

Judicial Reform as a Tug of War: How Ideological Differences Between Politicians and the Bar Explain Attempts at Judicial Reform

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What predicts attempts at judicial reform? We develop a broad, generalizable framework that both explains and predicts attempts at judicial reform. Specifically, we explore the political tug of war created by the polarization between the bar and political actors, in tandem with existing judicial selection mechanisms. The more liberal the bar and the more conservative political actors, the greater the incentive political actors will have to introduce ideology into judicial selection. (And, vice versa, the more conservative the bar and the more liberal political actors, the greater incentive political actors will have to introduce ideology into judicial selection.) Understanding this dynamic, we argue, is key to both explaining and predicting attempts at judicial reform. For example, under most ideological configurations, conservatives will, depending on how liberal they perceive the bar to be, push reform efforts toward partisan elections and executive appointments, while liberals will work to maintain merit-oriented commissions. We explore the contours of this predictive framework with three in-depth, illustrative case studies: Florida in 2001, Kansas in the 2010s, and North Carolina in 2016.

INTRODUCTION.....	1782
I. JUDICIAL REFORM BACKGROUND	1784
A. <i>Independence and Establishment of American Courts</i>	1784

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II.	WHAT PREDICTS JUDICIAL REFORM ATTEMPTS IN THE MODERN ERA?	1787
A.	<i>A Predictive Theory of Judicial Reform</i>	1788
B.	<i>Hypothetical Examples</i>	1789
III.	THREE CASE STUDIES OF JUDICIAL REFORM ATTEMPTS: FLORIDA, KANSAS, AND NORTH CAROLINA	1793
A.	<i>A Liberal Court Goes Too Far: The Case of Florida in 2001</i>	1793
1.	Judicial Selection at Time of Reform.....	1795
2.	Ideology of the Bar and of Political Actors	1795
3.	Proposed Judicial Reforms	1796
B.	<i>Politicians Move to the Right: Kansas in the 2010s</i>	1798
1.	Judicial Selection at Time of Attempted Reform	1799
2.	Ideology of the Bar and of Political Actors	1800
3.	Proposed Judicial Reforms	1801
C.	<i>Politicians Versus Voters: North Carolina in 2016</i>	1803
1.	Judicial Selection at Time of Attempted Reform	1803
2.	Ideology of the Bar and of Political Actors	1805
3.	Proposed Judicial Reforms	1806
4.	Voters' Versus Politicians' Intent.....	1808
	CONCLUSION	1809

INTRODUCTION

In 2001, the Florida Supreme Court gained national notoriety when it ordered the initial recounting of ballots in the 2000 presidential election race between Al Gore and George W. Bush—prolonging the election and leading to the eventual involvement of the U.S. Supreme Court. For many Democrats and liberals, the involvement of the Florida court was a welcome revival of their waning hopes for the White House. But for many Republicans and conservatives, the actions of the Florida Supreme Court in ordering a recount were tantamount to nothing more than an outrageous involvement of a liberal “activist” court in the election process. This anger soon turned to action: in response, the state legislature, with the support of then-Governor Jeb Bush, a Republican, enacted several reform measures designed to lessen the power of the Florida Bar Association over the Florida Supreme Court. These reforms, in tandem with years of Republican governors, have scaled

back the liberal nature of the court. In 2001, the state supreme court was comprised of seven Democrats; today, it is comprised of four Republicans, two Democrats, and one justice jointly nominated by an outgoing Democrat and an incoming Republican. No longer is the Florida Supreme Court a solidly liberal institution.

The case of the Florida Supreme Court illustrates the important issue of judicial reform, which we address in this Article. How states choose their judges is a product of deep political forces and tensions, and political actors may have strong reasons to favor one kind of selection mechanism over another. In addition, and again illustrated by the case of Florida, these circumstances can change depending not just on who is in power, but which way the bar leans. Thus, in the case of Florida, the perceived “liberal bias” of the Florida Bar Association led the state’s Republican political establishment to attempt to reduce its influence. This has been echoed in many other states, several of which have moved to reduce what they perceive to be the undue influence of a “liberal” bar.

We incorporate these ideas into a broad, generalizable argument that both explains and predicts attempts at judicial reform. Specifically, we explore various dynamics created by ideological disagreement between the bar and political actors, in tandem with existing judicial selection mechanisms. Our argument is simple: the more liberal the bar and the more conservative political actors, the greater the incentives political actors will have to introduce ideology into judicial selection and to limit the formal role played by the bar in judicial selection. (And, vice versa, the more conservative the bar and the more liberal political actors, the greater the incentive political actors will have to introduce ideology into judicial selection.) The actual sequence of events necessarily depends on the existing judicial selection mechanisms. For example, as we argue below, conservatives would be loath to move away from a judicial selection mechanism that naturally favors them, as would liberals. Thus, we explore the consequences of our framework in terms of efforts to reform *existing* judicial selection mechanisms, oftentimes in the context of political attempts to move away from merit-oriented commissions.

We note that our arguments here bypass some of the normative considerations commonly raised by scholars of judicial reform—which tend to center around judicial independence, the “quality” of candidates to judicial office, and whether judges are unduly influenced by partisanship or campaigning concerns. While those are, of course, salient concerns, our arguments here center more on what kinds of selection mechanisms will benefit political parties from *their strategic perspective*. That is, Democrats will prefer more liberal judges and

Republicans will prefer more conservative judges. Indeed, our argument is that it is the ideology of the judiciary—as opposed to genuine concerns about legitimacy or qualifications—that ultimately shape political actors’ preferences on how judges should be selected, perhaps superseding other considerations.

This Article is organized as follows. We begin in Part I by providing a short context on the history of judicial reform attempts. This discussion is by no means exhaustive, but it does provide a useful roadmap for contextualizing current reform efforts. In Part II, we provide a theoretical discussion of the forces that we believe will give rise to judicial reform attempts—including the tug of war between state bar associations and political actors. Specifically, we delineate possible outcomes under various hypothetical scenarios, including (1) a liberal bar, conservative political actors, and a conservative judiciary; (2) a liberal bar, conservative actors, and a liberal judiciary; and (3) a conservative bar, conservative actors, and a liberal judiciary. Such dynamics, we argue, are key to both understanding and predicting attempts at judicial reform. Next, in Part III, we contextualize these further with three illustrative case studies: (1) Florida in 2001, (2) Kansas in the 2010s, and (3) North Carolina in 2016. Lastly, we conclude by noting what our argument means—and does not mean—for the composition of the judiciary and for attempts at judicial reform.

I. JUDICIAL REFORM BACKGROUND

A short background on the history of judicial reform provides context for the discussion to follow.

A. Independence and Establishment of American Courts

At the time of the country’s founding, Anglo-American judges were generally appointed by the Crown. This political tradition was passed on to the colonies, whose early judges were also Crown appointments and, accordingly, representatives of the English monarchy. In the uneasy transition into American independence, this practice was generally followed but modified to suit the needs of the new democracy: the founders thus established a federal judiciary (modeled on the state systems of Massachusetts and Virginia) in which the executive would make appointments. As a check on the power of the executive, however, the lifetime appointment of judges was conditioned on the “advice and consent” of the Senate. These checks, according to Alexander Hamilton in Federalist Number 76, would provide “an excellent check upon a spirit of favoritism in the President, and would

tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”¹ In addition, the federal system was similar to those used by the first states joining the union—namely states in New England and along the eastern seaboard.² For example, “[o]f these original states, seven provided for selection of judges by the legislature, five by governor and council, and one, Delaware, by governor and legislature.”³ Indeed, today, several of these Northeastern states, including Massachusetts, New Hampshire, and New Jersey, still have a judicial selection system that relies on some sort of executive appointment.

The 1830s and 1840s not only saw territorial expansion and the admission of new states into the union, but a rising interest in populism and more direct rule. For many, the idea of an elite judiciary, appointed for life by the executive, undermined this desire for self-rule and smacked of elitism and privilege; these sentiments were no doubt stoked by the fact that many lawyers were educated in faraway areas, such as Boston and New Haven, and had no connection to either local customs or to the local business and political elite.

These increasing populist sentiments ripened the movement away from executive appointments and toward judicial elections. By 1812, the first local judges were being elected in Georgia, with Mississippi being the first state to have an entirely elected judiciary.⁴ Even states that had a long history of executive appointments moved toward judicial elections, starting with New York at its constitutional convention in 1846. This included Georgia, Maryland, Virginia, and Pennsylvania—all of which now have either hybrid or elected judicial systems.⁵ These early elected judiciaries, however, relied primarily on partisan elections, meaning either that the partisan affiliation of the judges was available to voters or that the slate of judicial candidates presented was somehow tied to the parties. These partisan pressures in turn opened up significant venues for political parties to exercise control over elected judiciaries. The situation was particularly contested in New York City, in which the notorious Tammany Hall network of Democratic Party operatives “aroused public indignation by

1. THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. This is not surprising, as the judicial systems of two colonies—Virginia and Massachusetts—were explicitly considered examples for the federal system that was to follow.

3. Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966).

4. *Id.*

5. As Winters notes, “New Hampshire, Massachusetts, Connecticut, Rhode Island, New Jersey, Delaware, and South Carolina resisted and to this day have never had elected judges.” *Id.* at 1082–83.

ousting able judges and putting in incompetent ones.”⁶ Thus, the move toward judicial elections was neither without controversy nor universally supported.

In response to these questionable practices, the pendulum swung back toward appointments systems in the post–Civil War period. New York did not return to an appointments-based system, but some states did—these included Vermont and Mississippi. It was also around this time period that other states began experimenting with nonpartisan electoral systems, particularly around the turn of the twentieth century. This included states in the upper and industrialized Midwest (Ohio, Michigan) and in the Sun Belt (for example, Arizona).

However, the continued use of judicial elections—even nonpartisan ones—discomfited intellectual elites and members of the legal academy. Roscoe Pound, future dean of Harvard Law School, noted in a 1906 speech to the American Bar Association that part of the reason why Americans were frustrated with the administration of justice was due to “[p]utting courts into politics and compelling judges to become politicians, [which] in many jurisdictions has almost destroyed the traditional respect for the bench.”⁷ Undergirding these arguments was a concern that those elected judges would not just lack independence, but that they reflected the worst that the bar could offer—less refined in intellect and more sensitive to the crass partisanship of electoral politics.

Perhaps the strongest advocate for reconsidering judicial selection systems that relied on judicial elections was Albert M. Kales, a professor at Northwestern Law School and one of the founders of the American Judicature Society (and its director from the Society’s start in 1913 until his death in 1922). Kales took a hard stance against the political machinery behind judicial elections. Discussing judicial selection in his hometown of Chicago, for example, he noted that

our judges, while they go through the form of election, are not selected by the people at all. They are appointed. The appointing power is lodged with the leaders of the party machines. These men appoint the nominees. . . . The voter only selects which of two or three appointing powers he prefers. Whichever way he votes he merely approves an appointment by party organization leaders.⁸

In response to these developments, Kales encouraged something different—a system of choosing candidates that he believed was both more transparent and also more deeply engaged with the bar and its

6. *Id.* at 1083.

7. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1, 23 (1956).

8. Albert M. Kales, *Methods of Selecting and Retiring Judges*, 11 J. AM. JUDICATURE SOC’Y 133, 134–35 (1928).

expertise. Specifically, he advocated a system whereby a nonpartisan group of lawyers would name a slate of judicial candidates that voters (or even the executive) could then choose from.

These intellectual efforts marked the beginnings of “merit plan” systems,⁹ but it was not until 1937 that the American Bar Association endorsed these types of plans. It was another three years before any state enacted a state-wide merit-oriented system—with Missouri doing so in 1940. (These merit-oriented plans are thus known as “Missouri Plans.”) In the twenty-five years that followed, nearly a dozen states included some sort of merit commission in their judicial selection systems. These include Alabama (1950), Kansas (1958), Iowa (1962), Nebraska (1962), Illinois (1962), Florida (1964), Colorado (1964), Utah (1965), and North Dakota (1965). By 1990, a plurality of states had moved to a merit-oriented commission system. And, as of 2016, a total of twenty-six states used merit commissions to select judges.¹⁰

In terms of the discussion that follows, an important point is that nearly all of the judicial reform attempts in the late twentieth century involved states moving away from partisan and nonpartisan elections and toward merit-oriented commissions, as opposed to gubernatorial (or legislative) appointments. As we discuss below, however, judicial reform attempts today usually involve states moving *away* from the use of merit-oriented commissions.

II. WHAT PREDICTS JUDICIAL REFORM ATTEMPTS IN THE MODERN ERA?

The previous discussion explained how the various states developed their patchwork of judicial selection systems, with a number using merit-oriented criteria, others using elections, and still others using executive appointments. However, these are by no means static, and, as the example of Florida in the Introduction demonstrates, political actors across the country are constantly seeking out ways to modify judicial selection systems. But what predicts judicial reform attempts? And what kind of reforms would we hope to predict?

9. For more on the historical origins of merit selection, and of the resulting political implications, see Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 677–78 (2009).

10. For a historical summary of judicial selection methods in the states dating back to the nation’s founding, see *Judicial Selection in the States*, BALLOTPEdia, https://ballotpedia.org/Judicial_selection_in_the_states (last visited Sept. 28, 2017) [<https://perma.cc/P4A-JQX4>].

A. A Predictive Theory of Judicial Reform

A useful starting point in developing a framework that predicts the timing and nature of judicial reform attempts is the important fact that all judges were at some point attorneys. That is, judges are, with rare exceptions, drawn from the pool of attorneys available in a state.¹¹ This means that the ideological leanings of the bar set the conditions and provide incentives for how political actors will approach judicial selection. For example, if the bar—that is, the pool of attorneys in a given state—tends to be more liberal, then this would introduce incentives for more conservative politicians to restrict the role of the bar in judicial selection. Contrariwise, for more liberal political actors, this would create incentives for them to seek out ways to involve the bar; after all, in such cases, the bar's interest and the interests of political actors are aligned. The opposite scenarios would unfold if attorneys skew conservative: if the bar skews conservative, then this would create incentives for more liberal politicians to restrict the role of the bar. Contrariwise, for more conservative politicians, having a more conservative bar involved in the selection of judges would be completely acceptable, since the interests of the two would be in ideological alignment. This simple tension between the bar and political actors characterizes the “tug of war” over the judiciary.

This tug of war is, however, hardly taking place on neutral territory. The judicial selection mechanism in place plays a significant role in determining the ideological tenor of the judiciary, thus creating incentives for increasing politicization or, alternatively, leaving things as is. For example, when the bar is left-leaning, liberal political actors might be content with a judicial system that heavily involves state and local bar associations; in such a scenario, conservatives might be content with (depending on political configurations) executive or legislative appointments. Regardless of the leanings of political actors, a merit-oriented system—such as the Missouri plan—will result in a judiciary that more or less resembles the ideological profile of attorneys.¹² On the other hand, a selection mechanism that allows ideology to be a factor in the selection of judges—for example, gubernatorial selection or partisan elections—gives political actors

11. There could, of course, be exceptions to this. For example, voters could, in some circumstances, probably consider judicial candidates coming in from out of state. To our knowledge, this is rare.

12. These are points made throughout by Fitzpatrick, *supra* note 9, at 676 (“[M]erit selection may simply *move* the politics of judicial selection into closer alignment with the ideological preferences of the bar.”).

more flexibility in manipulating the ultimate ideology of the judicial bench.

Thus, we have two competing forces. Political actors of both conservative and liberal stripes will want judges who resemble them ideologically and, in instances to the contrary, will look to judicial reforms to accomplish this simple goal. However, the nature of judicial reforms will depend on the existing legal climate and the political interests of the bar, taken in tandem with the existing judicial selection mechanism. The two forces at play are thus (1) the ideological leanings of the dominant party players and (2) the ideological leanings of the bar. Both of these are grounded within the extant judicial selection systems.

B. Hypothetical Examples

We illustrate some of these scenarios with hypothetical examples. In each of the examples, (1) “*A*” indicates the average ideological position of the professional bar (that is, the attorneys from which judges are drawn); (2) “*P*” indicates the average ideological positioning of politicians;¹³ and (3) “*J*” indicates the average ideological positioning of the judiciary. We assume, we think quite reasonably, that political actors (*P*) will want judges (*J*) to be as ideologically close to them as possible. We also assume that the ideological positioning of attorneys (*A*) and politicians (*P*) might be different.

For example, consider a situation like Figure 1. In this scenario, attorneys are on average to the left politically, and political actors are on average to the right. This is not an unusual scenario. As documented by several studies,¹⁴ nearly every state has a professional bar that is more liberal than the state’s political actors, and it is not uncommon for Republican-dominated legislatures in solidly conservative states to coexist with liberal-leaning bars. This “red state, blue bar” dilemma is often a source of political tension and can give rise to heated interbranch conflicts regarding the role of the bar. This is the case, for

13. For example, this would be the average ideology of all state representatives (the general assembly and the state senate) in each state, as well as the ideology of the executive. In our example of North Carolina, discussed below, we consider how the ideological leanings of voters play a role in this dynamic.

14. See, e.g., Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277 (2016); Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Politicize the Judiciary* (Harvard Kennedy Sch. Faculty Research Working Paper Series, Working Paper No. RWP15-001, 2015), <http://ssrn.com/abstract=2577378> [<https://perma.cc/SZ4U-LGQK>]; see also Fitzpatrick, *supra* note 9, at 692–702 (analyzing data from two merit commission states, Tennessee and Missouri).

example, in places like Arkansas, Kansas, Missouri, Montana, North Carolina, New York, Pennsylvania, Washington, and Virginia.¹⁵

FIGURE 1: IDEOLOGICAL ARRANGEMENT WHERE ATTORNEYS ARE TO THE LEFT IDEOLOGICALLY AND POLITICAL ACTORS ARE TO THE RIGHT. JUDGES ARE IN BETWEEN, BUT CLOSER TO POLITICAL ACTORS THAN TO ATTORNEYS.



In the case represented by Figure 1, however, the pertinent political actors have little incentive to change the judicial selection system. Why? The judges in this scenario are already fairly close to the ideological positioning of political actors, and changing the judicial selection system could potentially risk moving judges ideologically closer to the pool of attorneys—and away from the ideology of political actors. Indeed, if political actors attempted to reform the system toward greater inclusion of the bar and its interests—perhaps via a merit-oriented system—then the positioning of *J* would likely move away from *P* and closer to *A*. This would be undesirable from the perspective of the pertinent political actors (although perhaps of interest for more left-leaning political minorities).

Another realistic scenario is presented in Figure 2, which shows a similar pattern in that the average attorney ideology is to the left, while the average political actor's ideology is to the right.¹⁶ This scenario departs from Figure 1, however, in that Figure 2's judges (*J*) are on average closer to the ideological positioning of attorneys than they are to political actors. This scenario characterizes the actual situation in several states, including Kansas, South Carolina, and New Mexico.

15. See Bonica & Sen, *supra* note 14, at 23.

16. This is again consistent with scholarship on the bar and its political leanings, although the polarity could be reversed, and the example and our discussion would still apply.

FIGURE 2: IDEOLOGICAL ARRANGEMENT WHERE ATTORNEYS ARE TO THE LEFT IDEOLOGICALLY AND POLITICAL ACTORS ARE TO THE RIGHT. JUDGES ARE IN BETWEEN, BUT CLOSER TO ATTORNEYS THAN TO POLITICAL ACTORS.



The incentives that political actors face in Figure 2 are different than the incentives in Figure 1. What would our theory say about attempts at judicial reform here? We would expect that, in the long run, this would be an unstable arrangement. Specifically, political actors would over time become frustrated with a judiciary that is out of ideological alignment with themselves (and possibly also with voters, although we find limited evidence of this when we examine the example of North Carolina, below). Indeed, Figure 2 represents a situation ripe for attempts at judicial reform—or, more precisely, at attempts at shifting the ideology of the judiciary to be more in line with the governing party elites.

The nature of the reform in Figure 2 would depend, however, on the existing system of judicial selection. If this was a state in which judges were selected via a merit-oriented commission (or nonpartisan elections, perhaps), we would expect the majority party to attempt to reform the system by strengthening the role of the executive or by making the election process more explicitly partisan. We would also expect relevant political actors—for example, majority-party members in the state assembly—to try to limit the role of the bar in the recruitment or selection of judges. In addition, as we discuss below in the case of North Carolina, in instances where judicial reform might prove unpopular with the public, we might also see attempts to manipulate the overall configuration of the courts—including procedural processes that must be observed—to serve the benefit of the political party in power.

As other scholarship has explored, these two scenarios capture much of what we see across the fifty states.¹⁷ However, we note that a

17. See Fitzpatrick, *supra* note 9, at 683 (examining judicial retention through a merit commission versus partisan election). See generally Bonica & Sen, *supra* note 14, at 9, 23

remaining possibility is that the judiciary is more ideologically extreme (either on the conservative side or on the liberal side) than *both* political actors and attorneys. Figure 3 depicts this kind of arrangement:

FIGURE 3: IDEOLOGICAL ARRANGEMENT WHERE JUDGES ARE IDEOLOGICALLY DISTANT FROM BOTH ATTORNEYS AND LAWYERS.



In Figure 3, *A* and *P* are quite close to each other, but both are distant from *J*. We view this situation as remarkably untenable: both attorneys and political actors are ideologically distant from judges, which means that both entities have an incentive to try to shift the positioning of judges—in this case in the same ideological direction. (Again, the polarities could be reversed, from judges being more liberal to judges being more conservative, but the intuition is the same.) In such scenarios, we would expect that political actors push for judicial reform; however, they would also have no reason to exclude the professional bar in these attempts, since the bar is ideologically aligned with political actors and would help “shift” the judiciary closer. We would therefore not be surprised if judicial reform attempts in these instances would move toward merit-oriented commissions or other systems that involve the bar. We do not rule out that this kind of scenario would also result in attempts to introduce elections (partisan or nonpartisan) or even executive appointments; but, to the extent that merit commissions are politically uncontroversial, we would think that this move would be the most straightforward. Indeed, in a state such as this, judicial reform attempts would be a win-win for both the professional lawyers’ associations and for political actors as a whole.

We conclude this discussion by noting that previous scholarship has suggested that most states fall under the categories described by Figures 1 and 2, which in turn sets the stage for our case studies

(examining partisan elections versus merit retention and their effects on the politicization of the judiciary).

below.¹⁸ Substantially fewer, if any, fall under the situation described by Figure 3.¹⁹ We think the reason why is straightforward: Figure 3 presents an unstable configuration, one in which all of the pertinent parties have an incentive to move forward with judicial reform.

III. THREE CASE STUDIES OF JUDICIAL REFORM ATTEMPTS: FLORIDA, KANSAS, AND NORTH CAROLINA

We now turn to exploring the contours of this predictive paradigm with three diverse examples: (1) Florida in 2001, shortly after the explosive events of *Bush v. Gore*, (2) Kansas following the rise of the Tea Party movement in the late 2000s, and (3) most recently, North Carolina after the extremely divisive general election of 2016. For each of the case studies, we start with a brief overview of the political environment at the time and then discuss the existing method of judicial selection, the ideology of the bar and of political actors, and the nature of proposed reforms.

A. *A Liberal Court Goes Too Far: The Case of Florida in 2001*

As we noted in our Introduction, the Florida Supreme Court took the national stage shortly after the 2000 presidential election. To give some context for the judicial reforms that followed, the election was held on November 7, 2000. It became increasingly clear in the days following the election that the victor would be decided exclusively by Florida, which at that point was too close for officials to call. In response, several Florida counties—including the heavily Democratic areas of Palm Beach and Broward Counties—began the process of recounting ballots cast. However, on November 15, the Florida Secretary of State filed paperwork in the Florida courts to try to stop these recounts, presumably because they would favor Democratic Party nominee Al Gore. These challenges ultimately landed in the Florida Supreme Court, which, on December 8, 2000, issued a 4-3 ruling that ordered statewide recounts to continue.

This ruling was unusual for several reasons. First, the Florida Supreme Court had, at the time, tended to reach mostly unanimous

18. For an overview of the number of states that might fall into these categories, see Bonica & Sen, *supra* note 14, at 22, which compares the average ideology of judges, politicians, and attorneys by state.

19. As noted by Bonica and Sen, only a handful of states appear to fit this profile. *Id.* This includes the interesting case of Connecticut. One possible reason why may be the strong presence of Yale Law School, graduates of which tend to be more liberal than graduates of other law schools. See Bonica et al., *supra* note 14, at 302–04.

rulings,²⁰ making the narrow 4-3 ruling an anomaly. Second, the ruling, unlike most run-of-the-mill state court rulings, had significant nationwide impact, throwing the presidential election into a state of prolonged uncertainty. Lastly, all seven of the judges on the Florida Supreme Court at the time had been appointed by a Democratic governor.²¹ This fact led many—particularly those in national-level politics—to think that the ruling was politically motivated, with the state justices' ideology playing a decisive role.²² For many Republicans and conservatives, the actions of the Florida Supreme Court in ordering a recount were tantamount to nothing more than an outrageous involvement of a liberal court in the election process.²³

With this hyperpartisan context in mind, we now apply our framework to understanding the judicial reforms that followed. As in the other case studies below, we start with (1) judicial selection at the time of reform, followed by (2) ideologies of the bar and of political actors, and then conclude with (3) the nature of reforms.

20. David Firestone, *Contesting the Vote: The Overview; Florida Court Backs Recount; Bush Appealing to U.S. Justices*, N.Y. TIMES (Dec. 9, 2000), <http://www.nytimes.com/2000/12/09/us/contesting-vote-overview-florida-court-backs-recount-bush-appealing-us-justices.html?mcubz=1> [<https://perma.cc/DP93-664V>].

21. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 174 (2008). These were Charles Wells (the Chief Judge), Henry Lee Anstead, Major Harding, Barbara Pariente, Peggy Quince, and Leander Shaw. Note that, while all seven justices had been appointed by Democratic governors, statistical measures of judicial ideology indicate that the court was not uniformly liberal but was instead comprised of liberals and moderates. See Adam Bonica & Maya Sen, *A Common-Space Scaling of the American Judiciary and Legal Profession*, 25 POL. ANALYSIS 114, 117–20 (2017) (explaining framework for measuring ideology). Using the data from Bonica & Sen, *supra*, we calculated that the split in the 4-3 decision is perfectly predicted along ideological lines. See Adam Bonica, *Replication Data for: A Common-Space Scaling of the American Judiciary and Legal Profession*, POL. ANALYSIS DATAVERSE (2016), <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/RPZLMY> [<https://perma.cc/A6XQ-XQF5>] (providing data and coding for Bonica & Sen's *A Common-Space Scaling, supra*). Specifically, the majority was comprised of the four most liberal justices according to the Bonica & Sen data—Anstead, Pariente, Lewis, and Quince—and the dissent was from the three more moderate justices according to the same data—Shaw, Wells, and Harding.

22. Many commentators believed that the lack of credibility of an all-Democrat (and widely recognized as liberal) state supreme court involving itself on behalf of a Democratic candidate was a key reason why the U.S. Supreme Court became involved. TOOBIN, *supra* note 21, at 180. Toobin, for example, notes that “[t]he conservatives, especially Scalia, were outraged that the Florida Supreme Court seemed to be rewriting the state election code. He wanted to slap that court down, at least rhetorically. O’Connor, too, didn’t like the way the Florida justices appeared to be freelancing—and helping Gore.” *Id.*

23. The U.S. Supreme Court eventually intervened and, in its own 5-4 ruling along partisan lines, ended the Florida recounts; Gore conceded to Bush shortly thereafter. See *Bush v. Gore*, 531 U.S. 98 (2000).

1. Judicial Selection at Time of Reform

In 2000, Florida relied on the Missouri Plan to choose its judges.²⁴ According to one overview, “[u]nder this system, a judicial nominating commission composes a list of potential nominees, which is then given to the governor, who selects from among the listed individuals. After serving for one year, the incumbent stands in a retention election and, if successful, serves a term of six years.”²⁵ The Florida bar had an important role to play in these commissions. Specifically, of the nine members on the Judicial Nominating Commission, three were chosen by the governor, three by the Florida Bar Association, and three jointly by the governor and the Bar. This meant that “the political views of the Bar influence the types of individuals recommended for selection and, thus, are material to understanding the political dynamics affecting appellate judicial selection.”²⁶

2. Ideology of the Bar and of Political Actors

Among Florida political observers, the sentiment at the time was that the Florida bar was overwhelmingly left leaning,²⁷ and many Republicans believed this to be the case. For example, in endorsing the proposed judicial reform, one Republican state representative wrote that the Florida bar “has an agenda. Like the [American Bar Association], the Florida bar claims to be non-partisan, yet the Florida bar has appointed more than twice as many Democrats as Republicans to the present Circuit Court JNC. That’s 60% to 25%--hardly a balanced number.”²⁸ The same representative went on to complain that the

sadly unfortunate truth is that the JNC process has gained a reputation for nominating judges based on politics, rather than the qualifications of the applicants. The fact is, in

24. Florida voters chose to change the method of selecting judges in 1976, from nonpartisan elections to a merit commission. For this and more on the history of judicial selection in Florida, see Drew Noble Lanier & Roger Handberg, *In the Eye of the Hurricane: Florida Courts, Judicial Independence, and Politics*, 29 *FORDHAM URB. L.J.* 1029, 1032 (2002). Lanier and Handberg note that the ruling in *Bush v. Gore* was not the first instance of the Florida Supreme Court irking Republican state politicians. *Id.* at 1045. Specifically, “the court came into conflict with the Republican-controlled legislature and Republican Governor [Jeb] Bush in the Spring of 1999 for invalidating laws that would have accelerated death penalty executions in the state in the wake of one inmate being bloodied during an electrocution.” *Id.*

25. *Id.* at 1032 n.12.

26. *Id.* at 1044.

27. See Bonica et al., *supra* note 14, at 298–99, and Bonica & Sen, *supra* note 14, at 21–22, for quantitative measures documenting this. See also Lanier & Handberg, *supra* note 24, at 1044–45, for a discussion of the political environment.

28. Johnnie Byrd, *JNC Reform is Timely*, ASSOCIATED INDUSTRIES FLA. (Jan. 1, 2001), <http://www.aif.com/information/2001/sn010101.html> [https://perma.cc/LRH2-LYJC].

other professions such as medicine, nursing, and real estate, it is the Governor who determines who will serve on their professional boards. The Florida Bar, when selecting nominees, has a vested interest. They will be trying their cases in front of these judges.²⁹

These sentiments appear to have some basis in those studies examining the topic.³⁰

On the other hand, while the Florida bar had a reputation for being liberal, the pertinent political actors leaned to the right ideologically. At the time of the 2000 election and its aftermath, Republicans controlled the executive office (held by then-Governor Jeb Bush, brother of Republican Presidential nominee George W. Bush), the State Senate, and the State House.

3. Proposed Judicial Reforms

According to our theory, Florida in 2000 represented exactly the scenario we would expect to generate judicial reform efforts, driven largely by political actors looking to shift the composition of the judiciary. Three factors point to this. First, the ideology of the bar was significantly to the left in comparison to the ideology of the state's lawmakers, suggesting a configuration like the one we describe in Figure 2. (Again, the relative positioning makes no difference; we likely would have seen the same attempts at reform if the ideology of the bar and the judiciary were significantly to the *right* of state lawmakers.) Second, the state had a merit-oriented system that gave wide latitude to the state's bar association and, by extension, the state's lawyers. Reform that would shift power away from the bar would therefore have been attractive to political actors. Lastly, the Florida Supreme Court's ruling intervening in the U.S. presidential election in favor of Democrat Al Gore provided the perfect justification for Republicans in the state legislature to push for judicial reform.³¹

29. *Id.*

30. For example, Bonica and Sen, *supra* note 14, at 22–23, report a left-leaning Florida bar, one that is to the left of both politicians and the judiciary (estimated with data from 2014). In addition, looking at the quantitative data described in Bonica & Sen, *id.* at 48, we further examined contributions from 36,352 attorneys active in Florida circa 2000. Approximately 60% of attorneys in this Florida-based sample had donated primarily to Democrats. This provides additional evidence of a left-leaning bar.

31. Note that our framework does not require an exogenous shock such as a contested presidential election, and it seems likely, given the ideologies of the various actors involved, that judicial reform was a question of when, rather than if. For example, by many accounts, murmurs of judicial reform were seen as early as Jeb Bush's gubernatorial election in 1998. See Valeria Hendricks, "Fixing" the Unbroken Judicial Nominating Commissions: View from a Survivor of the 2001 Legislative Session, REC.: J. APP. PRAC. SEC. FLA. B., Summer 2001, at 7; Gwyneth K. Shaw, *Republicans Try to Cut Influence of Florida Bar*, ORLANDO SENTINEL (Apr. 23, 2001), http://articles.orlandosentinel.com/2001-04-23/news/0104230194_1_florida-bar-brummer-bar-

Our general predictions were borne out by two judicial reform attempts that immediately followed the 2000 election. The first, House Bill 367,³² was oriented toward limiting the Florida Bar Association's power over the state's judicial nominating commissions.³³ Under the previous system, three of the nine judicial nominating commission members were chosen by the bar itself, three were chosen by the governor, and three were chosen jointly by the bar and governor together. By contrast, the reforms called for the governor to choose four names from a list put forth by the bar association, with the remaining names to be chosen by the governor directly—thus significantly lessening the bar's control of the commission. This reform measure was passed by both chambers in the Florida Assembly and was signed into law by then-Governor Jeb Bush in June of 2001. As one scholarly review noted, this reform had the effect of “giving [Governor Bush] all but total control of the selection [of] Florida's appellate judges and a heightened degree of influence over the state's trial courts when there is an interim appointment.”³⁴

Second, the Florida legislature considered a series of (ultimately unsuccessful) bills designed to strip power away from the state's judicial nominating commissions and move them toward the governor. For example, Senate Bill 1794³⁵ was a proposed amendment to the Florida constitution that would have had the effect of requiring judges on the Florida district court and appeals court running for reelection to win a *two-thirds* majority of votes in order to stay in their seats—a significant hurdle. If a judge lost his retention bid, then the Florida governor would, with a Senate confirmation, have the ability to make the appointment. This bill would have also eliminated Florida's judicial nominating commissions altogether and—in a move that would have likely gutted the bar's professional standing—would have removed the requirement that state attorneys must join the Florida State Bar. Another constitutional proposal, House Joint Resolution 627, would have eliminated judicial nominating commissions and moved that power to the governor, with confirmation by the Senate.³⁶ And yet

officials [<https://perma.cc/X6SK-936Z>]. However, the fiasco surrounding *Bush v. Gore* no doubt hastened this path and provided the impetus for reform attempts.

32. FLA. STAT. § 43.291 (2017).

33. For additional discussion of these reform efforts, see Lanier & Handberg, *supra* note 24, at 1049–50. See also Hendricks, *supra* note 31, at 7 (explaining that House Bill 367 provided the governor with greater power to ensure appointments better reflected gender, racial, and geographic makeup of jurisdiction).

34. Lanier & Handberg, *supra* note 24, at 1049–50.

35. S.B. 1794, 103d Reg. Sess. (Fla. 2001). For a discussion of this proposal, see Lanier & Handberg, *supra* note 24, at 1050.

36. See Hendricks, *supra* note 31, at 8.

another constitutional proposal, House Joint Resolution 827, would also have given the Florida governor the power to name judicial candidates, but would have kept judicial nominating commissions insofar as they would “certify to the governor a list of all qualified candidates.”³⁷

For its part, the state bar association adamantly opposed these proposals, and its president wrote a strongly worded letter to all lawyers licensed by the state. In it, he warned that the bar’s own legal counsel believed that the “overall effect of the [constitutional amendment] would be to increase the influence of politics in the court system and would set our state back 100 years.”³⁸ He further wrote that the reform attempts “would remove all checks on the politicization of judicial selection, place incumbent judges at the whim of the legislature or any groups dissatisfied with a particular decision, and significantly reduce the independence of the judiciary, a critical element in the maintenance of a just and democratic society.”³⁹ Ultimately, even though these proposals to amend the Florida constitution died in various judicial oversight committees, they nonetheless represented a significant attack on the role played by the Florida bar in the selection of state judges.

B. Politicians Move to the Right: Kansas in the 2010s

We now turn to another example that illustrates the tensions between a liberal bar and conservative political actors: Kansas in the early 2010s. Unlike Florida in 2001, Kansas experienced no single exogenous political shock in the form of a closely watched national election. The state was, however, similar to many other states in the early 2010s in that it experienced a very strong shift to the right among its political class due to the mobilization of the conservative Tea Party. This makes Kansas similar to other states that underwent a comparable political shift—including Missouri and Arkansas.

37. *Id.* Hendricks further explains:

Under House Joint Resolution 827, the Florida Constitution would still confer the governor with the power to nominate and the senate to confirm judicial candidate [sic], but JNCs would still be kept to certify to the governor a list of all qualified candidates. Additionally, the resolution granted the governor, instead of the supreme court, the power to establish uniform rules of procedure for the JNCs. Finally, this legislation would have made the JNC deliberations public. Both House Joint Resolutions 827 and 827 died in the Judicial Oversight Committee.

Id.

38. Herman J. Russomanno, *Protecting the Independence of Florida Lawyers*, FLA. B.J., Apr. 2001, at 6, 6 (internal quotation marks omitted) (quoting Barry Richard).

39. *Id.* (internal quotation marks omitted) (quoting Barry Richard).

1. Judicial Selection at Time of Attempted Reform

Under Kansas's version of the Missouri Plan, a nominating commission composed of five lawyers (chosen by the state's bar) and four nonlawyers (chosen by the governor) would recommend a set of names to the Kansas governor; the governor would then choose his appointments from the list.⁴⁰ Judges would then be subject to periodic retention elections.⁴¹ A nominating commission was used not only for Kansas's state supreme court and appeals court judges, but also, as of 1972, its district court (trial) judges.⁴²

Important to note is that the Kansas Supreme Court, unlike the Florida Supreme Court, did not have a reputation as an overwhelmingly liberal court. According to one account, "[t]he court is largely viewed as [a] moderate, reasonable, and business-friendly"⁴³ court. However, although the court had a reputation for being moderate and business friendly, and although Kansas did not have a specific *Bush v. Gore* moment like the Florida Supreme Court did, a series of unfavorable rulings on important conservative issues galvanized opposition on the more extreme right. The first of these was the Kansas Supreme Court's 2014 reversal of the death sentences of Reginald and Jonathan Carr, who had been found guilty of a series of gruesome murders known as the "Wichita Massacre." The second was a 2014 ruling regarding the method by which the state of Kansas funded its public schools.⁴⁴ In that ruling, the Kansas Supreme Court struck down

40. Specifically, Kansas's plan works as follows:

The supreme court nominating commission submits a list of qualified individuals to the governor for supreme court appointments. . . . The supreme court nominating commission is composed of five lawyer members and four nonlawyer members (one lawyer and one nonlawyer member from each congressional district, and one additional lawyer member who serves as chairperson). Lawyer members are elected by their peers in each congressional district, and nonlawyer members are appointed by the governor. Commission members serve four-year terms.

See *Methods of Judicial Selection: Kansas*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=KS (last visited Sept. 29, 2017) [<https://perma.cc/MNH8-CP34>].

41. As of this writing, no justices of the Kansas Supreme Court had ever been voted out of office via a retention election. Lincoln Caplan, *The Political War Against the Kansas Supreme Court*, NEW YORKER (Feb. 5, 2016), <http://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court> [<https://perma.cc/CXX9-VLJ9>].

42. Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, J. KAN. B. ASS'N, Jan. 2000, at 32, 34–35.

43. Caplan, *supra* note 41.

44. See Steve Rose, *Attempt to Oust Kansas Supreme Court Judges Is Likely Doomed*, KAN. CITY STAR (June 18, 2016, 3:00 PM), <http://www.kansascity.com/opinion/opn-columns-blogs/steve-rose/article84456322.html> [<https://perma.cc/HKE3-A9PJ>] ("Conservatives have a list of grievances, including rulings on abortion laws and capital punishment, but it is the high court's mandate that the Legislature fund schools equitably that has really lit the fires.").

the public school funding provisions as being unequal and insufficient, instructing the state legislature to provide more funding to poorer districts.⁴⁵

Both rulings engendered backlash against the Kansas Supreme Court among conservatives and provided a target for conservatives' frustration. For example, the Wichita Massacre's families organized in favor of defeating the retention prospects of several of the state justices. (These efforts were ultimately unsuccessful, as all of the justices eventually won their retention elections.) Political actors also joined the criticism. The President of the Kansas Senate, a Republican, complained that the supreme court was engaged in "[a] political bullying tactic" and "an assault on Kansas families, taxpayers and elected appropriators" for its actions on the school funding issue.⁴⁶ Thus, although there was no exogenous political shock, tensions about the state judiciary had been building.

2. Ideology of the Bar and of Political Actors

In tandem with these developments, the early 2010s saw a move to the right for Kansas's politics. Specifically, the 2010, 2012, and 2014 state elections led to strongly conservative Republicans gaining political clout within the state legislature, pushing more centrist Republicans toward a pragmatic alignment with Democrats and weakening the moderate position.⁴⁷ In the executive branch, former U.S. Senator Sam Brownback, a conservative Republican backed by the state's Tea Party, won the 2010 and 2014 gubernatorial races. In attempting what he called a "real live experiment," Brownback began enacting a slew of conservative reforms, including instituting generous tax breaks, tightening of welfare requirements, cutting the education budget, and eliminating four state agencies.⁴⁸ The power of the new conservative wing in Kansas led to increased attacks on the Kansas judiciary. One member of the Kansas House of Representatives

45. See *Gannon v. State*, 319 P.3d 1196, 1251–53 (Kan. 2014) (affirming that, in violation of its duty to provide equity in public education, the State established wealth-based disparities by withholding funding from certain school districts).

46. Erik Eckholm, *Outraged by Kansas Justices' Rulings, Republicans Seek to Reshape Court*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/02/us/outraged-by-kansas-justices-rulings-gop-seeks-to-reshape-court.html?mcubz=1> [https://perma.cc/ZGB5-UQU2].

47. See Ammon Simon, *The Battle for Kansas*, NAT'L REV.: BENCH MEMOS (July 20, 2012, 4:40 PM), <http://www.nationalreview.com/bench-memos/310188/battle-kansas-ammon-simon> [https://perma.cc/3D3B-5L8W].

48. Eric Levitz, *The Republican Party Must Answer for What It Did to Kansas and Louisiana*, N.Y. MAG.: DAILY INTELLIGENCER (Mar. 18, 2016, 11:48 AM), <http://nymag.com/daily/intelligencer/2016/03/gop-must-answer-for-what-it-did-to-kansas.html> [https://perma.cc/B497-H3SU].

complained that the selection process via merit commission made it “virtually impossible” for “prominent conservatives” to be appointed to state appellate courts, and that the process “tends to exclude others who are equally qualified because they don’t fit the preferred political profile.”⁴⁹

By contrast, the Kansas Bar Association—including several members of the legal elite—did not see itself as part of this rightward shift. Indeed, like other state bars, the Kansas bar had the reputation of being liberal. This is largely borne out by existing scholarship.⁵⁰ Of 5,812 attorneys practicing in Kansas as of 2012, 2,211 are on record as having donated to political campaigns. Of those, 1,400 (or roughly 63%) had donated primarily to Democrats. This is in a deeply Republican state where Mitt Romney won 61% of the two-party presidential vote share and Republicans held 92 of 125 seats (74%) in the state house, 31 of 40 seats (75%) in the state senate, the Governor’s mansion, and all six congressional seats.

This configuration meant that the existing legal establishment tended to favor the involvement of the bar and the status quo. For example, one sitting supreme court justice commented that “[t]he merit-based system has served Kansas well and is held in high regard across the country, as evidenced by the fact it is utilized in nearly three-fourths of all states for appointments to some or all of those states’ courts. I am not persuaded Kansans should compromise and accept the second-best system.”⁵¹

3. Proposed Judicial Reforms

These tensions led to a number of proposed judicial reforms instigated by the Republicans in the Kansas State Legislature as well as in the governor’s mansion. We note three specific attempts.

The first, in 2011, was an attempt to eliminate the role of a judicial nominating commission by moving Kansas to a system similar to the federal one. Under the law, the governor would appoint members of the Kansas Supreme Court directly (with no nominating commission), with the advice and consent of the Senate. The bill was supported by the Tea Party–backed Governor and passed the House of

49. Ammon Simon, *Kansas Update*, NAT’L REV.: BENCH MEMOS (Nov. 28, 2012, 10:36 AM), <http://www.nationalreview.com/bench-memos/334250/kansas-update-ammon-simon> [<https://perma.cc/B3BU-8QLE>] (discussing reaction of House Judiciary Committee Chairman Lance Kinzer and including quotes given by Kinzer to media outlets).

50. See, e.g., Bonica et al., *supra* note 14, at 297–99.

51. *2016 Voter Guide: Marla Lukert*, TOPEKA CAP.-J., <http://cjonline.com/2016-voter-guide-marla-luckert> (last visited Sept. 29, 2017) [<https://perma.cc/5KFJ-FNUB>].

Representatives, but Democrats and moderate Republicans did not allow it out of the Senate Judiciary Committee. This generated substantial tensions between the governor and state senators. For example, one member of the Kansas Senate Judiciary Committee claimed that Governor Brownback “pointed his finger at me and said, ‘Tim, why can’t you go along with us on this judicial selection issue and let us change the way we select judges so we can get judges who will vote the way we want them to?’”⁵²

The second set of reforms was a response to the 2014 education ruling. In that ruling, the Kansas Supreme Court not only struck down specific funding provisions but also reaffirmed that it—and not the governor nor the legislature—had administrative authority to decide the case.⁵³ In response, the legislature passed House Bill 2338, which removed the Kansas Supreme Court from having administrative authority over the lower courts.⁵⁴ This law had the effect of stripping the supreme court’s authority to appoint the chief justices of the state’s thirty-one judicial districts. In addition, to add more “bite” to its threat, the legislature in 2015 enacted another bill, House Bill 2005, which would have had the effect of defunding the entirety of the Kansas judiciary if it struck down any portion of the 2014 law.⁵⁵ Despite these threats, the Kansas Supreme Court called the legislators’ bluff by striking down House Bill 2338 in December 2015, thus triggering House Bill 2005.⁵⁶ Perhaps guided by more moderate voices, the legislature “blinked,” as one reporter put it,⁵⁷ by overwhelmingly (39-1) passing House Bill 2449, making portions of House Bill 2005 invalid.⁵⁸

52. Tim Carpenter, *Ex-Senator Tim Owens: Ideology Drives Sam Brownback’s Push for Judicial Reform*, TOPEKA CAP.-J. (Feb. 9, 2015, 4:35 PM), <http://cjonline.com/legislature-state/2015-02-09/ex-senator-tim-owens-ideology-drives-sam-brownbacks-push-judicial> [<https://perma.cc/R4AL-7Y6A>].

53. See *Gannon v. State*, 319 P.3d 1196 (Kan. 2014). See generally Trevor Graff & John Eligon, *Court Orders Kansas Legislature to Spend More on Schools*, N.Y. TIMES (Mar. 7, 2014), <https://www.nytimes.com/2014/03/08/us/kansas-school-spending-ruling.html> [<https://perma.cc/43PR-576B>].

54. H.B. 2338, 2013 Sess. (Kan. 2014). For a description and overview of opinions of H.B. 2338, see Bryan Lowry, *Kansas Supreme Court Criticizes Brownback for Signing Judicial Budget*, WICHITA EAGLE (Apr. 18, 2014, 5:30 PM), <http://www.kansas.com/news/politics-government/article1140557.html> [<https://perma.cc/W3SW-CH6F>].

55. H.B. 2005, 2015 Sess. (Kan. 2015).

56. See *Solomon v. State*, 364 P.3d 536, 549–50 (Kan. 2015) (holding that section 11 of H.B. 2338 violates the state constitution’s separation of powers clause).

57. Caplan, *supra* note 41.

58. Jonathan Shorman, *Kansas Lawmakers Send Judicial Funding Fix to Governor*, TOPEKA CAP.-J. (Jan. 28, 2016 4:13 PM), <http://cjonline.com/news-legislature-local-state/2016-01-28/kansas-lawmakers-send-judicial-funding-fix-governor> [<https://perma.cc/NZ8J-XGKA>].

The third proposed reform was a 2016 Senate bill⁵⁹ that would expand the list of impeachable offenses for Kansas Supreme Court justices to include “attempting to subvert fundamental laws and introduce arbitrary power” and “attempting to usurp the power of the legislative or executive branch of government.” The bill passed narrowly in the Senate in a 21-19 vote but died in committee without receiving a vote in the House.

Given this history of repeated attempts, perhaps an open question remains why Kansas political actors have so far been unsuccessful in enacting judicial reform. We believe that one answer speaks to the fairly pronounced shift to the right among Kansas politicians, one that both triggered attempts at judicial reform, but also one that was without sufficient support among more moderate Republicans and Democrats. Indeed, unlike Florida in 2001, where more moderate Republicans backed the reform efforts, the Kansas reform efforts were backed only by the more conservative end of the Republican Party. Perhaps the last reason why the reforms have yet to succeed is that the proposed reforms were more extreme compared to the more incremental reforms adopted in Florida.

C. Politicians Versus Voters: North Carolina in 2016

Both Florida and Kansas presented instances of conservative political actors chafing against merit-oriented commissions and the perceived influence of their states’ bar associations. However, what happens to judicial reform attempts when the judicial selection mechanism relies on elections, be they partisan or nonpartisan? We now investigate our third case study: North Carolina in 2016.

1. Judicial Selection at Time of Attempted Reform

Judges in North Carolina—including the seven judges on the North Carolina Supreme Court—are chosen for eight-year terms and, if they so choose, must then stand for (nonpartisan) reelection.⁶⁰

59. S.B. 439, 2016 Leg., Reg. Sess. (Kan. 2016), http://www.kslegislature.org/li_2016/b2015_16/measures/documents/sb439_02_0000.pdf [<https://perma.cc/A8A3-R9B4>].

60. Article IV of the North Carolina Constitution specifies:

Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified. Justices of the Supreme Court and Judges of the Court of Appeals shall be elected by the qualified voters of the State. Regular Judges of the Superior Court may be elected by the qualified

Although all of the elections are nonpartisan, candidates for office often have the backing of partisan actors. At the time of the judicial reform attempts in 2016–2017, the North Carolina Supreme Court had seven members: six associate justices and one chief justice.⁶¹ In 2016, before the November presidential election, the supreme court had three liberals and four conservatives (including its Chief Justice, Mark Martin).

Like supreme courts in other states, the North Carolina Supreme Court adjudicates important issues having a political dimension—similar to both Kansas and Florida, from our examples above. In North Carolina, the most politically contentious issue has been redistricting, an issue that has only increased in national importance as North Carolina has moved rapidly toward being a national election “bellwether” state.⁶² As a former member of the court put it, “The outside interest in the [North Carolina] Supreme Court all revolves around redistricting, and that’s unfortunate. It does the court a disservice and the candidate a disservice.”⁶³ This sentiment is consistent with the legal context in 2016, in which the most politically contentious issue involving the North Carolina Supreme Court was the legality of the congressional district map based on the 2010 U.S. Census and approved by the state’s General Assembly in 2011.

Opponents of the map claimed that the General Assembly had engaged in significant racial gerrymandering by creating oddly shaped districts containing the majority of the state’s African-American voters—thus “packing” them into fewer districts and reducing the political power of African-American voters, a reliably Democratic voting bloc. The North Carolina Supreme Court rejected these criticisms of the plan in 2014, leading the United States Supreme Court to intervene and order a reconsideration of the issue in 2015. Later that same year, the North Carolina Supreme Court again upheld the dismissal of

voters of the State or by the voters of their respective districts, as the General Assembly may prescribe.

N.C. CONST. art. IV, § 16.

61. Our analysis of the dataset provided by Bonica and Sen suggests that the 2016 ordering of the North Carolina Supreme Court justices from more liberal to more conservative is Robin Hudson, Cheri Beasley, Sam Ervin, Mark Martin (the Chief Justice), Robert Edmunds, Barbara Jackson, and Paul M. Newby. The data further show that Mike Morgan, who defeated Bob Edmunds, is more liberal than Hudson, making him the most liberal member of the court. See Bonica & Sen, *supra* note 21.

62. For example, Barack Obama won North Carolina in 2008 and 2012, but Donald Trump won the state in 2016. With fifteen electoral votes, the gains to the candidate who wins the state are significant.

63. Mark Binker, *Supreme Court Spending “All About Redistricting,”* WRAL.COM (Oct. 28, 2016) <http://www.wral.com/supreme-court-spending-all-about-redistricting-/16168892> [https://perma.cc/8FKU-42HF].

challenges to the redistricting map, a presumed victory for North Carolina Republicans and for the General Assembly.⁶⁴ However, the decision was a narrow 4-3 ruling along party lines. The partisan divide on the court was made even more salient by the fact that the author of the majority opinion—Bob Edmunds—was up for reelection in 2016.

2. Ideology of the Bar and of Political Actors

The presidential election of 2016 was highly polarizing in North Carolina, exposing deep fault lines among the elites and among the public. At a national level, the election of Republican Donald J. Trump and the maintenance of Republican majorities in the U.S. House and the U.S. Senate saw national-level political actors move to the right. However, although Trump won the state of North Carolina (49.8% to 46.2%⁶⁵), the state's Republican incumbent governor, Pat McCrory, lost an extremely narrow prolonged contest to the Democratic challenger, Roy Cooper. In the General Assembly, little changed. In the state's House of Representatives, Republicans lost one seat in total but held onto their significant majority, 74-46.⁶⁶ In the State Senate, Republicans gained one seat to hold on to their majority, 35-15.

Unlike our previous examples of Florida and Kansas, North Carolina illustrates the additional element of a supreme court judicial election, which also took place in 2016. That race pitted incumbent conservative Bob Edmunds against challenger Mike Morgan, a liberal state lower court judge. A Morgan win would have tipped the balance on the supreme court from Republican to Democrat, while an Edmunds win would have preserved the Republicans' slim majority in that body and helped Republicans maintain some control over the issue of redistricting. Thus, to a large extent, the ultimate direction of the North Carolina Supreme Court depended not on the bar (via a merit-oriented commission, for example), nor on political actors (via gubernatorial or legislative appointment, for example), but on the voters of the state.

Nonetheless, we note substantial political involvement by political actors, as is typical of nonpartisan judicial elections. Morgan, the liberal challenger, was personally endorsed by President Barack Obama (a Democrat) and various progressive organizations, including

64. At this point, the litigation resumed in the federal courts, culminating in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which held that race improperly factored into the drawing of two of North Carolina's U.S. congressional districts.

65. *North Carolina Results*, N.Y. TIMES, <http://www.nytimes.com/elections/results/north-carolina> (last updated Aug. 1, 2017, 11:22 AM) [<https://perma.cc/EKF9-9MWX>].

66. *North Carolina House of Representatives Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/North_Carolina_House_of_Representatives_elections,_2016 (last visited Sept. 29, 2017) [<https://perma.cc/VF2Z-HHNL>].

the Sierra Club and state black leadership organizations. Edmunds, the conservative incumbent, was endorsed by various law enforcement organizations. In addition, even though judicial races in North Carolina are formally nonpartisan, both men were listed on their parties' respective websites—Morgan on the North Carolina Democrats' page and Edmunds on the Republicans' page—as candidates. In the election, Morgan decisively defeated Edmunds, 54.5% to 45.5% (2,134,650 votes to 1,785,437 votes).⁶⁷

Given our theoretical framework, we also note the ideology of the North Carolina bar. According to several scholarly studies, the bar in North Carolina (in 2016) was overwhelmingly liberal.⁶⁸ For example, we conducted a brief analysis using the dataset of Bonica and Sen (2017)⁶⁹ and found that, of 9,211 lawyers in the state, 72% had donated primarily to Democrats and other liberal groups. This, we believe, comports with public understanding in North Carolina. For example, in its guide to judicial candidates, the North Carolina Bar Association gives high marks to candidates endorsed by the North Carolina Democratic Party. In addition, the Bar Association made its displeasure with Republican-backed negative advertising well known.⁷⁰

3. Proposed Judicial Reforms

The push for judicial reform came after the 2016 election but before the Democratic governor was inaugurated; thus, it was at the behest of a Republican-controlled legislature and with the support of an outgoing Republican governor. This lame-duck session of the General Assembly enacted two bills (Senate Bill 4 and House Bill 17), which were signed into law by the Republican Governor (on December 16, 2016 and December 19, 2016, respectively). Both were oriented toward stripping the incoming Democratic governor of several key powers—including stripping the governor's ability to appoint members of North

67. *Judicial Performance Evaluation Survey—2016 Election Edition*, N.C. B. ASS'N (Oct. 2016), <http://www.ncbar.org/media/705414/2016-election-edition.pdf> [<https://perma.cc/9G6E-PHZX>].

68. See Bonica et al., *supra* note 14, at 324–35 (analyzing the ideological alignment of attorneys correlated to law schools and firms); Bonica & Sen, *supra* note 14, at 23 (comparing the ideological preferences of attorneys to those of judges and politicians).

69. Bonica & Sen, *supra* note 21.

70. For example, with regard to campaigning in the 2016 election, the Bar Association released a statement calling for “civility and respect.” Any advertisement that “attacks or maligns the character of those seeking elective office based on performance of their judicial duties . . . threatens the public trust on which our courts depend.” *Statement Addresses Campaign Advertising*, N.C. B. ASS'N, <https://www.ncbar.org/news/statement-addresses-campaign-advertising/> (last visited Sept. 29, 2017) [<https://perma.cc/LSV4-3HBE>].

Carolina's electoral boards, which were charged with overseeing the state's elections, and shifting that to a bipartisan composition.⁷¹

The General Assembly also enacted several pieces of judicial reform as part of these two pieces of legislation. The first piece of judicial reform, part of Senate Bill 4, made judicial elections partisan (as opposed to nonpartisan) for North Carolina Supreme Court and Court of Appeals judges. Effectively, this reform measure would have allowed the judges' partisan affiliations to appear next to their names on the ballot. As others have noted, partisan elections result in significantly greater politicization compared to either nonpartisan elections or gubernatorial or legislative appointments systems.⁷² Thus, movement toward a partisan election would, given the ideological landscape in North Carolina, result in a significantly more conservative judiciary. For Republicans in the North Carolina General Assembly, this was a straightforward move in shifting the judiciary to the right—and a particularly sensible move given the important issue of redistricting.

The second reform, also specified in Senate Bill 4, was more specific to the North Carolina judicial hierarchy and aimed to add a possible extra step before cases could be appealed to the North Carolina Supreme Court. Previously, parties looking to appeal cases to the North Carolina Supreme Court could proceed to do so immediately after having their cases heard by a three-judge panel of the North Carolina Court of Appeals—an intermediate court with fifteen members, eleven of whom were Republican at the time. After the reform, the Court of Appeals had greater authority to rehear any appeal by sitting *en banc*, with all fifteen judges sitting together. In addition, the reform measures stripped the possibility of parties appealing certain kinds of cases (for example, cases alleging a violation of the North Carolina or Federal Constitution) directly from the trial court to the North Carolina Supreme Court. For Republicans, these measures provided the additional procedural hurdle of having more cases be processed by a very Republican intermediate court.⁷³

71. As of this writing, this provision has been overturned by a North Carolina trial court. *Cooper v. Berger*, No. 16 CVS 15636, 2017 WL 1433245, at *8 (N.C. Super. Ct. Mar. 17, 2017).

72. See Bonica & Sen, *supra* note 14, at 22–23 (discussing states with gubernatorial and legislative appointments that do not exhibit extreme politicization trends).

73. A summary of the bill reads:

Part III will change the elections of Supreme Court Justices and Court of Appeals' Justices from nonpartisan to partisan elections.

Part IV makes several changes to the Court of Appeals. First, section 22(a) allows the Court of Appeals to sit *en banc* to hear or rehear any appeal upon the vote of a majority of the judges on the court. Section 22(b) eliminates the right to appeal directly to the

We also note the rumors of a third reform that would have had the goal of increasing the number of justices on the North Carolina Supreme Court. Because of the timing, such a “court packing” measure would have worked well for Republicans, as it would have allowed the outgoing Republican governor to make these appointments before the inauguration of his Democratic successor—thus preserving a conservative supreme court majority. However, the idea of a court-packing plan was met with immediate and widespread criticism, including strongly worded critiques from influential local newspapers—including the leading newspapers in Raleigh, Charlotte, and Winston-Salem—and threats of litigation from leading civil rights groups.⁷⁴ As of this writing, this particular reform measure appears to be moving toward dormancy.

4. Voters’ Versus Politicians’ Intent

An important point here is that none of the reform measures involved the state bar—neither in the sense of restricting the bar’s involvement nor in the sense of further involving the bar in the selection of judges. Our framework suggests two straightforward reasons for this. First, because it primarily relied on judicial elections, North Carolina presented a system where the bar’s involvement was already limited. Second, because Republicans were in control of all other branches of government, and because the bar was presumed to be left-leaning (echoed by the scholarly looks at the topic), it would strategically make

Supreme Court from a trial court order holding an act to be facially invalid because it violates the NC Constitution or federal law. Section 22(c) allows an appeal of right to the Supreme Court from a decision of the Court of Appeals sitting as a panel of three in which there is a dissent after either the Court of Appeals sitting en banc has rendered a decision in the case (if it was heard en banc) or the time for filing a motion for rehearing of the cause by the Court of Appeals has expired or the Court of Appeals has denied the motion for rehearing. Section 22(d) makes several conforming changes. Section 22(e) eliminates the right to seek discretionary review by the Supreme Court prior to the appeal’s determination by the Court of Appeal in certain cases involving the Commissioner of Insurance. Section 22(f) eliminates the appeal of right directly to the Supreme Court from any final order or judgment of a court declaring unconstitutional or otherwise invalid an act apportioning or redistricting State legislative or congressional districts. Finally, Section 23(a) amends a Rule of Civil Procedure governing the jurisdiction over matters challenging an act’s facial validity.

Fiscal Research Div., *Fourth Extra Session 2016 Legislative Fiscal Note*, GEN. ASSEMBLY N.C. 2 (Dec. 15, 2016), <http://www.ncleg.net/Sessions/2015E4/FiscalNotes/Senate/PDF/SFN0004v1.pdf> [<https://perma.cc/Y9S9-GMMC>].

74. Mark Abadi, *People in North Carolina Are Freaking Out over Rumors of a Republican “Power Grab” To Pack its Supreme Court*, BUS. INSIDER (Dec. 7, 2016, 2:45 PM), <http://www.businessinsider.com/north-carolina-supreme-court-packing-pat-mccrory-2016-12> [<https://perma.cc/A3YY-CC8M>].

sense to orient reforms away from increased bar involvement—an instance that we illustrate in our previous Figure 1.

However, the situation in North Carolina highlights an important possible link that we have so far set aside, which is the distinction between the incentives faced by political actors and the presumed intent of *voters*. Recall that our argument is one in which the bar provides the candidates for the judiciary, and the degree to which the bar and political actors are aligned is the “tug of war” that shapes the judiciary. We have so far examined this tension by focusing our attention on the ideology of political actors, and not members of the public. We did so for two reasons. First, the ideology of political actors corresponds closely with the ideology of voters, and, when voters lean conservative, on average so do political actors. But second, and more importantly, the preferences of political actors are what matter, not necessarily those of voters.

The case of North Carolina illustrates this point. In North Carolina, the popular vote was solidly in the Democrats’ favor, with a strong majority (54%) of North Carolinians supporting a liberal-tilted supreme court. A strong case could be made that perhaps most North Carolinians did not know the ideological profiles of the two men running for the supreme court seat, but Morgan’s decisive win means that, even if many did not know, many likely voted on that basis. Even so, the judicial reform efforts that followed were strictly in Republicans’ interests, attempting to limit the reach of the liberal judges on the supreme court on procedural grounds and, more importantly, trying to change the selection mechanism for the supreme court so that partisanship and ideology would be significantly more salient.

Our conclusion from this is that of the two—political actors’ preferences or voters’ preferences—it is the former that dominates, and not necessarily the latter. Indeed, voters’ preferences, as expressed by either partisan or nonpartisan elections, represent an additional selection mechanism that can be manipulated by the parties to accommodate their interests.

CONCLUSION

Where does this discussion leave us? The first point, which is consistent with other papers on this topic, is that judicial selection mechanisms are not exogenous, fixed institutions. To the contrary, deciding how judges are selected is, at a fundamental level, a highly strategic political calculation, and it has been so dating back to the constitutional convention of 1787. This has been the case particularly because political actors have strong policy preferences, and they want

the judiciary to reflect those preferences; in addition, the legal profession has its own preferences. These oftentimes overlap, in which case political actors will welcome the bar into the fold of judicial selection. But, at other times, the preferences of political actors and members of the bar will diverge; in these instances, we can expect to see attempts to limit the bar's involvement in the selection and nomination of judges. Thus, to return to some of the points raised in our Introduction, it is appropriate to think about attempts at judicial reform as a tug of war, with political actors on one side and the bar on the other. The nature and ideological tone of the judiciary will largely be a function of the preferences of these two groups.

The second point is that attempts at judicial reform are, effectively, spillovers from this tug of war, albeit ones initiated by political actors. Specifically, as we have shown here, the *less* that politicians want the judiciary to ideologically resemble the bar, the more they will back judicial reforms that exclude the professional bar from weighing in on judicial selection—this includes pushing for executive or legislative appointments or partisan elections and limiting the use of merit-oriented commissions. By contrast, the *more* that politicians want the judiciary to resemble the bar, the more they will endorse judicial reform attempts that incorporate the bar into judicial selection—such as merit-oriented commissions (the Missouri plan) or even nonpartisan elections. In both scenarios, subjective evaluations of the relative ideological positioning of the bar and of the judiciary are the primary considerations that motivate political actors; in addition, in both scenarios, political actors will be highly strategic in taking steps that yield a judiciary that will be ideologically favorable.

We note that our argument for understanding attempts at judicial reform necessarily assumes that political officials place high value on judges' ideological leanings and that they value a politically proximate (and thus favorable) bench. For Republicans, this means that they favor more conservative judges; for Democrats, this means they favor more liberal judges. For both, attempts at judicial reform are structured accordingly. Although this is a strategic way of thinking about judicial selection, it does raise important normative concerns that should be considered further. For example, many commentators have argued that current attempts at judicial reform are attempts to interject more "politics" into the judiciary, to the detriment of the quality and impartiality of the bench. These critiques are particularly pronounced when the reform attempts are oriented toward limiting the role of the bar and of merit commissions in the selection of judges.

Our findings complicate this view, however. While it is true that interjecting politics into judicial selection changes the nature of the

judiciary selected, it is also true that reliance on merit-oriented commissions and the use of the professional bar does so as well. Indeed, as has been supported by important papers in this literature⁷⁵ and by our other work,⁷⁶ judicial selection systems that heavily involve the professional bar have their own ideological leaning—usually (but not necessarily always) a more liberal one. Thus, to claim that judicial reform attempts moving judicial selection away from the bar are “interjecting politics” is perhaps an unfairly disparaging view of what really is best understood as a tug of war between political parties and the bar.

We conclude with some thoughts for future research looking at these questions. First, our analysis here relied on a few case studies to delineate the contours of our framework. Future research should take a larger view into the nature of judicial reform, perhaps taking a quantitative “large-N” look at the full breath of reform attempts across a variety of states, ideological compositions (both of the bar and of political actors), and judicial selection mechanisms. Second, we have examined judicial reform attempts arising in the last twenty years. As we have noted, however, judicial reform attempts have moved in waves, starting with a move toward executive appointments around the time of the American independence, then toward elections, and then finally toward merit appointments. The current trend away from merit appointments and back toward elections and appointments is a fairly recent one. Although our examples draw from this more recent time frame, we believe that our framework can be fruitfully applied toward understanding previous attempts at judicial reform and, indeed, very likely attempts at reform in a comparative context.

75. For example, see Fitzpatrick, *supra* note 9, at 676 (“In short, I am skeptical that merit selection *removes* politics from judicial selection. Rather, merit selection may simply *move* the politics of judicial selection into closer alignment with the ideological preferences of the bar.”).

76. See Bonica & Sen, *supra* note 14, at 29.

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