnicity and race. See, e.g., Davidow, supra note 39, at 430-31; Johnson & Urbis, supra note 37, at 558-59.


\(216.\) See, e.g., Kenyon D. Bunch & Gregory Casey, Political Controversy on Missouri's Supreme Court: The Case of Merit vs. Politics, 22 State & Loc. Gov't Rev., Winter 1990, at 5, 5-6; Dubois, supra note 3, at 33; Glick, supra note 51, at 519-23; McMillian, supra note 4, at 13; Roll, supra note 48, at 856-57; Leander Shaw, Jr., Florida's Judicial Merit Selection and Retention System: The Better Alternative, 20 Fla. St. U. L. Rev. 283, 286 (1992); Volcansek, supra note 4, at 86; Watson, supra note 18, at 5; Dunn, supra note 15, at 303; McClellan, supra note 10, at 547.

\(217.\) Polities of one form or another is frequently involved at the commission stage. See generally Bunch & Casey, supra note 216, at 8-10; Champagne, supra note 46, at 61-62; Roll, supra note 48, at 856; Troutman, supra note 215, at 534; Dunn, supra note 15, at 303; McClellan, supra note 10, at 547.

\(218.\) While "merit" systems limit the discretion of the governor regarding the choice of judges, the decision is still frequently based upon partisan political considerations because the individual appointed tends to be a member of the governor's party. See, e.g., Champagne, supra note 46, at 61; Glick, supra note 51, at 521; Roll, supra note 48, at 856-66; Dunn, supra note 15, at 303. As a former chief justice of Missouri has expressed it, "[t]he governor, of course, is a political person. When the constitution gives him complete discretion in selecting the appointee from the panel, it is unrealistic to suggest that political considerations play no part in the ultimate decision." Charles B. Blackmar, Some Observations on the Missouri Plan, 60 U. Mo. K. C. L. Rev. 77, 79 (1991).
As discussed previously, the subjective and normative considerations involved in any attempt to define a "good" judge make empirical analysis of claims that a particular method of selection results in the procurement of "better" judges extremely difficult. Moreover, existing empirical work suggests that the method of selection has little, if anything, to do with the overall quality of judges. However, some evidence supports the claim that judges chosen by some type of "merit" system may perform more competently those functions generally considered at the core of a judge's responsibility than do judges chosen by other means. For example, polls in states which have adopted some type of "merit" plan uniformly demonstrate that a majority believes that the "merit" plan is producing more qualified judges than did the prior system. Moreover, empirical data in Florida and in New York suggests that judges who reach the bench as the result of some type of "merit" system are less likely to face discipline or removal than are those who reach the bench by other means.

One cannot easily reconcile the conclusions drawn by commentators from the empirical data regarding the effect of "merit" plans upon the selection of women and minorities. Some conclude that the method of selection has little effect upon the number of women and minorities reaching the bench. Others conclude that, while contested elections result in fewer women and minorities reaching the bench than do other systems, women and minorities generally fare better under appointive systems than under "merit" systems. Still others insist that "merit" systems bring the greatest number of women and minorities to the bench. The answer to this apparent conundrum may lie in the scope of, and methods used in, the various studies.

219. See supra note 68 and accompanying text.
220. See supra note 69 and accompanying text.
221. See, e.g., Krivosha, supra note 15, at 19; Watson, supra note 18, at 5.
222. More than 88% of judges in Florida who have been disciplined reached the bench by a means other than "merit" selection and, since 1966, all judges removed from office reached the bench by popular election. BAR-RELATED ISSUES, supra note 173, at 63. See also Liles, supra note 206, at 6; Overton, supra note 39, at 19.
223. Although dealing with a very small group, one study found that more New York City judges who had reached the bench by election were subsequently disciplined in some way than were those who had reached the bench by "merit" selection. Henry, supra note 68, at 22. The conclusion of the study was that "merit selection produces a younger, more representative, better educated, highly qualified and more politically diverse judiciary." Id. at 23.
225. See, e.g., Graham, supra note 70, at 331-32.
226. According to the American Judicature Society, "50 per cent of black state supreme court justices and 49 per cent of women justices first reached the states' high courts under the merit plan." Judicial Nominating Commissions, supra note 211, at 236. In Florida, "nineteen
Perhaps the most problematic component of "merit" systems is that by which judges, once selected, are required periodically to participate in retention elections.\footnote{Retention elections are merely the most commonly used retention technique in "merit" plan states. For instance, in Hawaii and the District of Columbia, retention (or reappointment) decisions are made by a commission. See \cite{McFadden} supra note 10, at 179-80.} The empirical evidence suggests that retention elections are subject to virtually all of the criticisms directed at partisan and nonpartisan judicial elections, and then some. Based upon historical evidence, many commentators have questioned whether retention elections actually ensure any meaningful degree of accountability.\footnote{See, e.g., \cite{Hall} supra note 209, at 342; \cite{Volcansek} supra note 4, at 87.} They note that, because incumbents stand for retention without an opponent, the elections have generally been very low-key affairs, resulting in minimal voter interest in, and knowledge about, qualifications and past performance.\footnote{See, e.g., \cite{Hall} supra note 209, at 342; \cite{Luskin} supra note 71, at 318; \cite{Shaw} supra note 216, at 287; \cite{Volcansek} supra note 4, at 87.} As in nonpartisan elections, voters have no cues to assist them in voting.\footnote{See, e.g., \cite{Hall} supra note 209, at 342; \cite{Luskin} supra note 71, at 318; \cite{Shaw} supra note 216, at 287; \cite{Volcansek} supra note 4, at 87.} Despite its efforts, the organized bar has generally been unsuccessful in providing voters with meaningful guidance.\footnote{See, e.g., \cite{Hall} supra note 209, at 342; \cite{Luskin} supra note 71, at 318; \cite{Shaw} supra note 216, at 287; \cite{Volcansek} supra note 4, at 87.} As a consequence, voter drop-off has been more significant in retention elections than in either partisan or nonpartisan judicial elections.\footnote{See, e.g., \cite{Hall} supra note 209, at 342; \cite{Luskin} supra note 71, at 318-19; \cite{Volcansek} supra note 4, at 87.} Moreover, virtually all judges have routinely been retained, regardless of qualifications and past performance.\footnote{It has been noted that there is very little voter differentiation among judges standing for retention in the same territory. All judges on the ballot tend to receive similar affirmative vote percentages. \cite{Hall} supra note 209, at 346. This appears to have been true with regard to minority judges, as well. \cite{Luskin} supra note 71, at 319-21.} Thus, an analysis of data from ten states, covering some 1,900 retention elections between 1964 and 1984, revealed that the incumbent was not retained in only twenty-two cases.\footnote{Hall & Aspin, supra note 209, at 343-44.}

out of twenty-three black judges and forty-one out of seventy-one women judges came to the bench through the merit selection process." Overton, supra note 39, at 20 (footnote omitted). See also Henry, supra note 68, at 11, 16. But see \cite{Glick} supra note 69, at 234 (concluding that "merit" systems appear to limit the number of judges who are members of "minority" religions).

227. Retention elections are merely the most commonly used retention technique in "merit" plan states. For instance, in Hawaii and the District of Columbia, retention (or reappointment) decisions are made by a commission. See \cite{McFadden} supra note 10, at 179-80.

228. See, e.g., \cite{Hall} supra note 209, at 342; \cite{Volcansek} supra note 4, at 87.

229. See, e.g., \cite{Hall} supra note 209, at 342; \cite{Luskin} supra note 71, at 318; \cite{Shaw} supra note 216, at 287; \cite{Volcansek} supra note 4, at 87.

230. See, e.g., \cite{Hall} supra note 209, at 342; \cite{Luskin} supra note 71, at 318-19; \cite{Volcansek} supra note 4, at 87.


232. See, e.g., \cite{Hall} supra note 209, at 342; \cite{Luskin} supra note 71, at 318; \cite{Shaw} supra note 216, at 287; \cite{Watson} supra note 18, at 6.

233. See, e.g., \cite{Hall} supra note 209, at 342; \cite{Luskin} supra note 71, at 318; \cite{Volcansek} supra note 4, at 87; \cite{Watson} supra note 18, at 6. It has been noted that there is very little voter differentiation among judges standing for retention in the same territory. All judges on the ballot tend to receive similar affirmative vote percentages. \cite{Hall} supra note 209, at 346. This appears to have been true with regard to minority judges, as well. \cite{Luskin} supra note 71, at 319-21.

234. Hall & Aspin, supra note 209, at 343-44.
However, other new, and more disturbing, trends appear to be developing with regard to retention elections. Polls and surveys indicate an appalling amount of confusion and general lack of understanding among voters regarding the purpose of retention elections.235 For example, a poll conducted in 1990 on behalf of then Florida Chief Justice Leander Shaw revealed that 17.3 percent of those responding believed that "merit retention [was] similar to a recall election."236 A similar poll conducted in 1992 indicated that more than two-thirds of Florida voters admitted some confusion about retention elections, forty percent believed that judges appeared on the ballot because they had done something wrong and only thirty percent understood that retention elections were a normal event.237

In addition, the affirmative vote percentage appears to be consistently declining over time.238 Until 1976, the average affirmative vote percentage in Missouri had been more than eighty.239 By 1990, that figure had dropped to fifty-nine.240 While evidence indicates that a certain percentage of voters automatically votes against retention,241 judges standing for retention seem to face particularly difficult problems whenever a general anti-incumbent mood affects the electorate.242

More troubling still is an apparent trend toward politicization of retention elections, as special interest groups begin to recognize that judges standing in such elections are at a tremendous disadvantage when it comes to conducting a campaign. This trend appears to have begun in California. In 1966, upset over a decision by the supreme court invalidating an initiative allowing racial discrimination in the sale and rental of housing which had been overwhelmingly approved by the electorate, a loosely organized effort to deny retention to the justices, while unsuccessful, resulted in an average affirmative vote of sixty-five percent, compared with an historic average of eighty-five percent.243

235. See Toohey, supra note 231, at 264.
238. See, e.g., Hall & Aspin, supra note 209, at 344.
239. See Toohey, supra note 231, at 264.
240. Id.
242. See, e.g., Hall & Aspin, supra note 209, at 347; Anti-incumbency's Threat to Judicial Merit Selection, 76 JUDICATURE 56 (1992) (editorial) (noting that, because of ethical restraints, judges are unable to speak out in the absence of active opposition).
In 1977, Rose Bird was appointed Chief Justice of the California Supreme Court.\textsuperscript{244} She was criticized from the outset as unqualified.\textsuperscript{245} In 1978, she stood for retention.\textsuperscript{246} "Several conservative ‘law-and-order’ groups, agribusiness organizations, and a coalition of public officials, marshalled opposition . . . ."\textsuperscript{247} She managed to win retention, but only by a mere two percentage points.\textsuperscript{248}

By 1986, when Bird was again required to stand for retention, her opponents were ready.\textsuperscript{249} A coalition consisting of district attorneys and other law enforcement groups, "law-and-order" proponents, anti-abortion groups, agribusiness interests and Republicans, unhappy with rulings emanating from the supreme court, mounted a massive campaign to portray Bird (and Justices Reynoso and Grodin, who were also on the ballot) as ultra-liberal.\textsuperscript{250} They placed particular emphasis upon the votes of the three justices in death penalty cases, contending that the justices were "soft on crime."\textsuperscript{251} Because of ethical restraints and other factors, the justices were ill-prepared to do battle.\textsuperscript{252} The result was an overwhelming defeat for all three.\textsuperscript{253} According to Justice Grodin, he and the other two justices "raised nearly $4 million," and their opponents "raised approximately $7 million."\textsuperscript{254} Of course, virtually all of this money came from lawyers and special interest groups.\textsuperscript{255}

Retention elections similar to those in California in 1986 have since occurred in Florida. In 1990, then Chief Justice Leander Shaw faced opposition from anti-abortion activists and "law-and-order" groups upset

\begin{itemize}
\item \textsuperscript{244} Id. at 153.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id. at 154.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id. at 154-55.
\item \textsuperscript{251} See, e.g., Culver & Wold, supra note 46, at 155; Grodin, supra note 18, at 366; Wold & Culver, supra note 250, at 350. There seems to be a general agreement that, with regard to Bird, these assertions were true. See, e.g., Culver & Wold, supra note 46, at 155; Thompson, supra note 31, at 2034-35. However, there is some disagreement regarding their accuracy as to Reynoso and Grodin. Compare Thompson, supra note 31, at 2036 (stating that all three justices were "ultra liberal") with Grodin, supra note 18, at 367 (arguing that the three justices were lumped together, notwithstanding "quite disparate" voting records).
\item \textsuperscript{252} See, e.g., Grodin, supra note 18, at 368; Wold & Culver, supra note 250, at 350.
\item \textsuperscript{253} Bird received an affirmative vote of 34%, Reynoso received 40% and Grodin received 43%. See Wold & Culver, supra note 250, at 350.
\item \textsuperscript{254} Grodin, supra note 18, at 368.
\item \textsuperscript{255} See id.
\end{itemize}
with rulings of the court on matters of interest to them. Although Chief Justice Shaw was retained, he received only a 60-percent affirmative vote, compared to the 72-percent affirmative vote he had received six years earlier. He was forced to raise and to spend some $300,000 on the campaign. In 1992, then Chief Justice Rosemary Barkett received similar opposition. She, too, was retained with an affirmative vote of approximately sixty percent, which was several percentage points below other supreme court justices on the same ballot, but unopposed. She, too, was forced to spend some $300,000 on the campaign.

It is difficult to determine empirically whether retention elections have any impact upon the manner in which judges decide cases. However, one survey of judges subject to periodic retention elections revealed that "three-fifths believe[d] judicial retention elections have a pronounced effect on judicial behavior." Many judges subject to periodic retention affirm that this is true. In fact, former Justice Hans Linde of the Oregon Supreme Court has said that "[r]etention elections, with their simple yes or no choice, more directly but crudely hold judges politically accountable on a single popular issue, usually but not always crime, and therefore are a greater challenge to judicial independence and courage." In addition, just as in partisan and nonpartisan elections, when judges face organized opposition in retention elections, they must look for campaign contributions to lawyers and other groups having an interest in matters that come before the courts. Also, just as in partisan and nonpartisan elections, an appearance of impropriety is inevitably created.

Finally, it is as yet unclear whether section 2 of the Voting Rights Act of 1965 will be held to apply to retention

258. See Hansen, supra note 37, at 45.
260. See BAR-RELATED ISSUES, supra note 173, at 64.
262. Aspin & Hall, supra note 209, at 312.
263. See Grodin, supra note 13, at 1980.
265. See, e.g., Grodin, supra note 13, at 1981; Shaw, supra note 216, at 286.
266. See, e.g., Grodin, supra note 13, at 1981; Hansen, supra note 37, at 45; Nicholson & Nicholson, supra note 111, at 294.
elections.\textsuperscript{268} If it is, the effect upon continued use of retention elections will, undoubtedly, be substantial.

IV. SOME PROPOSALS FOR COMPROMISE

By this point, the answer to the question posed by the title of this Article should be clear. There is no one "best" method for selection and retention of judges. Rather, what method is "best" for any particular jurisdiction will, of necessity, involve numerous normative and political considerations. The method chosen will reflect the balance achieved among the many, often conflicting, objectives viewed in the particular jurisdiction as important. As one commentator has noted, "a realistic assessment of the inherent tensions suggests that the choice of a selection method will require unavoidable trade-offs."\textsuperscript{269} Moreover, one must recognize that a certain degree of ambivalence exists in our society regarding "the role of judges within the political process."\textsuperscript{270}

It would be foolhardy to suggest that the judiciary is not a political institution. However, it is clear that, in this country, "it was intended to be the least partisan\textsuperscript{ly} political institution of the government."\textsuperscript{271} Nevertheless, as one commentator has pointed out, "[t]he process of picking a person to be a judge is woven into the political fabric and is, by any definition, a political process."\textsuperscript{272} Accordingly, it would be unrealistic to suggest that it is possible totally to remove politics from the process of selecting judges.\textsuperscript{273} Rather, the goals should be to limit, to the extent feasible, the impact of partisan politics and to minimize the effect of other political considerations on the process.\textsuperscript{274}

Two developments intimate that the time may be ripe for a number of jurisdictions to consider major changes in their methods of selection and retention of judges. The first involves the growing recognition among voters in states which elect judges that, as election costs escalate, elections become an increasingly inefficient means of

\begin{itemize}
    \item \textsuperscript{268} See Bradley v. Indiana State Election Bd., 797 F. Supp. 694 (S.D. Ind. 1992) (holding that section 2 does apply to retention elections); \textit{but see} Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc) (holding that relief will not be granted under section 2 if the remedy would undermine the court's ability to administer justice), \textit{cert. denied}, 115 S. Ct. 1795 (1995).
    \item \textsuperscript{269} Dubois, \textit{supra} note 3, at 32.
    \item \textsuperscript{270} Champagne, \textit{supra} note 46, at 111.
    \item \textsuperscript{271} Hickok, \textit{supra} note 26, at 5 (emphasis in original).
    \item \textsuperscript{272} Meador, \textit{supra} note 9, at 122.
    \item \textsuperscript{273} \textit{Id.}
    \item \textsuperscript{274} See generally Korzen, \textit{supra} note 38, at 278.
\end{itemize}
selecting judges, and the recognition that the perception that judges will be influenced by campaign contributions cannot but erode public respect for the judiciary as an institution. "Judicial selection is re-emerging as an issue in many parts of the country . . . . The reason is simple. Complaints about judicial elections—their cost, their ethics and their consequences—are streaming in from contests for the lowest municipal trial courts to state [s]upreme [c]ourts across the land." The second development, the significance of which remains to be seen, is the effect that the Chisom v. Roemer and Houston Lawyers' Ass'n v. Attorney General of Texas decisions will have upon judicial elections, including retention elections. Accordingly, recognizing the practical and political obstacles which confront any effort to construct a more effective method of selection, it is, nevertheless, my belief that the time may be right for such an endeavor.

My proposal is an effort to achieve a balance, to the extent feasible, between the competing views regarding what the role of judges in our society ought to be. It is based in large part upon consideration of the two developments just discussed. It involves a commission, or "merit," plan of selection. However, no plan in effect today incorporates all of its components.

The proposal would call for several nominating and retention commissions. For instance, in a state having a supreme court, one intermediate court of appeal, circuit courts of general trial jurisdiction and county courts of limited jurisdiction, there would be a separate nominating and retention commission for the supreme court, the court of appeal and each judicial circuit. The latter would be responsible for the county courts within the circuit, as well. Each nominating and retention commission would consist of nine members, plus a judge chosen by the chief justice of the state, who would serve as chair. Not more than five members would be

275. See supra note 95.
276. See supra notes 126 and 169 and accompanying text.
277. Watson, supra note 73, at 49.
280. See supra note 268.
281. See Dubois, supra note 3, at 32.
283. The intent behind this provision is to ensure that commission members will be chosen from a geographic area coextensive with the jurisdiction of the court in question.
284. There is nothing novel about this component. Participation by judges in selection or retention of their brothers and sisters has been an aspect of many "merit" plan proposals, in-
permitted to be Republicans; and not more than five would be permitted to be Democrats. Five members would be required to be lawyers,\textsuperscript{285} and five would be required to be non-lawyers. Three members would be chosen by the governor, three by the leader in the upper house of the state legislature of the party opposite to that of the governor and three by the state bar association. All nine would be required to be registered voters and residents within the territorial jurisdiction of the court in question. At least one of the three appointed by each individual or entity would be required to be a member of a racial or ethnic minority, or a woman.\textsuperscript{286}

Once appointed, each member would serve for six years, provided that the initial appointments would be staggered to ensure institutional continuity. No member would be eligible for consecutive reappointment; and no member would be eligible for consideration for any judicial vacancy while on the commission, or for a period of two years thereafter.

Each commission would be required to be funded in an amount sufficient to permit it to retain an investigator on a full-time basis who would be charged with, among other things, checking the background and qualifications of applicants and the past performance of those seeking retention. Adoption of a uniform written set of procedures for interviewing and evaluating applicants and judges seeking retention, to be used by all commissions in the state, would be required. All proceedings of the commissions, except deliberations and votes, would be public.\textsuperscript{287} Candidates, and judges seeking retention, would be prohibited from communicating with commission members, except at commission meetings.\textsuperscript{288} A majority vote of the commission would be required for all actions.

including some of the earliest. See supra note 18 and accompanying text. Today, some 15 states and the District of Columbia include one or more judges on their commissions. See Judicial Merit Selection, supra note 201, at 1-3. One purpose of requiring that a judge serve on each commission is to make available a source of information to other commission members regarding the workings of the courts.

285. In general, one would expect that lawyers would be more interested in, and more familiar with, the workings of the courts than would lay persons. The judge/chair of each commission would be counted as one of the five lawyer-members.

286. Several states already have similar requirements. See Judicial Nominating Commissions, supra note 211, at 236. There may be some question regarding the constitutionality of such a rigid preference. See generally Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (all racial classifications whether imposed by federal, state or local government, are subject to strict scrutiny—they must serve a compelling governmental interest, and be narrowly drawn to further that interest). However, were such a provision found to be constitutionally impermissible, a similar provision that was merely hortatory, rather than mandatory, could be substituted.

287. The goal here is to increase public understanding and acceptance by increasing the visibility of the process.

288. The intent behind this provision is to reduce the opportunity for political machinations.
For each vacancy, the commission would be required to select from among the applicants the three most qualified individuals, and to submit their names to the governor. The commission would be required, further, to rank the three individuals in order of their relative qualifications. In making its selections and rankings, the commission would be required to consider the geographic distribution of the population within the area served by the court in question, the racial and ethnic composition of the population within the area served by the court, the geographic distribution of the caseload within the area served by the court, and whether the composition of the court, in general, reflected such circumstances. The names and rankings would be required to be made public. Within sixty days of receipt of the three names, the governor would be required to appoint one of the three to fill the vacancy. If the individual appointed was not the one ranked first by the commission, the governor would be required to explain to the public the reasons for the choice.

The initial term of each judge so appointed would be two years. A judge wishing to remain on the bench would, six months before the expiration of the 2-year term, inform the appropriate nominating and retention commission in writing of that desire. The commission would then investigate the judge's performance. If the commission were to conclude that the judge's performance had been satisfactory, the judge would be retained for a 10-year term, at the conclusion of which, if the judge still desired to remain on the bench, the process would be repeated. If the commission were to conclude that the judge's performance had been unsatisfactory, the judge would not be retained, a vacancy would be declared at the end of the judge's 2-year term, and the selection process would begin anew.

Finally, to retain the possibility of voter participation in retention decisions, a provision would be included for recall elections, initiated by citizen petition. Accountability would also be ensured by a provision requiring the creation of a strong and independent judicial discipline body, the proceedings of which would be public.

---

289. Florida has recently enacted a requirement similar to this. See Fl. Stat. § 26.021 (Supp. 1994).
290. The intent of these requirements is to make it more difficult for a governor to appoint based principally upon partisan political considerations, rather than qualifications.
291. This would be, in essence, a probationary term. The length of the term is intended to permit a new judge to become accustomed to the position.
292. This term has been chosen because it is sufficiently long to afford some sense of job security to the judge, while also providing a certain degree of accountability.
293. All 50 states and the District of Columbia already have some type of judicial discipline body in place. See Arlin M. Adams, Who Will Control the Judiciary?, 70 Judicature 142, 143 (1986).
Undoubtedly, this proposal will not satisfy all concerns of all people regarding selection and retention of judges. However, I suggest that it will accomplish the following: it will reduce political considerations to an acceptable level, while largely neutralizing, if not eliminating, partisan political considerations; it will actively encourage consideration of the need for diversity on the bench, and thereby lead to significant increases in the number of women and minority judges; it will eliminate entirely the offensive elements of judicial elections; and it will, in all likelihood, increase the public’s respect and support for the judiciary as an institution.

V. Conclusion

The debate over the proper role of the judiciary is at least as old as our nation. The normative and political considerations inherent in the various views regarding the proper role of judges in our society have a great deal to do with one’s choice of a method for selection and retention of judges.

All of the principal methods of judicial selection and retention currently in use in this country are, essentially, the result of perceptions regarding the proper role of judges and, therefore, whether it is more important that judges be independent or that they be accountable. However, the empirical data reveals that all of those methods fail, in one or more significant respects, to attain the goals they were designed to realize.

The debate over the proper role of the judiciary is not likely to end anytime soon. However, the growing realization in states which still elect judges that the drawbacks associated with such methods far outweigh the benefits, coupled with the Supreme Court’s rulings that section 2 of the Voting Rights Act of 1965 applies to the election of judges, might provide the impetus for some states to reexamine the methods used for selection and retention of judges.

Many obstacles, practical and political, stand in the way of any effort to construct a method of selection and retention that achieves a reasonable balance among the competing views in our society as to the proper role of judges. It may well be a practical impossibility to devise a plan which satisfies everyone. However, the proposal suggested here reaches a balance regarding a number of the most significant issues which are, today, the subject of discussion. If nothing else, the proposal provides a point of departure for further discussion and debate.