

the judges we choose:

HOW JUDICIAL SELECTION METHODS SHAPE STATE COURTS



WHY THIS MATTERS

State judges have an enormous impact on the law and the rights of individual citizens. While major federal appellate court and U.S. Supreme Court decisions attract attention, most of our disputes are resolved in state courts. As judicial systems are critically important in securing limited government, protecting equal rights, and upholding human dignity, all citizens should care about how we select judges.

WHAT MAKES A GOOD JUDGE?

A judge's job is to faithfully interpret the laws as written and not impose judicial policy preferences. To do that successfully, every judge must have the aptitude and character commensurate with judging — that means every judge should combine education, experience, intellectual rigor, understanding of the law, appropriate temperament, compassion, and commitment to justice.

WHAT CAN YOU DO TO IMPROVE STATE JUDICIARIES?

1 ELIMINATE THE MISSOURI PLAN

The Missouri Plan is a failed experiment — it was intended to create more competent and independent state judiciaries, but it has done neither. This method outsources the selection of judges to a board of unelected bureaucrats. Most judicial selection commissions are enshrined in state constitutions, so engagement in state constitutional reform is often necessary to undo this failed top-down system.

2 ADVOCATE FOR LEGISLATIVE CHANGE

Allow judges to fully inform voters about who they are, including their party affiliation. Party affiliation is one of the most valuable pieces of information a judge can give a voter about their ideology and judicial philosophy. Restricting judicial speech and association in the name of an unrealized “independence” from partisan politics is wrong; these restrictions should be eliminated.

3 ADVOCATE FOR BETTER JUDGES

Regardless of the system, voter education about judicial candidates and legislative and gubernatorial outreach make a difference in which judge is appointed and confirmed. Those who are qualified should also seek to serve on judicial nominating commissions to improve the quality of these selections. Judicial selection systems are not set in stone — there is always an opportunity to make a small difference toward producing a better state judiciary.

WHICH JUDICIAL PHILOSOPHY IS BEST?

EMBRACE Originalism and Textualism: This philosophy follows the principle that a judge's job is to interpret the law as written (i.e., textualism) and that the meaning of that text is the public meaning it had when the law was enacted (i.e., originalism). It recognizes the basic principles of separation of powers — that it's the legislature's job to enact new laws and not a judge's job to legislate from the bench.

REJECT Living Constitutionalism: This philosophy hinges on the idea that the meaning of constitutions, or even statutes, changes over time (outside of the amendment process) to reflect a particular purpose. It leads down a perilous path to "judicial activism." This philosophy does not comport with the proper role of the judiciary. Judges' personal or political proclivities should be left at the courtroom door. Judges should say what the law is, while political questions about what the law should be are left to legislators and voters.

HOW DO STATES SELECT THEIR JUDGES?

There are two options that are statistically shown to reduce the proliferation of activist judges in state judiciaries. The best is the federal model; a close second is a partisan election. States under the Missouri Plan and with nonpartisan elections produce fewer originalist judges and produce less judicial accountability.

• GUBERNATORIAL APPOINTMENT (FEDERAL MODEL)

Like the federal model, judges are nominated by the governor and approved with the consent of the legislature.

• PARTISAN ELECTIONS

Judges can campaign and are elected directly by voters who know the candidates' party affiliation.

• LEGISLATIVE ELECTIONS

Judges are selected by a majority vote of the state legislature (only Virginia and South Carolina select judges in this way).

• NONPARTISAN ELECTIONS

Judges are elected directly by voters but are prohibited from revealing their partisan affiliations.

• MISSOURI PLAN

The governor must choose a judge from a short list of candidates compiled by an unelected and often biased nominating commission.

TO LEARN MORE ABOUT JUDICIAL SELECTION AND HOW YOUR STATE CHOOSES ITS JUDGES, FOLLOW THE QR CODE OR CONTACT:

Thomas Kimbrell at TKimbrell@AFPHQ.org

