

THE STATE JUDICIAL ARTICLE

G. Alan Tarr

Center for State Constitutional Studies
Rutgers University
Camden, NJ 08102
tarr@crab.rutgers.edu
856-225-6084, ext. 43

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Introduction

For almost a century, since Roscoe Pound's famous address to the American Bar Association in 1906 on "The Causes of Popular Dissatisfaction with the Administration of Justice," the reform of state court systems has been a high priority item for state constitutional reformers and for national organizations within the legal profession. Since 1913, the American Judicature Society has sought to educate the public about the deficiencies of state court systems and to promote a more efficient administration of justice. The American Bar Association (ABA) has contributed to state court reform by disseminating standards pertaining to court organization, judicial administration, and judicial selection. In 1995 the ABA proposed a model state judicial article.

Reformers within the states have drawn upon these national standards in championing changes in the structure and administration of state court systems and in the mode of selection of state judges. Since World War II, these reformers have enjoyed considerable success. Several states have completely revised their judicial articles or have used the occasion of adopting a new constitution to institute major reforms. Other states, although eschewing comprehensive reform, have nonetheless introduced changes that take account of the national standards. As a consequence, in contrast with most other articles of state constitutions, the judicial articles of many (but not all) state constitutions have been subject to thorough reexamination and reformulation within recent decades.

This does not mean that all the problems confronting state court systems have been solved. For one thing, the reformers have not enjoyed complete success. For example, although administrative and structural reforms have been introduced, the campaign to substitute "merit selection" for election of judges has bogged down, particularly in recent years. For another thing, the success of the reformers is a positive development only if they have accurately diagnosed the problems afflicting state court systems and have proposed constitutional remedies that in fact solve those problems. Finally, new problems may have arisen that the reformers did not anticipate but that may be susceptible to constitutional resolution.

Nevertheless, the reform perspective provides a useful starting point for considering the reform of state judicial articles.

Guiding Principles

Four concerns should guide the reform of state judicial articles:

Judicial Independence: Judicial independence involves the insulation of the judiciary from the influence of other political institutions, interest groups, and the general public, so that judges can render impartial judgments in the cases they decide. Thus judicial independence is designed to protect not judges but the public interest in even-handed justice.

Autonomy of the Judicial Branch: Separation-of-power principles require recognition of the autonomy of the judicial branch as a coequal partner in state government. This means that the judicial branch must have the authority to govern and manage its own affairs, free from undue interference by other branches of government, although not from public scrutiny.

Effective Delivery of Judicial Services: State judicial systems must be structured, organized, and managed so that they ensure access to justice for all citizens and provide for the expeditious administration of justice.

Accountability of the Judiciary. The American system of government embraces the notion of accountability for public officials in order to prevent corruption or other abuses of power and to ensure that governmental policy reflects the values and interests of the community. This underlies the creation of a system of separate institutions sharing power to ensure checks and balances and the establishment of mechanisms for public scrutiny of the performance of government officials.

The judiciary likewise must be accountable. With respect to the judiciary, two different types of accountability can be distinguished.

With regard to their decisions, judges are accountable to the law. With regard to the operation of the judicial branch, the judiciary is accountable to the people and to their representatives.

First, it should be stressed that these principles, which should guide the reform of state judicial articles, are not ends in themselves. Rather, they are important because they enable state courts to do justice.

Second, these principles may be in some tension with one another. Accountability and decisional independence may seem at odds. So too may accountability and judicial-branch autonomy. Such tensions are not unusual--state constitution-makers must also balance competing concerns in dealing with the other branches of state government, with the scope of state powers, and with the protection of rights. Moreover, such tensions need not be viewed as negative. Our discussion will both identify those instances in which constitution-makers must choose between apparently conflicting principles and highlight

those opportunities for reconciling or striking a balance between competing concerns.

The Structure of the State Court System

Trial-Court Consolidation

For much of the twentieth century, state court systems were essentially "non-systems," characterized by a proliferation of limited-jurisdiction and specialized courts, often with their own distinctive rules of procedure and with overlapping and/or ill-defined jurisdictions. This led to uneven workloads among courts and to an unnecessary duplication of support personnel and facilities. Judges found their time consumed in hearing jurisdictional rather than substantive arguments and on unnecessary retrials resulting from an erroneous choice of forum. Even more important, the proliferation of courts interfered with doing justice. Litigants, unsuccessfully searching for the proper forum to hear their cases, too often were unable to get a ruling on the merits of their claims. Over the course of the twentieth century, most states recognized the problem posed by multiple trial courts and, following reform prescriptions, consolidated their trial courts into either one-tier or two-tier systems. Thus, in most states the coherence of state court systems is no longer a pressing issue.

The best evidence suggests that trial-court consolidation has contributed to a more effective administration of justice. Thus, those states that have failed to consolidate their trial courts fully because of political or historical factors should consider seriously the potential gains from consolidation. In addition, those states that continue to maintain separate courts for law and for equity should reexamine this choice.

In recent years there have been renewed calls for specialized state courts, such as drug courts, family courts, and business courts. Typically, state court systems have responded to these calls by creating divisions within existing trial courts. However, some advocates of specialized courts insist that they should not be created as divisions within existing trial courts, because they will not in such circumstances attract the resources and committed judges they need to succeed. The validity of this argument is open to question. But whatever its validity, it does not follow that these specialized courts should be enshrined in the state constitution. Different eras may have quite different views of what specialized courts (if any) are desirable, and giving specialized courts constitutional status produces undesirable rigidities and may empower vested interests.

This leads to a more general consideration of constitutional provisions relating to the structuring of state court systems.

Constitutionalization of Court Structure

A structural issue on which no consensus has emerged involves the extent to which the structure of the state court system should be constitutionalized. The states have adopted a variety of approaches:

The Federal Model: Some state constitutions, following the Federal Constitution, require the establishment of a Supreme Court but leave it to the Legislature to create and empower all additional courts. For example, the Maine Constitution vests the judicial power in a supreme court and such other courts as the Legislature shall create.

The Modified Federal Model: Some state constitutions establish various appellate and trial courts but allow the Legislature to create and empower additional courts. Illustrative is the Arizona Constitution, which creates the Supreme Court and the Superior Court (the general-jurisdiction trial court) but allows the Legislature to create an intermediate court of appeals and limited-jurisdiction trial courts. . Some state constitutions--for example, the Connecticut Constitution--restrict the Legislature to creating additional limited-jurisdiction trial courts. Other constitutions--for example, the Michigan Constitution--grant the Legislature the power to create additional courts but seek to discourage a proliferation of separate courts by requiring an extraordinary majority for the creation of courts.

The Full-Articulation Model: Some state constitutions establish the state's appellate and trial courts and expressly or implicitly prohibit the Legislature from creating additional courts. Thus, the Florida Constitution specifies all state courts and bans the creation of additional courts, while the Georgia Constitution requires that the judicial power be vested exclusively in those courts designated in the Judicial Article.

The advantage of the Full-Articulation Model is that it ensures a unified court system with clear divisions of jurisdiction and clear lines of authority. The advantage of the Federal Model and the Modified Federal Model is that they build in flexibility, allowing states to respond to changing needs and changed perceptions of desirable institutional design. The disadvantage of those models is that they encourage special interests to petition the Legislature to create specialized courts, thus undermining the coherence and unity of the court system. The Michigan requirement of an extraordinary majority for the creation of additional limited-jurisdiction trial courts has proved an effective safeguard in that state against an unwise proliferation of courts.

Degree of Unification

One structural issue on which no consensus has emerged involves the degree of consolidation appropriate to a state court system. States have adopted three alternative approaches in their constitutions:

The Single-Court Model: Some state constitutions conceive of the court system as a single court, with divisions including the supreme court, perhaps an intermediate appellate court, the general-jurisdiction trial court, and perhaps a limited-jurisdiction trial court. Thus, the Michigan Constitution (Article VI, section 1) states: "The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house."

The Multiple-Level Model: Most state constitutions distinguish a supreme court, an intermediate court of appeals, a trial court of general jurisdiction, and (in most states) one or more trial courts of limited jurisdiction. The Indiana Constitution exemplifies this model.

The Multiple-Court Model: Some state constitutions treat each intermediate court of appeals, each trial court of general jurisdiction, and each trial court of limited jurisdiction as a separate court.

There is no clear evidence at this point that these differences in design substantially affect the operation of state courts or the administration of justice.

The Jurisdiction of State Courts

Closely related to the issue of whether to constitutionalize court structure is the issue of whether to constitutionalize the jurisdiction of various courts. One possibility is to assign the allocation of jurisdiction to the Legislature--the Alaska Constitution (Article IV, section 1), for example, mandates that jurisdiction "shall be prescribed by law." This maximizes flexibility. Another possibility is to allocate the jurisdiction of each court in the constitution. This is problematic, particularly if the Legislature is authorized to create additional courts. Many state constitutions grant broad authority to the Legislature to allocate jurisdiction but nonetheless constitutionalize certain choices, particularly as they relate to the jurisdiction of the supreme court, and there may be advantages to this approach. More specifically, the following choices may be appropriate for constitutionalization:

Are there appeals that the constitution should require be heard by the state's highest court as a matter of right? Several states mandate that their supreme court hear certain classes of appeals as a matter of right. The Louisiana Constitution, for example, requires that the court

hear appeals in capital cases and in cases in which a law or ordinance is declared unconstitutional.

Should the constitution authorize the supreme court to issue advisory opinions or address the constitutionality of bills before their enactment into law? Currently, seven state supreme courts have the power to issue advisory opinions. Internationally, the movement has been to authorize supreme courts/constitutional courts to rule on the constitutionality of bills before they have been enacted into law upon petition from legislators or from the executive (so-called abstract review). State constitutional reformers should contemplate both the state and international experience in deciding on what state courts should do during the twenty-first century. However, if a state supreme court is given the power to issue advisory opinions or to rule on bills prior to final passage, it will undoubtedly have major implications for the political process in the state. Thus, it seems reasonable that the citizenry should decide whether or not to grant this power through the process of constitutional amendment or revision.

Should the constitution protect against legislative use of its power over jurisdiction to infringe on the autonomy of the judiciary? This seems a desirable goal in order to maintain the separation of powers. The Idaho Constitution (Article V, section 13) deals with this effectively: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government"

The Administration of the State Court System

Paralleling the movement for structural unification of state courts has been a movement for administrative unification. Administrative unification was championed as necessary to rescue trial courts from immersion in local politics, to ensure procedural uniformity throughout the state court system, and to encourage better management of the courts--in short, to promote a more efficient and uniform administration of justice. The reforms to achieve these ends included: (1) vesting rulemaking authority in the state supreme court in order to encourage uniform procedures throughout the court system, (2) making the chief justice the administrative head of the court system in order to promote a system-wide management perspective, (3) creating and empowering chief judges of trial courts in order to strengthen management at that level, and (4) establishing vertical lines of authority within the court system.

We turn now to constitutional provisions relating to specific aspects of judicial administration.

Administrative Authority

Most state constitutions vest administrative authority over the court system in the state supreme court, with the chief justice serving as the chief administrative officer. As the Article III, section 1 of the Kansas Constitution succinctly states: "The supreme court shall have general administrative authority over all courts in this state." This power to ensure the efficient and effective delivery of court services typically extends to selection of the administrative director of the courts and other personnel, to rule-making over practice and procedure in the courts, to regulation of the bar and disciplinary authority over members of the legal profession, and to assignment of judges from their "home" court in order to allocate workload equitably. This administrative authority may also encompass preparation of a budget for the judicial branch. Finally, the supreme court's responsibility for the operation of the judicial branch may lead to delivery of a "state of the courts" address and to less formalized contacts between the chief justice or his staff and members of the executive and legislative branches.

The California Constitution provides the major alternative to vesting administrative responsibility in the supreme court and the chief justice. Article VI, section 6 of the California Constitution creates a Judicial Council comprised of judges from both appellate and trial courts that exercises rule-making authority, oversees the work of the state's courts, reports to the Governor and the Legislature regarding that work, and makes recommendations for the more effective administration of justice. The aim of this model is to encourage widespread participation in making major decisions affecting the court system. Of course, vesting administrative responsibility in the supreme court or the chief justice need not preclude consultation. In fact, ABA Standard 1.32, Administrative Policy, states: "All judges and judicial officers of the court system should share in deliberations and discussions concerning the procedure and administration of the courts."

Because not all judges possess the requisite managerial skills or interest in administration, selecting as chief justice a judge qualified to act as the chief administrative officer for the court system is essential. The states currently employ three methods for selecting the chief justice. First, in some states those who select the judges also determine who will serve as chief justice. Thus, in New Jersey the governor appoints for the slot of chief justice when it becomes vacant, and in Alabama candidates run in partisan elections for the office of chief justice. Second, in some states--for example, Georgia and Michigan--the members of the supreme court elect the chief justice, usually for a set term of office. Third, in some states--for example, Louisiana and Kansas--the office of chief justice rotates to the senior justice in terms of service. Although this last method may avoid infighting on the supreme court, it does so at excessive cost. There is no reason to expect that the senior justice on a court has either the interest or ability to manage the courts effectively, and a senior justice may only serve a limited time after assuming the chief justiceship, thus precluding continuity in leadership. Likewise questionable for the same reason is Alaska's

ban on the chief justice, who is elected by colleagues to serve a three-year term, serving successive terms.

Rulemaking

As a concomitant to vesting administrative authority in the supreme court, several state constitutions expressly grant the supreme court authority to adopt rules governing the administration of the court system. This has not occasioned great controversy. In states whose constitutions do not grant such power, it is understood that the power is implicit in the grant of administrative authority.

Somewhat more controversial is the decision where to lodge the authority to make rules relating to legal practice and procedure--i.e., rules pertaining to the methods and stages whereby cases move from initiation to disposition. What fuels this controversy is the difficulty of distinguishing rules relating to practice or procedure from rules, which might be made by the judiciary, from rules relating to substantive law, which would be enacted by the Legislature. Even careful constitutional drafting cannot obviate this difficulty.

During the early twentieth century, legal commentators began to assert that the power to make rules of practice and procedure belonged to the courts as an inherent judicial power. Currently, most state constitutions expressly grant this authority to the state supreme court. Michigan's provision is exemplary, in that it vests the power in the supreme court and identifies the ends for which the power should be employed: "The supreme court shall by general rules establish, modify, amend, and simplify the practice and procedure in all courts in the state" (Article VI, sec. 5). (As noted, California has chosen an alternative approach, vesting rule-making authority in its Judicial Council.)

Some state constitutions, emphasizing the separation of powers, grant the supreme court exclusive rule-making power over procedure and practice. Other state constitutions permit the legislature to adopt rules as well and/or to alter those rules adopted by the supreme court. The Alabama Constitution, for example, permits court-created "rules to be changed by a general act of statewide application," thus securing uniform rules statewide but not judicial control over rules. Similarly, the Louisiana Constitution authorizes rule-making by the supreme court "not in conflict with the law." Such provisions seem incompatible with the idea that each branch of government should govern its own internal operations. Some states (e.g., Florida) permit the legislature to annul rules adopted by the supreme court only by a two-thirds majority. Although this still involves some intrusion on the judicial branch, the requirement of an extraordinary majority guarantees that the power will be used sparingly and makes it less likely that it will be used for narrow partisan purposes.

Funding and Budgeting in the State Court System

State vs. Local Financing?

During the first half of the twentieth century, state courts--especially state trial courts--received almost all their non-salary funding from local sources. This reliance on local governments for funds enmeshed the courts in local politics. It also meant that the level of funding enjoyed by a particular court depended in large measure upon the wealth and generosity of the local government. In some instances, trial courts generated much of their funding from the fees and fines that they collected.

State court reformers championed a state takeover of court financing, with all funds flowing from the state's general fund and with local fees and fines paid directly to the state treasury. Advocates of state financing argued that it would ensure a rough parity of funding--and thus of court services--throughout each state. They also believed that it would integrate the state judicial system, because it would facilitate planning and judicial management at the state level. Finally, they contended that the level of funding for the courts would increase, because the state had greater resources at its disposal than did local governments.

During the 1970s a gradual shift toward more state funding occurred in many states, driven less by the reformers' arguments than by increasing court costs and by the financial plight of local governments in a period of economic stringency. In fact, there is little evidence supporting the reformers' claims of the benefits that would accompany state financing. At present, there remains considerable diversity among the states in the level and form of state financing. Some states have increased state-level control through increasing state financing. Others, such as Pennsylvania, have taken over more of the financial burden but sought to avoid excessive centralization through grant financing of local courts.

Because the judicial branch is one of the three coequal branches of state government, states have a responsibility to ensure that it has sufficient funding to carry out its responsibilities. Some states have recognized this constitutionally. Section 6.10 of the Alabama Constitution, for example, mandates that "[a]dequate and reasonable financing for the entire unified judicial system shall be provided." Whether such mandates are enforceable remains a question. Yet even in the absence of such constitutional language, state courts have on occasion invoked the "inherent-powers" doctrine to incur and order paid expenses necessary to the performance of their judicial functions.

Beyond possible constitutional recognition of the need for adequate financing of the court system, it may well be that decisions about the allocation of funding responsibilities should be made at the sub-constitutional level. Even if these decisions are constitutionalized, there is no conclusive evidence that suggests that a single approach to the funding of courts should be adopted nationwide.

Budgeting

The states differ in the authority that they give the judicial branch over its budget. Many states require that the judiciary submit its budget requests to executive branch officials who review and revise the judiciary's requests and incorporate the revised requests in the overall budget sent by the Governor to the Legislature. However, it seems inappropriate to treat the requests of a coequal branch the same as one treats the requests of an executive-branch agency. Consequently, some states either permit the judiciary to submit its budget directly to the Legislature or require the Governor to transmit the judiciary's budget request without alteration to the Legislature. Of course, the Legislature is not obliged to fund all judicial requests, any more than it is obliged to fund the requests of the executive branch. And in those states in which the Governor exercises an item veto, that veto extends to appropriations for the judiciary as well.

The state constitution can expressly protect the autonomy of the judicial branch with regard to budgeting. For example, the New York Constitution (Article VII, section 1) requires: "Itemized estimates of the financial needs . . . of the judiciary, certified by the comptroller, shall be transmitted to the governor not later than the first day of December in each year for inclusion in the budget without revision but with such recommendations as he may deem proper."

Beyond safeguarding the autonomy of the judicial branch, details of the budgeting process should be dealt with at the subconstitutional level.

Judicial Qualifications and Prohibitions

All state constitutions establish qualifications for judicial office. These provisions parallel provisions establishing qualifications for legislators and executive branch officials. Some states also authorize the Legislature to impose additional qualifications by statute.

Qualifications for state judicial office typically include United States citizenship, a minimum age, a minimum number of years as a member of the state bar or in legal practice, and a period of residency in the state (and perhaps district or country) in which the judge serves. Some states vary judicial qualifications depending on the court on which the judge serves, imposing less onerous requirements on trial-court judges, particularly those serving on trial courts of limited jurisdiction. Some states have established distinctive requirements--for example, Arkansas and Arizona require that judges be of good moral character, and Delaware and Minnesota mandate that they be learned in the law. Nevertheless, there is considerable similarity in the qualifications from state to state.

Many state constitutions also impose limits on off-the-bench activities of judges. The Florida Constitution, for example, requires judges to serve full-time and prohibits them from practicing law or from holding a position in a political party. The Michigan Constitution prohibits judges from holding another office during their term of service and for one year thereafter.

Judicial Selection and Tenure

Currently, states employ five different modes of selection: partisan election, non-partisan election, legislative election, appointment by the governor, and the Missouri Plan ("merit selection"). In fact, some states employ different modes of selection for different courts. Very few states follow the Federal example of awarding tenure "during good behavior." Rather, state judges are periodically reelected or re-selected. Judicial terms of office vary both interstate and intrastate, with appellate judges typically serving longer terms than trial judges. In states that have non-partisan elections or merit selection, incumbent judges typically run unopposed in retention elections. Most states follow the ABA Standard 1.24 in setting a retirement age of seventy for judges, while allowing retired judges to be recalled to active duty on an annual basis at the request of the chief justice. The limited term of office and mandatory retirement age for state judges do not necessarily mean that turnover on the state bench is high. State supreme court justices, for example, tend to serve longer on average than do judges on federal appeals courts.

Legal groups--such as the American Bar Association and the American Judicature Society--have long espoused merit selection, as have reform groups, such as the National Municipal League and more recently the Citizens for Independent Courts. Many sitting judges, who do not relish having to participate in political fund-raising and campaigning, have also proposed that merit selection replace election. According to its proponents, merit selection encourages judicial independence, promotes informed choice in the selection of judges, and attracts more qualified lawyers to the bench. In contrast, popular election of judges, particularly contested partisan elections, undermines judicial independence, injects irrelevant considerations into judicial selection, results in a less qualified bench, and gives the appearance of corruption, in that judges are perceived as beholden to those who support them in their campaigns.

The evidence supporting these claims is largely anecdotal, and in fact it is hard to understand how one might prove that merit selection leads to a more qualified bench. During the middle of the twentieth century, several states shifted to merit selection, but in recent decades voters have consistently opposed merit selection, most recently in Florida, where voters in every county polled in 2000 rejected the option available to them to change from non-partisan election to merit appointment of trial judges. This has led reform groups such as the American Bar Association to seek ways of improving existing modes of selection rather than transforming them, at least in the short run.

Our report likewise will seek to improve existing modes of selection rather than prescribing a single mode. Among the questions to be explored are:

- (1) *Length of term of office*: Is it desirable to extend the term of office for judges, in order to ensure greater independence?
- (2) *Different modes of selection intrastate*: Is accountability more desirable for trial judges and independence more desirable for

appellate judges? Or vice versa? Does it make sense to have judges in a single state chosen by a variety of methods?

- (3) *Local option*: Should the constitution permit local option in determining the mode of selection, or should it prescribe the mode of selection?

Judicial Compensation

If legislatures have the power to reduce the pay of judges to punish them for unpopular decisions, judicial independence is compromised. State constitutions can secure judges against this in a variety of ways:

The Commission Approach: The constitution could vest the power to set judicial salaries in a commission separate from the legislature, perhaps subject to legislative veto. Alabama, having experimented with this, amended its constitution so that the Judicial Compensation Commission's recommendations did not take effect unless affirmatively adopted by the Legislature.

The Federal Model: State constitutions could safeguard judicial independence by prohibiting a reduction of judicial salaries during the judge's tenure in office. This is the approach of Article III of the United States Constitution.

The Shared-Burden Model: State constitutions could safeguard judicial independence by prohibiting a reduction of judicial salaries unless it was part of an across-the-board reduction of the salaries of state officials. A number of states have adopted this approach, which affords the state greater flexibility in dealing with difficult economic conditions.

Some state constitutions include a ban on increasing the salary of sitting judges, as well as on lowering it. This is undesirable, because judges who serve for an extended period will suffer a decrease in their real salaries over time. In addition, this will have the effect of establishing different salaries for judges on a single court, depending on when they ascend the bench. It is appropriate that judges of equivalent rank should be paid equally.

A distinctive provision in the California Constitution (Article VI, section 19) authorizes withholding the salary of judges who are not up-to-date in clearing their dockets. There is no evidence that this provision has been rigorously enforced or that it has had any positive effect in promoting the more effective administration of justice.

Judicial Discipline, Retirement, and Removal

Ensuring the quality and integrity of the state bench is a paramount constitutional aim. This goal might be achieved by allowing those outside the judiciary to assess the fitness and performance of sitting judges. The legislature might remove judges by impeachment, and citizenry either by defeat at the polls or (as in nine states) by the recall of judges. However, there are problems with each of these mechanisms. Impeachment has proved too cumbersome to be effective. Recall is both cumbersome and susceptible to use against judges who announce unpopular but legally defensible rulings. Electoral defeat shares the recall's susceptibility to abuse and is only periodically available, given the lengthy terms of office of most judges. Perhaps equally important, all these mechanisms employ the ultimate sanction of removal from office, whereas a range of sanctions, proportionate to judicial transgressions, might be more appropriate.

These deficiencies, plus the judicial branch's concern to police its own personnel, led to the adoption in all states of commissions within the judicial branch for the discipline of sitting judges. These commissions have the authority to receive complaints about judges, to investigate those complaints (or on occasion to initiate their own investigations), to file and prosecute formal charges, and either recommends sanctions to the state's highest court or impose sanctions themselves. These sanctions might include: (1) private admonition, reprimand, or censure; (2) public reprimand or censure; (3) suspension; or (4) removal from office. Typically, judicial disciplinary commissions also have authority to recommend the retirement of judges who are incapacitated.

Forty-one states employ a "one-tier" model, under prosecutorial and adjudicative functions are combined, thereby avoiding duplicative work and promoting speedier dispositions. In such systems, final disposition of cases rests in the hands of the state supreme court, which has administrative authority over the judicial branch. When a case involves a member of the supreme court, a special tribunal is constituted. Nine states employ a "two-tier" system, under which the prosecutorial and adjudicative functions are separated in order to avoid biased decision-making. Because commissions typically public members who are neither judges nor lawyers, the "two-tier" system allows the public to be represented in the final disposition of cases. The American Bar Association's Model Judicial Article endorses the "one-tier" model.

State constitution-makers may decide whether the constitution should prescribe the one-tier model or the two-tier model. Alternatively, they may merely create the Judicial Discipline Commission and leave the selection, structure, and operation of the Commission to implementing legislation--see, for example, Kansas Constitution, Article III, section 15. State constitution-makers must also determine what role the public should play in the discipline process. The movement over time seems to be to provide for greater non-lawyer representation on the Judicial Discipline Commission, although in no state do non-lawyers comprise a majority of members.

It is not yet clear how state constitutions can contribute to access to justice.

Emerging Challenges for State Court Systems

It is not yet clear what the emerging challenges confronting state court systems are nor how they can be addressed in the state constitution.