

Testimony before North Carolina
Senate Select Committee on Judicial
Reform and Redistricting:
Judicial Selection in the States and
Options for Reform

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BRENNAN CENTER
FOR JUSTICE

at New York University School of Law

About the Brennan Center

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all.

Brennan Center Judicial Selection Research

- Long-term project tracking supreme court elections
 - *New Politics of Judicial Elections* report series: <http://newpoliticsreport.org/>
- Policy research on judicial recusal and diversity
 - Recusal resource page: <http://www.brennancenter.org/analysis/judicial-recusal>
 - Diversity resource page: <https://www.brennancenter.org/analysis/judicial-diversity-0>
- “Rethinking Judicial Selection” research initiative
 - Interactive map on judicial selection in the 50 states (all court levels): <http://judicialselectionmap.brennancenter.org>
 - Judicial selection white paper: <http://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts>
 - Judicial selection resource page: <http://www.brennancenter.org/rethinking-judicial-selection>
 - Forthcoming policy paper (2018)

Rethinking Judicial Selection

- **Examined how each state structures** its judicial selection system, including **case studies** and an in-depth study of **judicial nominating commissions**.
- **Conversations** with dozens of judges, judicial nominating commissioners, lawyers, advocates, scholars, court users, and other stakeholders.
- **Surveyed legal and social science** literature on judicial selection.
- **Reviewed reform proposals**, including from bar associations, task forces, and scholars.

Values Forwarded by Judicial Selection

Choices about judicial selection implicate many important values:

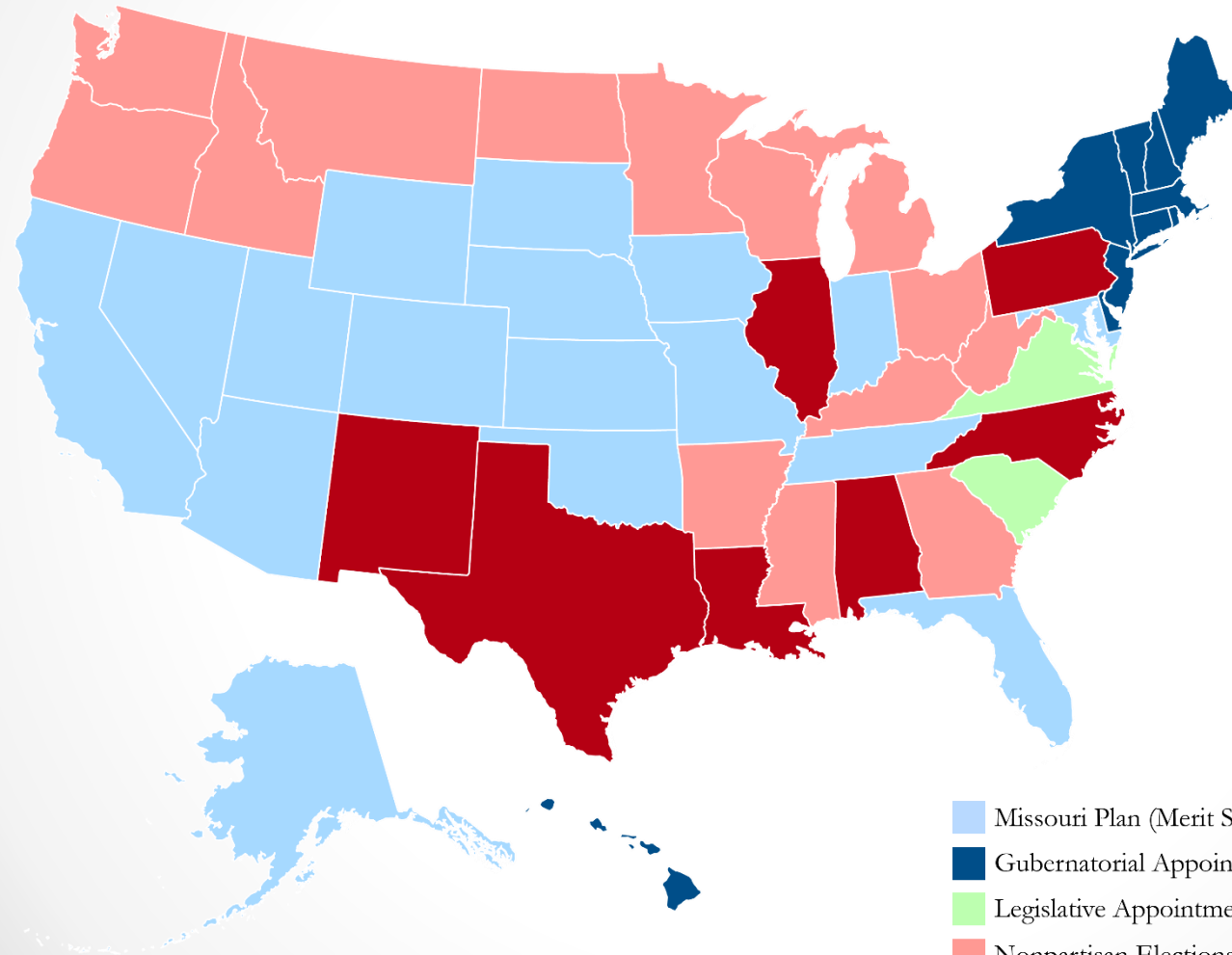
- Judicial **independence**
- Judicial **accountability**
- Democratic **legitimacy**
- **Quality** judges
- Public **confidence**
- Judicial **diversity**



Presentation Overview

- I. Overview of Judicial Selection Systems
- II. State Experience
- III. Implications for Reform
- IV. Recommendations
 - I. An accountable gubernatorial appointment system
 - a. nominating commission with diverse membership +
 - b. transparency & ethics safeguards
 - II. Eliminate politicized reselection processes (& do not reduce term lengths)
 - III. Adopt judicial election safeguards

Judicial Selection in the States

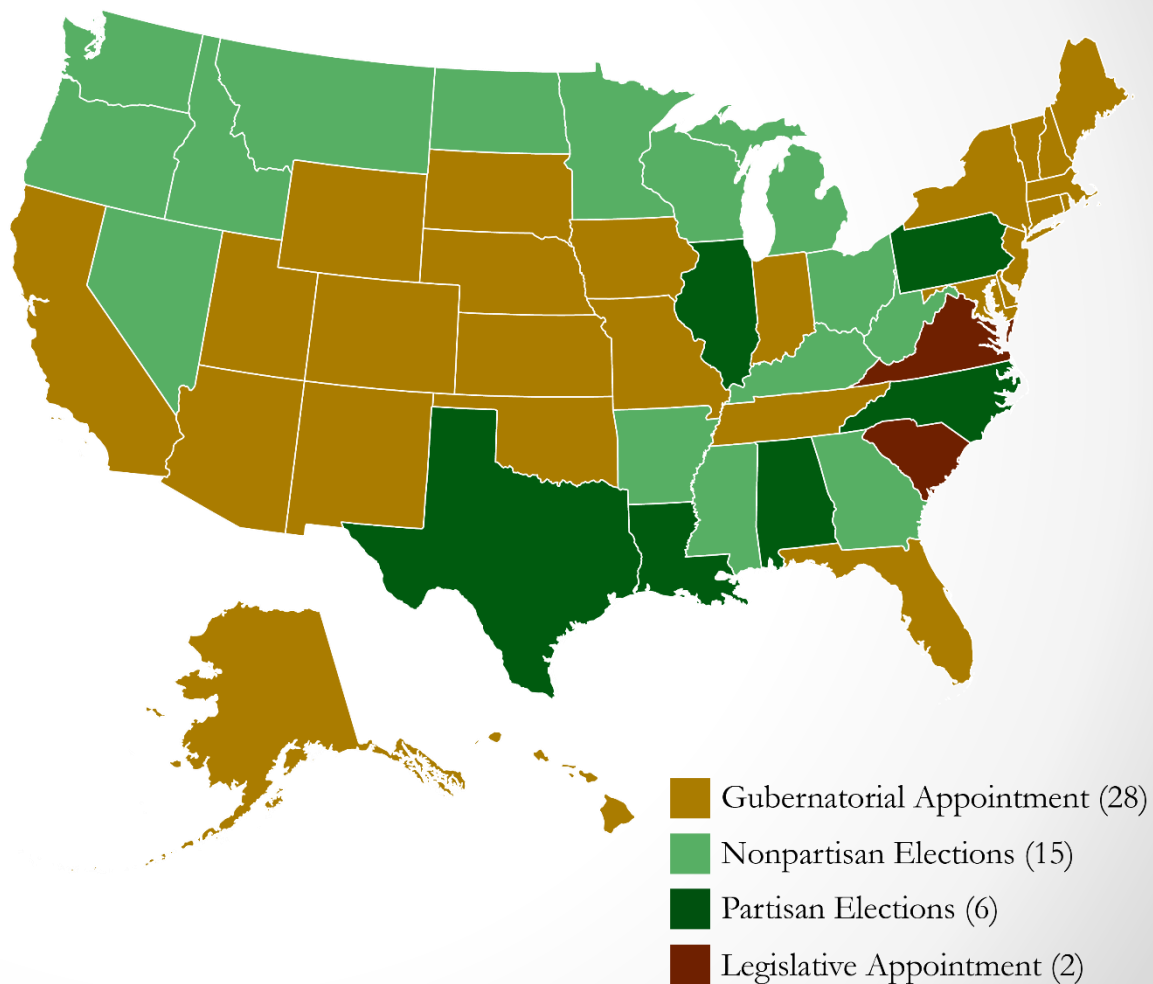


**Judicial Selection
for State Supreme
Courts**

- Missouri Plan (Merit Selection + Retention Elections) (17)
- Gubernatorial Appointment (10)
- Legislative Appointment (2)
- Nonpartisan Elections (14)
- Partisan Elections (7)

How Justices Initially Reach the Bench

- In **21 states**, justices are initially **elected** to the bench in contested elections.
- In **27 states + DC**, justices are initially **appointed** by the **governor** (or president).
- In **2 states** justices are initially appointed by the legislature.



More on Gubernatorial Appointments

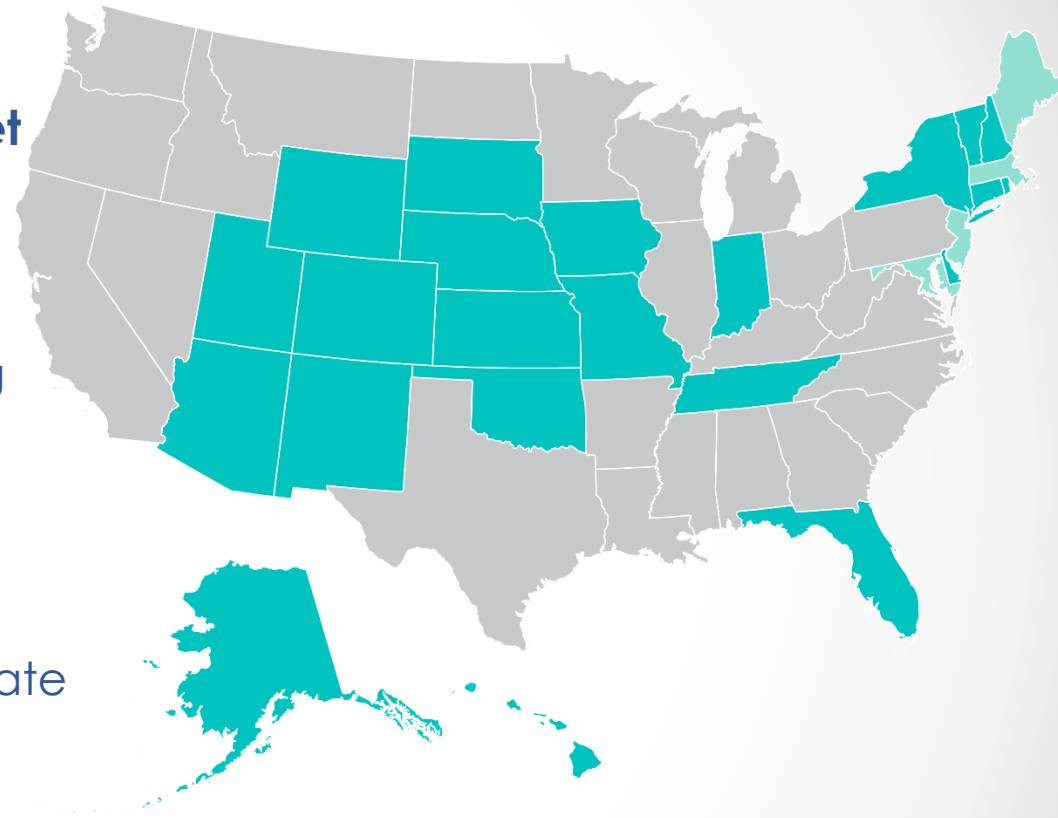
Of the 27 states + DC that use gubernatorial appointments:

Nominating Commissions (to vet candidates & create shortlist)

- **23** use binding nominating commissions
- **4** use non-binding nominating commissions
- **1** does not use a nominating commission

Confirmation

- **12** provide for legislative/ Senate confirmation
- **3** provide for confirmation by another elected body
- Confirmation **most common** in states that do not use retention elections.

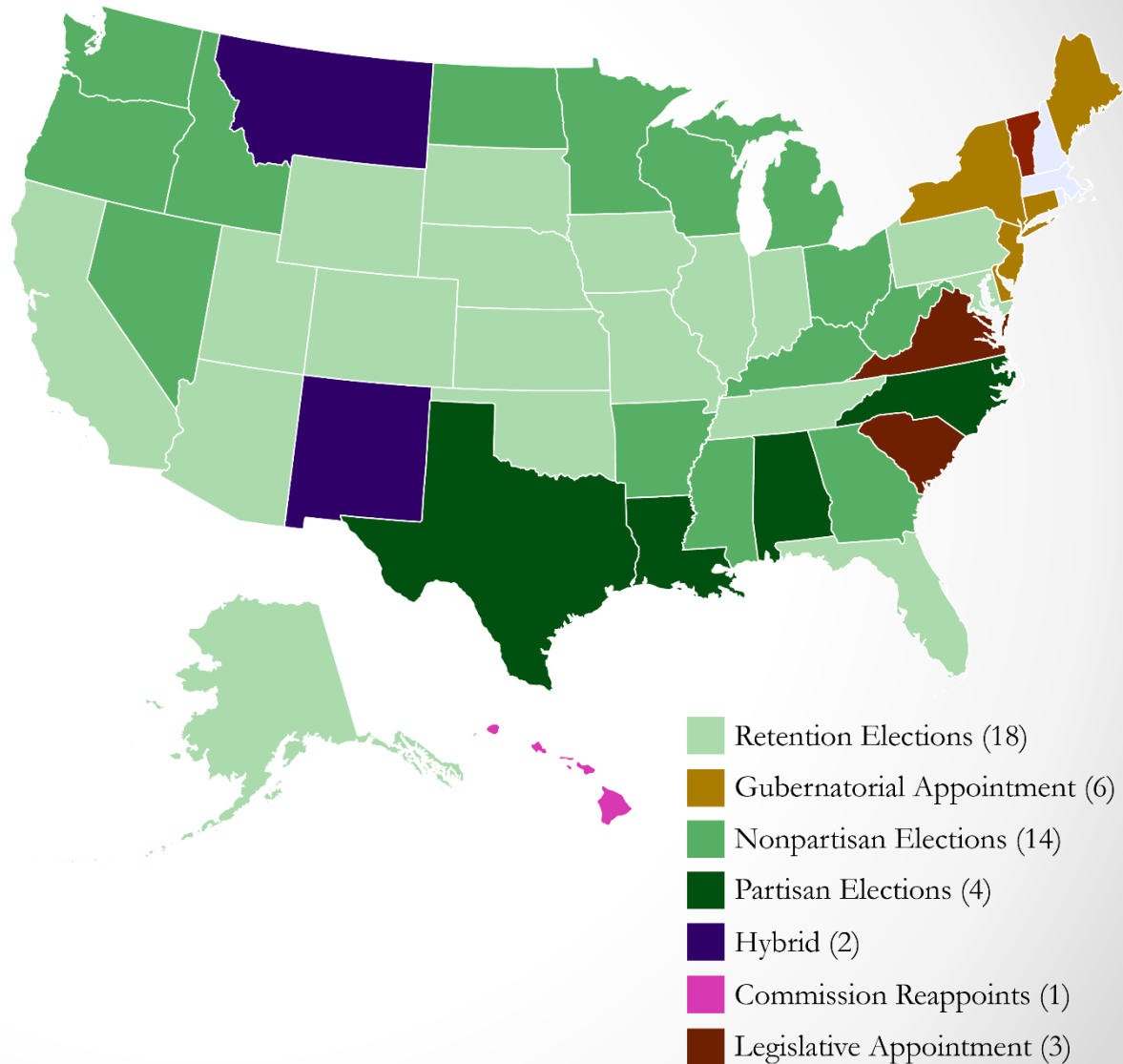


- Binding Nominating Commission (23)
- Nonbinding Nominating Commission (4)

Subsequent Terms for Justices

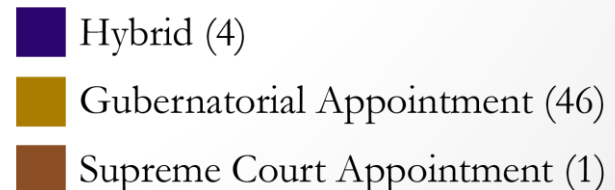
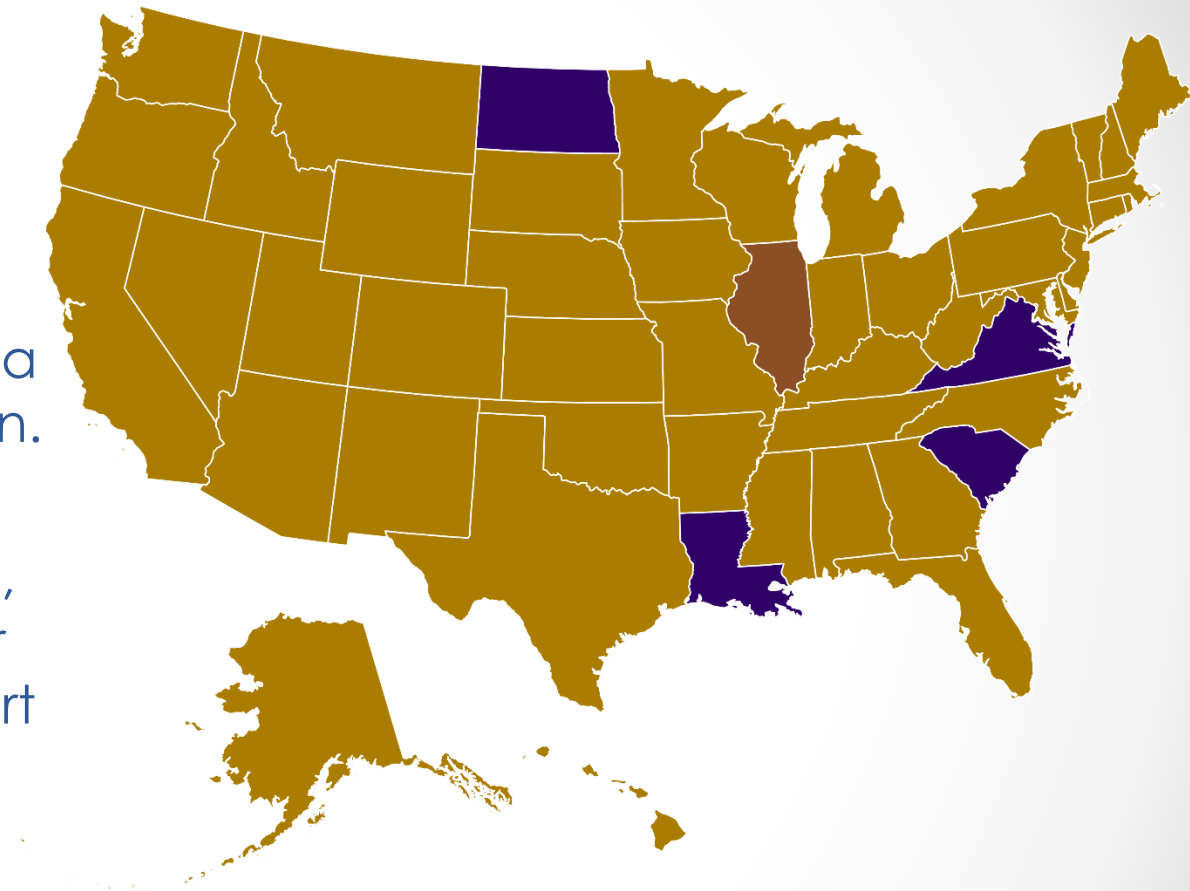
47 states + DC provide for multiple terms for justices.

- **38** use elections
 - 18 retention elections
 - 18 contested elections
 - 2 hybrid
- **10** use reappointment
 - 6 governor (or president)
 - 3 legislature
 - 1 nonpartisan commission
- **Term lengths** vary: 6-15 years
- **3** states have **life tenure** (no reselection)
 - 2 w/ mandatory retirement age



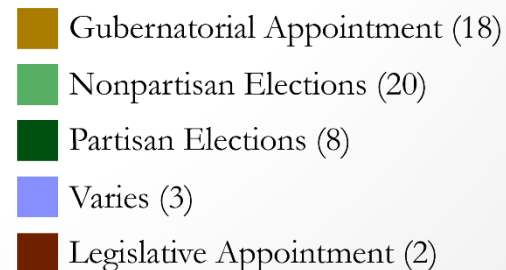
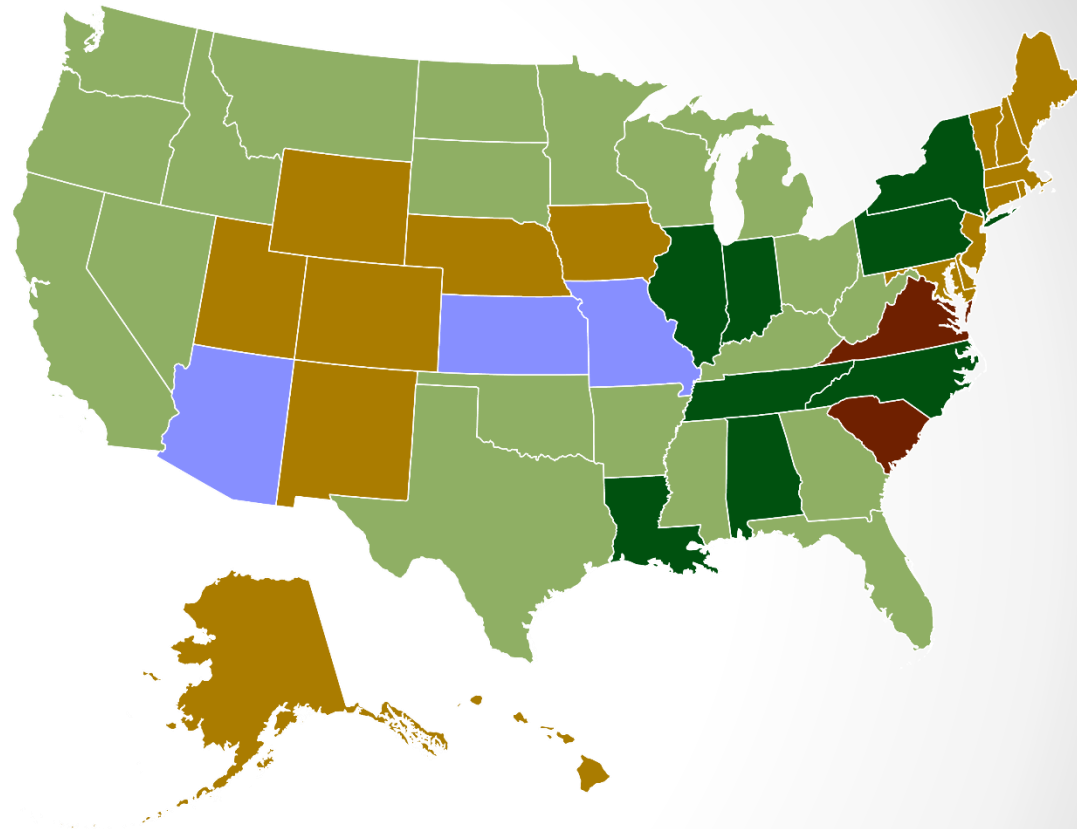
Interim vacancies

- In **45 states + D.C.**, interim vacancies are filled by the governor, often with the input of a nominating commission.
- In the remaining states, either the legislature or the state supreme court fills vacancies on an interim basis.



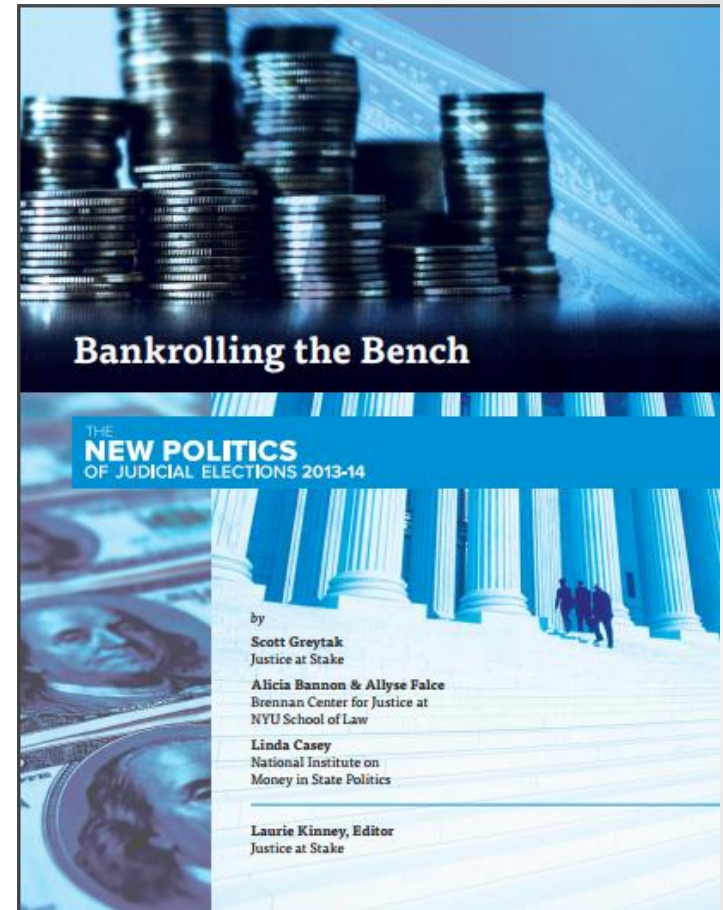
Judicial Selection for Lower Courts

- Contested elections are more common for lower courts, as compared to supreme courts.
 - **28 states** use contested elections to select their trial courts (**20** non-partisan, **8** partisan), as compared with **21 states** at the supreme court level.
- Most of this presentation will focus on state supreme courts. However, many of the observations and recommendations are broadly applicable to all court levels.



State Experience: Supreme Court Elections

- **High cost** and **politicized** state supreme court elections are now the norm.
- In the 2015-16 election cycle, there was **record outside TV spending by interest groups**:
 - National: \$20,947,494
 - North Carolina: \$3,367,450
- **Dark money** was prevalent.
- Spenders in state supreme court races **include regular players** in state courts.
- **Reforms, including public financing**, can mitigate special interest influence.



State Experience: Retention Elections

- Retention elections are also increasingly **politicized**:
 - Between 1999 and 2009, **no retention election** surpassed \$1 million.
 - Since 2009, **every cycle** has had at least one retention election that surpassed \$1 million.



2009-10



2011-12



2013-14



2015-16

Reselection Pressures & Judicial Independence

Courts are **constitutionally obliged** to decide cases based on their understanding of the law and the facts – not taking into account political or other pressures.

However, in both elective and appointive systems, there is **empirical and anecdotal evidence** that judges' decisions are influenced by concerns about **job security**.

- In the words of the late California Supreme Court Justice Otto Kaus, reselection pressure is like “**finding a crocodile in your bathtub** when you go in to shave in the morning. You know it's there and you try not to think about it, but it's hard to think about much else while you're shaving.”
- **Shortening term lengths** means judges must face reselection pressures **more frequently**.

Reselection Pressures & Judicial Independence

Empirical studies:

- Judges who receive **more campaign money** from business interests are **more likely to favor** these interests in cases – but this dynamic **disappears when they are not eligible for reelection**. (Kang & Shepherd (2011))
- Similar patterns exist in **criminal** and **business** cases.
- On the appointment side, judges are more likely to rule in favor of **government litigants** who are responsible for **reappointing** them to the bench. (Shepherd (2009))

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ARE APPOINTED JUDGES STRATEGIC TOO?

JOANNA M. SHEPHERD†

ABSTRACT

The conventional wisdom among many legal scholars is that judicial independence can best be achieved with an appointive judiciary; judicial elections turn judges into politicians, threatening judicial autonomy. Yet the original supporters of judicial elections successfully eliminated the appointive systems of many states by arguing that judges who owed their jobs to politicians could never be truly independent. Because the judiciary could function as a check and balance on the other governmental branches only if it truly were independent of them, the reformers reasoned that only popular elections could ensure a truly independent judiciary. Using a data set of virtually all state supreme court decisions from 1995–1998, this Article provides empirical support for the reformers' arguments; in many cases, judges seeking reappointment vote even more strategically than judges seeking reelection. My results suggest that, compared to other retention methods, judges facing gubernatorial or legislative reappointment are more likely to vote for litigants from the other government branches. Moreover, judges increasingly favor government litigants as their reappointments approach, which is consistent with the judges voting strategically to avoid reappointment denials from the other branches of government. In contrast, when these judges are in their last term before mandatory retirement, the effects disappear; without retention concerns, these judges are no more likely to vote for government litigants than other judges. My empirical evidence suggests that elective systems are not the only systems that produce bias; appointive systems also threaten judicial independence.

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† Associate Professor of Law, Emory University School of Law.

State Experience: Gov. Appointments

Many gubernatorial appointment systems work well, but they need **safeguards** to **avoid cronyism** and **promote public confidence** in the courts.

- For example, a study by the Center for Public Integrity found that **governors regularly appoint major campaign contributors** to judgeships, along with friends and political advisors.

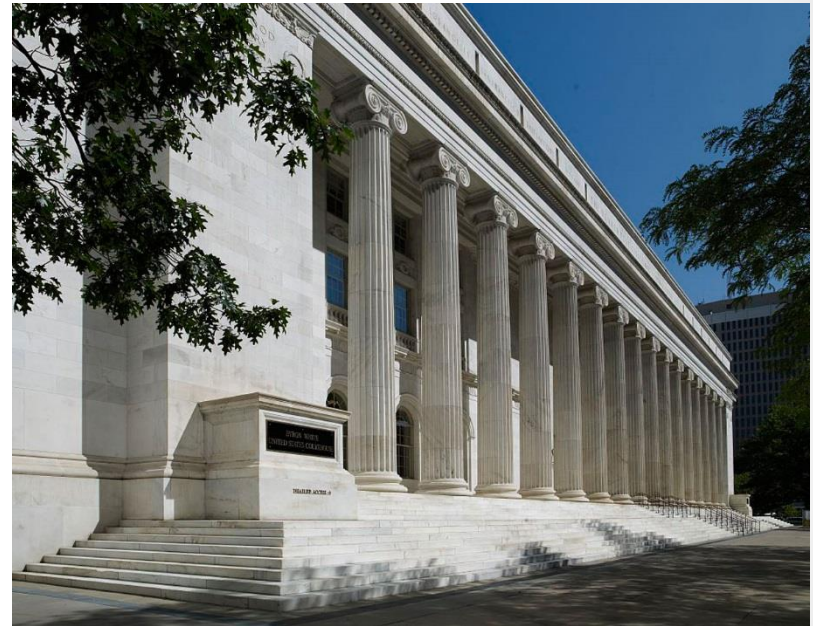


THE CENTER FOR
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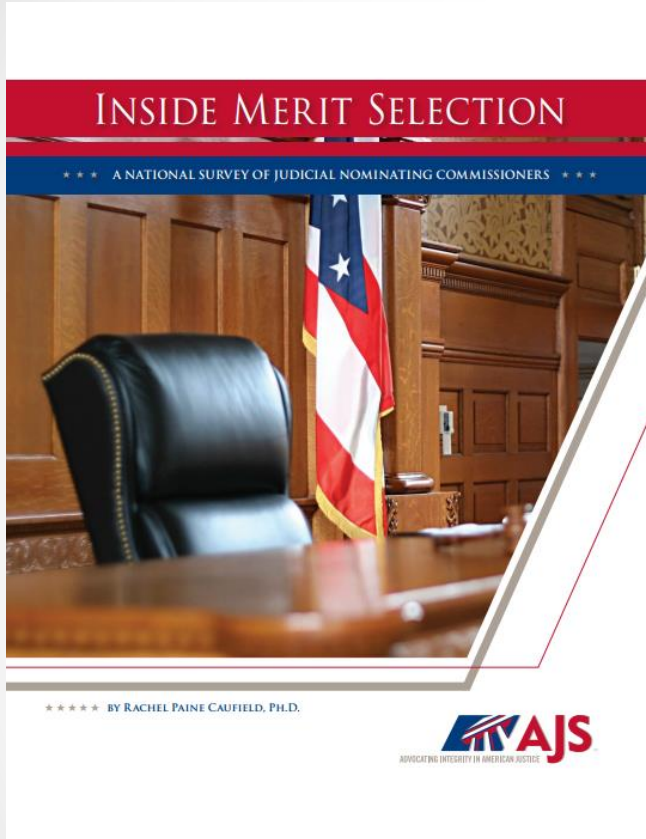
State Experience: Gov. Appointments

Using a **judicial nominating commission** to vet candidates may **reduce** the risk of cronyism.

- Goelzhauser (2016): States that used nominating commissions were **less likely to have justices with ties to major political offices** (such as former aides to the governor) than states that used appointments without nominating commissions.



State Experience: Gov. Appointments



Nominating commissioners also self-report that they do not consider political experience or affiliations as important criteria in evaluating candidates.

- American Judicature Society survey (2011): Nominating commissioners **reported that they focused on mental health, professional reputation, and the ability to communicate effectively** as their major criteria in evaluating judicial candidates. Political experience or affiliations received the lowest ratings as a criteria.

State Experience: Gov. Appointments

However, **judicial nominating commissions vary widely** in their structure, membership, practices, and independence from the governor.

- For example, in **nearly half** of the states that use commissions, **governors** appoint a **majority** of commissioners – potentially weakening their independence.

*These differences can have substantial implications for **public confidence** in the process and for the ability of commissions to meaningfully **insulate** the process from political and other pressures.*

State Experience: Gov. Appointments

Many nominating commissions also have a **striking lack of diversity**, potentially weakening public confidence in the process and contributing to a lack of diversity on the bench.

- A 2011 survey found only **32 percent** of commissioners were women and **4 percent** were African-American.
- Brennan Center research also found a lack of **professional diversity** on nominating commissions, including an absence of criminal lawyers or lawyers who represent low-income clients.

State Experience: Rhode Island

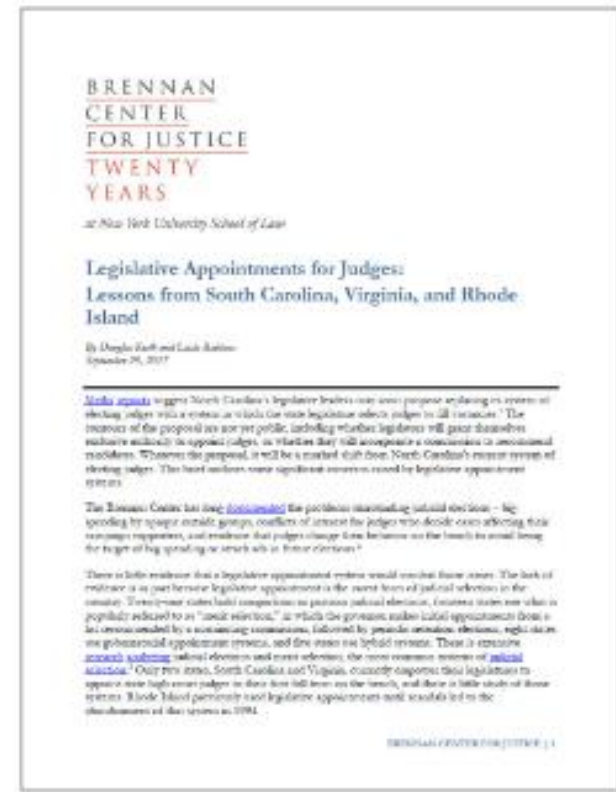


- Rhode Island's merit selection system has seen signs of politicization:
 - Governors and legislators **routinely appoint lobbyists** as commissioners.
 - Commissioners have had **behind-the-scenes conversations** with governors during the process of reviewing candidates.
 - Governors reportedly interviewed judicial candidates **before the nominating commission even created its list**.
- Rhode Island highlights the need for ethics rules & clear procedures.
- Also suggests value in providing for diverse appointing authorities to the commissions (including non-elected officials, such as the state bar).
- Political culture and structure both matter.

State Experience: Legislative Appointments

Legislative appointment systems are **rare and not widely studied**, but state experience suggests caution is warranted.

Such systems **lack clear lines of accountability** for appointment decisions, and may weaken public confidence in courts and legislatures alike.



State Experience: Legislative Appointments

Two states, Virginia and South Carolina, currently use legislative appointments. Their experiences raise significant concerns. For example:

1. Legislators have **regularly appointed their former colleagues** to the bench, and have faced accusations of **nepotism** and **favoritism**.
2. Decision-making is often opaque, pushing judicial selection decisions **behind closed doors** and opening the door to **special interest** influence.
3. **Legislative stand-offs** have led to unfilled judicial vacancies in Virginia, a particular concern with divided government.

Implications for Reform

Judicial selection is complex, and structure and political culture both matter.

While judicial elections raise serious concerns for judicial independence & integrity, a poorly-designed appointment system can raise similar issues.

For these reasons, broad consultation & deliberation is crucial.



Reform Recommendations

1. An **accountable gubernatorial appointment system**:

- A **nominating commission w/ diverse membership & appointing authorities**
 - Vet candidates & create a binding shortlist for governor.
- **Transparent** process and **ethics** rules for commissioners.
- [If state also provides for legislative confirmation, have an alternative process to fill vacancies in the face of legislative inaction.]

2. **Depoliticize reselection** of judges (elected or appointed). Do not shorten terms.

Potential reforms:

1. One-and-done: single fixed term of at least 14 years [preferred]
2. Life tenure (potentially w/ mandatory retirement age)
3. Commission reappointment model (Hawaii system)

3. Or, adopt reforms to **safeguard judicial elections**.

Best Practices: Nominating Commissions

- 1. Diffuse power to appoint** commissioners, with no single source with majority control.
 - *Example: In **New York**, four commissioners each are appointed by the Governor and Chief Judge, while the Assembly Speaker, the Assembly Minority Leader, the Senate President, and the Senate Minority Leader each appoint one commissioner.*
- 2. Mix of attorneys and non-attorneys**, including a process for members of the public to apply.
 - *Example: In **Indiana**, the governor appoints 3 non-lawyers, the State Bar Association Membership elects 3 lawyers, and the Chief Justice serves ex officio.*
 - *Example: **Colorado** publicly announces nominating commission vacancies and has a formal application process.*
- 3. Broad partisan input** in the committee, including members not affiliated with either of the two major political parties.
 - *Example: In **Arizona**, no more than 3 of 5 lawyer members and 5 of 10 non-lawyers members may belong to the same political party.*

Best Practices: Nominating Commissions

4. **Staggered terms** for commission members.

- *Example: In **Hawaii**, commissioners serve for a single six-year term, with terms staggered among commissioners.*

5. Reserve seats to **encourage professional diversity**.

- *Example: In **New Mexico**, the state bar can appoint four commissioners, who must represent “civil and criminal prosecution and defense.”*

6. Require appointing authorities to **consider regional, racial, and gender diversity in naming commissioners**.

- *Example: In **Florida**, the Governor must “seek to ensure that... the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population.”*
- *Example: In **Colorado**, commissioners must represent each of the state's congressional districts.*

Best Practices: Transparency and Ethics Safeguards

1. Application process for judges should be clear and open, including **public notice** and a **formal process**.
2. Commissioners' **votes should be made public**, so the public can assess if candidates are receiving bipartisan support or if the commission has broken into factions.
3. States should adopt **ethics rules** regarding when and how nominating commissioners can converse with candidates and the governor's office. (*See Model Code of Conduct from IAALS.*)
4. States should **collect** and **make public** diversity data at each stage of the process, including race, ethnicity, gender, sexual orientation, and professional experience.

Safeguarding Judicial Elections

- Reinststate **public financing** for judicial elections.
- **Strengthen recusal rules** to account for the realities of high-cost elections, including outside spending.
- Adopt **robust disclosure rules**.
- Provide for **Judicial Performance Evaluations**.
- Bolster **ethics rules** for judicial campaigns.
- Provide for a nominating commission for interim appointments.

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