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THE PEOPLE'S COURTS

PURSUING JUDICIAL INDEPENDENCE IN AMERICA

Introduction: America's Peculiar Institution

In 2002, a West Virginia jury hit Massey Energy, a West Virginia coal company, with a $50 million verdict for using illegal and fraudulent tactics to force a smaller company, Harman Mining, out of business. As Massey appealed this verdict in the court system, its CEO, Don Blankenship, recruited Brent Benjamin, a former state party treasurer with no judicial experience, to run against Justice Warren McGraw. Blankenship spent $3 million—the lion's share of the funding for Benjamin's campaign—to defeat Justice Warren McGraw. Most of Blankenship's money financed "And for the Sake of the Kids," an organization created just for this election which blitzed the state with television advertisements attacking McGraw for being soft on crime and dangerous to children. The most prominent ad alleged:

> Supreme Court Justice Warren McGraw voted to release child-rapist Tony Arbaugh from prison. Worse, McGraw agreed to let this convicted rapist work as a janitor in a West Virginia school. Letting a child rapist go free? To work in our schools? That's radical Supreme Court Justice Warren McGraw. [The word "radical" flashes onto the screen in red over McGraw's grainy picture.] Warren McGraw. Too soft on crime. Too dangerous for our kids.[1]

The McGraw campaign lacked the resources to overcome these attacks.[2] Benjamin beat McGraw 53 percent to 47 percent and became the deciding vote to overturn the jury verdict in 2007. Later, photos surfaced of a second justice, Spike Maynard, vacationing with CEO Blankenship in the French Riviera soon before he heard the case and also ruled in favor of

Massey Energy. Under pressure, Maynard recused himself from the 2008 rehearing, along with another justice who had called Blankenship a "clown" in the media and accused him of buying a Supreme Court seat. But again Benjamin refused to recuse himself, and again cast another deciding vote against the jury verdict.

In June 2009, the U.S. Supreme Court ruled for Caperton, Harman's president, against Blankenship's Massey Energy, deciding for the first time that an elected judge must recuse himself from a case involving a major campaign contributor.[3] In a five-to-four ruling, Justice Kennedy concluded, "There is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds . . . when the case was pending or imminent."[4] Such political and financial influences on the court violate due process and "threaten to imperil public confidence in the fairness and integrity of the nation's elected judges."[5]

Caperton v. Massey was not an isolated case, and this decision has been the only time the Supreme Court has weighed in on the hardball politics of money and special interests in state judicial elections. In May 2003, the Illinois Supreme Court heard oral arguments in a class action against State Farm Insurance.[6] State Farm was challenging a $1 billion verdict, half of which was based on a questionable contractual damages claim. Instead of ruling, the judges decided to wait a year and a half for the election of a new judge in November 2004. With this case hanging in the balance, Republican Lloyd Karmeier and Democrat Gordon Maag ran for the open seat and together raised over $9 million. Most of that money came from the groups with something at stake in the State Farm case. State Farm employees and other insurance groups gave almost $1.5 million directly to Karmeier, and the U.S. Chamber of Commerce spent $2.3 million. Trial lawyers gave $2.8 million to Maag through the state Democratic Party.[7] Remarkably, the race was not even statewide, but just one of the rural districts in southern Illinois far from the expensive Chicago media market.

Political groups attacked both judges for being soft on crime. The Illinois Chamber of Commerce blamed Maag for voting to overturn the conviction of a man for sexually assaulting a six-year-old girl. Its ads did not mention the constitutional and evidentiary problems with the conviction.[8] On the other side, a group of trial lawyers and labor unions attacked Karmeier for giving "probation to kidnappers who tortured and nearly beat a 92-year-old grandmother to death."[9] Over ominous music and a blurry image of children at a playground, another anti-Karmeier ad warned, "He used candy to lure the children into the house. Once inside, the three children were sexually molested. A 4-year-old girl, raped. Despite prosecutors' objections, Judge Lloyd Karmeier gave him probation."[10] True,

Karmeier had sentenced Bryan Watters to probation, but only after the appeals court had directed him to.[11]

Karmeier survived these attacks (in part because of his financial advantage) and won the race. He commented that the fundraising was "obscene," but he did not recuse himself from the State Farm case. He cast the decisive vote overturning the verdict against State Farm for breach of contract. It is impossible to know if Karmeier voted solely on his view of the merits or if he was swayed on some level by politics. Whether State Farm had invested wisely in a true believer or a grateful candidate, either way the company received a return of $456 million on a savvy investment of about $1 million.[12] The U.S. Supreme Court declined to hear the appeal.[13] In more recent races, both left and right have attacked judges for aiding and abetting child molesters, sometimes by race-baiting and often by exaggerating the facts and misleading the public.[14] One recent race in Wisconsin left such raw animosity that it led to accusations of violence between the judges in closed chambers.[15]

Tennessee Supreme Court Justice Penny White generally upheld death sentences, but one sentence struck her as excessive in 1996. The court unanimously upheld the defendant's murder conviction, but also ordered a resentencing hearing because of procedural violations. Justice White joined a concurrence that more narrowly interpreted the "aggravating circumstances" that made a defendant eligible for a death sentence. She was the only one of the concurring judges up for reelection that year, and she was defeated by a coalition of conservative groups.[16] Afterward, Tennessee Governor Don Sundquist, who had fanned the flames over the death penalty controversy, remarked: "Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so."[17]

One more example: In 2009, the Iowa Supreme Court ruled unanimously that the Iowa statute defining marriage as a union of a man and a woman violated the Iowa constitution's equal protection clause.[18] In the fall of 2010, three of those justices were up for their yes-or-no retention election. National organizations—the American Family Association, the National Organization for Marriage, and the Campaign for Working Families, which also fights for "pro-growth," "free enterprise" policies—spent over $800,000 against the three judges.[19] The judges decided not to campaign personally, and instead, other groups supported them independently, spending over $200,000 mostly on television ads.[20] In the end, all three justices lost their retention races.

Almost 90 percent of state judges face some kind of popular election.[21] Thirty-eight states put all of their judges up before the voters.[22] It has been a long-established practice for parties and lawyers to donate to the judges who will later hear their cases, but recently the size of such donations has

increased dramatically.[23] Spending on judicial campaigns has doubled in the past decade, exceeding $200 million.[24] That figure does not include the millions spent on outside advertising. An Ohio Supreme Court justice confessed, "I never felt so much like a hooker down by the bus station . . . as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote."[25]

Today, judicial elections reduce state judges' willingness to apply the law or protect rights in the face of public opposition or special interests. Recent studies demonstrate that elected judges face more political pressure and reach legal results more in keeping with local public opinion than appointed judges do.[26] Other studies have found that elected judges disproportionately rule in favor of their campaign contributors.[27] Even though codes of judicial conduct bar personal solicitation of campaign contributions, there are many stories of judges directly asking for donations from the lawyers in their chambers in the middle of presiding over their cases.[28]

These stories and studies may be discomforting, but judicial elections certainly are not the only way for politics to influence the courts. Appointments are also political. We are reminded every few years in high-stakes battles over Supreme Court nominations that federal judges are appointed effectively for life, and the federal appointment process has grown increasingly partisan. The U.S. Constitution guarantees that "the Judges, both of the supreme and inferior Courts shall hold their offices during good behavior," which in effect gives them life tenure.[29] Even if lower federal judges have life tenure, they are tethered to public opinion and partisan politics if they hope to be promoted. And less well known is that some specialized federal judges are not covered by Article III of the Constitution and are appointed to shorter terms. In the dozen states that appoint judges, nine states appoint judges to relatively short terms. These federal and state judges are subject to the politics of reappointment that can be just as unseemly and corrupt as modern judicial elections. More troubling, those pressures are less visible.[30] One study found that the appointed judges in Virginia were the least likely to reverse death sentences among all the state courts, and South Carolina's were close behind.[31] An explanation is that these judges face reappointment by the state legislature, and state legislators have lots of incentive to make noise about judges who overturn death sentences. Penny White lost her Tennessee race 53 percent to 47 percent. If she had been facing reappointment by the governor and/or state legislators, her margin of defeat would have been much larger, and she almost certainly would not have been renominated at all. If West Virginia had judicial appointments, Massey's CEO would not have waited patiently on the sidelines. Likewise, State Farm and the Illinois trial lawyers would not have focused only on

perfecting their legal briefs. They would have fought for the governorship and lobbied legislators—and made donations to them for the same purposes. These strategies would be less transparent than direct election spending—less obviously offensive to the casual observer, but more insidious. A nineteenth-century American lawyer-poet once quipped, "Laws, like sausages, cease to inspire respect in proportion as we know how they are made."[32] The same is true with judicial selection. With direct popular elections, we watch the sausage-making. With appointments, the sausage-making is out of sight, out of mind.

Many major democracies in Europe, Asia, South America, and Africa have turned over judicial selection to judges and judicial selection committees. France has one "marginal" specialized lower court with popular elections, but the rest of its system is a more insulated professional civil service. Law graduates interested in becoming judges must take a rigorous four-day exam, and only the top 5 percent are accepted to the École Nationale de Magistrature, an elite two-year judicial training program. They then enter the civil service, and they are evaluated by the Supreme Judicial Council, composed of judges, lawyers, and commissioners selected by the other branches of government. Many major democracies have adopted a similar system of civil service testing and bureaucratic internal promotion for the courts. This kind of appointment insulates the courts from popular politics, but it increases the influence of elite politics and judicial self-replication.[33]

One might think of judicial elections as America's truly unique institution. Many countries have copied American legal institutions, but almost no one else in the world has ever experimented with the popular election of judges.[34] Why have Americans adopted such a strange practice, when almost no one else has done so before or after?

Countless scholars describe judicial elections as a "threat to judicial independence."[35] In contrast, this book argues that the story of judicial elections is also the story of the ongoing American pursuit of judicial independence—and the changing understandings of what judicial independence means. Judicial independence has long been the rallying cry *in favor* of judicial elections in their various forms. "Judicial independence" and "judicial accountability" are not abstract concepts with fixed meanings over time. They depend on context, and they have evolved in the flow of events and crises. Interest group politics, economics, and specific events drive these stories of judicial design at each stage, yet at the same time, ideas mattered. The idea of judicial independence has been surprisingly resilient and popular throughout American history. At each stage, the goal of separating law from politics was a significant part of the campaign

for each model of judicial elections. But the notion of what "politics" judges were supposed to be independent *from* changed over time, in part because the notions of what kinds of politics were necessary versus corrupting also changed over time.

It is too simplistic to link elections to judicial accountability and appointments to judicial independence. Alexis de Tocqueville predicted in 1835, when only three states held judicial elections of any sort, that "sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked."[36] De Tocqueville presciently recognized the beginnings of a movement and the problems it would later create, but he missed the point about judicial power in his own time. In light of these stories of competitive and expensive judicial campaigns, one might imagine that Americans must have chosen this unique system because they opposed judicial independence. Scholars have suggested that states have turned to judicial elections in order to weaken the courts, "with little explanation of how an elective judiciary could protect constitutional rights."[37] To the contrary, advocates of judicial elections at each stage of American history have argued that elections bolster judicial independence and constitutional protections.[38] In the wave of judicial elections in the mid-nineteenth century, the agenda was more judicial power, not less. An economic crisis triggered a popular movement for fiscal restraint and limited government, and against partisan appointments and the weak courts they had produced. This movement had an economic ideology and a set of class interests, but its leaders also emphasized the abstract principles of judicial independence in their arguments for judicial elections. Reformers defined judicial independence as insulation from a certain kind of insider politics: the partisan patronage politics of appointments. Open partisan politics out-of-doors was their solution, not the problem. In that moment, reformers believed that direct elections gave "the people," mobilized by more participatory political parties, a check on insider politics. Intriguingly, they believed that partisan elections promised a *less* partisan and *less* politicized bench that would be emboldened to act as a stronger check and balance against the other branches. They were able to frame judicial elections as an improvement on the separation of powers and, even more remarkably, the separation of law and politics.

In the twentieth century, interest groups (chiefly business interests) drove the reform of judicial elections and the turn to merit selection, but they relied heavily on the rhetoric of judicial independence to legitimate their reform efforts. With time and experience, the definition of politics and corruption shifted: partisan elections were now perceived as having problems

behind closed doors with party bosses, special interests, and crime, and now open campaigning was perceived as unbecoming of a judge's professional dignity. A new brand of insider politics was the solution: professional "merit" nominating commissions run by bar leaders and committee members. The indignity of open campaigning was supposed to be replaced by the dignity of uncompetitive retention elections without campaigning. This book traces the shifting perception of partisan politics, sometimes viewed as an engine of democracy and law, and sometimes as a threat to democracy and law.

Judicial independence has different meanings, but at its core, it refers to a judge's insulation from the political and personal consequences of his or her legal decisions. This historical account contrasts *relative* judicial independence (independence *from whom*?) with *general* judicial independence (*how much* independence from political pressure generally?). Some reforms foster "general" judicial independence: most importantly, length of tenure and job security, but also protection of jurisdiction, salary, and other resources. General independence does not mean absolute autonomy; a judge might still be influenced informally by public opinion, elite opinion, reputation, and ambitions for promotion. General independence simply means a judge is more insulated from direct political pressure from any source. By contrast, reforms in methods of judicial selection produce relative judicial independence. In the switch from one form of selection to another, judges become more independent from one set of powers but more accountable to another. The principal-agent problem is one key to understanding the history of judicial elections. Judicial appointments gave presidents, governors, and legislators (the agents) control over the courts instead of giving that power to the people (the principals). Many critics argued that short-term appointments made the judges agents of the agents, not agents of the people.

This book is a work of legal history and political history, and it is also a history of an idea. Political interests and economics shaped the evolving concepts of judicial independence, but those ideas were not only functions of those interests or simply mirroring society. The idea of judicial independence is so capacious and flexible that it has been manipulated to serve various political and economic interests over time. While reformers throughout American history have talked about separating law and politics, they often were seeking specific legal and political outcomes in particular kinds of cases, sometimes using "rule of law" rhetoric to thwart popular movements. These elites may have sincerely believed in judicial independence and the rule of law, they may have been cynically using this rhetoric only to persuade an audience, or somewhere in between, or they may have been trying to convince

themselves of the moral correctness of their own positions. It is difficult to know from these sources. Nevertheless, advocates of judicial elections and their reform repeatedly emphasized judicial independence because that idea resonated with elites and the general public. Regardless of the sincerity of the leaders, the fact that they translated their specific reforms into general principles of fairness and justice indicates that they believed the public cared deeply enough about the concept of judicial independence. These stories illustrate that even if economic interests have been a driving force in legal change, they still needed to engage in a general discourse of ideas and public reason in order to legitimate those changes. Judicial independence became a principle that defined the terms of the debate, set boundaries on what amount of politicization was tolerable, and shaped the array of possible alternatives. Legal historians often use the phrase "constitutive" when describing how legal categories or legal ideas shape, define, and "constitute" social relationships.[39] In this book, broader ideas about justice, fairness, impartiality, and nonpartisanship roughly guided Americans' views, even when judicial independence sometimes might have created an obstacle to their political goals and might have been counter to their interests. This book suggests that a somewhat inchoate belief that law should be separate from politics influenced each change in judicial selection, even the adoption of partisan judicial elections, remarkably enough. Each chapter traces the role of interest groups or economics and the role of ideas about judicial independence, parties, and democratic politics in the evolution of judicial politics.

The development of judicial selection is also a story about the evolving concept of the separation of powers. Judicial independence and the separation of powers were political insurance, based on distrust and risk aversion.[40] Each generation feared concrete evils: imperious kings, incompetent legislators, corrupt political parties, corrupting special interests, demagoguery, and the masses. In various combinations, economic elites, political insiders, the dueling parties, and the general public distrusted each other more than they distrusted judges, so they were willing to entrust judges with more power and independence as a hedge against the other groups and the political branches of government. To insulate the judges from these evils, Americans in the late eighteenth century turned to life-tenure appointments. Nineteenth-century Americans switched to judicial elections, and then to elections to longer terms in office. In the twentieth century, the rise of the merit plan was a new separation of powers, separating courts from partisan politics (and, to an extent, from the masses). Nonpartisan "merit selection" commissions were a new mini-branch, separate from all of the other branches, but drawing their members from those branches and from civic

leadership. At each stage, reformers focused on separating the courts from an immediate set of evils, but separating the judges from one set of interests often left them vulnerable to the next set of interests.

The concepts of general and relative independence can be traced over five stages in American history: the premodern unseparated judiciary, judicial aristocracy, judicial democracy, judicial meritocracy, and judicial plutocracy. Chapter 1 explains how colonial America's elected judges reflected the first stage, the premodern judiciary, with dependent judges and a mixed English system of powers. Because the premodern judiciary lacked separation of powers and judicial independence, elected officials played multiple roles, including judging. In England and America over the eighteenth century, judicial independence emerged in the rise of judicial aristocracy—not an aristocracy of birth, but in the minds of some of the Framers, a "natural" aristocracy of virtue insulated from political and partisan pressure. In the words of a leading historian on the Founding era, the U.S. Constitution was "in some sense an aristocratic document designed to curb the democratic excesses of the Revolution."[41] The Framers turned to tenure during "good behavior" in order to create a separate branch of government, a specialized judicial role with more job security. As the concept of separation of powers evolved, the elected colonial judges were vestiges of the less specialized premodern system. They were driven into extinction, replaced by a new species of independent appointed judges with life tenure and distinctly legal responsibilities.

Judicial democracy spread over the course of the nineteenth century. Judicial elections played only a minor role from 1800 through the 1830s. As Chapter 2 details, the democratic reformers in the Jeffersonian and Jacksonian eras were generally seeking to weaken courts, and there were more effective weapons for attacking judges, such as impeachment or getting rid of the judges' offices. The appointed judges of this era get credit for announcing the theory of judicial review to void unconstitutional legislation, but often they refused to put this theory into practice, and instead retreated from political conflict. A closer examination of the dramatic showdowns over the courts shows that these appointed judges were relatively weak and that judicial review was more paper than practice, more bark than bite. Appointments did not equal independence or power. Jeffersonians and other democratic opponents of judicial independence did not need judicial elections to expose the weaknesses of the early judiciary. Nevertheless, some judges still tested boundaries and risked their careers to lay a foundation for judicial review, and these efforts raised the profile of the courts, making judges a potential solution for democratic governance, not just an obstacle.

Chapter 3 shows that judicial elections arose in a few exceptional cases in these early years where there was more of a focus on the separation of powers and on insulating judges from corrupt governors and legislatures. These early experiments in Vermont, Georgia, Indiana, and Mississippi remained isolated cases even at the height of the Jacksonian era of the 1830s. The American "exceptionalism" of direct democracy had spread to most offices, but not the judiciary. Then came the Panics and the trigger of the wave of judicial democracy, discussed in Chapters 4 and 5. Economic and fiscal crises of the 1830s and 1840s triggered the American Revolutions of 1848, a wave of state constitutional conventions throughout the country. The fiscal crisis was blamed on legislative overspending on internal improvements (canals, roads, and railroads), so the conventions focused on limiting legislative powers and increased the separation of powers. Almost all of these conventions turned to judicial elections as a way to separate the courts from the other branches and to enforce the "people's" constitutional rights against government excess. The system of political appointment could have gone in various directions, but instead of making judicial appointments less political, these conventions decided to make them more directly political. Slavery, America's more infamous "peculiar institution,"[42] also influenced the design and practice of judicial elections in both the South and the North, but it was much less significant than the economic and fiscal crisis. The Panics occurred while the second "Two-Party System" (Democrats and Whigs) had flourished and mobilized astonishing numbers of voters—and just before that system collapsed in the mid-1850s over the new slavery crisis. At that moment, party politics and direct elections appeared to be a panacea. Ever since that turning point, popular elections have been a given part of state judicial politics, a path-dependent institution with a life of its own. The "exceptional" political culture of American direct democracy was one necessary condition for the switch to judicial elections, but the timing and the framing of the economic crisis were also necessary to trigger the constitutional conventions to make these changes nation-wide. It is not obvious that judicial democracy would have spread so broadly if judicial appointments had survived up to the Civil War.

Chapter 6 offers comprehensive evidence that these reformers' expectations were filled in at least one respect: the first generation of elected judges blocked far more legislation than any earlier era of judges. These elected judges also offered more general criticisms of public opinion and democracy in these cases than any earlier era of judges, a counterintuitive turn toward "countermajoritarianism." The elected judges of the 1840s and 1850s played a role in developing modern judicial power, modern constitutional law, and judicial resistance to progressive regulation over the next

century. After the Civil War and Reconstruction, there were increasing concerns about the flaws of partisan elections. Judicial democracy emerged to promote judicial independence, but over time, party politics in those elections threatened judicial independence, too. In the late nineteenth century, reformers responded by lengthening judges' terms (discussed in Chapter 7), and early twentieth-century progressives turned to formally "nonpartisan" elections (a reform that failed, discussed in Chapter 8).

Then judicial meritocracy emerged during the Great Depression and spread in the 1950s through the 1970s, as told in Chapters 9 and 10. "Merit" commissions are a new twist on the separation of powers, a synthesis of appointment, election, and expertise that is not immune from politics but still is separated from the other branches and from the political parties. This campaign for judicial independence offers a strange puzzle of what, where, and when. *What*: In approving merit plans, voters were surrendering some of their voting rights—a very rare event generally in American history. *Where*: Merit plans emerged and then spread in relatively rural states in the Midwest, the Rockies, and the South, where one would imagine populism and antielite, antilawyer sentiment would block elite judicial selection. *When*: merit plans emerged in the 1930s and spread from the 1950s through the 1970s, in the very places that were most opposed to appointed judges and legal elites, first when the "Nine Old Men" blocked the New Deal and then during the most controversial decisions of the liberal Warren Court.

Chapters 9 and 10 do not solve this puzzle comprehensively, but they offer a number of clues based on a closer study of the early merit states. In both the early twentieth century and the late twentieth century, business interests drove the campaigns for merit plans, often behind the scenes, and often overcoming political resistance by using rhetoric to build broader coalitions. These puzzle pieces are a complicated balance of rural and urban dynamics; of business and labor, of plaintiffs' trial lawyers and the tort wars; reactions to World War II and the Cold War; the ideology of merit; and the politics of race, ethnicity, and crime. Ever since the 1980s, anticrime backlashes have threatened judicial independence, but oddly enough, crime waves in the 1930s and the late 1960s contributed to calls for *more* judicial independence from popular politics. Chapter 9 for the first time tells the story from the archives of a young prosecutor named Earl Warren leading the anticrime, pro-merit campaign on behalf of California businesses in 1934, launching his rise to power.

As Chapter 11 explains, modern America has shifted to an era of judicial plutocracy, not necessarily a judiciary of the wealthy, but a judiciary shaped by the massive campaign spending by lawyers, litigants, and interest

groups. These advertising battles focus on crime and the death penalty (another peculiarly American institution), but are most often a front for the tort wars between trial lawyers and business interests.[43] Chapter 11 surveys the current practice of judicial elections and explores potential areas of reform.

The popular election of judges is an unusual and increasingly contentious practice. However, it must be understood in context, with a clear-eyed view of the alternatives. Judicial appointments are no panacea. Judicial elections were an understandable reaction to a crisis of appointments, corruption, and government excess. In judicial selection, there is no escape from politics, but only different forms of political influence. Today, judicial elections have reached their own crisis point of corruption and special interest excess. We can find some hope to face this challenge by recognizing that even if merit selection has its own politics and its own flaws, it better insulates the courts from money and partisan politics, and offers more job security than competitive elections. The key to judicial independence is not front-end selection, but rather, back-end retention and job security—that is, general judicial independence. It turns out that the American public often has embraced the idea of judicial independence, and even general independence. This tour of American legal and political history will explain why these leaders viewed judicial elections as the key to constitutional protections against the abuse of power, and why this system first succeeded and then failed. America is now at a crossroads between a flawed-but-promising judicial meritocracy and a flawed-and-worsening judicial plutocracy. One nineteenth-century leader warned that judicial elections would be a "route to hell" with no way back.[44] The lessons of this history may help us find a plausible path back to judicial independence.

Note on Historical Causation

Historical causation is complex, and it is difficult to pin down which factors were necessary or sufficient causes. I rely on a classic model of historical causation to sort out the factors: long-term *preconditions*, midterm *precipitants*, and short-term *triggers*.[45] In the wave of judicial elections in the mid-nineteenth century, a precondition was democratic ideology. Precipitants were the Panics, the states' fiscal crisis, and systematic abuses of the appointment process. The triggers were New York's 1846 convention and the wave of constitutional conventions thereafter. America's democratic culture was a necessary condition, but not clearly a sufficient condition to

overcome a long-standing tradition of appointing judges. Without the precipitants and triggers, it is less likely that there would have been constitutional conventions proposing broad changes to state courts in the 1840s and early 1850s, and after the Civil War, it is unclear whether there would have been as much momentum for judicial elections. It is possible that judicial elections would have remained isolated to the American West, spreading only regionally and incrementally.

In the rise of merit selection in the mid-twentieth century, a precondition was a relatively rural society, but with increasing urbanization and industry. Another precondition was business interests seeking political control over the courts in labor and tort litigation. Precipitants varied from state to state. In some states, changes in voting rights and racial voting strength led to a backlash and a shift from popular participation to elite control by the bar. In other states, a precipitant was a crime wave, which created an opportunity to pitch merit selection as a way to produce a more effective bench in handling criminal prosecutions. World War II shaped Americans' views of judicial independence, and the Cold War led to renewed interest in "rule of law" ideology. Specific triggers also differed from state to state, such as Earl Warren's strategizing in California in 1934, corruption scandals in Missouri and Kansas, and Big Jim Folsom's cross-racial victory in Alabama. Often the preconditions and precipitants seem powerful enough to make a historical event appear almost inevitable. However, the triggers shape when and how these events took place, and sometimes whether they would take place at all. Sometimes it may appear that America's culture of popular democracy made judicial elections inevitable, but individual leadership, luck, and timing played a crucial role at each turning point.