

# Elected vs. Appointed Judges

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## **Promise of the Reform**

By injecting politics into the branch of government for which independence and impartiality are indispensable, judicial elections threaten to undermine the rule of law. Eliminating judicial elections and substituting bipartisan nominating commissions would depoliticize and restore confidence in state judiciaries.

## **Key Takeaways from the Research**

- The choice of judicial selection method entails important tradeoffs between values associated with independence and impartiality on the one hand, and democratic accountability on the other.
- Scholars have documented numerous differences in legal outcomes between states with elected and appointed supreme courts, and have shown that these courts exhibit greater responsiveness to public opinion when justices stand in partisan competitive elections.
- Scholars studying the behavior of trial court judges have exploited random case assignment and within-state variation in selection methods to make credible causal claims about how electoral incentives affect judicial behavior. Several studies have demonstrated that electoral pressures tend to make judges more punitive, and that this increased punitiveness may be borne disproportionately by minority defendants.

## **Important Questions that the Research Does Not Answer**

- Do observed incentive effects of electoral pressures on judicial behavior mitigate in favor of or against judicial elections?
- Should we expect the “best” process of selecting judges to be independent of the politics of a state, or of the level of the court for which judicial candidates are considered?

- Will bipartisan commissions aggregate the preferences of stakeholders in a way that would lead to the nomination of the most qualified candidates for the judiciary, replicate the underlying (possibly polarized) distribution of interests, or come to be dominated by an unrepresentative elite?

## Introduction

In the United States, the federal judiciary is composed of judges who were nominated by the President and confirmed by the Senate, and who serve life terms. By contrast, judges in *state* courts come to occupy their positions through a vast array of different procedures, and once in office, generally require additional procedures to stay there.

Governors appoint state supreme court justices in 27 states (following recommendations by a nominating commission in 22), and state legislatures appoint in 2 others. 14 states use nonpartisan elections for the initial selection, and seven use partisan elections. For subsequent terms, 18 states use noncompetitive retention elections,<sup>1</sup> 13 nonpartisan elections, and 5 partisan elections. Once appointed, justices in Massachusetts and New Hampshire serve a single term with a mandatory retirement age, and those in Delaware serve life terms. The remaining states rely on reappointment by the governor, the state legislature, a nominating commission, or a mixed approach. Methods for appointing lower and intermediate courts may differ from those used for the state's high court.<sup>2</sup>

87% of the approximately 12,000 state appellate and general jurisdiction trial court judges must face the voters at some point during their tenure in office.<sup>3</sup> The plain fact and ubiquity of judicial elections in the states stands in stark contrast to the method for selecting federal judges, and is nearly unique globally. Apprehension of negative consequences of judicial elections has led to longstanding calls to abolish them. Since the 1930s, for example, the American Bar Association (ABA) has recommended gubernatorial appointment of judges from a list of candidates compiled by a judicial nominating commission. In a 2003 report, an ABA Commission reiterated this position, while also recommending that judges serve a single lengthy term (15 years or until a mandatory retirement age) and not be subject to any reselection process.<sup>4</sup> The disdain for judicial elections has been echoed by think tanks and an array of legal academics.<sup>5</sup> The most prominent arguments against judicial elections

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<sup>1</sup>In a retention election, a judge's name appears on the ballot and voters are given the option to vote "yes" or "no" on whether to retain that judge.

<sup>2</sup>Data on state selection methods from the Brennan Center (see <https://www.brennancenter.org/judicial-selection-map>).

<sup>3</sup>Roy A. Schotland. "Should Judges Be More Like Politicians?" In: *Court Review: The Journal of the American Judges Association* 39.1 (2002); Ron Malega and Thomas H. Cohen. *State Court Organization, 2011*. Tech. rep. US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2013.

<sup>4</sup>Commission on the 21st Century Judiciary. *Justice in Jeopardy*. American Bar Association, 2003.

<sup>5</sup>See, e.g., Alicia Bannon. *Rethinking Judicial Selection in State Courts*. Brennan Center, New York University School of Law, 2016; Alicia Bannon. *Choosing State Judges: A Plan for Reform*. Brennan Center, New York University School of Law, 2018; Charles G. Geyh. "Why Judicial Elections Stink". In: *Ohio State Law Journal* 64.43-79 (2003).

concern the deleterious effects of the electoral process on the selection of qualified judges and the incentives that electoral pressures may create for incumbent judges.

This primer begins by discussing important tradeoffs between judicial independence and democratic accountability, and the issues with judicial elections that are most prominent in the minds of advocates of reform. Next, I examine what the empirical research suggests about the consequences of different modes of judicial selection, drawing distinctions where appropriate between more and less credible evidence. I conclude by noting fundamental limits to what the empirical record can tell us about the merits of different judicial selection methods, and discussing some directions for future study.

## Theoretical Research on Judicial Selection

The debate over whether judges should be elected or appointed hinges on a conflict between two competing ideals:

- **Judicial Independence.** Judges should be insulated from undue or improper influence by other political institutions, interests, and/or the general public. Independence is closely related to the idea of the **rule of law**: legal strictures should be applied in a consistent and unbiased manner irrespective of the identity of litigants or judges.
- **Accountability.** Public officials should answer to someone for their decisions in office. In a judicial hierarchy, lower court judges are internally accountable to higher ones. But another form of accountability at stake in discussions of judicial elections is accountability to the broader citizenry – that is, democratic accountability.

Scholars have hypothesized that an independent judiciary may have stabilizing tendencies in a political system where power is divided among branches. For example, Landes and Posner argue that judicial independence bolsters the credibility of laws: a judiciary that was subservient to a current legislative majority might feel pressured to overturn or curtail statutes passed by past majorities.<sup>6</sup>. And Glaeser and Schleifer highlight the instability that can emerge if law enforcers are subject to subversion through bribery and executive control.<sup>7</sup>.

Contrariwise, two critical issues motivating calls for greater accountability of judicial decisionmaking are **legal ambiguity** (there may be no obvious answer to a legal question, either because the law does not speak to the controversy at hand or because it is vague or contradictory) and **judicial externalities** (judicial decisions may have consequences for many other people beyond the litigants in a case). Owing to these issues, judges will frequently be compelled to rely on their discretion to resolve legal issues, which will invariably implicate their beliefs and values. It is thus unsurprising that citizens might want some say in

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<sup>6</sup>William M. Landes and Richard A. Posner. “The Independent Judiciary in an Interest-Group Perspective”. In: *The Journal of Law and Economics* 18.3 (1975), pp. 875–901.

<sup>7</sup>Edward L. Glaeser and Andrei Shleifer. “Legal Origins”. In: *The Quarterly Journal of Economics* 117.4 (Nov. 2002), pp. 1193–1229.

the selection and evaluation of those judges. In proposing to eliminate judicial elections and subject judges to a single non-renewable term, reformers effectively seek to eliminate either direct or indirect (via gubernatorial or legislative reappointment) democratic accountability.

One of the most useful treatments of the tradeoff between independence and accountability is offered by Maskin and Tirole in a 2003 essay.<sup>8</sup> In their theoretical treatment, an official may be “congruent,” sharing the values of the public, or non-congruent. The official is better informed about the specifics of an issue than the voters, i.e., more qualified. But voters have underlying beliefs about what those specifics are and, further, may become better informed about the specifics over time. If the official is insulated from the voters (as in the case of a judge appointed to a life term), she will simply implement her most preferred decision in light of the specifics of the case. This may or may not reflect the preferences of the electorate. If the official will ultimately face the voters, she may have an incentive to **pander**: to take an action that the electorate, were it fully informed, prefer she *not take*. The incentive to pander is greater when the official cares a lot about retaining office and when the voters are unlikely to learn much about the specifics of the case before the next election. Pandering to the majority of the electorate may, further, jeopardize minority rights.

As the foregoing indicates, we want to select judges who are qualified (e.g., knowledgeable about the law and wise) but also share our values. Notwithstanding calls for greater judicial accountability, reformers are concerned that elections threaten both: voters may be largely uninformed about the qualifications of judicial candidates, and rely on cues that are unrelated to jurisprudential competence. This may be particularly the case in instances of nonpartisan competitive elections, where candidate advertisements about positions on hot button issues may come to dominate the informational landscape. Partisan elections fare little better in reformers’ estimation, however, because parties may be expected to nominate candidates with narrow partisan interests.

A further concern offered by reformers concerns the deleterious effects of campaign spending on judicial selection. A fear that special interests will play an outsize role in judicial elections is one concern. A second is that the need to engage in campaign fundraising will deter qualified judicial candidates from running for office in the first place.

Reformers are also highly concerned about the potential incentive effects that future elections may create for incumbent judges. This fear is encapsulated in the following quote from the ABA’s Commission on the 21st Century Judiciary: “Public confidence in the courts is ... undermined to the extent that judicial decisions made in the shadow of upcoming elections are perceived—rightly or wrongly—as motivated by fear of defeat.”<sup>9</sup>

While reformers fear selection of unqualified judges and pandering, opponents of reform fear non-congruence of judges and their decisions. Judicial nominating commissions may propose that governors nominate candidates whose values are out of step with those of the

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<sup>8</sup>Eric Maskin and Jean Tirole. “The Politician and the Judge: Accountability in Government”. In: *American Economic Review* 94.4 (2004), pp. 1034–1054.

<sup>9</sup>Century Judiciary, *Justice in Jeopardy*, p. 96.

citizenry at large; in the absence of electoral pressures, non-congruent judges will have no motivation to take the values of the citizenry into account when exercising their discretion.

## Empirical Research

Can recent empirical research on the behavior of judges shed light on the accountability vs. independence tradeoff, and accordingly on the relative merits of different judicial selection institutions? In this section, I review a number of prominent studies on the subject. For reasons that will become apparent, I divide this discussion into studies focused on state high courts, and studies focused on state trial courts.

In an important 1987 case study of the Louisiana Supreme Court, Hall quoted a liberal justice who conceded that he would not dissent in death penalty cases (in favor of the appellant) for fear of adverse electoral consequences.<sup>10</sup> This paper ushered in several decades worth of studies seeking to examine the extent to which state high courts respond to public opinion, and whether that responsiveness itself depends on the method of judicial selection.

While a short primer precludes a comprehensive accounting of these findings, scholars have found that elected state judiciaries are associated with lower rates of litigation (consistent with an argument that greater independence induces greater uncertainty about judicial preferences);<sup>11</sup> higher tort awards (consistent with an argument that elected judges are more prone to redistribute assets of out-of-state defendants and must rely heavily on trial attorneys to finance campaigns);<sup>12</sup> more employment discrimination claims;<sup>13</sup> and lower quality judicial opinions measured by citations by out-of-state courts (but more opinions overall).<sup>14</sup>

A related strain of research considers whether elected Supreme Court justices display greater responsiveness to public opinion in their respective states than appointed ones. Prominent examples of this line of research include Brace and Boyea, who find that the probability a state supreme court justice votes to uphold the imposition of the death penalty by a lower court increases with the conservatism of state public opinion on the subject, but that the effect is significantly more pronounced in states with elected supreme courts.<sup>15</sup> Canes-Wrone, Clark, and Kelly conduct a related analysis using a much more extensive dataset and more sophisticated measures of public opinion. They find a strong relationship

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<sup>10</sup>Melinda Gann Hall. “Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study”. In: *The Journal of Politics* 49.4 (1987), pp. 1117–1124.

<sup>11</sup>F. Andrew Hanssen. “The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election versus Appointment of State Judges”. In: *The Journal of Legal Studies* 28.1 (1999), pp. 205–232.

<sup>12</sup>Alexander Tabarrok and Eric Helland. “Court Politics: The Political Economy of Tort Awards”. In: *The Journal of Law and Economics* 42.1 (1999), pp. 157–188.

<sup>13</sup>Timothy Besley and A. Abigail Payne. “Implementation of Anti-Discrimination Policy: Does Judicial Selection Matter?” In: *American Law and Economics Review* 15.1 (Feb. 2013), pp. 212–251.

<sup>14</sup>Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner. “Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary”. In: *The Journal of Law, Economics, and Organization* 26.2 (Nov. 2008), pp. 290–336.

<sup>15</sup>Paul Brace and Brent D. Boyea. “State Public Opinion, the Death Penalty, and the Practice of Electing Judges”. In: *American Journal of Political Science* 52.2 (2008), pp. 360–372.

between the likelihood a justice upholds the death penalty and public opinion in the state in states with partisan elections and those with gubernatorial or legislative reappointment, but no relationship in states with merit selection and retention or nonpartisan elections. However, the baseline level of support for upholding the death penalty decisions of lower courts is actually higher in states with nonpartisan and retention elections.<sup>16</sup>

The studies cited above provide rich description of a variety of judicial outcomes and their association with differences between states selection methods. There are several potential limitations of this research, however. Judicial selection methods rarely change within a state, so nearly all comparisons underlying the research are cross-sectional. The institutional variation may mask other differences between those states. To simplify the issue, suppose we decided to compare decisions to uphold or reverse death penalty decisions in Alabama, a state with partisan elections, with those in Massachusetts, a state with gubernatorial appointment. If we observe a difference, should we attribute it to the judicial selection method, or to any of the other myriad differences between those states?

Second, by focusing on state *high* courts, we need to make assumptions about the sample of cases appealed to each of them. Some states have discretionary dockets, meaning that the court can choose whether to hear a case or not. This means that a court that wishes to uphold a lower court's death penalty decision or determination of employment discrimination may simply choose not to hear it rather than hear and affirm. This will tend to make the court look more prone to reverse than is actually the case. Added to this is the fact that litigants are strategic in their decisions to appeal or not to appeal. Suppose you lost your discrimination suit against your employer. Would you waste your time and money on an appeal if you knew the odds an appellate court will side with you were negligible?

In the face of these inferential challenges, a number of scholars have sought to conduct empirical studies of related institutions where those issues are mitigated. Trial courts are a fruitful area in which to study the effects of judicial institutions, for several reasons. First, in most jurisdictions, criminal cases are *randomly assigned* to sitting judges. Second, trial judges see *a lot* of very similar cases. And finally, there are several interesting contexts in which the selection methods vary *within the same state*.

An early paper examining trial court judges is by Huber and Gordon.<sup>17</sup> They note that voters are more likely to learn about a judge's perceived excess leniency than her punitiveness. Using data on criminal sentencing by judges in Pennsylvania's courts of common pleas (who must stand periodically in staggered retention elections), they find that this dynamic leads judges to sentence more punitively (or approve more punitive plea bargains) as election day draws closer – an **electoral proximity effect**. This phenomenon is most acute in more conservative districts. This finding was replicated (using more advanced statistical techniques) by Beredjko and Yuchtman using a sample of Washington state trial judges (who

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<sup>16</sup>Brandice Canes-Wrone, Tom S. Clark, and Jason P. Kelly. "Judicial Selection and Death Penalty Decisions". In: *American Political Science Review* 108.1 (2014), pp. 23–39.

<sup>17</sup>Gregory A. Huber and Sanford C. Gordon. "Accountability and Coercion: Is Justice Blind When It Runs for Office?" In: *American Journal of Political Science* 48.2 (2004), pp. 247–263.

compete in nonpartisan elections).<sup>18</sup> A related paper by Gordon and Yntiso studies the effect of recall elections on judicial behavior.<sup>19</sup> They find that in the aftermath of an announcement to recall a sitting California judge based on a sentence widely perceived as too lenient, average sentencing by other California judges in their sample jumped by around 30%.

As noted above, comparisons of judicial behavior across states are fraught. What would be particularly useful would be to compare judges who serve in the same state but under different selection methods. This is the approach taken by Gordon and Huber, who in their 2007 paper exploit a unique feature of judicial elections in Kansas: roughly half of that state's judicial districts elect trial judges via partisan competitive elections, and half via county nominating commissions and retention elections.<sup>20</sup> Gordon and Huber match similar criminal cases across pairs of similar districts that differ in their selection methods. They find that judges in partisan competitive districts sentence more harshly than their counterparts in retention districts. Moreover, sentencing behavior in the partisan districts (but not the retention districts) appears to demonstrate the electoral proximity effect observed in Pennsylvania and Washington. Interestingly, at the beginning of judges' terms, there is not much difference between their behavior across selection systems. The main Kansas finding is replicated by Lim, who also demonstrates that there is less sentencing variability, and more judicial preference moderation, in the retention districts.<sup>21</sup>

Another paper that exploits within-state variation in judicial selection method concerns a 1996 change in North Carolina's method for selecting trial judges.<sup>22</sup> Prior to 1996, superior court judges were elected in statewide races and rotated around the state's 46 districts, but a reform eliminated rotation and devolved selection to the district level. This allows the authors to compare *the same judges under different selection rules*. Boston and Silveira find that following the reform, judges in more liberal districts became relatively more lenient, whereas those in more conservative districts became harsh – but, according to the authors, not sufficiently harsh to stave off electoral defeat in all cases.

## Discussion

Opponents of judicial elections sometimes invoke the empirical results described above as a justification for their positions.<sup>23</sup> But this may be unwarranted because we lack a value-neutral normative benchmark against which to compare actual judicial behavior. To take one

<sup>18</sup>Carlos Berdejó and Noam Yuchtman. "Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing". In: *The Review of Economics and Statistics* 95.3 (July 2013), pp. 741–756.

<sup>19</sup>Sanford C. Gordon and Sidak Yntiso. "Incentive Effects of Recall Elections: Evidence from Criminal Sentencing in California Courts". In: *The Journal of Politics* 84.4 (2022), pp. 1947–1962.

<sup>20</sup>Sanford C Gordon and Gregory Huber. "The Effect of Electoral Competitiveness on Incumbent Behavior". In: *Quarterly Journal of Political Science* 2.2 (2007), pp. 107–138.

<sup>21</sup>Claire S. H. Lim. "Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges". In: *American Economic Review* 103.4 (2013), pp. 1360–97.

<sup>22</sup>Joshua Boston and Bernardo S. Silveira. "The Electoral Connection in Court: How Sentencing Responds to Voter Preferences". In: *Journal of Law and Courts* (2023), pp. 1–22.

<sup>23</sup>See, for example, Bannon, *Rethinking Judicial Selection in State Courts*.

example, consider the persistent finding that judges become more punitive as election grows closer. On the one hand, this implies a violation of the principle of adjudicator anonymity, and threatens to treat defendants inconsistently – a point against judicial elections. On the other, perhaps we think judges are too lenient. If that’s the case, then we could solve the consistency and leniency problems by having judicial elections more frequently! By the same token, Lim’s finding that there is less variability in judicial preferences and sentencing in the retention districts might suggest the value of district nominating commissions in reenforcing litigant and adjudicator anonymity. But they may do so by selecting judges whose values depart from those of the citizens of those districts.

By contrast, suppose we were to find evidence that racial bias in sentencing increased as election grew closer, *and* that the bias was minimal at the beginning of a judge’s term. This would seem to point unambiguously in favor of the reformist position. A paper by Park appears to demonstrate just that: specifically, using sentencing data from Kansas, Park demonstrates that the burden of increased punishment associated with the electoral proximity effect is borne entirely by black defendants.<sup>24</sup>

The tradeoffs entailed in the choice of how to select judges are complex, and there is no reason to believe that a “one size fits all” approach is appropriate for all cases. A distinction that is frequently neglected in discussions of reforms is that between state lower courts and appellate (and especially supreme) courts. But consider the following: lower court activity is *extremely routinized*, especially in criminal cases. This is particularly true given the prevalence of plea bargaining and the popularity of sentencing guidelines since the 1980s. At the same time, to the extent that judicial discretion is entailed, we may have significant cause for concern that it is deployed in a racially discriminatory way.<sup>25</sup>

Insofar as the risk to litigant anonymity is relatively high, and on average, legal ambiguity and judicial externalities in individual criminal cases relatively low, the reformist critique of judicial elections in practice would seem to have the greatest bite for trial courts. By contrast, in state high courts, ambiguity is high, and the externalities potentially enormous. Given significant disagreement about the values justices should bring to the exercise of discretion, and the stakes involved, the defense of judicial elections on grounds of democratic accountability would seem to be most compelling for state supreme courts.

One final question left unaddressed concerns the value of bipartisan nominating commissions in selecting highly qualified judicial candidates. Critics argue that these are frequently dominated by state bar associations, whose members may be ideologically out of step with the electorate more generally. It is also unclear whether or not a judicial nominating commission, if adopted in a state with highly polarized judicial politics, would simply replicate those politics within the commission. In this regard, Lim’s finding concerning moderation in the set of judges appointed by commissions in Kansas is instructive, and points to the value

<sup>24</sup>Kyung H. Park. “The Impact of Judicial Elections in the Sentencing of Black Crime”. In: *Journal of Human Resources* 52.4 (2017), pp. 998–1031.

<sup>25</sup>See, for example, M. Marit Rehavi and Sonja B. Starr. “Racial Disparity in Federal Criminal Sentences”. In: *Journal of Political Economy* 122.6 (2014), pp. 1320–1354.

of additional research on the composition of these commissions and its consequences.