MEMORANDUM

April 20, 2017

TO: NCBA Judicial Independence Committee

FROM: JI Study Subcommittee: Wade Barber (Chair), John S. Hahn, Hank Van Hoy, and Gavin B. Parsons∗ (Jon Heyl, JI Committee Chair, ad hoc)

RE: Judicial Selection (2005 to Present)

The North Carolina Bar Association’s (“NCBA”) Resolution on Judicial Independence directs the NCBA to study judicial selection and formed the NCBA’s Committee for Judicial Independence to do so. See Appendix B, Resolution on Judicial Independence, NCBA Board of Governors, (January 17, 2002). This study subcommittee studied judicial selection—the trends over the past decade, the characteristics of good courts, and the prominent proposals for judicial reform—and makes the following report to the full committee.


A. North Carolina


The election system remained partisan for much of the 1990s, but reform measures beginning in 1996 and culminating with the 2002 Judicial Campaign Reform Act (JCRA) resulted in a system of nonpartisan elections for all North Carolina judges including the district, superior, and appellate courts. See N.C. Sess. Law 1996-9es2 (superior courts); N.C. Sess. Law 2001-403 (district courts); N.C. Sess. Law 2002-158 (supreme court and court of appeals). The

∗ The study subcommittee thanks Madeleine L. Hogue, of Mayer Brown LLP, for her assistance with the research for and preparation of this memorandum.
JCRA also gave appellate-court candidates a public financing option, provided a voter guide on appellate-court candidates, and lowered the limit on contributions to appellate-court candidates to $1,000. N.C. Sess. Law 2002-158. The push to a nonpartisan judiciary was not exhaustive, however: A 2003 amendment to the Code of Judicial Conduct permitted judges and judicial candidates to identify themselves as members of political parties and attend and speak at political gatherings. N.C. Code of Judicial Conduct, Canon 7 (2003).

2. The Joint Task Force Proposal of 2009. In 2009, a joint task force comprised of the NCBA and other North Carolina bar organizations proposed the addition of a judicial nominating commission (“JNC”) to the judicial-election system in North Carolina. The goals of the proposal were to attract qualified candidates, reduce the cost and duration of judicial elections, improve public financing, increase judicial independence while preserving accountability, promote diversity and quality of the bench, and increase public respect for judiciary. Joint Task Force on Judicial Selection, Proposed System for Merit Screening and Election of North Carolina Appellate Judges 1 (2009) (on file with the Judicial Independence Committee Study Subcommittee). To accomplish those goals, the Task Force recommended instituting a bipartisan merit-selection committee composed of a diverse group of 12 lawyers and 3 non-lawyers (most of whom would be appointed by members of the executive and legislative branch). Id. at 2. The role of the committee was to choose two (2) qualified candidates to participate in a nonpartisan general election. Id. Candidates for judicial election would apply directly to the committee, and could participate in the general election only if they were selected. Id. The candidate who won the election would serve an initial 8-year term, followed by retention elections at regular intervals. Id. at 2–3.

The proposal was adopted by resolution of the NCBA board of governors and the leadership of the other bar organizations. The proposal was considered by the North Carolina House of Representatives in 2009 and introduced in the Senate in 2011, but was eventually abandoned.

3. Campaign Finance in North Carolina. The JCRA remained in effect until 2013, when the Voter Information Verification Act amended campaign finance laws. See N.C. Sess. Law 2013-381. This Act eliminated public financing for judicial candidates, increased the JCRA’s donor contribution cap from $1,000 to $5,000 per election (adjusted for inflation), and relaxed requirements for 501(c)4 nonprofits reporting campaign-style ad spending. Id. Even before that, however, the North Carolina Board of Elections had ceased disbursing matching funds, which encouraged judicial candidates to accept public financing by providing for “rescue funds of up to double the amount they initially received” if an opponent outsponsored the public fund. Justin Moore, Election Law Society, The Battleground 2012: The Public Financing of Judicial Candidates in North Carolina after Arizona Free Enterprise v. Bennett (Nov. 6, 2012), http://electls.blogs.wm.edu/2012/11/06/the-battleground-2012-the-public-financing-of-judicial-candidates-in-north-carolina-after-arizona-free-enterprise-v-bennett. This was prompted by the Supreme Court’s 2011 decision in Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett, 564 U.S. 721 (2011), which held matching funds unconstitutional in the context of state legislative elections.
See Part I.C.1.b, infra. Following Bennett, the North Carolina Board of Elections voluntarily ceased disbursing matching funds in judicial elections. These developments opened the door further for interest groups to participate in judicial elections in the wake of Citizens United. See Part I.C.1.a, infra.

North Carolina’s experience before, during, and after the JCRA affords unique insight into the workings of public financing. The JCRA was enacted in response to recognized campaign-financing issues in North Carolina. Campaign spending in judicial elections was escalating. “The 2000 election for Chief Justice of North Carolina was the most expensive in North Carolina’s history (just over $2 million).” W. VA. INDEP. COMM’N ON JUDICIAL REFORM, FINAL REPORT 13 (Nov. 15, 2009). Lawyers were the primary contributors, with “attorneys or attorney committees contribut[ing] 54.6 percent of money raised in 2002. An additional 18.4 percent came from political parties and political action committees.” Sasha Horwitz, Ctr. for Governmental Studies, Public Campaign Financing in North Carolina Judiciary 24 (2010). A 2002 survey found that 84% of voters were concerned about lawyers’ campaign contributions to judicial candidates. Damon Circosta, N.C. Ctr. for Voter Educ., Raleigh, Presentation, Public Financing of Judicial Elections in North Carolina 9, http://www.lwwi.org/portals/0/members/pdfs/damoncircostahandout.pdf.

While the JCRA was in full effect—between 2004 and approximately 2011—campaign spending in North Carolina judicial elections was dramatically reduced:

The JCRA was first implemented in North Carolina’s 2004 election. Twelve of sixteen candidates successfully qualified for the public financing program, and a total of just under $1.5 million in public funds was provided to those candidates. Approximately $800,000 of that total was spent on campaigns for two open Supreme Court seats, with the rest going to Court of Appeals candidates. Of the five winning candidates, four received public financing. In 2006, eight of twelve candidates qualified for the program, and five of six winners received public funding. The success of candidates opting for public financing shows that the program provides sufficient funds to run a campaign.


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1 The Eastern District of North Carolina later held the matching funds to be unconstitutional pursuant to the reasoning of Bennett. See N.C. Right to Life Political Action Comm. v. Leake, 872 F. Supp. 2d 466, 473 (E.D.N.C. 2012).
The JCRA was widely viewed as successful, and was even considered a model for other states to emulate. Billy Corriher, Ctr. for Am. Progress, *Public Financing of Judicial Races Can Give Small Donors a Decisive Role* 1 (Dec. 12, 2012). North Carolina saw significantly reduced spending by interest groups. Circosta, *supra* at 21 (reporting that the legal community, for example, reduced spending from $321,284 to $136,153 from 2002 to 2004). Judges who participated in the system expressed satisfaction. For example, Judge Wanda Bryant, North Carolina Court of Appeals, stated: “I’ve run in two elections, one with campaign finance reform and one without. I’ll take ‘with’ any day of the week.” Carmen Lo et al., *Spending in Judicial Elections: State Trends in the Wake of Citizens United* 50 (2011), https://gov.uchastings.edu/public-law/docs/judicial-elections-report-and-appendices-corrected.pdf. The availability of “matching” or “rescue” funds was successful in promoting participation in the public-financing option. Most notably, they “played a pivotal role in assisting [former] Chief Justice Sarah Parker win her 2006 re-election campaign against a challenger who did not take public financing.” Moore, *supra*.

These benefits were reduced in the wake of *Citizens United, Bennett*, and North Carolina’s 2013 Voter Information Verification Act, as illustrated by the 2012 state Supreme Court election. During that election, political organizations, reportedly funded by business interests, combined to spend approximately $2.5 million. Indeed, many recognized *Bennett* as the death knell of public financing in North Carolina. See Moore, *supra* (recognizing the millions of dollars contributed by outside groups in 2012 and opining that “[s]tatewide judicial candidates in North Carolina will have no choice but to either opt out of the public financing system, or have their campaigns effectively farmed out to outside groups who are subject to far fewer legal limitations.”).

With the 2013 amendment of the JCRA (see N.C. Sess. Law 2013-381), spending has continued to increase. During the 2014 state Supreme Court elections, “more than $6 million dollars quickly poured in from lobbyists, lawyers, business interests, political action committees, so-called ‘527 groups’ and political parties.” Melissa P. Kromm, *Special Interest Assault on Judicial Independence is Harming NC*, Jefferson Post (Apr. 12, 2016), http://jeffersonpost.com/opinion/3351/special-interest-assault-on-judicial-independence-is-harming-nc. That election “was the most expensive election in the court’s history and the second most expensive judicial election in the United States.” *Id*.

4. “Tough on Crime” or “Soft on Crime.” The 2012 North Carolina Supreme Court campaign was the first to see campaign ads painting one candidate as “tough on crime” and the other as “soft on crime.” See Anne Blythe, News & Observer, *NC Supreme Court candidates campaign against outside money, TV attack ads* (Oct. 29, 2014), http://www.newsobserver.com/news/politics-government/article10111853.html. The ads were sponsored by a 527 group and not by the candidates. See *id*. Again, in the 2014 campaign for another Supreme Court seat, a 527 group reportedly spent $1.3 million attacking a candidate for allegedly siding with child predators. *Id. ; see also Scott Greytak, Alicia Bannon, Allyse Falce, and Linda Casey,*
5. Recent Developments. The year 2015 saw an attempt to move to retention elections for supreme court incumbents. In June 2015, a bill was approved by legislators to eliminate the requirement that sitting supreme court justices run for reelection in contested elections, and to move instead to retention elections. See N.C. Sess. Law 2015-66. This bill was signed into law, but in 2016 a three-judge panel of the North Carolina Superior Court, Wake County, ruled that retention elections are unconstitutional under Article IV, § 16 of the North Carolina Constitution. Faires v. State Bd. of Elections, 2016 WL 865472, at *1 (N.C. Super. 2016). The North Carolina Supreme Court issued a divided ruling and contested elections were retained. Faires v. State Bd. of Elections, 784 S.E.2d 463, 464 (N.C. 2016). Thus, as the law now stands, anyone seeking to implement retention elections would need either to amend the state constitution or to mount a new challenge in the courts.2

The most recent development in North Carolina judicial reform has been a return to partisan elections for North Carolina appellate judges. In late 2015, Governor McCrory signed a bill to add party designations to judicial elections for the Court of Appeals. See N.C. Sess. Law 2015-292. The bill did not require party primaries, but it took a step in the direction of partisan elections by requiring judicial candidates to indicate their party designations or mark “unaffiliated” when filing for candidacy; the designation chosen would then be listed on the ballot. Id. Then, on December 16, 2016, Governor McCrory signed Senate Bill 4, which reestablishes partisan elections for the North Carolina Court of Appeals and Supreme Court. See N.C. Sess. Law 2016-125. When Senate Bill 4 takes effect on January 1, 2018, candidates for election to the appellate bench will be required to participate in party primaries and North Carolina will rejoin the minority of states with partisan high-court elections.3 A similar bill addressing trial-court elections was passed by the House and Senate in early 2017; after Governor Cooper vetoed the bill, a supermajority of the legislature voted on March 23, 2017 to override the veto. See N.C. House Bill 100 (2017).

B. Methods of Judicial Selection in State Appellate Courts

1. First Full Term

State governments employ three main methods of judicial selection for a judge’s first full term. These are: (1) gubernatorial appointment; (2) judicial elections; and (3) legislative

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2 A divided ruling by the N.C. Supreme Court means that the three-judge panel ruling “stands without precedential value.” Faires, 784 S.E.2d at 464.

3 As of 2013, those states included Alabama, Illinois, Louisiana, Michigan, New Mexico, Ohio, Pennsylvania, Texas, and West Virginia. Am. Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts 2 (2013). West Virginia has since returned to a nonpartisan system. See Part I.C.1c, infra. In some of these states, although candidates are put forward by state political parties, there is no party affiliation listed on the general-election ballot. See, e.g., id. at 8 n.19 (Ohio).
appointment. Although there are some variations, states generally use the same method of selection for their intermediate appellate courts as they do for their highest court. See Appendix A, infra.

a. Gubernatorial Appointment. Twenty-eight states use a system of gubernatorial appointment. Appendix A, infra. Of those, twenty-seven follow an assisted-appointment method—referred to as “merit selection” or the “Missouri Plan”—that relies on a judicial nominating commission (“JNC”) to recommend candidates for the governor to appoint. Id. The composition of JNCs varies among the states. See generally AMERICAN JUDICATURE SOCIETY, JUDICIAL MERIT SELECTION: CURRENT STATUS (2011). JNCs are generally composed of both lawyers and non-lawyers. Id. Their members may be chosen by the state bar, the executive branch, the judiciary—or a combination thereof. Id. The role of a JNC is to “interview[] and screen[] candidates for judicial positions.” Ballotpedia, Assisted Appointment (Judicial Selection), https://ballotpedia.org/Assisted_appointment_(judicial_selection)#cite_note-merit1-4 (citing AM. JUDICATURE SOCIETY, MERIT SELECTION: THE BEST WAY TO CHOOSE JUDGES (October 2, 2014)). “The commission then sends a short list of qualified candidates, usually between three and five names, to the governor for consideration.” Id.

There are two significant variations among states that employ the merit-selection process to select appellate-court judges. The first is whether the recommendation of the state’s JNC is binding on the governor. Twenty-three states have a binding JNC. See Appendix A, infra. The remaining four have a nonbinding JNC, leaving the governor discretion to depart from the JNC’s recommendation if he or she so chooses. Id. The second variation among merit-selection systems is whether the legislative branch or other political bodies are involved in the selection process. Thirteen states have gubernatorial-appointment systems with no legislative or other involvement. Id. Other states employ a system in which the governor’s candidate must be approved by the Senate, by the Senate and the House, or by various committees and counsels. Id. In Massachusetts, for example, the governor receives recommendations from a nonbinding JNC. Id. The candidate selected must then be approved by the “Governor’s Counsel,” an eight-member counsel that is elected every two years by the citizens of Massachusetts. Id.; see also MARTIN W. HEALY, A GUIDE TO THE MASSACHUSETTS JUDICIAL SELECTION PROCESS 4 (2d ed. 2012).

California follows a scheme in which the governor nominates his or her preferred judicial candidate with the assistance of the State Bar’s Commission on Judicial Nominees Evaluation, but is not bound by their recommendations. Appendix A, infra. The nominee must then be confirmed by the “commission on judicial appointments,” which consists of the chief justice, the attorney general, and a presiding justice of the courts of appeal. Id.

b. Judicial Elections. Twenty-one states select their high-court judges by judicial election. Of those states, fifteen hold nonpartisan elections. Appendix A, infra. States with nonpartisan elections take steps to avoid emphasizing the party affiliation of judicial candidates. Ballotpedia, Nonpartisan Election of Judges, https://ballotpedia.org/Nonpartisan_election_of_judges. The approaches taken vary by state; it may be, for example, that judicial
candidates would not participate in party primaries or would not list party affiliations on the general-election ballot. \textit{Id.} Only six states, of which North Carolina is the newest member, hold partisan elections. Appendix A, \textit{infra}.


2. \textit{The Reselection Process}

\textit{a. Retention Elections}. Twenty states—including three judicial-election states\textsuperscript{4} and seventeen of the twenty-eight states with gubernatorial appointment—revert to retention elections after a sitting judge’s first full term. Appendix A, \textit{infra}. Retention elections are “a periodic process whereby voters are asked whether an incumbent judge should remain in office for another term. The judge, who does not face an opponent, is removed from the position if a percentage of voters (often 50 percent) indicate that he or she should not be retained.” Ballotpedia, \textit{Retention Election}, https://ballotpedia.org/Retention_election#cite_note-americanjudges-1 (citing AM. JUDGES ASS’N, THE DEBATE OVER THE SELECTION AND RETENTION OF JUDGES (2010)). Of the remaining gubernatorial-appointment states, six employ the same appointment process they use for the first full term. Appendix A, \textit{infra}. Two reappoint by other means. \textit{Id}. And three do not hold reselection, instead limiting their judges to only one term. \textit{Id}.

\textit{b. Single Terms}. In three states, judges serve a single term and thus do not undergo a reselection process. Rhode Island appoints for life; Massachusetts and New Hampshire until mandatory retirement at age 70. \textit{Id}.

\textit{c. JNC Reappointment}. In Hawaii, the state’s JNC “determines whether a justice or judge shall be retained in office. The Commission publicizes the fact that a justice or judge is seeking retention so that all persons who might have an interest in the matter be informed of the opportunity to comment.” Hawai’i State Judiciary, \textit{Judicial Selection Commission}, http://www.courts.state.hi.us/courts/judicial_selection_commission.

\textit{d. Legislative Reappointment}. In Vermont, sitting judges stand for reappointment by the legislature. Appendix A, \textit{infra}.

\textsuperscript{4} Illinois and Pennsylvania are partisan-election states that employ retention elections after a judge’s first full term. Appendix A, \textit{infra}. Montana (a state with nonpartisan elections) uses a combination of nonpartisan and retention elections. \textit{Id}.
e. Same As Original Selection Process. In the remaining states, sitting judges stand for reelection or re-appointment in competition with other candidates, in the same process as for an open seat. See id.

3. Interim Selection

The final variable is interim selection, which is “[t]he method for filling a vacant court seat that becomes open in the middle of a judge’s term (for example, due to retirement).” Brennan Ctr. for Justice, *Judicial Selection: A Glossary of Terms* (May 30, 2016). States that use gubernatorial or legislative appointment to select judges for their first full term typically use an interim system similar to the one they use for full-term appointments. Appendix A, infra. And unsurprisingly, given the logistics of convening a special election, states that select full term judges using judicial elections also resort to appointment in the interim context. Id. About one third of those states use a JNC to assist the governor in filling interim vacancies; the rest place that decision solely within the discretion of the governor. Id. An exception is Illinois, where the Illinois Supreme Court appoints judges to fill interim vacancies. Id.

C. Nationwide Trends

1. Judicial Elections

   a. Politicization and High-Dollar Elections. Politicization and interest-group spending have become significant factors in the judicial-selection process. This trend began in the 1980s and '90s, when two competing interest groups—plaintiffs’ lawyers and pro-business parties—realized the value of financing judicial election campaigns. John F. Kowal, Brennan Ctr. for Justice, *Judicial Selection for the 21st Century* 1 (2016). Conservative leaders in the early 1990s led a national campaign to advance tort reform, advancing a narrative that the nation faced a crisis of courts overburdened with tort lawsuits. Id. at 8. Tort reform measures were passed, but these new laws were struck down by several state supreme courts pursuant to state constitutional provisions “guaranteeing access to the courts” and “ensuring a remedy for wrongs committed.” Id. This sometimes resulted in protracted battles between courts and the state legislature. Compare *Sorrell v. Thevenir*, 633 N.E.2d 504, 508 (Ohio 1994) (holding tort-reform law unconstitutional on the basis of the “right to a remedy” under the Ohio constitution), with *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1097 (Ohio 1999) (overturning legislature’s attempt to abrogate *Sorrell* because the reenactment of a law previously held unconstitutional “usurps judicial power in violation of the Ohio constitutional doctrine of separation of powers”).

   These tensions raise the question of just how much latitude state judges should be entitled to when interpreting statutory and constitutional law. Although most members of the legal community will agree that “the law” is not always determinate—requiring judges to exercise discretion and “fill in the blanks” when statutes and constitutional provisions are unclear—there is a lack of consensus regarding just how much latitude this discretion affords. See Kowal, supra,
at 19. When does interpretation—the core business of judging—cross the line and become “legislating from the bench”? And are courts or the legislature the proper arbiters of state constitutional provisions? When it comes to accusations of judicial activism, neither liberal nor conservative factions hold a monopoly. Compare Frank V. Williams, III, Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts, 29 CAMPBELL L. REV. 591, 591 (2007) (“With the advent of judicially-imposed[,] same-sex marriages, the seething anger and distrust which many citizens and politicians once directed toward the federal judiciary has expanded to include the state courts as well.”), with Geoffrey R. Stone, Citizens United and Conservative Judicial Activism, 2012 U. ILL. L. REV. 485, 490 (2012) (arguing that “the conservative majority” in Citizens United “embraced an aggressively activist approach, disregarding an effort by our nation’s elected officials to bring order to what they regarded as a dangerously out-of-control electoral process”); see also Philip Morris USA v. Williams, 549 U.S. 346, 361 (2007) (Thomas, J., dissenting) (criticizing due-process limits on punitive damages, a cause célèbre of the tort-reform movement and other traditionally conservative interests, because “the Constitution does not constrain the size of punitive damages awards”).

Regardless of one’s views on judicial activism, it is clear that judicial campaigns have become increasingly partisan. See, e.g., Alicia Bannon, Brennan Ctr. for Justice, Rethinking Judicial Selection in State Courts 10 (2016) (reporting that judges and judicial candidates “now regularly describe themselves in overtly political terms”). This development has diminished the public’s faith that judges will follow or determine “the law” objectively. To the contrary, the politicization of judicial selection is causing the public to believe that outside influences such as political affiliation, political ideology, or favoring campaign donors influence judicial decisions.

Moreover, when tort-reform laws were reversed, the business lobby turned its focus to state judiciaries in another way: financing judicial races to shape more “business friendly” courts. Kowal, supra, at 8. This approach caught on, and in the recent past has been used by diverse special-interest groups including state political parties, pro-death-penalty groups, pro-life groups, state chambers of commerce, petroleum associations, trial lawyers’ associations, and charter-school supporters. See Brennan Ctr. for Justice, New Analysis: 2016 Judicial Elections See Secret Money and Heightened Outside Spending (Sept. 14, 2016), https://www.brennancenter.org/press-release/new-analysis-2016-judicial-elections-see-secret-money-and-heightened-outside-spending. With the Supreme Court’s 2010 ruling in Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), interest groups have spent soaring amounts on media campaigns targeting “unfriendly” candidates. See generally BANKROLLING THE BENCH, supra (reporting that spending has hit an all-time high over the past ten years). Often, “voters [are] left in the dark regarding who [is] trying to influence judicial elections . . . due to spending by ‘dark money’ groups that do not disclose their donors, as well as state campaign finance laws that do not require full disclosure of independent expenditures.” Id. at 44.

This chart, taken from Bankrolling the Bench, shows top TV-ad spenders for the years 2013 and 2014:
As may be seen from some of the spenders on this list, national organizations have begun to target state court races, funneling money for TV ads and mailing campaigns. *Id.; see also id.* at 36–37 (identifying organizations receiving donations from national interest groups). High-cost supreme court races have become commonplace. *See id.* at 6.

According to available empirical evidence, these trends represent a threat to judicial impartiality. One 2013 study found that higher levels of TV advertising and more outside spending correlated with judges being less likely to vote in favor of criminal defendants. Joanna Shepherd & Michael S. Kang, *Partisan Justice: How Campaign Money Politicizes Judicial Decisionmaking in Election Cases* (2016). The study further concluded that “for an average judge[,] . . . an additional $10,000 in contributions is associated with a 3 percent increase in the likelihood of partisan voting.” *Id.* The following graph, taken from Shepherd & Kang, illustrates this effect:

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**Top 10 TV Spenders, 2013-14**

<table>
<thead>
<tr>
<th>Spender</th>
<th>State</th>
<th>Spot Count</th>
<th>Est. Spending</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan Republican Party</td>
<td>Michigan</td>
<td>3,778</td>
<td>$3,342,430</td>
</tr>
<tr>
<td>Richard Bernstein</td>
<td>Michigan</td>
<td>3,244</td>
<td>$1,318,850</td>
</tr>
<tr>
<td>Campaign for 2016</td>
<td>Illinois</td>
<td>1,627</td>
<td>$1,089,370</td>
</tr>
<tr>
<td>Justice for All NC</td>
<td>North Carolina</td>
<td>1,906</td>
<td>$952,590</td>
</tr>
<tr>
<td>Republican State Leadership Committee</td>
<td>Montana &amp; Illinois</td>
<td>1,226</td>
<td>$796,620</td>
</tr>
<tr>
<td>Gary Wade, Cornelia Clark, &amp; Sharon Lee</td>
<td>Tennessee</td>
<td>1,877</td>
<td>$737,180</td>
</tr>
<tr>
<td>Brian Zahra &amp; David Viviano</td>
<td>Michigan</td>
<td>1,387</td>
<td>$690,710</td>
</tr>
<tr>
<td>Mark Martin</td>
<td>North Carolina</td>
<td>2,785</td>
<td>$611,615</td>
</tr>
<tr>
<td>The Tennessee Forum</td>
<td>Tennessee</td>
<td>1,567</td>
<td>$596,970</td>
</tr>
<tr>
<td>American Freedom Builders</td>
<td>Ohio</td>
<td>676</td>
<td>$596,440</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>20,053</strong></td>
<td><strong>$10,732,775</strong></td>
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*Id.* at 58.
And the politicization of the bench exacerbates this problem. States with partisan elections were among the top ten in total judicial campaign contributions from 2000 to 2010. Billy Corriher, Ctr. for Am. Progress, *Partisan Judicial Elections and the Distorting Influence of Campaign Cash* 1–2 (Oct. 25, 2012); *see also* Billy Corriher, Ctr. for Am. Progress, *Criminals and Campaign Cash: The Impact of Judicial Campaign Spending on Criminal Defendants* 1 (Oct. 2013) (finding that the “more partisan” a judicial campaign is, the “more often” the judge will rule “for prosecutors and against criminal defendants”). Indeed, a 2002 opinion poll showed that 89% of voters wanted judicial elections to be conducted independently of political parties, and 78% of North Carolina voters believed that campaign contributions have at least some influence on judges’ decisions. *See* Nat’l Ctr. for State Courts, *History of Reform Efforts: Opinion Polls and Surveys, North Carolina*, http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state.

To combat politicization and the trend towards high-dollar elections, recent efforts at reform have focused on either mitigating the role of money in elections through public financing
and stronger recusal rules, or moving away from contested elections altogether, typically to a "merit selection" system in which a nominating commission vets potential candidates, who are then appointed by the governor and later stand for periodic yes-or-no retention elections. See Kowal, supra, at 2 (describing merit selection as "the gold standard for many in the reform community"). But these reforms have failed either to gain traction or to adequately address the challenges facing courts today—such as politicization of the appointment process.

b. Campaign Finance. Public financing gained some momentum in the early 2000s: North Carolina, New Mexico, Wisconsin, and West Virginia implemented public financing during that period. Kowal, supra, at 4. But that effort stalled; the North Carolina and Wisconsin programs have since been undone. Id.

The future of public financing began to look bleak after the U.S. Supreme Court’s decision in Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett, 564 U.S. 721 (2011), which gutted an important feature in public financing schemes—trigger funds that protected publicly-financed candidates from being outspent. However, the petitioners in Bennett were candidates for the state legislature, and Bennett did not specifically address whether trigger funds are permitted for judicial elections. Id. at 732. The Court’s recent decision in Williams-Yulee v. Florida Bar suggests there may be openings for reformers to regulate campaign financing in the judicial context that might not be available in the context of legislative or executive elections. See 135 S. Ct. 1656, 1673 (2015) (upholding state ban on personal solicitation of campaign contributions by judicial candidates because “[a] state’s decision to elect judges does not compel it to compromise public confidence in their integrity”). But the constitutionality of trigger funds in judicial elections remains uncertain at best. See, e.g., N.C. Right to Life Political Action Comm. v. Leake, 872 F. Supp. 2d 466, 473 (E.D.N.C. 2012) (holding North Carolina matching funds unconstitutional under Bennett).

A possible alternative to trigger funds is “small-donor matching funds, a new form of public financing that provides candidates flexibility and vastly expands the pool of campaign donors to include ordinary citizens.” Corriher, Public Financing of Judicial Races, supra, at 4. The New York City municipal elections provide an example of such a fund: “The city gives participating municipal candidates $6 in matching funds for each $1 of the first $175 that a city resident donates to a campaign. These funds multiply the impact of small donations. A $175 donation, for example, becomes a $1,225 donation. New York City’s system has had great success in making small donors much more important relative to large donors in campaign fundraising.” Id. Some commentators have advocated for small-donor matching funds to be used

5 “Although the North Carolina Code of Judicial Conduct suggests that ‘a judge should disqualify himself/herself in a proceeding in which the judge’s impartiality may reasonably be questioned,’ the code was amended in 2003 to remove the instruction to ‘avoid . . . the appearance of impropriety’ . . . .” Billy Corriher & Jake Paiva Center for American Progress, State Judicial Ethics Rules Fail to Address Flood of Campaign Cash from Lawyers and Litigants, at 6 (May 7, 2014). Notably, the rotation system followed in North Carolina Superior Court means that Judges often do not need to formally “recuse” themselves. Instead, Superior Court judges can avoid conflicts by getting reassigned without putting a recusal in the record.
in judicial elections to keep public financing viable while “pass[ing] constitutional muster.” *Id.* at 6. In particular, “[b]ecause these funds are not disbursed in reaction to an opponent’s expenditures, they cannot be construed as a ‘penalty’ for speech like the matching funds at issue in *Bennett.*” *Id.*

To the extent campaign-finance reform remains viable after *Bennett* and *Citizens United*, there is evidence that voters may find it attractive. For example, “[a] 2011 poll from Justice at Stake, a nonpartisan campaign to keep courts fair and impartial, found that ‘94 percent of North Carolina voters believe campaign contributions have some sway on a judge’s decision.’” Corriher, *Public Financing of Judicial Races*, *supra*, at 2 (quoting Justice at Stake and North Carolina Center for Voter Education, N.C. Voters: Campaign Contributions Influence Court Rulings, Press release, February 22, 2011, http://www.justiceatstake.org/news_room/press_releases.cfm/nc_voters_campaign_contributions_influence法院_rulings?show=news&newsID=10005).


2. Gubernatorial Appointment

a. Merit Selection. Although many recognize merit selection as the gold standard of judicial selection, the last state to adopt such a system did so thirty years ago. However, South Carolina adopted a merit selection process more recently—wherein a JNC makes binding nominations of three candidate for election by the legislature. In seven of the 23 states with binding JNC’s, the process has come under attack “by politicians who . . . seek to weaken the independence of the commission process.” Kowal, *supra*, at 3. Since 2010, there have been efforts in some states to weaken or eliminate merit selection. *Id.* For example, Kansas in 2013 eliminated merit selection for intermediate appellate judges, instituting gubernatorial appointments with senate confirmation, but kept merit selection for its supreme court. Nat’l Ctr. for State Courts, *Judicial Selection in the States: Kansas*, http://www.judicial_selection.us/judicial_selection/index.cfm?state=KS.

b. Legislative Confirmation. Presently, twelve states require legislative confirmation as part of their gubernatorial-appointment system. Appendix A, *infra*. This number has seen an increase in recent years, evidencing a broader trend of state legislatures seeking a role in the selection of judges. For example, after several years of turmoil and the constitutionality of its statutory judicial selection process in question, *see* Niraj Chokshi, Washington Post, *Three

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c. Politicization. As events in Tennessee and elsewhere demonstrate, appointment systems are not immune to politicization. Authorities involved in the judicial-selection process are increasingly willing to stand on politics:

Recent years have witnessed attacks on the courts, federal and state, that have been notable for both their frequency and their stridency. Many of these attacks have been part of strategies calculated to create and sustain an impression of judges that makes courts fodder for electoral politics. The strategies reflect a theory of judicial agency, the idea that judges are a means to an end and that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit in advance to pursue those ends on the bench. The impression sought to be created is that not only are courts part of the political system; they and the judges who make them up are part of ordinary politics.

Stephen B. Burbank, On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility 33, Penn Law: Legal Scholarship Repository (Apr. 2009). In New Jersey, for example, a dispute between the governor and state senate kept a vacancy open for six years. Bannon, supra, at 12. In Kansas, Governor Sam Brownback criticized the state supreme court as too “liberal,” and the legislature targeted the court system with efforts to weaken its budgetary and administrative power. Id. at 10. The year 2011 saw “more efforts to impeach or otherwise legislatively remove state judges from office than at any point in recent history.” Gavel to Gavel, 2011 Year in Review, http://gavieltogavel.us/2011/12/27/2011-year-in-review-record-number-of-impeachment-attempts-against-judges-for-their-decisions. In most cases, the impetus for removal was the fact that “the judge(s) in question [had] issued opinions that displeased members of the legislature.” Id.

3. Legislative Appointment

Nor have the two states with legislative appointment been immune to the trends of politicization. In 2008, the Virginia legislature had “myriad opportunities” to elect vacancies on the bench. However, the Democratic Senate and Republican House were “ultimately unable to forge consensus while Republicans in both chambers seemingly disagreed among themselves.” Carl W. Tobias, Reconsidering Virginia Judicial Selection, 43 U. RICH. L. REV. 37, 44 (2008). The responsibility to appoint judges then shifted to the governor, but “without the assurance that
the [legislature] will appoint them” for a full term, the uncertainty “reduced the eligible candidate pool for these crucial judicial offices.” *Id.*

Furthermore, both South Carolina and Virginia face the issue of legislators—many of whom are also lawyers—appearing before the judges they helped appoint. In Virginia, the local delegation that is responsible for endorsing judges is “primarily a group of full-time attorneys who are part-time legislators.” Elizabeth Haring, *Judicial Selection in Virginia: An Inherently Flawed Process*, Jefferson Policy J. (Mar. 17, 2009), http://www.jeffersonpolicyjournal.com/judicial-selection-in-virginia-an-inherently-flawed-process. This results in a conflict of interest—these attorney-legislators “have a vested financial interest in … putting judges back on the bench regardless of their fitness to serve.” *Id.* They are “afraid to oppose a judge for fear of retribution.” *Id.*

The same is true in South Carolina: Legislators who are also lawyers “appear in court before the very judges they helped elect,” which has impaired “public confidence in South Carolina’s judicial selection process.” Samantha R. Wilder, *The Road Paved with Gravel: The Encroachment of South Carolina’s Judiciary Through Legislative Judicial Elections*, 65 S.C. L. REV. 639, 655 (2014). A 2014 “showdown” between two sitting judges for the chief justice position “thrust to the forefront of public discourse” the apparent “failures of South Carolina’s judicial election system.” *Id.* at 639. “State Senator Greg Gregory’s remarks—that ‘[a] lot of senators are terrified of this race’ and ‘[s]ome of their professions are tied to it’—highlighted the blurred lines between the South Carolina General Assembly and the state’s judiciary.” *Id.* at 639 n.3 (quoting Andrew Shain, *Politics: A Game of Thrones at the State House as chief justice candidates dual to career death*, The State (Jan. 26, 2014), http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article13835669.html).

Also in 2014, however, South Carolina legislators introduced a bill that would “deny pay to any judge or government official who recognized, granted, or enforced a same-sex marriage license.” BANKROLLING THE BENCH, supra, at 19. While these efforts to pressure the court through legislation faltered, they illustrate the ability of political hostility to inject itself into the judiciary through legislative pressure. *Id.*

### 4. Reselection Process

As judicial selection becomes more politicized, reformers have devoted increasing attention toward the reselection process, *i.e.*, the process of determining whether a sitting judge will serve subsequent terms.

Unlike initial selection, the ability of the reselection process to affect judicial behavior is two-fold: It may shape the behavior of the sitting judge, and it will also determine the judge for the following term. One crucial example of the effect of reselection on sitting judges is the fact that “the pressures of upcoming re-election and retention election campaigns make judges more punitive toward defendants in criminal cases.” Kate Berry, Brennan Ctr. for Justice, *How Judicial Elections Impact Criminal Cases* 1 (2015) (emphasis removed). This phenomenon,
documented in numerous “recent, prominent, and widely cited empirical studies,” means that judges facing reelection impose longer terms of incarceration and, at the appellate level, are more likely to affirm a sentence of death. *Id.* at 1–2. Moreover, although most available evidence relates to elections, gubernatorial-appointment systems may not be immune. *See id.* at 12 (describing a study reporting that, in appointment systems, “when a Republican governor replaces a Democratic governor, judges’ rulings in a variety of cases, including criminal cases, shift”).

Interest groups exacerbate this systematic disadvantaging of criminal defendants by making a judge’s stance on crime the focus of television advertising during campaigns:

The vast majority of television ads attacking candidates seek to portray them as “soft on crime.” In the 2013-14 election cycle, 82 percent of ad spots attacking candidates discussed criminal justice issues. Of the negative criminal justice-themed ads that cycle, all but one attacked candidates for judicial decisions they had made—focusing either on particular decisions or their criminal justice records as a whole. The remaining ad attacked a candidate for his representation of a criminal defendant as a lawyer.

*Id.* at 3.

Interest groups employ this tactic whether or not they are themselves concerned with criminal justice. For example, a national organization funded by industry groups spent $1.3 million to support an ad accusing a candidate for reelection to the North Carolina Supreme Court of “siding with child predators.” BANKROLLING THE BENCH, *supra*, at 36–37.

Furthermore, retention elections—formerly considered a healthy check on gubernatorial-appointment systems—have become as politicized and expensive as contested elections in many states. The average per-seat spending in retention elections between 2009 to 2014 reflects a tenfold increase from the average over the previous eight years. Bannon, *supra*, at 6. The following chart, taken from Bankrolling the Bench, *supra*, illustrates this trend:
Illinois  ($3.3 million for one seat) and Tennessee  ($2.5 million) had some of the most expensive and contentious races in the 2013-2014 cycle. Kowal, supra, at 3; BANKROLLING THE BENCH, supra, at 9. The influx of campaign cash puts new pressures on judges who had previously been insulated from politicized judicial elections. For example, in 2010, three Iowa Supreme Court justices were ousted in retention elections after an aggressive campaign, “[f]inanced largely by out-of-state organizations opposed to gay marriage,” targeted the justices for their ruling in support of same-sex marriage. A.G. Sulzberger, In Iowa, Voters Oust Judges Over Marriage Issue, N.Y. Times (Nov. 3, 2010). Similar “ouster campaigns” have since multiplied, targeting judges in retention elections for their rulings on a multitude of matters. Id.

States with gubernatorial appointment are not immune, moreover, to the politicization seen in retention elections. In 2010, for example, New Jersey’s governor declined to reappoint a justice for the first time since 1947 (i.e., since New Jersey adopted its current judicial-selection system). Alicia Bannon & Cody Cutting, Brennan Ctr. for Justice, Testimony to the New Jersey Bar Association Task Force on Judicial Independence (June 17, 2014). That led to a partisan dispute with the state senate and multiple supreme court and county-court seats remained vacant due to delayed judicial appointments. Id. In 2014, the Brennan Center recommended that New Jersey eliminate its reappointment process, citing examples of politicization such as ongoing vacancies, gubernatorial criticism of court decisions, accusations that the state supreme court was “legislating from the bench,” and refusal by the governor to nominate sitting supreme court justices for tenure. Id.
This trend suggests that reformers concerned with promoting judicial independence should rethink their approach to reselection. One prominent proposal is a shift to appointment for one longer term, eliminating the reselection process altogether. See Part III.B, infra. States that eschew reselection include Massachusetts and New Hampshire (single term, with mandatory retirement at age 70), and Rhode Island (life term, with no mandatory retirement age). Appendix A, infra. Other states with longer appointment terms include New York (14 years) and Delaware (12 years). Id.

II. Characteristics of Good Courts and an Ideal Selection Process

This Part enumerates the values a judicial-selection process should promote—i.e., the characteristics of a “good judge” and a “good court”—and comments on how various judicial selection processes may impact achieving a judiciary with those values. The qualities of a good judge include outstanding legal scholarship and ability, experience in practice, a reputation for integrity, the ability to be fair and impartial (including, in particular, to make decisions free from political influence and ideology), and diverse personal characteristics. An ideal selection process should attract, identify, and select good judges, create in the minds of the public a sense that the process will result in a fair and impartial judiciary, proceed in a timely fashion, and produce definitive results. The panel of judges selected should foster diversity of race, gender, ethnicity and geography to give the court a broad perspective and to foster public confidence. The following is a brief discussion of how reformers have attempted to delineate and accomplish these goals.

A. Judicial Temperament. As a general matter, the “judicial temperament” includes integrity, lack of bias, competence, and expertise in the interpretation and application of the law. Ideally, these qualities will be supplemented by abilities answering the requirements of a judge’s particular court. A trial-court judge, for example, might benefit from an ability to communicate effectively with the public (something appellate judges are rarely called upon to do). Research into “whether particular selection systems tend to yield higher- ‘quality’ judges” has been inconclusive. Bannon, supra, at 22 & n.141. It is clear, however, that different types of selection systems will advantage or disadvantage different candidates: merit selection is designed to yield judges with superlative legal expertise, see MALIA REDDICK, JUDGING THE QUALITY OF JUDICIAL SELECTION METHODS: MERIT SELECTION, ELECTIONS, AND JUDICIAL DISCIPLINE 2 (2010) (“[M]erit selection places an emphasis on qualifications and experience.”), while elections may advantage candidates who are personable and comfortable in the public eye.

B. Judicial Independence. Judicial independence has been described as “the capacity of individual judges to decide cases without threats or intimidation that could interfere with their ability to uphold the rule of law.” Bannon, supra, at 20. Because “[i]t is fundamental to the rule of law that judges decide cases based on their understanding of what the law requires—and not out of fear of political consequences,” judicial independence seeks to insulate judges against...
political forces that might seek “retribution” for particular judicial decisions. \textit{Id.} Judicial independence has also been described as having two distinct meanings:

First, it refers to the capacity of a judge to decide cases according to the facts as she finds them and the law as she conceives it to be written, without inappropriate external interference (“decision-making independence”). Second, it refers to the capacity of the judiciary as a separate and independent branch of government to resist encroachment from the political branches and thereby preserve its institutional integrity (“institutional independence”).

Charles G. Geyh, \textit{Rethinking Judicial Elections}, \textit{BILL OF PARTICULARS} 5 (Spring 2003). An ideal selection system promotes these values without sacrificing accountability or permitting judges to encroach on other branches of government. \textit{See} Part II.C, \textit{infra}.

An ideal selection system will depend on which political forces—political branches, special interests, political parties, the majority rule—pose the gravest threat to judicial independence at any given time. For instance, opponents of judicial election often emphasize the negative effect of elections on judicial independence: “Without reform, terms of incarceration and executions will continue to be determined, in part, by the decision-maker’s proximity to re-election.” Berry, \textit{supra}, at 13. But appointment systems also raise concerns. \textit{See} Kowal, \textit{supra}, at 18 (explaining that “judicial elections arose to protect judicial independence from interference by the other branches of government”); Brinkley, \textit{supra}, at 27 (collecting debate excerpts from North Carolina’s 1868 constitutional convention and reporting that those in favor of judicial elections argued that “[t]he Governor ‘must have favorites as well as all men.’”). Thus, it is important to consider from which body independence is required: The governor? The legislature? The popular majority? Different selection systems give judges more independence from one set of powers but make them more accountable to another.

In an attempt to revolve this Catch 22, some reform proposals focus on job security as a way to insulate judges from political forces after they ascend the bench. Strong empirical evidence suggests that reselection pressures “pose severe challenges to fair courts.” Bannon, \textit{supra}, at 25 n.163. And reselection is the area where conflict-of-interest safeguards—such as recusal rules—have little practical effect. \textit{Id.} at 25. In light of this, the ABA Commission in 2003 recommended, to help safeguard against reselection pressures, that states adopt merit-selection appointment for a single 15-year term. Kowal, \textit{supra}, at 18 (citing \textit{JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY} 72 (2003)). A judge who accepted such an appointment would receive retirement benefits at the end of the 15-year term as compensation for giving up what might have been a lucrative law practice. \textit{See} \textit{id}. But no state appears to have adopted this proposal. Today, forty-seven states have periodic reselection—either by reappointment or reelection—whereas only 3 states have life tenure. Bannon, \textit{supra}, at 2.
C. Judicial Accountability. Judicial accountability is concerned with the supervision of judges by the governor, the legislator, and the people, and, in the case of appellate review, by other judges. The related concept of democratic legitimacy is the idea that there should be a majoritarian check on judges (either by the legislature or by the people). The purpose of these principles is to provide a “check over judges who ‘go rogue,’” decide cases based on their own policy preferences rather than “the law,” and otherwise fail to apply the law in a fair and impartial way. Kowal, supra, at 19; see also Judge Thomas M. Reavley & Ryan S. Killian, Against the Rule of Judges, 68 BAYLOR L. REV. 661, 665 (2016) (“Judicial overreach sucks legislative power from the legislative branch and, consequently, from the people.”). These goals are easier stated than met, as they necessarily implicate the knotty question of what constitutes a “sound” judicial decision. See Kowal, supra, at 19 (opining that “whether recent court rulings upholding the right of gay and lesbian couples to marry have usurped the role of legislature in ‘defining’ marriage, or performed a traditional judicial function by interpreting what the Constitution’s guarantees of liberty and equality mean, is fundamentally in the eye of the beholder”).

In line with the idea of democratic legitimacy, recent political-science research has argued that because judges have “significant discretion in interpreting the law,” judicial elections provide a necessary means of democratic accountability. Id. at 18. But elections are not the only effective mechanism to ensure accountability. Id. at 18 n.101 (reporting that judicial elections are extremely rare outside the United States). Indeed, “there are numerous accountability mechanisms that do not depend on judicial selection,” Bannon, supra, at 21, such as appellate review for the correction of legal errors and disciplinary rules to police unethical conduct. Moreover, of the 27 states with merit selection, many mitigate accountability concerns by providing for retention elections to allow public input “at the back end of the process.” Id. at 22. But “as retention elections themselves grow increasingly costly and politicized, the question of how to insulate judicial selection from the negative aspects of political pressure while ensuring democratic legitimacy becomes even more difficult.” Id.

Indeed, one of the most difficult problems with designing a judicial-selection system is the extent to which judicial accountability and democratic legitimacy stand in tension with the concept of judicial independence: “The challenge, then, is to identify a judicial selection method that fits comfortably within our democratic system without transforming judges into ordinary politicians.” Id. at 21. Judges should be independent enough to make sound decisions, even when they are politically unpopular. See Kowal, supra, at 19 (“[T]he courts . . . play a crucial counter-majoritarian role. . . . [D]emocracies require that judges make rulings that are often unpopular in a variety of ways.”). But they should be sufficiently accountable as not to make unsound decisions.

D. Public Confidence. An ideal selection system encourages public confidence in the fairness and impartiality of the judiciary. Today, while the public tends to see the courts more favorably than the political branches, polling data suggests that the public has serious concerns about the fairness of state courts. Around 70% of voters think that courts “give preference to
large corporations and the wealthy.” Bannon, supra, at 23. Less than one-third of African Americans believe “state courts provide equal justice, compared with 57% of all Americans.” Id.

Aspects of the selection process, such as campaign finance and partisan elections, appear to influence these perceptions. Public concerns that “justice is for sale” are growing: From 2004 to 2012, a survey found that the percentage of voters who believed campaign contributions from interest groups have at least some influence on judges’ decisions in the courtroom grew from 71% to 87%. Id. But another study suggests that while the spiraling judicial campaign spending diminishes court legitimacy in the eyes of the public, all else being equal, elections enhance public judicial legitimacy. James L. Gibson, Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy 6–8 (2012). Thus, “[i]n assessing options for choosing judges, it is important to consider the legitimacy-enhancing role that elections can play, but also how campaign spending by special interests, along with a lack of diversity on the bench, can undermine public confidence.” Bannon, supra, at 23. Finally, it is worth noting that voters in states with partisan elections were more likely to agree that judges “make decisions based more on their own beliefs and political pressures.” Kowal, supra, at 21.

E. Diversity. Diversity—“including racial, gender, socio-economic, and professional diversity”—is vital. Bannon, supra, at 24. As Judge Harry T. Edwards (D.C. Circuit) noted, “[I]t is inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them. And in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better informed discussion.” Id. The path to achieving diversity is less clear: No existing research shows a clear relationship between judicial selection systems and diversity outcomes. Id. Also, a diverse court will build public confidence. When individuals see that there is a judge who can empathize with their situation or concern, they will have greater respect for the court.

III. Prominent Proposals For Judicial Reform

A. The O’Connor Judicial Selection Plan

The O’Connor Judicial Selection Plan was developed by U.S. Supreme Court Justice Sandra Day O’Connor (Ret.) in collaboration with the Institute for the Advancement of the American Legal System (“IAALS”). IAALS, Univ. of Denver, The O’Connor Judicial Selection Plan, UNIV. OF DENVER, http://iaals.du.edu/quality-judges/projects/oconnor-judicial-selection-plan. The plan endorses a merit-selection system with four main components: (1) judicial nominating commission; (2) gubernatorial appointment; (3) judicial performance evaluations; and (4) retention elections. The states with selection processes that most closely mirror the O’Connor plan are Alaska, Arizona, Colorado, Missouri, and New Mexico. See Appendix A, infra.
I. JNC. The O’Connor plan provides a number of specific recommendations for the composition of an ideal JNC. As set forth in the plan:

- To ensure the stability of the process, nominating commissions should be constitutionally based.

- The number of nominating commissions in a state may vary, but at the very least, there should be an appellate nominating commission and one or more trial court nominating commissions.

- Multiple appointing authorities should select nominating commission members. This bolsters public confidence in the commission’s independence by making it less likely that a majority of the members will be appointed by a single entity.

- In order to assure that the public viewpoint is well represented, a nominating commission should include a majority of non-attorney members who have a range of professional backgrounds and personal experience. Nominating commissions must not be viewed as captive to attorney groups.

- Nominating commissions should be balanced politically, ideologically, and demographically. Race/ethnic, gender, and geographical diversity among commission members should be encouraged, if not required.

- Members of nominating commissions must receive training so that they understand their role, and the role, responsibilities, and duties of judicial officers.

- Nominating commission proceedings should reflect openness and transparency, carefully balancing the applicants’ need for confidentiality with the public’s right to know.

- The respective terms of commission members should be staggered so that no one leadership group has a predominant voice. Staggered terms also prevent complete turnover in the commission’s membership, which provides new members with the benefit of existing members’ experience and ensures rotation among appointing authorities.

- There should be a default provision in place should the nominating commission fail to act.

SANDRA DAY O’CONNOR, IAALS, THE O’CONNOR JUDICIAL SELECTION PLAN 5 (2014). These recommendations are taken primarily from existing practices among states that use the merit-
selection process. Id. Today, twenty-eight states use JNCs to select at least some appellate judges. Appendix A, infra. An additional seven states use JNCs to select appellate judges for interim appointments. Id.

2. Gubernatorial Appointment. The O’Connor plan acknowledges that appointment by the governor is an inherently political process. Accordingly, it recommends the following safeguards to limit the use of judicial appointments as a political bargaining chip:

- Governor should be given an appropriately limited number of nominees for each position, and a limited time in which to make the appointment.
- There should be a default provision in place should the Governor fail to act timely.
- Governor should not be allowed to make an appointment outside of the list of recommended nominees.

O’Connor, supra, at 6. Although most states provide for a binding JNC, as recommended by the O’Connor plan, a minority of states still use their JNC in an advisory capacity only. See Appendix A, infra.

3. Performance Evaluations. The O’Connor plan includes performance evaluations of judges so that voters in retention elections can “cast informed votes when the judges appear on their ballots.” O’Connor, supra, at 8. The plan emphasizes that the evaluations must be about “procedural fairness, demeanor, and knowledge—not about particular outcomes in individual cases.” Id. at 7. Wide groups should be surveyed, including attorneys, litigants, jurors, witnesses, court employees, law enforcement, and victims. IAALS, Judicial Performance Evaluation: How It Works, http://iaals.du.edu/quality-judges/judicial-performance-evaluation-how-it-works. An independent commission should then review the surveys, rate the judges, and provide a recommendation regarding whether or not they should be retained. Id. The evaluations are made public before the retention election occurs. Id.

As set forth in Appendix A, thirteen states disclose performance evaluation results for use in the reappointment process—either to voters, for use in retention elections, or to the reappointment committee. Appendix A, infra. An additional five states provide results to individual judges, for self-improvement purposes, but do not make them public. Id.

d. Retention Elections. The O’Connor plan endorses retention elections as a “compromise” between the negative aspects of elections—which can be “contested and partisan”—and allowing citizens to have their say. O’Connor, supra, at 8. The rationale behind this is twofold. First, “[b]ecause judges do not face opponents in retention elections, they usually do not need to raise money and conduct campaigns. IAALS, Retention Election: How It Works, http://iaals.du.edu/quality-judges/retention-election-how-it-works. Second, “[a]lthough special interest groups can spend money to oust a judge they do not like, they cannot select a
replacement who fits their particular agenda because the judicial nominating commission is tasked with selecting nominees to fill vacancies.” *Id.*

An ideal retention election is nonpartisan and uncontested. *Id.* Additionally, the O’Connor plan recommends that:

- [The] voter base must have ready access to the judicial performance evaluation (JPE) information that allows each voter to cast an informed vote about the judge—based upon his or her actual performance on the bench.

- In retention elections, judges stand for retention after a provisional term of two to three years. This allows for the collection of sufficient data about the judge’s performance.

- Judges’ terms of office vary after that, so JPE data collection should be continuing and as frequent as possible to coincide with the judge’s respective term.

*Id.* Today, at least twenty states use retention elections (or a hybrid of retention and other types of elections) in some capacity. Appendix A, infra. Seventeen states have a gubernatorial-appointment process in which judges stand in retention elections for subsequent terms. *Id.* And three states have initial partisan elections, with retention elections for subsequent terms. *Id.*

The O’Connor plan’s biggest weakness may be its reliance on retention elections during the reselection process. As discussed above, *see* Part I.C.4, *supra*, retention elections have become increasingly politicized over the past 10 years. An influx of campaign cash has resulted in “ouster campaigns” targeting judges in retention elections for their rulings on hot-button issues. *See, e.g.,* Sulzberger, *supra* (describing the 2010 ouster of Iowa Supreme Court justices who ruled in support of same-sex marriage). Thus, the threat of ouster has a high likelihood of reducing judicial independence—even to the point of changing the outcome in particular cases. *See, e.g.,* Shepherd & Kang, *supra* (reporting that higher levels of TV advertising and more outside spending correlate with judges being less likely to vote in favor of criminal defendants).

**B. The ABA Report on the 21st Century Judiciary**

One answer to the problem of retention elections, and reselection more generally, is the American Bar Association (ABA) Report on the 21st Century Judiciary. *See generally JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY* (2003) (hereinafter “ABA Report”). The ABA Report represents an exhaustive study of the state of the American judiciary as it was in 2003. The Commission responsible for the report found that “the worst selection-related judicial independence problems arise in the context of judicial reselection.” *Id.* at 72. Additionally, although “[t]he problems with reselection may be
most common in contested reelection campaigns, they are “at risk of occurring in any reselection process—electoral or otherwise.” *Id.*

As discussed above (see Part II.B, *supra*), the Commission concluded that the best way to avoid these pitfalls is a merit-selection system with appointment for a single 15-year term. ABA Report, *supra*, at 70. In particular, the Commission recommended:

- Gubernatorial appointment with a binding JNC;
- A single term of at least 15 years (or until a specified age); and
- Eligibility for judicial retirement benefits.

*Id.* The Commission clarified: “While the Commission recommends that judges be appointed to the bench without the possibility of subsequent reappointment, reelection, or retention election, the Commission has remained flexible as to the optimal length of a judge’s term of office.” *Id.* at 72. Regardless of the length of the term, however, the Commission emphasized that judicial retirement benefits are necessary because “judicial office will lose its appeal to the best and brightest lawyers if judges are obligated to conclude judicial service before their retirement benefits vest.” *Id.* at 72-73.

There are two main downsides to the ABA framework. The first is that a long term of appointment—with no reselection process—reduces both accountability and the public perception of accountability. This represents a tradeoff between accountability, on the one hand, and judicial independence, on the other. Compare *Am. Judicature Soc’y, Merit Selection: The Best Way to Choose the Best Judges* 3, http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf (identifying reselection as an important component of a judicial-selection system because it “provides an opportunity to remove from office those who do not fulfill their judicial responsibilities”), with ABA Report, *supra*, at 72 (“Public confidence in the courts is . . . undermined to the extent that judicial decisions made in the shadow of upcoming elections are perceived—rightly or wrongly—as motivated by fear of defeat.”). To counteract this problem, the Commission recommends a system of “[p]erformance evaluations and disciplinary processes, including removal for misconduct.” ABA Report, *supra*, at 72. Ideally, such a system would provide “accountability” without reselection pressures. *Id.* at 73.

The second potential downside to a lengthy appointment term is that selection of the “right” judge becomes of the utmost importance to all concerned—leading, potentially, to greater politicization of the selection process. This phenomenon can be seen in the selection of federal appellate judges and U.S. Supreme Court justices, who are appointed for life, and who must run an increasingly demanding political gauntlet before obtaining Senate confirmation. *See, e.g.*, Ahmed Elbenni, *History Will Judge: A Look at Garland’s Nomination in Polarized Washington*, The Politic (Feb. 22, 2017), http://thepolitic.org/history-will-judge-a-look-at-garlands-nomination-in-polarized-washington (describing Barak Obama’s nomination of Merrick Garland to the U.S. Supreme Court, the Senate’s refusal to consider the nomination, and the ensuing
“year-long battle for ideological dominance of the country’s judicial branch”). For this reason, the ABA Commission recommends against legislative confirmation of gubernatorial appointments: “The protracted and combative confirmation process in the federal system, coupled with the highly politicized relationship between governors and legislators in many states, has led the Commission not to recommend such an approach.” ABA Report, supra, at 71.

Despite having much to recommend it, the ABA Commission’s recommendation has not found much support among the states. Today, forty-seven states have periodic reselection—either by reappointment or reelection—whereas only 3 states have life tenure. See Appendix A, infra; Bannon, supra, at 2.