cient and uniform administration of justice. The reforms to achieve these ends included: (1) vesting rule-making 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 systemwide 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 judicial article of the Kansas Constitution succinctly states: "The supreme court shall have general administrative authority over all courts in this state."[24] 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 regulation of the bar and disciplinary authority over members of the legal profession, and to reassignment of judges from their "home" court in order to allocate workload equitably.[25] This administrative authority may also include rule making over practice and procedure in the courts. It may likewise include preparation of a budget for the entire 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 or her 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. It 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.[26] The aim of the California model is to encourage widespread participation in making major decisions affecting the court system. Such a model may work well in large, populous, and diverse states such as California, but its value is not so limited. Utah, for example, a relatively small and homogeneous state, has had considerable success with its judicial council. Of course, vesting administrative responsibility in the supreme court or the chief justice rather than in a judicial council 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."[27] Some states also encourage consultation. The Alaska Constitution creates a Judicial Council of seven members—the chief justice, three attorneys

appointed by the state bar, and three nonattorneys appointed by the governor with the concurrence of the legislature—to recommend improvements in the administration of justice.[28] And the Georgia Constitution authorizes the Chief Justice to promulgate rules and record-keeping rules only after consultation with a council of the affected class or classes of courts.[29]

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, often going 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. A more extended tenure may give the chief justice the opportunity to develop the skills and knowledge necessary to administer the court system effectively. In addition, a longer tenure may give the chief justice the incentive to undertake long-term reforms by ensuring that he or she will have the opportunity to see them through to completion.

## Rule Making

As a concomitant to vesting administrative authority in the supreme court, some state constitutions expressly grant the supreme court the authority to adopt rules governing the administration of the court system. This has typically not occasioned great controversy. In the majority of states whose constitutions do not expressly grant such power, it is generally understood that the power is implicit in the grant of administrative authority to the supreme court. Nevertheless, express recognition of this authority in the state constitution may prevent conflicts from arising and safeguard the separation of powers by helping to secure the appropriate autonomy of the judicial branch.

Considerably more controversial is the decision where to lodge the authority to make rules relating to legal practice and procedure—that is, rules per-

taining to the methods and stages whereby cases move from initiation to disposition. In part, the controversy reflects the natural tension between the legislative and judicial branches. In part, too, what fuels this controversy is the difficulty of distinguishing rules relating to practice or procedure, which might be made by the judiciary, from rules relating to substantive law, which should be enacted by the legislature. Conflict has arisen, for example, over whether legislative efforts to enact some tort reforms intrude on the rule-making authority of the judiciary. Even careful constitutional drafting cannot altogether obviate this difficulty.

Many state constitutions expressly grant the authority to make rules of practice and procedure to the state supreme court, thus ensuring a uniformity of rules within the judicial system. 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."[30] (As noted, California has chosen an alternative approach, vesting rule-making authority in its Judicial Council.)

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. They argued that the judicial branch should determine its own procedures and modes of operation, just as do the legislative and executive branches. Some state constitutions, emphasizing a strict 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 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.[31] Similarly, the Louisiana Constitution authorizes rule-making by the supreme court "not in conflict with the law."[32] 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 but only by a two-thirds majority.[33] 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.

In recent years legislators in some states have responded to judicial rulings that they opposed by seeking to remove rule-making authority altogether from the judicial branch. Such attempts to penalize the judiciary for disfavored decisions run contrary to the principle of judicial independence. It is unwise to base constitutional prescriptions for the allocation of powers on dissatisfaction with particular rulings.

## FUNDING AND BUDGETING IN THE STATE COURT SYSTEM

### State versus Local Financing?

During the first half of the twentieth century, state courts—especially state trial courts—received almost all of their nonsalary 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 on the wealth and generosity of the local government. In some instances, trial courts generated much of their own funding from the fees and fines that they collected.[34]

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 strengthen judicial management at the state level. Without state funding, they argued, it is impossible to secure coherence within the judicial system. 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. There is no conclusive evidence either supporting or refuting the reformers' claims of the benefits that would accompany state financing, although this may reflect the difficulty of measuring the long-term effects of state financing.[35] 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 sought to shoulder more of the financial burden without imposing excessive centralization by emphasizing 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. The Institute for Court Management has recommended minimum funding standards to guard against retaliatory budget cuts and to ensure that the judiciary's core functions are not sacrificed in times of financial stringency.[36] Some states have expressly recognized in their constitutions the obligation to maintain adequate funding for state courts. The Alabama Constitution, for example, mandates that "[a]dequate and reasonable financing for the entire unified judicial system shall be provided."[37] The extent to which such mandates are enforceable remains a question. Even in the absence of such constitutional language, state trial courts have on occasion invoked the "inherent-

powers" doctrine to order local governments to pay expenses that they deemed necessary to the performance of their judicial functions.[38]

Beyond possible constitutional recognition of the need for adequate financing of the court system, it is likely that decisions about the allocation of funding responsibilities should be made at the subconstitutional level. Even if these decisions are constitutionalized, there is no conclusive evidence that suggests that a particular 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.[39] However, from a separation-of-powers perspective, this seems inappropriate: one should not treat the requests of a coequal branch the same as one treats the requests of a (subordinate) 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 to support the activities of all branches, including the judiciary.

The state constitution can expressly protect the autonomy of the judicial branch with regard to budgeting. The New York Constitution provides a model provision: "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."[40] However, beyond safeguarding the autonomy of the judicial branch, details of the budgeting process should be dealt with not by the constitution but by other forms of legal regulation.

## Judicial Qualifications and Prohibitions

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

The constitutionally prescribed 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 in the district or county as well) in which the judge serves.[41] Some states have instituted different 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 limit 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.[42] The Michigan Constitution prohibits judges from holding another office during their term of service and for one year thereafter.[43] These requirements might as easily be imposed through codes of judicial ethics, but there is no harm to constitutionalizing them. In fact, their appearance in the constitution may help promote public confidence in the judiciary. One must note, however, that the appropriate limits on off-the-bench activities may vary from state to state. To take an obvious example, a ban on active party membership for judges would be inappropriate in a state in which judges are chosen in partisan elections.

## JUDICIAL SELECTION, TENURE, AND REELIGIBILITY

Judicial selection represents the most controversial issue in the state judicial article, because it raises in the clearest fashion the tension between judicial independence and judicial accountability. The federal Constitution provides that federal judges be appointed by the president with the advice and consent of the Senate and hold office during good behavior. However, each state is free to establish its own mode of selection and determine the tenure and reeligibility of its judges. Most states depart from the federal model, providing for fixed terms of office rather than for tenure during good behavior, so the length of tenure and the process for determining whether an incumbent judge should remain in office are likewise important issues.[44] Most states also depart form the federal model and follow ABA Standard 1.24 in providing for a fixed retirement age (usually 70) while allowing retired judges to be recalled to active service on an annual basis at the request of the chief justice. Although there are distinctive features to the selection process in each state, basically five methods are currently used in selecting state judges. These methods include:

1. Merit selection: This system, sometimes called the Missouri Plan after the state in which it was first adopted, emphasizes judicial independence rather than judicial accountability. The key feature of merit selection is a judicial nominating commission, composed of lawyers selected by the state bar and nonlawyers typically appointed by the governor. When a judicial vacancy occurs, the commission nominates three to seven candidates (the number is determined by state law) to fill the position. The governor then selects the judge from that list. After a short period of service on the bench, the judge runs in an uncontested retention election, which allows voters to determine whether the judge should remain in office. If retained, the judge stands for reelection in retention elections periodically thereafter.
2. Election by the legislature: In South Carolina and Virginia the legislature selects state judges. In the former, a nominating screening committee provides a list of candidates for judgeships.
3. Appointment by the governor: In four states the governor appoints judges with the advice and consent of the state senate. (This parallels the system for selection of federal judges.) Judges appointed by the governor typically serve a fixed term of office, so it is necessary to establish a procedure for determining whether they should continue in office. These procedures vary from state to state. In New Jersey, judges serve for seven years, after which, if reappointed by the governor and confirmed by the state senate, they hold office until they reach retirement age. In California, judges run in a retention election at the next general election after their appointment and periodically thereafter at the conclusion of each twelve-year term.
4. Partisan election: This system is the main mode of selection in eleven states. Political parties nominate judicial candidates, and they run with party labels in the general election. Typically, judges under this system must seek reelection in contested partisan elections, although Illinois and Pennsylvania hold retention elections for incumbent judges.
5. Nonpartisan election: Nineteen states conduct judicial elections with no party affiliation indicated on the ballot. Typically, the top two candidates in a nonpartisan primary qualify for the general election. In most states judges elected in nonpartisan elections run for reelection in retention elections.

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 the Citizens for Independent Courts, and ad hoc groups, such as the National Summit on Improving Judicial

Selection.[45] Many sitting judges, who do not relish having to participate in political fund-raising and campaigning, have also urged 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 attorneys to the bench. They insist that 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.[46] In contrast, proponents of judicial elections stress the importance of judicial accountability to the public, especially given the broad effects of judicial rulings on controversial issues. They also deny that merit selection eliminates politics from the selection process, insisting that it is merely a different sort of politics that operates under merit selection.[47]

The evidence supporting these claims is largely anecdotal, and in fact it is hard to understand how, for example, one might prove that merit selection leads to a more qualified bench. During the 1960s and 1970s several states shifted to merit selection, but in recent decades voters have consistently opposed merit selection. In Florida in 2000, voters in every county polled rejected the option available to them to change from nonpartisan election to merit appointment of trial judges. This loss of reform momentum has led 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.

In choosing the mode of selection for judges, state constitution makers should take account of three important changes in judicial elections within recent years. One development is the increased contentiousness of judicial elections, as more elections are being contested and interest groups are becoming more heavily involved through campaign contributions and through independent expenditures, often in the form of television or radio ads promoting or opposing particular candidates.[48] A second and related development is the vastly greater sums being spent in judicial elections, both by candidates and by groups interested in the outcomes of the elections.[49] A third is the prospect of more outspoken campaigns for judicial office, as the U.S. Supreme Court has invalidated some traditional restrictions on the speech of judicial candidates.[50]

## Tenure and Reeligibility

Likewise important to judicial selection are the issues of judicial tenure and reeligibility. Most state constitutions prescribe longer terms of office for judges than for other public officials and place no limits on reeligibility. The median

term of office for general-jurisdiction trial court judges is six years, while the median term of office for appellate judges is longer, at eight years.[51] Proponents of judicial independence have proposed extending the terms of judges, because this will reduce the frequency with which sitting judges must seek reelection or appointment. Thus, the American Bar Association's Commission on the Twenty-First Century Judiciary proposed that in states not employing merit selection, "judicial terms should be as long as possible."[52] Reducing the accountability of sitting judges to the political process would theoretically reduce both the fear of electoral retribution and the temptation to curry the favor of potential supporters, thereby encouraging rulings in accordance with the law.[53]

European countries have developed an alternative approach that is worth considering. For members of their constitutional courts—the functional equivalent of state supreme courts—these countries rely on a system of initial appointment that is frankly political. Once selected, justices serve relatively lengthy terms (9 years in some countries, 12 years in others). However, the justices are limited to a single term. This non-reeligibility eliminates the incentive for judges to decide cases in a way that will enhance their prospects for reelection. It also provides a regular opportunity for the dominant political forces in the state to influence the membership and general orientation of the supreme court. However, it excludes highly qualified sitting judges from providing continued service to the state.[54]

## Hybrid Selection Systems

Some states employ different modes of selection depending on the level of courts. For example, South Dakota, Missouri and Florida (among others) use merit selection to choose their appellate judges but elect their trial judges in nonpartisan elections. Many states, as noted, also prescribe shorter terms of office for trial judges than for appellate judges. These hybrid systems suggest that assessments of the appropriate balance between judicial independence and judicial accountability may depend on the function served by the judge—deciding cases of first instance or hearing appeals. In the United States, the tendency has been to hold trial judges more accountable through election and shorter terms of office, presumably thereby ensuring that trial judges more closely reflect community sentiment. In Europe the nonpolitical selection of ordinary judges and political selection of members of constitutional courts suggests a different assessment: those judges whose decisions have the broadest societal impact should reflect (in broad terms) public opinion within the country. State constitution makers should keep these alternatives in mind in determining whether to institute hybrid systems of selection.

### Local Option

Closely related to the notion of hybrid systems linked to the level of court (trial or appellate) is the idea of local option. Given the diversity of many states, it is possible that different communities within an individual state will have different ideas about how their trial-court judges should be selected. State constitution makers need to decide whether these differing views should be reflected in constitutional arrangements. They might prescribe a system of selection for state trial-court judges but create a mechanism by which a county (or other jurisdiction, where appropriate) could opt out of that system and adopt an alternative mode of selection. Florida's failed ballot question of 2000, in which counties were invited to replace election with merit selection, provides an example of how a system of local option might be instituted.

## 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. Alabama experimented with this approach, but it later amended its constitution so that the Judicial Compensation Commission's recommendations did not take effect unless affirmatively adopted by the legislature. Most states that have commissions follow the Alabama model: commission recommendations must be endorsed by the legislature. An alternative is to have the commission's recommendations have the force of law unless expressly disapproved by the legislature within a prescribed time period after their announcement.
- *The Federal Model:* State constitutions could safeguard judicial independence by prohibiting a reduction of judicial salaries during the judge's tenure in office. This mirrors 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, such a ban 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 receive equal pay.

A distinctive provision in the California Constitution authorizes withholding the salary of judges who do not promptly make decisions after cases are submitted to them.[55] In order to receive their paychecks, judges must submit an affidavit under penalty of perjury that they do not have any submitted matters that have been pending for more than ninety days. Judges have regularly been subject to disciplinary proceedings in those rare instances in which they have submitted false affidavits. However, there may be more effective means of ensuring efficient case management, measures that do not require enshrinement in state constitutions.

## 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 the citizenry might do so 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 slow and cumbersome to be an effective check on judicial misconduct. Recall is both cumbersome and susceptible to use against judges who announce unpopular but legally defensible rulings, thus jeopardizing judicial independence. Accountability during reelection campaigns 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.

The limitations of these weapons against judicial misconduct are not necessarily a justification for their elimination. Impeachment in particular is a time-honored, even if rarely employed, check on judicial abuses of office. Nevertheless, the deficiencies of these weapons, plus the judicial branch's concern to police its own personnel, has led to the creation 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 when necessary to initiate their own investigations), to file and prosecute formal charges, and either to recommend sanctions to the state's highest court or to 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.