The United States, we are often reminded, is a republic and not a democracy. One practical implication of this familiar distinction is the exercise of day-to-day power. Republics are governed not directly by the people, but indirectly through elected and appointed officials responsible for running the representative institutions of government. This representative nature of American government has produced historically a recurring dilemma among state governments with respect to which officials should be elected and which should be appointed?

During early periods of national history the tendency among states was to elect more and appoint fewer public officials. The so-called “long ballot” used to elect a wide range of state and local officials exemplified this practice. More recently, however, the trend has been reversed and states elect fewer and appoint more public officials.

The selection of judges has always presented a special problem, in part because the dual and not altogether consistent expectations we have for the judiciary. In fact, the courts are different. Indeed, they are unique. We expect judges to be “above politics,” to transcend partisanship, and to provide impartial justice devoid of political considerations. At the same time, the courts are manifestly political institutions—independent and co-equal branches of government along with the executive and legislative branches--and like the other two branches possessed of enormous power.

Given the inherent power of the courts, it is unthinkable that they not be accountable to the people, just as are the executive and legislative branches. But deciding how to achieve accountability has not been easy. Elections have always been the direct line of accountability between the people and members of the executive and legislative branches. For courts, some form of appointment system has been most common. Most frequently, the appointment system has been a version of the so-called “Merit System,” under which judges are appointed by a governor from a list of qualified candidates.

But still elections continue to be used to select judges in a minority of states. Pennsylvania is one of those. In fact, this year in Pennsylvania, judicial races, also known as appellate court elections, will be held statewide. Pennsylvania’s three appellate courts (Supreme Court, Superior Court and Commonwealth Court) will add seven new members.

ELECTING APPELATE JURISTS IS A CONTROVERSIAL SUBJECT IN PENNSYLVANIA’S POLITICAL COMMUNITY. THE DEBATE PITS LABOR, THE TRIAL LAWYERS, AND MANY PARTY LEADERS AGAINST AN ASSORTED GROUP OF REFORMERS, LED BY PENNSYLVANIANS FOR MODERN COURTS, THE PENNSYLVANIA BAR ASSOCIATION, AND THE LEAGUE OF WOMEN VOTERS. BOTH SIDES ARE SINCERE AND MAKE THEIR ARGUMENTS PASSIONATELY, BUT IT IS HARD TO FIND EVIDENCE THAT JUDICIAL ELECTIONS HAVE WORKED IN PENNSYLVANIA. THE LIST OF PROBLEMS COULD BE EXTENDED, BUT LET’S SUMMARIZE A FEW:

· Partisanship mars judicial selection. Candidates are forced to seek out support and votes in a manner inconsistent with that of a judicial officer. The increased spending in these races, and the consequent need for
money, is worrisome. Ballooning advertising costs here brought million-dollar judicial campaigns to Pennsylvania. The money chase has led judicial candidates into a thicket of potential conflict. They must seek and raise substantial sums of money from the very lawyers who will appear before them.

· Negative campaigning. A new disturbing trend of negative campaigns has appeared on the horizon. Mirroring their other elective cousins, judicial candidates are now using negative advertising and “attack ads” in their quest for judicial office. The spectacle of judicial candidates thrashing each other and acting like just another set of campaign jackals will not instill confidence in the justice system.

· Unknown candidates. Who are these people anyway? That question could be asked by almost any voter going into the voting booth on election day after viewing the names of the judicial candidates on the ballot. Polls have shown that almost eighty percent of voters either didn’t know who the candidates were or didn’t know enough about them to make an informed choice. Hence, name recognition, and not merit, becomes the essential electoral ingredient.

· Issue blackout. The state’s Code of Judicial Conduct attempts to prevent candidates from discussing issues, which they conceivably could confront on the bench, completely limiting the public comments judicial candidates can make. Since candidates can’t talk about issues, what is the reason to have a campaign? Campaigns are more and more becoming vapid exercises in mere biographical recounting.

· Vague Qualifications. No minimum standards for judicial office exist. Who need care about qualifications, ethics, temperament, or experience, all major ingredients in producing successful judges? And Pennsylvania has quite a history of electing all types of judges—smart and dumb, stable and unstable, and those with exemplary and outstanding lives, as well as those with unethical and questionable pasts.

· Low voting turnout. If the past is predictive, then about 25 percent of the state’s eligible voters will find their way to voting booths next fall. Perhaps equally important, the winning judicial candidates will have obtained the votes of about 13 to 15 percent of potential voters, not exactly a mandate.

The problem is palpable. The dilemma is real. There is no perfect way to select judges. But there are better ways to do it than the way Pennsylvania does it now. Judicial elections as we have them are deeply flawed. Voters are asked to vote for judicial candidates they know little or nothing about. Judicial candidates themselves are often pressured to run campaigns they are not proud of, and the political system is compromised by the increased sleaziness of it all. The legislature should study, and then prescribe a merit system that works for Pennsylvania. That is something forty-two states have now done leaving Pennsylvania among an undistinguished minority that have failed to modernize and revise judicial selection. It is clear what to do, and it is clearly time to do it.

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