Compelling Question: How should judges be selected for the bench?	
Standard	American Government 16. As a framework for the state, the Ohio Constitution has similarities and differences to the federal Constitution; it was changed in 1851 to address difficulties governing the state.
Staging the Question	Present students with the two quotes below that offer contrasting perspectives on the question of politics in the judicial selection process. Without discussion, take a poll of students on the issue of whether judges should be elected or appointed: "If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges." Former Justice Sandra Day O'Connor *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring). "The desirability of judicial elections is a question that has sparked disagreement for more than 200 years. Hamilton believed that appointing judges to positions with life tenure constituted "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." The Federalist No. 78, at 465. Jefferson thought that making judges "dependent on none but themselves" ran counter to the principle of "a government founded on the public will." 12 The Works of Thomas Jefferson 5 (P. Ford ed. 1905). The federal courts reflect the view of Hamilton; most States have sided with Jefferson. Both methods have given our Nation jurists of wisdom and rectitude who have devoted themselves to maintaining "the public's respect . . . and a reserve of public goodwill, without becoming subservient to public opinion." Rehnquist, Judicial Independence, 38 U. Rich. L. Rev. 579, 596 (2004)." Chief Justice John Roberts *Williams-Yulee v. Florida Bar,* 575 U.S. ___ (2015)

Supporting Question	Supporting Question
How has the process of selecting judges changed in Ohio since 1803?	What are the different options for how to select judges?
Formative Performance Task	**Formative Performance Task**
Create a timeline of changes to the judicial selection process in Ohio since the 1803 Constitution.	Create a list of the options for selecting judges described in the sources. Give each a score based on the attached rubric.
Featured Sources	**Featured Sources**
1. *"Reasons why the People should Vote for a Convention to Amend the Constitution of Ohio"* The spirit of democracy. [volume] (Woodsfield, Ohio), 29 Sept. 1849. 2. Francis R. Aumann *The Selection, Tenure, Retirement and Compensation of Judges in Ohio,* 5 U. Cin. L. Rev. 408 (1931). 3. Ohio Capital Journal – July 2, 2021	1. *It's Good that Marylanders Choose their Judges*, Washington Post, Oct 30, 2020 2. AUDIO - *State Judicial Elections Become Political Battlegrounds*, All Things Considered, NPR News Nov 2, 2016. 3. AUDIO – *Fairness in State Courts: Electing Versus Appointing State Judges*, Diane Rehm Show, WAMU Radio, Sep 5, 2012 4. *Why We Should Keep Judicial Elections*, Washington Post, May 26, 2011

Summative Performance Task	**ARGUMENT** Using evidence gathered from the sources, construct a claim that responds to the compelling question "How should judges be selected for the bench?" Be sure to address counterarguments.
	EXTENSION Ask students to research the judicial selection process in other states. Students should select one state and decide whether they prefer the process in that state or here in Ohio.

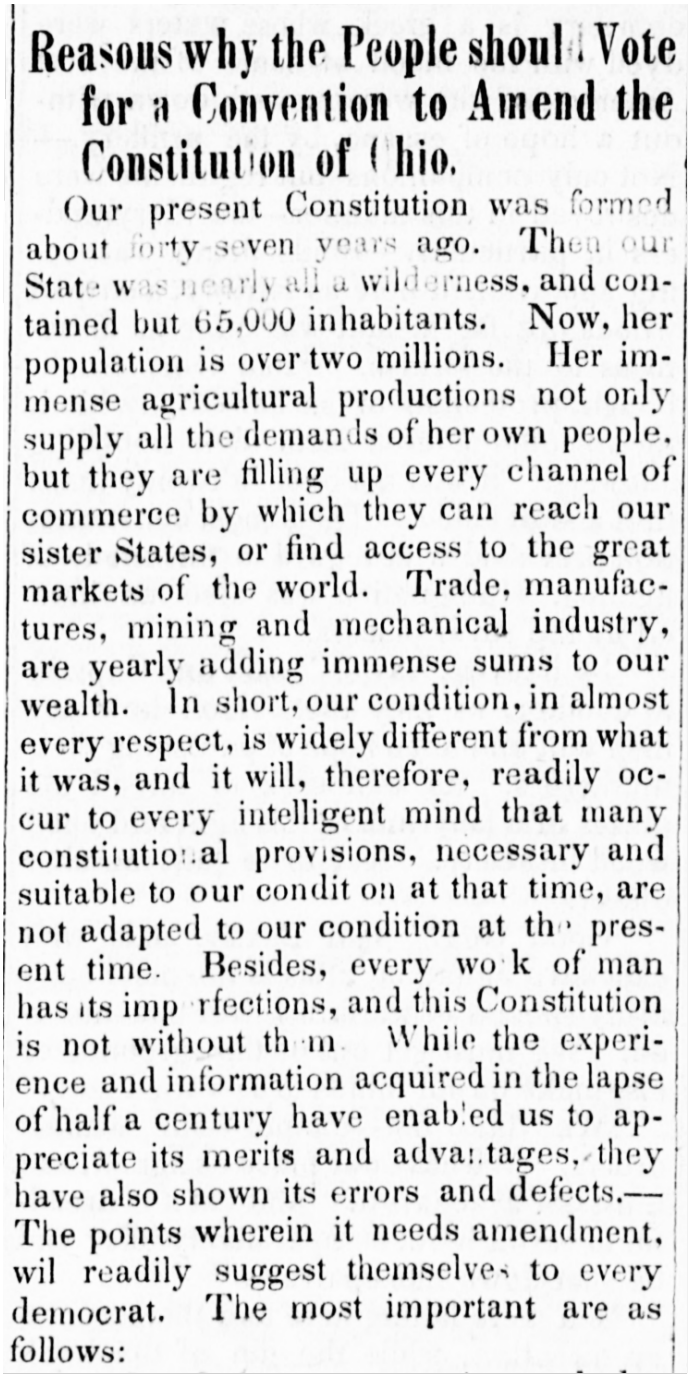
Featured sources and rubric are excerpted in the following pages.

Scoring Rubric for Judicial Selection Processes

This rubric is adapted from the criteria described by the Brennan Center for Justice in a 2018 policy paper titled *Choosing State Judges: A Plan for Reform*

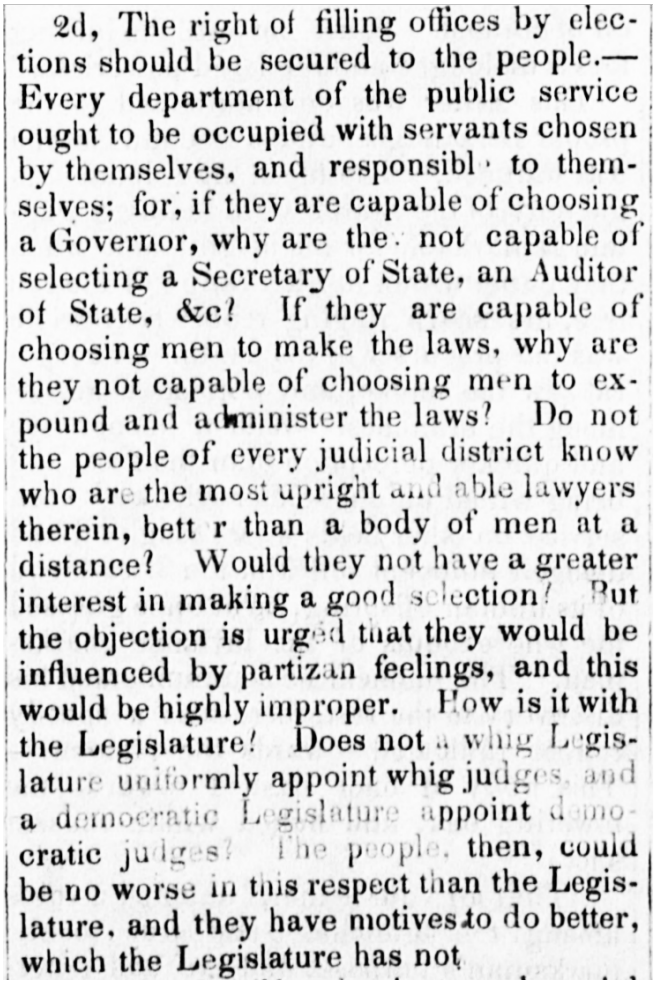
Criteria	Meets the criteria	Somewhat meets the criteria	Does not meet the criteria
Adequately protect judicial independence, so that we can be confident that judges are deciding cases fairly and not based on inappropriate political, partisan, or special interest pressure.	3	2	1
Provide for sufficient input from the public or from democratically accountable actors, so that the judges chosen under the system are more likely to be seen as legitimate.	3	2	1
Provide mechanisms to hold judges accountable for legal errors or ethical lapses.	3	2	1
Be likely to produce a high-quality and diverse bench and to instill public confidence in the courts.	3	2	1

Total possible points = 12



Reasons why the People should Vote for a Convention to Amend the Constitution of Ohio.

Our present Constitution was formed about forty-seven years ago. Then our State was nearly all a wilderness, and contained but 65,000 inhabitants. Now, her population is over two millions. Her immense agricultural productions not only supply all the demands of her own people, but they are filling up every channel of commerce by which they can reach our sister States, or find access to the great markets of the world. Trade, manufactures, mining and mechanical industry, are yearly adding immense sums to our wealth. In short, our condition, in almost every respect, is widely different from what it was, and it will, therefore, readily occur to every intelligent mind that many constitutional provisions, necessary and suitable to our condition at that time, are not adapted to our condition at the present time. Besides, every work of man has its imperfections, and this Constitution is not without them. While the experience and information acquired in the lapse of half a century have enabled us to appreciate its merits and advantages, they have also shown its errors and defects.—The points wherein it needs amendment, will readily suggest themselves to every democrat. The most important are as follows:



2d, The right of filling offices by elections should be secured to the people.—Every department of the public service ought to be occupied with servants chosen by themselves, and responsible to themselves; for, if they are capable of choosing a Governor, why are they not capable of selecting a Secretary of State, an Auditor of State, &c? If they are capable of choosing men to make the laws, why are they not capable of choosing men to expound and administer the laws? Do not the people of every judicial district know who are the most upright and able lawyers therein, better than a body of men at a distance? Would they not have a greater interest in making a good selection? But the objection is urged that they would be influenced by partizan feelings, and this would be highly improper. How is it with the Legislature? Does not a whig Legislature uniformly appoint whig judges, and a democratic Legislature appoint democratic judges? The people, then, could be no worse in this respect than the Legislature, and they have motives to do better, which the Legislature has not

The spirit of democracy. [volume] (Woodsfield, Ohio), 29 Sept. 1849. *Chronicling America: Historic American Newspapers*. Lib. of Congress. <https://chroniclingamerica.loc.gov/lccn/sn85038115/1849-09-29/ed-1/seq-2/>

5 U. CIN. L. REV. 408 (1931).

THE SELECTION, TENURE, RETIREMENT AND COMPENSATION OF JUDGES IN OHIO

FRANCIS R. AUMANN,
Professor of Political Science, Ohio State University

The first constitution of Ohio was framed in 1802. The makers of this instrument were followers of Thomas Jefferson and ardent exponents of the theory of legislative supremacy. These men feared a strong executive and were not unduly sympathetic to the courts. In consequence, both of these branches were made subordinate to the legislature. The method of choosing judges provided by the constitution was especially restrictive of the courts.

At the outset, there was some talk in the convention of adopting the plan of the Tennessee Constitution of 1792, as to the selection of judges. This was the federal plan of life tenure. Nothing came of this suggestion, however, and the plan adopted was one whereby the judges were selected by the legislature for the limited term of seven years.[1] This method continued until the

[1]In the older states Jeffersonian principles were not accepted as readily as they were in frontier Ohio. In most of the older states tenure during good behaviour was granted the judges, even before this plan was adopted by the federal government in 1787. In Pennsylvania, the judges of the first state courts were chosen for a term of years. In 1790, this was changed to tenure during good behaviour. THORPE, CHARTERS AND CONSTITUTIONS, p. 3079. In Vermont, Kentucky, and Tennessee, which were admitted soon after the ratification of the Federal Constitution, a similar tenure was provided. THORPE, *ibid.*, pp. 1270, 3419, 3765. In Georgia, New Jersey, Rhode Island and Connecticut, however, short term commissions were granted the judges. The most complete subordination of the courts to the legislature was in Ohio where the principles of Thomas Jefferson permeated the first constitution. Influenced by these principles the people of Ohio gave their governor no power of veto, entrusted him with no appointments to office, and limited the commissions of all officers to a fixed term of years. The judges were to be selected by the legislature for a term of seven years, "if so long they behave well."

adoption of the new constitution in 1851, when it was supplanted by popular election.

There were a good many reasons for making the shift to popular election. In the first place, the system of legislative selection had developed some very undesirable features. It was openly asserted in the 1851 convention that judicial office had become the spoils of party conflict and that appointments were not made on a basis of ability or fitness, but as a reward for party service.[2] In the second place, there was a rather well defined feeling in Ohio as well as in many other states, that the courts were undemocratic. The wave of democracy which swept Andrew Jackson into power in 1824, may have had something to do with this attitude. At any rate there was a widespread dissatisfaction with the courts during this mid-century period which demanded changes both with regards to the tenure of judges and the manner of their selection.[3]

These demands secured results. Terms were lessened and popular election adopted in many states.[4] In fact,

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[2]Statements were made in the convention to the effect that the legislature had become "a mere political arena, embittering the feelings of party spirit, and corrupting the pure fountain of justice." 1 DEBATES, OHIO CONVENTION (1850), p. 86.

[3]There were different causes for dissatisfaction with the courts in different states. In the newer sections of the country it may be traced in part to the attitude of the courts toward the debtor class. This was true in Kentucky, see 1 COLLINS, HISTORY OF KENTUCKY, p. 218; Alabama, BROWN, HISTORY OF ALABAMA, pp. 156-157, and Maine, 15 Maine Rep. 156. In New York and Pennsylvania, delay was the cause for dissatisfaction. In New York the courts were not infrequently two years behind with the cases on their dockets. See PROCEEDINGS, NEW YORK CONVENTION (1846), p. 370; and 10 DEBATES, PENNSYLVANIA CONVENTION (1838), p. 193.

[4]Between 1830, and the beginning of the Civil War, the tenure of judges was limited to a period of years in twenty-one states. Many of these changes occurred in the newer, western states, where a short term of four or six years was preferred. But many of the older states favored similar changes when they revised their constitutions. The states altering the tenure of their judges included Alabama (1830); Mississippi (1832); Tennessee (1834); Mich-

it is during this period that the theory of popular sovereignty and the elective principle have their widest acceptance.[5] Although Andrew Jackson and his frontiersmen followers have long since departed the stage, his ideas are still making their pressure felt and must be given respectful consideration by anyone who would explain why the elective principle found its way into the judiciary provision of Ohio's Constitution of 1851.

The makers of Ohio's second constitution simply followed the fashion of the times in applying the principle of popular election to judges. In fact, there was little else they could do. A powerful combination of forces virtually forced the adoption of this method. The previous method of legislative selection had failed; the growing power of the judiciary required more control; and the elective principle was sweeping the country.[6]

With the elective principle established in Ohio, the organization, procedure, and methods of the political

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igan (1835); Arkansas (1836); Pennsylvania (1838); Maine (1839); Texas and Louisiana (1845); New York and Iowa (1846); Florida, Missouri, and Wisconsin (1848); California (1849); Kentucky and Virginia (1850); Maryland (1851); Kansas (1855); Oregon and Minnesota (1857).

[5]The adoption of popular election for the judges of the Supreme Court of Mississippi in 1832, marks the beginning of the change in the method of selection. It was not until New York adopted this principle in 1846, however, that it received widespread acceptance. In the next eleven years, some seventeen states following the lead of New York in establishing an elective judiciary; and at the beginning of the Civil War this system was provided for in nineteen of the thirty-four state constitutions. This included: Georgia (1777); Mississippi (1832); New York (1846); Wisconsin (1848); California (1849); Kentucky, Michigan, Missouri, Pennsylvania, and Virginia (1850); Indiana, Maryland, and Ohio (1851); Louisiana (1852); Tennessee (1853); Kansas (1855); Iowa, Minnesota, and Oregon (1857).

[6]The elective principle has survived in every state but one in which it was adopted. In 1865, Georgia abandoned popular election of judges in favor of their selection by a joint vote of the two houses of the legislature. THORPE, CHARTERS AND CONSTITUTIONS, p. 818. In 1868, Mississippi adopted the appointive system, but abandoned it in 1914. In 1864, Louisiana adopted the appointive system, but returned to popular election in 1904. In 1868, Texas adopted the appointive system, but abandoned it in 1876.

party become of vital importance in the selection of our judges, because it is the party organization which determines who shall be the party nominees. By controlling nominations they determine the voter's choice as between two candidates at the general election.[7] A short survey of the procedure employed by the party in nominating judicial candidates in Ohio will throw some light on the new system of selection.

From 1851 to 1911, all judges in Ohio were nominated by party caucusses, conventions, or primaries, and elected on party tickets.[8] During the greater part of this time, there was very little criticism of this method. The general

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[7]At the present time there are three methods of selecting judges in the United States. (1) In four states (Rhode Island, Virginia, South Carolina and Vermont), the judges are chosen by the legislature; and in one state, Connecticut, they are appointed by the legislature upon the nomination of the governor. (2) In five states (Maine, Massachusetts, New Hampshire, Delaware, and New Jersey the highest judges are appointed by the governor, subject to confirmation by the executive council, or the senate. Certain inferior judges in other states are also appointed by the governor. (3) In thirty-eight states, the highest judges are elected by the people. Trial judges are chosen in a similar way in the same way in all but one of these states. In Florida, trial judges are appointed by the governor, although supreme court judges are popularly elected.

[8]In 1891, the legislature passed an act providing for two methods of nomination—first, by caucus or convention, primary election, or certification of the executive committee of an established political party, and second, by petition signed by a certain number or percentage of the voters. 88 Ohio Laws 455, sec. 12 (1891). In 1904, a small change was made in the provision as to nomination by petition. The prevailing method of nomination was by party convention, the petition method being rarely used. 97 Ohio Laws, 226 (1904). In 1908, an act passed by the legislature provided for nomination by direct vote unless the county controlling committee desired a nominating convention, in which case the delegates were to be elected at the primary. Nomination by petition was not disturbed. As a matter of fact, nomination by convention still persisted, and nomination by petition remained as the last hope and the unsuccessful one of the "independents". (George Harris, in speaking on this point, said, "For many years theretofore the Ohio statutes had provided for judicial (as well as other) nominations by petition. Very rarely, however, had this privilege been exercised, so that no Supreme Court judge, or any other, so far as I know, had ever been elected as an independent prior to 1911." In that year, however, an independent was elected to the supreme court. He was re-elected in 1918.)

success of the plan seemed unquestioned. During this time, however, forces were at work which in due course were to effect its dissolution. In the first years of the present century a progressive movement swept the country which demanded changes all along the line. The old convention system was made an especial object of attack by proponents of the new order.[9]

Proponents of the convention system have asserted that during this period judges were almost invariably selected by lawyers although political parties nominated them.[10] This opinion was not universally shared in the state, however. As a matter of fact, a law was passed in 1911 for the express purpose of taking judges out of politics. This act, called the Non-Partisan Judiciary Act, required the names of candidates for judicial offices, "whose nominations have been duly made," to be placed on a separate ballot without party designation and on which their names rotate.[11]

In 1912, the Constitution of Ohio was amended so as to provide for compulsory direct primary nomination of all elective officers, except those nominated by petition.[12]

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[9]Note remarks of Mr. Tannehill, sponsor of Ohio's direct primary law when advocating that amendment before the convention of 1912: "The chief cause of the frequent failure of representative government lies in the corrupt, boss-controlled, drunken, debauched, and often hysterical nominating convention." PROCEEDINGS AND DEBATES, OHIO CONSTITUTIONAL CONVENTION (1912), p. 1239.

[10]See Address by President George B. Harris, at the meeting of the Ohio State Bar Association, held January 26, 1923. Mr. Harris believes that the solution of the problem of selecting judges is to be found in permitting the bar to nominate the bench. Harris, *Taking Judges Out of Politics*, 8 J. AMER. JUD. SOC. (June, 1924), p. 258.

[11]Nonpartisan judicial primaries and elections are now employed in twelve states: Arizona, California, Idaho, Minnesota, Nebrasks, North Dakota, Ohio, South Dakota, Washington, Wisconsin, and Wyoming. Iowa, Kansas, and Pennsylvania tried this plan and abandoned it. E. M. SAIT, AMERICAN PARTIES AND ELECTIONS (1927), p. 383.

[12]OHIO CONSTITUTION (1912), art. V, sec. 7.

This abolished the party judicial convention which had existed for sixty years.[13]

In 1913, the "Direct Primary Law" was passed[14] which provided for nomination by direct primary, nomination papers to be signed by two per cent of the voters. In 1914, a law was passed which eliminated the necessity of having voters sign such nomination papers for the primaries.[15] This is the law today.[16] Nomination by petition outside of the primary is retained and is now used to a considerable extent.[17]

Although laws were passed by the legislature in 1913 and 1915,[18] which did much to restore a partisan touch to the election of our judges,[19] it can be safely asserted

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[13]For a criticism of the direct primary as affecting the judiciary, see *The Duty and Responsibility of the Bar in the Selection of the Judiciary*, 5 J. AMER. JUD. SOC. 42 (August, 1921). This article is by William D. Guthrie, of the New York Bar. Mr. Guthrie quotes with approval a similar criticism made by Mr. Chief Justice Taft.

[14]103 Ohio Laws 476 (1913).

[15]106 *ibid.* 542 (1914).

[16]OHIO GEN. CODE, sec. 4969.

[17]OHIO GEN. CODE, sec. 4999.

[18]103 Ohio Laws 476 (1913); 106 *ibid.* 542 (1915).

[19]By the terms of these laws every candidate for partisan nomination to judicial office (as well as to other offices), was required to pledge his support to the principles of his party if elected. See a discussion of this by Judge John A. Shauck, 12 OHIO L. REP. 351. George B. Harris in discussing this provision said: "Never before had a candidate for any judgeship in Ohio been required to take a solemn oath and obligation that if elected he would be a good Republican or a good Democratic judge. And yet, now before his name may be placed on the primary ballot, the candidate must on his oath aver, 'I am a member of the Democratic (or Republican) party and intend to vote for a majority of the candidates of such party at the coming election,' as well as 'I will support and abide by the principles enumerated by the Republican (or Democratic) party in its national platform and in its platform in this state adopted during the present year.' Also he must furnish five vouchers for his partisan integrity, as well as qualification to perform the duties of the office sought, and pay $25 as an entrance fee.

"In 1914, 1916, 1918, 1920 and 1922 elections have been held under such a law. Furthermore, in no year has the state platform been promulgated before the last date for filing declarations of candidacy, and in presidential

that the year 1910 marks the end of one period of judicial selection and the year 1912 ushers in the beginnings of a new system. With the election of 1910, the period of a partisan judiciary and convention nomination ends; with the election of 1912, the period of wide-open elections and direct nominations begin. The new system paved the way for new criticisms of our system of judicial selection, particularly as it is administered in the large metropolitan centers.

OHIO CAPITAL JOURNAL

POLITICS & GOV

Ohio ballots will list party affiliations for top judicial candidates

BY: **TYLER BUCHANAN** - JULY 2, 2021 12:50 AM

Courtesy of the Ohio Supreme Court

A change to Ohio's ballot rules could impact key Supreme Court races in 2022 and influence the leaning of the state's highest court for years to come.

Gov. Mike DeWine signed a bill into law Thursday that will list candidates' party affiliations on ballots for certain judicial races. This will include races for the Ohio Supreme Court as well as the dozen appellate court districts.

Ohio's election system is currently unique in that judicial candidates campaign in partisan primaries, but the November General Election lists them without party affiliation. This is ostensibly to promote judicial independence, but is thought to contribute to significant ballot "drop off" — more than 1 million Ohio voters in 2020 left the two Supreme Court races blank.

Republican supporters of adding ballot party affiliation say this change is necessary to provide more information to voters and also because the campaign trail already features partisan spending, endorsements and advertising.

“In reality, the process of electing a judge is already simply partisan in nature,” said Rep. D.J. Swearingen of Huron, who introduced legislation to make this change. Lawmakers ultimately approved an identical bill originating from the Ohio Senate.

“This bill is sorely needed and long overdue,” Swearingen added.

1State Rep. D.J. Swearingen, R-Huron, sponsored legislation and spoke in favor of the ballot change. Photo courtesy The Ohio Channel.

Democrats joined organizations like the Ohio State Bar Association, Ohio Courts of Appeals Judges Association and Ohio Judicial Conference in opposition. The executive director of the latter group, former Ohio Supreme Court Justice Paul Pfeifer, told lawmakers that party affiliation is “wholly irrelevant to the work of a judge” and should not be included on ballots. Pfeifer blames the voting drop off to “broader unfamiliarity with judicial candidates” rather than political party confusion in the ballot box.

Pfeifer and other opponents point to the Ohio Code of Judicial Conduct, which prohibits candidates from any political activity “inconsistent with the independence, integrity, or impartiality of the judiciary.”

“Judges are currently not even allowed to make statements implying how they would rule on a case before them under the code of judicial conduct,” said state Rep. Bride Rose Sweeney, D-Cleveland. “Then why would we further continue to require a party label that would make similar implications to voters?”

Critics like state Rep. Stephanie Howse of Cleveland believe this change is only being sought for political purposes. Democrats have won three of the past four Ohio Supreme Court elections (held in 2018 and 2020), narrowing the Republican majority on the court to 4-3. GOP candidates have fared well in other statewide races where party affiliations are listed on the ballot.

“I know we talked about being honest with voters, so let’s just be real,” Howse said. “Be a straight-shooter. Y’all scared. It’s cool, because Democrats are absolutely coming for the Ohio Supreme Court in ‘22.”

Another Republican sponsor of the legislation, Rep. Brian Stewart of Ashville, pushed back against this line of attack and noted his policy support predates the recent election results.

Stewart and Swearingen both highlighted earlier support for this change from Democrats.

The Ohio Democratic Party, in fact, once waged a legal battle seeking to include party affiliation on judicial ballots and viewed the forced nonpartisan labelling as being unconstitutional. The party lost this fight, and now a decade later sees its lawmakers fighting against such a change.

Just 18 months ago, Democratic state Rep. Michael Skindell sponsored legislation that would have added party affiliation to ballots unless a judicial candidate expressly opted out of having it listed. Skindell unsuccessfully ran for the Ohio Supreme Court in 2010 and his bipartisan legislation was cosponsored by Democratic state Rep. Michael O’Brien of Warren.

Both Skindell and O’Brien voted against the more recent legislation put forward by Republicans.

Democrats also accused the bill sponsors of “cherry picking” some judicial races to include while candidates for lower courts will continue to be listed on ballots without party affiliation.

Swearingen said this was intentional.

“When we see a Super PAC or Eric Holder come in for a Municipal Court judge, let me know about it, because we’ll put them in the next bill,” he said, referring to the former Democratic attorney general who campaigned for Ohio Supreme Court candidates in 2020.

2Ohio Supreme Court Justice Patrick DeWine, the governor’s son, will campaign for the chief justice position in 2022. Photo courtesy the Ohio Supreme Court.

“We don’t see nearly the levels of fundraising and, quite frankly, national politics that occur at the Ohio Supreme Court levels and the appellate appeals levels that we would at the local level,” Swearingen argued.

The change could have an impact on an election involving the governor’s son, Patrick DeWine, a Republican serving on the Ohio Supreme Court.

The younger DeWine has announced plans to campaign for chief justice in 2022 to replace sitting Chief Justice Maureen O’Connor, who is forced to retire due to mandatory age restrictions.

He may end up facing Justice Jennifer Brunner, a Democrat elected to the court in 2020 who also jumped into the chief justice race.

Said Brunner about the possible ballot change, “Frankly, my opinion is, just tell me the rules and I’ll run.”

The Washington Post
Democracy Dies in Darkness

Letters to the Editor

Opinion: It's good that Marylanders choose their judges

(iStock)
October 30, 2020

Regarding the Oct. 28 editorial "A Maryland judge who merits election":

"Less qualified" and "no convincing argument" were phrases I heard when I ran for the Circuit Court bench in Howard County this past year against three other lawyers and are phrases that miss the point. Those words, also, have historically been used as tropes against many who seek election to the judicial branch in Maryland.

Judicial appointments are inherently political. Judicial elections are a check on that political process. Judicial elections are democracy in action. I have been through the judicial appointment process as applicant and reviewer and have run for a judgeship. Both methods are political.

The judicial appointment and vetting process plays the ideas and strategies of a select group of people with a political governor making a selection while an election permits people to democratically choose who makes decisions fundamental to the people's lives. One cannot think of anything more American. We need to respect both processes.

Quincy Coleman is a trial attorney with more than 30 years in the criminal justice system. He represents the indigent. Interestingly, his clients do not have a voice in the appointment process. One can ask many questions that show how Mr. Coleman is extremely qualified and has presented a great closing argument to why he should be on the bench. Such questions and answers are for the voters, not only a small group in a selection process. Does his opponent have the wealth of criminal experience that Mr. Coleman has? Has his opponent tried jury trials in Howard County? Both candidates have conceded that they are fit and qualified. Let Marylanders decide.

Stephen J. Musselman, *West Friendship, Md.*

LAW

State Judicial Elections Become Political Battlegrounds

November 2, 2016 · 4:48 PM ET
Heard on All Things Considered

ASHLEY CLEEK

4-Minute Listen + PLAYLIST ···

ACCESS AUDIO AT: https://www.npr.org/2016/11/02/500351735/state-judicial-elections-become-political-battlegrounds

On a recent, rainy Tuesday night, a surprisingly big crowd — a few hundred people — gather in an auditorium at Hutchinson Community College to watch the Kansas Supreme Court hear oral arguments.

The justices slowly walk out in their robes and sit on a raised podium. It looks a little goofy, like a community theater production of a trial.

But that auditorium is a real courtroom. The Kansas Supreme Court has been holding hearings in public places across the state for a few years now, in an effort to demystify the court and show Kansans what they do.

Megan Storie, a criminal justice major who hopes to be an attorney, is really pumped to be here.

"This is something that I'm really passionate about. I love law, and everything that has to do with it," she says.

But Storie is not sure how she'll vote in the state's upcoming judicial election — or even how she should go about picking a judge.

And that's the question at the center of this election and those in other states: Should judges be impartial arbiters? Or are they accountable to the people who elect them?

Across the country, judicial elections such as the one coming up in Kansas have become increasingly political. In Kansas — and 15 other states — voters don't elect their Supreme Court justices. But once they're in, voters go to the polls to decide whether to keep them.
For decades, the majority of Kansans have voted yes, to keep their judges. In fact, no Kansas Supreme Court justice has ever been voted out.

But this year, as with national politics, the script has been thrown out, and with this election, the Kansas Supreme Court could completely change, with five out of seven justices up for election.

Alicia Bannon, who monitors state courts at the Brennan Center for Justice at New York University School of Law, has noticed a dramatic shift across the country as judicial elections have become more partisan and negative.

"It's essentially created an arms race, where you have a lot of money going in and interest groups basically trying to shape who's sitting on the courts and the decision that the courts are making," Bannon says.

Kansas used to be immune to these trends. The Supreme Court judges are selected by a nonpartisan nominating commission and appointed by the governor. Then, every six years Kansans vote on whether to retain the judges.

Decades ago, Kansas adopted the merit system as a way to keep politics out of the judiciary. But this year, the judiciary is right back in the middle of a political firefight, with concerted efforts to oust four of the five judges who are up for election.

Wed, Sep 05 2012 • 10 a.m. (ET)

Fairness In State Courts: Electing Versus Appointing State Judges

State judges rule on most legal cases, but some argue campaign funding for judicial candidates leads to bias. Please join us to discuss fairness in state courts: elections versus appointment for state judges.

Transcript of minutes 00:00 - 12:40.

To access audio, visit: https://dianerehm.org/shows/2012-09-05/fairness-state-courts-electing-versus-appointing-state-judges

- **10:06:56** MS. DIANE REHM
  Thanks for joining us. I'm Diane Rehm. Money is playing a greater role than ever in state judicial elections. Critics argue the trend could take a toll on judicial impartiality. Joining me in the studio to talk about how different states choose judges and why there's growing concern about how the process is changing: Ian Millhiser of the Center for American Progress, Charlie Hall from Justice at Stake and, joining us from Elon, N.C., Scott Gaylord. He's associate professor of law at Elon University School of Law.
- **10:07:40** MS. DIANE REHM
  And we do invite you to chime in with your questions and comments. Feel free to call us, 800-433-8850. Send us your email to drshow@wamu.org. Join us on Facebook or Twitter. Good morning, gentlemen. Thanks for joining us.
- **10:08:03** MR. IAN MILLHISER
  Good morning.
- **10:08:03** MR. CHARLIE HALL
  Good morning.
- **10:08:05** REHM
  Charlie, let me start with you. Give us a brief overview of how judges are selected in various states around the country.
- **10:08:17** HALL
  Certainly, Diane. We've actually been arguing as a country about courts and how to choose judges almost from the birth of our country. And we've seen different waves over the last 200 years.

- **10:08:29** HALL
  As most people know about the federal courts where judges are appointed by the president and for life -- and that's the way all the first 13 states started -- but we've seen waves since then, beginning in the 1830s with Andrew Jackson's era where there's a lot of populism, it swung to the other extreme. And states, for the next 60, 70 years, swung overwhelmingly towards electing judges, just like any other position, like a senator or a governor.
- **10:09:02** HALL
  There have been issues and concerns and a little bit of progressive movement in, ultimately, starting 1940s through the '70s. People became concerned about the influence of politics and money, the idea that judges could be bought or influenced by sort of side channels outside the courtroom. And so appointments became much more common. And with this, a new device of using commissions of lawyers and non-lawyers to essentially vet candidates, submit them to the governor. And the idea was to take politics out of the process, and that's really where the debate has wound up.
- **10:09:40** REHM
  So how many states currently elect judges? How many states appoint judges?
- **10:09:47** HALL
  It's actually a very interesting split. At the Supreme Court level, 22 states hold competitive elections, just like we expect with other offices. Twenty-four states use this commission, as to my view, is called merit selection, and another five use other forms of appointment. So it's slightly more common still to appoint judges than to elect judges at the state Supreme Court level.
- **10:10:09** REHM
  It's really important, I think, for people to realize that 95 percent of issues are settled by state courts.
- **10:10:20** HALL
  That is exactly right. When we think of courts, we think of the U.S. Supreme Court. They handle 200-odd cases a year. If you are getting a divorce, if you have a lawsuit, if you are -- you've been facing a traffic case, all of that happens in the state courts. It's a hugely important branch, and it's one that most Americans just don't think about.
- **10:10:39** REHM
  Charlie Hall, he's editor of Justice at Stake. Turning to you, Ian Millhiser, what has the Center for American Progress been -- why have you been focusing on this?
- **10:10:56** MILLHISER
  OK, sure thing. So I want you to imagine for a second that you come to the election next November, and you get your ballot. And you find out there's a hospital opening in your neighborhood. And at the top of the ballot, it says, we need to elect a doctor to be the head of the hospital. Here's five names. Vote for someone. And then you turn the page, and this hospital needs a head of cardiology and head of gastroenterology and head of obstetrics, and so there's a list of names you've got to vote for there.

- **10:11:25** MILLHISER
  And you continue to turn the page, and you start electing doctors all the way down to the first-year residents. I don't know about you, but I wouldn't want to be treated at that hospital. And the reason why is because I don't know who the good doctors are. Most voters don't. And as it turns out, most voters don't know who the good lawyers are and who the good judges are. So the decisions that are frequently made at the polls wind up often not being very informed, and there's another problem.
- **10:11:55** MILLHISER
  So, going back to the hospital, imagine there's a drug company, and that drug company knows there's a particular doctor who will prescribe their drug over and over again and make them a lot of money. So that drug company decides to spend $1 million running an ad campaign to promote their candidate as the head of cardiology at that hospital. Well, that's what we're seeing in our state judiciaries.
- **10:12:20** REHM
  And how do you think the Supreme Court Citizens United decision has affected the process of selecting or electing judges?
- **10:12:34** MILLHISER
  Well, so Citizens United said that corporations and unions can spend unlimited amounts of money to influence elections. It also clarified to the extent there was confusion that wealthy individuals can spend as much as they want as well. And before Citizens United, I think, there was a steady stream of people wanting to influence judges who were spending money to try to buy up seats on state Supreme Courts and lower courts. That stream has now turned into a flood.
- **10:13:05** REHM
  Ian Millhiser, he's with the Center for American Progress. And turning to you, Scott Gaylord, what do you see as the pros and cons of the different processes in place today of either selecting or electing judges?
- **10:13:29** PROF. SCOTT GAYLORD
  Well, certainly I think it's obviously an extremely important position, as both Ian and Charlie have mentioned, and a lot of people just are unaware of it. But I guess I take the view sort of as Churchill famously stated, "Democracy is the worst form of government except for all the others." To me, judicial elections probably fit in the same category. I mean, there are different concerns. There's no perfect way to select judges.
- **10:13:50** PROF. SCOTT GAYLORD
  And I think in large measure you need to step back, and people need to consider what we want from the judiciary. What are the goals that we seek from a judiciary? And then see what are the various pluses and minuses. Again, none are going to be perfect. But, I mean, three big ones to think about for your listeners would be accountability, independence and qualifications, and a lot of concern over independence.

- **10:14:11** PROF. SCOTT GAYLORD
  And if there's, you know, hard proof that judges are being bought, then that's certainly a concern and can undermine the system. But the judicial elections, of course, allow for the opportunity to vote those people out of office. And so if you have someone who is beholden to a particular interest, be that through elections or in the appointment scheme, I mean, we certainly can talk about the threats of politics in that as well.
- **10:14:31** PROF. SCOTT GAYLORD
  I think in your lead-in to the show, you mentioned how politics were in the process generally. And we see that in other forms of selection methods as well, so that becomes important. And with respect to accountability, certainly elections provide a direct way for the people to hold the electorate accountable. And in terms of that, you know, it's important to able to get a message out, that it -- that takes money in order to campaign and to let people know what one's views are, and those views can be political.
- **10:15:00** PROF. SCOTT GAYLORD
  I don't think anyone will challenge the view that judges are political at some level. A legal realist sort of really harped on this at the turn of the 20th century. We see that with the nomination and confirmation process in the federal system now that it's highly political and that the views of judges on things from various statutory construction, federalism, separation of powers, judicial restraint, all bear on how they decide cases.
- **10:15:24** PROF. SCOTT GAYLORD
  And if that's true whether they're appointed or elected, and as a result, I think it's important for citizens in the states across the country to know that and be able to respond accordingly in terms of their voting.
- **10:15:35** REHM
  Scott Gaylord, he is associate professor of law at Elon University School of Law. If you'd like to join us, call us, 800-433-8850. Ian Millhiser, no perfect way, so politics are always going to be part of it. Tell me why the Center for American Progress decided to take a hard look at this.
- **10:16:09** MILLHISER
  Sure thing. So I agree that politics are a problem in the judiciary. You want a judiciary that's non-ideological, and we only have to look at our U.S. Supreme Court to realize that, you know, the party of the president who appoints the judge has a lot to do with what the judge winds up doing when they get on the bench. But there's another equally important interest, and that's that we don't just want judges who are non-ideological. We want judges who are not self-interested.
- **10:16:37** MILLHISER
  And the problem that we're seeing in states that have elected judges is that you have corporations who have a case pending in front of the court, giving money to the judges on the court when they have an election coming.

- **10:16:51** REHM
  So nobody is recusing himself when perhaps a donor is involved in a court case that he or she is hearing.
- **10:17:03** MILLHISER
  In many cases, it's up to the judge. You know, in the Wisconsin Supreme Court, recently on a 4-3 split, enacted a new ethics rule saying that, oh, it's perfectly fine for judges to sit on many cases involving their donors. Texas has had a problem with this for a long time. There was a scandal about, I believe, six or seven years ago when President Bush elevated a member of the Texas Supreme Court to the 5th Circuit.
- **10:17:30** MILLHISER
  And it turns out that this woman had taken tens of thousands of dollars in campaign donation from Enron and then had turned around and ruled in a case involving Enron that was worth $15 million to the company. So politics are important, but it is just as important that judges don't have an interest in the case that they're deciding. And we're seeing, in no small part because of Citizen's United, more and more conflicts of interest for judges.
- **10:17:57** REHM
  More and more conflicts of interest, Charlie Hall.
- **10:18:01** HALL
  Yeah. And also take a step back. Why is this a concern? People don't usually think about judicial elections.
- **10:18:06** REHM
  Right.
- **10:18:06** HALL
  But starting in 2000, there was an explosion of money from special interest, not only corporations but also trial lawyers. There was really a national battle to gain control of these courts because they decide cases worth billions of dollars, and it really has raised a new specter of, can you be fair when that much money is on the table?
- **10:18:27** REHM
  Charlie Hall, he is editor of Justice at Stake. We'll take a short break. When we come back, we'll talk about a particular case in West Virginia, oral arguments being heard today.

Wisconsin's Supreme Court race this spring is likely to intensify the already heated national debate over judicial selection in the states. From the hyperbolic rhetoric in media reports, one would think that the very

Opinions

Why we should keep judicial elections

By **Chris W. Bonneau**
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legitimacy of state courts is at stake when ignorant voters are allowed to decide whether judges should retain their jobs. The New York Times editorial board lamented last month: "Whoever ultimately gets the job, all of Wisconsin has lost. This nasty, highly politicized race is raising serious questions about the impartiality of the state's highest court."

Powerful opponents of judicial elections — which include the American Bar Association, Justice at Stake and the American Judicature Society, as well as former Supreme Court justice Sandra Day O'Connor — have spent countless hours and funds to eradicate elections. O'Connor even campaigned on behalf of a Nevada ballot measure that would have eliminated the state's judicial elections system, appearing in television ads. Critics tend to cloak their activity in "good government" rhetoric, arguing that the election process erodes public confidence in the courts by injecting politics into the judicial process and threatens judicial independence as judges are dependent on the public to retain their jobs. But political scientists have been examining judicial elections for some time and have amassed considerable empirical evidence in this area. The data suggest:

l There is no evidence that elections cause voters to view judicial institutions as less legitimate. In 2008 and 2009, Washington University professor James Gibson, in a series of survey experiments, found that while particular campaign contributions can lead to legitimacy concerns, there are no such consequences when candidates engage in policy talk, negative ads or other ordinary incidents of a judicial race. Additionally, according to Gibson's data, the net effects of elections are still positive in terms of public perception of the judiciary.

l There is no difference, other things being equal, in the quality of judges who emerge from elections as opposed to appointments. Law professors Stephen Choi, Mitu Gulati and Eric Posner recently found that appointed judges not only do not perform at a higher level than elected judges in terms of opinion quality and output but also that elected judges do not appear to be less independent than appointed judges. The authors were appropriately cautious in interpreting their findings, but any fair reading of their results suggests that elected judges are, at worst, equal to appointed judges in quality and independence.

l Campaign spending makes elections more competitive. As my research has shown, just as in elections more generally, the more money challengers spend trying to unseat an incumbent, the better they perform with the electorate. Campaign spending thus has positive effects in these elections. Moreover, stringent

campaign finance limitations reduce the amounts a challenger can spend, thus making the election less competitive and increasing the incumbency advantage. Campaign spending is key to providing voters with a meaningful choice.

l There is no proof that elected judges are for sale. Critics of judicial elections frequently point to *Caperton v. Massey* as an example of how judges can be "bought." This West Virginia case, in which a judge supported by the Massey coal company won election and then did not recuse himself regarding the company's appeal of a $50 million verdict, includes several facts that are routinely ignored. A news release from the West Virginia Court of Appeals noted that Chief Justice Brent Benjamin — the judge who allegedly benefited from millions of dollars in campaign ads paid for by the chief executive of Massey Energy — voted against Massey Energy or its subsidiaries 81.6 percent of the time, including in the *Caperton* case. These votes "cost" Massey Energy approximately $317 million. In contrast, Massey "benefited" from Benjamin's votes 18.4 percent of the time, for a total sum of about $53.5 million. So, was Benjamin's vote "bought"? The numbers are unconvincing. More generally, there is no systematic evidence to date that judges' votes are influenced by campaign contributions.

Little has also been said about the biases in the systems with which critics would like to replace elections. No method is perfect. But, unlike the "merit" commission process most frequently offered as an alternative — in which judges are selected by the governor off a list formulated by political and legal elites and then retain their jobs simply by receiving a majority of "Yes" votes in an uncompetitive election — elections are at least transparent processes open to the public.

In the debate so far, many of the arguments have been based on rhetoric, not fact. It is important to remember that efforts to maximize judicial "independence" from the electorate can also maximize independence from the law and the Constitution. Without a mechanism for effectively holding judges accountable, judges are free to "go rogue" and make decisions based solely on their political views. Is that better than a campaign season every now and then?

Chris W. Bonneau is an associate professor of political science at the University of Pittsburgh and co-author, with Melinda Gan Hall, of the book "In Defense of Judicial Elections."