

## LEGEND

**ELECTIONS:** Judges are directly elected by the voters of the state.

▲ Non-Partisan

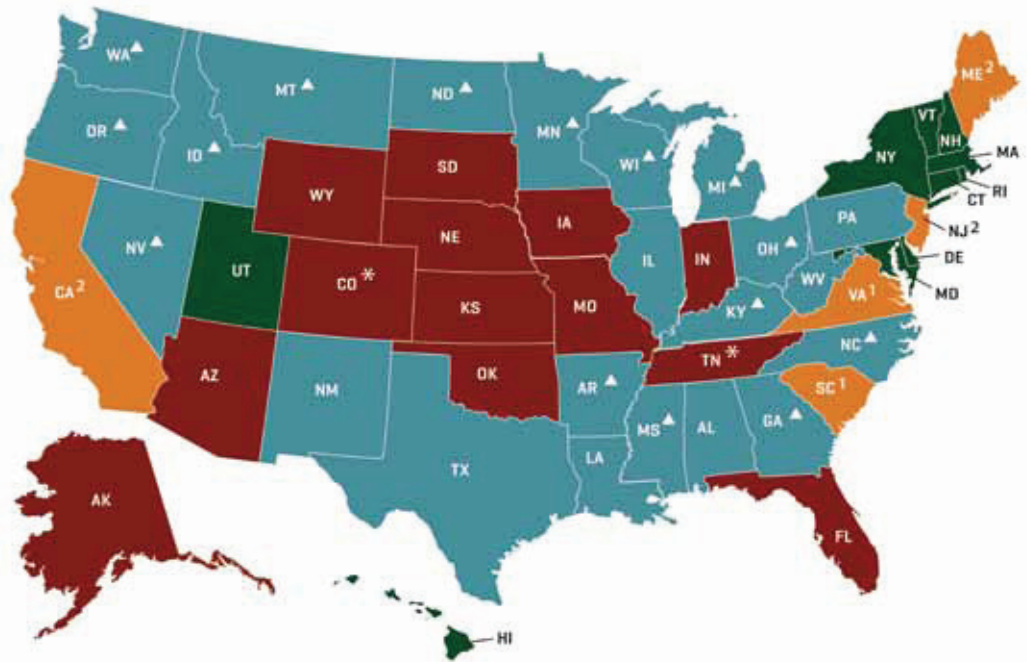
**DEMOCRATIC APPOINTMENT:** Judges are appointed directly by a democratic body, or appointed by the governor with the advice and consent of a democratic body. (Note: Democratic body = popularly-elected officials or judges nominated and confirmed by popularly-elected officials.

1) Legislative and 2) Gubernatorial

**MISSOURI PLAN:** Judges are appointed by the governor after nomination by a commission without confirmation by a democratic body.

\* No bar-selected members on commission.

**HYBRID:** Judges are appointed by the governor after nomination by a commission and confirmed by a democratic body.



# How does your state select its judges?

BY BRIAN FITZPATRICK AND STEPHEN WARE

The fifty United States use a great variety of methods to select their judges. These methods can be broadly grouped into three categories: 1) elections, 2) democratic appointment, and 3) the Missouri Plan. Some states use hybrids of democratic appointment and the Missouri Plan.

The relative popularity of these selection methods has changed a great deal over the course of American history. The U.S. Constitution follows the democratic appointment model: federal judges are nominated by the president and confirmed by the U.S. Senate. Similarly, at the time of the founding of the United States, judges in all the states were selected by the democratic appointment model: they were either appointed by the governor and legislature or by the legislature alone. This began to change in the middle of the nineteenth century, when, in the wake of Andrew Jackson's presidency, states began replacing democratic appointment with judicial elections. By the time of the Civil War, the vast majority of states were selecting their judges much like other public officials in partisan elections. In the late nineteenth century, states began to replace their partisan judicial elections with nonpartisan elections.

During the Progressive Era of the early twentieth century, a new method was conceived whereby a nominating commission would play a powerful role in selecting judges; the commission

would narrow down a pool of judicial applicants to a short list of finalists from which the governor would be required to choose. The commission was designed to include members selected by the bar, rather than by the people or popularly-elected officials. In 1940, Missouri was the first state to adopt a commission with a special role for the bar and the commission method has since been known as the

Missouri Plan. Several states have adopted versions of the Missouri Plan with varying levels of power for the bar. Other states use hybrids of the Missouri Plan and democratic appointment in which a commission with a special role for the bar is combined with confirmation of judicial nominees by the senate or other popularly-elected body.

As things stand today, the most common method to select judges to the courts of last resort (e.g., state supreme courts) is still elections, although some election states use appointment to fill interim judicial vacancies. The second most common method is the Missouri Plan. Smaller numbers of states use a democratic appointment process or hybrids of the Missouri Plan and democratic appointment methods. The relative popularity of these selection methods is a bit different for lower appellate and trial courts, but the focus of this article is courts of last resort. Each of the selection systems is discussed in more detail on the following pages.

*Note: This article is an attempt to provide an objective summary analysis of the methods most commonly used to select state supreme court judges. The arguments set forth herein do not necessarily reflect the authors' views.*

## Elections

The plurality of states uses judicial elections to select their judges. Judicial elections are run much like elections for other public officials such as governors and state legislators: two or more candidates can run for a position, the public votes, and the candidate with the most votes wins. Many states currently use partisan elections for their judges where candidates are affiliated with a political party on the ballot, but many other states currently use non-partisan elections where party affiliation is not listed on the ballot.

### ADVANTAGES

There are several commonly cited advantages of using elections to select judges:

#### Democratic accountability

It is often asserted that elections foster democratic accountability. Legal texts are often ambiguous and judges exercise a great deal of discretion over the content and direction of the law by interpreting those texts. When judicial elections are used to select judges, judges are likely to exercise their discretion in accordance with the preferences of a majority of the public. This is especially so when judges have short terms of office before facing re-election so the electorate can keep judges on a short leash.

#### Performance accountability

Judges that are corrupt, incompetent, or unfaithful to the law and the constitution can be removed more easily through elections than through some of the other methods of selection, such as uncontested retention referenda, which, as noted below, were designed to insulate judges from removal.

#### Independence from the other branches of government

One of the original motivations to elect judges was to give judges an independent base of political power so that they would not be beholden to the governor or the legislature. This independence furthers the ability of the judiciary to check and balance the executive and the legislature. On the other hand, to the extent judges need the support of the same political parties and interest groups influential in gubernatorial and legislative races, some people believe such independence is often overstated.

### DISADVANTAGES

There are also several commonly cited disadvantages to electing judges and especially to requiring sitting judges to win re-election in order to retain their jobs:

#### Threat to the rule of law

When the law is not ambiguous, there is a danger that judges who run for election will feel pressure to disregard clear laws in order to avoid making decisions that are controversial with various segments of the public. That is, sometimes we want judges who will not interpret the law in accordance with public preferences. The threat to rule-of-law values is especially acute in judicial elections because judicial decisions can be easy to caricature in television attack ads (e.g., this judge “cares more about corporations than injured people.”) that often run in these elections. In turn, judges

that are faithful to the law and the constitution can be removed more easily through elections than through some of the other methods of selection.

#### Instability

Because the results of partisan judicial elections can be influenced by party affiliation, the ideological composition of the judiciary can change significantly from one election to the next. To the extent judges render decisions consistently with their ideological dispositions, the content of the law can move sharply to the left or to the right after each election. This concern is especially acute when judges face short terms before re-election. When judges have longer terms of office (a “longer leash”) the direction of the law changes more slowly.

#### Campaign atmospherics and fundraising

Some people believe that the atmospherics of political campaigns—speaking to voters, making statements about legal issues, and, especially, raising campaign money—undermine the legitimacy of the judiciary. Many times, judges raise money from lawyers or parties that might appear before them. If judges do not recuse themselves in these cases, it raises the specter that judges will make decisions based on campaign contributions. On the other hand, although there is some empirical evidence that campaign fundraising undermines the public’s confidence in the courts, there is not much evidence that other campaign activities do. Moreover, there are possible solutions to the threats posed by fundraising, such as asking judges to recuse themselves from cases involving campaign donors, making campaign donations anonymous, and publicly financing judicial elections.

#### Voters do not know enough to select judges

While judging, especially at the supreme court level, does involve making law to fill out ambiguous legal texts, it also involves the technical, lawyerly tasks of applying law to facts and running a courtroom efficiently. In this regard, judges are more like the administrators of specialized government agencies (who are appointed by popularly-elected officials) than like the popularly-elected governors and legislators, who enact broad policies and rely on their appointees with the technical knowledge to implement them. Some people believe that the vast majority of voters—e.g., those who are not lawyers—are not sufficiently knowledgeable to assess whether a candidate for a judgeship possesses these technical, lawyerly skills. As a result, they believe voters select judges on arbitrary grounds such as whether they like a candidate’s last name. Others are more optimistic about voters’ abilities. In partisan election states, voters can rely on party affiliation to tell them about the likely beliefs of judicial candidates. Moreover, although assessing the qualifications of judges can be complex, some believe it is no more complex than assessing the qualifications of other public officials, such as governors or legislators, who are asked to write the very same laws that judges are asked to interpret. Empirical studies have not clearly shown that judges selected by elections are better or worse qualified than judges selected by other methods.

## Democratic Appointment

Several states use a method of selecting judges for their courts of last resort similar to the U.S. Constitution's method of selecting federal judges. In these states, the governor nominates judges but the governor's nominee does not join the court unless confirmed by the state senate or similar popularly-elected body. Once confirmed, judges in most democratic appointment states serve a term of years, at which point they must be reappointed or retained in uncontested referenda through which voters can remove the judges from the bench.

### ADVANTAGES

There are several commonly cited advantages to selecting judges by democratic appointment:

#### Indirect democratic accountability

It is often thought that appointment will lead to judges who will exercise their discretion over the content and direction of the law in accordance with the preferences of a majority of the public. This is the case because the public officials who must appoint and confirm them were themselves elected by the majority of voters. This mechanism is less direct and less swift than it is in systems of judicial elections because public preferences take time to filter through governors and legislatures to reach and impact the judiciary. Some people like this delay because they believe it insulates judges somewhat from the prevailing political winds and increases stability in the law.

#### Public officials know enough to select judges

It is thought that public officials are better able to assess the qualifications of judges than are voters because they are themselves lawyers or can ask lawyers to vet judicial candidates. Empirical studies have not clearly shown that judges selected by democratic appointment are better or worse qualified than judges selected by other methods.

### No campaign atmospherics

Because judges need not run for election or retention when they win their jobs through political appointment, they need not meet with voters, make campaign promises, or raise campaign money. Thus, there are not the same concerns as in other systems with the effect of campaign atmospherics have on judicial legitimacy. On the other hand, some people believe that judges in this system win their jobs through other sorts of politicking—such as lobbying public officials by making promises behind closed doors. To the extent people believe politicking of this sort exists and this sort of politicking threatens judicial legitimacy, it is unclear how much of an advantage political appointment offers on this point.

### DISADVANTAGES

There are also several commonly cited disadvantages to selecting judges by democratic appointment:

#### Lack of independence from the other branches

As noted above, one of the main reasons states moved away from appointment and toward elections for judges is because many people believe that judges who must win appointment and especially reappointment from the governor and legislature will not be independent from those entities. This is why the U.S. Constitution gives federal judges life tenure. Life tenure gives judges a substantial degree of independence from the branches that appointed them. For this reason, states with democratic appointment tend to give their judges long terms of office.

#### Cronyism

Some people believe that public officials use judicial appointments to reward their friends and campaign donors. On the other hand, requiring both the executive and the legislature to place a judge on the bench may mitigate this concern.

## The Missouri Plan

The Missouri Plan was conceived as one of several Progressive Era reforms to the judiciary. Like other Progressive Era reforms, the Missouri Plan was designed to remove government decision-making from the political process and place it instead in the hands of “experts.” The “experts” identified by progressives to select judges were lawyers and, in particular, state bar associations. Bar associations were the primary advocates of this system when it was first conceived and remain the primary advocates today.

The Missouri Plan consists of two main design features. First, judges are appointed to the bench by the governor from a list of names submitted by a nominating commission. In most Missouri Plan states, lawyers are required by law to be well represented on the nominating commission. Moreover, in most Missouri Plan states, the bar fills most or all of the lawyer seats on the commissions, either by directly selecting members for the commission or by controlling the list of names from which elected officials must select members.

Second, at some point after appointment, judges come before

the public in uncontested referenda through which voters can remove the judges from the bench. That is, judges have no opponents in these races and voters are asked only to answer “yes” or “no” on whether judges should be retained. Incumbent high-court judges are returned to the bench 99 percent of the time across the country when they run in retention referenda. As such, it is much more difficult to remove incumbents in Missouri Plan states than in states that use judicial elections.

### ADVANTAGES

There are several commonly cited advantages of using the Missouri Plan to select judges:

#### Commissions, especially their lawyer members, know enough to select judges

Like the democratic appointment method, it is thought that the lawyers who sit on Missouri Plan commissions are better able to assess the qualifications of judges than are voters because they know

more about the law. Some people assert that Missouri Plan judges may be even better qualified than judges selected by democratic appointment because there will be no political cronyism in the selections. On the other hand, some people believe that the lawyers on the nominating commission could exercise their own brand of cronyism by nominating their friends for the bench. Empirical studies have not clearly shown that judges selected by Missouri Plan commissions are better or worse qualified than judges selected by other methods.

### Minimal campaign atmospherics

Because it is so difficult for judges to lose uncontested retention referenda, judges need not meet with voters, make campaign promises, or raise campaign money to the same extent they must in contested judicial elections. On the other hand, they are permitted to do these things in Missouri Plan states, and Missouri Plan judges have been criticized for taking campaign donations and giving campaign contributions to political candidates.

### Independence from the political branches and the public

Some people believe that Missouri Plan judges can stand up to the political branches and the public as required by the rule-of-law values because they are not much dependent on either group to win or keep their jobs. On the other hand, to the extent the bar has significant influence over Missouri Plan nominating commissions, it may be that judges are not as independent from the bar as they are in other selection systems.

### DISADVANTAGES

There are also several commonly cited disadvantages to using the Missouri Plan to select judges:

#### Lawyer domination

One of the motivations behind the Missouri Plan was to shift power over judicial selection away from the electorate and toward the bar. Some people believe that members of the bar should have no more influence over the selection of important public officials like judges than other members of the public. Others have noted that lawyers are not representative of the public, and the judges they select will reflect the preferences of lawyers rather than the preferences of the public. To the extent that, as many people believe, lawyers are more liberal than the public at large is, judges selected with the Missouri Plan judges may issue more liberal opinions than if they had been selected with another system. Empirical studies have shown that Missouri Plan judicial nominees in some states are more liberal than the electorates in those states.

#### Lack of democratic and performance accountability

Some people believe that the Missouri Plan leaves judges less accountable to democratic and other forces than either judicial elections or democratic appointment because judges are selected in large part by the bar rather than the public or elected officials and because it is so difficult to remove judges through the uncontested referendum device. On the other hand, as noted above, there are occasions when many people believe that judges should not inter-

pret the law in accordance with public preferences.

### Cronyism

Some people believe that the lawyers on Missouri Plan commissions will nominate their friends for judgeships rather than people they do not know who may be more qualified. Although cronyism is arguably minimized in the democratic appointment model by requiring another branch of government to approve any nomination by the governor, there is not the same check on the Missouri Plan. Although the governor must sign off any Missouri Plan appointment, the governor is required under the Missouri Plan to pick one of the names sent to him by the commission. The governor cannot, therefore, keep rejecting nominations until the commission has sent a name lacking cronyism as, for example, a state senate could under the democratic appointment method.

### Hybrid

As noted above, several other states use hybrids of the democratic appointment and Missouri Plan systems. These systems include a nominating commission, but with less power for the bar than in Missouri Plan states, plus confirmation of judicial nominees by the senate or similar popularly-elected body. The advantages and disadvantages of the systems in these states are largely the same as those described in the states that use democratic appointment or the Missouri Plan on their own.

### Conclusion

As the sweep of American history shows, there is not one obvious answer to the question of what is the best way to select judges. Each system has its own advantages and its own disadvantages. Which systems are better than others depend on the values and political philosophies that each of us brings to questions of public policy. 🌐

Brian Fitzpatrick is an Associate Professor of Law at Vanderbilt University in Nashville, TN, where his research focuses on judicial selection, complex litigation, and constitutional law.



Stephen Ware, Professor of Law at the University of Kansas, has testified on judicial selection before state legislatures and has published several articles on the topic in newspapers and scholarly journals.