

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ARTICLES

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### THE NON-UNITED STATES OF AMERICA

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I was asked to write on a provocative topic: why is the United States so deeply divided and what can be done about it? I agree with the premise that the United States is deeply politically divided but am hesitant whether I have anything useful to say in response to the questions.

The results of the last two presidential elections paint a picture of a population almost evenly divided between sharply contrasting ideological poles. In November 2020, Joe Biden won 81,283,098 votes, or 51.3% of the votes cast.<sup>1</sup> Donald Trump won 74,222,958 votes, or 46.8% of the votes cast.<sup>2</sup> The 2016 presidential election was even closer, with Hillary Clinton beating Donald Trump by nearly three million votes.<sup>3</sup> Biden and Trump

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1. James M. Lindsay, *The 2020 Election by the Numbers*, COUNCIL ON FOREIGN RELS.: THE WATER'S EDGE (Dec. 15, 2020, 5:00 PM), <https://www.cfr.org/blog/2020-election-numbers>.

2. *Id.*

3. Sarah Begley, *Hillary Clinton Leads by 2.8 Million in Final Popular Vote Count*, TIME (Dec. 20, 2016, 4:38 PM), <https://time.com/4608555/hillary-clinton-popular-vote-final/>.

espoused dramatically different views and values, and they were nominated by political parties that at this time share little common ground on the issues.

Yet even that does not reflect the intensity of the divide in the country. Studies have shown that 38% of Democrats and 38% of Republicans said they would feel somewhat or very upset at the prospect of their child marrying someone from the opposite party.<sup>4</sup>

The divide is along racial, age, and educational lines. As Professors Gould and Pozen point out:

Simply put, white voters favor Republicans decisively, and non-white voters favor Democrats even more decisively. In presidential elections since 2008, Republican candidates have won white voters by margins of 12% to 20%, while Democratic candidates have won Black voters by margins of 81% to 91%, Hispanic voters by margins of 36% to 44%, and Asian-American voters by margins of 27% to 47%. In recent decades, a parallel gap has opened up between increasingly Democratic-leaning younger voters and Republican-leaning senior citizens and between increasingly Democratic-leaning women and Republican-leaning men. The contemporary partisan gap with respect to education is especially striking—highly educated voters now tend to support Democrats and less educated voters to support Republicans—in that it represents an inversion of dynamics that prevailed as recently as the early 2000s.<sup>5</sup>

In one sense, deep polarization is not new in the United States. For its first seventy-five years, the country was profoundly split over the issue of slavery. A civil war is the most extreme manifestation of a divided

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4. India Opzoomer, *America Speaks: What Do They Think About Cross-Party Marriages?*, YOUgov (Sep. 24, 2020, 12:56 PM), <https://today.yougov.com/topics/lifestyle/articles-reports/2020/09/24/america-speaks-what-do-they-think-about-cross-part>.

5. Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. (forthcoming 2022) (manuscript at 21–22), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3797051](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797051) (last visited Apr. 29, 2021).

nation. The civil rights movement in the 1950s and the 1960s certainly divided the country. When I was in college, the country was seriously split over the Vietnam War.

Yet, I also believe that the country is more deeply divided today than it has been at any time since the Civil War. Why? What can be done about it? I am an expert in constitutional law and worry that I have little to add in thinking about these questions. But I will try to address them, focusing especially on the role of the Constitution in contributing to the divide and perhaps solving it. And I will recommend one concrete step a president can take to mitigate the role appointing and confirming federal judges plays in exacerbating the divide: an executive order creating a merit-selection process for federal judges. This short essay is not a comprehensive treatment of the subject, but rather some thoughts about it.<sup>6</sup>

## I. WHY?

Countless factors contribute to the political divide in the United States. I would point to a few of them.

First, to state the obvious, there is a huge difference in values among Americans; liberals and conservatives disagree about countless basic questions. In constitutional law, this is reflected constantly on the Supreme Court. In October Term 2019, the Court decided fifty-three cases with signed opinions after briefing and oral argument.<sup>7</sup> Thirteen were 5–4 decisions.<sup>8</sup> In ten of the thirteen, the majority was Roberts, Thomas, Alito, Gorsuch, and Kavanaugh, with Ginsburg, Breyer,

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6. For an excellent book length examination, see ROBERT D. PUTNAM, *THE UPSWING: HOW AMERICA CAME TOGETHER A CENTURY AGO AND HOW WE CAN DO IT AGAIN* (2020).

7. See *Opinions of the Court—2019*, SUPREMECOURT.GOV, <https://www.supremecourt.gov/opinions/19#list> (last visited Apr. 29, 2021).

8. See Adam Feldman, *Final Stat Pack for October Term 2019 (Updated)*, SCOTUSBLOG (Jul. 10, 2020, 7:36 PM), <https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019/> (“5–4 Cases” table).

Sotomayor, and Kagan dissenting.<sup>9</sup> In two of the thirteen, the majority was Roberts with the four liberals, Ginsburg, Breyer, Sotomayor, and Kagan.<sup>10</sup> On all of the major constitutional issues—separation of church and state, gun control and gun rights, rights of criminal suspects and defendants, death penalty, abortion rights, protection of gays and lesbians and transgender individuals from discrimination, affirmative action—there is a huge gulf between the liberal and conservative justices. This gulf mirrors the great disagreements that exist in American society on these and countless other issues.

There is an obvious and large difference between the Republican and Democratic platforms, or, in the recent election, between the views of Joe Biden and Donald Trump. The fact that 81 million people chose one and 74 million chose the other illustrates the deep disagreement in values in our country.

Second, the non-democratic nature of American government as enshrined in the very text of the Constitution exacerbates this polarization. In my view, the Electoral College makes no sense as a way for a democracy to choose a president. During the 2020 presidential election, everyone focused on the vote counts in Pennsylvania, Georgia, Arizona, and Nevada, and which candidate could get enough electoral votes to reach 270 in the Electoral College. Less attention was paid to the fact that Joe Biden decisively won the popular vote by over seven million votes.

In a democracy, the candidate with the most popular votes should win. But five times in American history, including in 2000 and 2016, the loser became president of the United States.<sup>11</sup> This anti-democratic feature of the Electoral College was intentional. Alexander Hamilton, in *Federalist No. 68*, explained that the “immediate

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9. *Id.*

10. *Id.*

11. See Dave Roos, *5 Presidents Who Lost the Popular Vote But Won the Election*, HISTORY (Nov. 2, 2020), <https://www.history.com/news/presidents-electoral-college-popular-vote>.

election [of the president] should be made by men most capable of analyzing the qualities adapted to the station.”<sup>12</sup> He wrote that a “small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.”<sup>13</sup>

The Electoral College also was very much a product of the compromises concerning slavery that were at the core of the Constitution’s drafting and ratification. Before considering the method of choosing the president, the Constitutional Convention had agreed to the “three fifths clause,” the provision in Article I of the Constitution providing that slaves counted as three-fifths of a person for the purpose of determining a state’s population for allocating seats in the House of Representatives. But slaves obviously could not vote. Southern states would not get the benefit of this population in presidential elections.

The Electoral College was proposed to deal with this: electors would be allocated based on seats in Congress, meaning that slaves would count towards the number of electors each state received. If the president were directly elected by the voters, voters in the North would outnumber voters in the South because the South’s half-million slaves were not voters. The Electoral College meant that each southern state could count its slaves as three-fifths of a person in its share of votes in the Electoral College. This was explicitly understood and expressed at the Constitutional Convention.<sup>14</sup>

But it is not just the Electoral College that is anti-democratic. Every state, regardless of population, has two senators. A voter in Wyoming (population 582,000) enjoys roughly 70 times more influence in the Senate

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12. THE FEDERALIST NO. 68 (Alexander Hamilton).

13. *Id.*

14. See AKHIL REED AMAR, THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA 333 (2016) (discussing how the Electoral College “was originally much more about slavery than about a big-state, small-state balance; that in today’s world, the college operates to dampen democracy; and that ‘federalism’ is no talismanic answer”).

than a voter in California (population 39.5 million). When the Constitution was written, the difference between the largest and the smallest states was 12.7 to 1;<sup>15</sup> now it is 68 to 1.<sup>16</sup> Senators representing as little as 17.6% of the population can constitute a majority in the Senate.<sup>17</sup>

The Supreme Court and the federal judiciary also were created to be anti-democratic, with Justices and judges appointed by the president and confirmed by the Senate. Although I agree with the need to shield the judiciary from politics, the combined result of the Electoral College, the allocation of senators, and the appointment process is that a president who lost the popular vote can nominate a Justice who is confirmed by a Senate that represents a minority of the population.

This scenario is not hypothetical: Democrats have won the popular vote in seven of the last eight elections. But during this time, Republican presidents have appointed five Supreme Court Justices and Democratic presidents have appointed just two. President Donald Trump, who lost the popular vote in 2016, appointed three Justices, all of whom were confirmed by Senators representing a distinct minority of the population. Since 1960, there have been thirty-two years with Republican presidents and twenty-eight years with Democratic presidents. But Republican presidents have named fifteen

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15. See *1790 Census: Return of the Whole Number of Persons Within the Several Districts of the United States*, U.S. CENSUS BUREAU, <https://www.census.gov/library/publications/1793/dec/number-of-persons.html> (last visited Apr. 29, 2021) (dividing the population of Virginia, 747,610, by the population of Delaware, 59,094).

16. See *Annual Estimates of the Resident Population for the United States, Regions, States, and the District of Columbia: April 1, 2010 to July 1, 2020 (NST-EST2020)*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates.html> (last visited Apr. 29, 2021) (dividing the population of California, 39,368,078, by the population of Wyoming, 582,328).

17. See *id.*

Supreme Court Justices and Democratic presidents have picked only eight.<sup>18</sup>

Even the House of Representatives—which is supposed to be the most majoritarian body, with seats allocated by population—is anti-democratic because of partisan gerrymandering. In a majority of the states, the state legislature draws congressional districts and with the aid of sophisticated computer programs can ensure who will control the seats.<sup>19</sup> In 2018, Republican and Democratic congressional candidates in North Carolina received in total about the same number of votes.<sup>20</sup> But because of partisan gerrymandering, Republicans won ten of thirteen seats from North Carolina in the House of Representatives.<sup>21</sup> The Supreme Court ruled that the challenge to this partisan gerrymandering could not be heard by the federal courts because it is a non-justiciable political question.<sup>22</sup>

Of course, these features always have existed in American government. Why do they contribute more to polarization now? I think that the realignment of the political parties in the last half century has contributed enormously to this, especially as many of the small states, especially in the South and the Midwest, have become politically homogeneous. The Roosevelt coalition was made of liberals and labor and Southern Democrats. Southern states from the end of the Civil War until the 1960s were solidly Democratic. This circumstance

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18. See *Judgeship Appointments by President*, USCOURTS.GOV, <https://www.uscourts.gov/sites/default/files/apptsbypres.pdf> (last visited Apr. 29, 2021). Republican Presidents appointed: Burger, Blackmun, Powell, Stevens, Rehnquist, O'Connor, Scalia, Kennedy, Thomas, Souter, Roberts, Alito, Gorsuch, Kavanaugh, and Barrett. Democratic Presidents appointed: White, Goldberg, Fortas, Marshall, Ginsburg, Breyer, Kagan, and Sotomayor.

19. Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/>.

20. Maggie Astor & K.K. Rebecca Lai, *What's Stronger Than a Blue Wave? Gerrymandered Districts*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/interactive/2018/11/29/us/politics/north-carolina-gerrymandering.html>.

21. *Id.*

22. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

greatly lessened the chance of a losing candidate winning in the Electoral College or the Senate being controlled by senators representing a minority of the states. It was not coincidence that never in the twentieth century did the candidate who lost the popular vote win in the Electoral College.

Also, the parties were not as ideologically defined. There were conservative Democrats, such as from Southern states, and liberal Republicans, from Northern states (think of Senators Edward Brooke from Massachusetts or Jacob Javits from New York).

But beginning in 1964, and especially with Richard Nixon's election in 1968, the parties began to realign. The South and smaller midwestern states have become solidly red. There no longer is a conservative wing in the Democratic party or a liberal one in the Republican party. The parties have become far more ideologically defined than earlier.

As a result, Republican senators from smaller states in the South and Midwest can more easily control the Senate because these states are now much more similar ideologically. Brett Kavanaugh was confirmed by senators representing only 44% of the population.<sup>23</sup> And twice already in this century, the candidate who lost the popular vote was chosen as president. This phenomenon both reflects the deep partisan divide in our country and exacerbates it.

Third, Donald Trump significantly increased the polarization in the United States. To be clear, he did not cause it. His election reflects it. But no one can deny that in countless ways, large and small, he made it worse. His administration did not offer a semblance of efforts at bipartisanship. On every major issue, he governed from the far right of the political spectrum. His style of race-baiting and insults made the divisions much worse.

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23. Joshua Tauberer, *With Kavanaugh Vote, the Senate Reaches a Historic Low in Democratic Metric*, GOVTRACK.US (Oct. 7, 2018), <https://govtrackinsider.com/with-kavanaugh-vote-the-senate-reaches-a-historic-low-in-democratic-metric-dfb0f5fa7fa>.



Most of all, though, he squandered the opportunity that the COVID-19 pandemic offered to unify the country. A crisis uniquely offers the opportunity to bring the nation together. We saw this after 9/11. President George W. Bush, for a time, had 90% public approval ratings.<sup>24</sup> Unfortunately, he squandered this unity with the misguided and tragic Iraq war. I often have wondered what would have happened if he had foregone that war, saved the country a trillion dollars, and been a unifying president throughout his time in office.

COVID-19 provided another opportunity to unify the nation. What if Donald Trump in March and April 2020 had said, “We’re all in this together. We all must act to stop the spread of coronavirus. Everyone, wear masks. Businesses, you will need to close for a time so we can open sooner.” If Trump had done this, it is likely that many fewer would have died. Our country could have come together. Trump would have easily won reelection. But that was beyond Trump: instead, he politicized a pandemic and it increased, not lessened, the divide.

To his last days in office, Trump continued to stoke the division with his false claims of election fraud and his exhorting his supporters to violence. The storming of the Capitol on January 6 reflects how deeply divided the country is and how much Trump contributed to that division. That nothing like that ever happened in American history is a strong testament to the profound divisions that exist.

Fourth, the internet and social media undoubtedly contribute to the political polarization. The internet is the most important medium for communication to be developed since the printing press. In *Packingham v. North Carolina*, the Supreme Court spoke forcefully about the importance of the internet and social media as a place for

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24. See *Presidential Approval Ratings—George W. Bush*, GALLUP, <https://news.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx> (last visited Apr. 29, 2021) (showing relatively steady decline in approval from 90% in 2001 to 34% in 2009).

speech.<sup>25</sup> The Court declared unconstitutional a North Carolina law that prohibited registered sex offenders from using interactive social media where minors might be present. The Court explained that cyberspace, and social media in particular, are vitally important places for speech. Justice Kennedy, writing for the majority, explained:

Seven in ten American adults use at least one Internet social networking service. . . . According to sources cited to the Court in this case, Facebook has 1.79 billion active users. This is about three times the population of North America.

Social media offers “relatively unlimited, low-cost capacity for communication of all kinds.” On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics “as diverse as human thought.” . . .

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. . . While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.<sup>26</sup>

The internet has democratized the ability to reach a mass audience. It used to be that to reach a large

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25. 137 S. Ct. 1730 (2017).

26. *Id.* at 1735–36.

audience, a person had to be rich enough to own a newspaper or to get a broadcast license. Now, though, anyone with a smartphone—or even just access to a library with public computers and WiFi—can reach a huge audience instantaneously. There are great benefits to this democratization of mass communication, but also costs.

In the twentieth century, the media played an enormous unifying function. People across the country watched the same movies, listened to the same radio programs, and saw the same television programs. Everywhere in the United States people got their news from Walter Cronkite or Huntley and Brinkley. This helped bring together a nation with enormous regional differences. Because of the internet, now, people no longer are dependent on a relatively small number of sources for news. On the other hand, people now can seek out news that not only reinforces their beliefs but also—pointedly and purposefully—emphasizes our differences. The media is dividing, not unifying, us as a nation.

## II. WHAT NOW?

I have briefly reviewed what I see as some of the causes of the deep partisan divide in the United States. I see this divide as the greatest threat to democracy that the United States has faced. Can a country that is so riven continue to exist in the long term? Is the violence that emerged from this divide on January 6 likely a precursor of more to come? How long will it be before there is serious talk of secession? Had Trump won reelection, I know there would have been a movement in this direction in California. And Biden's victory caused Rush Limbaugh to float the idea of secession by red states.<sup>27</sup>

I am an optimist and believe that there is much more that unites the American people than divides us. The

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27. Paul Farhi, *Secession? Rush Limbaugh Floats a Startling Notion—Then Quickly Backs Off*, WASH. POST (Dec. 10, 2020, 5:00 PM), [https://www.washingtonpost.com/lifestyle/media/rush-limbaugh-trump-secession-election/2020/12/10/8889397a-3b0d-11eb-bc68-96af0daae728\\_story.html](https://www.washingtonpost.com/lifestyle/media/rush-limbaugh-trump-secession-election/2020/12/10/8889397a-3b0d-11eb-bc68-96af0daae728_story.html).

same country that chose Donald Trump also twice elected Barack Obama to be President of the United States. My hope is that the normalcy of a Biden presidency can help to somewhat heal the partisan divide, but I am not so naïve as to think that there will be a cure.

I struggle to offer solutions for the division and admire those advanced by others.<sup>28</sup> I will offer one suggestion from my field which focuses on the Supreme Court and the Constitution: change the method of picking Justices and lower federal court judges to make it less partisan.

There is no doubt that recent confirmation fights both reflected and exacerbated the partisan divide. Justice Amy Coney Barrett was confirmed without the vote of a single Democratic senator. The prior confirmation, of Justice Brett Kavanaugh, was by a 50–48 vote.

I have an approach to decrease the partisan divide that I have advanced earlier: presidential merit-selection committees.<sup>29</sup> I recommend that the President of the United States adopt a merit-selection approach to filling vacancies on the Supreme Court and the lower federal courts. The president should promulgate an executive order, just as President Jimmy Carter did, creating a merit-selection panel for Supreme Court vacancies, as well as such panels for federal courts of appeals and district court vacancies. Each merit-selection panel should be ideologically diverse, including Democrats and Republicans, lawyers and non-lawyers. The role of the merit-selection panel should be to present the president the most qualified individuals to consider for each vacancy. The merit-selection panel should be charged with giving the president at least two names for each vacancy, and the president should promise to pick the nominee from this list.

The president would need to create this merit-selection process voluntarily. It likely would be

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28. See generally PUTNAM, *supra* note 6.

29. See generally ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014).

unconstitutional as an infringement of the president's powers for Congress to impose this process by statute. A constitutional amendment to mandate this process is obviously unlikely. But a president could create such a merit-selection process and then hope that his or her successors would follow suit. That action, of course, creates a risk; President Ronald Reagan eliminated President Jimmy Carter's merit-selection panels, and no subsequent president has recreated them. A president may fear that going to such a system is like unilateral disarmament; there is no assurance that a subsequent president of a different political party will continue with merit selection. But my hope is that once a courageous president creates the system, especially for high-profile Supreme Court nominations, political pressure will be great for others to follow the practice of merit selection.

Every year since 1990, I have spoken at the annual conference of the Alaska judges and lawyers. Each year, I do a review of the Supreme Court's decisions and also a review of the decisions of the Alaska Supreme Court and its Court of Appeals on constitutional law and criminal law issues. As I read the decisions of these Alaska state courts every year, I am struck by their tremendous quality. Alaska has had some very conservative governors in recent years, most notably Sarah Palin, but the justices and judges on the Alaska courts are not particularly conservative. For example, Sarah Palin selected Morgan Christen, who was opposed by antiabortion groups because of her work on the board of Planned Parenthood, for the Alaska Supreme Court. President Barack Obama then picked Christen for the United States Court of Appeals for the Ninth Circuit, where she now sits. Even more recently, Marjorie Allard, a public defender, was picked for the Alaska Court of Appeals by conservative Governor Sean Parnell.

I thus have been fascinated at how this has happened and learned that the answer is "merit selection." The Alaska Constitution creates a judicial council whose task is to nominate candidates for judgeships at all four

levels of the state court system.<sup>30</sup> The council is made up of seven individuals: three attorney members appointed by the Alaska Bar Association Board of Governors; three non-attorney members appointed by the governor and confirmed by a majority of the members of the legislature in joint session; and the Chief Justice of the Alaska Supreme Court, who serves as the ex-officio chair.<sup>31</sup>

The judicial council must provide the governor a list of at least two qualified applicants for each vacancy.<sup>32</sup> Any candidate who gets four votes on the judicial council is on the list given to the governor; if there are fewer than two candidates who get four votes, no names are given to the governor and a new search is begun.<sup>33</sup> As I have spoken to individuals in Alaska, I have gotten the strong sense that the judicial council sees its task as identifying those who will be outstanding judges without regard to their political party or ideology.

The governor must use the council's list in choosing whom to appoint. The Alaska Constitution is explicit in this regard: "The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council."<sup>34</sup>

After selection, a judge in Alaska serves a three-year term and then must run for retention.<sup>35</sup> The judge runs unopposed and voters cast a "yes" or "no" vote on the judge's retention.<sup>36</sup> Following retention, supreme court justices serve a term of ten years, court of appeals judges serve for eight years, superior court judges serve for six years, and district court judges serve for four years.<sup>37</sup> At the end of each term, the judge then faces another

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30. ALASKA CONST. art. IV, § 8.

31. *Id.*

32. ALASKA JUD. COUNCIL, *AJC Bylaws* (Dec. 10, 2020) <http://www.ajc.state.ak.us/about/bylaws.html> (art. VII, § 4).

33. *Id.*

34. ALASKA CONST. art. IV, § 5.

35. *Id.* art. IV, § 6.

36. *Id.*

37. *Id.*; ALASKA STAT. §§ 15.35.053 (1980); *id.* § 15.35.100 (1990).

retention election, with the voters once more asked to decide “yes” or “no” as to the person staying on the bench.<sup>38</sup>

My sense is that over time this has truly been a “merit” selection process and has produced courts with excellent judges. Alaska is not the only state with such a merit-selection commission, though the method of selecting state judges varies widely across the country. In Texas, for example, judges run in partisan elections for fixed terms.<sup>39</sup> In California, a vacancy on the California Supreme Court is filled by a nomination from the governor, confirmation by a three-person panel (comprised of the chief justice of the California Supreme Court, the attorney general, and the most senior judge on the court of appeals), and then a retention election.<sup>40</sup> But without question, I think the best selection process is one that truly emphasizes merit, and Alaska’s has succeeded in this regard.

Nothing in the United States Constitution prevents the president from creating a merit-selection panel for judicial vacancies on the Supreme Court and the federal courts and then promising to pick an individual from the names forwarded to him or her. President Jimmy Carter did exactly this for federal court of appeals vacancies—he never got to select a Justice for the Supreme Court—and the results were stunning. When Carter ran for president, he promised to appoint judges based on merit and to increase the diversity of the federal bench. Within a month of taking office, he created by executive order a United States Circuit Nominating Commission, charged with recommending nominees for the federal courts of appeals.<sup>41</sup>

The United States Department of Justice then developed detailed guidelines for the operation of these

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38. ALASKA CONST. art. IV, § 6; ALASKA STAT. §§ 15.35.053, 15.35.100.

39. See TEX. CONST. art. V §§ 2, 4, 7.

40. CAL. CONST. art. IV, §§ 7, 16.

41. Exec. Order No. 11,972, 42 Fed. Reg. 9659 (Feb. 14, 1977).

nominating commissions.<sup>42</sup> Each commission had to be composed of lawyers and non-lawyers and men and women and, it was assumed, be balanced among Democrats, Republicans, and independents.<sup>43</sup> When a vacancy occurred on a circuit court of appeals, the commission, following the prescribed procedures and criteria, was to recommend three to five well-qualified persons to the president.<sup>44</sup> There was a commission in each circuit, with two in the Ninth Circuit because of its large size.<sup>45</sup>

President Carter encouraged senators to create merit-selection plans for federal district court vacancies. Traditionally, senators have been responsible for recommending individuals to the president to fill vacancies on the district court, particularly where the senator is from the same political party as the president. Often senators have made recommendations based on merit, but sometimes it has been a matter of patronage with those of dubious qualifications being picked. When President Carter urged merit selection instead, many senators rebelled, though some did create merit-selection panels.

At the very least, President Carter's approach substantially increased the diversity of the federal bench. When President Carter took office, there was only one woman serving on a federal appellate court.<sup>46</sup> President Carter appointed eleven, including Ruth Bader Ginsburg to the United States Court of Appeals for the District of

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42. See ALAN NEFF, UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS—THEIR MEMBERS, PROCEDURES AND CANDIDATES 257–78 (1981); see also generally Elliot E. Slotnick, *Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270 (1983).

43. NEFF, *supra* note 42, at 268–70.

44. See Larry Berkson, Susan Carbon & Alan Neff, *A Study of the U.S. Circuit Judge Nominating Commission: Findings, Conclusions and Recommendations*, 63 JUDICATURE 104, 105 (1979).

45. *Id.*

46. See Mary L. Clark, *Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243, 245 (2002).



Columbia Circuit.<sup>47</sup> More generally, when President Carter took office in 1977, there were only eight women (1.4% of all federal court judges at that time), twenty African-Americans (3.5%), and five Hispanics (0.9%) on the entire federal bench”—including the district courts, the courts of appeals, and the Supreme Court.<sup>48</sup> President Carter’s merit-selection system made “significant progress toward[] achieving a diverse bench, appointing forty-one women (15.7% of total Carter appointees and 3.7% of all judges at the end of Carter’s term), thirty-seven African-Americans (14.2% for Carter, 5.6% of all judges), and sixteen Hispanics (6.1% for Carter, 2.3% of all judges).”<sup>49</sup>

Assessing quality of nominees is obviously more subjective than assessing diversity, but my overall sense is that President Carter’s picks to the federal court of appeals were the best in terms of consistent merit of any in my career. I think of the eleven women he appointed to the federal courts of appeals—Ruth Bader Ginsburg, Betty Fletcher, Amalya Kearse, Carolyn Dineen King, Phyllis Kravitch, Dorothy Nelson, Stephanie Seymour, Mary Schroeder, and Patricia Wald—and by any measure they had superb qualifications and have been outstanding judges.

Of course, some of those who have sat on the Supreme Court likely would have been picked through any merit-selection process. John Roberts and Ruth Bader Ginsburg would have been on any list based on merit. But through history, others of lesser qualifications likely would not have made it through the process. Particularly divisive nominees—whether conservative or liberal—would not have been selected. But that is precisely why merit selection can help to heal the partisan divide.

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47. See *List of Federal Judges Appointed by Jimmy Carter*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_federal\\_judges\\_appointed\\_by\\_Jimmy\\_Carter](https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Jimmy_Carter) (last visited Apr. 29, 2021).

48. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. UNIV. L. REV. 587, 588 (2011).

49. *Id.*

I would recommend such merit selection not just for Supreme Court vacancies, but for all federal judicial appointments. Any president can implement this approach, and it would be an important step to transform a process that unnecessarily exacerbates division.

I wish I had a way to eliminate the Electoral College, to change the composition of the Senate, and to get the Supreme Court to reverse itself and eliminate partisan gerrymandering. Eliminating all of these would help, too, in making the country more democratic and healing the partisan divide.

### III. CONCLUSION

President John F. Kennedy said, “Our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children’s future. And we are all mortal.”<sup>50</sup> As a society, we must find ways to emphasize that which unites us and more than that which divides us. It was another president, Abraham Lincoln, who reminded us, “A house divided against itself cannot stand.”<sup>51</sup>

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50. John F. Kennedy, Speech at American University, Washington D.C. (June 10, 1963), <http://www.humanity.org/voices/commencements/john.f.kennedy-american-university-speech-1963> (last visited Apr. 29, 2021).

51. Abraham Lincoln, Address at Illinois Republican State Convention, Springfield, Ill. (June 16, 1858).