

## Judicial Selection: an Overview of the Issues<sup>1</sup>

The choice of a method to select judges is much more complex than it might seem. North Carolina has approximately 400 judges, of whom more than half (about 270) are district judges. Their roles are very different from those of NC's 170 legislators:

- Whereas a typical bill requires that all 170 legislators vote it up or down, individual judges have wide authority in managing cases coming before them, especially in non-jury trials and lawsuits. Judges make life-changing decisions every day, from child-custody to criminal sentences.
- The NC courts disposed of more than 2.8 million cases in 2015-16, covering everything from traffic infractions to constitutional matters. More than half (1.5 million) were criminal cases. Unlike legislation, the vast majority of court cases proceed outside the public eye, visible only to the parties directly concerned.

The character, impartiality, and judgment of our 400 judges have a major impact on how these cases are decided. These attributes, unlike legal credentials and experience, are very hard for the public (or anyone) to observe or measure directly. How we select judges is therefore key to the quality of our courts.

In recent months, the legislature has greatly accelerated the pace and scope of changes proposed for state courts. Legislators have openly stated in committee hearings their desire to exert control over the judiciary by changing how they are selected. These developments have made North Carolina a front-line state in the emerging battle to preserve our nation's independent, impartial courts.

Recent changes to judicial selection:	Changes to be considered in 2018
<ul style="list-style-type: none"><li>• Made judicial elections partisan</li><li>• Canceled public funding for judicial elections</li><li>• Reduced the size of the Court of Appeals to prevent the governor naming replacements</li><li>• Provided for candidates of the governor's party to be listed first (before races were made partisan)</li><li>• Canceled judicial primaries for 2018</li></ul>	<ul style="list-style-type: none"><li>• Redrawing judicial districts in a highly partisan manner</li><li>• Eliminating judicial elections in favor of legislative appointment</li><li>• Reducing judicial terms from 4-8 years to just 2 years, creating "permanent elections"</li></ul>

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<sup>1</sup> This is a draft League document prepared for ongoing League work on judicial reform. Author: Dr. Jennifer Bremer, State Coordinator for Fair Elections. Not for quotation. Comments welcome.

**What’s wrong with how we select judges now? <sup>2</sup>**

Politicization of the judiciary can occur under any system of judicial selection, but it appears to be more likely under some systems than others. NYU’s Brennan Center, a leading authority on judicial and electoral reform, argues that judicial elections are more likely to lead to problems than a well-designed system of merit selection, where judges are screened by a commission, appointed by the governor, and, in some states, then confirmed by the senate or general assembly. Brennan has identified several problems that can undermine judicial selection systems and threaten the fairness of state courts. The table below summarizes these challenges and very briefly summarizes where these issues stand in North Carolina.

**Emerging Threats to the Independence and Impartiality of State Courts**

Challenge	Situation in North Carolina
<p>Politicized judicial elections undermine judicial integrity. In particular, judicial races are becoming much more expensive, risking independence, creating potential conflicts of interest, and discouraging judicial diversity</p>	<p>North Carolina adopted public funding for judicial campaigns and limited expenditures in 2004 (a League victory!). This was repealed in 2013, a move opposed by “business and civic leaders, former governors, a dozen former presidents of the State Bar Association, the American Bar Association and hundreds of other public leaders”*. The loss of public funding contributes to skyrocketing campaign costs. In the first state supreme court race after this change, in 2014, candidates spent over \$6 million and PACS \$2 million.*</p>
<p>Judicial campaigns have become more overtly political and partisan.</p>	<p>With all NC judicial races now partisan, candidates will be under pressure to endorse party platforms, including issues on which they may rule. In the 2014 supreme court race, an out-of-state PAC spent \$900,000 on an ad falsely accusing one candidate of ruling in favor of child molesters.* Earlier this fall, the NC House of Representatives adopted a redistricting plan that has very high efficiency gaps (10-11%, far above the 7.5% cutoff proposed in Gill v Whitford), thus qualifying as a partisan gerrymander. The plan also disadvantages minority judges through high rates of “double-bunking,” (drawing two sitting judges into one district, ensuring one is not re-elected).</p>
<p>Threats of political retaliation put pressure on judges in deciding cases: research suggests that in both elective and appointive systems, concerns about job security are affecting how judges rule in certain high-visibility cases</p>	<p>“A 2015 study found that the more TV ads aired during state supreme court elections, the less likely justices are to vote in favor of criminal defendants....Several studies have also shown that the more campaign contributions from business interests justices receive, the more likely they are to vote for business litigants appearing before them in court.”* Former judge Don Stephens, appearing at a recent NCPW program, reported that political pressure is already being exerted against judges in the run-up to the January special session.</p>
<p>*Melissa Kromm, <a href="#">NC should restore public funding for judicial elections,</a>” News &amp; Observer, Oct. 19, 2016.</p>	

<sup>2</sup> This section draws heavily on Alicia Bannon, [Rethinking Judicial Selection in State Courts](#), Brennan Center for Justice, New York University School of Law, 2016, including direct quotation and paraphrasing.

## So, How Should We Select Judges?

The core criterion for designing a judicial selection system is how well it performs in selecting judges who are professionally qualified, fair and impartial, and capable of managing both inside and outside the courtroom. It should also promote and protect judicial independence, transparency, citizen confidence in the courts, and the accountability of judges for their performance once in office.

A major problem is that judicial independence and accountability conflict with each other. How to hold judges accountable while ensuring they remain independent of public opinion? A second challenge is that, even though polls show voters favor judicial election (a mechanism for accountability), they rarely pay close attention to these races, particularly for district and superior court, so it's unclear whether elections actually bring accountability. Elections are required under the NC Constitution, however, unless amended. A previous effort to replace competitive elections for the renewal of sitting justices with up-or-down "retention" elections was declared unconstitutional.

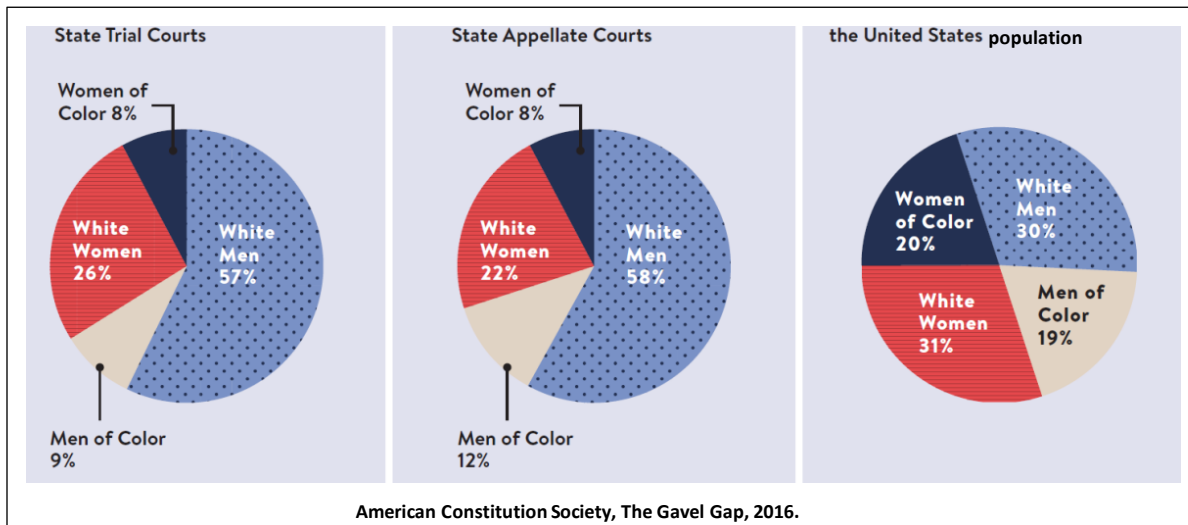
The 1995 *Commission on the Future of Justice and the Courts in North Carolina* concluded that judges should be (in descending order of importance): "honest, fair, unbiased, good managers, hardworking, consistent, and speedy." Most people would agree that these are all important, but how to assess them and how to define a process that in fact selects judges with these qualities?

These criteria, however, leave out an important factor: judicial diversity. A recent study by the American Constitution Society found that the composition of America's judiciary does not reflect the makeup of our population, as shown in the figure below. North Carolina's diversity gap is larger than the national averages.

Other considerations in designing a judicial selection include: What is the role of judges and how should their job performance be assessed? Should the same system be used for trial and appellate courts? Perhaps most importantly, who should do the selecting and how should it be done?

**NC Code of Judicial Conduct:** A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.... A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

US states have come up with very different methods of answering these questions, with varying degrees of success in meeting the criteria above.



The League has not yet established an overall policy on judicial selection methods in North Carolina (although we have adopted a position against drawing judicial maps for partisan advantage). We believe further study is needed to determine the best system for our state. Judicial election remains highly popular with the voters but poses increasing risks of politicization as races have been made partisan and the flow of outside money into judicial races has accelerated. Leading groups within the legal profession have long argued that a well-designed merit selection system would improve judicial selection in North Carolina and are reportedly looking again at how to design such a system and push for its adoption.

Judicial selection is clearly a case where the devil is in the details: a state-of-the-art election system could perform well, and so could a state-of-the-art merit selection system, but both types of systems can also be set up to be biased, politicized, and opaque and to make judges accountable to politicians and funders, rather than to the citizens, the constitution, and the law.

**North Carolina State Constitution  
ARTICLE I  
DECLARATION OF RIGHTS**

**Sec. 6. Separation of powers.**

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.