
EVALUATING

Judicial Selection In Texas

A Comparative Study of State Judicial Selection Methods



TEXANS FOR LAWSUIT REFORM FOUNDATION

2019

EVALUATING

Judicial Selection In Texas

A Comparative Study of State Judicial Selection Methods

TEXANS FOR LAWSUIT REFORM FOUNDATION

Texans for Lawsuit Reform Foundation conducts and supports academically sound, impartial and non-partisan research, study, analysis, and writing related to the justice system in Texas. Research is conducted by lawyers, scholars, analysts, and professionals with experience and expertise in the areas being researched and reported. The Foundation's published research and reports are posted on its website and are available to the public. The purpose of the Foundation's activities is public education on matters concerning the Texas justice system, including its statutory and common law, its regulations and administrative agencies, and the organization and operation of its courts.

TEXANS FOR LAWSUIT REFORM FOUNDATION

1701 Brun Street, Suite 200 | Houston, Texas 77019
713.963.9363 | 713.963.9787

© Copyright 2019 – TEXANS FOR LAWSUIT REFORM FOUNDATION

All rights reserved. No part of this paper may be reproduced by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without written permission from Texans for Lawsuit Reform Foundation.

FOREWORD

A young Abraham Lincoln, commenting on the recent passing of the last surviving Founding Father, James Madison, urged his audience to “let reverence for the laws ... become the political reason of the Nation.” He observed that all should agree that to violate the law “is to trample on the blood of his father,” and that only “reverence for the constitution and laws” will preserve our political institutions and “retain the attachment of the people.”¹

Lincoln knew that the law is the bedrock of a free society. Our judges are the guardians of the rule of law. If they do not apply the law in a competent, efficient, and impartial manner, trust in the rule of law will erode and society will fray. Therefore, our system for selecting and retaining judges should be based on merit and should encourage stability, experience, and professionalism in our judiciary.

The 86th Legislature created a special commission to study judicial selection, ensuring that the 87th Legislature in 2021 will consider judicial selection in Texas. The purpose of this paper is to discuss Texas’s current system of electing judges, to provide a summary of various judicial selection systems in other states, and to offer a compendium of research materials on this topic. Our intent is for this paper to assist the public debate and legislative consideration of how judges will be chosen in Texas in the future. There is no perfect system of selecting judges, no system in another state that Texas should adopt whole. But there is much to be learned by reflecting on our state’s experience in judicial elections and in the study of other states’ systems, which will help Texans develop a system with unique attributes that can become a model for the nation.

While it is not the purpose of this paper to make specific proposals for establishing a new system of judicial selection in Texas, we do believe that our current system of partisan election of judges does not place merit at the forefront of the selection process. How can it? Unquestionably, most voters—even the most diligent and informed ones—do not know the qualifications (or lack thereof) of all the judicial candidates listed on our ballots. This is especially true in our metropolitan counties, where the ballots list dozens of judicial positions. And even in our rural counties, voters are asked to make choices about candidates for our two statewide appellate courts and our fourteen intermediate appellate courts with little or no knowledge of the candidates for those offices.

The clearest manifestation of the ill consequences of the partisan election of judges is periodic partisan sweeps, in which nonjudicial top-of-the-ballot dynamics cause all judicial positions to be determined on a purely partisan basis, *without regard to* the qualifications of the candidates. A presidential race, U.S. Senate race, or gubernatorial race may be the main determinant of judicial races lower on the ballot. These sweeps impact both political parties equally, depending on the election year. For example, in the 2010 election, only Republican judicial candidates won in many Texas counties. In 2018, the opposite occurred and only Democratic judicial candidates won in many counties. These sweeps are devastating to the stability and efficacy of our judicial system when good and experienced judges are swept out of office for no meritorious reason. Nathan Hecht, Chief Justice of the Supreme Court of Texas, described this vividly in his State of the Judiciary Address to the 86th Legislature:

No method of judicial selection is perfect.... Still, partisan election is among the very worst methods of judicial selection. Voters understandably want accountability, and they should have it, but knowing almost nothing about judicial candidates, they end up throwing out very good judges who happen to be on the wrong side of races higher on the ballot.

Partisan sweeps—they have gone both ways over the years, and whichever way they went, I protested—partisan sweeps are demoralizing to judges, disruptive to the legal system, and degrading to the administration of justice. Even worse, when partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty. Make no mistake: a judicial selection system that continues to sow the political wind will reap the whirlwind.²

And there is this: judges in Texas are forced to be politicians in seeking election to what decidedly should not be political offices. They are not representatives of the people in the same way as are elected officials of the executive and legislative branches. A state legislator is to represent the interests and views of her constituents, consistent with her own conscience. A judge is to apply the law objectively, reasonably, and fairly—therefore, impartiality, personal integrity, and knowledge of and experience in the law should be the deciding factors in whether a person becomes and remains a judge. A judicial selection system should make qualifications, rather than personal political views or partisan affiliation, the paramount factor in choosing and retaining judges.

Over the past twenty-five years, Texas has led the way in restoring fairness to our civil justice system. We now have the opportunity to lead the way in establishing a stable, consistent, fair, highly qualified, and professional judiciary, keeping it accountable to the people, while also increasing integrity by removing it from the shifting winds of popular sentiment, electoral politics, and the need to raise campaign funds, all with the knowledge that the truest constituency of a judge is the law itself.

Hugh Rice Kelly and David Haug
Directors
Texans for Lawsuit Reform Foundation

TABLE OF CONTENTS

PART I: INTRODUCTION	1
PART II: THE TEXAS JUDICIARY	3
Election of Texas Judges	3
Initial Appointment of Judges	4
Qualifications for Judicial Office	6
Seeking Election to Judicial Office	7
Campaign Contributions and Expenditures	8
Restrictions on Judicial Campaign Speech	9
Judicial Reelection	10
Judicial Incumbent Challenges	11
Removal of Texas Judges from Office	13
PART III: JUDICIAL SELECTION PROCEDURES AMONG THE STATES	15
Historic Trends in Judicial Selection	15
Current Methods of State Judicial Selection	16
Current Variations of Judicial Selection by Gubernatorial Appointment	18
Current Variations of Judicial Selection by Legislative Appointment.....	19
Current Variations of Judicial Selection by Partisan Election	19
Current Variations of Judicial Selection by Nonpartisan Election	19
Current Variations of Judicial Selection by Missouri-Plan Appointment	20
Justice O'Connor Judicial Selection Plan.....	20
Use of Nominating Commissions in State Judicial Selection	21
Nominating Commissions Among the States	22
<i>Missouri Plan States</i>	22
<i>Gubernatorial Appointment States</i>	22
<i>Traditional Election States</i>	22
<i>Legislative Appointment States</i>	23
Number of Nominating Commissions Per State.....	23
Number of Commissioners	23
Selection of Commissioners	24
Composition of Commissions	25
<i>Attorney and Lay Members</i>	25
<i>Partisanship</i>	25
<i>Gender, Race, and Ethnicity</i>	25
<i>Geography</i>	26
<i>Practice Area</i>	27
<i>Industry, Business, or Profession</i>	27

Restrictions on Holding Public Office and on Nominations	27
Commissioner Terms.....	27
Recruiting Judicial Candidates	27
Retention of Judges.....	28
PART IV: EVALUATION OF SELECTION MODELS	29
A Method to Evaluate Selection Models.....	29
Evaluating Partisan Elections	30
Competence	31
Fairness	35
Independence	37
Accountability.....	38
Evaluating Nonpartisan Elections.....	39
Competence	40
Fairness	40
Independence	41
Accountability.....	42
Evaluating Gubernatorial Appointment	42
Competence	44
Fairness	45
Independence	46
Accountability.....	46
Legislative Confirmation.....	47
Evaluating Legislative Appointment	47
Competence	48
Fairness	48
Independence	48
Accountability.....	48
Evaluating the Missouri Plan	49
Competence	50
Fairness	50
Independence	51
Accountability.....	52
The Use and Effect of Retention Elections.....	52
The O'Connor Variant	53
PART V: CONCLUSION	54
ENDNOTES	55
APPENDIX TABLE 1 Election Cycles for Places on Texas Appellate Courts & Results of 2018 General Election for Texas Appellate Courts	A-1
APPENDIX TABLE 2 Judicial Selection Models in the United States	A-4

PART I: INTRODUCTION

Movements to change Texas's judicial selection system have been undertaken for decades.³ In 1946, following a five-year study of the state's judicial system, the Texas Civil Judicial Council proposed amending the Texas Constitution to allow for gubernatorial appointment of judges followed by unopposed retention elections.⁴ Similar proposals were suggested in 1953, in 1971 by Chief Justice Calvert and the Task Force for Court Improvement, and in 1986 by Chief Justice John Hill and the Committee of 100.⁵ None of these movements succeeded.

Nonetheless, calls for change continued. Senators Robert Duncan (R-Lubbock) and Rodney Ellis (D-Houston) led a bipartisan effort to pass judicial selection reform through the Texas Legislature.⁶ In 1999, a bill was proposed providing for gubernatorial appointment of judges with senate confirmation and unopposed retention elections, which passed the Senate but stalled in the House.⁷ In 2001, the two senators proposed the same plan to apply only to Texas's two highest courts: Supreme Court of Texas and Court of Criminal Appeals of Texas.⁸ Senator Ellis filed the same proposal to apply to all Texas courts in the 2003 and 2005 legislative sessions.⁹ Chief Justice Tom Phillips advocated for change during and after his tenure on the Supreme Court.¹⁰ None of these efforts succeeded, either.

In the last ten years, calls for reform by state leaders, at least five former Supreme Court justices, leaders of the State Bar of Texas, academic commentators, and public policy groups have continued.¹¹ In 2013, former Supreme Court Chief Justice Wallace Jefferson noted that Republican and Democrat chief justices have been calling on the Texas Legislature for the last thirty years to change the way judges come to the bench in Texas and voiced his belief that the system is "broken" and should be changed.¹²

In November 2018, Texas voters swept dozens of incumbent judges from office, apparently based solely on the judges' affiliation with a particular political party. Texas has eighty intermediate appellate court judges. Forty-five of these judgeships were on the 2018 ballot, with a contested election occurring in thirty-two of the forty-five seats.¹³ The candidate nominated by the Democratic Party won thirty-one of the thirty-two contested elections,¹⁴ including in districts where Republican candidates had dominated for years. Every incumbent Republican intermediate appellate court and trial court judge on the ballot in Harris County (Houston) was defeated.¹⁵ When all the new judges took office on January 1, 2019, about one-third of Texas's 254 constitutional county judges were new and one-fourth of Texas's district court, statutory county court, and justice court judges were, too.¹⁶ In total, 443 judges were new to the bench in Texas when they assumed office in January 2019.¹⁷ On the appellate and district courts, the Texas judiciary lost seven centuries of judicial experience in a single day.¹⁸

The November 2018 sweep of judicial offices was hardly unprecedented. In 1994, for example, Republicans won in forty-one of forty-two contested appellate court races in Texas.¹⁹ A 2017 analysis of elections held between 2008 and 2016 found dramatic sweeps to be the rule, not the exception. Focusing on Texas's twenty most-populous counties, the study found that within any given jurisdiction where one or more judgeships was up for election (be that jurisdiction a county, an appellate district, or statewide), all judicial races

within that jurisdiction were won by candidates from the same party approximately ninety-four percent of the time.²⁰

Election results also show that the popularity of candidates at the top of the ballot (not the judicial candidates' qualifications for office) greatly influences judicial elections down ballot.²¹ For example, when popular Democrat incumbent Lloyd Bentsen ran for reelection to the U.S. Senate in 1982, mostly Democratic judicial candidates prevailed.²² When Republican Ronald Reagan ran for reelection as president in 1984, Republican judicial candidates were more frequently elected.²³ The 2018 sweep by Democrats appears to have been related in large part to the U.S. senatorial race between Republican Senator Ted Cruz and Democratic challenger Beto O'Rourke.²⁴ Even though Cruz won the race, O'Rourke was more popular in the large urban counties and the Democratic judicial candidates swept those counties.

The election cycle itself appears to be a deciding factor in judicial election outcomes in some counties. For instance, Republican judicial candidates garnered the majority of votes cast in Harris County (Texas's most populous county) in the 2010 and 2014 general elections—gubernatorial election years when voter participation was modest.²⁵ Democratic judicial candidates, on the other hand, gathered the majority of votes in most races in the 2012 and 2016 general elections—presidential election years in which a larger numbers of voters participated.²⁶ The back-and-forth pattern—wholly unrelated to the qualifications of any of the judicial candidates—changed in 2018, when candidates fielded by the Democratic Party swept judicial races in Harris County, even though it was a gubernatorial election year.²⁷

History proves that these partisan swings will continue to happen in Texas, sometimes sweeping in Republican judicial candidates and sometimes sweeping in Democrats, undermining the stability of the judiciary, discouraging many qualified lawyers from seeking judicial office, and diminishing the development of an experienced and professional judicial branch.

In response to the most recent upheaval in the Texas judiciary, the Texas Legislature passed a bill during the 2019 legislative session establishing the Texas Commission on Judicial Selection to study and review the method by which appellate court judges and trial court judges having county-wide jurisdiction are selected for office in Texas.²⁸ The Commission must submit its findings to the Governor and Legislature no later than December 31, 2020,²⁹ so that the Legislature may consider its recommendations during the next legislative session, which begins on January 12, 2021.

This paper provides in Part II an overview of Texas's judiciary, the method used in Texas for selecting and removing judges, and other information concerning Texas's judiciary. In Part III, the paper summarizes the various judicial selection systems used in other states, which fall into two general categories of selection by election and selection by appointment. The Missouri Plan, which is a method using appointment and retention elections, is used in numerous states and discussed in detail.

Part IV provides a method for evaluating the various judicial selection methods. The major methods currently in use—partisan election, nonpartisan election, gubernatorial appointment, legislative appointment, and the Missouri Plan—are evaluated to determine how likely each is to yield judges who are competent, fair, independent, and accountable.

PART II: THE TEXAS JUDICIARY

In evaluating whether Texas's method of selecting judges can be improved, it is necessary to understand the current method of judicial selection and how it operates in practice. Texas is one of *only six states* that select all of the judges in their judicial branch via partisan elections.³⁰ However, while the Texas Constitution expressly provides that Texas's judges are to be elected to office,³¹ the constitution also allows interim court vacancies to be filled through appointment by the Governor or county officials,³² as opposed to interim elections generally used to fill vacancies in other branches of Texas government.³³ The frequency with which interim judicial appointments occur, when combined with the low percentages of contested elections involving those who have been appointed, suggest that it is a misconception to think Texas has a purely elective judicial selection system.

Election of Texas Judges

The current Texas Constitution mandates that Texas judges are to be selected for office by general election.³⁴ Texas, however, has not always elected its judges. During the Republic era, from 1836 to 1846, the Texas Legislature appointed appellate judges, but not trial judges.³⁵ When Texas became a state in 1846, its new constitution provided for gubernatorial appointment of judges with the concurrence of the Senate.³⁶ Four years after that, in response to sweeping judicial selection changes across the country, Texas adopted a partisan election-based method for selecting judges.³⁷ Then, in 1861, when Texas joined the Confederacy, its new constitution returned to the selection of judges by gubernatorial appointment with Senate approval,³⁸ and the 1869 Reconstruction constitution continued this system.³⁹ In 1876, Texas adopted its current constitution, which provides for election-based judicial selection.⁴⁰

The requirement to stand for election applies to all judges whose office is created under Article V of the Texas Constitution: justices on the Supreme Court of Texas, judges on the Court of Criminal Appeals of Texas, justices on the fourteen intermediate appellate courts, judges on the district courts, statutory county courts and statutory probate courts, constitutional county court judges, and justices of the peace.⁴¹

Nearly every state in the Union has tried partisan elections for selecting judges at some point in the past 150 years.⁴² However, most of the other states have since adopted some other judicial selection system.⁴³ Texas is one of only a few states to continue to select all of its constitutional judges through partisan elections.⁴⁴ Aside from small changes to the Texas judicial selection system since its rebirth in 1876, the fundamental features of the system have remained unchanged for more than 140 years.

Texas has a total of eighteen judges on its two high courts: nine each on the Supreme Court (which has jurisdiction over civil matters) and the Court of Criminal Appeals (which has jurisdiction over criminal matters), who are elected to six-year terms.⁴⁵ The elections for these offices are staggered so that three judges from each court are scheduled for election in each biennial general election.⁴⁶

Texas has fourteen intermediate courts of appeals.⁴⁷ The eighty justices of these courts of appeals are also elected to six-year terms.⁴⁸ Intermediate appellate court elections are staggered, but somewhat unevenly. About half of these positions are filled in one election

cycle (2018, 2024, 2030, etc.) and about one-fourth of the positions are filled in the two intervening election cycles (2020, 2022, 2026, 2028, etc.).⁴⁹

At the trial court level, Texas has 1,794 Article V judges serving on 472 district courts, 254 constitutional county courts, 247 statutory county courts, 18 statutory probate courts, and 803 justice courts, all of whom are elected for four-year terms, such that about half of the trial judges serving full terms are up for election every two years.⁵⁰ However, in any given biennial general election, more than half the total number of the trial court judges will be on the ballot because a significant portion of Texas judges are initially appointed to fill vacancies and must stand for reelection in the next general election, rather than serving out the remainder of the departing judge’s term.

Initial Appointment of Judges

While all Texas judges ultimately stand for election, judges can initially be selected for judicial office either by general election or appointment to fill a vacant position.⁵¹ Interim vacancies arise when the preceding judge vacates her seat prior to completing her term, whether due to death, illness, retirement, resignation, or appointment to another office. The Governor is authorized to appoint individuals to fill interim vacancies on the Supreme Court, Court of Criminal Appeals, the intermediate courts of appeals, and district courts.⁵² When vacancies occur in county-level courts—including statutory county courts (also called “county courts at law”), probate courts, constitutional county courts, and justice courts—the Commissioners Court in that county is entitled to appoint the replacement.⁵³ As the following table shows, thirty-one percent of Texas’s Article V judges (excluding justices of the peace) as of September 1, 2018 first came to the bench via an interim appointment.

INITIAL SELECTION OF CURRENT JUDGES ⁵⁴ (AS OF SEPTEMBER 1, 2018)			
Court	Judges in Office	Number Initially Appointed	Number Initially Elected
Supreme Court	9	7 (78%)	2 (22%)
Court of Criminal Appeals	9	1 (11%)	8 (89%)
Intermediate Courts of Appeals	79	44 (56%)	35 (44%)
District Courts	452	158 (35%)	294 (65%)
County Courts	516	120 (24%)	396 (76%)
TOTAL	1065	330 (31%)	735 (69%)

An individual appointed to fill a court vacancy is entitled to remain on the bench until the next general election.⁵⁵ For example, if a court of appeals justice resigns in 2019 during the first year of a six-year term of office, the Governor’s appointee to fill the vacancy would be entitled to maintain that office only until the next general election in 2020. The winner

of the 2020 election would then be entitled to maintain the office for the remaining four years of the vacated six-year term, after which the seat would again be up for election in 2024. The winner of the 2024 election would then be entitled to hold the office for a full six-year term.

The percentage of judges who were initially appointed to office varies by the type of court. For example, seven of the nine Supreme Court justices were initially appointed to their positions, whereas only one of the Court of Criminal Appeals judges was initially

INITIAL SELECTION OF SUPREME COURT JUSTICES, 1945 TO 2019⁵⁹

Justice	Selection Date	Appointed	Elected	Justice	Selection Date	Appointed	Elected
Hart, James P.	1947	X		Hill, John L.	1985		X
Garwood, W. St. John	1948	X		Mauzy, Oscar H.	1987		X
Hickman, J.E.	1948	X		Culver, Barbara	1988	X	
Harvey, R.H.	1949	X		Cook, Eugene A.	1988	X	
Griffin, Meade F.	1949	X		Hightower, Jack	1988		X
Calvert, Robert W.	1950		X	Phillips, Thomas R.	1988	X	
Smith, Clyde E.	1950	X		Doggett, Lloyd	1989		X
Wilson, Will	1951		X	Hecht, Nathan L.	1989		X
Culver, Frank P.	1953		X	Gammage, Bob	1991		X
Walker, Ruel C.	1954	X		Cornyn, John	1991		X
McCall, Abner V.	1956	X		Spector, Rose	1993		X
Norvell, James R.	1957		X	Enoch, Craig T.	1993		X
Greenhill, Joe R.	1957	X		Baker, James A.	1995	X	
Hamilton, Robert W.	1959		X	Owen, Priscilla R.	1995		X
Calvert, Robert W.	1961		X	Abbott, Greg	1996	X	
Steakley, Zollie	1961	X		Hankinson, Deborah	1997	X	
Pope, Jack	1965		X	Gonzales, Alberto	1999	X	
Reavley, Thomas M.	1968	X		O'Neill, Harriet	1999		X
McGee, Sears	1969		X	Rodriguez, Xavier	2001	X	
Daniel, Price	1971	X		Jefferson, Wallace	2001	X	
Denton, James G.	1971		X	Schneider, Michael	2002	X	
Phillips, Hawthorne	1972	X		Smith, Steven W.	2002		X
Greenhill, Joe R.	1972	X		Wainwright, Dale	2002		X
Johnson, Sam	1973		X	Brister, Scott A.	2003	X	
Doughty, Ross E.	1975	X		Jefferson, Wallace	2004	X	
Yarbrough, Don	1977		X	Medina, David M.	2004	X	
Chadick, T.C.	1977	X		Green, Paul W.	2005		X
Barrow, Charles W.	1977	X		Johnson, Phil	2005	X	
Campbell, Robert M.	1978		X	Willett, Don R.	2005	X	
Garwood, William L.	1979	X		Guzman, Eva M.	2009	X	
Spears, Franklin S.	1979		X	Lehrmann, Debra H.	2010	X	
Ray, C.L.	1980		X	Boyd, Jeffrey S.	2012	X	
Wallace, James P.	1981		X	Devine, John	2013		X
Robertson, Ted Z.	1982	X		Hecht, Nathan L.	2013	X	
Sondock, Ruby K.	1982	X		Brown, Jeffrey V.	2013	X	
Pope, Andrew "Jack"	1982	X		Blacklock, James D.	2018	X	
Kilgarlin, William W.	1983		X	Busby, J. Brett	2019	X	
Gonzalez, Raul A.	1984	X		Bland, Jane	2019	X	

appointed.⁵⁶ Additionally, as of September 1, 2018, fifty-six percent of intermediate appellate court justices were initially appointed to the bench by the Governor, as were thirty-five percent of Texas district court judges.⁵⁷ While such initially appointed judges soon face election, the election may or may not be contested. These statistics have led some commentators to conclude that, beneath its elective veneer, Texas's judicial selection mechanisms are, in fact, often appointive in nature.⁵⁸ The preceding chart summarizes the initial selection process of Texas Supreme Court justices from 1945 to 2019. Over the seventy-two-year period, forty-five of seventy-six justices—fifty-nine percent—were initially appointed to the office.

Qualifications for Judicial Office

To be qualified for election or appointment, a candidate for judicial office must satisfy certain requirements set out in the Texas Constitution and the Texas Government Code. All Texas judges must be citizens of the United States and reside in the state of Texas, and apart from constitutional county courts and justice courts, which are discussed below, must be licensed to practice law in Texas.⁶⁰ Judges on the two high courts and the intermediate appellate courts must also be at least thirty-five years old and must have been a practicing lawyer or judge of a court of record for at least ten years prior to taking office.⁶¹

Texas trial court judges must satisfy similar, but less strict, qualification standards. A district court judge need only be twenty-five years old and have at least four years of experience as a practicing lawyer or judge of a Texas court.⁶² Additionally, a district judge must reside in the district to which elected while serving in that office.⁶³ Similarly, a county court at law judge must have at least four years of experience and must also have resided in the county where the court is located for at least two years before taking the bench.⁶⁴

The only requirement for a constitutional county court judge is that the person is “well informed in the law of the State.”⁶⁵ The Texas Constitution does not set out qualifications for justices of the peace, and so the generally applicable qualifications statute applies to these judges.⁶⁶ Thus, a justice of the peace must be a United States citizen who has resided in the state and district for which election is sought for at least twelve months. A justice of the peace must be at least eighteen years of age, not mentally incapacitated, and not a felon.⁶⁷

The constitutional and statutory minimum qualifications for judicial office in Texas are somewhat similar to the standards imposed by other states.⁶⁸ Most, but not all, require a judicial candidate to be a resident of the state and to have a certain number of years in practice (typically between five and ten) before becoming eligible to serve as an appellate judge.⁶⁹ For trial court candidates, experience as a practicing lawyer is likewise required, but the requisite number of years is usually reduced.⁷⁰

Notably, certain criteria are not mandatory qualifications for becoming a judge in Texas or other states. For example, no state requires that its judges have any specific type of legal experience—such as litigation or appellate experience—or to be certified or specialized in any particular field.⁷¹ Additionally, almost no states require that their high court and appellate judges have previous judicial experience.⁷² New York and New Jersey, however, require that appointments to their intermediate courts of appeals must come from their existing pool of trial court judges.⁷³

Although not mandated, many Texas judges nonetheless do have prior judicial experience.⁷⁴ As of September 1, 2018, twenty-seven percent of the judges on Texas's intermediate

courts of appeal served on a lower court immediately prior to taking their seat and eleven percent of district court judges had previously served on a lower court.⁷⁵

Seeking Election to Judicial Office

A qualified candidate seeking election to a Texas court must win a plurality of votes in the general election for the judicial office.⁷⁶ In seeking to have his or her name put on the ballot for a general election, there are two paths a candidate can pursue. First, a candidate can seek the nomination of a political party.⁷⁷ In Texas judicial elections, the overwhelming majority of candidates choose this route.⁷⁸ Second, a candidate can campaign as an independent and obtain a spot on the general election ballot without first seeking a political party nomination.⁷⁹

Candidates seeking the nomination of the Republican or Democratic Party must run for nomination in the party's primary election.⁸⁰ To be listed as a candidate on a party's primary ballot, a candidate must first file an application to be placed on the ballot.⁸¹ Certain judicial candidates must also file a petition signed by qualified voters supporting the candidate's placement on the ballot.⁸² A candidate for the Supreme Court or Court of Criminal Appeals, for example, must obtain at least fifty signatures from qualified voters in each of the fourteen courts of appeals districts.⁸³ Judicial candidates seeking a seat on an intermediate court of appeals, district court, or county court at law that includes a county with a population exceeding certain thresholds (of 1.0 or 1.5 million) must obtain at least 250 petition signatures.⁸⁴ Candidates seeking judicial positions in less populated areas, however, may need to obtain as few as fifty signatures.⁸⁵ Additionally, judicial candidates seeking a party nomination may be required to pay that party a filing fee, ranging from \$2,500 for statewide judicial office to \$1,500 for small-county trial court positions.⁸⁶ However, candidates for positions on certain intermediate courts of appeals and trial courts can avoid these filing fees by submitting petition signatures.⁸⁷

To obtain the Republican or Democratic Party nomination for the general election, a judicial candidate must receive a majority of the total votes cast in the primary election.⁸⁸ In the event no candidate receives a majority of the initial primary votes cast, the two candidates who received the most votes must participate in a runoff primary election.⁸⁹ The candidate who obtains a majority of the votes cast—either in the primary election or the runoff election—is the party's nominee for the judicial office in the general election.⁹⁰

A judicial candidate running as an independent must file both a declaration of intent to run as an independent candidate and an application for a place on the general election ballot, which application includes the candidate's name, occupation, date of birth, residence, office sought, and a sworn representation that the candidate satisfies the requirements for that office.⁹¹ Additionally, an independent candidate must file a petition supporting her placement on the ballot, signed by qualified voters who did not vote in any party primary election that nominated a candidate for the same race.⁹² When seeking a statewide judicial position, an independent candidate must obtain a number of signatures equal to one percent of the total vote received by all candidates for governor in the most recent gubernatorial general election.⁹³ For other judicial positions, the independent candidate must obtain between twenty-five and 500 signatures, depending on the total vote for governor cast in that district or county in the most recent gubernatorial general election.⁹⁴

Campaign Contributions and Expenditures

One feature that distinguishes judicial elections from other elections in Texas is the regulation of campaign contributions and expenditures. In general, Texas law does not limit the amount of money a candidate for state office may accept in campaign contributions or spend on campaigning. However, concerns regarding unlimited fundraising in judicial campaigns have received significant attention from the media, government officials, citizens, and interest groups. In the 1980s in particular, Texas was the focus of national media reports questioning whether large judicial campaign contributions from a small number of lawyers jeopardized judicial independence.⁹⁵ The perception that contributions to judicial campaigns result in preferential treatment for contributors persists today.⁹⁶

In an effort to control the perceived problems related to unlimited contributions to candidates for Texas's Supreme Court, Court of Criminal Appeals, intermediate appellate courts, district courts, and statutory county courts, the Texas Legislature enacted the Judicial Campaign Fairness Act in 1995.⁹⁷ As initially enacted, the statute capped contributions to a judicial candidate and restricted independent expenditures made in support of a judicial candidate.⁹⁸ It also provided for voluntary compliance by judicial candidates with expenditure limits.⁹⁹ The statute was amended in 2019 to repeal the restrictions on independent expenditures and the voluntary compliance provisions.¹⁰⁰ Limitations on independent expenditures have been held to be unconstitutional¹⁰¹ and the voluntary expenditure limits were meaningless given that the tight contribution limits effectively prevent most judicial candidates from raising sufficient funds to reach the expenditure limits.

After the 2019 amendments, the Judicial Campaign Fairness Act still limits contributions to judicial candidates.¹⁰² These limits vary depending on the particular office sought and, in some cases, the population of the area served by the court.¹⁰³ In addition to limiting the total amount of campaign contributions, the law limits the amount of contributions a candidate can receive from specific sources, such as individuals, law firms, and political action committees.¹⁰⁴

For example, a judge on the Supreme Court or Court of Criminal Appeals may accept a maximum of \$5,000 in an election from an individual, a maximum of \$25,000 from a political action committee (PAC), and a maximum of \$300,000 in total from all contributing PACs during the election.¹⁰⁵ A person running for a trial court bench in a district having a population of less than 250,000 can accept only \$1,000 from an individual, \$5,000 from a PAC, and \$15,000 in total from all PACs.¹⁰⁶

The contribution limits of the Judicial Campaign Fairness Act apply to a single election cycle.¹⁰⁷ Thus, a candidate can raise up to the statutory limits for each primary election, runoff election, and general election.¹⁰⁸ However, the primary and general elections are considered to be one election for the purposes of calculating contribution limits under the law, if the candidate is unopposed in these elections.¹⁰⁹

In addition to limiting the amount of contributions judicial candidates can accept, the Judicial Campaign Fairness Act also establishes limits on when a candidate can accept contributions.¹¹⁰ In general, a judicial candidate is prohibited from accepting contributions when not involved in a campaign. Specifically, a candidate cannot accept a contribution more than 210 days prior to the deadline for filing an application for a place on the ballot.¹¹¹

Additionally, a judicial candidate cannot accept a contribution 120 days after the date of the election in which the candidate last appeared on the ballot.¹¹⁷

Restrictions on Judicial Campaign Speech

Another significant difference between judicial elections and other elections in Texas is the restriction on certain types of statements that a judicial candidate can make in the context of a campaign. Since the 1920s, candidates for judicial office in Texas and elsewhere have been prohibited from making statements that could impugn the public perception of the candidate's willingness to faithfully and impartially perform his judicial duties.¹¹³ However, over the past thirty years, such restrictions have been challenged as constitutionally impermissible infringements on a judicial candidate's First Amendment rights.

In 2002, the United States Supreme Court, in *Republican Party of Minnesota v. White*, struck down a restriction that prohibited Minnesota candidates for judicial office from announcing their views on disputed legal and political issues.¹¹⁴ As one court later noted, the United States Supreme Court's decision raised more questions than it answered about the constitutionality of restrictions on judicial campaign speech.¹¹⁵ Today, a significant amount of uncertainty continues to surround the permissible scope of restrictions on judicial candidate speech.

Both nationwide and in Texas, past and present restrictions on judicial campaign speech are traceable to the efforts of the American Bar Association ("ABA"). Beginning with its 1924 Canons of Judicial Ethics, and continuing with its 1972 successor, the Code of Judicial Conduct, such model legislation was adopted by most states (including Texas, in 1964), and served as a guide to judicial campaign speech for nearly fifty years.¹¹⁶

Two of the most of the significant provisions of the model ABA Code were its restrictions upon judicial candidates: (1) making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office (the "Pledges or Promises Clause"); and (2) announcing their views on disputed legal or political issues (the "Announce Clause").¹¹⁷

Beginning in the 1980s, candidates for judicial office nationwide began challenging these restrictions on judicial speech as violating their First Amendment rights.¹¹⁸ The challenges culminated in the United States Supreme Court's decision in *Republican Party of Minnesota v. White*, which addressed the constitutionality of Minnesota's Announce Clause, which was based upon the 1972 ABA Model Code.¹¹⁹ At the time, Texas also employed similar campaign speech restrictions.¹²⁰ The question presented in *White* was whether the First Amendment allowed the Minnesota Supreme Court to prohibit judicial candidates from announcing their views on disputed legal and political issues.¹²¹ The Court concluded that the Announce Clause was not narrowly tailored to serve a compelling state interest and therefore violated the First Amendment.¹²²

In reaching its conclusion, the majority in *White* ruled that the clause's overall prohibition on announcing views on disputed legal and political issues extended beyond promising to decide a specific issue in a particular way.¹²³ It concluded that the Announce Clause restriction would prohibit a judicial candidate from stating his views on any specific legal question within the province of the court for which he was running.¹²⁴

Applying strict scrutiny, the Court next questioned whether Minnesota had a compelling interest to justify the Announce Clause.¹²⁵ The state’s alleged interests were to preserve the impartiality, as well as the appearance of impartiality, of its judiciary. The Court then considered three meanings of “impartiality”: (1) the lack of bias for or against a litigant; (2) the lack of preconception in favor of or against a particular view; and (3) open-mindedness.¹²⁷ The Court concluded that the Announce Clause was not narrowly tailored to serve the first interest because it did not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.¹²⁸ It further concluded that the second definition was not a compelling interest because proof that a judge lacked preconceived views on legal issues would be evidence of lack of qualification, not lack of bias.¹²⁹ And it dismissed the third definition as under-inclusive, given that judges were permitted to express their views on legal issues at all times other than during campaigns.¹³⁰ Based on these conclusions, the *White* court concluded that the Announce Clause was constitutionally unsound.¹³¹

Since *White*, courts and commentators have struggled to determine whether limitations on judicial campaign speech can withstand strict scrutiny.¹³² In expanding the range of permissible judicial campaign speech, *White* “dramatically changed the landscape for judicial ethics as it relates to judicial campaigns.”¹³³

Texas responded to *White* by amending the Texas Code of Judicial Conduct.¹³⁴ The 2002 amendments replaced the problematic “Announce Clause”—derived from the 1972 ABA Model Code—with the current Canon 5, which provides that a judge or judicial candidate shall not

- make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;
- knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or
- make a public comment about a pending or impending proceeding that may come before the judge’s court in a manner which suggests to a reasonable person the judge’s probable decision on any particular case.¹³⁵

Entitled “Refraining From Inappropriate Political Activity,” Texas’s Canon 5(3) further provides that if a judge enters into an election contest for a nonjudicial office, he is required to resign from the bench. Canon 5(2) likewise bars a judge or candidate from endorsing another candidate for public office. While all such current Texas restrictions have been modified to comply with *White*, the constitutionality of these revised restrictions on judicial campaign speech has not yet been fully tested.

Judicial Reelection

Texas does not impose term limits on judges. However, the Texas Constitution provides that the seats of high court, intermediate appellate, and district court judges “shall become vacant” on the expiration of the term during which the incumbent reaches seventy-five years of age.¹³⁶ Thus, Texas judges are not automatically turned out of office upon reach-

ing seventy-five years of age but are instead barred from running for reelection or being appointed to another judicial position.¹³⁷

As of September 2018, the justices on the Texas Supreme Court had served on the court, on average, for nine years. One justice had been on the court for over twenty-nine years, while two had been on the court for less than five.¹³⁸ The justices of the intermediate courts of appeals had served on their courts for an average of nine years, with the range of experience spread fairly evenly between one and twenty-four years on the bench. The average years of experience for Texas district court judges was approximately nine years.¹³⁹

Judicial Incumbent Challenges

While every Texas judge who seeks to retain his office must eventually face election, in many races an incumbent judge is reelected without opposition.¹⁴⁰ In the 2018 general election, there were a combined total of 308 races for seats on the Supreme Court, Court of Criminal Appeals, intermediate appellate courts, and district courts.¹⁴¹ An incumbent judge ran for reelection in seventy-eight percent of those races. Of these 240 incumbents running for reelection in the general election, twenty-eight percent had an opponent,¹⁴² as demonstrated in the chart¹⁴³ below.

2018 JUDICIAL GENERAL ELECTION		
Races	Number	% of Total
All Races	308	100%
Contested Races	99	32%
Open Seats	68	22%
Incumbents	240	78%
Challenged Incumbents	68	28%
Defeated Incumbents	56	82%

The percentage of incumbent challenges in Supreme Court and Court of Criminal Appeals races is significantly higher than the percentage in the intermediate courts of appeals and the district courts.¹⁴⁴ In the 2018 general election, for example, all five incumbent-held seats on the ballot for the two high courts were contested. In the intermediate courts of appeals, incumbents held thirty-seven of the seats on the ballot in 2018 (out of a total of forty-five), and sixty-eight percent of those incumbents faced a contested race.¹⁴⁵ At the district court level, 198 seats were held by incumbents (out of a total of 257), but just nineteen percent of those incumbents faced opposition in the 2018 general election.¹⁴⁶

These November 2018 Texas judicial election results were, simultaneously, both typical and atypical. That is, in 2018, as in prior elections, a number of incumbent judges faced no opponent in either the primary or general elections. Of those incumbents who did draw an opponent, 2018 was similar to other election years in which judicial election outcomes were determined by a partisan wave. Aside from Texas's highest courts, the great majority of challengers in 2018 were successful in unseating incumbent judges. As demonstrated in

the following three charts, fully sixty-seven percent of incumbent appellate judges—and ninety-five percent of district court incumbents—facing contested elections were defeated in 2018.¹⁴⁷

2018 HIGH COURT GENERAL ELECTIONS		
Races	Number	% of Total
All Races	6	100%
Contested Races	6	100%
Open Seats	1	17%
Incumbents	5	83%
Challenged Incumbents	5	100%
Defeated Incumbents	0	0%

2018 COURTS OF APPEALS GENERAL ELECTIONS		
Races	Number	% of Total
All Races	45	100%
Contested Races	32	71%
Open Seats	8	18%
Incumbents	37	82%
Challenged Incumbents	25	68%
Defeated Incumbents	20	80%

2018 DISTRICT COURT GENERAL ELECTIONS		
Races	Number	% of Total
All Races	257	100%
Contested Races	61	24%
Open Seats	59	23%
Incumbents	198	77%
Challenged Incumbents	38	19%
Defeated Incumbents	36	95%

Incumbent challenges in the 2018 Republican and Democratic *primary* elections were relatively few in number.¹⁴⁸ In Republican primary elections, ten of the 175 incumbents (roughly six percent) were challenged by an opponent.¹⁴⁹ These primary challenges were most frequent in the context of Republican high court incumbents, twenty-five percent of

whom faced a same-party primary opponent. The percentage of Republican incumbents challenged in intermediate appellate primary races was zero, and the percentage in district court primary races was six percent.¹⁵⁰

In the 2018 Democratic primary elections, eleven of the sixty-nine incumbents (sixteen percent) were challenged by an opponent.¹⁵¹ Among the small handful of Democratic appellate incumbents, there were no primary challenges.¹⁵² At the district court level, roughly eighteen percent of Democratic incumbents faced challenges in the primary.¹⁵³

Removal of Texas Judges from Office

A Texas judge may be removed from office through a variety of mechanisms. First, an Article V judge may be removed from office by the Judicial Conduct Commission for “willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.”¹⁵⁴ In lieu of removal from office, a judge may be disciplined, censured, or suspended from office for any of the foregoing reasons and may be suspended upon being indicted by a state or federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct.¹⁵⁵

Second, a judge on the Supreme Court, a court of appeals, or a district court may be removed from office through impeachment by the Texas House of Representatives and conviction on the vote of two-thirds of the Texas Senate.¹⁵⁶

Third, a district court judge “who is incompetent to discharge the duties of his office, or who shall be guilty of partiality, or oppression, or other official misconduct, or whose habits and conduct are such as to render him unfit to hold such office, or who shall negligently fail to perform his duties as judge; or who shall fail to execute in a reasonable measure the business in his courts, may be removed by the [Texas] Supreme Court.”¹⁵⁷ The constitution provides that this process may be based upon “the oaths ... of not less than ten lawyers, practicing in the courts held by such judge, and licensed to practice in the Supreme Court.”¹⁵⁸ But, strictly speaking, the constitutional provision does not state that the Supreme Court may proceed to remove a judge *only* if ten attorneys provide sworn testimony of the judge’s incompetence or misconduct. It can be read to allow removal by the Supreme Court on its own initiative and without the participation of ten or more lawyers.

Fourth, the constitution provides that the judges of the Supreme Court, court of appeals, and district courts “shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for wilful neglect of duty, incompetence, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment.”¹⁵⁹ It is not entirely clear how this method differs from impeachment, except that it requires a two-thirds vote in both houses rather than a two-thirds vote only in the Senate.¹⁶⁰

This constitutional “removal by address” process is addressed in Chapter 665 of the Texas Government Code. By statute, the process applies to judges on the Supreme Court, Court of Criminal Appeals, a court of appeals, or a district court (including a criminal district court).¹⁶¹ The statute appears to expand the grounds for removal from those provided in

the constitution by adding “breach of trust” to the list.¹⁶² The Government Code states that “incompetency” means: “(1) gross ignorance of official duties; (2) gross carelessness in the discharge of official duties; or (3) inability or unfitness to discharge promptly and properly official duties because of a serious physical or mental defect that did not exist at the time of the officer’s election.”¹⁶³

Fifth, “[i]n addition to the other procedures provided by law for removal of public officers, the governor who appoints an officer may remove the officer with the advice and consent of two-thirds of the members of the Senate present.”¹⁶⁴ If the Legislature is not in session when the Governor desires to remove an officer, the Governor must call a special session of the Senate (not, apparently, of the entire Legislature) for consideration of the proposed removal.¹⁶⁵ The session may not exceed two days in duration.¹⁶⁶

Sixth, in unusual circumstances, a judge may be removed through a *quo warranto* action. A *quo warranto* action may be pursued and lead to removal from office if “a person usurps, intrudes into, or unlawfully holds ... an office ... [or] a public officer does an act or allows an act that by law causes a forfeiture of his office.”¹⁶⁷ *Quo warranto* is an action that may be pursued in district court by the Attorney General, or by a county or district attorney of the proper county.¹⁶⁸

Seventh, the Texas Constitution provides that an Article V judicial office automatically becomes vacant on the expiration of the term during which the incumbent reaches the age of seventy-five years or such earlier age (not less than seventy years) as the Legislature prescribes by statute, unless the judge reaches the age of seventy-five years during the first four years of a six-year term, in which case the office becomes vacant on December 31 of the fourth year of the judge’s term.¹⁶⁹

Finally, although it is not, strictly speaking, a form of removal from office, the voters can refuse to reelect a judge under the current selection system in Texas.

PART III: JUDICIAL SELECTION PROCEDURES AMONG THE STATES

While there are two basic methods for selecting judges—election or appointment—those two conceptual methods have numerous subcategories, with the specific details of each varying greatly among the states. Academic scholarship on this topic often divides judicial selection systems into five different models: partisan election, nonpartisan election, gubernatorial appointment, legislative appointment, and the hybrid Missouri Plan appointment model.¹⁷⁰

The election model of judicial selection breaks down into two subcategories: partisan elections, in which candidates seek election after nomination by a political party, and nonpartisan elections, in which judges run for election without reference to party labels.¹⁷¹

In systems that appoint judges for a term—i.e., either life or a fixed number of years—the appointments may be made by either the governor or the legislature. In rare instances, judges are appointed by the judiciary, but with such infrequency as to be excluded from the five general categories discussed in this paper.¹⁷² In the simplest terms, the distinguishing feature of the purely appointive models is that those judges never face any type of popular election, whether partisan, nonpartisan, or retention.

Finally, the Missouri Plan method for judicial selection typically involves nomination of a candidate by a judicial nominating committee¹⁷³ and appointment by the governor, followed by a retention election that is usually uncontested and nonpartisan in which voters decide whether the judge should continue to hold office or the governor should appoint a new person for that office.¹⁷⁴

These basic judicial selection models can also be further distinguished by taking into account other features, including the type and composition of commissions used to screen and nominate potential judicial candidates, senate or legislative confirmation of gubernatorial appointments, lifetime versus limited terms of appointment, and differing forms of election or reappointment after the initial selection of a judge.¹⁷⁵

Historic Trends in Judicial Selection

The current diversity of state judicial selection models developed over the past 200 years through a series of shifts between the five general selection models, as well as incremental refinements upon those basic models. Initially, as of 1790, all of the original American states selected their judges either by gubernatorial or legislative appointment, with most states appointing judges for life terms during good behavior.¹⁷⁶ The first major shift, often attributed to the rise of Jacksonian Democracy, started in the 1830s when states increasingly began to replace their appointive systems with partisan elections for judicial office.¹⁷⁷ By the 1860s, partisan election was the most commonly used method of judicial selection.¹⁷⁸ However, with the coming of the twentieth century, states increasingly adopted nonpartisan elections to replace partisan elections.¹⁷⁹ Subsequently, many states again shifted direction in mid-century, in favor of the Missouri Plan.¹⁸⁰

Among the evolution of judicial selection procedures, there were several pronounced trends. Appointment was the dominant method of selecting justices until the 1850s when partisan election surpassed it to become the leading method.¹⁸¹ Since the 1840s, legislative judicial appointment has declined at roughly the same rate as appointment by the governor

has increased.¹⁸² However, for the past sixty years, the total number of states that appoint their supreme court judges has remained constant.¹⁸³

Judicial selection by partisan election was first adopted in Georgia in 1812.¹⁸⁴ By the Civil War, partisan election had become the predominant form of judicial selection.¹⁸⁵ Indeed, up until the 1950s, every state that entered the Union after 1850 had an elected judiciary.¹⁸⁶ In the 1920s, however, selection by partisan election began to steadily decline in prominence,¹⁸⁷ caused in part by the rise of nonpartisan elections to select judges. Since their initial widespread adoption as part of the Progressive reforms of the 1920s, nonpartisan elections have continued to be used with greater frequency, while the popularity of partisan judicial elections has continued to wane.¹⁸⁸

A second factor in the decline of partisan elections was the advent of the Missouri Plan. First adopted by Missouri in 1940, this model¹⁸⁹ was adopted by over twenty states within the next three decades. Since the 1990s, however, the number of states using this model has essentially remained static.¹⁹¹

In sum, a historical overview of changes in judicial selection methods reveals two unmistakable trends. First, most states have tried and rejected judicial selection by partisan election.¹⁹² Of the thirty-nine states that at one time selected all of their judges by partisan election, only six states—Texas, Alabama, Illinois, Louisiana, North Carolina, and Pennsylvania—still do so today.¹⁹³ Second, almost all states that once legislatively appointed their judges have now abandoned that model.¹⁹⁴ Of the seventeen states that once selected judges by legislative appointment, only two—South Carolina and Virginia—continue to do so today.¹⁹⁵

Current Methods of State Judicial Selection¹⁹⁶

The primary focus of this paper will be on the methodology used to select judges for their first full term of office, rather than on methods used to fill the remainder of the term of a departing judge, a distinction applying only to elective states. Save for the handful of states that appoint judges to what is essentially a life term, the remaining states utilize a wide variety of approaches to retain or reject incumbent judges who later seek additional terms. In the interest of clarity, this paper largely excludes analysis of the various systems applicable to incumbents seeking additional terms.¹⁹⁷

At the high court level, only six states—including Texas—currently select judges for first full terms by partisan election.¹⁹⁸ Another fifteen states select high court judges for first full terms by nonpartisan election.¹⁹⁹ Of the twelve states that appoint their high-court judges to first full terms, ten do so by gubernatorial appointment, and the other two do so by legislative appointment.²⁰⁰ The remaining seventeen states select high court judges for first terms via the Missouri Plan.²⁰¹

Nine states do not have intermediate appellate courts.²⁰² Of the remaining forty-one states, only six—including Texas—currently select intermediate appellate judges for first full terms by partisan elections.²⁰³ Twelve states employ nonpartisan elections. Eight states appoint their appellate judges to first full terms: five by gubernatorial appointment, two by legislative appointment, and one through appointment by the state supreme court.²⁰⁵ The remaining fifteen states select appellate judges for first terms pursuant to Missouri Plan appointment.²⁰⁶

SUMMARY OF JUDICIAL SELECTION METHODS IN THE STATES²⁰⁷

State High Courts. For state high courts (called “supreme courts” in 48 of the 50 states), the breakdown of selection systems is as follows:

- **Six states have partisan elections** (AL, IL, LA, NC, PA, TX). All judges in both Illinois and Pennsylvania run in uncontested retention elections for additional terms after winning a first term through a contested partisan election.
- **Fifteen states have nonpartisan elections** (AR, GA, ID, KY, MI, MN, MS, MT, NV, ND, OH, OR, WA, WI, WV). Ohio and Michigan have nonpartisan general elections, but political parties are involved with the nomination of candidates, who frequently run with party endorsements.
- **Seventeen states utilize the Missouri Plan, i.e., gubernatorial appointment followed by uncontested retention election** (AK, AZ, CA, CO, FL, IN, IA, KS, MD, MO, NE, NM, OK, SD, TN, UT, WY): All judges in New Mexico are initially appointed from a commission list, face a contested partisan election for a full term, and then run in contested retention elections for additional terms.
- **The remaining twelve states utilize either gubernatorial or legislative appointment for a set term (set number of years or for life)** (CT, DE, HI, MA, ME, NH, NJ, NY, RI, SC, VA, VT). Other than those few states utilizing life terms, incumbent judges may seek reappointment at conclusion of initial term.

Intermediate Appellate Courts. Only 41 of the 50 states have intermediate appellate courts. The breakdown of selection systems for intermediate appellate courts is as follows:

- **Six states have partisan elections** (AL, IL, LA, NC, PA, TX). See note above on Illinois and Pennsylvania.
- **Twelve states have nonpartisan elections** (AR, GA, ID, KY, MI, MN, MS, NV, OH, OR, WA, WI). See note above on Michigan and Ohio.
- **Fifteen states utilize the Missouri Plan, i.e., gubernatorial appointment followed by uncontested retention election** (AK, AZ, CA, CO, FL, IN, IA, KS, MO, MD, NE, NM, OK, TN, UT).
- **Eight states utilize either gubernatorial, legislative or judicial appointment for a set term (set number of years or for life)** (CT, HA, MS, ND, NJ, NY, SC, VA). Note that in North Dakota, appellate judges are appointed by state supreme court, while in New Jersey appellate judges are selected by state supreme court from trial judges appointed by governor.
- **The remaining nine states do not have intermediate appellate courts** (DE, ME, MT, NH, RI, SD, VT, WV, WY). Limited appellate courts were established fairly recently in North Dakota (1987) and Nevada (2014).

Trial Courts. The breakdown of selection systems for trial courts of general jurisdiction is as follows:

- **Eight states have partisan elections for all trial courts** (AL, IL, LA, NC, NY, PA, TN, TX). See note concerning New Mexico, below.
- **Twenty states have nonpartisan elections for all trial courts** (AR, CA, FL, GA, ID, KY, MD, MI, MN, MS, MT, NV, ND, OH, OK, OR, SD, WA, WI, WV).
- **Seven states utilize the Missouri Plan for all trial courts** (AK, CO, IA, NE, NM, UT, WY). All judges in New Mexico are initially appointed from a commission list, face a contested partisan election for a full term, and then run in contested retention elections for additional terms.
- **Eleven states utilize either gubernatorial or legislative appointment for a set term (set number of years or for life)** (CT, DE, HA, MA, ME, NH, NJ, RI, SC, VA, VT).
- **Four states use two differing models—Missouri-Plan appointment in certain counties or judicial districts (most often highly urbanized), and partisan or nonpartisan elections in all others—for their trial courts** (AZ, IN, KS, MO).

At the trial court level, thirty-two out of fifty states select trial judges by some form of election.²⁰⁸ Of these, eight do so by partisan election (in nonvacancy scenarios),²⁰⁹ twenty do so by nonpartisan election (in nonvacancy scenarios),²¹⁰ and four conduct trial-level elections only within certain counties or districts, while otherwise adhering to the Missouri Plan.²¹¹ This leaves seven states that exclusively use the Missouri Plan.²¹² Of the eleven remaining states that appoint trial judges to first full terms, nine do so by gubernatorial appointment, and two do so by legislative appointment.²¹³

The preceding table summarizes the methods of judicial selection employed by states to select judges at the high court level, intermediate appellate court level, and trial court level.

As shown, there are a finite number of basic judicial selection models among the fifty states. However, as actually practiced among the fifty states, variances in the details of each selection model produce a diverse set of judicial selection methods, which can also vary among the levels of courts within one state, or occasionally among trial courts located within different areas of the same state. Moreover, states utilizing partisan or nonpartisan election systems may use one set of procedures to fill interim judicial vacancies, while employing an entirely different methodology to select judges for a first full term.

The appendix includes a table setting out how each of the fifty states has chosen to mix and match the variables set forth above, in both “vacancy” and “first term” scenarios.

Current Variations of Judicial Selection by Gubernatorial Appointment There are ten states that extensively (although not exclusively) utilize gubernatorial appointment without an accompanying retention election to appoint judges to full terms. Again, this “first full term” qualifier is important to bear in mind because nearly all states utilize some variant of gubernatorial appointment when filling interim vacancies.²¹⁵ Unlike in elective states, distinctions between interim vacancies and first full terms are irrelevant under the gubernatorial and legislative appointment models, as all vacancies are filled by full-term appointments.

The ten states utilizing gubernatorial appointments for first full-term judgeships are Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. The procedural differences among these gubernatorial appointment states are found in the term of judicial office, the use of nominating commissions, and the requirement for confirmation of the governor’s appointee, whether by the state Senate, both houses of the Legislature, or by a panel.

In a majority of states utilizing gubernatorial appointment to fill a judicial seat for a full first term, the term is limited to a certain number of years. The terms range from six years in Vermont to fourteen years for the New York Court of Appeals. Only three states—Massachusetts, New Hampshire and Rhode Island—appoint judges for what is essentially a life term (barring misbehavior) until age seventy.²¹⁶ In New Jersey, a judge is first appointed to an initial seven-year term, after which he may be reappointed to a second term lasting until the age of seventy, assuming good behavior.²¹⁷

Next, all states employing the gubernatorial appointment model also use nominating commissions in some fashion, with those commissions that issue binding recommendations slightly outnumbering the states utilizing nonbinding commissions. Nominating commissions are widely used across a variety of judicial selection models and serve to create a list of qualified judicial candidates from which the governor may choose, although where

a commission's recommendation is nonbinding in nature, the governor is free to request that additional candidates be supplied.²¹⁸

Finally, some form of "confirmation" of a gubernatorial judicial appointment is required in all ten of the states discussed in this section. Most frequently, confirmation is performed by the state Senate or the entire Legislature. In Massachusetts and New Hampshire, confirmation authority lies with a governmental panel.

Current Variations of Judicial Selection by Legislative Appointment South Carolina and Virginia are the only states that still use legislative appointments.²¹⁹ South Carolina uses a nominating commission to create a list of qualified candidates for a judicial opening from which the state's General Assembly must select a candidate by majority vote.²²⁰ In Virginia, the names of candidates are submitted by General Assembly members to House and Senate committees that determine whether the individual is qualified for the judgeship sought.²²¹ Following the committees' determination of qualification, the House of Delegates and the Senate fill the vacant judgeship.²²²

Current Variations of Judicial Selection by Partisan Election Texas is among the six states—along with Alabama, Illinois, Louisiana, North Carolina, and Pennsylvania—that select all judges for first full terms using partisan election.²²³ There are a number of states, including Indiana, New York, and Tennessee, that make exclusive (or nearly exclusive) use of partisan elections for selecting judges solely at the trial level.

One interesting variance among these six states is the length of the term of office. At the high court level, Illinois, Louisiana, and Pennsylvania elect their justices for ten-year terms. Texas has the shortest terms of office: six years for appellate judges and four years for trial judges.

Current Variations of Judicial Selection by Nonpartisan Election A nonpartisan election model is one that generally prohibits political parties from nominating candidates for judicial office, and excludes party labels from candidates' listings on the ballot.²²⁴ Those states that select their judges via nonpartisan election include Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, Ohio, Oregon, Washington, West Virginia, and Wisconsin. However, two states—Michigan and Ohio—are unique in that they use a partisan primary (Ohio) or caucus (Michigan) to select the candidates who will later run in the nonpartisan election.²²⁵

These nonpartisan-election model states utilize relatively uniform procedures, other than the length of the term for judicial office. Supreme court justices are elected to full terms between six and twelve years, with six or eight-year terms being the most prevalent. All other lower court judges are elected to terms ranging from four to eight years. Each of these states allows its governor to appoint judges to fill interim vacancies, often with the assistance of a judicial nominating commission, whether binding or nonbinding.

Two states in this group have unique judicial selection provisions. In Montana, if an incumbent is unopposed in a nonpartisan election, the judge must win a retention election to retain office.²²⁶ In Nevada, voters have the option of selecting "none of these candidates" in statewide judicial races.²²⁷

Finally, there are a number of states—including California, Florida, Oklahoma, and South Dakota—that utilize nonpartisan elections only for their trial-level courts, while employing a different model for their appellate courts.²²⁸

Current Variations of Judicial Selection by Missouri-Plan Appointment The Missouri Plan involves an initial gubernatorial appointment from candidates supplied by a judicial nominating commission, subsequently followed by a retention election. States that employ a form of the Missouri Plan model to select judges at all levels include Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming. There are also numerous other states, such as Maryland, which selectively depart from the Missouri Plan as to certain courts (most often at the trial level). The Missouri Plan is uniformly applied in both the interim vacancy and first term scenarios, making any distinctions between interim vacancies and full first terms irrelevant.

The appointment stage begins whenever a judicial vacancy occurs. At that point, a nominating commission prepares a list of candidates qualified to fill the vacancy. Such listing is binding in all of the aforementioned states, except Maryland. The governor then appoints a person from that list to fill the vacancy. In most states that follow this method, there is no legislative oversight of the appointment process. In Maryland and Utah, however, the governor's appointment is subject to senate confirmation.

At this point in the process, the operation of the Missouri Plan is often identical to that of the gubernatorial appointment model, with the two models differing only when the newly appointed judge's initial term has concluded. At that point, a judge seated via the gubernatorial appointment model will (if not in a life-term state) face *reappointment* no earlier than four years later, but not reelection. A judge appointed pursuant to the Missouri Plan will face a *retention election* after an initial term of between one to three years on the bench.²²⁹ If the judge wins the election, the judge is entitled to hold office for a full term.²³⁰ Among the Missouri Plan states, full terms for supreme court seats range from six to twelve years, for intermediate courts of appeals six to eight years, and for trial courts six to fifteen years. At the end of each full term, a judge then faces another retention election. If the judge loses a retention election, the seat becomes vacant, and the selection process starts over again.

Finally, there are numerous states that apply the Missouri Plan in their higher courts but utilize alternate methods at the trial court level. These states include Arizona, California, Florida, Indiana, Kansas, Oklahoma, South Dakota, and Tennessee.²³¹

Justice O'Connor Judicial Selection Plan Both before and after serving on the United States Supreme Court, Justice Sandra Day O'Connor was an outspoken opponent of contested judicial elections.²³² Following her 2006 retirement from the bench, O'Connor began to work closely with the Denver-based Institute for the Advancement of the American Legal System. Her collaboration with the Institute resulted in the 2014 publication of the O'Connor Judicial Selection Plan ("O'Connor Plan").²³³ O'Connor stated that she was "distressed to see persistent efforts in some states to politicize the bench and the role of our judges" and described the plan as a step toward "developing systems that prioritize the qualifications and impartiality of judges, while still building in tools for accountability through an informed election process."²³⁴ The O'Connor Plan notes that "[w]e do not offer it as perfect; no selection system is."²³⁵

The O'Connor Plan adopts the primary elements of the Missouri Plan—including gubernatorial appointment, judicial nominating committees, and no-opponent retention elections—while nonetheless suggesting numerous modifications intended to improve upon the Missouri Plan. Only three states—Alaska, Colorado, and Utah—are already fully compliant with all four elements of the O'Connor Plan.²³⁶

As to the first element, judicial nominating commissions, some of the plan's notable features include requirements that commissions be constitutionally authorized (rather than created via revocable executive orders), that commission members be appointed by multiple authorities and represent a broad range of societal interests, and that a majority of commission members be nonlawyers.²³⁷

The O'Connor Plan's second element limits the number of nominees presented to the governor by the nominating committee and bars the governor from departing from the committee's list.²³⁸ Moreover, in order to prevent judicial seats from going unfilled for political purposes, the plan provides for a default appointment mechanism, in the event the governor fails to take prompt action.²³⁹

The plan's third element involves a method for extensive judicial performance evaluation, whereby freestanding, statutorily created commissions (populated in large part by nonlawyers) would evaluate sitting judges based on criteria focusing on sound decision-making processes, rather than the outcome of any particular case.²⁴⁰ Such evaluations would then be regularly disseminated to assist voters in connection with the plan's final element: retention elections.²⁴¹ Seeking to strike a balance between judicial independence and accountability, the plan stresses that retention elections should represent a yes/no referendum on an incumbent judge's performance rendered on the basis of the data made available to the voting public via the evaluation process and be conducted without fundraising, political efforts, or speech-making by the incumbent.²⁴²

Use of Nominating Commissions in State Judicial Selection

The broad majority of states use one or more judicial nominating commissions in some manner when selecting judges.²⁴³ Some authorities place the total number of states employing such commissions at thirty-six and others at thirty-eight, a disparity reflecting the myriad forms and roles such commissions assume.²⁴⁴ Texas is among the minority of states that does not utilize a nominating commission in their judicial selection system. Among those majority states that do employ commissions, there are numerous differences concerning the number and composition of commissions, their methods of selecting members, and requirements regarding the commissions' geographic and political makeup. However, certain generalizations may be made regarding these commissions.

Nominating commissions generally find, screen, evaluate, and nominate candidates for appointment to judicial office. In states that employ the Missouri Plan, commissions typically submit a list of potential nominees to the governor for each vacancy, and the governor usually must appoint one of those nominees.²⁴⁵ However, in a significant number of states, the judicial commission's recommendation is nonbinding, and the governor is not required to choose from among the offered list of candidates.²⁴⁶ Even among states that elect judges, nominating commissions are often used in filling interim vacancies.²⁴⁷ Finally, several states, such as Alabama, Arizona, Indiana, Kansas, and Missouri, use nominating commissions to

select judges only in certain counties or districts—usually urban—while not utilizing them in less-populated areas.²⁴⁸

There is also a great degree of disparity among the states regarding how judicial nominating commissions are established: some by executive order, some by statute, and others by constitutional amendment.²⁴⁹ While some states utilize a single nominating commission for all of their courts, other states have created multiple county-level commissions to supply trial court nominees in each of the counties.²⁵⁰ Moreover, a state may choose to utilize a nominating commission for one level of courts, but not another.²⁵¹ Minnesota, for example, utilizes a commission for its trial courts, but not its appellate courts.²⁵²

Nominating Commissions Among the States

Missouri Plan States A significant number of states—including Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming—utilize one or more judicial nominating commissions in conjunction with the Missouri Plan, wherein the initial gubernatorial appointment is followed by a retention election.²⁵³ In fact, use of judicial nominating commissions is essentially synonymous with the Missouri Plan, subject only to the caveat that two of these states—California and Maryland—employ commissions whose candidate lists are not binding on their respective governors.

Gubernatorial Appointment States In a number of primarily eastern states—including Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont—at least some judges are appointed (for either life, or a term of years) by the Governor, almost always from a list provided by a judicial nominating commission and usually subject to confirmation by the Legislature or Senate.²⁵⁴ In at least some of these appointive states—including Massachusetts, Maine, and New Jersey—the list of nominees submitted to the Governor is not binding, and he or she may appoint someone not considered by the commission.²⁵⁵ In appointing justices to Massachusetts’s highest court, however, the governor forgoes the assistance of any formal nominating commission.

What these states have in common with Missouri Plan states is the involvement of judicial nominating commissions. One notable difference, however, is that in gubernatorial appointment states, the commissions tend to be established via executive order, rather than by statute.²⁵⁶ The major difference between gubernatorial-appointment and Missouri Plan states is that the appointed judges do not stand for retention elections in the gubernatorial-appointment states.

Traditional Election States Among the states that exclusively utilize elections (whether partisan or nonpartisan) to select judges for their first full terms, there is obviously no role for judicial nominating committees. Nonetheless—and excluding the Missouri Plan states—a sizeable number of states that otherwise select judges via popular election use a combination of nominating commissions and gubernatorial appointments when filling interim vacancies for at least some courts. These states include Alabama, Florida, Georgia, Idaho, Kentucky, Minnesota, Mississippi,

Montana, Nevada, New York, North Dakota, West Virginia and Wisconsin.²⁵⁷ In several of these states, senate or legislative confirmation may also be required.²⁵⁸ And in several of these elective states—including Georgia, Mississippi, and Wisconsin—the list of nominees submitted to the governor is not binding, and he or she may appoint someone not considered by the commission.²⁵⁹ In North Dakota, the Governor may likewise choose not to appoint from the commission’s list, but then must either request a new list or call a special election to fill the vacancy.²⁶⁰ While these nominating committees are rare among those six states that exclusively elect full-term justices via partisan elections (the group that includes Texas), Alabama does make use of nominating commissions on a limited basis at the county level.

Legislative Appointment States South Carolina and Virginia are unique in that they select judges by legislative appointment.²⁶¹ In South Carolina, the General Assembly appoints judges from nominees submitted by its Judicial Merit Selection Commission,²⁶² a ten-member committee selected by legislative leaders and having at least six members chosen from the General Assembly.²⁶³

In Virginia, the names of candidates are submitted by General Assembly members to the House and Senate Committees for Courts of Justice, and these committees determine whether each individual is qualified for the judgeship sought.²⁶⁴ Following the committees’ determination of qualification, the House of Delegates and the Senate then vote separately, and the candidate receiving the most votes in each house is elected to the vacant judgeship or new seat.²⁶⁵

Number of Nominating Commissions Per State Of those states that use some form of nominating commission, more than one-half use only a single commission.²⁶⁶ Of those remaining states utilizing multiple commissions, the total number of nominating commissions ranges from a low of three in Arizona to fifty-seven in Kentucky and 114 in Iowa.²⁶⁷

Of the states that use nominating commissions at least partly on the basis of executive order, only Maryland and New York use more than one commission.²⁶⁸ Many single-commission states are largely rural or relatively small, including Alaska, Connecticut, Delaware, Hawaii, Idaho, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.²⁶⁹

Among those states utilizing multiple nominating commissions, a given commission’s jurisdiction typically covers an appellate or trial court district. One relatively common structure utilizes one statewide commission for supreme and intermediate appellate courts and a second set of local commissions—one for each of a state’s judicial districts—to handle trial courts. States that have adopted this structure include Colorado, Iowa, Kentucky, Maryland, New Mexico, and Utah.²⁷⁰ A similar arrangement, used by Florida and Nebraska, involves separate nominating commissions for each intermediate appellate district, in addition to those for trial court districts.²⁷¹

Number of Commissioners It is difficult to generalize concerning the number of commissioners that serve on nominating commissions among the states, especially given that in certain states, such as Indiana, appellate level nominating commissions may differ in size from trial-level commissions.²⁷² Most often, commission membership ranges between seven

to nine members.²⁷³ The remaining commissions range from as few as five members in Alabama to as many as twenty-one in Massachusetts.²⁷⁴

The above numbers represent only those “full time” commissioners expected to participate in all committee decisions. However, a few states utilize alternate structures in which a core group of commissioners is supplemented by additional members from the district or circuit in which a particular vacancy occurs. Minnesota, for example, has a forty-nine member commission, but only nine at-large members uniformly participate in meetings and deliberations on every vacancy.²⁷⁵ Four additional members of the commission are selected from each of the state’s ten judicial districts, with each four-member bloc participating only when a vacancy occurs within its specific district.²⁷⁶

Selection of Commissioners Among those states that utilize judicial nominating commissions, differing methods of selecting commission members have developed. The most prevalent method involves a hybrid system, in that the attorney members are either appointed or elected by the state bar association, and the nonattorney members are gubernatorially appointed, with the state supreme court chief justice often serving as the *ex officio* chair. Both attorney and nonattorney members may also be confirmed by the Legislature or Senate. Examples of states utilizing this method for at least some commissions include Alaska, Idaho, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, Nevada, and Wyoming.²⁷⁷

Other states provide for the selection of at least some commission members by appointment but disperse that appointive power among various state officials. In Colorado, attorney members of its nominating commission are appointed by majority action of the governor, the attorney general, and the chief justice, with the governor retaining power to appoint all other members.²⁷⁸ In Connecticut, Hawaii, New Mexico, and New York, the selection process includes appointment of some commissioners by certain members of those states’ legislatures.²⁷⁹ These appointing authorities may include the president of the senate, the speaker of the house, and the majority and minority leaders of either or both houses.²⁸⁰ Commissions in Hawaii, New Mexico, and New York also have additional members appointed by their chief justices.²⁸¹

Elsewhere, nearly all members of other states’ commissions (save for *ex officio* positions) are appointed by the governor, but such autonomy is often restrained by requirements that at least some appointments be made from nominees submitted by various groups. In Florida, the governor must select four attorney members from lists provided by the State Bar’s Board of Governors.²⁸² The Governor of Rhode Island must choose five of nine commission members from lists of nominees provided by the minority leaders of both houses, as well as by the Speaker of the House and the President of the Senate.²⁸³ In Utah, the Governor must select two members from a list of nominees provided by the State Bar.²⁸⁴

Finally, in South Carolina—where the state’s General Assembly jointly selects South Carolina’s judges—the Legislature not only participates in selecting members for the state’s judicial nominating committee but wholly controls the process. Its ten-member Judicial Merit Selection Commission is composed of five members appointed by the Speaker of the House, three by the Chairman of the Senate Judiciary Committee, and two by the President Pro Tempore of the Senate.²⁸⁵ Moreover, six of these appointees must be members of the General Assembly.²⁸⁶

Composition of Commissions

Attorney and Lay Members Statutes and constitutional provisions authorizing nominating commissions typically require that the commissions include both attorney and nonattorney members.²⁸⁷ States often require that at least one judge serves on a commission as well.

The most common membership structure involves one judge (usually the chief justice of the state's supreme court, or his or her designee) and an equal number of attorney members and nonattorneys drawn from the general public. Examples of states employing this structure include Alaska, Indiana, Missouri, Nebraska, Nevada, and Wyoming.²⁸⁸ Certain nominating commissions in other states—including Arizona, Colorado, Kentucky, and Montana—use commissions with a single judge and an unequal number of attorneys and nonattorneys, with the nonattorneys in the majority.²⁸⁹ New Mexico and South Dakota also draw commissioners from the state bar and the general public in unequal numbers, but the commissions in those states also include more than one judge.²⁹⁰ In other states, the nominating commissions do not include any judges at all. Those states include Connecticut, New Hampshire, Oklahoma, and Rhode Island.²⁹¹

Partisanship Many states have adopted provisions concerning the political activities or affiliations of nominating commission members.²⁹² Some states, such as Connecticut, provide that commission members may not hold an official position in a political party.²⁹³ Other states—including Alaska, Arizona, and Hawaii—require that the selection of commission members and/or the nomination of commission candidates be done on a nonpartisan basis.²⁹⁴

Other states have adopted specific requirements regarding the representation of political parties among members of nominating commissions, so as to ensure that the two major parties are represented either equally or by a majority of no more than one member. These states include Arizona, Colorado, Connecticut, Delaware, Idaho, Nebraska, New Mexico, New York, South Dakota, and Utah.²⁹⁵ In fact, New Mexico requires the appointment of additional commission members if necessary to provide political balance on the state's commissions.²⁹⁶ A small number of other states—including Kentucky and Oklahoma—require that nonattorney commissioners be split equally along party lines, but do not impose a similar requirement for attorney members.²⁹⁷ Finally, in Vermont, where its House and Senate each select three of their members to serve on its Judicial Nominations Board, the three members of each group cannot all be from the same party.²⁹⁸

Gender, Race, and Ethnicity A number of states have provisions seeking to ensure that the makeup of their nominating commissions reflects the diversity of their population. In some states, such as Arizona, this consists of no more than a generalized statutory directive that “[t]he makeup of the committee shall, to the extent feasible, reflect the diversity of the population of the state.”²⁹⁹ Other states, such as

Florida, specifically reference gender, race and/or ethnicity in urging the appointment of diverse commissions.³⁰⁰

Finally, the statutes of some states provide that a specific number of women or racial or ethnic minorities must be appointed to their nominating commissions. In Indiana, the statute governing the Lake County nominating commission states that one of the four attorney members, as well as one of the four nonattorney public members, must be a “minority individual,” statutorily defined as black or Hispanic.³⁰¹ In addition, each group of four commissioners must include two men and two women.³⁰² Similarly, the membership of Iowa’s nominating commissions may not include more than a simple majority of either gender.³⁰³

In the absence of clear evidence of discrimination, however, numerous lower courts have ruled that specific requirements concerning the composition of nominating commissions are constitutionally suspect.³⁰⁴ In fact, in 1996 a federal district court issued a preliminary injunction preventing enforcement of the Lake County race and gender requirements as applied to attorney members of the commission.³⁰⁵ Similarly, Florida formerly required that one-third of the seats on its judicial nominating commissions be filled by women or members of racial or ethnic minority groups.³⁰⁶ However, in 1995 a federal district court found this statute to be unconstitutional in violation of the Fourteenth Amendment right to equal protection and entered a permanent injunction barring enforcement of the requirement.³⁰⁷ Florida’s current statute now merely directs the Governor to seek to ensure that the membership of the state’s commissions reflects the state’s diversity “to the extent possible.”³⁰⁸

Geography The commission structure adopted by many states requires that commission membership correspond to the geographic layout of those states. As with race and gender, some states simply encourage broad geographical representation in general terms, while others have adopted more specific requirements. For example, Alaska requires only that appointments to its Judicial Council be made with “due consideration to area representation,” and Montana mandates that commission members be selected from different geographical areas of the state.³⁰⁹ In the states utilizing multiple judicial nominating commissions, geographic diversity is often a nonissue, given that their membership is usually drawn from the same district or county over which that specific commission has jurisdiction.³¹⁰ Most commonly, the controlling rules for statewide commissions require that members must be appointed from each of that state’s congressional districts (as in Colorado) or its appellate districts (as in Indiana).³¹¹ Elsewhere, as in Arizona, both the attorney and the nonattorney sections of the Appellate Commission cannot include more than two residents of any one county.³¹² In Hawaii, at least one member of its Judicial Selection Commission must live outside the Honolulu area.³¹³

Practice Area In a few states, membership criteria for certain nominating commissions include the practice areas of its attorney members. New Mexico, for example, requires that four of the attorney members on its Commissions be chosen so that all aspects of the “civil and criminal prosecution and defense” bars are represented.³¹⁴

Similarly, in Alabama, the four attorney members of the Tuscaloosa County Commission are to be selected from each of four groups: plaintiffs' civil practice, defense civil practice, domestic relations, and criminal defense.³¹⁵ Relatedly, some states stipulate that no more than two of the attorney-members of their commission can be from the same law firm.³¹⁶

Industry, Business, or Profession Another membership requirement adopted in connection with certain state nominating commissions involves diversity of representation of businesses and industries among their nonlawyer members. For example, the four nonattorney members of Montana's Commission must each represent different industries, businesses, or professions.³¹⁷ Similarly, the membership of the advisory council that serves as a nominating commission for the housing courts of the New York City civil court system must include three members drawn from the real estate industry and three from tenants' organizations.³¹⁸

Restrictions on Holding Public Office and on Nominations States that use nominating commissions typically forbid members from holding other public office while serving on a commission, though such restrictions exclude those justices who often serve as the *ex officio* heads of such commissions. These states include, among others, Alaska, Missouri, and New York.³¹⁹ In Florida, this restriction only bars commissioners from holding judicial office, but no other public office.³²⁰

Another common restriction prevents commissions from appointing their own members to fill vacant judicial seats. In a small number of states, such as Iowa, this restriction applies only to the nomination of current commission members.³²¹ More commonly, however, states extend this restriction through a specified period of time following the end of a commissioner's service. Such ineligibility period between departing the commission and regaining eligibility to fill a vacancy can last as long as five years, as in Oklahoma.³²² The most common restrictive period is one year, which has been adopted by numerous states including Arizona, New York, and Rhode Island.³²³

Commissioner Terms Almost all states impose a term of office on commission members, but in a few states, including Georgia, Massachusetts, and Minnesota, the commission members serve at the pleasure of the Governor.³²⁴ Relatedly, in Maryland, the commissioners' terms are co-extensive with that of the Governor.³²⁵ Otherwise, term lengths range from two years to six years, with the caveat that states with multiple commissions may utilize differing term lengths.³²⁶ Terms of four and six years appear to be most widely utilized.³²⁷

Recruiting Judicial Candidates A majority of states utilizing judicial nominating committees have provisions that allow or encourage commission members to seek out qualified individuals to apply to fill vacant judicial seats, or to otherwise stand for consideration by the commission.³²⁸ For example, the rules governing Hawaii's selection commission provide that commissioners "may actively seek out and encourage qualified individuals to apply for judicial office."³²⁹ In New Mexico, this directive is mandatory and commissioners are instructed to "actively solicit" applications from qualified lawyers.³³⁰

Directing commissioners to solicit applications is intended to encourage recruitment of qualified persons who might not otherwise apply for judicial vacancies, so that those

appointed as judges might more accurately “reflect the diversity of the community they will serve.”³³¹ In Missouri, the Appellate Judicial Commission is specifically instructed not to limit itself to persons suggested by others and those candidates seeking to serve, but to also tender nominations from other qualified persons.³³² Similarly, Nebraska characterizes the recruitment of qualified applicants as one of the “most important” parts of a commissioner’s duties, because of a general reluctance among potential candidates “to make the sacrifice which is sometimes necessary in accepting judicial office.”³³³

Retention of Judges In Missouri Plan states, judges at the end of a term typically must run in an unopposed election in which the electorate votes for or against their retention in office.³³⁴ In addition to their role in soliciting, evaluating, and nominating candidates for judicial office, the nominating commissions of a few states also evaluate judges seeking retention.

In Alaska, the Judicial Council evaluates judges nearing the end of their term and publishes a pamphlet containing information about each judge.³³⁵ This information must include a statement regarding any suspensions, public censures, or reprimands.³³⁶ At its discretion, the Council may also recommend for or against the retention of any judge.³³⁷

A number of other states, including Arizona, Colorado, Missouri, New Mexico, and Utah, have established freestanding commissions that also evaluate judges in connection with retention, but which are distinct entities.³³⁸ While such performance evaluation entities are in certain respects similar to judicial nominating commissions, they (unlike Alaska’s Judicial Council) are separate, independent organizations whose functions are limited to evaluation of incumbents with the primary purpose of educating the voting public, rather than the nomination of judges.

Finally, in some states other commissions wield binding power concerning the retention of judges. In Hawaii, the decision to renew or reject an incumbent judge lies solely with its Judicial Selection Commission.³³⁹ Connecticut judges also do not face retention elections, but instead may be reappointed by the Governor at the end of each term.³⁴⁰ That state’s Judicial Selection Commission evaluates incumbent judges, and its refusal to recommend an incumbent bars reappointment.³⁴¹ Similarly, if South Carolina’s Judicial Merit Selection Commission deems an incumbent unqualified, that judge may not be submitted to the General Assembly for reelection.³⁴²

PART IV: EVALUATION OF SELECTION MODELS

A Method to Evaluate Selection Models

The true measure of the efficacy of a particular judicial selection model is the degree to which it advances the purpose of the judicial branch in our government. This measure includes an evaluation of whether the *result* of selection is a judiciary with qualities likely to satisfy the duties of the office. It also includes an evaluation of whether the *process* of selection contributes to or detracts from the fulfillment of the judiciary's purpose. Consequently, an understanding of the role of the judiciary in our state and the functions judges perform is a prerequisite to a meaningful evaluation of judicial selection.

Consistent with the general form of American government, the Texas judiciary stands as a separate branch of government with powers and duties distinct from the other branches.³⁴³ The principal role of the judiciary is to provide a neutral forum for the resolution of disputes that promotes the rule of law in the state. The principal role of a judge is to hear the specific disputes between parties and apply the law to resolve those disputes. In civil matters, judges serve as neutral arbiters of private disputes. In criminal matters, judges ensure that the state impartially and dispassionately administers justice.

The judiciary also functions as a check on governmental abuse of power. In the words of Alexander Hamilton, judges are “the bulwarks of a limited Constitution against legislative encroachments.”³⁴⁴ In fulfilling this purpose, courts act as “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”³⁴⁵ In this role, unlike the executive and legislative branches, the judiciary is not a constituency-driven, political arm of government.³⁴⁶ Instead, judges are called on to fulfill their duties with intellectual honesty and dedication to the enforcement of the rule of law, regardless of popular sentiment.³⁴⁷

The judiciary also plays a role in shaping the law. It is the legislature's function to decide matters of public policy by enacting statutes and judges' function to apply those statutes to the facts of a particular case without interposing their own policy judgments.³⁴⁸ By adopting the common law of England, however, the Texas Legislature has allowed the judiciary to share the law-making role to a limited degree through the development of the common law in connection with the resolution of individual civil disputes.³⁴⁹ Texas courts have long held the view that the Texas Supreme Court has the sole authority to abrogate or modify the existing common law and that trial courts and intermediate courts of appeals must follow established precedent.

To fulfill these functions, judges need certain characteristics. First, judges need to be competent to properly resolve disputes, appropriately check governmental abuse of power, and reasonably shape the law. A variety of features make a judge capable of performing these tasks, including knowledge of the law, experience, decisiveness, temperance, patience, and thoughtfulness.

Second, a judge must be impartial. A fair judge seeks to reach a legally sound result in every case. She is evenhanded and does not act with preference or prejudice to the parties appearing in court, nor to advance her own or another's business, political, social, religious,

or other interest. A judge must also ensure that court proceedings are conducted with procedural fairness and adherence to the relevant rules of procedure.

Third, a judge must be independent of extraneous pressures and influences.³⁵¹ Sometimes judges are called on to make decisions involving divisive political and social issues. Other times the law requires a judge to make a decision that is contrary to a belief strongly held by a majority of the public. A judge's faithful performance of her duty requires the freedom to make the right decision even if it is currently unpopular.³⁵² Without independence, a judge may feel compelled to follow the views of supporters or special interests, without regard to what the law requires. In doing so, a judge abdicates judicial responsibility and relegates the rule of law to the whims of public opinion. Individuals who hold the dominant view on an issue decided by the court may dislike judicial independence when a judge's decision goes against their view. This short-sighted dissatisfaction is likely to change, however, when they find their view to be in the minority in the next matter requiring judicial review.

A final consideration of judicial selection systems is accountability. It is possible with any system that a judge who is not competent, fair, or independent attains office. Or a judge, while in office, may become incompetent or unfair. Thus, the selection process needs mechanisms to compel judges to conform to their expected function or to remove them from office if they do not. The wrong kind, or wrong degree, of accountability, however, can undermine judicial independence. For example, if a judge could be removed from office for any one decision, the judge may not have the independence necessary to fulfill her duties.

In addition to producing judges who are competent, fair, and independent, the process of selecting judges should reassure the public that the judges selected in fact have those characteristics. Public confidence in the judiciary is critical to the orderly resolution of disputes.³⁵³ If the public does not trust that courts are neutral forums for the competent and fair dispensation of justice, the public may adopt other, less socially desirable means to resolve disputes. The public need not always agree with the results of court decisions but must believe in the integrity of the system and that judicial decisions were made competently and equitably, regardless of results.

The best method of selecting judges has been the subject of debate since the founding of the United States.³⁵⁴ Many methods exist and most states have hybrid systems in which judges are chosen by different methods depending on the level of court.³⁵⁵ Some states have different methods for filling interim vacancies than for full terms of office. Scholars and commentators have long debated which of these methods creates judiciaries with the greatest competence, independence, and accountability. As discussed in the following sections, measuring judicial selection methods by evaluating both the result and selection process sufficiently distinguishes the quality of the various systems relative to each other.

Evaluating Partisan Elections

Most states have selected judges through partisan elections at some point in their histories,³⁵⁶ but most have since moved from partisan judicial elections to a different selection system for at least some of their judges.³⁵⁷ Six states, including Texas, currently use partisan elections to select appellate judges and ten states use them to select trial court judges.³⁵⁸ Many Texas leaders contend that changing our judicial selection process is necessary and long overdue.³⁵⁹

Partisan elections have been widely criticized as a method for selecting judges,³⁶⁰ with many commentators concluding that they are ineffective for selecting judges based on competence and experience.³⁶¹ Those commentators have observed that voters are generally unable to discern the best qualified candidate, and instead cast their ballots based on factors such as party affiliation and name appeal that are poor substitutes for experience and competence.³⁶² Some commentators assert that “as much as 80% of the electorate is completely unfamiliar with its candidates for judicial office.”³⁶³

Competence The effectiveness of partisan elections to select competent judges turns on two primary factors: voter access to information related to judicial competence and voter consideration of candidate competence when casting ballots. The consensus among various studies, surveys, and commentaries is that voters generally do not evaluate actual judicial competence and instead decide between candidates based on factors not indicative of judicial quality.³⁶⁴ As one newspaper columnist stated:

Rather than providing voter oversight and guaranteeing minimum quality, partisan elections shelter—sometimes foster—incompetence as distinguished judges of the minority party are swept out, often to be replaced by inferior candidates of the political majority.³⁶⁵

While competence is often difficult to measure,³⁶⁶ a survey of Texas lawyers shows that lawyers have historically perceived some deficiencies in judicial quality. Although somewhat dated, the survey revealed that only thirty-six percent of attorneys believed that Texas courts follow the law in deciding cases.³⁶⁷ Thirty-one percent of the lawyers surveyed believed Texas judges write quality opinions, and thirty-seven percent believed Texas judges are appropriately attentive to evidence and arguments.³⁶⁸ Finally, eighty-nine percent of lawyers surveyed did not think that elected judges are generally more highly qualified than appointed judges.³⁶⁹

Voters may consult a variety of sources of information concerning judicial candidates, but much of that information is not necessarily related to the candidates' suitability to fulfill the duties of office. For example, candidates may discuss their qualifications for office through their campaigns. Judicial candidates frequently discuss their legal experience, education, judgment, ability to analyze complex legal issues, peer awards, and other indicia of their competence. These communications occur in a variety of forums and formats, including speeches, websites, print, radio and television advertisements, and conversations with individual voters.

Voters may also measure an incumbent judge's competence by studying the judge's decisions and written opinions. Most state court decisions are public records available for review. Additionally, all Texas appellate courts have websites that allow the public to search opinions of the court.³⁷⁰ Thus, if a voter is willing to do the work, he could review all of a particular judge's opinions in evaluating the judge's competence. Along with the voter's perception of the merits of these decisions, the voter can learn how many times the judge has been reversed on appeal. However, it is unlikely that the average voter would take the time to parse lengthy, written appellate opinions or be able to glean information about the competence of a judge by doing so.³⁷¹

Bar polls also provide voters with information regarding a candidate's competence.³⁷² The State Bar of Texas sends ballots to all members of the bar, allowing attorneys to express their preferences on candidates for judicial office.³⁷³ The State Bar Association publishes the results of the poll,³⁷⁴ which are frequently included in campaign materials by candidates who received the highest number of votes for a particular race. Bar polls, however, may not be accurate, objective, and detached evaluations of judicial competence. First, few lawyers submit ballots, so poll results cannot be considered as representative of the state's lawyers. For example, at a time when there were nearly 99,000 active members of the State Bar of Texas,³⁷⁵ an average of 4,415 attorneys, or 4.5% of the bar, cast ballots for the three statewide Texas Supreme Court races listed in the 2018 Judicial Poll.³⁷⁶ Bar polls also may fail to provide significant information regarding judicial competence. Most lawyers do not have direct experience with many judicial candidates and base their vote on the general reputation of the candidates or their general reaction (whether positive or negative) to court decisions affecting them personally.

Voters may also obtain information about a candidate from endorsements the candidate has received. Judicial candidates strive to receive endorsements from a variety of groups to increase visibility and interest with voters, and there are numerous examples during each election cycle of television and online videos. For example, a 2010 candidate for the Texas Supreme Court ran an ad that exclaimed: "Hey, friends. I have some earth-shattering news for you. First of all, this campaign is now Chuck Norris approved."³⁷⁷

Further, many newspapers endorse judicial candidates in voter guides circulated to the papers' readership, often with discussion of the candidates' qualifications for office. Additionally, political parties and some interest groups endorse candidates and encourage their members to vote for the endorsed candidate. There has been little academic study regarding whether newspapers and interest groups engage in substantive evaluations of judicial competence or measuring the impact of endorsements on voter decision-making.

While some information about the competence of judicial candidates may be available, most commentators conclude that voters usually cast ballots based on party label or other factors unrelated to judicial competence.³⁷⁸ Moreover, studies show that there is often a significant drop-off in the number of votes between more high-profile political races and judicial races.³⁷⁹ Because many voters are unable to cast an informed vote in judicial elections, many do not vote in those races. As a result, contested judicial races may be decided by a small percentage of the electorate who may, or may not, have a rational basis for their vote.³⁸⁰

Overall, studies suggest that voters are not aware of candidate competence in many judicial races, and, therefore, must be casting their votes on the basis of other factors.³⁸¹ The general lack of public awareness of candidates indicates that judicial campaigns do not necessarily inform the general public about the candidates.³⁸² Similarly, endorsements by newspapers and interest groups are apparently not raising public awareness of judicial elections.³⁸³

Because voters are generally not aware of the candidates' competence, they look to other cues in casting their votes.³⁸⁴ The primary deciding factor in partisan judicial elections is party label.³⁸⁵ Most voters are predisposed to vote by party affiliation when they have little information about the qualifications of the candidates. In fact, many commentators claim that a candidate's party affiliation has been an important factor for success in Texas judicial elections.³⁸⁶

Urban areas in Texas have experienced alternating party sweeps in which judicial candidates from one party were uniformly elected to office based on party affiliation and later voted out of office for the same reason.³⁸⁷ Moreover, the popularity of the candidates at the top of the ballot often becomes a deciding factor in a judicial election.³⁸⁸ When Democrat Lloyd Bentsen ran for reelection to the Senate in 1982, Democratic judges fared well.³⁸⁹ When Republican Ronald Reagan ran for reelection as President in 1984, Republican judicial candidates were more frequently elected.³⁹⁰ In 1994, Republicans in Harris County (Houston) won in forty-one of forty-two contested county-wide judicial races.³⁹¹ In 2018, Democrats won in thirty-one of thirty-two contested courts of appeals races, in a partisan sweep that was impacted by the U.S. senatorial race between Republican Senator Ted Cruz and Democrat challenger Beto O'Rourke.³⁹²

The 2018 general election in Texas also demonstrated that party affiliation affects voter decision-making. In that election, six statewide judicial races featured both Republican and Democratic candidates.³⁹³ If voters were basing their decision on judicial competence and not party label, one might expect members of both parties to win elections. At least, varying margins of victory might be expected in different races. However, in the statewide races—three for the Texas Supreme Court and three for the Court of Criminal Appeals—the prevailing candidates (all Republicans) won their races with nearly identical margins of victory.³⁹⁴

Texas and Alabama are the only two states that currently³⁹⁵ conduct partisan judicial elections with the option of casting a straight-ticket vote.³⁹⁶ Consequently, Texas is considered an “outlier” by some commentators.³⁹⁷ Straight-ticket voting has historically compounded the problems of partisan voting by setting the stage for huge sweeps in judicial elections.³⁹⁸ In addition to the 2018 general election, between 2008 and 2016, an average of 100 percent of statewide courts, ninety-four percent of appellate courts, and eighty-eight percent of county-level jurisdictions experienced partisan sweeps.³⁹⁹ While straight-ticket voting may limit drop-off in judicial elections more than other methods, commentators contend that straight-ticket voting exacerbates the problem of having voters who are unfamiliar with the candidates and their qualifications decide judicial races.⁴⁰⁰ Moreover, straight-ticket partisan elections that result in sweeps create upheaval within the judiciary, which negatively impacts the judicial system.⁴⁰¹ Straight-ticket voting appears to be an ineffective, if not harmful, method to ensure competent judges are selected by voters.⁴⁰² Starting in 2020, Texas will no longer allow one-lever straight-ticket voting. The exact impact on judicial elections is uncertain.

When party affiliation is not available as a decisional tool, as in party primary elections, voters rely on other cues, including incumbency, name familiarity, or ethnic and religious affiliation.⁴⁰³ When these cues are not available, voters cast ballots based on arbitrary factors such as ballot placement, gender, and name appeal.⁴⁰⁴ One name-appeal study found, for example, that candidates whose nicknames appeared on the ballot had a seventy-nine percent advantage over candidates without nicknames.⁴⁰⁵ Studies also show that ethnic associations with a candidate's name affect voter decision-making.⁴⁰⁶ This is particularly true in races in which voters had little specific knowledge about the candidates.⁴⁰⁷

Perhaps the most famous Texas example demonstrating the importance of name appeal in judicial elections is the case of Don Yarbrough. Yarbrough ran for a spot on the Texas Supreme Court in the 1976 Democratic primary against a highly respected incumbent.⁴⁰⁸

His name was purportedly confused with those of the well-known gubernatorial candidate Don Yarbrough or the long-time Texas Senator Ralph Yarborough.⁴⁰⁹ At the time of election, Yarbrough had been sued at least fifteen times, and two weeks before the general election, was the subject of a disbarment suit alleging various legal violations and professional misconduct.⁴¹⁰ Despite a great deal of media attention to this race, a survey revealed that seventy-five percent of voters were unaware of the candidate's controversies.⁴¹¹

While no commentator seriously disputes that voters primarily focus on party label in partisan judicial elections instead of candidate competence, some contend that party-based voting is nevertheless a rational basis for electing judges.⁴¹² Some commentators argue that partisan elections provide voters with more information, choice, and transparency than nonpartisan elections or the Missouri Plan selection model.⁴¹³ Having information about the political ideology of judicial candidates tells voters important and relevant information and allows them to choose the candidates they believe will be the best judges based on the criteria they believe are important.⁴¹⁴ Thus, voting by party label may be a meaningful way for some voters to express their general preferences on the resolution of public policy issues addressed by the courts.

Additionally, party-based voting may also have a direct effect on judicial decision-making. Because incumbent judges must face reelection to continue holding office, judges who want to continue on the bench may, when deciding cases before the court, consider the potential reaction of key political supporters and those segments of the electorate they hope will secure their reelection.⁴¹⁵ Consequently, partisan elections can “prospectively influence judicial behavior as judges anticipate the expectations and reactions of their constituencies.”⁴¹⁶

To many, this explanation of party-based voting is an indictment of partisan elections rather than a justification.⁴¹⁷ However, advocates of partisan elections conclude that the selection of judges involves choices among different political values, and, thus, that judicial qualification in some respects is a measure of whether the candidate's political values are consistent with the voting majority's political values.⁴¹⁸

It is clear, though, that party affiliation is not indicative of competence for judicial service. Whether a judicial candidate is Republican or Democrat or holds a particular view on a political issue does not necessarily correspond to whether the candidate has sufficient legal knowledge and experience to competently fulfill the duties of a judge. Selecting judges solely based on party label or political values will likely produce both competent and incompetent judges unless a screening mechanism ensures that all candidates are sufficiently competent to fulfill the functions of judicial office.

Further, Texas imposes fairly low minimum qualifications on candidates seeking judicial office. For example, judges must be of a certain age and must have been licensed to practice law between four and ten years, depending on the office sought.⁴¹⁹ Having legal experience is a component of judicial competence, but a certain number of years of practice alone may not be indicative of competence for office. Texas also requires candidates for certain judicial offices to obtain signatures of support to be entitled to a place on a primary ballot.⁴²⁰ This petition requirement only serves to demonstrate some degree of popular support or organizational effort, but not a degree of competence for office. These low standards imposed to screen candidates for Texas judicial office do little to ensure that Texas judges

meet minimum standards of competence. Ultimately, there is nothing in the Texas judicial selection system to prevent an incompetent candidate with an appealing name from winning a primary election and then winning the general election on the basis of his party label. Further, an incompetent candidate could sweep into office on the basis of straight-ticket voting with minimal voter awareness of his qualifications or those of the opposing candidates.⁴²¹ As former Texas Supreme Court Chief Justice Wallace Jefferson noted, “[t]hese votes are not based upon the merits of the judge but on partisan affiliation and if not party affiliation, it’s the sound of your name.”⁴²²

Another problem with party-label voting is that no screening mechanism exists in Texas to ensure that a judicial candidate actually shares the values associated with the political label she adopts. Texas’s open primaries allow any candidate to seek the nomination of the dominant political party without regard to whether the candidate’s beliefs are consistent with the party’s beliefs. It also allows judges to switch parties to follow the ebb and flow of party dominance. For example, in the early 1980s, many incumbent Democratic judges changed political parties to become incumbent Republican judges.⁴²³ This practice has continued.³²⁴ Consequently, the one feature of partisan elections that its defenders celebrate—that the popular majority can shape judicial policy by selecting like-minded judges as reflected by their party affiliation—is not necessarily effective.

Overall, partisan elections appear to be poor mechanisms for selecting judges based on competence, and most states have completely rejected this model.⁴²⁵

Fairness One of the main criticisms of partisan judicial elections is that the practice of campaigning compromises the impartiality of the courts and creates incentives for unfairness.⁴²⁶ The most commonly cited sources of these problems include the potential quid pro quo effect of campaign contributions, the constituency-creating effect of an increasingly politicized electorate, and the undue influence of political parties and special interest groups.⁴²⁷

Campaign fundraising and politics have been part of Texas’s judicial election landscape for over 140 years. Thus, it is fair to ask what has changed to now suggest that fundraising and campaigning are problematic. The answer may be that such aspects of the system have always been problematic. However, these problems are magnified with each passing decade as judicial elections have become more expensive, more contentious, more issue-driven, and more impacted by special interests and the dynamics of top-of-the-ballot races.⁴²⁸

This reality creates two fundamental impediments to judicial fairness. First, the increasingly high cost of running a campaign generates a dangerous dependence on campaign contributors.⁴²⁹ The constant need for campaign funds may compel some judges to consider their supporters’ and potential supporters’ interests instead of the merits of a case when performing their judicial duties.⁴³⁰ Certainly, campaign contributions often become a convenient source of complaints against judges’ objectivity. Second, issue-based campaigns have the tendency to create constituencies among voters, who may then expect judges to apply their preferred views when deciding cases.⁴³¹ Consequently, judges may feel pressured to follow the voting majority’s preferences instead of the law. Finally, in seeking to advance their agendas, interest groups have become both important sources of campaign funds and influential players in shaping public opinion in judicial campaigns.⁴³²

This analysis is not intended to suggest that Texas judges are unfair. Rather, it suggests that modern partisan elections create systemic incentives for unfairness that require fortitude to resist—fortitude that honest and conscientious judges demonstrate every day. However, it is inevitable that not all judges will be able to resist the pressures associated with seeking and maintaining judicial office. Further, partisan elections create the appearance to the public that such systemic unfairness exists.⁴³³ Former Chief Justice Wallace Jefferson touched on the issue of public perception in his 2009 State of the Judiciary address, noting the “corrosive influence of money in judicial elections.”⁴³⁴

In 1999, in an effort to measure perceptions about the fairness of the Texas judiciary, the Texas Supreme Court, the State Bar of Texas, and the Texas Office of Court Administration jointly commissioned a survey of judges, court staff, and lawyers.⁴³⁵ One goal of the survey was to measure the perceived influence campaign contributions have on judicial decision-making.⁴³⁶ Although now dated, the results of the survey revealed that lawyers who make contributions and the judges who accept them believed that contributions to judicial campaigns influence judicial decisions.⁴³⁷

The study reported that ninety-nine percent of the attorneys surveyed believed that campaign contributions have some effect on judicial decision-making.⁴³⁸ Forty-two percent believed contributions have a fairly significant influence, and thirty-seven percent believed contributions have a very significant influence.⁴³⁹ The study also showed that eighty-one percent of court personnel believed that campaign contributions have at least some influence on judicial decision-making.⁴⁴⁰ The most disturbing result of the survey, however, was that eighty-six percent of Texas judges believed that campaign contributions have at least some influence on judicial decision-making.⁴⁴¹

Contributions to judicial campaigns by parties with matters pending in court create a public impression that “modern justice may be going to the highest bidder.”⁴⁴² This perception has been repeatedly shown in various public opinion surveys.⁴⁴³ A national survey found that eighty-one percent of respondents believed that judicial decisions are influenced by political considerations, and seventy-eight percent believed that elected judges are influenced by having to raise campaign funds.⁴⁴⁴ Likewise, eighty-eight percent of Pennsylvanians, ninety percent of Ohioans, and seventy-six percent of Washingtonians believed that political contributions influenced judicial decisions.⁴⁴⁵

Fierce campaign battles waged by opposing interests to influence the composition of a court also may impact the public’s perception that courts are impartial. Instead, parties who come before the court and the public, in general, may believe that judges are beholden to the interests that campaigned on their behalf. Moreover, decisions made by judges in cases that affect their political supporters may be viewed as repayment for political support, even when the cases are correctly decided under the law.⁴⁴⁶

As the cost of judicial elections inevitably increases, candidates need to raise ever more money to fund their campaigns. It is unavoidable that if judicial candidates are required to raise money to become judges, they will be forced to seek money from individuals and groups who are interested in the courts’ activities. Some contributors may have an honest civic interest in creating fair and competent courts. Others may be interested in electing judges who will decide cases in ways that advance their interests. As long as contributions are necessary to win judicial elections, the incentives for unfairness caused by campaign

contributions—and attendant public perceptions that undermine public trust in the judiciary—will remain.

Interest group involvement in judicial campaigns adds fuel to the fire of politicized judicial elections and exacerbates the problems that issue-based campaigns create for a judicial system based on fairness and impartiality. By definition, interest groups assert influence to achieve their political goals. In the 1990s, interest groups throughout the country became active in judicial elections to shape the social, political, business, and environmental issues decided by the courts.⁴⁴⁷ As a result, supreme court elections in many states became increasingly contested and similar to other, nonjudicial elections.⁴⁴⁸

There has also been a consistent trend of increased spending by interest groups in judicial elections since the U.S. Supreme Court's ruling in *Citizens United v. Federal Election Commission*.⁴⁴⁹ That decision barred restrictions on independent spending by corporations and unions.⁴⁵⁰ In the 2015–2016 election cycle, outside spending in state supreme court races by interest groups—not including political parties—hit a record \$27.8 million, which was more than \$10 million higher than the previous 2011–2012 election cycle.⁴⁵¹ Because judicial offices are important and interest group involvement in judicial campaigns is constitutionally protected, it is safe to assume that interest group spending is here to stay and will continue to increase.

Independence The optimal amount of judicial independence in the American form of government has been thoroughly debated but never resolved.⁴⁵² During the formative years of the federal government, the dominant view considered judicial independence necessary to check potential abuses of government power and to “secure a steady, upright, and impartial administration of the laws” in the midst of mercurial popular opinion.⁴⁵³ Others were concerned, however, that unrestricted judicial independence could undermine representative democracy and allow unprincipled judicial decisions.⁴⁵⁴

The modern debate over judicial independence focuses on two main concerns—institutional independence and decisional independence.⁴⁵⁵ Institutional independence focuses on the ability of courts to perform the judiciary's functions without fear of retribution by the other branches of government or the population at large.⁴⁵⁶ Decisional independence is generally considered to mean the ability to decide cases on their merits without external influences impairing judicial impartiality.⁴⁵⁷

One of the principal purposes of the judiciary is to protect individuals from encroachments upon their rights by one of the other branches of government or the majority of the electorate.⁴⁵⁸ According to this view, judges are expected to make decisions that may be unpopular with the executive or legislative branches or the popular majority.⁴⁵⁹ Judges who are subject to reprisals for their decisions may be less likely to fulfill this judicial function.⁴⁶⁰

Partisan elections are not well-suited to fostering institutional independence from the electorate. Periodic voter approval directly threatens judges' willingness to make unpopular decisions.⁴⁶¹ When faced with a case involving a divisive political issue, such as the death penalty, gun control, education, or immigration, an elected judge may be reluctant to adopt the legally required result in light of a potentially negative public response,⁴⁶² or otherwise behave with “perfect equanimity.”⁴⁶³ This chilling effect on the neutral application of the law may be heightened when the judge is required to make such a decision shortly before an election.

The desired result of decisional independence is the impartial adjudication of disputes without preference for any party, attorney, or other interest. Consequently, decisional independence is intrinsically related to fairness. Judges influenced by interests unrelated to the merits of the case are more likely to produce unfair decisions.⁴⁶⁴ As with institutional independence, different judicial selection methods will impair decisional independence in different ways. Regardless of selection method, however, the impairment of decisional independence stems from the creation of incentives for unfairness. In the case of partisan elections, judges typically raise campaign funds from lawyers and other parties who have an interest in the business of the court. Additionally, successful candidates often require the support of various political interests, including political and social activists, political parties, and interest groups. In some circumstances, judges may campaign on certain issues to garner public support, creating another form of political constituency. Judges who aspire to be reelected may be inclined to consider the interests of their contributors, supporters, and constituencies when making decisions that relate to certain issues. These incentives for unfairness directly undermine a judge's decisional independence in a partisan-election system.⁴⁶⁵

Accountability Advocates of judicial selection by partisan election primarily cite accountability as the chief benefit of electing judges. Their assertion raises two questions: whether partisan elections effectively hold judges accountable for failing to perform their duties, and whether other, less problematic, mechanisms are available to provide accountability.

Partisan elections hold bad judges accountable only if the voting public is aware that they are bad judges. But voters are generally uninformed about the qualifications of candidates for judicial office.⁴⁶⁶ Voters may have access to some information about the competence of candidates, but the amount of information is limited and voters rarely consider that which is available.⁴⁶⁷ Just as voters are generally not able to compare the competence of candidates in an open election, they are often unable to determine whether an incumbent judge has competently performed his duties.⁴⁶⁸ This inability is exacerbated by issue-based campaign advertisements, which frequently highlight a single issue, decision, or category of decisions. Thus, partisan elections do not effectively ensure that only bad judges are removed from office and qualified judges are retained in office.

Moreover, there are other mechanisms that can be used to address judges who fail to competently perform their duties, engage in misconduct, or extend the law in a manner beyond their authority to do so. First, legal remedies available to parties, such as appeals and writs of mandamus, provide a means to correct wrongly decided cases. Additionally, institutions such as the Judicial Conduct Commission have authority to address judicial misconduct.⁴⁶⁹ However, the Commission typically prosecutes willful violations of the Texas Code of Judicial Conduct, as opposed to basic incompetence or inability to perform the duties of office by accurately applying the law.⁴⁷⁰ “Wrong” decisions by a judge are not misconduct, even if those decisions appear to fly in the face of the evidence or appear to be based upon perjured testimony, and even if the judge misapplies the law.⁴⁷¹ Appeal may be the only remedy for such a situation, or there may be no remedy.⁴⁷² However, when judges extend the law in an unpopular way, the legislature is empowered to modify the law consistent with the will of the popular majority.

Defenders of judicial elections contend, however, that the real value of partisan elections lies in the transfer of some decision-making power from government officials to voters.⁴⁷³ Voters have the power to choose the candidates they believe will be the best judges based on the criteria that matters to them.⁴⁷⁴ They can then hold judges accountable at reelection time.⁴⁷⁵ Based on a comparison of reelection rates of state supreme court justices and other statewide races, incumbent justices were reelected at the lowest rate, suggesting that partisan elections may provide an institutional mechanism to promote accountability.⁴⁷⁶

However, competent, well-qualified judges may be arbitrarily removed from office during partisan elections sweeps in Texas.⁴⁷⁷ The benefit of accountability in judicial selection by election is severely diluted when the same mechanism serves to destroy accountability in that there is no reward—through reelection—for judges who competently and fairly perform their duties of office. When factors unrelated to judicial competence or qualification, such as a high-profile senate race or partisan backlash to a presidency, dictate the outcome of elections and serve to sweep good judges out of office, then partisan elections serve as the antithesis of accountability. “[T]he truth is that this notion of accountability doesn’t work because the voters don’t know the judges and they can’t be expected to know the judges.”⁴⁷⁸

Evaluating Nonpartisan Elections

Nonpartisan elections were designed to remove the influences of party affiliation from judicial elections and, thus, promote greater voter consideration of candidate qualifications.⁴⁷⁹ Supporters argue that nonpartisan elections remove political considerations while ensuring the same judicial accountability as partisan elections.⁴⁸⁰ Many commentators conclude, however, that nonpartisan elections have all of the problems of partisan elections, but none of the promised benefits.⁴⁸¹

A nonpartisan election is one in which, if a primary is held, it is not for the purpose of selecting the candidate chosen from each political party. Instead, the top two candidates, regardless of party, advance to the general election. At both the primary and general elections, candidates are listed on the ballot without designating any party affiliation.⁴⁸² While a number of states use nonpartisan elections to select judges for all courts, many states use nonpartisan elections only at the lower court level.⁴⁸³

Notably, nonpartisan elections may have an inherent element of partisanship. For example, North Carolina’s Supreme Court elections are nonpartisan, but party affiliation is often obvious throughout the campaign process. Courts of appeal elections in North Carolina are similarly nonpartisan, but candidates are required to submit party affiliations or note that they are unaffiliated, to appear on the ballot.⁴⁸⁴

Two additional states have a nonpartisan electoral process that includes partisan elements. In Michigan, candidates for the Supreme Court are nominated at party conventions, but no partisan affiliation is listed by their names on the ballot.⁴⁸⁵ Judges of the Michigan appellate courts and circuit courts are selected in nonpartisan elections and are not nominated at conventions.⁴⁸⁶ In Ohio, candidates for both the Supreme Court and courts of appeals are chosen in partisan primary elections, but no party affiliation is listed with the candidates’ names on the general election ballot.⁴⁸⁷

This section of the paper evaluates nonpartisan elections as a method of electing judges to full terms of office. This section does not include an evaluation of nonpartisan retention elections, which are discussed in other sections of the paper.

Competence For the same reasons that apply to partisan elections, most voters in nonpartisan elections are not equipped to evaluate judicial competence. Nonpartisan elections provide voters with no additional information about the candidates and exclude a piece of potentially valuable information—party affiliation.⁴⁸⁸ Consequently, voters are even less informed about judicial races than in partisan-election states.

In all elections, those voters who are uninformed generally look to cues to make their selections.⁴⁸⁹ By removing party labels, voters in nonpartisan elections rely on other information for guidance.⁴⁹⁰ Studies show that the two most frequently used bases for voting in nonpartisan elections are incumbency and name recognition.⁴⁹¹ When these cues are absent, voters in nonpartisan elections tend to rely on name appeal, ethnic and religious associations with candidate names, gender, nickname, and ballot position.⁴⁹² As discussed in connection with partisan elections, these factors, other than incumbency, have no bearing on a candidate's competence.

Incumbency has the potential to provide some information to voters in evaluating judicial competence. In theory, a voter focused on incumbency instead of party affiliation may be more inclined to study whether the incumbent judge has performed his judicial duties to the voters' satisfaction. In general, however, nonpartisan judicial elections are usually less salient to voters and, consequently, voters are less likely to investigate a candidate's competence.⁴⁹³

Further, nonpartisan elections are not well suited to allow voters to impact judicial policy by voting for candidates based on perceptions of their political values. Voters in partisan elections can vote based on party label, which may allow some degree of indirect influence over judicial policy.⁴⁹⁴

Fairness Nonpartisan elections do not necessarily reduce a candidate's need to seek campaign funds or minimize the increasing politicization of elections and influence of interest groups. In fact, some commentators suggest that nonpartisan elections increase the cost of elections and politicization of campaigns.⁴⁹⁵

The need to raise money in nonpartisan elections is likely no less than the need in partisan elections.⁴⁹⁶ Some contend that candidates are required to spend even more money to generate name recognition because they cannot rely on party-label voting.⁴⁹⁷ For example, in the 2000 elections, four of the states that set campaign spending records selected judges through nonpartisan elections.⁴⁹⁸

Without the fundraising and campaign support that comes with running under a party label, candidates more frequently seek campaign contributions from attorneys and parties with matters before the court.⁴⁹⁹ Consequently, many believe that attorneys, who may contribute the majority of campaign funds, have greater influence over courts in nonpartisan election states.⁵⁰⁰ Others contend that nonpartisan elections also increase the influence of special interest groups.⁵⁰¹

Moreover, nonpartisan elections have the potential of concentrating influence in a smaller group of significant contributors. Although designed to reduce the influence of

politics in judicial elections, commentators continue to observe the trend of nonpartisan elections becoming increasingly politicized.⁵⁰² Judicial elections in Oregon provide a good example of this trend. Oregon initially selected judges by partisan elections.⁵⁰³ In 1930, six of the seven Oregon Supreme Court justices were Republicans allegedly elected as part of “powerful and undemocratic political machines.”⁵⁰⁴ In 1931, the Legislature replaced partisan elections with nonpartisan elections, requiring that candidates’ names be printed on the ballot without any party designation.⁵⁰⁵ Judicial campaigns between the 1930s and 1950s in Oregon were largely apolitical.⁵⁰⁶ Candidates campaigned on their legal backgrounds and history of public service, and election results were largely influenced by bar poll results.⁵⁰⁷

Then in the 1970s, judicial candidates in Oregon started to discuss political issues beyond the legal background and experience of themselves and their opponents. In 1970, an incumbent justice was defeated for the first time since 1932.⁵⁰⁸ The challenger ran a “law and order” campaign and suggested that the incumbent was soft on crime.⁵⁰⁹ Oregon judicial elections became more politicized in the 1990s as the volume of issue-based rhetoric in judicial campaigns increased and became more specific. In an example of issue-based campaigning in 1998, a judicial candidate claimed he would be tough on crime, and based on his conservative legal background, would bring a business perspective to the court.⁵¹⁰ During his campaign, the candidate criticized the Supreme Court for a decision that freed a death row inmate on constitutional grounds.⁵¹¹ The candidate also had the public and sometimes televised support of interest groups such as Crime Victims United, Oregon Homeowners Association, Oregon Family Farm Association, and Oregon Association of Small Business.⁵¹²

Other states that employ nonpartisan elections to select judges have also seen an increase in issue-based campaigns that frequently focus on divisive political and social issues or on a single controversial decision of an incumbent.⁵¹³ Several issue-based advertisements in Michigan focused on candidates’ views on crime and punishment.⁵¹⁴ An attack ad against three Michigan judges criticized Republican allegiance to “big corporations and insurance companies,” which both commented on the candidates’ purported views and signaled their party affiliation.⁵¹⁵ Some candidates expressed their belief in “family values” and commented on other social issues.⁵¹⁶

In short, the trend in nonpartisan campaigns and elections has tracked that of partisan elections. Despite the absence of party labels on the ballot, these elections have become ever more politicized and costly, and subject to the same troublesome dynamics as partisan elections.

Independence Commentators also recognize that nonpartisan elections may not be better suited than partisan elections to ensure institutional or decisional independence.⁵¹⁷ Judges under this system are equally subject to periodic voter approval, which is likely to threaten judicial willingness to make unpopular decisions.⁵¹⁸

On the other hand, judges selected in nonpartisan elections are equally independent of other branches of government as those selected in partisan elections. Moreover, the challenges to decisional independence associated with partisan elections apply equally to nonpartisan elections. Judges in both systems are subject to decision-influencing pressures from interests unrelated to the merits of the cases they adjudicate.

Commentators differ on the relative campaign costs in partisan and nonpartisan judicial elections. Some commentators assert that nonpartisan elections are preferable to partisan elections, in part because they do not generally attract as much funding, with one commentator noting that between the years of 2000 and 2009, campaign fundraising was three times greater in states with partisan elections than in nonpartisan elections.⁵¹⁹ Lower campaign fundraising figures may equate to less influence by interest groups and lawyers who contribute to judicial campaigns.⁵²⁰ In contrast, it is argued that candidates in nonpartisan elections may have a need to raise even more money than candidates in partisan elections to generate name recognition in the absence of party affiliation or party-label cues listed on the ballot.⁵²¹ Further, some argue that in states with nonpartisan election systems, interest groups and other organizations can more easily shape voter perception of a judicial candidate by publicizing specific or isolated rulings.⁵²²

Accountability As compared to an appointive system, a nonpartisan election system offers more direct accountability to the public since it allows voters to reject incumbent judges or judicial candidates. However, some commentators assert that nonpartisan elections are arguably less able than partisan elections to provide meaningful accountability.⁵²³ Because nonpartisan elections are designed to eliminate expressions of a candidate's party affiliation, they are less capable of allowing voters to indirectly shape judicial policy by party-based voting.⁵²⁴

As previously discussed, even nonpartisan elections may have distinct elements of partisanship.⁵²⁵ If party affiliation is obvious throughout the campaign process, then nonpartisan elections may offer the same level of accountability that partisan elections do. If candidates are nominated at a party convention in states like Michigan, this same reasoning may hold true.⁵²⁶ However, this type of accountability is more to ideological interests and the candidate's political party than to the electorate at large. No commentators dispute that an elective model, whether it be partisan, nonpartisan, or retention,⁵²⁷ offers more direct accountability to voters who actually take part in judicial elections.

Evaluating Gubernatorial Appointment

Executive appointment has been a standard method of selecting judges for more than two hundred years.⁵²⁸ At the time of the founding of the country, the federal government and all of the states selected their judges via either executive or legislative appointment or a combination of the two.⁵²⁹ Moreover, the results of appointive selection are widespread because nearly every state that elects judges also provides for gubernatorial appointment to fill interim vacancies on the bench.⁵³⁰ In some states that select the judiciary through elections, judges often step down before the end of their terms to provide the governor's office with an appointment opportunity.⁵³¹ Consequently, many state judges serving today in elective jurisdictions first came to office via gubernatorial appointment. For example, although Minnesota, North Dakota, and Georgia utilize nonpartisan elections, all of their current high court justices were initially appointed to the bench to fill interim vacancies.⁵³² Many Texas Supreme Court justices were initially appointed to the bench.⁵³³

No commentators have suggested that judges appointed by a governor are categorically less fair or less trusted by the public. Indeed, some contend that appointed judges are

far preferable in those categories.⁵³⁴ Other commentators assert that appointed judges are substantially more independent from pressure to acquiesce to the majority will, particularly when deciding difficult cases involving politically divisive issues. There is also general agreement that appointment for a *limited* term allows for a degree of accountability. Finally, courts with appointed judges generally enjoy more public trust and confidence, precisely because these judges are not subject to the incentives for—and perceptions of—unfairness that are generated by an election process.⁵³⁵

Currently, six states—California, Maine, Maryland, Massachusetts, New Hampshire, and New Jersey—select judges for their highest courts through a gubernatorial appointment process wherein the governor makes the initial selection of nominees, and a committee may be used to assist the governor during the initial screening process in a nonbinding fashion. Although California makes use of retention elections (thereby making it fall within the Missouri Plan model), California’s Governor does the front-end vetting of judicial candidates and creates a list of nominees for appointment to the courts of appeal and Supreme Court, after which a state bar commission reviews the Governor’s choices, and a three-member panel votes to confirm them.⁵³⁶ The commission reviews candidates after the Governor has nominated them and, at the end of twelve-year terms, California judges stand for retention elections to keep their seats.⁵³⁷

In Maine, the Governor chooses nominees but also establishes by executive order a fourteen-member judicial selection committee to “advise [him] about matters related to judicial appointments and recommend candidates to fill vacancies.”⁵³⁸ When a judicial vacancy occurs, the Governor nominates a candidate to fill the vacancy and the Legislature’s joint standing committee on the judiciary recommends by majority vote that the nominee be confirmed or denied, after which time the committee’s recommendation is reviewed by the Senate and becomes final unless two-thirds of the Senate votes to override the recommendation.⁵³⁹

In Maryland, the state constitution grants the Governor the sole power to choose judicial nominees, subject to majority confirmation by the state Senate. However, since the 1970s, Maryland governors have issued executive orders establishing an appellate court judicial nominating commission to supply nonbinding vetting and recommendations regarding potential nominees.⁵⁴⁰ The Commission submits a list of three potential nominees, and the Governor may request additional candidates.⁵⁴¹

Since the 1970s, the governors of Massachusetts have issued executive orders establishing the creation of formal judicial nominating commissions, which vet potential candidates and supply the Governor with nonbinding lists of potential nominees for all vacancies on the trial and appellate court level.⁵⁴² As for appointments to Massachusetts’s Supreme Judicial Court, however, the Governor is guided only by the informal advice of the State Bar’s Committee on Judicial Appointments, although gubernatorial appointees to all courts are subject to confirmation by the state’s Governor’s Council.⁵⁴³ The movement away from utilizing the commission for the high court apparently was due to the Governor’s Council’s concerns that the commission was usurping its constitutionally authorized role in the selection process.⁵⁴⁴

New Jersey has two appellate courts—the Supreme Court and the Appellate Division of the Superior Court—and three trial courts: the Superior Court, the Tax Court, and the Municipal Court.⁵⁴⁵ The Governor chooses all judges in New Jersey (with nonbinding assistance from a judicial advisory panel created by executive order) with the approval of the Senate.⁵⁴⁶ Judges in New Jersey stand for reappointment after seven years in office, and once reappointed, they serve until the age of seventy.⁵⁴⁷

The New Jersey model of gubernatorial appointment has two interesting features. The first is the practice of senatorial courtesy, whereby senators have veto-like powers over judicial appointees from their home districts.⁵⁴⁸ As a professional courtesy, other senators will not proceed with confirmation of a judicial candidate unless the senator from the candidate's home district has approved.⁵⁴⁹ In 1994, the rules of reappointment changed so that the Senate Judiciary Committee could proceed with the reappointment of a judge without receiving approval of the home senator.⁵⁵⁰ The second interesting feature is that New Jersey judgeships also have a tradition of political balance. Governors, regardless of their party affiliation, have generally followed a policy of replacing outgoing judges with someone of the same party.⁵⁵¹ On the Supreme Court, the traditional balance is three Democrats and three Republicans, with the Chief Justice belonging to the party of the appointing governor.⁵⁵²

As previously discussed, many states employ gubernatorial appointment to fill interim vacancies. This section of the paper, however, evaluates judicial selection by gubernatorial appointment for full terms of office, not interim vacancies.

Competence Studies measuring the relative competence of appointed judges typically include the screening effect of nominating commissions, since most gubernatorial-appointment states use a judicial nominating commission in some fashion to assist the governor. Consequently, there is little data to evaluate the competence of judges appointed without the involvement of a formal nominating commission. However, most commentators agree that appointment of judges by the executive branch involves a much more thorough review of the background and record of candidates than a partisan-election system, where voters often choose candidates on the basis of party label alone. Implicit in the conclusions of commentators who support gubernatorial appointment is the concept that voters should be able to trust their highest-elected state official to act as their representative in screening and appointing qualified judicial candidates to these positions.

One obvious advantage of appointive models of judicial selection is the amount of information that potential appointees can be required to disclose regarding their qualifications and personal history. The gubernatorial-appointment states often publish standardized application forms to be completed by potential nominees and submitted either to the governor's office or to that state's judicial nominating committee. These applications delve deeply into a potential appointee's education, prior legal experience, prior judicial experience, health, finances, conduct, publications, awards, references, public and community service, and potential conflicts of interest.⁵⁵³ While certain states employ a universal application form applicable to all judgeships, others utilize differing applications specific to the type of court involved. Some states, like Connecticut, require the submission of multiple documents, including an application for judicial appointment; a financial affida-

vit stating annual income and expenses, as well as net assets and liabilities; and numerous other accompanying documents, including a resume, a medical release authorizing disclosure by a personal physician, a general release permitting review of all professional grievances filed, and copies of last-filed state tax returns.⁵⁵⁴ In New York, a party seeking judicial appointment to certain courts must submit no less than three applications: the first to the Governor’s Screening Board⁵⁵⁵ and two additional applications—one short and one long—to the Commission on Judicial Nomination.⁵⁵⁶

Governors may also consider a variety of political factors in appointing judges.⁵⁵⁷ This aspect of the appointment process may be exacerbated by the increasing politicization of the judiciary.⁵⁵⁸ Consequently, some commentators assert that appointments may be based on political considerations in addition to the candidate’s competence or experience.⁵⁵⁹ Governors, as elected officials, may consider the input of interest groups, campaign contributors, and the public when appointing judges. Governors might also consider the wishes of the Legislature or local governments.

The question of what characteristics ensure judicial competence would likely never be answered to everyone’s satisfaction.⁵⁶⁰ Nevertheless, judges are professionals with some standard elements in their job descriptions, which vary depending on their jurisdiction and level of court.⁵⁶¹ Judges must resolve disputes in all types of cases—family law cases, criminal cases, tort cases, to name only a few—and move those cases along expeditiously within the parameters of the overarching state justice system.⁵⁶² In contrast to lawyers tasked with zealously representing their clients, judges should be a societal model of impartiality.⁵⁶³ Assessing these characteristics is undeniably easier in an appointive system requiring prospective judges to fully disclose their background, experience, and record. Notably, some states that elect judges—including Texas—require an extensive application, criminal background check, and a medical exam or attestation of good health from candidates applying for appointment to interim judicial vacancies.⁵⁶⁴ Consequently, commentators assert that one of the main reasons to support the appointment of judges is that governors are able to make judicial selections after a more thorough study of the background and record of candidates, in contrast to the very limited information available to voters.⁵⁶⁵

Fairness Any system of selecting judges that involves a limited term of office may generate allegiances between the selector and the judge.⁵⁶⁶ In that sense, both electing and appointing judges contain incentives for unfairness, although the nature of the specific incentives may differ.

Studies concerning the relationship between appointment and judicial fairness usually include the effect of nominating commissions. While the political realities of appointment suggest that appointed judges may also have incentives for unfairness, this is likely to a much lesser degree than elected judges. The incorporation of a nominating commission as part of a gubernatorial appointment system has the potential of reducing the pressure on judges to consider external influences in decision-making.

It also may be likely that elected judges will have a greater number of potentially influential relationships than appointed judges. For example, an elected judge is likely to have many contributors and political supporters. This has the effect of increasing the number of sources of influence, but at the same time may dilute the power of any one influencer.

With an appointed judge, however, these external influences may be more concentrated in fewer people with proportionately greater individual influence. Some commentators therefore assert that appointing judges arguably exchanges one set of incentives for unfairness for another.⁵⁶⁷

Regardless, many commentators assert that the best way to ensure unbiased and fair rulings by judges is by establishing gubernatorial appointment, assisted in some fashion by a judicial nominating commission, as the standard method of judicial selection.⁵⁶⁸ There are many more states that have chosen an appointment process instead of partisan elections to select judges.⁵⁶⁹

Independence Proponents of judicial appointment contend it is the best system to promote an independent judiciary.⁵⁷⁰ An appointed judge would not be directly dependent on the prevailing popular opinion as an elected judge. Granting “life” tenure—as a small number of states do—would arguably maximize independence, but may minimize accountability.⁵⁷¹ Conversely, an appointed judge with a limited term of office is subject to the indirect control of the public. If confirmation is a feature of the appointment process, the judge may be dependent on the legislative branch of government to some degree and may be dependent on the governor for future reappointment.⁵⁷² However, the independence of appointed judges is arguably greater than a judge forced to participate in campaign-driven political elections.⁵⁷³

Commentators generally conclude that appointing judges for longer terms is the best method of improving independence from popular opinion and other branches of government.⁵⁷⁴ Similarly, the use of a nominating commission may increase the likelihood of selecting a more independent judiciary, depending on the role of the commission in the process.⁵⁷⁵ The appropriate length for judicial terms is a matter of opinion. Although life tenure, or tenure to age seventy, mirrors the federal model, most states judges are appointed to relatively short terms by comparison.⁵⁷⁶ Longer terms permit judges to focus efforts on their judicial duties and may reduce the influence of political forces within the judicial selection process. Further, lengthy terms provide the public with a greater opportunity to assess the record of a particular judge.

Accountability While appointed judges are not subject to direct public accountability, voters still have a degree of control over the judiciary through their influence on the governor.⁵⁷⁷ While this influence may not create the same degree of accountability as direct election of judges, in that the public’s dissatisfaction with any particular judicial appointment may not be so great as to determine the outcome of a subsequent gubernatorial election, the electorate arguably will pay attention to the overall quality of judges appointed by a sitting governor. Further, the appointment of a controversial or unqualified judge is likely to draw more attention and public input through an appointment process than an elective process. Voters will be more knowledgeable about gubernatorial races and will vote in greater numbers than in judicial races, and a governor who makes bad judicial appointments can be held accountable at the ballot box. Also, voters can hold a governor accountable at election time for any judicial appointments that are not reflective of the representational responsibility of the executive branch.⁵⁷⁸

Insulating judges from the ugly politics of judicial elections and putting them in office through an appointment process also serves to improve the public's trust and confidence in the judiciary.⁵⁷⁹ As discussed earlier, the general public, lawyers, and even judges believe that campaign contributions may improperly affect judicial decision-making.⁵⁸⁰ This perception has the potential to create mistrust in the legitimacy of the judiciary and specific decisions, particularly if the winning side in a case was a contributor to the judge's campaign. Appointed judges have no need to state their personal values or describe themselves as "tough on crime" or "pro-business" or "social justice warriors" to curry favor with the voting public. Consequently, the public is likely to have greater confidence that an appointed judge would be a neutral arbiter of the law. Some contend, however, that judges will apply their own values in every case and that elections at least allow some public awareness of what values a judge might bring into court.⁵⁸¹

Some commentators assert that judges who are appointed by governors reflect the political preferences of the electorate better than any other system.⁵⁸² In particular, it has been asserted that a commission system, wherein the commission has binding control over which judge is appointed, does not represent the citizenry, especially if the commission is primarily composed of lawyers⁵⁸³ because the lawyers' interests and ideology are not reflective of the broader public.⁵⁸⁴

Legislative Confirmation The value of requiring some type of legislative confirmation of gubernatorial nominees has long been recognized. Foremost among the advantages of requiring confirmation is that the legislative branch serves as a check on the appointing authority.⁵⁸⁵ The possibility that a governor would select a candidate based solely on local prejudices, personal or political connection, or public popularity diminishes if the candidate must be approved by a representative body.⁵⁸⁶ Moreover, the mere possibility that a judicial nominee will be publicly rejected in a confirmation vote provides governors with an obvious incentive to put forth qualified candidates, if only to avoid damage to their own prestige. In other words, the appointing authority would be unlikely to risk the political fallout that could follow the nomination of candidates who possessed "the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."⁵⁸⁷ For these reasons, requiring confirmation of gubernatorial appointees is generally viewed as enhancing the judicial selection process.

Evaluating Legislative Appointment

There are only two states—South Carolina and Virginia—whose legislatures are responsible for selecting judges.⁵⁸⁸ Because this system is not a prevalent one, our discussion of it will be limited.

In South Carolina, the Legislature has selected judges throughout its history. In the 1990s, the system's detractors argued that it promoted "inbreeding" because many of the Supreme Court and circuit court judges had served in the Legislature before taking the bench.⁵⁸⁹ Detractors also noted that there was no objective body to evaluate the qualifications of judicial candidates, and thus the Legislature lacked external guidance in casting votes.⁵⁹⁰ South Carolina voters approved a constitutional amendment in 1996 that created a judicial merit selection commission.⁵⁹¹ The commission considers the qualifications and

candidates and submits the names of up to three nominees to the General Assembly, which must elect one of the nominees.⁵⁹²

In Virginia, the judicial selection process begins when a vacancy occurs or when a new judgeship is created by the General Assembly.⁵⁹³ The names of candidates are submitted by General Assembly members to the House and Senate Committees for Courts of Justice.⁵⁹⁴ These committees then determine whether or not each individual is qualified for the judgeship sought.⁵⁹⁵ The committee hearings are open to the public and the public is given an opportunity to appear before the committees.⁵⁹⁶ Following the committees' determination of qualification, a report listing qualified candidates is made to each house. The two houses then vote separately, and the candidate receiving the most votes in each house is elected to the vacant judgeship or new seat.⁵⁹⁷ Incumbent judges standing for election to a subsequent term must go through the same process. This legislative "election" does not require action by the Governor. However, during months when the Legislature is not in session, the Governor has the power to fill judicial vacancies that occur in the appellate courts and the circuit courts, and the circuit courts can appoint district judges to fill those vacancies.⁵⁹⁸ These pro tempore appointees are subject to legislative election at the next session of the General Assembly following the appointment.⁵⁹⁹

Competence In the same way that governors may be likely to consider a variety of political factors in appointing judges, so may legislatures.⁶⁰⁰ Similarly, this aspect of the appointment process is also likely exacerbated by the increasing politicization of the judiciary.⁶⁰¹ Consequently, many commentators conclude that legislative appointments are often based on political considerations in addition to the candidate's competence or experience.⁶⁰²

Fairness If the judiciary is composed primarily of former legislators, both the actual and perceived separation of the different branches of government could be questioned. The incentives for unfairness may be greater, but perhaps to a lesser degree than elected judges.

Both South Carolina and Virginia employ committees in different ways to attenuate the influence of the selectors during the selection process.⁶⁰³ However, as in Virginia where members of the Legislature submit names of candidates, the potential exists for allegiances between legislators and their chosen candidates.⁶⁰⁴

Independence Proponents of judicial appointment contend it is better than an elective system to ensure an independent judiciary.⁶⁰⁵ An appointed judge would not be as directly dependent on popular opinion as an elected judge. The most obvious concern relating to independence would be decisional independence in cases involving a difficult or divisive political issue involving the members of the legislature, or the pertinent committee thereof, charged with selecting judges. However, state judicial canons of conduct governing conflicts and recusal serve to mitigate this concern.

Accountability Appointed judges are not subject to direct voter accountability. However, voters will have some degree of control over the judiciary through their elected officials in the legislature.⁶⁰⁶ The appointment of certain judicial candidates by the legislature might draw more attention and public input through an appointment process than an elective process if the nominated candidate were controversial. In the same way, voters can hold their elected officials accountable at the ballot box for disfavored or unqualified judicial appointments made.⁶⁰⁷

Evaluating the Missouri Plan

The American Judicature Society, organized in 1913, adopted judicial selection reform as one of its founding objectives and offered a series of proposals for ensuring that experts, rather than voters, would be responsible for selecting judges.⁶⁰⁸ While the society's initial proposals called for the appointment of judges by an elected chief justice, over time the preferred reform became what is still called "merit selection."⁶⁰⁹ The merit-selection system—referred to as the Missouri Plan—employs a bipartisan commission to screen and nominate judicial candidates to the governor for appointment. After nomination and appointment, the judges are then subject to a retention election or some other means of confirmation by legislative or popular endorsement. Merit selection was endorsed by the American Bar Association in 1937, prompting several bar associations to study and propose merit selection in their own jurisdictions.⁶¹⁰

No two states have adopted merit selection in quite the same way. Some states use senate confirmation after appointment based on commission nominations. Some states use retention elections, and some do not. Some nominating commissions are populated by lawyers while others focus on broader public representation. As discussed, the methods of selecting nominating commission members also vary greatly.

Judicial nominating commissions are an integral part of the Missouri Plan.⁶¹¹ Commissions typically submit a list of nominees to the governor for each vacancy, and the governor usually must appoint one of those nominees.⁶¹² The commissions were established by executive order in some states and by constitutional amendment or statute in others, and the governor may or may not be bound to select an appointee from the list of nominees.⁶¹³ Finally, several states with different selection systems for different courts use nominating commissions to select appellate court judges but elections to choose at least some trial court judges.⁶¹⁴

The use of judicial nominating commissions has become a prevalent feature of the selection of judges in the United States. Even states that elect judges may employ commissions to assist the governor in filling interim vacancies on the bench.⁶¹⁵ Among the states, thirty-nine jurisdictions use one or more judicial nominating commissions in some manner.⁶¹⁶

Many commentators, including Justice Sandra Day O'Connor, conclude that the merit selection of judges has many advantages. The most noted advantage is the removal of partisan politics from the selection of judges. By eliminating the many unseemly influences inherent in a partisan election system, merit selection frees judges to render impartial decisions without any appearance of impropriety, resulting in enhanced public trust and confidence.⁶¹⁷

The most common criticism of the Missouri Plan is that it deprives the public of the right to vote for judges and the concomitant accountability to the electorate. Proponents of merit selection respond that judicial elections may not provide true accountability when political parties influence the selection process and the voting public has very few cues other than partisan labels upon which to base their vote.⁶¹⁸

By the time of the fiftieth anniversary of Missouri's adoption of merit selection, thirty-three states and the District of Columbia were using merit selection for at least some

courts. Today, thirty-nine states use some version of this model by utilizing judicial nominating commissions in some form or fashion.⁶¹⁹ The focus of this section of the paper is on the Missouri Plan, with an emphasis on the integral role of nominating commissions.

Competence It is asserted that the selection of judges through nominating commissions will result in a more qualified and competent judiciary. The Governor of Massachusetts previously asserted that the highest quality judges can be identified through a nonpartisan, nonpolitical nominating commission.⁶²⁰ Similar statements support the establishment of commissions in other states.⁶²¹

Proponents of the commission system claim that it leads to a more qualified judiciary because of the direct involvement of attorney commissioners, although, as noted below, excessive attorney involvement (sometimes to the point of “capture” by some attorneys) also is the primary criticism of commissions. A typical commission includes both attorney members and those drawn from the general public.⁶²² It is argued that attorney members are “best equipped to evaluate the qualifications of potential judges.”⁶²³ Attorneys may be able to contribute an understanding of legal experience and competence, as well as insights regarding particular candidates and judicial qualities. In addition to this particularized knowledge, attorneys usually have a strong professional interest in the selection process.⁶²⁴

Finally, many nominating commissions actively solicit potential candidates for judicial office, which arguably results in a larger pool of qualified individuals from which to draw. The perception exists that qualified individuals might not otherwise be considered by the appointing authority.⁶²⁵ It follows that a search for a larger number of qualified applicants may be facilitated by the efforts of multiple commissions.

Any assessment of judicial qualities is complicated by the intangible nature of those qualities, which makes them difficult to quantitatively measure.⁶²⁶ Among the qualities identified and investigated by nominating commissions are temperament, sobriety, health, professional reputation, patience, impartiality, and courteousness.⁶²⁷ As one commentator noted, these qualities are “vague and imprecise.”⁶²⁸ Even though these characteristics may serve to reveal the intrinsic and individual qualities of judges, they cannot always objectively be proven.⁶²⁹

Commentators also note that many judges must, at some point in their careers, participate in an election.⁶³⁰ Consequently, some scholars argue that pitting the qualifications of elected judges against commission-nominated judges sets up a false dichotomy.⁶³¹ Many judges who are elected were originally nominated and appointed through a merit-based system and there are respected jurists who came to the bench via election.

Fairness One advantage of the Missouri Plan is the elimination of campaign funding. The need for campaign funding in elections, the increased politicization of judicial elections, and the various restrictions implemented by states on campaign conduct create numerous problems for judicial candidates, as discussed in earlier sections of this paper.⁶³²

Several commentators also assert that appointment may actually increase diversity on the bench⁶³³ since it focuses more on qualifications than on political alliances, thus permitting nontraditional candidates for the bench to stand on their own achievements.⁶³⁴ However, some scholars assert that the Missouri Plan, with its emphasis on selection of judicial nominees by a commission, does not screen well for ideology and therefore does

not represent the electorate through representational democracy as well as gubernatorial or legislative appointment.⁶³⁵ This is attributed to the fact that commissions are generally composed primarily of lawyers or other “experts” who have different interests or ideology than the public at large.⁶³⁶

Independence One of the most common justifications for the use of nominating commissions is that judges selected through such commissions will be more independent than elected judges. This independence stems from partisan balance on the commission and freedom from political pressure from the electorate or other appointive authority.

The use of nominating commissions represents “an attempt to reduce or eliminate the influence of partisan politics in the selection of judges.”⁶³⁷ Many states with nominating commissions have adopted provisions demonstrating that the reduction of partisan influence is a common goal of commission systems.⁶³⁸ Some states forbid commission members from holding any official position in a political party, and others provide that members must be selected on a nonpartisan basis, that commissions should nominate candidates for judicial office without regard to political affiliation, or both.⁶³⁹ Moreover, several states have adopted specific requirements regarding the representation of political parties on commissions.⁶⁴⁰ Several states also require commission members to take an oath of office disavowing any partisan influence in the nomination process.⁶⁴¹

Another aspect of judicial independence that may arise from the use of nominating commissions is independence from the governor or other appointing authority. One commentator asserted that the historical purpose of commissions has been to constrain the governor’s choice in appointing judges.⁶⁴² Another observer remarked that merit selection is intended to “deprive the executive of the opportunity to make judicial appointments solely on the basis of his political motivations.”⁶⁴³ Without the check of a nominating commission or legislative consent, the appointing authority could use judicial appointment as a reward for personal or political considerations.⁶⁴⁴

While these studies support the claim that nominating commissions enhance the independence of the judiciary, others reach contrary conclusions. Some commentators believe appointment systems tend to replace electoral politics with a “somewhat subterranean” set of state bar politics.⁶⁴⁵ Even proponents of appointment selection recognize the risk of lawyer control—the rule of capture—inherent in nominating commission members selected, at least in part, by state bar associations.⁶⁴⁶

In sum, these findings and assertions suggest that the use of nominating commissions likely results in the selection of a more independent judiciary, depending on the composition of the commission. A commission structure incorporating features adopted by states that report nonpartisan results from their nominating commissions and avoiding undesirable features of commissions in other states would maximize the ability of a particular commission to contribute to a judiciary independent of both partisan politics and the appointing authority. Equalizing as nearly as possible the partisan balance of the commission and adopting a method of selecting commission members that does not rely too heavily on the ultimate appointing authority or on attorneys are examples of how to achieve these goals.

Accountability Proponents of nominating commissions assert that commissions increase both public participation in the judicial selection process and trust in the justice system as

a whole. Almost all commissions include members drawn from the general public, often in numbers substantially equal to the number of attorney members on the commission.⁶⁴⁷ Moreover, the creation of a dialogue between commissions and the public is supposed to facilitate confidence in the selection process and in the judiciary. Commissions may be required to inform the public concerning vacancies, to conduct public hearings, and to solicit information from the public through news releases and other communications.⁶⁴⁸ Nominating commissions provide a method for more meaningful public participation in the process because commission members drawn from the general public are a common feature of commissions, and those members have access to large amounts of information about judicial candidates' qualifications that average voters would not be able to obtain.⁶⁴⁹

The Use and Effect of Retention Elections Under the Missouri Plan, an appointed judge must stand for a retention election after an initial appointment and often at the end of a term of office to allow voters to decide whether the judge should remain in office for another full term.⁶⁵⁰ Retention elections are usually conducted on a nonpartisan, unopposed basis.⁶⁵¹ Such elections are the result of a practical compromise between the goals of judicial independence and public accountability.⁶⁵² The use of a selection system combining initial appointment from candidates nominated by a commission and retention elections is intended to select quality judges, maintain their independence by insulating them from political influence, and provide public accountability through a mechanism for removal.⁶⁵³

Commentators assert that retention elections may be subject to some of the same criticisms directed at partisan and nonpartisan judicial elections.⁶⁵⁴ First, voters have no greater information about judges running for retention than they do about candidates in nonpartisan elections because of a lack of party cues on which to base their vote.⁶⁵⁵ Moreover, because a judge has no opponent in a retention election, voters have no ability to compare and contrast candidates.⁶⁵⁶ Because voter interest in retention elections is usually low, nearly all judges on the ballot receive the same numbers of votes for retention, and judges are rarely voted out of office.⁶⁵⁷ For these reasons, critics contend that retention elections may produce very little actual accountability. Finally, retention elections could manifest the same problems as partisan elections by becoming issue-based or serving as a vehicle for an ambush opposition campaign, which could force judges to raise money to retain their seats.⁶⁵⁸

However, in an appointive judicial selection system, retention elections are still a sound method for building in some measure of accountability to the voting public. Retention elections allow voters to decide whether an incumbent judge should remain in office for another term. Six states—Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming—utilize retention elections for all levels of their courts.⁶⁵⁹ Another ten states—Arizona, California, Florida, Indiana, Kansas, Maryland, Missouri, Oklahoma, South Dakota, and Tennessee—use retention elections for their appellate courts.⁶⁶⁰ Given the consistent use of retention elections by other states and by the generally nonpartisan and low-profile nature of such elections, the overall potential for eroding fairness, trust, and independence is considerably lower than with partisan elections.

The O'Connor Variant As previously discussed, former United States Supreme Court Justice Sandra Day O'Connor helped create the O'Connor Judicial Selection Plan, which is a variation of the Missouri Plan.⁶⁶¹ An element of the plan involves a method for judicial perfor-

mance evaluation, yielding information to be disseminated to voters to use when deciding whether to retain a judge in office.⁶⁶² In this way, the O'Connor Plan seeks to balance judicial independence against accountability. By giving voters relevant and impartial information upon which to base the retention decision, the plan attempts to create a better accountability model. At the same time, the O'Connor Plan stresses that retention elections should be conducted without fundraising or political efforts by the incumbent judge, thus preventing the judge from being exposed to influences that naturally tend to reduce judicial independence, or at least the appearance of independence.

PART V: CONCLUSION

One of the most frequently quoted comments about judicial selection reform is still apt: “Judicial reform is not for the short-winded.”⁶⁶³ This has proven true in Texas, as the debate over the best method for selecting Texas’s judges began when Texas gained its independence in 1836 and continues to this day.

Texas is among a small minority of states that employs partisan elections to select all of its judges. As numerous studies conclude, however, Texas voters have very little information about the judicial candidates listed on election ballots. As a consequence, Texas voters make decisions that are largely uninformed about the qualifications of the candidates. Indeed, their decisions are largely based on information having nothing to do with qualifications, like the candidate’s name, party affiliation, or ballot position. As demonstrated repeatedly in Texas, the partisan-election system results in judicial sweeps and upheaval in the courts, which in turn impact the fair and efficient administration of justice.

Many state leaders, former Texas Supreme Court chief justices, and respected scholars have voiced their strong opinions that the partisan election model of selecting judges in Texas should be changed to a merit-based selection system. This paper does not advocate for any specific selection model, but the inescapable conclusion drawn from the data and scholarly research summarized herein is that a partisan election system suffers from significant and incurable flaws. Thus, while judicial selection reform may be difficult to achieve, creating a system that protects the professionalism of judges and the stability of the court system should be a high priority for the people of Texas and their representatives.⁶⁶⁴

ENDNOTES

- 1 Abraham Lincoln, THE PERPETUATIONS OF OUR POLITICAL INSTITUTIONS, available at <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm> (last visited Aug. 15, 2019).
- 2 Nathan L. Hecht, The State of the Judiciary in Texas: An Address to the 86th Texas Legislature (Feb. 6, 2019), available at <http://www.txcourts.gov/media/1443500/soj2019.pdf> (last visited Aug. 15, 2019).
- 3 Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 2 (1995) (noting "[t]he debate over selection and tenure of judges has been ongoing since shortly after the founding of our nation.").
- 4 See John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 350 (1988).
- 5 *Id.* at 351-56.
- 6 Daniel Becker & Malia Reddick, *Judicial Selection Reform: Examples From Six States*, AM. JUDICATURE Soc'y, 5-6 (2003), available at http://www.judicialselection.com/uploads/Documents/jsreform_1185395742450.pdf (last visited Aug. 15, 2019).
- 7 *Id.* at 8.
- 8 Tex. S.B. 129, 77th Leg. R.S. (2001).
- 9 Tex. S.B. 794, 78th Leg. R.S. (2003); Tex. S.B. 553, 79th Leg. R.S. (2005).
- 10 Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas As a Case Study*, 29 FORDHAM URB. L. J. 907, 932-34 (2002).
- 11 See Mark P. Jones, *The Selection of Judges in Texas: Analysis of the Current System and of The Principal Reform Options*, BAKER INST. FOR PUB. POL'Y (2017), available at <https://www.bakerinstitute.org/media/files/files/b38e1ecc/POLI-pub-TexasJudges-011317.pdf> (last visited Aug. 15, 2019).
- 12 See Andrew Cohen, "A Broken System": Texas's Former Chief Justice Condemns Judicial Elections, THE ATLANTIC (Oct. 28, 2013), available at <https://www.theatlantic.com/national/archive/2013/10/a-broken-system-texas-former-chief-justice-condemns-judicial-elections/280654/> (last visited Aug. 15, 2019).
- 13 See Appendix.
- 14 See *Id.*
- 15 See Zach Despart, *Emmett ousted as Democrats rout GOP in Harris County races*, HOUSTON CHRONICLE (Nov. 6, 2018), available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Emmett-threatened-by-Democratic-rout-in-Harris-13369367.php> (last visited Aug. 15, 2019).
- 16 Hecht, State of the Judiciary Address, *supra* note 2.
- 17 *Id.*
- 18 *Id.*
- 19 See Anthony Champagne, *Coming to a Judicial Election Near You: The New Era in Texas Judicial Elections*, 43 S. TEX. L. REV. 11 (2001).
- 20 See Jones, *The Selection of Judges in Texas*, *supra* note 11.
- 21 See Champagne, *Coming to a Judicial Election Near You*, *supra* note 19, at 11.
- 22 *Id.*
- 23 *Id.*
- 24 See TEX. SEC'Y OF STATE, *1992-Present Election History: 2018 General Election*, available at https://elections.sos.state.tx.us/elchist331_state.htm (last visited Aug. 15, 2019).
- 25 See Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 02, 2010, available at <https://harrisvotes.com/HISTORY/101102/cumulative/cumulative.pdf> (last visited Aug. 15, 2019) (approximately 799,000 people voted in Harris County in the general election); Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 04, 2014, available at <https://harrisvotes.com/HISTORY/20141104/cumulative/cumulative.pdf> (last visited Aug. 15, 2019) (approximately 688,000 people voted cast in Harris County in the general election).
- 26 See Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 06, 2012, available at <https://harrisvotes.com/HISTORY/20121106/cumulative/cumulative.pdf> (last visited Aug. 15, 2019) (just over 1.2 million people voted in Harris County in the general election); Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 08, 2016, available at <https://harrisvotes.com/HISTORY/20161108/cumulative/cumulative.pdf> (last visited Aug. 15, 2019) (almost 1.35 million people voted in Harris County in the general election).
- 27 See Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 06, 2018, available at <https://harrisvotes.com/HISTORY/20181106/cumulative/cumulative.pdf> (last visited Aug. 15, 2019). The 2018 election cycle produced unusually high voter participation throughout Texas, including in Harris County. See *Id.* (over 1.22 million people voted in Harris County in the 2018 general election, similar to voter participation in the 2012 and 2016 general elections).
- 28 Tex. H.B. 3040, 86th Leg. R.S. (2019).
- 29 *Id.*
- 30 BRENNAN CTR. FOR JUSTICE, *Judicial Selection: An Interactive Map*, available at <http://judicialselectionmap.brennancenter.org/?court=Supreme> (last visited Aug. 15, 2019). We distinguish here between Texas's Article V judges—those judicial officers who hold judgeships created under Article V of the Texas Constitution (the Supreme Court, Court of Criminal Appeals, intermediate courts of appeals, district courts, county courts at law, and probate courts)—and: (1) municipal court judges, whose offices are created by municipal charters and ordinances, and (2) administrative law judges, who are part of the executive branch of government.
- 31 TEX. CONST. art. V, §§ 2, 4, 6, 7, 15, 18.
- 32 TEX. CONST. art. V, § 28.

- 33 See, e.g., TEX. CONST. art III, § 13 (legislators); TEX. ELEC. CODE § 202.002.
- 34 TEX. CONST. art. V, §§ 2, 4, 6, 7, 15, 18, 30.
- 35 Hill, *Taking Texas Judges Out of Politics*, *supra* note 4 at 344.
- 36 TEX. CONST. of 1845, art. IV, § 5.
- 37 TEX. CONST. of 1845, amend. 1, 2.
- 38 TEX. CONST. of 1861, art. IV, § 5.
- 39 TEX. CONST. of 1869, art. V, §§ 2, 6, 19.
- 40 TEX. CONST. art. V, §§ 2, 4, 6, 7, 15, 18.
- 41 TEX. CONST. art. V, §§ 1 (vesting judicial power in courts), 2(c) (supreme court justices), 4(a) (court of criminal appeals judges), 6(b) (court of appeals justices), 7 (district judges), 15 (county judges), 18 (justices of the peace), 30 (judges serving on any court created by the Legislature having county-wide jurisdiction, which covers the county courts at law and probate courts). Municipal court judges and administrative law judges in Texas are not Article V judges and are either appointed or employed.
- 42 See Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176 (1980) (discussing evolution of selection process).
- 43 See NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, available at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited Aug. 15, 2019) (listing information on each state's current method for selecting judges compiled by the National Center for State Courts).
- 44 *Id.*
- 45 TEX. CONST. art. V, §§ 2, 4. The constitution refers to the judges serving on the supreme court as "justices," judges serving on the court of criminal appeals as "judges," judges serving on the intermediate courts of appeals as "justices," and judges serving on the various trial courts as "judges." Generally, this paper will use "judge" or "judges" to refer to all of these judicial officers.
- 46 TEX. CONST. art. V, § 2(c); BALLOTPEDIA, *Texas Court of Criminal Appeals*, available at https://ballotpedia.org/Texas_Court_of_Criminal_Appeals (last visited Aug. 15, 2019). If an interim appointment is made to either court, more than three of these justices or judges may be on the ballot in the next election cycle.
- 47 TEX. GOV'T CODE § 22.201(a).
- 48 TEX. CONST. art. V, § 6.
- 49 BALLOTPEDIA, *Texas intermediate appellate court elections, 2018*, available at https://ballotpedia.org/Texas_intermediate_appellate_court_elections,_2018 (last visited Aug. 15, 2019).
- 50 TEX. CONST. art. V, §§ 7, 15. See TEX. JUD. BRANCH, *Court Structure of Texas (2019)*, available at <http://www.txcourts.gov/media/1443399/court-structure-chart-jan-2019.pdf> (last visited Aug. 15, 2019).
- 51 TEX. CONST. art. V, § 28(a).
- 52 See *Id.*
- 53 TEX. CONST. art. V, § 28(b); TEX. GOV'T CODE § 25.0009; TEX. LOC. GOV'T CODE § 87.041. There are also specific rules regarding the selection of judges in multi-county statutory county courts and multi-county statutory probate courts. See TEX. GOV'T CODE §§ 25.2603, 25.2653.
- 54 See TEX. JUD. BRANCH, *Profile of Appellate and Trial Judges (2018)*, available at <http://www.txcourts.gov/media/1442352/judge-profile-sept-18.pdf> (last visited Aug. 15, 2019). This source, which is published annually on September 1, has not yet been updated to reflect the fact that all current sitting judges on the Texas Court of Criminal Appeals were elected.
- 55 TEX. CONST. art. V, § 28(a),(b); TEX. GOV'T CODE § 25.0009; TEX. LOC. GOV'T CODE § 87.041.
- 56 See TEX. JUD. BRANCH, *Profile of Appellate and Trial Judges*, *supra* note 54. Of the currently serving justices on the Texas Supreme Court, Chief Justice Nathan Hecht and Justices Paul Green and John Devine were initially elected, while Justices Eva Guzman, Debra Lehmann, Jeffrey Boyd, Jeffrey Brown, James Blacklock, and Brett Busby were initially appointed. See TEX. JUD. BRANCH, *Supreme Court, About the Court*, available at <https://www.txcourts.gov/supreme/about-the-court/> (last visited Aug. 15, 2019).
- 57 See TEX. JUD. BRANCH, *Profile of Appellate and Trial Judges*, *supra* note 54. The data was current as of Sept. 1, 2018. See *supra* note 54.
- 58 See Anthony Champagne & Kyle Cheek, *Judicial Politics in Texas: Partisanship, Money and Politics in State Courts* 93-95 (David A. Schultz, ed., 2005); see also Billy Monroe, *Partisan Elections in Texas: Best Choice or Reform Failure*, 21 TEX. HISP. J.L. & POL'Y 1, 13 (2015); Hill, *Taking Texas Judges Out of Politics*, *supra* note 4, at 347.
- 59 TEX. JUD. BRANCH, *Court History: Justices Since 1945 (2019)*, available at <http://www.txcourts.gov/supreme/about-the-court/court-history.aspx> (last visited Aug. 15, 2019).
- 60 TEX. CONST. art. V, §§ 2(b), 4(a), 6(a), 7; TEX. GOV'T CODE § 25.0014.
- 61 TEX. CONST. art. V, §§ 2(b), 6(a).
- 62 TEX. CONST. art. V, § 7; TEX. GOV'T CODE § 24.001.
- 63 TEX. CONST. art. V, § 7.
- 64 TEX. GOV'T CODE § 25.0014.
- 65 TEX. CONST. art. V, § 15.
- 66 See TEX. ELEC. CODE § 141.001(a).
- 67 See *Id.*
- 68 See NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 69 See *Id.*
- 70 See *Id.*

- 71 *See Id.*
- 72 *See Id.*
- 73 *See Id.*
- 74 *See* TEX. JUD. BRANCH, *Profile of Appellate and Trial Judges*, *supra* note 54.
- 75 *See Id.*
- 76 TEX. CONST. art. V, §§ 2, 4, 7, 15, 18; TEX. ELEC. CODE § 2.001.
- 77 TEX. ELEC. CODE § 172.001 *et seq.*
- 78 *See* TEX. SEC'Y OF STATE, *1992-Present Election History: 2018 General Election*, *supra* note 24.
- 79 TEX. ELEC. CODE § 142.001 *et seq.*
- 80 *Id.* § 172.001 *et seq.*
- 81 *Id.* § 172.021.
- 82 *See Id.*
- 83 *Id.* § 172.021(g).
- 84 *Id.* § 172.021(e).
- 85 *Id.* § 172.025.
- 86 *Id.* § 172.024.
- 87 *Id.* § 172.021(b).
- 88 *Id.* § 172.003.
- 89 *Id.* § 172.004.
- 90 *Id.* § 172.003.
- 91 *Id.* §§ 142.002, 142.004.
- 92 *Id.* §§ 142.004, 142.008.
- 93 *Id.* § 142.007.
- 94 *Id.*
- 95 *See* Champagne & Cheek, *The Cycle of Judicial Elections*, *supra* note 10, at 931-32.
- 96 *See, e.g.,* Wallace B. Jefferson, *My View: Reform the Partisan System*, 79 TEX. B.J. 90 (Feb. 2016); Trevor Brown, *Money Talks While Democracy Walks: The Constitutionality of the Texas Ethics Commission Enforcing the Judicial Campaign Fairness Act in the Face of McCutcheon v. FEC*, 16 TEX. TECH ADMIN. L.J. 395, 403 (2015); Seana Willing, *Post-Caperton Recusal Reform In Texas: Is It Needed?*, 51 S. TEX. L. REV. 1143, 1160-62 (2010).
- 97 TEX. ELEC. CODE § 253.151, *et seq.* (as added by S.B. 94, Acts 1995 74th Leg., ch. 763).
- 98 *Id.* §§ 253.155 - 253.1611.
- 99 *Id.* §§ 253.164 - 253.166.
- 100 *See* Tex. H.B. 3233, § 17, 86th Leg. R.S. (2019).
- 101 *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that limiting independent expenditures on political campaigns by groups such as corporations, labor unions, or other collective entities violates the First Amendment because limitations constitute a prior restraint on speech); *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that governmental restriction of independent expenditures in campaigns, the limitation on expenditures by candidates from their own personal or family resources, and the limitation on total campaign expenditures, violate the First Amendment).
- 102 TEX. ELEC. CODE §§ 253.155 - 253.1611.
- 103 *Id.*
- 104 *Id.*
- 105 *Id.* §§ 253.155, 253.157.
- 106 *Id.*
- 107 *Id.* § 253.1621.
- 108 Tex. Ethics Comm'n Op. No. 302 (1996).
- 109 TEX. ELEC. CODE § 253.1621.
- 110 *Id.* § 253.153.
- 111 *Id.* § 253.153(a).
- 112 *Id.*
- 113 Julie Schuering Shuetz, Comment, *Judicial Campaign Speech Restrictions in Light of Republican Party of Minnesota v. White*, 24 N. Ill. U. L. REV. 295, 300-01 (2004).
- 114 *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).
- 115 *N.D. Fam. Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1035 (D. N.D. 2005).
- 116 Peter Gregory Juettten, Note, *Should They Stay or Should They Go: The Implications of Republican Party of Minnesota v. White on Restrictions of Speech During Judicial Election Campaigns*, 56 ARK. L. REV. 677, 680-81 (2003); Angela Allen, Note and Comment: *The Judicial Election Gag Is Removed – Now Should Texas Remove Its Gag and Respond*, 10 TEX. WESLEYAN L. REV. 201, 212-13 (2003).
- 117 MODEL CODE OF JUD. CONDUCT, Canon 7B(1)(C) (AM. BAR ASS'N. 1972).
- 118 *See, e.g., Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984).
- 119 *See White*, 536 U.S. at 768.
- 120 *See* Allen, *The Judicial Election Gag is Removed*, *supra* note 116, at 213.
- 121 *See White*, 536 U.S. at 768.

- 122 *Id.* at 776-77, 788.
- 123 *Id.* at 770.
- 124 *Id.*
- 125 *Id.* at 775.
- 126 *Id.* at 775.
- 127 *Id.* at 775-78.
- 128 *Id.* at 776.
- 129 *Id.* at 777-78.
- 130 *Id.* at 779-80.
- 131 *Id.* at 788.
- 132 See David M. O'Brien, *State Court Elections and Judicial Independence*, 31 J.L. & POL. 417, 427 (2016); Jacintha M. Webster, Note: *An Impossible Balance: Judicial Elections and The Constitution*, 9 ALB. GOV'T L. REV. 384, 395-96 (2016).
- 133 Bader, 361 F. Supp. 2d at 1035-36.
- 134 See Tex. Sup. Ct. Misc. Doc. No. 02-9167 (Aug. 22, 2002) (order approving amendments to the Texas Code of Judicial Conduct), available at http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/02/02916700.pdf (last visited Aug. 15, 2019).
- 135 TEX. CODE OF JUD. CONDUCT, Canon 5(1)(iii) (citing Canon 3B(10)).
- 136 TEX. CONST. art. V, § 1-a(1).
- 137 Darren Goldman, *Mandatory Retirement: A Comprehensive Analysis Exploring Key Differences Between Trial & Appellate Level Judges 4-5* (2009), available at <http://socialaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system/05goldman-paper.pdf?sfvrsn=6> (last visited Aug. 15, 2019).
- 138 See TEX. JUD. BRANCH, *Profile of Appellate and Trial Judges*, *supra* note 54. The data was current as of Sept. 1, 2018. See *supra* note 54.
- 139 See *Id.*
- 140 See TEX. SEC'Y OF STATE, *1992-Present Election History: 2018 General Election*, *supra* note 24.
- 141 *Id.*
- 142 *Id.*
- 143 *Id.*; In addition, a number of constitutional county court judges, statutory county court judges, and justices of the peace also were also defeated in the 2018 election. See *Id.*
- 144 *Id.*
- 145 *Id.*
- 146 *Id.*
- 147 *Id.*
- 148 See TEX. SEC'Y OF STATE, *1992-Present Election History: 2018 Democratic Party Primary Election*, available at https://elections.sos.state.tx.us/elchist324_state.htm (last visited Aug. 15, 2019); TEX. SEC'Y OF STATE, *1992-Present Election History: 2018 Republican Party Primary Election*, available at https://elections.sos.state.tx.us/elchist325_state.htm (last visited Aug. 15, 2019).
- 149 TEX. SEC'Y OF STATE, *1992-Present Election History: 2018 Republican Party Primary Election*, *supra* note 148.
- 150 *Id.*
- 151 TEX. SEC'Y OF STATE, *1992-Present Election History: 2018 Democratic Party Primary Election*, *supra* note 148.
- 152 *Id.*
- 153 *Id.*
- 154 TEX. CONST. art. XV, § 1-a(6).
- 155 *Id.* The wording of the constitution is ambiguous. It might be read to require suspension upon indictment for a felony or being charged with official misconduct, but being indicted or charged with these criminal acts does not result in the automatic removal from office.
- 156 TEX. CONST. art. XV, §§ 1-4. Read strictly, Article XV may not provide for the impeachment of judges serving on the court of criminal appeals, but it does provide that the legislature "shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution." *Id.* § 7. Chapter 665 of the Texas Government Code governs impeachment, which applies to any "state officer," which reaches the judges on the court of criminal appeals. See TEX. GOV. CODE § 665.002(1).
- 157 TEX. CONST. art. XV, § 6.
- 158 *Id.*
- 159 TEX. CONST. art. XV, § 8.
- 160 See *Id.*
- 161 TEX. GOV. CODE § 665.051. Article XV, § 7 of the constitution provides that the legislature "shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution," which allows the addition of judges on the court of criminal appeals to the process for removal.
- 162 See *Id.* § 665.052(a)(5). Adding a ground for removal to the list is constitutionally questionable.
- 163 See *Id.* § 665.052(b).
- 164 TEX. CONST. art. XV, § 9. The constitution does not differentiate between state officials who are appointed and never stand for election, such as a commissioner on the Public Utility Commission, and an official who is appointed subject to being elected in the

- next election cycle, like a justice on the Texas Supreme Court. As such, it appears that an appointed judge is subject to removal by the governor until she assumes the office pursuant to an election.
- 165 *See Id.*
- 166 *See Id.*
- 167 TEX. CIV. PRAC. & REM. CODE §§ 66.001, 66.003. For example, in April 2019, a newly elected county court at law judge in Harris County forfeited his office by declaring that he would be a candidate for the Texas Supreme Court, in violation of the Texas Constitution. *See* Washington Post, *A newly elected county judge resigned abruptly. Just one problem: It was an accident.* April 4, 2019, available at <https://www.texastribune.org/2019/04/04/harris-county-civil-court-judge-william-mcleod-accidentally-resigns/>. (last visited Sep. 12, 2019).
- 168 TEX. CIV. PRAC. & REM. CODE § 66.002.
- 169 TEX. CONST. art. V, § 1-a(1).
- 170 The terms “Missouri Plan” and “merit-based system” are commonly used as interchangeable synonyms with respect to the appointment/retention-election model. Andrea McArdle, *The Increasingly Fractious Politics of Nonpartisan Judicial Selection: Accountability Challenges to Merit-Based Reform*, 75 ALB. L. REV. 1799, 1801 (2012). In the interest of clarity, however, the term “merit based” is not so used herein, as judicial nominating commissions (presumably tasked with supplying qualified candidates) are also used in conjunction with other judicial selection models.
- 171 *See* BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30.
- 172 *See Id.*
- 173 *See infra*, Part III.
- 174 *See Id.*
- 175 *See Id.*; NAT’L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 176 THE FEDERALIST SOC’Y, *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 356-57, 359-60 (2002).
- 177 *See Id.* at 358.
- 178 *See Id.*
- 179 Rachel Paine Caulfield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L. J. 163, 168-69 (2007).
- 180 *See Id.* at 170-71.
- 181 *Id.* at 166-68.
- 182 F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 440, tbl. 1, 458, tbl. 2 (2004).
- 183 *Id.*; *see also* NAT’L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 184 Caulfield, *How the Pickers Pick*, *supra* note 179, at 167.
- 185 *See Id.* at 167-68.
- 186 *See Id.* at 168.
- 187 *See Id.* at 168-69; Hanssen, *Learning About Judicial Independence*, *supra* note 182 at 458, tbl. 2.
- 188 Hanssen, *Learning About Judicial Independence*, *supra* note 182, at 440, tbl. 1, 458, tbl. 2.
- 189 This model and its variations are often described by commentators as “The Missouri Model” or “Merit Selection.”
- 190 Caulfield, *How the Pickers Pick*, *supra* note 179 at 170-71; Hanssen, *Learning About Judicial Independence*, *supra* note 182, at 458, tbl. 2.
- 191 AM. JUDICATURE SOC’Y, *Chronology of Successful and Unsuccessful Merit Selection Ballot Measures*, available at http://www.judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf (last visited Aug. 15, 2019).
- 192 Hanssen, *Learning About Judicial Independence*, *supra* note 182, at 443, tbl. 1, 458, tbl. 2.
- 193 *Id.*; BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30.
- 194 *See Id.*
- 195 *See Id.*
- 196 The following discussion of the judicial selection models utilized by the various states is supported by the data tables provided in this part of the paper and their underlying source data. Because of the mix-and-match approach taken by the states in utilizing the basic selection models, the discussion in this part of the paper focuses only on representative examples of the various selection models and does not attempt to exhaustively discuss those states that have adopted multiple methodologies.
- 197 A state-by-state analysis of the varying methods used by the states in the additional-term context is set out at BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30.
- 198 *See Id.* (AL, IL, LA, NC, PA, TX). Note that while the Brennan Center’s interactive map is an invaluable resource, its methodologies depart slightly from those used in this paper. Thus, although the Brennan Center utilizes an additional “hybrid” category for four states, this paper categorizes three of those states (California, Maryland, and New Mexico) in the Missouri Plan appointment category, and the final “hybrid” state (Hawaii) in the gubernatorial appointment category. Additionally, in tallying which states utilize a particular model, the Brennan Center figures have been recalculated to exclude the District of Columbia.
- 199 *See Id.* (AR, GA, ID, KY, MI, MN, MS, MT, NV, ND, OH, OR, WA, WI, WV).
- 200 *See Id.* (CT, DE, HI, MA, ME, NH, NJ, NY, RI, SC, VA, VT).
- 201 *See Id.* (AK, AZ, CA, CO, FL, IN, IA, KS, MD, MO, NE, NM, OK, SD, TN, UT, WY); *White*, 536 U.S. at 790-91 (O’Connor, J., concurring)(citations omitted).

- 202 See *Id.* (DE, ME, MT, NH, RI, SD, VT, WV, WY).
- 203 See *Id.* (AL, IL, LA, NC, PA, TX).
- 204 See *Id.* (AR, GA, ID, KY, MI, MN, MS, NV, OH, OR, WA, WI).
- 205 See *Id.* (CT, HI, MS, ND, NJ, NY, SC, VA).
- 206 See *Id.* (AK, AZ, CA, CO, FL, IN, IA, KS, MO, MD, NE, NM, OK, TN, UT).
- 207 This table was created in reliance upon data set forth in BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30; NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43; and BALLOTPEA, *Judicial Selection in the States*, available at https://ballotpedia.org/Judicial_selection_in_the_states (last visited Aug. 15, 2019). In seeking to authoritatively set forth the judicial selection procedures applicable to over 140 courts located in fifty states, these three websites occasionally provide conflicting answers, either through human error or subsequent amendment of the applicable law. The accuracy of this table is necessarily subject to the accuracy of the underlying source data utilized by such websites. See also BRENNAN CTR., *Judicial Selection: An Interactive Map*, *supra* note 30.
- 208 See *Id.*
- 209 See *Id.* (AL, IL, LA, NC, NY, PA, TN, TX).
- 210 See *Id.* (AR, CA, FL, GA, ID, KY, MD, MI, MN, MS, MT, NV, ND, OH, OK, OR, SD, WA, WI, WV).
- 211 See *Id.* (AZ, IN, KS, MO).
- 212 See *Id.* (AK, CO, IA, NE, NM, UT, WY).
- 213 See *Id.* (CT, DE, HI, MA, ME, NH, NJ, RI, SC, VA, VT).
- 215 See BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30.
- 216 See NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 217 N.J. CONST. art. VI, § VI.
- 218 See BRENNAN CTR., *Judicial Selection: A Glossary of Terms*, available at <https://www.brennancenter.org/rethinking-judicial-selection/glossary> (last visited Aug. 15, 2019).
- 219 NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, available at http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state (last visited Aug. 15, 2019).
- 220 See NAT'L CTR. FOR ST. CTS., *Judicial Selection in the States: South Carolina*, available at http://www.judicialselection.us/judicial_selection/index.cfm?state=SC (last visited Aug. 15, 2019).
- 221 COMMONWEALTH OF VA. DIV. OF LEGIS. SERVS., *Judicial Selection Overview*, available at <http://dls.virginia.gov/judicial.html> (last visited Aug. 15, 2019).
- 222 See *Id.*
- 223 See *supra* note 30 (excluding Texas's justice courts and municipal courts from the analysis in this paper).
- 224 See, e.g., IDAHO CODE § 34-905; BRENNAN CTR., *Judicial Selection: A Glossary of Terms*, *supra* note 218.
- 225 See Chris W. Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, THE FEDERALIST Soc'Y (March 2012) at 3, available at <https://fedsoc.org/commentary/publications/a-survey-of-empirical-evidence-concerning-judicial-elections> (last visited Aug. 15, 2019).
- 226 MONT. CONST. art. VII, § 8.
- 227 NEV. REV. STAT. § 293.269.
- 228 See BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30; NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 229 See *Id.*
- 230 See *Id.*
- 231 See *Id.*
- 232 See *White*, 536 U.S. at 792 (O'Connor, J. concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").
- 233 See Sandra Day O'Connor, *The O'Connor Judicial Selection Plan*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (June 2014), available at https://iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf (last visited Aug. 15, 2019).
- 234 *Id.*
- 235 *Id.* at 8.
- 236 See *Id.* at 9.
- 237 See *Id.* at 5.
- 238 See *Id.* at 6.
- 239 See *Id.*
- 240 See *Id.* at 7.
- 241 See *Id.* at 7-8.
- 242 See *Id.* at 8.
- 243 NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219.; see also INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *States With Judicial Nominating Commissions*, available at <https://iaals.du.edu/projects/oconnor-judicial-selection-plan#tab=judicial-nominating-commission> (last visited Aug. 15, 2019).
- 244 See *Id.*
- 245 NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219; BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30.

- 246 *See Id.*
- 247 *See Id.*; NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 248 *See Id.*
- 249 *See Id.*; AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, tbl. 1 (Characteristics of Merit Selection Plans: Scope of The Plans) (2011), available at http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf (last visited Aug. 15, 2019).
- 250 *See Id.*
- 251 *See Id.*
- 252 *See Id.*
- 253 *See* BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30; NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43; NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219.
- 254 *See Id.*
- 255 *See Id.*
- 256 *See* AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, *supra* note 249, at tbl. 1.
- 257 *See Id.*
- 258 *See Id.*
- 259 *See Id.*
- 260 NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219.
- 261 *See Id.*; BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30.
- 262 *See Id.*
- 263 *See* NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219.
- 264 COMMONWEALTH OF VA. DIV. OF LEGIS. SERVS., *Judicial Selection Overview*, available at <http://dls.virginia.gov/judicial.html> (last visited Aug. 15, 2019).
- 265 *See Id.*
- 266 *See* AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, *supra* note 223, at tbl. 1.
- 267 *See Id.*
- 268 *See Id.*
- 269 *See Id.*
- 270 *See Id.*; NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219.
- 271 *See Id.*
- 272 *See* AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, *supra* note 249, at tbl. 1.
- 273 *See Id.*
- 274 *See Id.*
- 275 *See* NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219.
- 276 *See Id.*
- 277 *See* NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219; AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, *supra* note 249, at tbls. 2 (Composition of Nominating Commission), 3 (Rules Governing Submission of List of Nominees).
- 278 *See Id.*
- 279 *See Id.*
- 280 *See Id.*
- 281 *See Id.*
- 282 *See* AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, *supra* note 249, at tbl. 2.
- 283 *See Id.*; NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219.
- 284 *See Id.*
- 285 *See Id.*
- 286 *See Id.*
- 287 *See Id.*; AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, *supra* note 249, at tbl. 1.
- 288 *See Id.*
- 289 *See Id.*
- 290 *See Id.*
- 291 *See Id.*
- 292 *See* AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, *supra* note 249, at tbl. 5 (Nominating Commission Procedures).
- 293 *See* CONN. GEN. STAT. § 51-44a.
- 294 Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. L. & PUB. POL'Y 273, Appendix (State Judicial Selection Laws) at 314 (2002).
- 295 *See Id.*
- 296 N.M. CONST. art. VI, § 35.
- 297 KY. CONST. § 118; OKLA. CONST. art. VII-B, § 3.
- 298 VT. STAT. tit. 4, § 601.
- 299 ARIZ. CONST. art. VI, §§ 36, 41.

- 300 FLA. STAT. § 43.291.
- 301 IND. CODE §§ 21-13-1-6, 33-33-45-28.
- 302 *See Id.*
- 303 IOWA CODE §§ 46.1, 46.3.
- 304 Anisa A. Somani, *The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go?*, 54 WM. & MARY L. REV. 1451, 1475 (2013).
- 305 *Back v. Carter*, 933 F. Supp. 738 (N.D. Ind. 1996). Despite the injunction, the Indiana statute has not been repealed or amended. *See* IND. CODE § 33-33-45-28.
- 306 *See Mallory v. Harkness*, 895 F. Supp. 1556, 1559 (S.D. Fla. 1995), *aff'd*, 109 F.3d 771 (11th Cir. 1997).
- 307 *Id.* at 1559, 1560-61, 1564.
- 308 FLA. STAT. § 43.291(4).
- 309 ALASKA CONST. art. IV, § 8; MONT. CODE § 3-1-1001.
- 310 *See, e.g.*, MINN. STAT. § 480B.01(2)(d),(e) (requiring that four representatives of the relevant judicial district serve on the Commission on Judicial Selection in connection with vacancies in that district).
- 311 *See* NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Judicial Nominating Commissions*, *supra* note 219.
- 312 ARIZ. CONST. art. VI, § 36.
- 313 HAW. CONST. art. VI, § 4.
- 314 N.M. CONST. art. VI, § 35.
- 315 ALA. CONST. amend. 741.
- 316 R.I. GEN. LAWS § 8-16.1-2.
- 317 MONT. CODE § 3-1-1001.
- 318 N.Y. CITY CIV. CT. ACT § 110(g).
- 319 ALASKA CONST. art. IV, § 8; MO. CONST. art. V, § 25(d); N.Y. CONST. art. VI, § 2(d)(1).
- 320 FLA. STAT. § 43.291.
- 321 IOWA CODE § 46.14(2).
- 322 OKLA. CONST. art. VII-B, § 3(f).
- 323 ARIZ. CONST. art. VI, §§ 36, 41; N.Y. CONST. art. VI, § 2 (d)(1); R.I. GEN. LAWS § 8-16.1-2.
- 324 *See* AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, *supra* note 249, at tbl. 2.
- 325 *See* Md. Executive Order 01.01.2015.09.
- 326 *See* AM. JUDICATURE SOC'Y, *Judicial Merit Selection: Current Status*, *supra* note 249 at tbl. 2.
- 327 *See Id.*
- 328 *See Id.* at tbl. 5.
- 329 HAW. JUD. SELECTION COMM'N R. 7(A).
- 330 N.M. CONST. art. VI, § 35.
- 331 ARIZ. UNIFORM RULES OF PROC. FOR COMM'NS ON APP. AND TRIAL CT. APPOINTMENTS, RULE 5(a), available at <https://www.azcourts.gov/Portals/75/UniformRulesofProcedure-2016.pdf> (last visited Aug. 15, 2019).
- 332 MO. SUP. CT. R. 10.27.
- 333 NEB. JUD. BRANCH, *Judicial Nominating Commissioner's Manual*, available at <https://supremecourt.nebraska.gov/judicial-nominating-commissioners-manual> (last visited Aug. 15, 2019).
- 334 NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 335 ALASKA STAT. §§ 15.58.050, 22.05.100, 22.07.060, 22.10.150, 22.15.195.
- 336 *See Id.*
- 337 *See Id.*
- 338 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *Judicial Performance Evaluation in the States*, available at <https://iaals.du.edu/judicial-performance-evaluation-states> (last visited Aug. 15, 2019).
- 339 HAW. CONST. art. 6, § 3.
- 340 CONN. GEN. STAT. § 51-44a(e).
- 341 *See Id.*
- 342 S.C. CODE § 2-19-80(C)(1).
- 343 *See* TEX. CONST. art. II, § 1.
- 344 THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
- 345 *Id.* at 466.
- 346 Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002); *Republican Party of Minn. v. White*, 536 U.S. 765, 803 (2002) (Stevens, J., dissenting).
- 347 *See* TEX. CODE JUD. CONDUCT, Preamble, reprinted in TEX. GOV'T CODE, tit. 2, subtit. G app. B.
- 348 *Barrett v. Indiana*, 229 U.S. 26, 30 (1913); *Fitzgerald v. Adv. Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999).
- 349 *See* TEX. CIV. PRAC. & REM. CODE § 5.001.
- 350 *See Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964).
- 351 *See* TEX. CONST. art. V, § 11.
- 352 *See* Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L. J. 851, 853 (2002).

- 353 NAT'L CTR. FOR ST. CTS., *Public Trust and Confidence Resource Guide*, available at <https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide.aspx> (last visited Aug. 15, 2019).
- 354 Webster, *Selection and Retention of Judges*, *supra* note 3, at 2 (noting "the debate over selection and tenure of judges has been ongoing since shortly after the founding of our nation").
- 355 See NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 356 See Alicia Bannon, *Rethinking Judicial Selection in State Courts*, BRENNAN CTR. FOR JUSTICE, 2016, at 18, available at <https://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts> (last visited Aug. 15, 2019).
- 357 Webster, *Selection and Retention of Judges*, *supra* note 3, at 2.
- 358 See Jones, *The Selection of Judges in Texas*, *supra* note 11, at 5.
- 359 See Hecht, *State of the Judiciary Address*, *supra* note 2.
- 360 See, e.g., Jones, *The Selection of Judges in Texas*, *supra* note 11, at 21.
- 361 See Jones, *The Selection of Judges in Texas*, *supra* note 11, at 20-21.
- 362 Charles G. Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52 (2003).
- 363 *Id.* at 54.
- 364 See Webster, *Selection and Retention of Judges?*, *supra* note 3, at 18; Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 95 (1986); Orrin W. Johnson & Laura J. Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH. L. REV. 525, 543-44 (1992).
- 365 *Partisan Elections Almost Guarantee Some Poor Judges*, HOUSTON CHRON., Jul. 27, 2001, at A34.
- 366 See Champagne, *The Selection and Retention of Judges in Texas*, *supra* note 364, at 104.
- 367 See *The Courts and the Legal Profession in Texas-The Insider's Perspective*, at 50 (May 1999) (survey jointly conducted by the Supreme Court of Texas, State Bar of Texas, and the Texas Office of Court Administration), available at <https://www.worldcat.org/title/courts-and-the-legal-profession-in-texas-the-insiders-perspective-a-survey-of-judges-court-personnel-and-attorneys-a-joint-project/oclc/41604066> (last visited Aug. 15, 2019).
- 368 *Id.*
- 369 *Id.*
- 370 See TEX. JUD. ONLINE, <http://www.courts.state.tx.us/appcourt.asp> (last visited Aug. 15, 2019).
- 371 See Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 225.
- 372 See Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection*, 77 JUDICATURE 300, 302 (1994).
- 373 See STATE BAR OF TEX., 2018 Judicial Poll, Final Vote Summary – February 6, 2018, available at <https://www.texasbar.com/AM/Template.cfm?Section=Search&Template=/CM/ContentDisplay.cfm&ContentID=39261> (last visited Aug. 15, 2019).
- 374 *Id.*
- 375 STATE BAR OF TEX. 2015-2016 Attorney Statistical Profile, available at https://texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=32670 (last visited Aug. 15, 2019).
- 376 See STATE BAR OF TEX., 2018 Judicial Poll, Final Vote Summary – February 6, 2018, *supra* note 373.
- 377 See Ben Philpott, *In Texas, a Never-Ending Battle Over Judicial Elections*, TEX. TRIBUNE, Mar. 30, 2012, <https://www.texastribune.org/2012/03/30/never-ending-battle-over-judicial-elections/> (last visited Sep. 12, 2019). Chuck Norris is a martial arts champion and an actor who is known for playing the title role in *Walker, Texas Ranger*, a television drama that aired from 1993 until 2001. See Wikipedia, *Chuck Norris*, https://en.wikipedia.org/wiki/Chuck_Norris (last visited Sep. 12, 2019).
- 378 See Jones, *The Selection of Judges in Texas*, *supra* note 11, at 2, 21.
- 379 See Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 8-9.
- 380 See Jones, *The Selection of Judges in Texas*, *supra* note 11, at 20-22.
- 381 See Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* 67 (1980).
- 382 *Id.*
- 383 *Id.*
- 384 See, e.g., Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 13; Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, *supra* note 3, at 18.
- 385 See Webster, *Selection and Retention of Judges*, *supra* note 3, at 18.
- 386 See Champagne, *Coming to a Judicial Election Near You*, *supra* note 19, at 11.
- 387 See Jones, *The Selection of Judges in Texas*, *supra* note 11, at 2, 13.
- 388 See Champagne, *Coming to a Judicial Election Near You*, *supra* note 19, at 11.
- 389 *Id.*
- 390 *Id.*
- 391 *Id.*; Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 780 (1995).
- 392 See TEX. SEC'Y OF STATE, *1992-Present Election History: 2018 General Election*, *supra* note 24.
- 393 See *Id.*
- 394 See *Id.*
- 395 In 2017, Texas Gov. Greg Abbott signed into law House Bill 25, which removes the straight-ticket option from Texas ballots after September 2020; see TEX. ELEC. CODE §§ 31.012, 122.001(a), 129.023(c); see also Jolie McCullough, *Gov. Abbott signs bill to eliminate straight-ticket voting beginning in 2020*, TEX. TRIBUNE, Jun. 1, 2017, <https://www.texastribune.org/2017/06/01/>

- texas-gov-greg-abbott-signs-bill-eliminate-straight-ticket-voting/ (last visited Sep. 12, 2019). No data exists yet showing the actual effect of this change on Texas judicial elections.
- 396 See Jones, *The Selection of Judges in Texas*, *supra* note 11, at 2, 4.
- 397 *Id.* at 4.
- 398 *See Id.*
- 399 *See Id.* at 2, 13.
- 400 *See Id.* at 21.
- 401 *See* Hecht, *State of the Judiciary Address*, *supra* note 2.
- 402 *See* Jones, *The Selection of Judges in Texas*, *supra* note 11, at 21.
- 403 Dubois, *From Ballot to Bench*, *supra* note 352, at 245.
- 404 *See Id.*; Champagne, *The Selection and Retention of Judges in Texas*, *supra* note 335, at 100-03.
- 405 *See Id.* at 101.
- 406 *See Id.* at 102.
- 407 *See Id.*
- 408 *See Id.*; Hill, *Taking Texas Judges Out of Politics*, *supra* note 4, at 351.
- 409 *See Id.*
- 410 *See Id.*
- 411 *See Id.*
- 412 *See* Chris W. Bonneau, *The Case for Partisan Judicial Elections*, THE FEDERALIST SOC'Y (January 2018) at 5, available at <https://fedsoc.org/commentary/publications/the-case-for-partisan-judicial-elections-1> (last visited Aug. 15, 2019).
- 413 *See Id.*
- 414 *See Id.* at 5-6.
- 415 *See* Bannon, *Rethinking Judicial Selection in State Courts*, *supra* note 356, at 12-13; Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 7-8.
- 416 Dubois, *From Ballot to Bench*, *supra* note 352, at 148.
- 417 *See, e.g.*, Bannon, *Rethinking Judicial Selection in State Courts*, *supra* note 356, at 13.
- 418 *See, e.g.*, Bonneau, *The Case for Partisan Judicial Elections*, *supra* note 412, at 5.
- 419 TEX. CONST. art. V, §§ 2(b), 4(a), 6(b), 7.
- 420 *See* TEX. ELEC. CODE § 172.021.
- 421 *See* Jones, *The Selection of Judges in Texas*, *supra* note 11, at 13.
- 422 *See* Cohen, *A Broken System*, *supra* note 12, at 6 (Wallace Jefferson interview).
- 423 Champagne, *Coming to a Judicial Election Near You*, *supra* note 19, at 26.
- 424 *See, e.g.*, Steven Kreytak, *Only Republican Judge No More: Julie Kocurek Is Now a Democrat*, AUSTIN AM. STATESMAN, Jun. 7, 2006.
- 425 *See* NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 426 *See* Jones, *The Selection of Judges in Texas*, *supra* note 11, at 20; Bannon, *Rethinking Judicial Selection in State Courts*, *supra* note 356, at 6.
- 427 *See* Bannon, *Rethinking Judicial Selection in State Courts*, *supra* note 356, at 6-10, 12-13.
- 428 *Id.* at 7; Champagne, *The Selection and Retention of Judges*, *supra* note 335, at 84-90.
- 429 *Id.*
- 430 *Id.*
- 431 *Id.*
- 432 *Id.*
- 433 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 4.
- 434 Wallace B. Jefferson, *The State of the Judiciary in Texas: An Address to the 81st Texas Legislature* (Feb. 11, 2009), available at <https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-2009.pdf> (last visited Aug. 15, 2019).
- 435 *See* *The Courts and the Legal Profession in Texas-The Insider's Perspective*, *supra* note 367, at 19 (May 1999).
- 436 *Id.* at 5.
- 437 *Id.* at 34-56.
- 438 *Id.* at 54.
- 439 *Id.*
- 440 *Id.* at 36.
- 441 *Id.* at 19.
- 442 Mark Hansen, *The High Cost of Judging*, AM. B. ASS'N J., Sept. 1991, at 45.
- 443 Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1408 (2001).
- 444 *See Id.* at 1408.
- 445 *See Id.*
- 446 *See Id.*
- 447 *See* De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, *supra* note 346, at 367-68. Interest groups have been active in Texas elections for at least forty years. *See* Champagne, *Interest Groups and Judicial Elections*, *supra* note 443, at 1394-97. In the 1980s, the plaintiffs' bar was active in Texas Supreme Court elections by providing significant campaign contributions to like-minded candidates. *See* Champagne & Cheek, *The Cycle of Judicial Elections*, *supra* note 10, at

911. In the last half of the 1980s, interest groups opposing the plaintiffs' bar joined the fray by backing candidates who were aligned with their interests and by providing campaign contributions. *Id.*
- 448 De Muniz, *Politicizing State Judicial Elections*, *supra* note 346, at 368.
- 449 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).
- 450 *See Id.*
- 451 *See* Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Election: Who Pays for Judicial Races?*, BRENNAN CTR. FOR JUSTICE (2016) at 7, available at https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf (last visited Aug. 15, 2019).
- 452 Webster, *Selection and Retention of Judges*, *supra* note 3, at 3.
- 453 *See, e.g.*, THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
- 454 *See, e.g.*, Thomas Jefferson, *Autobiography*, in 1 THE WRITINGS OF THOMAS JEFFERSON 1, 121 (Andrew A. Lipscomb ed., 1903), quoted in Webster, *Selection and Retention of Judges*, *supra* note 3, at 1–2.
- 455 Dubois, *From Ballot to Bench*, *supra* note 353, at 20–21; Webster, *Selection and Retention of Judges*, *supra* note 3, at 4.
- 456 Dubois, *From Ballot to Bench*, *supra* note 353, at 20–21.
- 457 *Id.* at 20.
- 458 Webster, *Selection and Retention of Judges*, *supra* note 3, at 7.
- 459 *See Id.*
- 460 *See Id.*
- 461 *See Id.* at 8.
- 462 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 7–8.
- 463 Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL'Y 67, 87 (2009).
- 464 *See* Joanna Shepherd, *Justice At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, AM. CONST. SOC'Y 9 (2013), available at https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/JusticeAtRisk_Nov2013.pdf (last visited Aug. 15, 2019).
- 465 *Id.*
- 466 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 7–8.
- 467 *Id.*
- 468 *Id.*
- 469 TEX. CONST. art. V, § 1-a(2).
- 470 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 8.
- 471 *See* STATE COMM'N ON JUD. CONDUCT, *Frequently Asked Questions*, available at <http://www.scjc.texas.gov/faqs/> (last visited Aug. 15, 2019).
- 472 *Id.*
- 473 *See* Bonneau, *The Case for Partisan Judicial Elections*, *supra* note 412, at 5.
- 474 *Id.*
- 475 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 11.
- 476 *Id.*
- 477 *See supra* Part III.
- 478 Cohen, *A Broken System*, *supra* note 12, at 6 (Wallace Jefferson interview).
- 479 Dubois, *From Ballot to Bench*, *supra* note 352, at 79.
- 480 Webster, *Selection and Retention of Judges*, *supra* note 3, at 25.
- 481 Bonneau, *The Case for Partisan Judicial Elections*, *supra* note 412, at 5–6; Webster, *Selection and Retention of Judges*, *supra* note 3, at 26.
- 482 *See* BALLOTEDIA, *Nonpartisan Election of Judges*, available at https://ballotpedia.org/Nonpartisan_election_of_judges (last visited Aug. 15, 2019).
- 483 *Id.*
- 484 General Assembly of North Carolina, Session Law 2015-292: House Bill 8, Oct. 29, 2015.
- 485 *See* BALLOTEDIA, *Nonpartisan Election of Judges*, *supra* note 482.
- 486 *Id.*
- 487 *Id.*
- 488 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 13.
- 489 *Id.*
- 490 *Id.*
- 491 Dubois, *From Ballot to Bench*, *supra* note 352, at 80.
- 492 *Id.*
- 493 *See, e.g.*, Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 12–13; *see also* Chris W. Bonneau & Eric Loepp, *Getting things straight: The effects of ballot design and electoral structure on voter participation*, Univ. of Pittsburgh, DEPT. OF POL. SCIENCE ELECTORAL STUDIES 34, 119–130 at 121–22 (discussing ballot roll-off and effect of straight-ticket voting option on partisan and nonpartisan races) available at <https://www.polisci.pitt.edu/sites/default/files/Electoral%20Studies%20Article.pdf> (last visited Aug. 15, 2019).
- 494 *See* Bonneau, *The Case for Partisan Judicial Elections*, *supra* note 412, at 5.

- 495 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 12; Webster, *Selection and Retention of Judges*, *supra* note 3, at 26-27.
- 496 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 12; Champagne, *Tort Reform and Judicial Selection*, *supra* note 414, at 1493.
- 497 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 12.
- 498 Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1408 (2003).
- 499 *Id.*; Champagne & Cheek, *The Cycle of Judicial Elections*, *supra* note 10, at 916.
- 500 See Elizabeth A. Larkin, *Tort Reform and Judicial Selection*, 79 DENV. U. L. REV. 65, 83 (2001).
- 501 Glenn C. Noe, Comment, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215, 226 (1997-98).
- 502 Champagne, *Tort Reform and Judicial Selection*, *supra* note 414, at 1491.
- 503 De Muniz, *Politicizing State Judicial Elections*, *supra* note 346, at 366.
- 504 *Id.*
- 505 *Id.* at 377.
- 506 *Id.* at 377-79.
- 507 *Id.*
- 508 *Id.* at 380-81.
- 509 *Id.* at 381.
- 510 *Id.*
- 511 *Id.*
- 512 *Id.* at 385.
- 513 See Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 678 (2002).
- 514 *Id.*
- 515 *Id.* at 678-79.
- 516 See *Id.* at 679; Champagne, *Coming to a Judicial Election Near You*, *supra* note 19, at 16.
- 517 See, e.g., Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 13.
- 518 *Id.*
- 519 Shepherd, *Justice At Risk*, *supra* note 464, at 5-6.
- 520 *Id.*
- 521 See Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 12.
- 522 See Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 33-35 (2009).
- 523 *Id.* at 39-40.
- 524 See Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, *supra* note 342, at 12-13.
- 525 Chris W. Bonneau & Damon M. Cann, *Voters' Verdicts: Citizens, Campaigns, and Institutions in State Supreme Court Elections 57-68* (2015), available at <http://www.jstor.org/stable/j.ctt15hvzft.7>. (last visited Sep. 12, 2019).
- 526 See BALLOTEDIA, *Nonpartisan Election of Judges*, *supra* note 482.
- 527 See *supra* Part IV (discussion of retention elections).
- 528 See Webster, *Selection and Retention of Judges*, *supra* note 3, at 13.
- 529 Brian T. Fitzpatrick, *The Case for Political Appointment of Judges*, THE FED. SOC'Y (April 2018) at 4, available at <https://fedsoc.org/commentary/publications/the-case-for-political-appointment-of-judges> (last visited Aug. 15, 2019).
- 530 NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 531 Bannon, *Rethinking Judicial Selection in State Courts*, *supra* note 356, at 25.
- 532 MINN. JUD. BRANCH, <http://www.mncourts.gov/SupremeCourt.aspx> (last visited Sep. 12, 2019); N.D. SUP. CT., <http://ndcourts.gov/Court/COURT.htm> (last visited Sep. 12, 2019); SUP. CT. OF GA., <http://www.gasupreme.us/court-information/biographies/> (last visited Sep. 12, 2019).
- 533 See *supra* Part II (Initial Appointment Chart).
- 534 Fitzpatrick, *The Case for Political Appointment of Judges*, *supra* note 529, at 5.
- 535 *Id.*
- 536 See BRENNAN CTR. FOR JUSTICE, *Judicial Selection: A Look at California*, available at <https://www.brennancenter.org/analysis/judicial-selection-look-california> (last visited Aug. 15, 2019).
- 537 *Id.*
- 538 See NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 539 *Id.*
- 540 See https://ballotpedia.org/Article_IV,_Maryland_Constitution; see <https://governor.maryland.gov/wp-content/uploads/2015/02/EO0101201509.pdf> (last visited Aug. 15, 2019).
- 541 *Id.*
- 542 See Martin W. Healy, *A Guide To The Massachusetts Judicial Selection Process: The Making of a Judge* (3rd ed., 2015), available at <https://www.massbar.org/docs/default-source/advocacy/mjisp-3-ed.pdf?sfvrsn=2> (last visited Aug. 15, 2019); Mass. Exec. Order 558 (Feb. 5, 2015), available at <https://www.mass.gov/files/documents/2016/09/rv/eo-558.pdf> (last visited Aug. 15, 2019).
- 543 *Id.*

- 544 See Peter Vickery, *Choosing Judges In Massachusetts: The Governor's Council and Judicial Nominating Commission Then and Now* (Nov. 27, 2018), available at <https://masslandlords.net/choosing-judges-in-massachusetts-the-governors-council-and-judicial-nominating-commission-then-and-now> (last visited Aug. 15, 2019).
- 545 See NAT'L CTR. FOR ST. CTS., *Judicial Selection in the States: New Jersey*, available at http://www.judicialselection.us/judicial_selection/index.cfm?state=NJ (last visited Aug. 27, 2019).
- 546 *Id.*
- 547 *Id.*
- 548 *Id.*
- 549 *Id.*
- 550 *Id.*
- 551 *Id.*
- 552 *Id.*
- 553 See, e.g., VT. JUD., *Application For Candidates For Supreme Court Justice*, available at https://www.vermontjudiciary.org/sites/default/files/documents/Justice%20Candidates%20Application-October-2016_0.pdf (last visited Aug. 15, 2019).
- 554 See CONN. OFF. OF GOVERNMENTAL ACCOUNTABILITY, JUD. SELECTION COMM'N: *Applications*, available at <https://www.ct.gov/jsc/cwp/view.asp?a=3250&Q=499482&jscNav=%7C> (last visited Aug. 15, 2019).
- 555 See https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/JudicialAppointmentQuestionnaire_2017.pdf (last visited Aug. 15, 2019).
- 556 See STATE OF N.Y. COMM'N ON JUD. NOMINATION, <http://www.nysegov.com/cjn/assets/documents/Brochure%2005.13.15.pdf> (last visited Aug. 15, 2019).
- 557 See Webster, *Selection and Retention of Judges*, *supra* note 3, at 17-19.
- 558 *Id.*
- 559 *Id.*
- 560 See Bierman, *Beyond Merit Selection*, *supra* note 352, at 867; see also Stephen Choi, Mitu Gulati, & Eric Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2008), available at http://www.ericposner.com/professionals_or_politicians.pdf (last visited Aug. 15, 2019).
- 561 See Bierman, *Beyond Merit Selection*, *supra* note 352, at 867.
- 562 *Id.*
- 563 *Id.*
- 564 See Off. of GOVERNOR GREG ABBOTT, https://gov.texas.gov/uploads/files/organization/appointments/Abbott_Judicial_Questionnaire.pdf; <https://gov.texas.gov/uploads/files/organization/appointments/conductrelease.pdf> (last visited Sep 12, 2019).
- 565 See Bierman, *Beyond Merit Selection*, *supra* note 352, at 868-69.
- 566 THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
- 567 See Jed H. Shugerman, *The People's Courts* 4 (2012).
- 568 See Bierman, *Beyond Merit Selection*, *supra* note 352, at 867.
- 569 See NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 570 See Webster, *Selection and Retention of Judges*, *supra* note 3, at 14.
- 571 See Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L. J. 125, 133-35, 139-40 (2007).
- 572 See Bannon, *Rethinking Judicial Selection in State Courts*, *supra* note 356, at 20-21.
- 573 See Bierman, *Beyond Merit Selection*, *supra* note 352, at 867.
- 574 See Fitzpatrick, *The Case for Political Appointment of Judges*, *supra* note 529, at 5; Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, *supra* note 571, at 133.
- 575 See discussion of O'Connor Plan, *supra* Part III.
- 576 See NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 577 Webster, *Selection and Retention of Judges*, *supra* note 3, at 14.
- 578 See Mathew Schneider, *Options for an Independent Judiciary in Michigan: Why Merit Selection of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609 (2010).
- 579 See Fitzpatrick, *The Case for Political Appointment of Judges*, *supra* note 529, at 5.
- 580 See NAT'L CTR. FOR ST. CTS., *Public Trust and Confidence Resources Guide*, *supra* note 353.
- 581 See Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 VAND. L. REV. 1729, 1729-40 (2017).
- 582 See Fitzpatrick, *The Case for Political Appointment of Judges*, *supra* note 529, at 5-6.
- 583 *See id.*
- 584 See Fitzpatrick, *The Ideological Consequences of Selection*, *supra* note 581, at 1732-48.
- 585 See THE FEDERALIST NO. 76 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
- 586 *See id.*
- 587 *Id.*
- 588 *See id.*

- 589 See NAT'L CTR. FOR ST. CTS., *Judicial Selection in the States: South Carolina*, available at http://www.judicialselection.us/judicial_selection/index.cfm?state=SC (last visited Aug. 15, 2019).
- 590 See *Id.*
- 591 See *Id.*
- 592 See *Id.*
- 593 COMMONWEALTH OF VA. DIV. OF LEGIS. SERVS., *Judicial Selection Overview*, available at <http://dls.virginia.gov/judicial.html> (last visited Aug. 15, 2019).
- 594 See *Id.*
- 595 See *Id.*
- 596 See *Id.*
- 597 See *Id.*
- 598 See *Id.*
- 599 See *Id.*
- 600 See Webster, *Selection and Retention of Judges*, *supra* note 3, at 17-19.
- 601 See *Id.*
- 602 See *Id.*
- 603 See NAT'L CTR. FOR ST. CTS., *Judicial Selection in the States: South Carolina*, *supra* note 589; COMMONWEALTH OF VA. DIV. OF LEGIS. SERVS., *Judicial Selection Overview*, *supra* note 577.
- 604 See *Id.*
- 605 See Webster, *Selection and Retention of Judges*, *supra* note 3, at 14.
- 606 See *Id.*
- 607 See Schneider, *Options for an Independent Judiciary in Michigan: Why Merit Selection of State Court Judges Lacks Merit*, *supra* note 578, at 631.
- 608 See NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 609 *Id.*
- 610 See Bierman, *Beyond Merit Selection*, *supra* note 352, at 854-56.
- 611 Allan Ashman & James J. Alfani, *The Key to Judicial Merit Selection: The Nominating Process*, 22 AM. JUDICATURE SOC'Y (1974).
- 612 See NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43.
- 613 *Id.*
- 614 See *Id.*
- 615 See *Id.*
- 616 *Id.*
- 617 See *Id.*
- 618 See *Id.*
- 619 *Id.*
- 620 Mass. Exec. Order 470.
- 621 See, e.g., N.H. Exec. Order 2005-2; N.Y. Governor's Exec. Order 10.1 (1997).
- 622 See *supra* Part IV (judicial nomination commissions).
- 623 Symposium, *The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 362 (2002).
- 624 See James J. Alfani & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683, 724 (2002).
- 625 See *supra* Part IV (judicial nominating commissions).
- 626 See Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 523-24 (1978).
- 627 See *supra* Part IV (judicial nominating commissions).
- 628 See Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, *supra* note 626, at 522-23.
- 629 *Id.* at 528.
- 630 See Bierman, *Beyond Merit Selection*, *supra* note 352, at 859.
- 631 See Bannon, *Rethinking Judicial Selection in State Courts*, *supra* note 356, at 25.
- 632 See Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 217 (2010).
- 633 See Bierman, *Beyond Merit Selection*, *supra* note 352, at 855.
- 634 See *Id.*
- 635 See Fitzpatrick, *The Case for Political Appointment of Judges*, *supra* note 529, at 5-6.
- 636 *Id.*
- 637 Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 732 (2002).
- 638 See *supra* Part IV (judicial nominating commissions).
- 639 *Id.*
- 640 *Id.*
- 641 *Id.*
- 642 See Steven Scott Stevens, *Who Judges the Judges?*, 69 FLA. B.J. 12, 15 (Jan. 1995).
- 643 See Norman L. Greene, *Perspectives on Judicial Selection*, 56 MERCER L. REV. 949, 963 (2005).

- 644 Symposium, *The Case for Judicial Appointments*, 33 U. TOLEDO L. REV. 353, 369 (2002).
- 645 Richard A. Watson & Rondal G. Downing, *The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan*, at 258 (John Wiley & Sons, Inc. 1969).
- 646 See Fitzpatrick, *The Case for Political Appointment of Judges*, *supra* note 529, at 6.
- 647 See *supra* Part IV (judicial nominating commissions).
- 648 See *Id.*
- 649 See *Id.*
- 650 See *supra* Part IV (retention elections).
- 651 See Webster, *Selection and Retention of Judges*, *supra* note 3, at 14.
- 652 See *Id.*
- 653 See *Id.*
- 654 See *Id.*
- 655 See *Id.*
- 656 See *Id.*
- 657 See *Id.*
- 658 Webster, *Selection and Retention of Judges*, *supra* note 3, at 36.
- 659 BALLOTEDIA, *Retention Elections*, available at https://ballotpedia.org/Retention_election (last visited Aug. 15, 2019).
- 660 *Id.*
- 661 See O'Connor, *The O'Connor Judicial Selection Plan*, *supra* note 233.
- 662 See *Id.* at 7-8.
- 663 See Anthony Champagne, *Judicial Reform in Texas: A Look Back After Two Decades*, J. OF AM. JUDGES ASSOC., Vol. 43, Iss. 2 at 68 (quoting late New Jersey Chief Justice Arthur Vanderbilt), available at <http://digitalcommons.unl.edu/ajacourtreview/210> (last visited Aug. 15, 2019).
- 664 See Phillips, *The Merits of Merit Selection*, *supra* note 463, at 96.

APPENDIX TABLE 1

Election Cycles for “Places” on Texas Appellate Courts & Results of 2018 General Election for Texas Appellate Courts

TEXAS SUPREME COURT							
ELECTION CYCLES BY “PLACE” ON COURT				2018 GENERAL ELECTION			
Place	Six – Year Election Cycle			Incumbent Party	Contested Election?	Incumbent Seeking Reelection?	Winning Party
	2018, 2024 etc.	2020, 2026 etc.	2022, 2028 etc.				
Chief Justice		X					
Place 2	X			R	Yes	Yes	R
Place 3			X				
Place 4	X			R	Yes	Yes	R
Place 5			X				
Place 6	X			R	Yes	Yes	R
Place 7		X					
Place 8		X					
Place 9			X				
TOTALS	3	3	3	3R	3 of 3	3 of 3	3R

TEXAS COURT OF CRIMINAL APPEALS							
ELECTION CYCLES BY “PLACE” ON COURT				2018 GENERAL ELECTION			
Place	Six – Year Election Cycle			Incumbent Party	Contested Election?	Incumbent Seeking Reelection?	Winning Party
	2018, 2024 etc.	2020, 2026 etc.	2022, 2028 etc.				
Presiding Judge	X			R	Yes	Yes	R
Place 2			X				
Place 3		X					
Place 4		X					
Place 5			X				
Place 6			X				
Place 7	X			R	Yes	Yes	R
Place 8	X			R	Yes	No	R
Place 9		X					
TOTALS	3	3	3	3R	3 of 3	2 of 3	3R

INTERMEDIATE APPELLATE COURTS								
ELECTION CYCLES BY "PLACE" ON COURT					2018 GENERAL ELECTION			
Court (City)	Place	Six – Year Election Cycle			Incumbent Party	Contested Election?	Incumbent Seeking Reelection?	Winning Party
		2018, 2024 etc.	2020, 2026 etc.	2022, 2028 etc.				
First (Houston)	Chief			X				
	2	X			R	Yes	Yes	D
	3		X					
	4			X				
	5		X					
	6	X			R	Yes	Yes	D
	7	X			D ¹	Yes	No	D
	8	X			R	Yes	Yes	D
	9	X			R	Yes	Yes	D
Second (FortWorth)	Chief	X			R	No	Yes	R
	2		X					
	3			X				
	4	X			R	No	Yes	R
	5	X			R	Yes	No	R
	6	X			R	No	Yes	R
	7		X					
Third (Austin)	Chief		X					
	2	X			R	Yes	Yes	D
	3	X			R	Yes	Yes	D
	4			X				
	5	X			R	Yes	Yes	D
	6	X			R	Yes	Yes	D
Fourth (San Antonio)	Chief		X					
	2	X			R	Yes	Yes	D
	3	X			D	Yes	Yes	D
	4	X			D	Yes	Yes	D
	5	X			R	Yes	No	D
	6			X				
	7	X			D	Yes	Yes	D
Fifth (Dallas)	Chief	X			R	Yes	Yes	D
	2	X			R	Yes	Yes	D
	3		X					
	4			X				
	5	X			R	Yes	Yes	D
	6		X					
	7			X				
	8		X					
	9	X			R	Yes	Yes	D
	10	X			R	Yes	Yes	D
	11	X			R	Yes	No	D
	12	X			R	Yes	No	D
	13	X			R	Yes	Yes	D
Sixth (Texarkana)	Chief			X				
	2	X			R	No	No	R
	3		X					

¹ Justice Terry Jennings was elected as a Republican in 2000, 2006, and 2012. He switched to the Democratic Party in October of 2016 and did not run for reelection in 2018.

INTERMEDIATE APPELLATE COURTS (CONTINUED)								
ELECTION CYCLES BY "PLACE" ON COURT					2018 GENERAL ELECTION			
Court (City)	Place	Six – Year Election Cycle			Incumbent Party	Contested Election?	Incumbent Seeking Reelection?	Winning Party
		2018, 2024 etc.	2020, 2026 etc.	2022, 2028 etc.				
Seventh (Amarillo)	Chief		X					
	2	X			R	No	Yes	R
	3	X			R	No	Yes	R
	4			X				
Eight (El Paso)	Chief		X					
	2	X			D	No	Yes	D
	3	X			D	No	Yes	D
Ninth (Beaumont)	Chief		X					
	2			X				
	3	X			R	No	Yes	R
	4	X			R	No	Yes	R
Tenth (Waco)	Chief	X			R	No	Yes	R
	2		X					
	3			X				
Eleventh (Dallas)	Chief	X			R	No	Yes	R
	2		X					
	3			X				
Twelfth (Tyler)	Chief		X					
	2			X				
	3	X			R	No	Yes	R
Thirteenth (Corpus, Christi & Edinburg)	Chief	X			D	Yes	No	D
	2	X			D	Yes	Yes	D
	3			X				
	4	X			D	Yes	No	D
	5	X			D	Yes	Yes	D
	6		X					
Fourteenth (Houston)	Chief		X					
	2			X				
	3	X			R	Yes	Yes	D
	4	X			R	Yes	Yes	D
	5	X			R	Yes	Yes	D
	6	X			R	Yes	Yes	D
	7		X					
	8	X			R	Yes	Yes	D
	9			X				
TOTALS	80	45	19	16	10D & 35R	32 (Ds won 31)	37 (20 lost)	33D & 12R

APPENDIX TABLE 2

Judicial Selection Models in the United States

CURRENT JUDICIAL SELECTION MODELS BY STATE ²			
	High Court	Intermediate Appellate Court	Trial Court
Alabama	Interim Vacancy: Gubernatorial appointment until next election. Full Term: Partisan election, 6-year term.	SAME.	IN CERTAIN COUNTIES (8 of 67) Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, until next election. Full Term: Partisan election, 6-year term. IN ALL OTHER COUNTIES Interim Vacancy: Gubernatorial appointment until next election. Full Term: Partisan election, 6-year term.
Alaska	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 3 years hence. If successful, 10-year term.	SAME, save for 8-year term.	SAME, save for 6-year term.
Arizona	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. If successful, 6-year term.	SAME.	IN CERTAIN COUNTIES (Pop. Over 250,000 Or Choosing To Opt In) Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. Full Term: Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. If successful, 4-year term. IN ALL OTHER COUNTIES Interim Vacancy: Gubernatorial appointment until next election, for remainder of term. Full Term: Nonpartisan election for 4-year term.

² This table was created in reliance upon data set forth in BRENNAN CTR., *Judicial Selection: Interactive Map*, *supra* note 30; NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges*, *supra* note 43; and BALLOTPEdia, *Judicial Selection In The States*, *supra* note 213.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)			
	High Court	Intermediate Appellate Court	Trial Court
Arkansas	Interim Vacancy: Gubernatorial appointment, until next election. Full Term: Nonpartisan election, 8-year term.	SAME, save for 6-year term.	SAME, save for 6-year term.
California	Gubernatorial appointment after nonbinding vetting by state bar, with majority confirmation by commission on judicial appointments, until retention election at least 1 year hence. If successful, 12-year term.	SAME.	Interim Vacancy: Gubernatorial appointment until next election. Full term: Nonpartisan election, with 6-year term.
Colorado	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. If successful, 10-year term.	SAME, save for 8-year term.	SAME, save for 6-year term.
Connecticut	Gubernatorial appointment from list provided by judicial nominating commission. Subject to majority confirmation by Legislature. 8-year term.	SAME.	SAME.
Delaware	Gubernatorial appointment from list provided by judicial nominating commission, subject to majority confirmation by Senate. 12-year term.	N/A	SAME.
Florida	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 6-year term.	SAME.	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, until next relevant election. Full Term: Nonpartisan election, with 6-year term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)			
	High Court	Intermediate Appellate Court	Trial Court
Georgia	Interim Vacancy: Gubernatorial appointment, after nonbinding vetting by judicial nominating commission, until next election. Full Term: Nonpartisan election, 6-year term.	SAME.	SAME, save for 4-year term.
Hawaii	Gubernatorial appointment from list provided by judicial nominating commission, subject to majority confirmation by Senate. 10-year term.	SAME.	SAME.
Idaho	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, for remainder of term. Full Term: Nonpartisan election, 6-year term.	SAME.	SAME, save for 4-year term.
Illinois	Interim Vacancy: Appointed by state Supreme Court, until next relevant election. Full Term: Partisan election, 10-year term.	SAME.	SAME, save for 6-year term.
Indiana	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. If successful, 10-year term.	SAME.	IN CERTAIN COUNTIES (Allen, Lake, and St. Joseph) Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. IN ALL OTHER COUNTIES Interim Vacancy: Gubernatorial appointment until next election. Full term: Partisan election, with 6-year term.
Iowa	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 8-year term.	SAME, save for 6-year term.	SAME, save for 6-year term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)			
	High Court	Intermediate Appellate Court	Trial Court
Kansas	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 6-year term.	Gubernatorial appointment with majority Senate confirmation, until retention election at least 1 year hence. If successful, 4-year term.	IN DISTRICTS ADOPTING COMMISSION-BASED SYSTEM (17 of 31) Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 4-year term. IN ALL OTHER DISTRICTS Interim Vacancy: Gubernatorial appointment until next election. Full term: Partisan election, with 4-year term.
Kentucky	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, until next election. Full Term: Nonpartisan election, 8-year term.	SAME.	SAME.
Louisiana	Interim Vacancy: Supreme Court appointment until special election, with interim appointee barred from running. Full Term: Partisan election, 10-year term.	SAME.	SAME, save for 6-year term.
Maine	Gubernatorial appointment, after nonbinding vetting by judicial nominating commission. Nominee is then subject to review by joint legislative committee. Committee's recommendation may be overridden by Senate, but only by 2/3 majority. 7-year term.	N/A	SAME.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)			
	High Court	Intermediate Appellate Court	Trial Court
Maryland	Gubernatorial appointment after nonbinding vetting by judicial nominating commission, with majority Senate confirmation, until retention election at least 1 year hence. If successful, 10-year term.	SAME.	Gubernatorial appointment after nonbinding vetting by judicial nominating commission, until nonpartisan election at least 1 year hence. If successful, 15-year term.
Massachusetts	Gubernatorial appointment, with confirmation by majority vote of Governor's Council. Life term.	SAME, save for nonbinding vetting by judicial nominating council, prior to gubernatorial appointment.	SAME, save for nonbinding vetting by judicial nominating council, prior to gubernatorial appointment.
Michigan	Interim Vacancy: Gubernatorial appointment, until next election. Full Term: Nonpartisan election, 8-year term.	SAME, save for 6-year term.	SAME, save for 6-year term.
Minnesota	Interim Vacancy: Gubernatorial appointment, until next election. Full Term: Nonpartisan election, 6-year term.	SAME.	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, until next election. Full Term: Nonpartisan election, 6-year term.
Mississippi	Interim Vacancy: Gubernatorial appointment, after nonbinding vetting by judicial nominating commission, until next election OR remainder of term if less than 4 years. Full Term: Nonpartisan election, 8-year term.	SAME.	Interim Vacancy: Gubernatorial appointment, after nonbinding vetting by judicial nominating commission, until next election. Full Term: Nonpartisan election, 4-year term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)			
	High Court	Intermediate Appellate Court	Trial Court
Missouri	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 12-year term.	SAME.	IN CERTAIN DISTRICTS (City of St. Louis, Jackson County, Or Choosing to Opt In): Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 6-year term. IN ALL OTHER COUNTIES Interim Vacancy: Gubernatorial appointment until next election. Full Term: Partisan election, with 6-year term.
Montana	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, with majority Senate confirmation, until next election. Full Term: Nonpartisan election, 8-year term.	N/A	SAME, save for 6-year term.
Nebraska	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 3 years hence. If successful, 6-year term.	SAME.	SAME.
Nevada	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, until next election. Full Term: Nonpartisan election, 6-year term.	SAME.	SAME.
New Hampshire	Gubernatorial appointment after nonbinding recommendation by judicial nominating commission, with confirmation by majority vote of Executive Council. Life term.	N/A	SAME.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)			
	High Court	Intermediate Appellate Court	Trial Court
New Jersey	Gubernatorial appointment after nonbinding vetting by judicial advisory panel and state bar board, subject to majority confirmation by Senate. 7-year term.	Chief justice of state Supreme Court appoints a gubernatorially-appointed trial judge to serve on the superior court's appellate division. 7-year term.	SAME as Supreme Court.
New Mexico	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, until next election. Full Term: Gubernatorial appointment from list provided by judicial nominating commission, until next election. If successful in partisan election, remainder of 8-year term.	SAME.	SAME, save for 6-year term.
New York	Gubernatorial appointment from list provided by judicial nominating commission, subject to majority confirmation by Senate. 14-year term.	Gubernatorial appointment from list of sitting trial judges provided by judicial nominating commission. 5-year term or remainder of trial court term, whichever is shorter.	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, subject to majority confirmation by Senate, until next election. Full Term: Partisan election, 14-year term.
North Carolina	Interim Vacancy: Gubernatorial appointment until next election, for remainder of term. Full Term: Partisan election, 8-year term.	SAME.	SAME.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)			
	High Court	Intermediate Appellate Court	Trial Court
North Dakota	Interim Vacancy: Governor may call special election OR appoint candidate from list provided by judicial nominating commission, until next election at least 2 years hence, for remainder of term. Full Term: Nonpartisan election, 10-year term.	Appointed by state Supreme Court.	Interim Vacancy: Governor may call special election OR appoint candidate from list provided by judicial nominating commission, until next election at least 2 years hence, for remainder of term. Full Term: Nonpartisan election, 6-year term.
Ohio	Interim Vacancy: Gubernatorial appointment, until next election, for remainder of term. Full Term: Nonpartisan election, 6-year term.	SAME.	SAME.
Oklahoma	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 6-year term.	SAME.	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, for remainder of term. Full Term: Nonpartisan election, 4-year term.
Oregon	Interim Vacancy: Gubernatorial appointment, until next election. Full Term: Nonpartisan election, 6-year term.	SAME.	SAME.
Pennsylvania	Interim Vacancy: Gubernatorial appointment subject to 2/3 Senate confirmation, until next election. Full Term: Partisan election, 10-year term.	SAME.	SAME.
Rhode Island	Gubernatorial appointment from list provided by judicial nominating commission. Subject to majority confirmation by entire Legislature. Life term.	N/A	Gubernatorial appointment from list provided by judicial nominating commission. Subject to majority confirmation by Senate. Life term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)			
	High Court	Intermediate Appellate Court	Trial Court
South Carolina	<p>Interim Vacancy: Legislative appointment from list provided by judicial nominating committee, OR gubernatorial appointment for vacancies shorter than 1 year, and all for remainder of term.</p> <p>Full Term: Legislative appointment from list provided by judicial nominating committee. 10-year term.</p>	<p>Interim Vacancy: SAME. Full Term: SAME, save for 6-year term.</p>	<p>Interim Vacancy: SAME. Full Term: SAME, save for 6-year term.</p>
South Dakota	<p>Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 3 years hence. If successful, 8-year term.</p>	N/A	<p>Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, for remainder of term. Full Term: Nonpartisan election, 8-year term.</p>
Tennessee	<p>Gubernatorial appointment from list provided by judicial nominating commission, with majority legislative confirmation, until retention election at least 30 days hence. If successful, 8-year term (full term) or remainder of term (interim vacancy).</p>	SAME.	<p>Interim Vacancy: Gubernatorial appointment from list provided by Trial Court Vacancy Commission, for remainder of unexpired term. Full Term: Partisan election, with 8-year term.</p>
Texas	<p>Interim Vacancy: Gubernatorial appointment, with majority Senate confirmation, until next election. Full Term: Partisan election, 6-year term.</p>	SAME.	SAME, save for 4-year term.
Utah	<p>Gubernatorial appointment from list provided by judicial nominating commission, with majority Senate confirmation, until retention election at least 3 years hence. If successful, 10-year term.</p>	SAME, save for 6-year term.	SAME, save for 6-year term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)			
	High Court	Intermediate Appellate Court	Trial Court
Vermont	Gubernatorial appointment from list provided by judicial nominating commission, with majority Senate confirmation. 6-year term.	N/A	SAME.
Virginia	When in session, legislative appointment, 12-year term. When out of session, gubernatorial appointment until next session.	SAME, save for 8-year term.	SAME, save for 8-year term.
Washington	Interim Vacancy: Gubernatorial appointment, until next election, for remainder of term. Full Term: Nonpartisan election, 6-year term.	SAME.	SAME, save for 4-year term.
West Virginia	Interim Vacancy: Gubernatorial appointment from list provided by judicial nominating commission, until next election. Full Term: Nonpartisan election, 12-year term.	N/A	SAME, save for 8-year term.
Wisconsin	Interim Vacancy: Gubernatorial appointment, after nonbinding vetting by judicial nominating commission, until next relevant election. Full Term: Nonpartisan election, 10-year term.	SAME, save for 6-year term.	SAME, save for 6-year term.
Wyoming	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 8-year term.	N/A	SAME, save for 6-year term.

