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Articles

HISTORICAL OVERVIEW OF THE JUDICIAL SELECTION PROCESS IN THE UNITED STATES: IS THE ELECTORAL SYSTEM IN PENNSYLVANIA UNJUSTIFIED?

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I. INTRODUCTION

THE effective functioning of the dispute resolution process in our society requires an independent and accountable judiciary. It is, therefore, not surprising that the method for identifying and selecting justices and judges has been the subject of controversy since the early history of our nation.[1]

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1. *Compare* THE FEDERALIST NO. 78, at 487-88 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888), *with* 1 THOMAS JEFFERSON, *Autobiography of Thomas Jefferson, in* JEFFERSON'S COMPLETE WORKS 1, 81 (H.A. Washington ed., Washington, D.C., Taylor & Maury 1853). According to Hamilton:

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

THE FEDERALIST NO. 78, *supra*, at 231. On the subject of judges' independence, Jefferson wrote:

> [O]ur judges are effectually independent of the nation. But this ought not to be. I would not, indeed, make them dependent on the Executive authority, as they formerly were in England; but I deem it indispensable to the continuance of this government, that they should be submitted to some practical and impartial control; and that this, to be imparted, must be compounded of a mixture of State and Federal authorities. It is not enough that honest men are appointed Judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence.

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On June 27, 2002, in *Republican Party of Minnesota v. White*,[2] the United States Supreme Court entered the fray when it commented on the propriety of the election of justices and judges in holding that a state may not "prohibit candidates for judicial election in that state from announcing their views on disputed legal and political issues."[3] In reaching its determination that the content-based limitation on speech failed to meet strict scrutiny,[4] the Court discussed the "obvious tension" between the state's constitutional requirements for the popular election of justices and judges and limitations on the speech of those candidates for judicial office.[5] Indeed, the Court explained that the "disparity is perhaps unsurprising, since the [American Bar Association], which originated the [limitation], has long been an opponent of judicial elections."[6] The Court pointed out, though, that most states select state justices and judges through elections.[7] Accordingly, the Court found that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic

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THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 121 (Andrew A. Lipscomb ed., 1904).

2. 536 U.S. 765 (2002).

3. *Id.* at 768. The Court addressed the constitutionality of a provision of the Minnesota Code of Judicial Conduct, which provided that a "candidate for a judicial office, including an incumbent [justice or] judge," shall not "announce his or her views on disputed legal or political issues." *Id.* (quoting MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000) (the "Announce Clause")). The Minnesota provision originated from Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct.

4. *See id.* at 774-75 (providing that strict scrutiny requires courts to consider whether the statute at issue is narrowly tailored to serve a compelling state interest).

5. *See id.* at 787 (discussing controversy of state requirement). After significant analysis, the Court held that the state statute failed to meet strict scrutiny and therefore violated the First Amendment. *See id.* at 788.

6. *Id.* at 787.

7. *See id.* at 786 (citing American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (Apr. 2002)) ("[Thirty-one] States . . . select some or all of their appellate and general-jurisdiction [justices and] judges by election."). The American Judicature Society (AJS) identifies itself as follows: "Founded in 1913, AJS is an independent national nonprofit organization of judges, lawyers, and lay members of the public who support improvements in the justice system at all levels. Its work includes improving judicial selection methods and promoting the highest standard of conduct and ethics in the courts." American Judicature Society, *AJS to Administer Devitt Award, available at* http://www.uscourts.gov/ttb/julttb/devitt.htm (July 1995). The AJS has researched the methods of judicial selection and set forth their results in several charts. *See* American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts, available at* http://www.ajs.org/js/judicialselectioncharts.pdf (last visited Oct. 22, 2003). Throughout this Article, the authors refer to the Appendix, which cites the statutes and constitutions that govern the judicial selection method and process in the United States. We credit the work of AJS, whose research informed this Article.

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process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."[8]

In contrast to the *Republican Party of Minnesota* majority, Justice O'Connor used her concurring opinion to express her belief that "the very practice of electing judges undermines . . . [the perception of an impartial judiciary]."[9] She posited that, "if judges are subject to regular elections[,] they are likely to feel that they have at least some personal stake in the outcome of every publicized case" because they will be "aware that if the public is not satisfied with the outcome of a particular case, it could hurt [the judge's] reelection prospects."[10]

Justice O'Connor also contended that judicial candidates who must raise significant sums of money are likely to feel indebted to those who make campaign contributions.[11] She explained that "[b]y the beginning of the 20th century . . . elected judiciaries increasingly came to be viewed as incompetent and corrupt, and criticism of partisan judicial elections mounted."[12] Justice O'Connor concluded by rejecting the complaints of states that have had to restrict speech to prevent justices and judges from being impartial because those states, she reasoned, have no one to blame but themselves for leaving in place systems for the election of justices and judges that engender judicial bias.[13]

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8. *Repub. Party of Minn.*, 536 U.S. at 788 (quoting Renne v. Geary, 501 U.S. 312, 349 (1991)). Perhaps because the Supreme Court in *Republican Party of Minnesota* ruled an ABA Canon unconstitutional, the new ABA president is willing to consider options other than the elimination of elections as a means to maintain and improve the quality of the justices and judges that now serve our states. *See* Jeff Blumenthal, *Madeira to Head Commission on Judicial Elections*, LEGAL INTELLIGENCER, Aug. 19, 2002, at 3 (reporting that new ABA president committed to judicial reform).

9. *Repub. Party of Minn.*, 536 U.S. at 788 (O'Connor, J., concurring).

10. *Id.* at 788-89 (recognizing influence of potential loss of campaign funding would have on judges' possible determinations in cases). Justice O'Connor noted that "even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public confidence in the judiciary." *Id.* at 790 (citing Greenberg Quinlan Rosner Research, Inc. & American Viewpoint, *National Public Opinion Survey Frequency Questionnaire* 4, 7 (Oct. 30 – Nov. 7, 2001), *available at* http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf (describing "survey results indicating that 76 percent of registered voters believe that campaign contributions influence judicial decisions [and] that two-thirds of registered voters believe individuals and groups who give money to judicial candidates often receive favorable treatment"). Justice O'Connor also cites a law review article, relating "anecdotes of lawyers who felt that their contributions to judicial campaigns affected their chance of success in court." *Id.* (citing David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 378-79 (2001)).

11. *See id.* at 790 (O'Connor, J., concurring) (acknowledging presumption of obligation judges may feel after accepting donations).

12. *Id.* at 791 (citing Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 723 (1995)).

13. *See id.* at 792 (displaying no sympathy for states that ruling adversely affects).

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The elected judiciary of Pennsylvania[14] holds itself to very high moral standards, accepting that the right to serve comes from the people they serve. Justice Kennedy, in his concurring opinion, acknowledged that elected justices and judges, like most appointed jurists, are generally of the highest integrity.[15] He wrote:

> In resolving this case . . . we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this mechanism rather than, say, appointment and confirmation. By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant. Many of them, despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity. We should not, even by inadvertence, "impute to judges a lack of firmness, wisdom, or honor."[16]

The divergent opinions of the justices in *Republican Party of Minnesota*, addressing the propriety of judicial speech, highlighted the compelling issues involved in the selection of justices and judges.[17] The particular methods used by states to select justices and judges have varied with the passage of time.[18] While those methods might reflect the societal and political fashions of their age, fundamental but seemingly competing themes exist, including: the independence of the judiciary from political interference, the need for accountability to the public and the constitutional concern for the protection of individual rights. This Article traces the early history of the selection of justices and judges, identifies the manner in which states currently choose their justices and judges and discusses the pros and cons of each approach.

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14. *See* 42 PA. CONS. STAT. § 3131(a) (2003) (providing that justices and judges in all Pennsylvania courts are elected in partisan elections).

15. *See Repub. Party of Minn.*, 536 U.S. at 796 (Kennedy, J., concurring) (noting elected judges do have integrity).

16. *Id.* at 795-96 (citing Bridges v. California, 314 U.S. 252, 273 (1941)).

17. *See generally id.* at 797-821 (Stevens, J., dissenting) (discussing selection of judges).

18. *See id.* at 821 (citing P. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86 (1990); Brief of Amicus Curiae Conference of Chief Justices in Support of Respondent, 2002 WL 257559 (Feb. 19, 2002) ("For more than three-quarters of a century, States . . . have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary.").

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II. HISTORY OF THE JUDICIAL SELECTION PROCESS

The evolution of judicial selection in the common law system is well documented.[19] Nevertheless, when evaluating the competing methods for the selection of justices and judges, it is useful to consider their historical origins. Early law in the Western tradition established the antecedents of the methods employed today in the selection of justices and judges.

During the reign of William the Conqueror from 1066 until his death in 1087, the judicial function was an integral part of the *Curia Regis*, the King's Court.[20] Cases dealing with royal law were heard and decided by the King sitting with counselors of his selection.[21] A separate judiciary did not come into being until after William's death.[22] Eventually, the dispute resolution function was increasingly delegated to justices who were not necessarily the King's personal advisors.[23]

At about the same time, the law merchant was developing as a secondary component of the dispute resolution process.[24] Law merchant judges were laymen rather than professional jurists. They were elected by the merchants from among their number, or chosen by the head of a merchants' or tradesmen's guild with the advice of the members.[25] As time progressed, the King's appointed judges absorbed commercial matters.[26] The memory of elected and committee-appointed judges, however, remained in the legal subconscious, to resurface in more recent times.

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19. *See* EVAN HAYNES, SELECTION AND TENURE OF JUDGES 101-35 (1944) (outlining states' judicial selection process over years); *see also* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176 (1980) (discussing evolution of selection process).

20. *See generally* DAVID C. DOUGLAS, WILLIAM THE CONQUEROR (1964) (discussing role of judicial function during age of kings).

21. *See id.* at 287 ("The duty of his council was . . . in the most general sense, to advise the king . . . and the king . . . would always wish to secure the support of the men who alone could make his rule effective.").

22. *See id.* at 287-88 ("The essence of his government was a personal monarchy" and "not until after William's death was there to be evolved out of his court specialized bodies composed of men charged with particular fiscal and judicial duties. . . . [T]he later courts of law were offshoots of the *curia*.").

23. *See id.* at 290-91 (describing delegation of powers among "household officials").

24. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 346-47 (1983) (describing development of mercantile law).

25. *See id.* at 346 (discussing "non-professional community tribunals" and different methods of "elections").

26. *See id.* at 446-47 (discussing expansion to commercial matters). Commercial courts included "courts of markets and fairs, courts of merchant guilds, and urban courts." *Id.* at 346 (listing commercial court types). "Various other types of commercial courts developed" over time, including "courts of the staple" (*e.g.*, wool, leather and lead) and local maritime courts. *Id.* at 347 (describing development of commercial courts).

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The role of professional jurists as agents of the Crown continued until 1700.[27] The King retained the right to appoint the judges of his courts and to remove them arbitrarily.[28] So tied were the judges to the King that their tenure ceased at the end of his reign.[29] The Act of Settlement of 1700 "gave the English judiciary tenure 'during good behavior.'"[30] Later, a 1761 statute provided that the death of the King was not to affect judges' tenure.[31]

In general, the eighteenth century English reforms did not apply to the American colonies; the King appointed colonial judges.[32] In reaction, the Declaration of Independence protested that judges were "dependent on [the King's] will alone, for the tenure of His offices, and the amount and payment of their salaries."[33] Thus, the question of the method for determining judicial selection was one of the matters of disagreement facing the creators of the federal system.[34] The Drafters of the United States Constitution did not, however, embrace the idea of an elected judiciary because of the concern that it would undermine judicial independence.[35] They believed that the judiciary must be free of influence from a monarch (or executive), as well as from the people judged.[36]

Pennsylvania's process of judicial selection has proceeded through a number of variations. Its origins trace to the 1681 Charter from King Charles II to William Penn.[37] The Charter granted to Penn the authority

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27. *See* MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 3 (1987) (discussing history of judges who were "deemed crown agents").

28. *See id.* (citing Dorothy W. Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 13-14 (1962) (noting that judges were subject to "instantaneous and arbitrary removal by the king")).

29. *See id.* (noting symbiotic relationship between judges and monarch).

30. *Id.* (identifying legislation passed giving judges greater stability). In addition, the Act provided that a judge could not be removed absent action by both houses of Parliament. *See id.*

31. *See id.* (citing Nelson, *supra* note 28, at 13) (explaining elimination of old practice of disposing of judges at time of monarch's death).

32. *See id.* (noting that reforms did not apply to American colonies).

33. *Id.* (citing THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776)). Similarly, the Pennsylvania Constitution of 1790 provided for holding office by the justices of the supreme court during good behavior. *See* PA. CONST. art. V, § 2 (historical note) (tracing early language to Pennsylvania Constitution of 1790); *see also* PA. CONST. art. V, §§ 16-17 (concerning financial matters of judges).

34. For a further discussion of the disagreement facing the creators of the federal system, see *supra* note 1 and accompanying text.

35. *See* THE FEDERALIST NO. 78, *supra* note 1, at 484 (discussing importance of judicial independence).

36. *See id.* at 487 ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors.").

37. *See* Voorhees E. Dunn, Jr., *Judicial Reform in Pennsylvania*, *in* JUDICIAL REFORM IN THE STATES 117, 117-20 (Anthony Champagne & Judith Haydel eds., 1993) (discussing historical background of judicial reform in Pennsylvania); *see also* Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settle-*

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to establish a judicial system.[38] Penn responded in 1683 with his First Frame of Government, his proposed first constitution for Pennsylvania, which provided that judges were to be nominated by the provincial council and commissioned by the governor.[39] Their tenure was conditioned on good behavior.[40]

The ensuing 1701 Frame of Government abolished the provincial council and placed with the governor the sole authority to choose judges.[41] When Pennsylvania became a state in 1776, its first constitution established government by an executive council.[42] The council, headed by a president, had the power to appoint judges.[43] In the multi-tiered court system, Pennsylvania Supreme Court justices served seven-year terms with the possibility of reappointment.[44]

Pennsylvania rewrote its constitution in 1790 to follow more closely the federal model, which endorsed the principle of separation of powers.[45] The result was a popularly elected governor with the power to appoint supreme court justices to serve during good behavior with the advice and consent of the legislature.[46] The governor could remove a justice at the request of two-thirds of the legislature.[47]

The Jacksonian populist idea of an elected judiciary, based on the concept that a judge should be accountable to the public, strongly influenced the Pennsylvania Constitutional Convention of 1838.[48] A debate on the issue of judicial elections prompted a compromise, which provided for appointment of supreme court justices by the governor for a fifteen-year

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ment: English Intrusions on the American Mainland in the Seventeenth Century, 26 LAW & SOC. INQUIRY 315, 345 (2001) (tracing roots of Pennsylvania's judicial system); Pennsylvania Historical and Museum Commission, *Pennsylvania State History: The Quaker Province: 1681-1776, available at* http://www.phmc.state.pa.us/bah/pahist/quaker.asp?secid=31 (last visited Oct. 22, 2003).

38. *See* Dunn, *supra* note 37, at 117 (stating Penn had authority to establish judicial system); Tomlins, *supra* note 37 at 346 ("[Penn] could make laws . . . and appoint Judges and Justices, Magistrates and Officers . . . for what Causes so ever.").

39. *See* Tomlins, *supra* note 37, at 346-47 (discussing formation of Pennsylvania through Penn's efforts); *see also* Dunn, *supra* note 37, at 117 (describing terms of Penn's frame of government).

40. *See* Dunn, *supra* note 37, at 117 (noting that tenure was at discretion of governor).

41. *See id.* (noting authority to choose judges granted solely to governor).

42. *See id.* (describing form of government established when Pennsylvania became a state).

43. *See id.*

44. *See id.* (describing terms for Pennsylvania Supreme Court justices).

45. *See id.* (providing basis for Pennsylvania's 1790 Constitution).

46. *See id.* at 117-18 (describing government under Pennsylvania's 1790 Constitution).

47. *See id.* at 118 (indicating how legislative vote affected tenure of justices).

48. *See id.* (discussing Pennsylvania Constitutional Convention of 1838).

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term, but did not require the "advice and consent" of the legislature.[49] Nevertheless, those favoring popular elections continued to press the issue. In 1850, the constitution was amended to require direct election of supreme court justices for fifteen-year terms.[50] The 1874 constitution increased the elective term to twenty-one years, but limited justices to one term.[51]

The resulting partisan elective process required a candidate for the Pennsylvania Supreme Court to receive a nomination from a political party and win the primary election in order to qualify for the general election. As a result of the Constitutional Convention of 1967-1968, the Judicial Article of the Pennsylvania Constitution was repealed and replaced by a unified court system.[52] Today, the system consists of "the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, [and] such other courts as may be provided by law and justices of the peace."[53]

A proposal to the 1967-1968 Constitutional Convention provided for merit selection and retention of all justices and judges.[54] Its rejection by the voters in a popular referendum left Pennsylvania with a selection process that provides separate regimes for interim and non-interim appointments.[55] A candidate for an initial non-interim seat on the bench runs in a partisan election for a ten-year term.[56] If a justice or judge sitting by virtue of victory in a partisan election wishes to remain for another term, the justice or judge runs unopposed in a retention election.[57] Historically, most justices and judges win their retention elections in Pennsylvania.[58]

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49. *See id.* (noting debate between Whigs and Democrats over judicial tenure).

50. *See id.* (discussing changes to judicial terms).

51. *See id.*

52. *See id.* at 119 (discussing implementation of today's system).

53. PA. CONST. art. V, § 1. Pursuant to the 1968 Amendments to the Constitution of Pennsylvania, effective 1970, the Commonwealth Court was created. *See* PA. CONST. art. V, § 4. Although judges are currently elected in partisan elections, the governor initially appointed the first contingent of Commonwealth Court judges.

54. *See* Dunn, *supra* note 37, at 119 (discussing further proposed changes of Constitutional Convention).

55. *See id.* at 119-20 (discussing system of partisan election).

56. *See* PA. CONST. art. V, § 13(a) (describing process); *id.* § 15(a) (defining tenure). Primary cross-filing, once permitted in all courts, is now permitted only in the courts of common pleas. Cross-filing allows a candidate to receive the nomination of both parties and thereby run unopposed in the general election. *See generally* Appendix.

57. *See* PA. CONST. art. V, § 15(b) (defining means by which justices may serve multiple terms).

58. *See* Jonathan P. Nase, *Why Judges Leave the Bench: Pennsylvania 1978-1993*, 68 TEMP. L. REV. 739, 744 (1995) (reporting study results between January 1, 1978 and September 15, 1993, which indicated 3.3% rate of loss).

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When a judicial vacancy occurs, the governor, with the advice and consent of two-thirds of the Senate, appoints an individual to fill the interim vacancy for the remainder of the unserved term.[59] The appointee serves the shorter of either the remainder of the unexpired term or the time until the next municipal election occurring more than ten months after the vacancy.[60] If the appointed justice or judge wishes to remain on the bench at the end of the interim appointive term, the justice or judge must run in a partisan election rather than in a retention election.[61] Because judicial vacancies routinely occur, the appointment process is frequently employed, and it is thought that appointment gives the incumbent an advantage over rivals in the ensuing partisan election.[62]

III. METHODS OF JUDICIAL SELECTION

In general, the states use two methods to select judges: appointment and election.[63] Throughout its history, Pennsylvania has dabbled with various forms of both methods.

A. *Appointment*

As the foregoing summary indicates, appointment is the oldest of the methods of judicial selection. The majority of states today, however, do not use appointment for the initial selection of justices and judges.

In an apparent reaction to the colonial practice, the original thirteen states were reluctant to put the power to select the judiciary into the hands of one person. At the same time, however, the idea of popular election of judges and forms of appointment were not yet widely considered viable alternatives. Accordingly, eight of the original states chose to select justices and judges through appointment by the legislature, and the remaining five gave the governor appointment power subject to the approval of the legislature.[64]

To balance the seemingly competing considerations of independence and accountability, proponents of appointment argue that judicial inde-

59. *See* PA. CONST. art. V, § 13(b).

60. *See id.*

61. *See* Nase, *supra* note 58, at 741 (describing method by which appointed judge may serve subsequent term).

62. *See id.* at 751 n.57 (discussing low rate of loss in retention elections).

63. *See, e.g.*, N.Y. CONST. art. VI, §§ 2, 4 (illustrating use of two methods). Appointment and election are the widely recognized categories of judicial selection. There are, however, many variations of these broad categories. Some states may use one method to select appellate judges and another to select trial judges. For example, in New York, court of appeals judges are appointed through a nominating commission and supreme court (trial division) justices are selected in partisan elections. *See id.* Supreme court (appellate division) justices are appointed from among the justices of the supreme court (trial division). *See id.*

64. *See* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 13 (1995) (discussing selection of judges in original states).

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pendence should come first. Further, proponents believe that the appointment process, rather than the election process, allows a more rational and informed determination of the qualifications needed to select a justice or judge capable of making an informed and legally supportable decision. They view the absence of periodic accountability to the electorate as a positive feature. They contend that, by the inherent nature of the public election process, voters are not, and cannot be, sufficiently informed about the qualities of a justice or judge necessary to the proper and efficient functioning of the legal system.[65]

Proponents of appointment assert that the appointment process achieves an adequate quantum of accountability because the appointing authority is responsible for its actions in selecting the candidates it designates to the bench. A justice or judge not capable of making an informed and legally supportable decision impairs not only the particular justice or judge, but also those who favored the selection of the justice or judge. Proponents of appointment contend, however, that the appointing authority is in a better position to take direct curative action than is the voting public, which is likely to lack the information and the expertise of the appointing authority. Finally, there are arguments that the appointment of justices and judges increases the probability that qualified minorities and women will be selected.[66]

Most states that use gubernatorial appointment as the method of initial selection temper the chief executive's choice with an approval mechanism: requiring confirmation and approval by either the legislature or an executive council.[67] For example, Vermont requires that the appointment of appellate court justices and judges be subject to legislative confirmation,[68] and New Jersey requires that the governor obtain the advice and consent of the Senate before making judicial appointments.[69] New Hampshire provides that an executive council must approve the governor's judicial appointments.[70]

As mentioned above, a majority of the original thirteen states used a legislative appointment method of judicial selection. Currently, in Virginia, for example, both houses of the legislature participate in the selection process, which requires a separate majority vote of each house.[71]

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65. *See* Ellen Mattleman Kaplan, Pennsylvanians for Modern Courts, *Blueprint of the Future of Judicial Selection Reform*, § I.B, para. 9 (July 1999), *available at* http://www.pmconline.org/blue/blue_Main.htm.

66. *See* Webster, *supra* note 64, at 14 (mentioning appointive method's possible benefits for minorities).

67. *See* COMISKY & PATTERSON, *supra* note 27, at 6 (discussing legislative veto power in appointment process).

68. *See* VT. CONST. ch. II, § 32.

69. *See* N.J. CONST. art. 6, § 6, ¶ 1.

70. *See* N.H. CONST. pt. 2, art. 46.

71. *See* COMISKY & PATTERSON, *supra* note 27, at 5 (discussing legislative appointment of judges). Also, in Rhode Island and South Carolina, an appointment

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Critics of legislative appointment maintain that few legislators are qualified to decide the criteria for and initial qualifications of a justice or judge. They also believe that legislators are too politically motivated and that justices and judges may feel obligated to those legislators who were instrumental in their appointment to the bench. Additionally, present or former legislators who seek appointment to the bench may receive more favor from their former political colleagues than their opponents may receive.[72]

The new wave of appointment is merit selection, called the "Missouri Plan" for the first state that introduced it. In general, a special commission identifies the criteria that the state seeks in its justices and judges, and then the commission selects acceptable candidates.[73] The slate of acceptable candidates is submitted to the state appointing authority, which decides on the judge.[74]

Merit selection moved to the forefront in 1937, when the American Bar Association (ABA) endorsed it as the preferred method of judicial selection.[75] In its prototypical form, the process requires a nonpartisan commission composed of lawyers and non-lawyers who actively identify, recruit and screen candidates for judicial vacancies. The commission provides a list of acceptable candidates (usually three) to the governor, who must select from the list to fill the vacancy. After an initial term of years, the justice or judge can run in a retention election, in which the voters are simply asked whether they wish to retain the justice or judge.

Proponents of the merit selection process insist that it is the most effective way to solve the primary problems of judicial selection: voter ignorance and apathy.[76] Proponents of merit selection say that those factors result in a less-qualified judiciary.

The system presupposes a selection commission that itself is highly qualified to identify the characteristics sought for in justices and judges and thereby select the individuals who will make the best justices and judges. Supporters of the Missouri Plan reason that merit selection increases the pool of qualified candidates by eliminating the pressures and

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must be approved by a joint vote of both houses. In Virginia, a separate majority vote of each house suffices.

72. *See id.* (discussing advantages of legislative appointment system).

73. *See* James E. Lozier, *Judicial Selection: The Missouri Plan A/K/A Merit Selection: Is It the Best Solution for Selecting Michigan's Judges?*, 75 MICH. B.J. 918, 920 (1996) (providing overview of merit selection system).

74. *See id.*

75. *See* COMISKY & PATTERSON, *supra* note 27, at 5 (discussing initial endorsements of merit selection).

76. *See* Bridget E. Montgomery & Christopher C. Connor, *Partisan Elections: The Albatross of Pennsylvania's Appellate Judiciary*, 98 DICK. L. REV. 1, 18 (1993) (relating survey results showing that ninety percent of Pennsylvania voters admit to spending "little or no time learning about the background and qualifications of judicial candidates for Pennsylvania appellate courts").

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vagaries of the elective process that would otherwise discourage competent candidates from pursuing a position on the bench.[77]

Opponents of this method focus on whether justices and judges chosen via a merit selection process are representative of or accountable to the populace.[78] They argue that the selection commissions often are not representative of the public and that the candidate pool may not adequately represent all segments of the community. Further, its critics do not see merit selection as an effective compromise on accountability. A subsequent retention election is deemed an inadequate solution because the incumbents rarely lose. Some see merit selection as an elitist system that replaces the popular will with the will of a few individuals. Additionally, opponents of merit selection contend that it is not as apolitical as it appears. A governor may choose commission members who share the governor's party affiliation or social views and who may thereby be politically biased.[79]

Currently, twenty-nine jurisdictions use some variation of the merit selection method of appointment.[80] Ten states combine merit selection with the election of judges.[81] In eight of the jurisdictions with merit selection, the judges are reappointed in a manner similar to the way they were

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77. *See* Pennsylvanians for Modern Courts, *Merit Selection—The Supreme Choice for Pennsylvania: What Pennsylvanians Need to Know About Choosing Judges, available at* http://www.pmconline.org/archive/meritbro.shtml (last modified Mar. 1994) (championing benefits of merit selection); *see also* Lozier, *supra* note 73, at 921 (describing disadvantages inherent in elective process that deter well-qualified candidates from seeking judicial positions).

78. *See, e.g.*, Montgomery & Connor, *supra* note 76, at 16-17 (detailing arguments against merit selection).

79. *See* Lozier, *supra* note 73, at 922 (discussing criticisms of Missouri Plan); *see also* Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1226 (1998) ("A recent study revealed that commissioners, on the whole, remain overwhelmingly white, largely over 40 years of age and reflective of both an educational and occupational elite. Judicial commissioners also typically evidence high levels of political and civic involvement. Some cry that this results in judicial selection commissions that reflect the elite of society. With such a concentration of similar characteristics combined in a politically active group of individuals, political influence appears as a potential threat to the merit selection system." (internal quotations and citations omitted)); Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1235 (2000) ("About one third of lawyer and non-lawyer commissioners have had high levels of political or civic activity, having served in partisan or public offices. This evidence raises a 'troubling spectre of political favoritism' that could call into question the legitimacy of merit selection systems." (citations omitted)).

80. Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia and Wyoming. *See* Appendix.

81. Arizona, California, Florida, Indiana, Kansas, Maryland, Missouri, New York, South Dakota and Tennessee. *See* Appendix.

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appointed originally.[82] In three states that use merit selection, judges are appointed for life during good behavior.[83]

B. *Election*

1. *In General*

The majority of state court justices and judges in this country are elected, and these elected justices and judges write most of our opinions.[84] Indeed, thirty-two states select at least some of their justices and judges in partisan and nonpartisan elections.[85] Specifically, Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas and West Virginia select all of their justices and judges in partisan elections.[86] Additionally, the following states select all of their justices and judges in nonpartisan elections: Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington and Wisconsin.[87] Mississippi elects all justices and judges, some through partisan elections and others in nonpartisan elections.[88] In ten other states, some justices and judges are elected.[89] Of the nineteen jurisdictions (including the District of Columbia) that select their justices and judges without elections,[90] nine (Alaska, Colorado, Connecticut, Iowa, Nebraska, Oklahoma, Utah, Vermont and Wyoming) require justices and judges to run in retention elections, sometimes as soon as a year after their original appointments, to retain their positions.[91] Thus, elections play a role in more than eighty percent (80%) of jurisdictions.

Advocates of the elective process weigh the accountability factor more heavily than considerations of judicial independence. They assert that qualified justices and judges inevitably survive the process while unqualified justices and judges do not. Proponents believe in the right of the people to vote for those who will judge them. They argue that because a justice's or judge's decisions on public policy issues influence the law, justices and judges should be held accountable to the people who are directly

82. Delaware, District of Columbia, Hawaii, Maine, New Jersey, New York (Court of Appeals), South Carolina, Virginia. *See* Appendix.

83. Massachusetts, New Hampshire and Rhode Island. *See* Appendix.

84. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 690 (1995) (discussing preponderance of court opinions written by elected judges).

85. *See* Appendix.

86. *See* Appendix.

87. *See* Appendix.

88. *See* Appendix.

89. Arizona, California, Florida, Indiana, Kansas, Maryland, Missouri, New York, South Dakota and Tennessee. *See* Appendix.

90. Alaska, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, Oklahoma, Rhode Island, South Carolina, Utah, Vermont, Virginia and Wyoming. *See* Appendix.

91. *See* Appendix.

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affected by those decisions, just as the executive and the legislative bodies are held accountable to the electorate through the elective process.[92]

Opponents of judicial elections believe that it is more important that the judiciary be independent than accountable to the electorate. Some insist that judicial elections go so far as to violate due process by making fair and impartial adjudication difficult, if not impossible, because elected justices and judges are unable to be completely neutral.[93]

2. *Partisan Elections*

Fourteen states utilize partisan elections to elect at least some of their justices and judges.[94] Seven of those jurisdictions use partisan elections as the sole method of selecting justices and judges for all courts.[95] To serve additional terms in those states, justices and judges must be re-elected[96] or retained.[97]

The 1909 Amendments to the Pennsylvania Constitution provided, for the first time, for the election of all justices and judges at general elections, in the same manner as the election of legislators.[98] The change was apparently based on the theory that the inclusion of the judiciary in general elections encouraged votes along party lines. As a result, general elections in Pennsylvania are held in even-numbered years,[99] and judicial elections are held in odd-numbered years.[100]

Those who believe in partisan elections assert that more candidates are eligible to participate in the process because it is an open method of selection. Further, the identification of a candidate's party gives the voters an idea of the candidate's ideology.[101] On the other hand, opponents of partisan elections cite a myriad of reasons for concern. Philosophically,

92. *See* Judge Laurence H. Silberman, Circuit Judge, United States Court of Appeals for the District of Columbia, Federalist Society Symposium: Washington, D.C.: Nov. 14-16, 1996, *Panel Five: Term Limits for Judges?*, 13 J.L. & POL. 669, 684 (1997) ("The more judges are engaged in policymaking, as a matter of political theory, the more they should be accountable through elections.").

93. *See, e.g.*, Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 189 (1996) (arguing that public election of judges creates "substantial . . . risk to fair and impartial adjudication").

94. Alabama, Arizona, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, New Mexico, New York, Pennsylvania, Tennessee, Texas and West Virginia. *See* Appendix.

95. Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas and West Virginia use partisan elections for all courts and re-elect judges at the end of their terms. *See* Appendix.

96. Alabama, Louisiana, Texas and West Virginia. *See* Appendix.

97. Illinois, New Mexico and Pennsylvania. *See* Appendix.

98. *See* PA. CONST. art. V, § 13(a).

99. *See* PA. STAT. ANN. tit. 25, § 2602(h) (West 2003).

100. *See* PA. CONST. art VII, §§ 2-3.

101. *See* COMISKY & PATTERSON, *supra* note 27, at 8 (listing arguments against partisan elections).

they tend to believe that judicial independence trumps accountability and that the elective system is not an effective method of ensuring accountability because voters are apathetic and uninformed about judicial elections.[102] Additionally, they contend that voters are not sufficiently competent to evaluate a candidate's qualifications. Voters are said to be influenced by factors having nothing to do with a candidate's ability to perform the duties of a qualified justice or judge, such as: party affiliation, name recognition, geographical location and ethnicity. The politics of partisan election creates opposition to a candidate based on party affiliation, rather than on qualities that will make him or her a justice or judge capable of making an informed, reasoned and legally supportable decision.[103] Further, critics maintain that party leaders, who are either unable or unwilling to determine the qualifications of a competent justice or judge, select the judicial nominees for the party. Critics fear that justices and judges will feel obligated to the political leaders who select them and to those who contribute to their campaign funds. Finally, it is argued that the stress of campaigning, eliciting support and raising funds, deter many otherwise qualified candidates.[104]

Critics of partisan elections also posit that the interim appointment process neutralizes the accountability benefits of the election method. They contend that because most justices and judges begin their judicial careers through interim appointments, the ensuing partisan election is a hollow one. The sitting candidate is virtually assured the party nomination, in both the primary and general elections, and has the benefit of a record of accomplishment to use to defeat any opponent.[105]

3. *Nonpartisan Elections*

Nonpartisan elections became prevalent in the middle of the last century. They began in part because of suspicions and concerns about the integrity of partisan elections, such as the belief that political machines selected judicial candidates and subsequently controlled elected justices and judges.[106]

The principal argument in support of nonpartisan elections is that they remove the undesirable political element from judicial selection, while retaining the predominant element of accountability.[107] Because

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102. *See* Maute, *supra* note 79, at 1221.

103. *See, e.g.*, Thomas E. Brennan, *Judicial Selection: What Fits Texas?: Nonpartisan Election of Judges: The Michigan Case*, 40 SW. L.J. 23, 24 (1986) (Special Issue) (analyzing Michigan's judicial election system).

104. *See* Montgomery & Connor, *supra* note 76, at 15-16 (detailing benefits of merit selection).

105. *See* Kaplan, *supra* note 65, at 8-13 (arguing for judicial reform).

106. *See* Webster, *supra* note 64, at 24-25 (discussing causes for creation of nonpartisan elections).

107. *See, e.g.*, Brennan, *supra* note 103, at 23-24 (comparing effect of partisan versus nonpartisan election of Michigan judges).

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party affiliation is not before the electorate, justices and judges are more likely to be chosen because of their professional and personal qualifications, which are not tainted or screened from view by the distraction of partisan factionalism.[108] Those favoring nonpartisan elections assert that "[p]artisanship is a notion clearly at odds with impartiality, and impartiality is the goal of the judiciary [and that there] is no place for party discipline or party loyalty in the courts."[109]

IV. COMMENTARY

Competing concerns of democracy and constitutionalism underlie the philosophical issue of whether justices and judges should be elected or appointed. In a democracy, the consent of the governed legitimizes political authority and power. Further, the legitimacy of decision-makers becomes more tenuous as the procedure for their selection becomes more distant from the people their decisions affect. In our constitutional democracy, however, the will of the majority is not absolute; it is limited by the concept of constitutionalism, which tempers the will of the majority by protecting the rights of individuals. Constitutionalism is, at base, protection against the consequences of majoritarian power:

> Constitutionalism thus seeks to limit the scope of democratic power, to circumscribe majoritarianism. Over certain spheres, the majority possesses no immediate control. These spheres are designated as "rights," and the individual is said to "possess" these rights "against" the majority, which is to say, against encroachment by majoritarian power.
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> . . . .
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> . . . "Majoritarian authority is limited by the constitutional rights individuals hold against the majority, such that policies supported by a majority that contravene those rights, substantively or procedurally, are for that reason without force." Constitutions embody this principle of constitutionalism by providing certain checks on majoritarian decisions. Majoritarian decisions are subject to review to ensure their compatibility with constitutionally protected rights.[110]

While the concept of democracy supports the selection of justices and judges by election, the need to protect individual rights, or constitutionalism, causes us to question whether the majority can successfully choose justices and judges willing to protect individual rights when the rights of the individual are inconsistent with the will of the majority. This

108. *See* Webster, *supra* note 64, at 25. In a nonpartisan election system, good judges are generally unopposed.

109. Brennan, *supra* note 103, at 23-24.

110. Croley, *supra* note 84, at 704-05 (internal citations and formatting omitted).

majoritarian problem thus raises the question: How can elected justices and judges be acceptable in a society dedicated to constitutionalism?[111]

There is a more significant question, though: How effective are the elected judiciaries in protecting constitutional rights? If elected justices and judges are protecting individual rights as well as, or more successfully than, appointed justices and judges, then constitutionalism may not be a basis for favoring the selection of justices and judges by appointment. The theoretical argument that justices and judges elected by "the majority" do not protect constitutionally preserved rights as well as appointed justices and judges do is well taken. There is little data supporting that proposition, however, whereas there is a great deal of anecdotal evidence that elected justices and judges are able to protect constitutional rights notwithstanding that their actions may not be popular.[112]

V. CONCLUSION

Contrary to the concerns of some, it may be that the process of requiring someone to campaign for a judicial position helps to foster the placement of individuals of integrity into the role of justice or judge. Perhaps the campaign process, which requires candidates for judicial office to talk with thousands of people from diverse walks of life and, in Pennsylvania, travel through unknown territory in a state with sixty-seven counties, gives judicial candidates a broader perspective from which to consider the issues they will face as judicial officers. The point is that if those concerned with constitutionalism fear the willingness of state-elected judiciaries to protect individual rights, they should first demonstrate that the elected officials are failing to protect those rights. To date, the authors do not believe that such a showing has been made and, at least anecdotally, it appears that elected justices and judges are doing as good a job as appointed ones in safeguarding individual rights.

111. *See id.*

112. The other confounding principle is that the majority of people in this country favor the protection of individual rights. Accordingly, even if one were to accept, for purposes of discussion, the argument that elected judges are beholden to the majority, if the majority favors the protection of individual rights, constitutionalism need not fear the current majority.

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APPENDIX

SUMMARY OF STATE COURT JUDICIAL SELECTION IN THE UNITED STATES

ALABAMA

- *Court Structure*
  Supreme Court; Court of Civil Appeals (intermediate court of appeals); Court of Criminal Appeals (intermediate court of appeals); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  "All [justices and] judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts."[113] "The term of office of each [justice or] judge of a court of the judicial system of this state shall be six years."[114] The elections are partisan elections.[115]
- *Method and Term of Retention*
  To remain in office, a justice or judge must be re-elected[116] in the same manner in which the justice or judge was elected originally. The length of subsequent terms equals the length of the original term.
- *Mandatory Retirement Age*
  A justice or judge cannot be elected once the justice or judge has attained the age of seventy years.[117] A justice or judge who reaches seventy during the course of a term may serve the remainder of the term.
- *Cross-Filing*[118]
  There is no cross-filing in Alabama.[119]

ALASKA

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Superior Court (trial court).
- *Method of Selection and Initial Term of Office*
  The governor appoints justices on the supreme court and judges on the court of appeals and superior court from a list of two or more names provided by a judicial council.[120]

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113. ALA. CONST. art. VI, § 6.13.

114. ALA. CONST. art. VI, § 6.15.

115. *See* ALA. CODE § 17-7-1 (2003).

116. Unless otherwise indicated, judges may run for an unlimited number of terms until they reach an applicable mandatory retirement age.

117. *See* ALA. CONST. art. VI, § 6.16.

118. Cross-filing allows a candidate to receive the nomination of both parties and thereby run unopposed in the general election.

119. *See* ALA. CODE § 17-7-1.

120. *See* ALASKA CONST. art. IV, §5; ALASKA STAT. §§ 22.05.080, 22.07.070, 22.10.100 (Michie 2003).

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> The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the Governor subject to confirmation by a majority of the members of the legislature in joint session. . . . The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council.[121]

The initial term of office for all justices and judges is three years.

- *Method and Term of Retention*
  Retention elections are held at the first general election more than three years after the justice or judge is appointed. After the first retention election, supreme court justices must run in retention elections every ten years, judges on the court of appeals run for retention every eight years and judges on the superior court run for retention every six years.[122]
- *Mandatory Retirement Age*
  At the age of seventy, justices and judges must retire.[123]
- *Cross-Filing*
  Cross-filing is not a consideration in Alaska because initial selection is by the governor through a nominating commission.

ARIZONA

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Superior Court (trial court).
- *Method of Selection and Initial Term of Office*
  The governor selects from those nominated by a judicial nominating commission and appoints justices for the supreme court, and judges for the court of appeals and the superior court in the state's two largest counties.

> There shall be a non-partisan commission on appellate court appointments which shall be composed of the chief justice of the supreme court . . . five attorney members, who shall be nominated by the board of Governors of the state bar of Arizona and appointed by the Governor with the advice and consent of the senate . . . and ten nonattorney members who shall be appointed by the Governor with the advice and consent of the senate . . . .[124]

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121. ALASKA CONST. art. IV, § 8.

122. *See* ALASKA CONST. art. IV, § 6; http://www.state.ak.us/courts/ctinfo.htm (last visited Mar. 18, 2003).

123. *See* ALASKA STAT. § 22.25.010.

124. ARIZ. CONST. art. VI, §§ 36, 37.

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The initial term in office ends sixty days after the end of the year in which a two-year term expires.[125] Judges of the superior court in smaller counties are elected in partisan elections and serve for four-year terms.[126]

- *Method and Term of Retention*
  Retention elections are held at the expiration of the initial terms of all justices and judges who are selected via the judicial nominating commission.[127] They serve six-year terms. Judges of the superior court in smaller counties must be re-elected in partisan elections for additional four-year terms.
- *Mandatory Retirement Age*
  Justices and judges must retire when they reach the age of seventy.[128]
- *Cross-Filing*
  Cross-filing is not a consideration in Arizona for appellate courts and the superior court in large counties because initial selection is by the governor through a judicial nominating commission. Cross-filing is not permitted in the counties that have partisan elections.

ARKANSAS

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  Supreme court justices and court of appeals judges serve eight-year terms. Circuit court judges serve six-year terms.[129] Supreme court justices and court of appeals and circuit court judges are selected in nonpartisan elections.[130]
- *Method and Term of Retention*
  To serve additional terms of the same duration, justices and judges must be re-elected in nonpartisan elections.[131]
- *Mandatory Retirement Age*
  Generally, justices and judges must retire by age seventy or lose retirement benefits.[132]
- *Cross-Filing*
  Cross-filing is not a consideration in Arkansas because elections are nonpartisan.

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125. *See id.* art. VI, § 37(C).
126. *See id.* art. VI, §§ 12, 41.
127. *See id.* art. VI, § 38.
128. *See id.* art. VI, § 9.
129. *See id.* amend. 80, § 16.
130. *See id.* amend. 80, §§ 17, 18.
131. *See id.*
132. *See* ARK. CODE ANN. § 24-8-215 (Michie 2003).

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CALIFORNIA

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Superior Court (trial court).[133]
- *Method of Selection and Initial Term of Office*
  Justices of the supreme court are elected at large.[134] Justices of the courts of appeals are elected at general elections in their districts.[135] Judges of the superior courts are elected at general elections in their counties.[136] Supreme court and courts of appeals justices serve twelve-year terms and superior court judges serve six-year terms.[137]
- *Method and Term of Retention*
  The governor usually fills vacancies in the courts by appointment.[138] At the appellate level, if a justice is appointed to a vacancy, the justice serves until the first general election after appointment.[139] At that general election, the name of the appointed justice goes on the ballot for confirmation for the remainder of the term.[140] In each case, the justice must be elected in a retention election. Judges on the superior court must be re-elected (but almost no one ever opposes them). If the elections are unopposed, then the legislature may provide that the name of the judge does not have to appear on the ballot.[141]
- *Mandatory Retirement Age*
  There is no mandatory retirement age.
- *Cross-Filing*
  Because California appears to have elections, it is not clear whether "cross-filing" is a consideration for California.

COLORADO

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  Justices of the supreme court and judges of the court of appeals and district court are nominated by a judicial nominating commission and appointed by the governor for an initial term of two years. The judicial

133. In California, all jurists serving on appellate courts are called "justices."
134. *See* CAL. CONST. art. VI, § 16(a).
135. *See id.*
136. *See id.* § 16(b). Under certain circumstances, general elections will not be appropriate because the requirements of federal law will not be met. In those cases, the legislature will provide for the election of superior court judges. *See id.* § 16(b), (d).
137. *See id.* § 16(a), (c).
138. *See id.* § 16(d)(2).
139. *See id.*
140. *See id.* § 16(d)(1).
141. *See id.* § 16(b).

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nominating commission consists of four governor-appointed non-attorney members, three governor-appointed attorney members, the chief justice of the supreme court and the attorney general. Political parties are barred from having a majority of more than one on the commission.[142]

- *Method and Term of Retention*
  At the expiration of their initial terms, justices and judges must run in retention elections to be entitled to serve subsequent full terms. Justices on the supreme court serve ten-year terms. Judges on the court of appeals serve eight-year terms and judges on the district court serve six-year terms.
- *Mandatory Retirement Age*
  Justices and judges must retire at the age of seventy-two.[143]
- *Cross-Filing*
  Cross-filing is not a consideration in Colorado because justices and judges are appointed.

CONNECTICUT

- *Court Structure*
  Supreme Court; Appellate Court (intermediate appellate court); Superior Court (trial court).
- *Method of Selection and Initial Term of Office*
  Justices of the supreme court and judges of the appellate court and superior court are "nominated by the Governor exclusively from candidates submitted by the judicial selection commission."[144] They serve eight-year terms.[145]

> There is established a Judicial Selection Commission comprised of twelve members. Two persons shall be appointed from each congressional district, one of whom shall be an attorney-at-law and one of whom shall not be an attorney-at-law. Not more than six of the members shall belong to the same political party.[146]

- *Method and Term of Retention*
  A judicial selection commission reviews justices and judges who wish to be retained. The commission makes recommendations to the governor regarding whether the judge should be reappointed.[147]
- *Mandatory Retirement Age*
  Justices and judges must retire at the age of seventy.[148]

142. *See* COLO. CONST. art. VI, § 24(3).
143. *See id.* § 23(1).
144. CONN. CONST. art. 5, § 2.
145. *See id.*
146. CONN. GEN. STAT. § 51-44a(a) (2003).
147. *See id.* § 51-44a(e).
148. *See* CONN. CONST. art. 5, § 6.

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- *Cross-Filing*
  Cross-filing is not a consideration in Connecticut because justices and judges are appointed.

DELAWARE

- *Court Structure*
  Supreme Court; Court of Chancery (specialty court of equity); Superior Court (trial court). Delaware does not have an intermediate appellate court.
- *Method of Selection and Initial Term of Office*
  The governor, with the consent of the state Senate, appoints justices of the supreme court and judges of the court of chancery and superior court for twelve-year terms.[149]
- *Method and Term of Retention*
  An incumbent justice or judge must be reappointed to serve additional terms.[150]
- *Mandatory Retirement Age*
  There is no mandatory retirement age.
- *Cross-Filing*
  Cross-filing is not a consideration in Delaware because justices and judges are appointed.

DISTRICT OF COLUMBIA

- *Court Structure*
  Court of Appeals; Superior Court (trial court). The District of Columbia does not have an intermediate appellate court.[151]
- *Method of Selection and Initial Term of Office*
  The President of the United States nominates judges "from the list of persons recommended by the District of Columbia Judicial Nomination Commission . . . and with the advice and consent of the Senate, appoint[s] all judges of the District of Columbia courts."[152] District of Columbia judges serve fifteen-year terms.[153]

> [The seven m]embers of the [District of Columbia Judicial Nomination] Commission shall be appointed as follows: (A) One member shall be appointed by the President of the United States. (B) Two members shall be appointed by the Board of Governors of the unified District of Columbia Bar, both of whom shall have been engaged in the practice of law in the District for at least five successive years preceding their ap-

149. *See* DEL. CONST. art. IV, § 3.
150. *See id.*
151. In the District of Columbia, all jurists are called "judges."
152. D.C. CODE ANN. § 1-204.33(a) (2003).
153. *See id.* § 11-1502.

> pointment. (C) Two members shall be appointed by the Mayor, one of whom shall not be a lawyer. (D) One member shall be appointed by the Council, and shall not be a lawyer. (E) One member shall be appointed by the chief judge of the United States District Court for the District of Columbia, and such member shall be an active or retired Federal judge serving in the District.[154]

- *Method and Term of Retention*

> Not less than six months prior to the expiration of the judge's term of office, any judge of the District of Columbia courts may file with the Tenure Commission a declaration of candidacy for reappointment. . . . If a declaration is so filed, the Tenure Commission shall . . . prepare and submit to the President a written evaluation of the declaring candidate's performance during the present term of office and the candidate's fitness for reappointment to another term. If the Tenure Commission determines the declaring candidate to be well qualified for reappointment to another term, then the term of such declaring candidate shall be automatically extended for another full term, subject to mandatory retirement, suspension, or removal. If the Tenure Commission determines the declaring candidate to be qualified for reappointment to another term, then the President may nominate such candidate, in which case the President shall submit to the Senate for advice and consent the renomination of the declaring candidate as judge.[155]

- *Mandatory Retirement Age*
  The mandatory retirement age is seventy-four.[156]
- *Cross-Filing*
  Cross-filing is not a consideration in the District of Columbia because judges are appointed.

FLORIDA

- *Court Structure*
  Supreme Court; District Court of Appeal (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  The governor selects justices for the supreme court and judges for the district court of appeal from a list "of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominat-

154. *Id.* § 1-204.34(b)(4).
155. *Id.* § 1-204.33(c).
156. *See id.* § 11-1502.

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ing commission."[157] Justices on the supreme court and judges on the district court of appeal serve six-year terms.[158] "Circuit court judges are elected by the voters of the circuits in non-partisan, contested elections against other persons who choose to qualify as candidates for the position. Circuit court judges serve for six-year terms."[159]

- *Method and Term of Retention*
  Justices on the supreme court and judges on the district court of appeal can "qualify for retention by a vote of the electors in the general election next preceding the expiration of the justice's or judge's term . . . ."[160] Circuit court judges must be re-elected to the office in the same manner in which they were originally elected. The length of subsequent terms equals the length of the original term.
- *Mandatory Retirement Age*
  Justices and judges must retire at the age of seventy.[161] A justice or judge may, however, serve the remainder of the term if the justice or judge has completed one-half of the term upon reaching the age of seventy.[162]
- *Cross-Filing*
  Cross-filing is not a consideration in Florida because justices and judges are appointed or selected in nonpartisan elections.

GEORGIA

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Superior Court (trial court).
- *Method of Selection and Initial Term of Office*
  All supreme court justices and court of appeals judges are elected on a nonpartisan basis for six-year terms; superior court judges are selected through nonpartisan election for terms of four years.[163]
- *Method and Term of Retention*
  To remain in office, a justice or judge must be re-elected to the office in the same manner in which the justice or judge was elected originally. The length of subsequent terms equals the length of the original term.
- *Mandatory Retirement Age*

> [I]n consideration of the payment of [retirement] benefits . . . , [an] appellate court judge shall resign from office as an

157. FLA. CONST. art. V, § 11.

158. *See id.* § 10(a).

159. Florida Center for Interactive Media, *Florida—History, People and Politics: Unit 4: Florida Today: Judicial Branch, available at* http://www.fcim.org/flhistory/unit4_t3.htm (last visited Oct. 22, 2003); *see also* FLA. CONST. art. V, § 10(a).

160. FLA. CONST. art. V, § 10(a).

161. *See id.* § 8.

162. *See id.*

163. *See* GA. CONST. art. VI, § 7, ¶ 1.

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> appellate court judge on or before the day upon which he or she attains 75 years of age or on the last day of the term in which such appellate court judge is serving when he or she attains age 70, whichever is later.[164]

- *Cross-Filing*
  Cross-filing is not a consideration in Georgia because elections are nonpartisan.

HAWAII

- *Court Structure*
  Supreme Court; Intermediate Court of Appeals; Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  The governor fills a vacancy on any court by appointing a person from a list of four to six candidates nominated by a judicial selection commission.[165] The judicial selection commission consists of nine members—two appointed by the governor, two appointed by the speaker of the state House of Representatives, two appointed by the president of the state Senate, one appointed by the chief justice of the supreme court and two elected by the members in good standing of the state bar.[166] No more than four members of the commission may be attorneys.[167] The term of office for all justices and judges is ten years.[168]
- *Method and Term of Retention*

> At least six months prior to the expiration of a justice's or judge's term of office, every justice and judge shall petition the judicial selection commission to be retained in office or shall inform the commission of an intention to retire. If the judicial selection commission determines that the justice or judge should be retained in office, the commission shall renew the term of office of such justice or judge . . . .[169]

- *Mandatory Retirement Age*
  All justices and judges must retire at age seventy.[170]
- *Cross-Filing*
  Cross-filing is not a consideration in Hawaii because initial selection is through a nominating commission.

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164. GA. CODE ANN. § 47-2-244(c) (2002).
165. *See* HAW. CONST. art. VI, § 3.
166. *See id.* § 4.
167. *See id.*
168. *See id.* § 3.
169. *Id.*
170. *See id.*

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IDAHO

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  Supreme court justices and court of appeals judges are elected in nonpartisan elections and serve six-year terms.[171] District court judges are also elected in nonpartisan elections and serve four-year terms.[172]
- *Method and Term of Retention*
  To remain in office, a justice or judge must be re-elected to the office in the same manner in which the justice or judge was elected originally. The length of subsequent terms equals the length of the original term.
- *Mandatory Retirement Age*
  There is no mandatory retirement age for justices and judges.
- *Cross-Filing*
  Cross-filing is not a consideration in Idaho because elections are nonpartisan.

ILLINOIS

- *Court Structure*
  Supreme Court; Appellate Court (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  Justices of the supreme court and judges of the appellate court and circuit court are selected in partisan elections.[173] Supreme court justices and appellate court judges serve ten-year terms. Circuit court judges serve six-year terms.[174]
- *Method and Term of Retention*
  Justices and judges are retained for additional terms of the same duration through retention elections.[175]
- *Mandatory Retirement Age*
  Justices and judges are deemed to be retired at the age of seventy-five.[176]

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171. *See* IDAHO CONST. art. V, § 6 (outlining procedure for electing supreme court justices and defining terms); *id.* art. VI, § 7 (prohibiting partisan interference with judicial election process); IDAHO CODE § 1-2404(4)(b) (Michie 2003) (requiring consistency in manner of electing supreme court justices and court of appeals judges).

172. *See* IDAHO CONST. art. V, § 11 (defining terms); *id.* art. VI, § 7 (prohibiting partisan interference with judicial election process).

173. *See* ILL. CONST. art. VI, § 12(a).

174. *See id.* § 10.

175. *See id.* § 12(d).

176. *See* 705 ILL. COMP. STAT. 55/1 (2003).

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- *Cross-Filing*
  There is no cross-filing in Illinois.[177]

INDIANA

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  A judicial nominating commission selects Indiana justices and judges. The commission consists of seven members—the chief justice of the supreme court, three members selected by attorneys admitted to practice and three non-attorney members selected by the governor.[178] Supreme court justices and court of appeals judges "serve until the next general election following the expiration of two years from the date of appointment . . . ."[179] Circuit court judges serve six-year terms.[180] They are appointed by the governor upon the opening of a vacancy and must stand for partisan elections at "the first general election following an appointment by the Governor to fill a vacancy in the office of judge of the circuit court."[181]
- *Method and Term of Retention*
  At the end of their initial terms, justices on the supreme court and judges on the court of appeals must run in retention elections for ten-year terms.[182] To remain in office, a circuit court judge must be re-elected to the office in the same manner in which the judge was elected originally. The length of subsequent terms equals the length of the original term.[183]
- *Mandatory Retirement Age*
  Justices and judges must retire upon attaining seventy-five years of age.[184]
- *Cross-Filing*
  Cross-filing in Indiana is not a consideration with regard to supreme court justices and court of appeals judges because they are not elected. Cross-filing is not permitted for those seeking the position of a circuit court judge.[185]

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177. *See* 10 ILL. COMP. STAT. 5/7-12(11) (2003).

178. *See* IND. CONST. art. 7, § 9. The chief justice of supreme court acts as the chairman of the commission. *See id.* The chief justice may designate another justice of the Indiana Supreme Court to take the chief justice's place. *See id.*

179. *Id.* § 11.

180. *See id.* § 7.

181. IND. CODE § 3-10-2-11(a)(1) (2003).

182. *See* IND. CONST. art. 7, § 11.

183. *See* IND. CODE § 3-10-2-11(a).

184. *See id.* § 33-5.1-2-25(c).

185. *See id.* § 3-8-2-16.

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IOWA

- *Court Structure*

  Supreme Court; Court of Appeals (intermediate appellate court); District Court (trial court).

- *Method of Selection and Initial Term of Office*

  A judicial nominating commission nominates supreme court justices and court of appeals judges.

> [T]he state judicial nominating commission shall be composed and selected as follows: There shall be not less than three nor more than eight appointive members, as provided by law, and an equal number of elective members on such commission, all of whom shall be electors of the state. The appointive members shall be appointed by the governor subject to confirmation by the senate. The elective members shall be elected by the resident members of the bar of the state.[186]

A nominating commission also nominates members of the district court.

> [D]istrict judicial nominating commissions shall be composed and selected as follows: There shall be not less than three nor more than six appointive members, as provided by law, and an equal number of elective members on each such commission, all of whom shall be electors of the district. All appointive members shall be selected by the Governor, while all elective members shall be elected by the resident members of the Bar of the district. The district judge of such district who is senior in length of service shall also be a member of such commission and shall be its chairman.[187]

All justices and judges are appointed for an initial term of one year.

- *Method and Term of Retention*

  Following expiration of the one-year initial term, justices and judges must be elected in retention elections.[188] Supreme court judges may serve additional terms of eight years; judges on the court of appeals and district court run for additional six-year terms.[189]

- *Mandatory Retirement Age*

  "The mandatory retirement age is seventy-two years for all justices of the supreme court, judges of the court of appeals, and district judges appointed to office after July 1, 1965."[190]

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186. IOWA CONST. art. V, § 16.
187. *Id.*
188. *See id.* § 17.
189. *See* IOWA CODE § 46.16(1)(b) (2003).
190. *Id.* § 602.1610.

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◆ *Cross-Filing*

Partisan elections do not take place because judges are appointed and then run in retention elections. Consequently, cross-filing is not a consideration in Iowa.

KANSAS

◆ *Court Structure*

Supreme Court; Court of Appeals (intermediate appellate court); District Court (trial court).

◆ *Method of Selection and Initial Term of Office*

The governor fills vacancies on the supreme court by appointing one of three persons recommended by a nominating commission.[191] The initial term ends on the second Monday in January following the first general election that occurs after the justice's one-year term has expired.[192] Court of appeals judges are selected in the same way as justices on the supreme court.[193]

> [The nominating commission] shall be composed as follows: One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each congressional district, appointed by the governor from among the residents of each such district.[194]

There are thirty-one districts. In seventeen of the districts, a nonpartisan commission forwards a list of approved district court judge candidates to the governor, who appoints a judge from the list. In the remaining fourteen districts, judges must run in partisan elections. In both cases, they serve four-year terms.[195]

◆ *Method and Term of Retention*

After serving an initial term, a supreme court justice must run for retention every six years.[196] Court of appeals judges stand for retention every four years. To remain in office, a district court judge must either run for re-election (if originally elected) or stand for retention (if appointed) every four years.

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191. *See* KAN. CONST. art. 3, § 5(a).
192. *See id.* § 5(c).
193. *See* KAN. STAT. ANN. § 20-3002(b) (2002).
194. KAN. CONST. art. 3, § 5(e).
195. *See id.* § 6(a).
196. *See id.* § 5(c).

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- *Mandatory Retirement Age*
  The mandatory retirement age of justices and judges in Kansas is seventy, but justices and judges may serve out the remainder of their terms despite reaching that age limit.[197]
- *Cross-Filing*
  Cross-filing is not a consideration for the appellate courts in Kansas because appellate justices and judges are not elected. Cross-filing is not permitted in districts that have partisan elections.

KENTUCKY

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  All justices and judges are elected in nonpartisan elections. Supreme court, court of appeals and circuit court judges all serve eight-year terms.[198]
- *Method and Term of Retention*
  To be retained for additional terms, justices and judges must win additional nonpartisan elections.[199]
- *Mandatory Retirement Age*
  There is no mandatory retirement age.
- *Cross-Filing*
  Cross-filing is not a consideration in Kentucky because elections are nonpartisan.

LOUISIANA

- *Court Structure*
  Supreme Court; Court of Appeal (intermediate appellate court); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  All justices and judges are elected.[200] Judges on the court of appeal serve ten-year terms.[201] Supreme court justices serve ten-year terms.[202] District court judges serve six-year terms.[203]
- *Method and Term of Retention*
  Justices and judges can serve additional terms of equal length by winning additional partisan elections.

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197. *See* KAN. STAT. ANN. § 20-2608(a).
198. *See* KY. CONST. § 119.
199. *See id.* § 117.
200. *See* LA. CONST. art. 5, § 22(A).
201. *See id.* § 8(C).
202. *See id.* § 3.
203. *See id.* § 15(C).

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- *Mandatory Retirement Age*
  Justices and judges must retire at the age of seventy.[204]
- *Cross-Filing*
  Louisiana utilizes an open primary system, so party affiliation does not matter.

MAINE

- *Court Structure*
  Supreme Judicial Court; Superior Court (trial court). Maine does not have an intermediate appellate court.
- *Method of Selection and Initial Term of Office*
  Justices and judges are appointed by the governor and serve seven-year terms.[205]
- *Method and Term of Retention*
  To serve additional terms, justices and judges must be reappointed by the governor. Justices and judges are customarily reappointed.
- *Mandatory Retirement Age*
  There is no mandatory retirement age.
- *Cross-Filing*
  Cross-filing is not a consideration in Maine because justices and judges are appointed.

MARYLAND

- *Court Structure*
  Court of Appeals; Court of Special Appeals (intermediate appellate court); Circuit Court (trial court).[206]
- *Method of Selection and Initial Term of Office*
  All appellate court judges are appointed to initial terms of one year.[207] Circuit court judges must run in nonpartisan elections to serve a fifteen-year term.[208]
- *Method and Term of Retention*
  When their initial one-year terms expire, appellate court judges must win retention elections to serve additional ten-year terms.[209] A circuit court judge must win a nonpartisan election to serve a full fifteen-year term.[210]
- *Mandatory Retirement Age*
  Judges must retire at the age of seventy.[211]

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204. *See id.* § 23(B).
205. *See* ME. CONST. art. 6, § 4.
206. In Maryland, all jurists are called "judges."
207. *See* MD. CONST. pt. I, art. IV, § 5A.
208. *See id.* § 5.
209. *See id.* § 5A(c).
210. *See id.* § 5.
211. *See id.* § 3.

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- *Cross-Filing*
  Cross-filing is not a consideration in Maryland because judges are appointed or selected in nonpartisan elections.

MASSACHUSETTS

- *Court Structure*
  Supreme Judicial Court; Appeals Court (intermediate appellate court); Trial Court.[212]
- *Method of Selection and Initial Term of Office*
  All judicial officers are nominated and appointed by the governor, with the advice and consent of a council.[213] All judicial officers hold their positions for life during good behavior.[214]
- *Method and Term of Retention*
  Judges in Massachusetts serve during good behavior.
- *Mandatory Retirement Age*
  "[U]pon attaining seventy years of age said [judges] shall be retired."[215]
- *Cross-Filing*
  Cross-filing is not a consideration in Massachusetts because the governor appoints all judges.

MICHIGAN

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  Justices on the supreme court are elected in nonpartisan elections and serve eight-year terms.[216] Judges on the court of appeals are elected in nonpartisan elections and serve six-year terms.[217] Circuit court judges are also elected in nonpartisan elections and serve six-year terms.[218]
- *Method and Term of Retention*
  Justices and judges can serve additional terms by winning additional nonpartisan elections.[219]

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212. In Massachusetts, all jurists are called "judges."

213. *See* MASS. CONST. pt. 2, ch. II, § I, art. IX. "There shall be a council for advising the governor in the executive part of government, to consist of [nine] persons besides the lieutenant governor, whom the governor, for the time being, shall have full power and authority, from time to time, at his discretion, to assemble and call together." *Id.* § III, art. I (alteration in original).

214. *See id.* ch. III, art. I.

215. *Id.*

216. *See* MICH. CONST. art. VI, § 2.

217. *See id.* § 8 (describing method of attaining office of judge of court of appeals); *id.* § 9 (defining term lengths).

218. *See id.* § 12.

219. *See id.* §§ 2, 9, 12.

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- *Mandatory Retirement Age*
  Justices and judges who have attained the age of seventy may not serve additional terms.[220]
- *Cross-Filing*
  Cross-filing is not a consideration in Michigan because elections are nonpartisan.

MINNESOTA

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  Justices and judges in Minnesota are elected in nonpartisan elections and serve six-year terms.[221]
- *Method and Term of Retention*
  At the end of each term, a justice or judge must run in another nonpartisan election.[222]
- *Mandatory Retirement Age*
  Justices and judges must retire at the end of the year they turn seventy years old.[223]
- *Cross-Filing*
  Cross-filing is not a consideration in Minnesota because justices and judges run in nonpartisan elections.

MISSISSIPPI

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court law); Chancery Court (trial court equity).
- *Method of Selection and Initial Term of Office*
  Supreme court justices are elected in nonpartisan elections and serve eight-year terms.[224] Court of appeals judges are elected in nonpartisan elections and serve eight-year terms.[225] Circuit and chancery court judges are elected in nonpartisan elections and serve four-year terms.[226]
- *Method and Term of Retention*
  To remain in office, a justice or judge must be re-elected to the office in the same manner in which the justice or judge was elected originally.

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220. *See id.* § 19(3).

221. *See* MINN. CONST. art. VI, §§ 7-8.

222. *See id.*

223. *See* MINN. STAT. § 490.125 (2002) (imposing mandatory age limit); *id.* § 490.121, subd. 12 (defining "mandatory retirement date").

224. *See* MISS. CONST. art. 6, § 145 (describing election procedure for supreme court judges); *id.* § 149 (defining term lengths).

225. *See* MISS. CODE ANN. § 9-4-5 (2003).

226. *See* MISS. CONST. art. 6, § 153.

The length of subsequent terms equals the length of the original term.[227]

- *Mandatory Retirement Age*
  Justices and judges must retire at the age of sixty-eight.[228]
- *Cross-Filing*
  Cross-filing is not permitted in Mississippi.

MISSOURI

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court).[229]
- *Method of Selection and Initial Term of Office*
  An appellate judicial commission consisting of two non-lawyers, two lawyers and one Missouri Supreme Court judge recommends judges for the supreme court and the court of appeals.[230] The commission provides the governor with a list of three candidates from which the governor must choose.[231] After serving initial one-year terms, supreme court and court of appeals judges are placed on the ballot for the next general election, which occurs every two years.[232]

> Each county shall have such number of associate circuit judges as provided by law. There shall be at least one resident associate circuit judge in each county. Associate circuit judges shall be selected or elected in each county. In those circuits where the circuit judge is selected under section 25 of article 5 of the constitution the associate circuit judge shall be selected in the same manner. All other associate circuit judges shall be elected in the county in which they are to serve.[233]

Circuit court judges serve initial six-year terms.[234]

- *Method and Term of Retention*
  At the next general election, supreme court justices and court of appeals judges who have served one year in office require approval in retention elections to serve additional twelve-year terms.[235] The circuits that select judges through partisan elections require those judges to be

227. *See id.* §§ 145, 153 (defining term lengths); MISS. CODE ANN. § 9-4-5 (same).

228. *See* MISS. CODE ANN. § 9-3-12.

229. In Missouri, all jurists except for the chief justice of the Supreme Court of Missouri are called "judges."

230. *See* MO. CONST. art. V, § 25(d) (describing makeup of judicial commission); *id.* § 25(a) (detailing judicial recommendation process).

231. *See id.* § 25(d).

232. *See id.* § 25(c)(1).

233. *Id.* § 16.

234. *See id.* § 19.

235. *See id.* § 25(c)(1).

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re-elected in partisan elections for additional six-year terms.[236] The circuits that select judges through a commission require the judges to stand for retention election for additional six-year terms.[237]

- *Mandatory Retirement Age*
  Judges must retire at the age of seventy.[238]
- *Cross-Filing*
  Cross-filing is not permitted in Missouri.

MONTANA

- *Court Structure*
  Supreme Court; District Court (trial court). Montana does not have an intermediate appellate court.
- *Method of Selection and Initial Term of Office*
  Justices of the supreme court and judges of the district court are selected in nonpartisan elections.[239] Supreme court justices serve terms of eight years and district court judges are elected for six-year terms.[240]
- *Method and Term of Retention*
  To remain in office, a justice or judge must be re-elected to the office in the same manner in which the justice or judge was elected originally.[241] The length of subsequent terms equals the length of the original term. If there is no one to run against the incumbent, the voters are still given the opportunity to vote to retain or remove the justice or judge.[242]
- *Mandatory Retirement Age*
  There is no mandatory retirement age.
- *Cross-Filing*
  Cross-filing is not a consideration in Montana because judicial elections are nonpartisan.

NEBRASKA

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  Nebraska has a nine-member judicial nominating commission consisting of one non-voting member of the state supreme court, four lawyers selected by the state bar and four non-lawyer citizens.[243] The governor then chooses from a list of at least two candidates who received a major-

236. *See* Interview by Scott Friedman with Michael Buenger, Administrator, Missouri State Court (Oct. 8, 2003).

237. *See id.*

238. *See* MO. CONST. art. V, § 26.

239. *See* MONT. CONST. art. VII, § 7(2).

240. *See id.* § 8.

241. *See id.* § 8(2).

242. *See id.* § 8(3).

243. *See* NEB. CONST. art. V, § 21(4).

ity of the votes of the commission members.[244] The appointed justice or judge serves from the date of appointment plus three full calendar years.[245]

- *Method and Term of Retention*
  After the original term of office, a justice or judge must be approved in a retention election for an additional six-year term.[246]
- *Mandatory Retirement Age*
  There is no mandatory retirement age.
- *Cross-Filing*
  Cross-filing is not a consideration in Nebraska because justices and judges are selected by gubernatorial appointment following nomination by the judicial nominating commission.

NEVADA

- *Court Structure*
  Supreme Court; District Court (trial court). Nevada does not have an intermediate appellate court.
- *Method of Selection and Initial Term of Office*
  Supreme court justices are elected in nonpartisan elections to serve six-year terms.[247] District court judges are also elected in nonpartisan elections and serve six-year terms.[248]
- *Method and Term of Retention*
  To serve additional terms, justices on the supreme court and judges on the district court must run in additional elections.[249]
- *Mandatory Retirement Age*
  Unless the commission on judicial discipline determines that the advanced age of a justice or judge interferes with work performance, the commission may not require the justice or judge to retire.[250]
- *Cross-Filing*
  Cross-filing is not a consideration in Nevada because elections are nonpartisan.

NEW HAMPSHIRE

- *Court Structure*
  Supreme Court; Superior Court (intermediate appellate court); District Court (trial court).

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244. *See id.* § 21(5).
245. *See id.* § 21(3).
246. *See id.*
247. *See* NEV. CONST. art. 6, § 3.
248. *See id.* § 5.
249. *See id.* §§ 3, 5.
250. *See id.* § 21.

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- *Method of Selection and Initial Term of Office*
  All judicial officers are nominated and appointed by the governor and an executive council.[251] "The 'Judicial Selection Commission' recommends candidates for judgeships to the governor whom they believe are the most qualified for judicial vacancies."[252] The governor then makes appointments with the advice and consent of the executive council. "The 11 member Judicial Selection Commission is composed of seven attorneys and four members of the public."[253]
- *Method and Term of Retention*
  "[A]ll judicial officers duly appointed, commissioned and sworn, shall hold their offices during good behavior except those for whom a different provision is made in this constitution."[254]
- *Mandatory Retirement Age*
  "No person shall hold the office of judge of any court . . . after he has attained the age of seventy years."[255]
- *Cross-Filing*
  Cross-filing is not a consideration in New Hampshire because initial selection is through a judicial selection commission, the governor and the executive council.

NEW JERSEY

- *Court Structure*
  Supreme Court; Superior Court (appellate division and trial division).
- *Method of Selection and Initial Term of Office*
  The governor nominates and appoints justices of the supreme court and judges of the superior court with the advice and consent of the New Jersey Senate.[256] All justices and judges serve for an initial term of seven years.[257]
- *Method and Term of Retention*
  After the initial term, justices and judges must be reappointed. If reappointed, a justice or judge serves during good behavior.[258]
- *Mandatory Retirement Age*
  Justices of the supreme court and judges of the superior court must retire at the age of seventy.[259]

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251. *See* N.H. CONST. pt. 2, art. 46.

252. Judicial Branch: State of New Hampshire, *Frequently Asked Questions, available at* http://www.courts.state.nh.us/sitewidelinks/faqindex.htm#Judges (last visited Nov. 18, 2003).

253. *Id.*

254. N.H. CONST. pt. 2, art. 73.

255. *Id.* art. 78.

256. *See* N.J. CONST. art. VI, § VI, para. 1.

257. *See id.* para. 3.

258. *See id.*

259. *See id.*

- *Cross-Filing*
  Cross-filing is not a consideration in New Jersey because initial selection is through the governor, with the advice and consent of the state Senate.

NEW MEXICO

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  Supreme court justices and court of appeals and district court judges are elected in partisan elections.[260] Supreme court justices and court of appeals judges serve eight-year terms.[261] District court judges serve six-year terms.[262]
- *Method and Term of Retention*
  At the end of their terms, justices and judges must run in retention elections for additional terms of the same duration and must receive fifty-seven percent (57%) of the vote.[263]
- *Mandatory Retirement Age*
  There is no mandatory retirement age.
- *Cross-Filing*
  Cross-filing is not permitted in New Mexico.

NEW YORK

- *Court Structure*
  Court of Appeals; Supreme Court (appellate division and trial division).[264]
- *Method of Selection and Initial Term of Office*
  A judicial nominating commission nominates judges to vacancies on the New York Court of Appeals and the governor selects for appointment, with the advice and consent of the state Senate, from the list the commission provides.[265]

> The commission on judicial nomination shall consist of twelve members of whom four shall be appointed by the governor, four by the chief judge of the court of appeals, and one each by the speaker of the assembly, the temporary president of the

260. *See* N.M. CONST. art. VI, § 33.
261. *See id.*
262. *See id.*
263. *See id.*
264. In New York, supreme court (trial division) jurists are called "justices" and all other jurists are called "judges." This differs from the nomenclature employed by most states, where the term "justice" designates the members of the court of last resort rather than the general court of original jurisdiction.
265. *See* N.Y. CONST. art. 6, § 2.

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senate, the minority leader of the senate, and the minority leader of the assembly.[266]

Judges on the court of appeals serve fourteen-year terms.[267] Judges on the supreme court (appellate division) are selected from among the justices of the supreme court (trial division) and serve five-year terms.[268] Supreme court justices are elected in partisan elections and serve fourteen-year terms.[269]

- *Method and Term of Retention*

  Judges on the court of appeals must be reappointed for additional terms in the same manner that they were originally selected. At the end of the designation period of a judge on the supreme court (appellate division), the judge must be redesignated by the governor for additional terms.[270] To serve for additional terms, supreme court (trial division) justices must run in an additional election.[271]
- *Mandatory Retirement Age*

  Justices and judges must retire at age seventy.[272]
- *Cross-Filing*

  New York does permit cross-filing. Each party has a convention to select judicial candidates for the supreme court and prospective justices and judges are permitted to seek the endorsements of more than one party.

NORTH CAROLINA

- *Court Structure*

  Supreme Court; Court of Appeals (intermediate appellate court); Superior Court (trial court).
- *Method of Selection and Initial Term of Office*

  Justices of the supreme court and judges of the court of appeals and superior court are selected in nonpartisan elections. All justices and judges serve eight-year terms.[273]
- *Method and Term of Retention*

  To remain in office, a justice or judge must be re-elected to the office in the same manner in which the justice or judge was elected originally. The length of the subsequent term equals the length of the original term.[274]

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266. *Id.* § 2(d)(1).
267. *See id.* § 2(a).
268. *See id.* § 4(c).
269. *See id.* § 6(c).
270. *See id.* § 4.
271. Because the New York Constitution provides for neither the reappointment nor redesignation of appellate court judges, it is implicit that supreme court (trial division) judges can only retain their positions through the same manner in which they were originally elected.
272. *See* N.Y. CONST. art. 6, § 25.
273. *See* N.C. CONST. art. IV, § 16.
274. *See id.*

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- *Mandatory Retirement Age*

  "No justice or judge . . . may continue in office beyond the last day of the month in which he attains his seventy-second birthday, but justices and judges so retired may be recalled for periods of temporary service . . . ."[275]

- *Cross-Filing*

  Cross-filing is not a consideration in North Carolina because justices and judges are selected in nonpartisan elections.

NORTH DAKOTA

- *Court Structure*

  Supreme Court; Court of Appeals (reviews decisions of the district court only when the supreme court so directs); District Court (trial court).

- *Method of Selection and Initial Term of Office*

  Supreme court justices are elected in nonpartisan elections for ten-year terms, "so arranged that one justice is elected every two years."[276] District court judges are also elected in nonpartisan elections and serve six-year terms.[277] The court of appeals is not a standing court; it is convened when necessary.

  > The Court of Appeals hears only the cases assigned to it by the Supreme Court. It is composed of three judges chosen from among active and retired district court judges, retired justices of the Supreme Court, and attorneys. Temporary court of appeals judges are assigned by the Supreme Court for up to one year.[278]

- *Method and Term of Retention*

  To serve additional terms, supreme court justices and district court judges must be re-elected in nonpartisan elections.[279]

- *Mandatory Retirement Age*

  There is no mandatory retirement age.

- *Cross-Filing*

  Cross-filing is not a consideration in North Dakota because justices and judges are elected in nonpartisan elections.

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275. N.C. GEN. STAT. § 7A-4.20 (2003).

276. N.D. CONST. art. VI, § 7.

277. *See id.* § 9; *see also* North Dakota Judicial System, *The Structure of the Judicial System, available at* http://www.court.state.nd.us/Court/BROCHURE.HTM (last visited Oct. 1, 2003).

278. North Dakota Judicial System, *The Structure of the Judicial System, available at* http://www.court.state.nd.us/Court/BROCHURE.HTM (last visited Oct. 1, 2003).

279. *See* N.D. CONST. art. VI, §§ 7, 9.

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OHIO

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Court of Common Pleas (trial court).
- *Method of Selection and Initial Term of Office*
  Supreme court justices, court of appeals judges and common pleas judges are elected in nonpartisan elections and serve terms that are not less than six years.[280]
- *Method and Term of Retention*
  Justices and judges are re-elected in nonpartisan elections to serve additional six-year terms.[281]
- *Mandatory Retirement Age*
  When a justice or judge reaches the age of seventy, the justice or judge can no longer be re-elected or appointed. The justice or judge may finish out the term. A retired justice or judge may also be assigned, with consent, to active duty.[282]
- *Cross-Filing*
  Cross-filing is not a consideration in Ohio because justices and judges are elected in nonpartisan elections.

OKLAHOMA

- *Court Structure*
  Supreme Court; Court of Criminal Appeals (intermediate appellate court for criminal cases); Court of Appeals (intermediate appellate court for civil cases); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  Justices and judges in Oklahoma are nominated by a judicial nominating commission and appointed by the governor.[283] The commission is composed of (1) six members appointed by the governor, (2) six members who are members of the Oklahoma Bar Association elected by that entity and (3) one member who is not admitted to the practice of law in any state and who is selected by not less than eight of the commission's members.[284] All justices and judges serve initial one-year terms.[285]
- *Method and Term of Retention*
  To serve beyond their original one-year term, judges must run in retention elections.[286] Justices and judges so retained serve additional six-year terms.[287]

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280. *See* OHIO CONST. art. 4, § 6(A)(1)-(3).
281. *See id.* § 6.
282. *See id.* § 6(C).
283. *See* OKLA. CONST. art. VII-B, § 4; OKLA. STAT. tit. 20, § 30.17 (2002).
284. *See* OKLA. CONST. art. VII-B, § 3.
285. *See id.* § 5.
286. *See id.* § 2.
287. *See id.* § 5.

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- *Mandatory Retirement Age*
  There is no mandatory retirement age.
- *Cross-Filing*
  Cross-filing is not a consideration in Oklahoma because justices and judges are appointed.

OREGON

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  Justices of the supreme court and judges of the court of appeals and circuit court are elected and serve six-year terms.[288] The elections are nonpartisan.[289]
- *Method and Term of Retention*
  To remain in office, a justice or judge must be re-elected to the office in the same manner in which the justice or judge was elected originally. The length of subsequent terms equals the length of the original term.[290]
- *Mandatory Retirement Age*
  A justice or judge must retire when the justice or judge reaches the age of seventy-five. The legislature may set a younger age but may not set it lower than the age of seventy.[291]
- *Cross-Filing*
  Cross-filing is not a consideration in Oregon because elections are nonpartisan.

PENNSYLVANIA

- *Court Structure*
  Supreme Court; Superior Court and Commonwealth Court (intermediate appellate courts); Court of Common Pleas (trial court).
- *Method of Selection and Initial Term of Office*
  Justices and judges of all courts are elected in partisan elections.[292] "The regular term of office of justices and judges shall be ten years . . . ."[293]

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288. *See* OR. CONST. art. VII, § 1.
289. *See* OR. REV. STAT. § 254.125 (2001) (describing nonpartisan process).
290. *See* OR. CONST. art. VII, § 1.
291. *See id.* § 1a.
292. *See* PA. CONST. art. V, § 13(a).
293. *Id.* § 15(a).

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- *Method and Term of Retention*
  In the last year of the current term of a justice or judge, the justice or judge may file a declaration to run for retention.[294] If a justice or judge chooses to run for retention:

  > [The candidate's n]ame shall be submitted to the electors without party designation, on a separate judicial ballot . . . to determine only the question whether he [or she] shall be retained in office . . . . If a majority favors retention, the justice or judge shall serve for the regular term of office.[295]

- *Mandatory Retirement Age*
  Justices and judges "shall be retired on the last day of the calendar year in which they attain the age of 70 years."[296]
- *Cross-Filing*
  Cross-filing used to be permitted for justices and judges at all levels of Pennsylvania courts. It remains permitted in the courts of common pleas but not in the appellate courts of the Commonwealth.[297]

RHODE ISLAND

- *Court Structure*
  Supreme Court; Superior Court (trial court). Rhode Island does not have an intermediate appellate court.
- *Method of Selection and Initial Term of Office*
  An independent nonpartisan judicial nominating commission submits a list of nominees to the governor.[298] The governor, with the advice and consent of the state legislature, then appoints one of the nominees to the court on which the vacancy has occurred.[299] Justices of the supreme court are appointed for life, provided they maintain "good behavior."[300] The same holds true for superior court judges. The judicial nominating commission comprises nine members:

  > The speaker of the house of representatives shall submit to the governor a list of at least three (3) attorneys[—the governor chooses one]; (ii) The president of the senate shall submit to the governor a list of at least three (3) persons who may be attorneys and/or members of the public[—the governor chooses one]; (iii) The speaker of the house of representatives and the president of the senate shall jointly submit to the gov-

294. *See id.* § 15(b).
295. *Id.* The regular term of office for a justice or judge in Pennsylvania is ten years. *See id.* § 15(a).
296. *Id.* § 16(b).
297. *See* PA. STAT. ANN. tit. 25, § 2953 (West 2003).
298. *See* R.I. CONST. art. X, § 4.
299. *See id.*
300. *Id.* § 5.

> ernor a list of four (4) members of the public[—the governor chooses one]; (iv) The minority leader of the house of representatives shall submit to the Governor a list of at least three (3) members of the public[—the governor chooses one]; . . . (v) The minority leader of the senate shall submit to the governor a list of at least three (3) members of the public[—the Governor chooses one];[301] three (3) attorneys the governor chooses without regard to any of the lists; and one member of the public the governor chooses without regard to the list.[302]

- *Method and Term of Retention*
  Justices and judges serve during good behavior.[303]
- *Mandatory Retirement Age*
  There is no mandatory retirement age.
- *Cross-Filing*
  Cross-filing is not a consideration in Rhode Island because selection of all jurists is accomplished via a nominating commission.

SOUTH CAROLINA

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  A judicial merit selection commission makes recommendations to the General Assembly to fill vacancies occurring in the courts. The General Assembly elects justices and judges from the nominees recommended by the commission.[304] Supreme court justices serve ten-year terms.[305] Court of appeals judges serve six-year terms.[306] Circuit court judges also serve six-year terms.[307]
- *Method and Term of Retention*
  To serve additional terms, justices and judges must be reapproved by the General Assembly for additional terms of equal length.[308]

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301. R.I. GEN. LAWS § 8-16.1-2(a)(1) (2003). The bracketed material that appears in the quotes is derived from section 8-16.1-2(2) of the Rhode Island General Laws.

302. *See id.* § 8-16.1-2(2).

303. *See* R.I. CONST. art. X, § 5.

304. *See* S.C. CONST. art. V, § 27.

305. *See id.* § 3.

306. *See id.* § 8; *see also* South Carolina Judicial Department, *Court of Appeals, available at* http://www.judicial.state.sc.us/appeals/index.cfm (last visited Oct. 1, 2003).

307. *See* S.C. CONST. art. V, § 13; *see also* South Carolina Judicial Department, *Circuit Courts, available at* http://www.judicial.state.sc.us/trial/circuit/index.cfm (last visited Oct. 1, 2003).

308. *See* S.C. CONST. art. V, § 27; *see also, e.g.*, South Carolina Judicial Department, *Supreme Court, available at* http://www.judicial.state.sc.us/supreme/index.

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- *Mandatory Retirement Age*
  Justices and judges must retire at age seventy-two.[309]
- *Cross-Filing*
  Cross-filing is not a consideration in South Carolina because justices and judges are selected by the General Assembly.

SOUTH DAKOTA

- *Court Structure*
  Supreme Court; Circuit Court (trial court). South Dakota does not have an intermediate appellate court.
- *Method of Selection and Initial Term of Office*
  Supreme court positions are filled by appointment of the governor from two or more persons nominated by a judicial qualifications commission.[310] The commission consists of two judges of the circuit court, elected by a judicial conference, three members of the state bar (no more than two from one party), appointed by the President of the state bar, and two non-lawyers or non-jurists (not from the same party), appointed by the governor.[311] Circuit court judges are elected in "nonpolitical election[s] by the electorate of the circuit each represents for an eight-year term."[312]
- *Method and Term of Retention*

  > Retention of each Supreme Court justice shall, in the manner provided by law, be subject to approval or rejection on a nonpolitical ballot at the first general election following the expiration of three years from the date of his appointment. Thereafter, each Supreme Court justice shall be subject to approval or rejection in like manner every eighth year.[313]

  Circuit court judges must be re-elected to the office in the same manner in which they were elected originally.[314] The length of subsequent terms equals the length of the original term.[315]
- *Mandatory Retirement Age*
  All justices and judges are:

  > [A]utomatically retired on the first Tuesday after the first Monday of January next after the general election at which members of the Legislature are elected immediately following the

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cfm (last visited Oct. 1, 2003) (indicating that justices of South Carolina's Supreme Court may be re-elected for infinite number of terms).

309. *See* S.C. CODE ANN. § 9-8-60(1) (Law. Co-op. 2002).
310. *See* S.D. CONST. art. V, § 7.
311. *See* S.D. CODIFIED LAWS § 16-1A-2 (Michie 2003).
312. S.D. CONST. art. V, § 7.
313. *Id.*
314. *See id.*
315. *See id.*

attainment of age seventy of such justice [or judge]. Such justice [or judge] shall conclude all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.[316]

- *Cross-Filing*

  Cross-filing is not a consideration in South Dakota because justices and judges are either appointed or selected in nonpartisan elections.

TENNESSEE

- *Court Structure*

  Supreme Court; Court of Criminal Appeals (intermediate appellate court); Court of Appeals (intermediate appellate court); Circuit Court (law trial court); Chancery Court (equity trial court).

- *Method of Selection and Initial Term of Office*

  When a vacancy occurs on the supreme court, court of criminal appeals or court of appeals, a judicial selection commission recommends three candidates to the governor, who selects one of the candidates to fill the vacancy.[317] The judicial selection commission is composed of seventeen members selected to represent a cross section of the state.[318] Circuit and chancery court judges are elected in partisan elections and serve eight-year terms.[319]

- *Method and Term of Retention*

  To be retained for a full eight-year term and any additional terms, appellate court justices and judges run in retention elections.[320] For circuit and chancery court judges to serve additional terms, they must be re-elected in partisan elections.[321]

- *Mandatory Retirement Age*

  A justice or judge reaches senior status at age seventy and may only continue if the supreme court determines that there is a need for the justice's or judge's services and that the justice or judge is "physically and mentally capable of performing valuable judicial service."[322]

- *Cross-Filing*

  Cross-filing is not permitted in Tennessee.

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316. S.D. CODIFIED LAWS § 16-1-4.1 (specifying when supreme court justices are required to retire); *id.* § 16-6-31 (specifying when circuit court judges are required to retire).

317. *See* TENN. CODE ANN. § 17-4-112 (2003).

318. *See id.* § 17-4-102.

319. *See* TENN. CONST. art. VI, § 4.

320. *See id.* § 3; TENN. CODE ANN. § 16-5-103.

321. *See* TENN. CONST. art. VI, § 4.

322. TENN. CODE ANN. § 17-2-303.

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TEXAS

- *Court Structure*
  Supreme Court; Court of Criminal Appeals (intermediate appellate court); Court of Appeals (intermediate appellate court); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  Justices on the Supreme Court of Texas are elected in partisan elections and serve six-year terms.[323] Judges of the court of criminal appeals and court of appeals are elected in partisan elections and serve six-year terms.[324] District court judges are elected in partisan elections and serve for four years.[325]
- *Method and Term of Retention*
  Justices and judges must run in additional partisan elections to serve additional terms.
- *Mandatory Retirement Age*
  "The office of every such Justice and Judge shall become vacant when the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the Legislature may prescribe."[326]
- *Cross-Filing*
  Texas does not allow cross-filing.

UTAH

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  "When a vacancy occurs in a court of record, the Governor shall fill the vacancy by appointment from a list of at least three nominees certified to the Governor by the Judicial Nominating Commission having authority over the vacancy."[327] The Commission comprises eight members—seven appointed by the governor plus the chief justice of the supreme court, who does not have a vote.[328] No more than four members may be of the same political party.[329] "The appointment shall be effective upon approval of a majority of all members of the Senate. If the Senate

323. *See* TEX. CONST. art. 5, § 2.
324. *See id.* §§ 4, 6.
325. *See id.* § 7.
326. *Id.* § 1-a.
327. UTAH CONST. art. VIII, § 8(1). "Judicial nominating commissions, created in Section 20A-12-102 and 20A-12-103, are repealed July 1, 2004." UTAH CODE ANN. § 63-55-220 (2003).
328. *See* UTAH CODE ANN. § 20A-12-102 (defining appellate court nominating commission); *id.* § 20A-12-103 (defining trial court nominating commission).
329. *See id.* §§ 20A-12-102, 20A-12-103.

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fails to approve the appointment, the office shall be considered vacant and a new nominating process shall commence."[330]

- *Method and Term of Retention*

> Each appointee to a court of record shall be subject to an unopposed retention election at the first general election held more than three years after appointment. Following initial voter approval, each Supreme Court justice every tenth year, and each judge of other courts of record every sixth year, shall be subject to an unopposed retention election at the corresponding general election.[331]

- *Mandatory Retirement Age*
  A judge shall retire upon attaining the age of seventy-five.[332]
- *Cross-Filing*
  Cross-filing is not a consideration in Utah because initial selection is through legislative and gubernatorial appointment.

VERMONT

- *Court Structure*
  Supreme Court; Superior Court (intermediate appellate court); District Court (trial court).
- *Method of Selection and Initial Term of Office*
  "The Governor, with the advice and consent of the Senate, shall fill a [judicial] vacancy . . . from a list of nominees presented by a judicial nominating body established by the General Assembly having authority to apply reasonable standards of selection."[333] The judicial nominating commission is composed of eleven members: two non-attorney members appointed by the governor, three members selected by the Senate, three members selected by the House of Representatives, and three members elected by attorneys admitted to the supreme court.[334] In the groups of three chosen by the Senate and the House of Representatives, all may not be from one party and only one can be an attorney.[335] Justices of the supreme court and justices and judges of the subordinate courts serve an initial term of six years.[336]
- *Method and Term of Retention*

> At the end of the initial six year term and at the end of each six year term thereafter, such justice or judge may give notice in the manner provided by law of a desire to continue in office.

330. UTAH CONST. art. VIII, § 8(3).
331. *Id.* § 9.
332. *See* UTAH CODE ANN. § 49-17-701.
333. VT. CONST. ch. 2, § 32.
334. *See* VT. STAT. ANN. tit. 4, § 601 (2003).
335. *See id.* at § 601(b)(2)-(3).
336. *See* VT. CONST. ch. 2, § 34.

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> When such justice or judge gives the required notice, the question of continuance in office shall be submitted to the General Assembly and the justice or judge shall continue in office for another term of six years unless a majority of the members of the General Assembly voting on the question vote against continuation in office.[337]

- *Mandatory Retirement Age*
  Justices and judges must retire at the end of the calendar year in which they attain the age of seventy.[338]
- *Cross-Filing*
  Cross-filing is not a consideration in Vermont because initial selection is through legislative and gubernatorial appointment.

VIRGINIA

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*

> The justices of the Supreme Court shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of twelve years. The judges of all other courts of record shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of eight years.[339]

- *Method and Term of Retention*
  Justices and judges are retained in the same manner in which they were originally selected.
- *Mandatory Retirement Age*
  "Any member who attains seventy years of age shall be retired twenty days after the convening of the next regular session of the General Assembly."[340]
- *Cross-Filing*
  Cross-filing is not a consideration in Virginia as justices and judges are selected by the state legislature.

WASHINGTON

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Superior Court (trial court).

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337. *Id.*
338. *See id.* § 35.
339. VA. CONST. art. VI, § 7.
340. VA. CODE ANN. § 51.1-305.B1 (Michie 2003).

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- *Method of Selection and Initial Term of Office*
  Justices and judges for all courts are selected in nonpartisan elections.[341] Supreme court justices and court of appeals judges serve six-year terms; superior court judges serve four-year terms.[342]
- *Method and Term of Retention*
  To remain in office, a justice or judge must be re-elected to the office in the same manner in which the justice or judge was elected originally. The length of subsequent terms equals the length of the original term.[343]
- *Mandatory Retirement Age*
  Justices and judges must retire at the end of the calendar year in which they attain the age of seventy-five.[344]
- *Cross-Filing*
  Cross-filing is not a consideration in Washington because elections are nonpartisan.

WEST VIRGINIA

- *Court Structure*
  Supreme Court of Appeals; Circuit Court (trial court). West Virginia does not have an intermediate appellate court.
- *Method of Selection and Initial Term of Office*
  Justices and judges of all courts are selected in elections.[345] The legislature determines by way of law whether the elections are to be partisan or nonpartisan.[346] Supreme court of appeals justices are elected to twelve-year terms and circuit court judges are elected to eight-year terms through partisan elections.[347]
- *Method and Term of Retention*
  To remain in office, a justice or judge must be re-elected in a partisan election.[348] The length of subsequent terms equals the length of the original term.[349]
- *Mandatory Retirement Age*
  There is no mandatory retirement age. Nevertheless:

> [T]he supreme court of appeals is authorized . . . to retire any . . . justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any suc-

341. *See* WASH. CONST. art. IV, §§ 3, 5, 30.
342. *See id.*
343. *See id.*
344. *See id.* § 3(a).
345. *See* W. VA. CONST. art. VIII, § 2 (defining election of and length of term for justices of supreme court of appeals); *id.* § 5 (defining election of and length of term for judges of circuit courts).
346. *See id.* §§ 2, 5.
347. *See id.*
348. *See id.*
349. *See id.*

cessor or substituted retirement system for justices, judges and magistrates of this state) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice, judge or magistrate.[350]

- *Cross-Filing*
  Cross-filing is not permitted in West Virginia.

WISCONSIN

- *Court Structure*
  Supreme Court; Court of Appeals (intermediate appellate court); Circuit Court (trial court).
- *Method of Selection and Initial Term of Office*
  Justices and judges of all courts are selected in nonpartisan elections.[351] Supreme court justices serve ten-year terms and court of appeals and circuit court judges serve six-year terms.[352]
- *Method and Term of Retention*
  To remain in office, a justice or judge must be re-elected to the office in the same manner in which the justice or judge was elected originally.[353] The length of subsequent terms equals the length of the original term.[354]
- *Mandatory Retirement Age*
  Justices and judges cannot serve beyond the first July thirty-first following the date on which they attain the age of seventy.[355]
- *Cross-Filing*
  Cross-filing is not a consideration in Wisconsin because elections are nonpartisan.

WYOMING

- *Court Structure*
  Supreme Court; District Court (trial court). Wyoming does not have an intermediate appellate court.
- *Method of Selection and Initial Term of Office*
  Justices of the supreme court and judges of the district court are chosen through merit selection by a judicial nominating commission and appointment by the governor.[356]

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350. *Id.* § 8.
351. *See* WIS. CONST. art. VII, §§ 4(1), 5(2), 7.
352. *See id.*
353. *See id.*
354. *Id.* §§ 4, 5, 7.
355. *See id.* § 24.
356. *See* WYO. CONST. art. 5, § 4(b).

> The commission shall consist of seven members, one of whom shall be the chief justice [or his designee from members of the Supreme Court], who shall be chairman thereof. In addition to the chief justice, or his designee, three resident members of the bar engaged in active practice shall be elected by the Wyoming state bar and three electors of the state not admitted to practice law shall be appointed by the Governor . . . .[357]

"Each justice or judge selected under these provisions shall serve for one year after his appointment and until the first Monday in January following the next general election after the expiration of such year."[358]

- *Method and Term of Retention*

  At such general election, the justice or judge must run for retention.[359] A supreme court justice who is retained serves an additional eight-year term and, at the expiry of such term, can run for subsequent terms of identical duration.[360] A district court judge who is retained serves an additional six-year term and, at the expiry of such term, can run for subsequent terms of identical duration.[361]

- *Mandatory Retirement Age*

  Justices and judges must retire upon reaching seventy years of age.[362]

- *Cross-Filing*

  Cross-filing is not a consideration in Wyoming because initial selection is through a nominating commission.

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357. *Id.* § 4(c).
358. *Id.* § 4(g).
359. *See id.*
360. *See id.* § 4(f).
361. *See id.* §§ 4(f), 19.
362. *See id.* § 5.

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VOUCHERS, BUSES, AND FLATS: THE PERSISTENCE OF SOCIAL SEGREGATION

PAUL BOUDREAUX*

I. INTRODUCTION

AMERICA'S laws to help the poor have a split personality. At the same time that we fund costly subsidies for poor people for housing, transportation, and education, we recoil from even simple measures that would encourage the social integration of poor persons with the middle and affluent classes. For example, the Supreme Court's recent decision rejecting the claim that Cleveland's school voucher program unconstitutionally supported religion hid the real flaw—the statutorily imposed inability of poor persons to use these vouchers in public schools outside the central city.[1] This defect, which prevents city students from bringing vouchers to more effective nearby suburban public schools, will probably prevent voucher programs from serving as any kind of large-scale solution to the problem of ineffective urban public schools. This flaw is also emblematic of America's two-faced legal efforts to help the poor.

In this essay, I briefly analyze three areas—school vouchers, public transportation, and housing assistance—in which programs with good intentions fail to achieve their goals. They fail, in large part, because of a taboo against social integration of poor persons into middle-class society. Unless and until American law relinquishes its preference for social segregation, efforts to help the poor will remain hypocritical and inadequate.

II. AMERICA AND SOCIAL INTEGRATION

The United States was established as a nation with a regard for the common person. Before the French Revolution and Marxism posited the superiority in politics of the workers over the wealthy, the American Declaration of Independence asserted, rather boldly for the 1770s, that "all men are created equal."[2] Of course legal equality of any sort for women and African Americans would not come until much later, but the seed was planted. Unlike societies in which one's social background or caste largely

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1. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002) (holding that Cleveland's voucher program, which has been in use mostly at religiously affiliated schools, does not necessarily violate Establishment Clause).

2. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776). For a discussion of how the Declaration of Independence has been idolized, including an argument that it played a smaller role in developing American democratic thought in the eighteenth century than is commonly assumed today, see generally PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997).

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