

# A Survey of Empirical Evidence Concerning Judicial Elections

*By Chris W. Bonneau*



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# A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS



*Chris W. Bonneau*

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# A Survey of Empirical Evidence Concerning Judicial Elections

Chris W. Bonneau

The election of state judges is a controversial topic. Consider, for example, this quote from a paper by Adam Skaggs et al.: “*The story of the 2009-10 elections, and their aftermath in state legislatures in 2011, reveals a coalescing national campaign that seeks to intimidate America’s state judges into becoming accountable to money and ideologies instead of the constitution and the law.*”<sup>1</sup> Legal scholars, legal groups,<sup>2</sup> and advocacy groups interested in reforming judicial selection<sup>3</sup> have engaged in a coordinated effort over the past decade to try to end the popular election of judges. These efforts have been largely unsuccessful in recent years, with only two states modifying their method of selection<sup>4</sup> and no states ending their method of popular election of judges.<sup>5</sup> But legislation to alter the method of selection continues to be discussed in several states,<sup>6</sup> and it is expected to continue to be an issue in many states.

In this paper, I evaluate the arguments made by opponents of judicial elections. Focusing primarily on state supreme court elections (since that is the level of court where most studies have been conducted), though also discussing intermediate appellate courts and trial courts where appropriate, I evaluate the arguments of judicial reform advocates in light of empirical evidence. This paper presents a synthesis of the existing literature in this area, integrating the disparate findings by scholars into a single publication.

## I. Brief Overview of Methods of Selection in State High Courts

Before looking at the empirical evidence concerning judicial elections, it is useful to provide a quick overview of the different methods states use to select judges. It is also important to note that variation exists not only across states but also within states, as some states employ

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\* Associate Professor of Political Science, University of Pittsburgh, Pittsburgh, PA 15260; cwbonneau@gmail.com. I would like to thank Brent Boyea, Damon Cann, Brian Frederick, Melinda Gann Hall, and Matt Streb for their extremely helpful comments.

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different methods of selection for different courts. There are four basic methods by which states select judges: judicial elections, the Missouri Plan, democratic appointment, and hybrid selection, though there are some variations even within these methods.

### A. Elections

First, in twenty-two states, the judges of the highest court are elected. Seven of these states elect judges in partisan elections.<sup>7</sup> These elections are the same as traditional elections for other offices: generally two candidates are listed on the ballot along with their partisan affiliation. Voters can see which candidate is running as a Republican and which candidate is running as a Democrat. Each candidate is selected in a partisan primary to represent the party in the general election. Winners serve for a period of time<sup>8</sup> and then must run for reelection. In most states, this reelection is also a partisan election, though in three states (Illinois, New Mexico, and Pennsylvania), incumbents keep their job simply by winning a retention election. In a retention election, voters do not have a choice of candidates; they can only choose whether or not to keep the incumbent. The question on the ballot is, “Should Judge X be retained?” If the judge receives a majority<sup>9</sup> of “Yes” votes, then she stays on the bench and serves a full term of office.

The remaining fifteen judicial election states elect their judges in nonpartisan elections.<sup>10</sup> These can be distinguished from partisan elections in that the candidate’s partisan affiliation is not listed on the ballot. Thus, unless some other method of communication shares the information, voters are not aware of the political party of the candidates. Indeed, they could be choosing between two Democrats or two Republicans. Usually, candidates are selected in nonpartisan primaries, where the top two vote-getters advance to the general election, regardless of their political party. In Ohio, there is a partisan primary, though the general election is nonpartisan. In Michigan, candidates are nominated by their parties in a party caucus, though, again, any mention of their political party is removed on the general election ballot. Finally, in Montana, if the incumbent is unopposed, the election becomes a retention election with no contestation. Again, these

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judges serve for a period of time<sup>11</sup> and must win another nonpartisan election to retain their positions.

### *B. Missouri Plan*

Second, thirteen states<sup>12</sup> select their judges using the Missouri Plan, often called the “merit-selection plan” by its proponents.<sup>13</sup> In Missouri Plan states, judges are selected by the governor from a list generated by a “judicial nominating commission,” which consists of a mixture of attorneys and non-attorneys. This commission generates a list of names (typically three) and presents this list to the governor. In nearly all Missouri Plan states, the governor is forced to appoint a judge from this list. After a period of time (one to three years, depending on when the appointment occurred), the judge must stand for retention before the electorate. At the end of her term of office, the judge must stand for retention again. If a judge is defeated, then the selection process starts anew, with the commission providing a list of candidates to the governor.

### *C. Democratic Appointment*

Third, judges in five states are selected through democratic appointment. Three of these states provide for gubernatorial appointment,<sup>14</sup> in which the governor appoints judges with advice and consent of a democratic body, and two states have legislative appointment,<sup>15</sup> in which judges are appointed directly by each state’s General Assembly.<sup>16</sup> To stay in office, judges in California are subject to a statewide retention election. In New Jersey and Maine, they are reappointed by the governor (but in Maine, they are also subject to confirmation by the Senate). In Virginia and South Carolina, judges are subject to another election by the state legislature.

### *D. Hybrid Selection*

Fourth and finally, ten states<sup>17</sup> employ a hybrid selection that combines elements of the Missouri Plan with elements of gubernatorial appointment. Under this method, judges are appointed by the governor after nomination by a commission<sup>18</sup> (as in the Missouri Plan), but they must be confirmed by a democratic body (as in gubernatorial appointment). These states are more similar to the federal model, though it should be noted that only three states allow for either life tenure

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(Massachusetts) or tenure until the age of 70 (New Hampshire and Rhode Island). In every other state, judges must be reappointed by either the governor or legislature or win a retention election. Thus, even in states where the selection of judges is most proximate to the federal system, judges are dependent upon someone else in order to retain their jobs.

In this paper, states that do not have an elective component of their selection system are not considered. My primary focus is on partisan and nonpartisan elections, since those are the elections that are most frequently criticized. I also briefly discuss the state of knowledge on the Missouri Plan, since that is the plan favored most by opponents of judicial elections.

## **II. Arguments Against Judicial Elections**

**Argument 1: Campaign Spending Is Out of Control and the Candidate Who Spends the Most Money Wins.** The role of money is perhaps the most controversial aspect of judicial elections. As Skaggs et al. says: “Special-interest contributions pose a tremendous threat to the public’s faith in fair and impartial courts. Overwhelming bipartisan majorities are extremely wary of the role that money plays in judicial elections and believe that campaign funding support buys favorable legal outcomes.”<sup>19</sup> Bonneau and Melinda Gann Hall<sup>20</sup> show that campaign spending (in constant dollars) in both partisan and nonpartisan elections increased over the period from 1990 to 2004, though the rise was not monotonic. For example, campaign spending in nonpartisan elections in 2004 was lower than it was in 2002 and 2000; campaign spending for partisan elections in 2002 was the lowest it had been since 1992. Additionally, on average, partisan elections are more expensive than nonpartisan elections (though this bivariate relationship disappears once other variables are included).

One can look at this spending as a negative or a positive. On the negative side, expensive elections require candidate to raise large sums of money, some of which will be raised from attorneys who will argue cases before the judge they are contributing to or from corporations who have litigation pending before the court. This raises the argument that judges are beholden to contributors and not to the law. Mark Hansen<sup>21</sup>

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reports that in Texas, “60 percent of the 530 opinions issued by the court between 1994 and 1997 were tainted by the fact that at least one of the seven justices whose campaign contributions were studied took money from a contributor with close links to a party or a lawyer in the case.” I will treat these two separate claims (loss of legitimacy and justice for sale) individually later on. It is enough to recognize that these are serious concerns, and if true, would be worth taking very seriously given the potential impact on the legitimacy of the judiciary as an institution.

Campaign spending also can have positive effects on elections, however. “In fact, campaign spending is one of the best mobilization agents in state supreme court elections. Rather than being alienated by costly campaigns, citizens embrace highly spirited expensive races by voting in much greater proportions than in more mundane contests.”<sup>22</sup> Campaign spending allows candidates to provide voters with information. This information is then used by voters to help them make a decision in the race.<sup>23</sup> In this way, campaign spending actually *benefits* voters by allowing candidates to run a vigorous campaign and make their case to the voter. This is even more important for lower levels of courts: “[I]f one’s goal is to increase political participation, then *more* money needs to be spent in IAC [intermediate appellate court] contests.”<sup>24</sup>

While incumbents outspend challengers, this does not necessarily mean they are able to spend their way onto the bench. This is because of the diminishing marginal returns that are at play in competitive elections. Bonneau and Damon Cann<sup>25</sup> show that challengers receive more votes for each additional dollar they spend than incumbents do. This is because the incumbent is already pretty well-known, has a track record, etc.<sup>26</sup> There is only so much new information the incumbent can provide voters. Challengers, on the other hand, are lesser-known and thus can use their campaign spending to inform voters about their qualifications, views, and so forth. Campaign spending for challengers, then, is more efficacious in terms of attracting votes than incumbent spending. So while incumbents, on average, spend more money than challengers, challengers receive higher returns on their spending than incumbents. This explains why Bonneau<sup>27</sup> found that spending by

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the challenger affected the incumbent’s vote total, but spending by the incumbent did not.

At the intermediate appellate court level, Brian Frederick and Matthew Streb<sup>28</sup> find that overall levels of campaign spending are lower than at the state supreme court level, but also that “there is no linear upward trend in spending over this period [2000–2009] once inflation is taken into consideration.” While Frederick and Streb<sup>29</sup> find that different factors predict campaign spending in intermediate appellate court elections than state supreme court elections,<sup>30</sup> they do find that spending in these elections is predictable, and certain factors make these elections more or less expensive. Additionally, Streb and Frederick<sup>31</sup> find that the spending difference between candidates is not a significant predictor of vote total (although it is significant for incumbents who were initially appointed and thus are making their first run for the bench). At the trial court level, systematic research has yet to be conducted.

**Argument 2: Justice Is For Sale.** Charles Geyh<sup>32</sup> wrote that “roughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive.” Regardless of the exact percentage, it is true that surveys have shown a majority of the public is concerned that judges are “for sale”<sup>33</sup> and the presence of campaign contributions can affect the legitimacy of the court.<sup>34</sup> This data and the underlying arguments concern fairness and impartiality.

The literature on this is mixed. Some scholars have found a correlation between campaign contributions and judicial decisions<sup>35</sup> while others have not, at least under some conditions.<sup>36</sup> The difficulty with this whole line of research is establishing causality from simple correlational measures. The methodological problem is summarized succinctly by Cann<sup>37</sup>:

They argue that a correlation between campaign contributions and judicial decisions exists because contributions from attorneys on the liberal (conservative) side of a case leads judges to reciprocate by voting in a liberal (conservative) way. But it may be that attorneys who generally find themselves on the liberal (conservative) side of a case contribute to candidates who are already likely to rule in a liberal (conservative) direction.

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This contributions strategy increases the chances of their preferred candidate winning. If their candidate is elected, they are more likely to win cases before them, not because the judge's vote was influenced by the campaign contribution, but because it was the judge's propensity to vote in a particular way that led to the contribution in the first place.

Moreover, the studies that model this relationship<sup>38</sup> come to divergent conclusions.

Cann<sup>39</sup> deals with the problem of endogeneity by creating an instrumental variable that is related to campaign contributions but not to the judges' decisions. His primary instrument is whether the judge was contested in her election: a judge who is challenged needs to raise money, but this fact should not affect her behavior on the bench. He also uses the presence of a public defender or district attorney (these lawyers make less money and thus contribute much less to judicial campaigns than private attorneys). Using this sophisticated methodology, Cann<sup>40</sup> concludes that campaign contributions do influence judicial votes in Georgia.

Cann, Bonneau, and Brent Boyea<sup>41</sup> adopt a slightly different approach. Looking at Michigan, Nevada, and Texas, they examine the relationship between contributions and judicial decisions. This study also "matched" judges and decisions. Specifically, they look at judges' voting only where two judges have the same ideology. In Michigan there was a strong relationship between campaign contributions and the rate of unanimous voting, as well as a strong association between campaign contributions and voting decisions, but these relationships did not exist in Nevada or Texas.

What does all this mean? Clearly, there is a need for more data and more studies examining this phenomenon. The literature suggests that under some conditions, judges may be influenced by campaign contributions. However, it is difficult to get a lot of analytical leverage out of a small number of states. For example, what makes Michigan different from Texas and Nevada? Is it something about the nature of the docket there? The way they select judges? The professionalism of the court? We simply do not know. Additionally, establishing causality (and not simply a

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correlation) can be methodologically tricky. Hence, based on the existing empirical evidence, one cannot look at the existing evidence in Michigan, Texas, Nevada, or anywhere else and conclude that justice is for sale.

**Argument 3: Judicial Elections Lead to a Loss of Legitimacy.** Another serious objection to judicial elections is that they lead to a loss of legitimacy for the judicial system. In the words of former Justice Sandra Day O'Connor<sup>42</sup>: "Unsurprisingly, people who live in states that hold partisan judicial elections are considerably more distrusting of their judges, and they're less likely to believe that the judges act fairly and impartially, and they're more likely to agree that judges are just politicians in robes." Sara Benesh<sup>43</sup> finds that, among other things, citizens who live in states with appointed courts have higher levels of confidence in the court system. This is confirmed by Cann and Jeff Yates.<sup>44</sup> However, James Wenzel, Shaun Bowler, and David Lanoue<sup>45</sup> found that method of selection was unrelated to public confidence, except for the most educated citizens. Moreover, others have found that "[s]ixty percent of Americans trust the courts in their own state a 'great deal' or 'fair amount.'"<sup>46</sup> The comparable percentage for the U.S. Supreme Court was 66 percent.

The mixed results are largely the result of the use of survey questions ill-suited to the questions at hand. These surveys tend to be commissioned by interest groups, and the questions that are asked vary across surveys and are not as well-constructed as scholars would like. For example, the questions ask about "local courts" or "courts in your community." Imprecision in question wording (and inconsistency across surveys) can obscure the real relationship between elections and legitimacy. Fortunately, James Gibson has recently designed a series of survey experiments specifically to address this important question.

Gibson<sup>47</sup> conducted a series of survey experiments in Kentucky. He found that campaign contributions lead "many (if not most) citizens to perceive policy making as biased and partial and the policy-making institution as illegitimate." However, he also found that the same is true for state legislatures. The public

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finds campaign contributions, and policy promises, as corrosive, regardless of the institution.<sup>48</sup> Regarding issue-based campaigning, “candidates for judicial office can engage in policy debates with their opponents without undermining the legitimacy of courts and judges.”<sup>49</sup> Thus, predictions that *Republican Party of Minnesota v. White*, which allowed candidates for judicial office to take positions on issues, would lead to a loss of legitimacy seem to be false. Gibson<sup>50</sup> replicates these results using a national survey. He additionally finds that, “When attack ads are used in judicial campaigns, few consequences for institutional legitimacy materialize.”<sup>51</sup>

Most recently, Gibson, Jeffrey Gottfried, Michael Delli Carpini, and Kathleen Hall Jamieson<sup>52</sup> examined whether the positives from judicial elections outweigh the negatives. Using a survey experiment conducted in Pennsylvania in 2007, the authors found:

Elections by themselves seem to generate more support for the judiciary; these data do suggest that courts do in fact profit to some degree from their periodic encounters with voters. At the same time, however, the positive effect of elections is dampened by the campaign ads that associate courts with ordinary voters. The effect is not great, and not great enough to neutralize entirely the positive consequences of exposure to the judiciary.<sup>53</sup>

That is, the net effects of elections are positive. Elections serve to *enhance* the legitimacy of the office. Given the experimental design of this study, this finding is quite robust and persuasive. That being said, it is only based on one state. Future research examining this at the national level is needed before we can be completely convinced that this is generalizable. Minimally, though, it suggests we need to rethink the conventional wisdom about the relationship between elections and legitimacy. Judicial elections may, in fact, enhance the legitimacy of courts.

**Argument 4: Judges Change Their Decisions on Cases When They Need to Face the Electorate.** One area where the evidence is pretty clear is that elected judges are responsive to their constituencies when it comes time to make decisions on the bench.<sup>54</sup> Hall,<sup>55</sup>

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in the first study to examine this pattern, found that “under restricted conditions, elected justices in state supreme courts adopt a representational posture.” Specifically, liberal justices at the end of their terms and with narrow vote margins are less likely to dissent and more likely to vote conservatively in death penalty cases. Another study by Hall<sup>56</sup> found the same effects. Paul Brace and Hall<sup>57</sup> further developed this research; looking at votes in death penalty cases in eight states from 1983-1988, they found that the presence of elections, along with other factors (such as the facts of the case) affects the likelihood that a justice will vote to uphold the death penalty. Building off this, Brace and Boyea<sup>58</sup> demonstrate that “elections and strong public opinion exert a notable and significant direct influence on judge decision making in these cases, but these effects do not outweigh the impact of case characteristics and judge ideology.” Thus, while elections are important, they are not as important as the facts of the case and the ideology of the judge. Finally, Cann and Teena Wilhelm<sup>59</sup> find that judges running for reelection are only responsive to citizens on visible cases where they know citizens have preferences. At the supreme court level, it seems that there are conditions under which the decisions of a judge can be affected by the fact that she has to keep her job by winning an election. It is important to note, though, that other factors are also important (like the facts of the case and the judge’s ideology), and this electoral effect is only likely on salient, visible cases such as crime and abortion, which comprise a relatively small proportion of the docket.

At the trial court level, Gregory Huber and Sanford Gordon<sup>60</sup> have examined sentencing under different methods of selection. In a 2004 article, they examine sentencing decisions from over 22,000 cases in Pennsylvania in the 1990s. They find that “judges become significantly more punitive the closer they are to standing for reelection.”<sup>61</sup> This finding is particularly interesting because judges in Pennsylvania keep their jobs in retention elections and is consistent with the findings of Hall<sup>62</sup> at the state supreme court level. So, even though the retention rate is extraordinarily high, the mere threat of losing her seat, however unlikely, induces more punitive sentencing.<sup>63</sup> They follow this study up with an examination of sentencing in Kansas,

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where there is variation in how judges are selected across districts: 14 districts use partisan elections, while 17 districts use retention elections. So, in 14 districts incumbents can face a challenger, while in 17 districts challengers are precluded. This allows Gordon and Huber to examine the differences in sentencing across these methods of selection. They find that “the risk of challenger entry induced trial judges elected in partisan competitive districts in Kansas to behave more punitively than their peers in that state’s retention districts.”<sup>64</sup> However, this is only true as the electoral threat grows closer: “[W]e find that the sentencing behavior of judges under partisan competitive selection rules is indistinguishable from that of judges under retention rules when election is a far-off prospect . . . .”<sup>65</sup>

Overall, the evidence that judges consider their likelihood of reelection when making judicial decisions is pretty persuasive. However, what this means, exactly, is far from clear. One could conclude that judges are not following the law because they are afraid of losing their jobs, but one could also argue that the evidence shows that the electorate is forcing the judges to do their jobs (instead of following their own personal predilections) or risk losing an election. For example, consider the issue of sentencing. Judges have discretion in sentencing. This means there is a range of punishment that the state legislature has determined is appropriate for a crime. So, whatever decision a judge makes within that range is permissible. If the public desires a judge to be more punitive than she would otherwise want to be, there is nothing wrong with that from a legal or constitutional standpoint. Likewise with the death penalty: the Supreme Court has determined that the death penalty is a constitutional form of punishment for some crimes. If a judge in a state with the death penalty categorically refuses to use it, then that judge is not following the law; that judge is substituting her own policy preferences for the constitutionally permissible laws of the state. If an election makes that judge more likely to uphold a death sentence, then the election is forcing the judge to do her job and follow the law. The general point is that while there is evidence that judges behave differently in the face of elections, it is unclear what this change in behavior means or if it is problematic.

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**Argument 5: Voters Do Not Participate in These Elections.** One of the recurring arguments made by opponents of judicial elections is that the electorate does not participate in these elections. In the words of former Supreme Court Justice Sandra Day O’Connor,<sup>66</sup> “When you go into the ballot box and see a whole list of judges names on a ballot, and you don’t know anything about them, it’s just a hopeless mess. People just, in many cases, don’t vote at all.” Justice O’Connor is echoing the conventional wisdom established by scholars such as Lawrence Baum<sup>67</sup> and Geyh,<sup>68</sup> who wrote that “it is not uncommon to find that 80% or more of eligible voters fail to vote in judicial elections.” While that may have been true in the distant past, the reality today is much different.

At the state supreme court level, Hall<sup>69</sup> examined the predictors of voter participation in these elections by examining ballot roll-off.<sup>70</sup> “Roll-off” is the percentage of voters who go to the polls but do not vote for the judicial races.<sup>71</sup> Hall<sup>72</sup> and Bonneau and Hall<sup>73</sup> explain that roll-off is a more theoretically appropriate concept than turnout, since voters rarely go to the polls simply to vote in the state supreme court election. Instead, what mobilizes voters to turn out tends to be presidential or gubernatorial or senatorial elections. However, once they are at the polls, there are certain conditions that make it more (or less) likely that they will participate in the state supreme court election.

Hall<sup>74</sup> and Bonneau and Hall<sup>75</sup> find that, contrary to the rhetoric of O’Connor<sup>76</sup> and Geyh,<sup>77</sup> state supreme court elections are not universally characterized by a lack of participation by the public. From 1990-2004, average roll-off was 22.9% for all elections. So, roughly 73% of the people who turned out to vote actually cast a ballot for state supreme court judge. This is almost the inverse of Geyh’s<sup>78</sup> claim. Further, when one looks at contested races (races where there was more than one candidate seeking the position), roll-off decreases to 16.1%. Finally, if one looks at contested partisan elections (where voters are provided the partisan affiliation of the candidates on the ballot), roll-off is even lower: 11.1%.<sup>79</sup> Notably, Hall<sup>80</sup> finds similar results looking at all elections from 1980-2000. Thus, these findings about roll-off have been consistent over a 25-year period.

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More importantly, “higher amounts of campaign spending produce significantly lower levels of ballot roll-off.”<sup>81</sup> Specifically, Bonneau and Hall’s<sup>82</sup> model predicts ballot roll-off at 18.2% if all variables are held at their means; if campaign spending is increased one standard deviation, roll-off falls to 15.8%. Additionally, ballot roll-off is higher in presidential election years, since there are more “casual” voters who participate in presidential elections than in off-year elections. Finally, there is less roll-off in partisan statewide elections than in nonpartisan statewide elections, as one would expect from the figures given above.<sup>83</sup> In sum, the literature clearly shows that “voters in state supreme court elections are drawn into the electoral arena by the same factors that stimulate voting for elections to non-judicial offices.”<sup>84</sup>

While Bonneau and Hall’s work only applies to the state supreme court level, Streb, Frederick, and Casey LaFrance<sup>85</sup> have examined ballot roll-off in intermediate appellate court elections. They examine elections from 2000-2007 and find:

[A]s in supreme court elections, there is great variance in rolloff across states in intermediate appellate contests. The type of election (partisan, nonpartisan, or retention) as well as whether the race is held in conjunction with a presidential election, has a successful incumbent running, or is contested all influence rolloff in similar ways at both levels of appellate courts.<sup>86</sup>

While the absolute levels of roll-off are higher in intermediate appellate court elections (29.1% on average, according to Table 1 in Streb, Frederick and LaFrance<sup>87</sup>), many of the same factors found to be important in state supreme court elections can serve to increase voter participation in these elections. However, Streb and Frederick<sup>88</sup> did not find any influence of campaign spending on ballot roll-off at the intermediate appellate court level, and once campaign spending was included in the model, only the type of election (partisan versus nonpartisan) was significant. A likely explanation for this has to do with the nature of these races: “IAC elections are substantially less expensive than supreme court elections, so much so that it does not create conditions for voters to participate easily in

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the lower court elections. Candidates not only have to spend more, but likely significantly more, to catch the attention of voters.”<sup>89</sup> While to date a similar systematic study has not been conducted at the trial court level, the results would be interesting, and I would expect the results to look more like intermediate appellate court elections than state supreme court elections. Taken together, the evidence indicates that O’Connor’s<sup>90</sup> and Geyh’s<sup>91</sup> claims about the lack of voter participation in these elections are not empirically accurate, though the specific factors that can increase participation (and the ease by which they can increase participation) vary depending on the level of court being studied.

**Argument 6: Voters Do Not Know Who They Are Voting For.** It is one thing for voters to participate in these elections; however, if they do not know the candidates, their qualifications, etc., then it does little good for them to participate.<sup>92</sup> That is, it is important for voters to be able to distinguish between the alternatives in order for elections to fulfill their promise of accountability. Participation must be meaningful. Geyh<sup>93</sup> asserts: “[A]s much as 80% of the electorate is completely unfamiliar with its candidates for judicial office.” If this is true, then elections are institutional failures. Of course, one can defend judicial elections even in the presence of voter ignorance, as Michael Dimino<sup>94</sup> does: “Voter ignorance, however, has not stopped us from extending universal suffrage in legislative and executive races, where the public votes with the same visceral, half-informed opinions as determine their votes in judicial races.” While this is true, a better argument in favor of judicial elections is that voters actually are able to make informed choices.

Hall<sup>95</sup> established that the ideological distance between the incumbent and voters is a powerful predictor of the incumbent’s percentage of the vote in partisan elections. Specifically, “an increase of 10% in ideological distance reduces incumbent vote share by about 4%, a significant but not substantial change.”<sup>96</sup> Following up on this, Bonneau and Hall<sup>97</sup> examine whether or not voters, in the aggregate, are able to distinguish between qualified alternatives to incumbents. They operationalize a “quality” challenger as a challenger with lower court experience, following

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the political science convention in the study of legislatures where a “quality” challenger is one with prior elective experience. They argue that these candidates represent qualified alternatives to incumbents in the eyes of the electorate. Moreover, a lower court judge can campaign with slogans like, “Elect Judge X to the Supreme Court.” This sends a signal to the voters that the candidate is a judge and thus possesses minimum qualifications to serve on the court. In fact, some voters might even think the candidate is an incumbent.

Looking at state supreme court elections between 1990-2000, Bonneau and Hall<sup>98</sup> find that a challenger who has prior judicial experience performs about 4.7% better against an incumbent than a challenger without such experience. This is substantively important because “given that the average incumbent’s vote is only 56.8 percent during the time frame of our study, the challenger’s relative experience or inexperience could well mean the difference between an incumbent’s reelection and defeat in many of these contests.”<sup>99</sup> Thus, it appears that voters are able to recognize incumbents who are ideological outliers (at least in partisan elections) and distinguish between higher-qualified alternatives to incumbents and lower-qualified alternatives. In the aggregate, then, voters appear to have enough information to make an informed decision in the election.

At the intermediate appellate court level, Streb and Frederick<sup>100</sup> examine the effect of quality challengers from 2000-2007. However, they do not find any effect of quality challengers. Indeed, “One would generally think that if citizens are voting intelligently, then the best-quality challengers who enter races against more vulnerable incumbents would receive a greater share of the vote. Unlike in higher-profile elections, our findings indicate that this is not the case in IAC races.”<sup>101</sup> A likely explanation for the contradictory results is that intermediate appellate court races are far less visible than state supreme court races in terms of salience, advertising, etc. While “lower-court candidates focus on their own experience and qualifications . . .”<sup>102</sup> in lower court races, Brian Arbour and Mark McKenzie<sup>103</sup> found, “[t]he results of our survey also show that candidates for these lower court races rarely engage in high-cost television advertising, even on cable television.”

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Thus, voters may have enough information about state supreme court candidates to make an informed decision, but they may not have enough information in intermediate appellate or trial court elections. This is certainly an area in need of further research.

**Argument 7: Incumbents Are Rarely Challenged and Never Lose and Thus Are Not Able to Be Held Accountable.** A seventh argument against judicial elections is that incumbents are rarely challenged, and when they are challenged, they invariably win. Under this argument, while accountability may exist in theory, it does not exist in practice.

It is true that, historically, state supreme court races were uncontested. O’Connor<sup>104</sup> states that “of high court incumbents in states, only 50% had contested elections from 1880 to 1996 . . . .” While O’Connor does not provide a reference for that statistic, it seems about right. Recently, however, the numbers are much higher. Looking at elections from 1990-2004, Bonneau and Hall<sup>105</sup> find that 68.2% of all elections were contested. There was also quite a bit of variation between types of elections, with 82.4% of partisan elections being contested and only 59.9% of nonpartisan elections. The contrast is even more stark in recent years: over 90% of incumbents in partisan elections have been challenged in every election cycle since 1998; in nonpartisan elections, only in 1998 and 2004 did the percentage of incumbents being challenged top 70%.<sup>106</sup> At the intermediate appellate court level, Streb, Frederick, and LaFrance<sup>107</sup> found that only 26.6% of incumbents were challenged from 2000-2006, a much lower percentage, though when they are challenged, incumbents lose 29% of the time. Strikingly, they did not find a large difference between partisan elections (28.3%) and nonpartisan elections (22.8%), though this is likely due to the fact that they code Ohio and Michigan as partisan elections even though they are nonpartisan. Streb and Frederick,<sup>108</sup> coding Michigan and Ohio as nonpartisan, find that partisan races are more likely to be contested and competitive. Finally, at the trial court level, Michael Nelson<sup>109</sup> finds:

[L]ess than 22 percent of the trial court races studied provided voters with a choice at either stage of

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the electoral process. The contestation rates vary greatly from state to state: over 80 percent of general jurisdiction trial courts races were contested in New York while less than 10 percent of races were contested in California and Minnesota.

Nelson did find that partisan races were far more likely to be contested than nonpartisan races (34.2% vs. 14.8%).

There are two ways to look at the results of Streb, Frederick, and LaFrance<sup>110</sup> and Nelson.<sup>111</sup> On the one hand, one can look at the way Nelson<sup>112</sup> interprets the data: “These findings suggest that, at the local level, contestable elections are unable to promote the form of judicial accountability espoused by advocates of this method of judicial selection.” However, this logic equates something that does not happen with something that cannot happen. That is to say that just because incumbents are not challenged is not equivalent to the situation when incumbents cannot be challenged.

A second way to interpret this evidence (and a way that is more consistent with the evidence on state supreme courts) is that while these elections may not currently promote accountability, the institutional mechanism is there for them to do so. The fact that very few incumbents are challenged may reflect the satisfaction that voters have with their local judges. It is true that it may also reflect apathy, and perhaps trial court judges (despite their importance to the judicial system) are simply not salient offices to the voting public. At this point, we cannot distinguish between these alternatives. But it is important to note that a trial judge in a state where there is the possibility of a contested election is aware of that fact, and likely behaves differently simply knowing she could be challenged.<sup>113</sup> This is consistent with the voluminous work on legislatures in the U.S. The very fact that an incumbent might be challenged and might lose is enough to promote electoral accountability, even if a challenge does not happen on a regular basis.

The reelection rate of incumbents shows that these judges have something real to fear if they are challenged. From 1990-2004, Bonneau and Hall<sup>114</sup> show that the reelection rate for members of the U.S. House was 94.9%; for the Senate, 90.0%; for governors,

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81.1%. State supreme court justices were reelected 91.3% of the time, about the same as for members of the Senate. Moreover, when you look just at partisan elections (which elections for the House, Senate, and Governor all are), state supreme court incumbents won reelection only 68.8% of the time. That is, in the races most comparable to races for other statewide elected offices, state supreme court incumbents have the *most* to fear in terms of losing their jobs. Looking at intermediate appellate courts, Streb, Frederick, and LaFrance<sup>115</sup> report that 92.2% of incumbents were reelected; 93.4% in partisan elections and 90.6% in nonpartisan elections. (Strangely, the reelection rate is lower in nonpartisan states, likely because of their unconventional coding of Michigan and Ohio.) Again, these races are competitive, and defeat is a real possibility for incumbents.

**Argument 8: Elected Judges Are Not As Qualified and Elections Lead to Less Diversity on the Bench.**

One of the chief concerns raised by opponents of elections is that elections yield judges who are of lower quality and are less diverse than those in appointed and Missouri Plan states: “Closely related to the complaint that elections excessively empower parties and their bosses is the complaint that voters will select whomever the bosses put before them, and, therefore, elections will fill courts with unfit judges.”<sup>116</sup> If true, this is one of the most serious criticisms that could be leveled against electing judges.

Stephen Choi, G. Mitu Gulati, and Eric Posner<sup>117</sup> set out to test whether elected judges perform better or worse once on the bench than appointed judges. They measured the performance of judges on three dimensions: productivity, citations, and independence. Their results contradict the conventional wisdom:

We find that elected judges are more productive. And although appointed judges write opinions that are cited more often, the difference is small and outweighed by the productivity difference. In other words, in a given time period, the product of the number of opinions authored and citations-per-opinion is higher for elected judges than for appointed judges.<sup>118</sup>

They go on to say that this relationship may only hold in small states, so clearly more research needs to be conducted. However, it is fair to say that the conventional wisdom that elections yield inferior judges lacks empirical support.<sup>119</sup>

Their conclusions are bolstered by results from another study ranking state courts.<sup>120</sup> Looking at their composite rankings,<sup>121</sup> one can clearly see that elected judiciaries are well-represented in their top ten list. Indeed, six of the ten top judiciaries are elected state courts. Moreover, when they run an analysis using U.S. Chamber of Commerce rankings,<sup>122</sup> there is no relationship between the court ranking and partisan elections, nonpartisan elections are only significant in one of the specifications, and the same is true with “merit” systems (with the results showing that courts who have judges selected in this manner are actually ranked lower). Again, there is simply no empirical evidence that elected judiciaries are of lower quality.

In terms of racial and gender diversity, the evidence is mixed as to whether the method of judicial selection promotes diversity. Kathleen Bratton and Rorie Spill<sup>123</sup> found that women are more likely to be appointed to the bench than elected but “only when the court is all male” and this effect is even greater when the governor is Democratic. Yet, Mark Hurwitz and Drew Nobel Lanier<sup>124</sup> find no such effects. “[O]ne result with important policy implications was consistent across our study periods—the lack of influence of judicial selection systems. . . . [W]e found that none of the selection systems had any consistent influence on judicial diversity in either 1985 or 1999.”<sup>125</sup> This finding was also true in 2005.<sup>126</sup> Additionally, Frederick and Streb<sup>127</sup> find:

If any verdict can be reached on the role of sex in the outcomes of judicial elections, then it is that women might receive a modest boost at the polls. In the intermediate appellate court elections studied here, women candidates actually fared better than male candidates both in terms of vote share and whether they win.

This is similar to the findings of Hall<sup>128</sup> and Bonneau.<sup>129</sup> In sum, the bulk of the evidence suggests that there is no relationship between diversity and the method of selection.<sup>130</sup>

### III. Reforms

In recent years, a variety of reforms have been either adopted or introduced by state legislatures. Here I focus on three: changing from partisan elections to nonpartisan elections, changing from competitive elections to retention elections, and adopting public financing of elections.

**Reform 1: Changing from Partisan to Nonpartisan Elections.** As mentioned above, until recently most states that changed their method of selection moved from either partisan or nonpartisan elections to the Missouri Plan. However, no state has done so in almost two decades. More recently, two states (Arkansas and North Carolina) have moved from partisan elections to nonpartisan elections. Bonneau and Hall<sup>131</sup> have a detailed discussion of these changes and some of the consequences of them (such as lower voter participation, lower levels of contestation for incumbents, etc.). It is worth noting some general differences between nonpartisan and partisan elections more generally.

First, nonpartisan elections are contested at lower levels than partisan elections, and, when they are contested, they are less competitive both in terms of the incumbent’s percentage of the vote and the likelihood of an incumbent being defeated.<sup>132</sup> This is also true at the trial court level.<sup>133</sup> So, nonpartisan elections are less able to effectively hold judges accountable.

Second, while nonpartisan elections are less expensive when the relationship is looked at bivariately, once other factors are taken into account, these elections are more expensive.<sup>134</sup> This is not surprising since candidates in these elections are not able to rely on the political party for financial or other assistance in their elections, and thus must rely on their own campaigns in order to attract votes. “In an election system in which highly salient information about candidates’ party affiliations is not available on the ballot, contests that feature more spending and more media coverage increase the level of partisan voting by communicating information about the candidates—both their partisan affiliations and other information to which voters can respond in a partisan way.”<sup>135</sup>

Third, removing the partisan affiliation of the candidates leads to higher ballot roll-off and,

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therefore, less voter participation.<sup>136</sup> This is because the partisan affiliation of the candidate is a useful piece of information for voters to have. In removing the partisan affiliation of the candidates, states deprive voters of an important, meaningful cue. After all, we know there are differences in how Democratic candidates and Republican candidates view the law, Constitution, role of the judge, etc. If this were not the case, then we should not see the prolonged and heated battles for judicial confirmation that we see for federal judgeships. Indeed, David Klein and Baum<sup>137</sup> found that “[s]imply providing respondents with the candidates’ party affiliations had an enormous impact on their willingness to choose a candidate and on the choice of one candidate over another.”

Fourth, and finally, nonpartisan elections do not insulate judges from being affected by the public.<sup>138</sup> In fact, according to Richard Caldarone, Brandice Canes-Wrone, and Tom Clark,<sup>139</sup> “the results show that the justices in nonpartisan systems are more likely to make popular decisions than the justices in partisan systems.” It is unclear exactly why this might be the case, and the authors only look at abortion decisions, but it is clear that nonpartisan elections do not remove electoral considerations from judicial behavior. Given this, and all the reasons above, the choice to move from partisan to nonpartisan elections seems curious. The body of evidence, taken together, suggests that if a state changes its method of selection from partisan to nonpartisan elections, this will result in lower levels of contestation, higher reelection rates, more spending during the campaigns, and no less public influence in decisions.

### **Reform 2: Missouri Plan/Retention Elections.**

Throughout most of the 20<sup>th</sup> century, if states switched their method of selection, it was to switch to the Missouri Plan. “Between 1940 and 1988, fifteen states adopted constitutional amendments to replace judicial elections with some type of merit-selection system for some or all levels of courts.”<sup>140</sup> This movement has stalled lately, with voters now routinely rejecting such proposals (such as in Nevada in 2010), and Skaggs et al.<sup>141</sup> report that “there were efforts to weaken or eliminate merit selection of judges in at least seven

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states: Arizona, Illinois, Iowa, Kansas, Missouri, Oklahoma, and Tennessee.”

One way to assess the Missouri Plan is to look at what kind of candidates end up being nominated by the commissions. Looking at data from Tennessee and Missouri, Brian Fitzpatrick<sup>142</sup> found that “merit systems select judiciaries with ideological preferences to the left of those that would have been selected by the public or its elected representatives.” Fitzpatrick is appropriately cautious in his conclusions, and he is careful not to speak outside the bounds of his data. However, his evidence is at least suggestive that the type of bench one gets with the Missouri Plan is significantly different than the kind one would get with other methods of selection. And the difference is not based on the quality of judges; it is based on ideology. This leads one to be skeptical that “merit selection *removes* politics from judicial selection. Rather, merit selection may simply *move* the politics of judicial selection into closer alignment with the ideological preferences of the bar.”<sup>143</sup> This is exactly what Hall<sup>144</sup> finds: “[R]etention elections are not impervious to partisan pressures, contrary to the claims of reformers.” Interestingly, as the election grows closer, the behavior of these judges changes: “In states where citizen preferences are conservative, judges’ decisions become more pro-government as retention elections draw closer, but in states where citizens are more liberal, judges’ decisions become more pro-defendant in the face of retention.”<sup>145</sup> When it comes to keeping their jobs, these judges are responsive to the public, just like judges in partisan and nonpartisan states.

Another way to evaluate Missouri Plan states is by what happens to judges once they ascend to the bench. Are retention elections “elections” in any meaningful sense? Larry Aspin<sup>146</sup> reports that the average percentage of the vote received by candidates standing for retention in 2010 was 69.5%; this is the lowest percentage of “yes” votes in the period 1964-2010. That is, since 1964, candidates standing for retention have received, on average, more than 70% of the vote. Fitzpatrick<sup>147</sup> reports that “[i]ncumbent high-court judges are returned to the bench 99% of the time across the country when they run in retention elections. . . .” Finally, Bonneau and Hall<sup>148</sup> report that only 3 of 231 (1.3%) of incumbent state supreme

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court justices were defeated in their retention bids from 1990-2004, compared to 5.2% of incumbents in nonpartisan elections and 31.4% of incumbents in partisan elections. In terms of the average percentage of the vote received during that time period, incumbents in retention elections received 71.0%; the figure was 57.9% in contested nonpartisan elections and 55.7% in contested partisan races.<sup>149</sup> In sum, the evidence strongly suggests that “retention elections seek to have the benefit of appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy.”<sup>150</sup>

It is also worth briefly discussing what happens in the event an incumbent is challenged in a retention election. Often, these challenges emerge late in the election season. This makes it very difficult for the incumbent who is being challenged to respond effectively. Since most candidates are not anticipating opposition, they do not raise money, so if a challenge emerges late in the process, they are defenseless. Moreover, it is very difficult to campaign against nobody, which is what an incumbent has to do in a retention election. If an incumbent has an opponent, she can contrast her record with that of the opponent. But who is the opponent in a retention election? There is none; the opponent is a nameless, faceless abstraction. The incumbent is severely constrained in the kind of campaign she can run. Finally, retention elections deprive the voter of a meaningful choice. The voters might not like Justice A, but they have no idea who her replacement would be if they voted her out of office. Perhaps Justice A is preferable to potential Justice B, but not potential Justice C. How should the voter vote? These elections deprive the electorate of meaningful choice.

**Reform 3: Public Financing.** When North Carolina changed its method of selection from partisan to nonpartisan, it also adopted public financing for candidates who qualified for it. It was not the first state to do so; Wisconsin has had public financing for years. However, the Wisconsin system has been so underfunded that very few candidates have taken advantage of it.<sup>151,152</sup> A full assessment of this program is outside the scope of this paper, and the current

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economic situation makes it highly unlikely other states will adopt public financing any time in the near future. It is worth noting that early on, 12 of 16 candidates running for the North Carolina Supreme Court and North Carolina Court of Appeals in 2004 availed themselves of the public financing.<sup>153</sup> In 2004 and 2006, 82% of the candidates sought public funding.<sup>154</sup> Thus, in the first few years of public financing, candidates were taking advantage of the system,<sup>155</sup> consistent with the findings of Owen Abbe and Paul Herrnson.<sup>156</sup>

There are two concerns with public financing that need to be considered moving forward. There is a consideration that candidates will stop taking advantage of the program if the funds are not at reasonable levels.<sup>157</sup> As money becomes tighter for both individuals and states, the sustainability of public financing programs for state judicial elections is likely to be called into question. Second, Bonneau and Cann<sup>158</sup> have shown that stringent campaign finance restrictions leads to less competitive elections and reinforce the incumbency advantage. Given that incumbent spending runs into diminishing marginal returns at lower levels of spending than challenger spending does, the amount of public financing needs to be at a level sufficient for challengers to be able to mount a competitive campaign against incumbents. If not, then challengers will opt not to take advantage of the program.

### Conclusion

The purpose of this paper is to articulate some of the most common arguments against judicial elections and evaluate them in light of the relevant empirical data. Current empirical evidence suggests that some of the concerns raised by opponents of judicial elections are not justified. According to data: voters participate in these elections, they participate meaningfully, elections do not lead to a loss of legitimacy, and elections do not produce inferior or less diverse judges. However, there are other areas where we need more data before we can say anything definitive, such as whether and to what extent justice might be “for sale,” the viability of public financing, and so forth. Additionally, there is a need for more research into judicial elections at the trial court level. Generally speaking, the empirical evidence seems to refute many of the claims made by opponents

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of judicial elections,<sup>159</sup> regardless of the level of court being discussed.

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## Endnotes

1 ADAM SKAGGS, MARIA DA SILVA, LINDA CASEY & CHARLES HALL, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10*, at 3 (2011).

2 Such as the American Bar Association and National Center for State Courts.

3 Such as the American Judicature Society and Justice at Stake.

4 These states are Arkansas and North Carolina.

5 In past decades, these groups were far more successful, with sixteen states changing their method of selection since 1960. Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793 (2004); CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009).

6 Michigan, Minnesota, Pennsylvania, and Wisconsin.

7 These states are Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas, and West Virginia.

8 Six to twelve years depending on the state.

9 Except for Illinois, where 60% is required, and New Mexico, where 57% is required.

10 These states are Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin.

11 Six to ten years.

12 These states are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, and Wyoming.

13 As I will discuss later, this method of selection does not yield more meritorious judges than the other methods of selection.

14 These states are California, Maine, and New Jersey; judges in California keep their seats in retention elections.

15 These states are South Carolina and Virginia.

16 In South Carolina, a Judicial Merit Selection Commission generates a list of nominees, from which the General Assembly must choose one.

17 These states are Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Utah, and Vermont; judges in Maryland and Utah keep their seats in retention elections.

18 In four states (Delaware, Maryland, Massachusetts, and New Hampshire) these commissions are advisory.

19 SKAGGS ET AL., *supra* note 1, at 21.

20 BONNEAU & HALL, *supra* note 5.

21 Mark Hansen, *A Run for the Bench*, 84 A.B.A. J. 68, 70 (1998).

22 BONNEAU & HALL, *supra* note 5, at 131.

23 Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13 (2003).

24 Matthew J. Streb & Brian Frederick, *When Money Cannot Encourage Participation: Campaign Spending and Rolloff in Low Visibility Judicial Elections*, 33 POL. BEHAV. 665, 681 (2011).

25 Chris W. Bonneau & Damon Cann, *Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in State Supreme Court Elections*, 73 J. POL. 1267 (2011).

26 Baum, *supra* note 23.

27 Chris W. Bonneau, *The Effects of Campaign Spending in State Supreme Court Elections*, 60 POL. RES. Q. 489 (2007).

28 Brian Frederick & Matthew J. Streb, *The Cost of Going for the Gavel: Individual Candidate Spending in Intermediate Appellate Court Elections*, 32 JUST. SYS. J. 25, 39-40 (2011).

29 Brian Frederick & Matthew J. Streb, *Paying the Price for a Seat on the Bench: Campaign Spending in Contested State Intermediate Appellate Court Elections*, 8 ST. POL. & POL'Y. Q. 410 (2008).

30 Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections*, 5 ST. POL. & POL'Y. Q. 107 (2005).

31 Matthew J. Streb & Brian Frederick, *Conditions for Competition in Low-Information Judicial Elections: The Case of Intermediate Appellate Court Elections*, 62 POL. RES. Q. 523 (2009).

32 Charles G. Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52 (2003).

33 Bonneau and Hall (2009) report the results of some recent statewide surveys. A 2002 survey of North Carolina voters showed that 78% thought money had some or a great deal of influence over judicial decisions. A 2008 survey in Minnesota showed that 47% of respondents believed judges favor their campaign contributors and 78% were concerned about judges needing to raise money for campaigns. Finally, a 2008 survey in Wisconsin indicated that 78% of the respondents believed that campaign contributions had at least some influence over judicial decisions. Bonneau & Hall, *supra* note 5.

34 James L. Gibson, *Challenges to the Impartiality of State Supreme*

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Courts: *Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59 (2008); James L. Gibson, "New-Style" *Judicial Campaigns and the Legitimacy of State High Courts*, 71 J. POL. 1285 (2009).

35 Damon Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. POL'Y Q. 281 (2007); Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994-1997*, 31 POL. & POL'Y 314 (2003); Joanna M. Shepherd, *Money, Politics and Impartial Justice*, 58 DUKE L.J. 623 (2009).

36 Damon M. Cann, *Campaign Contributions and Judicial Behavior*, 23 AM. REV. POL. 261 (2002); Damon M. Cann et al., *Campaign Contributions and Judicial Decisions in Partisan and Nonpartisan Elections*, in NEW DIRECTIONS IN JUDICIAL POLITICS (Kevin T. McGuire ed., 2012).

37 Cann, *Justice for Sale?*, *supra* note 35, at 284.

38 Cann, *Justice for Sale?*, *supra* note 35; Cann et al., *supra* note 35.

39 Cann, *Justice for Sale?*, *supra* note 35.

40 *Id.*

41 Cann et al., *supra* note 35.

42 Sandra Day O'Connor, Keynote Address at the Judicial Independence Conference at Seattle University (Sept. 14, 2009), in 33 SEATTLE U. L. REV. 561, 564 (2010).

43 Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697 (2006).

44 Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for State Courts*, 36 AM. POL. RES. 297 (2008).

45 Wenzel et al., *The Sources of Public Confidence in State Courts: Experience and Institutions*, 31 AM. POL. RES. 191 (2003).

46 Kathleen H. Jamieson & Bruce W. Hardy, *Will Ignorance & Partisan Election of Judges Undermine Public Trust in the Judiciary?*, 137 DAEDALUS 11, 12 (2008).

47 Gibson, *Challenges*, *supra* note 34, at 72.

48 James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 LAW & SOC'Y REV. 899 (2008).

49 Gibson, *Challenges*, *supra* note 34, at 72.

50 Gibson, "New-Style," *supra* note 34.

51 *Id.* at 1298; *see also* Gibson, *Campaigning*, *supra* note 48.

52 James Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-based Experiment*, 64 POL. RES. Q. 545 (2011).

53 *Id.* at 553.

54 Note, however, that this is not limited solely to elected judges. Appointed judges are also responsive to their constituencies. The

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best treatment of this issue is Langer. LAURA LANGER, *JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY* (2002).

55 Melinda G. Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 442 (1992).

56 Melinda G. Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485 (1995).

57 Paul R. Brace & Melinda G. Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206 (1997).

58 Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 370 (2008).

59 Damon M. Cann & Teena Wilhelm, *Case Visibility and the Electoral Connection in State Supreme Courts*, 39 AM. POL. RES. 557 (2011).

60 Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004); Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q. J. POL. SCI. 107 (2007).

61 Huber & Gordon, *supra* note 60, at 261.

62 Hall, *Electoral Politics*, *supra* note 55; Melinda G. Hall, *Justices as Representatives*, *supra* note 56; Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315 (2001).

63 This shows how events that do not happen are different from events that cannot happen.

64 Gordon & Huber, *supra* note 60, at 133.

65 *Id.*

66 O'Connor, *supra* note 42, at 565.

67 Baum, *supra* note 23.

68 Geyh, *supra* note 32, at 53.

69 Melinda G. Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POL. 1147 (2007).

70 *See also* Bonneau & Hall, *supra* note 5; Melinda G. Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457 (2008).

71 That is, they turn out to vote, but fail to complete their ballots. So, if 100 people turn out to vote, and 20 fail to vote for the state supreme court race, "roll-off" is 20%.

72 Hall, *Voting*, *supra* note 69.

73 Bonneau & Hall, *supra* note 5; Hall & Bonneau, *Mobilizing*, *supra* note 70.

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74 Hall, *Voting*, *supra* note 69.

75 Bonneau & Hall, *supra* note 5.

76 O'Connor, *supra* note 42.

77 Geyh, *supra* note 32.

78 *Id.*

79 For more information, see Tables 2.1 and 2.2 in Bonneau & Hall, *supra* note 5.

80 Hall, *Voting*, *supra* note 69.

81 Bonneau & Hall, *supra* note 5, at 44.

82 *Id.*

83 Hall, *Voting*, *supra* note 69.

84 Bonneau & Hall, *supra* note 5, at 130.

85 Matthew J. Streb et al., *Voter Rolloff in a Low-Information Context: Evidence from Intermediate Appellate Court Elections*, 37 AM. POL. RES. 644 (2009).

86 *Id.* at 660.

87 *Id.*

88 Streb & Frederick, *When Money Cannot Encourage Participation*, *supra* note 24.

89 *Id.* at 680-81.

90 O'Connor, *supra* note 42.

91 Geyh, *supra* note 32.

92 Baum, *supra* note 23.

93 Geyh, *supra* note 32, at 54.

94 Michael R. Dimino, Sr., *The Worst Way of Selecting Judges – Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 299 (2005).

95 Hall, *State Supreme Courts*, *supra* note 62.

96 *Id.* at 325.

97 Bonneau & Hall, *supra* note 5; Melinda G. Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 AM. J. POL. SCI. 20 (2006).

98 Bonneau & Hall, *supra* note 5.

99 Bonneau & Hall, *supra* note 5, at 98.

100 Streb & Frederick, *Conditions*, *supra* note 31.

101 *Id.* at 534.

102 Brian K. Arbour & Mark J. McKenzie, *Campaign Messages in Lower-Court Elections After Republican Party of Minnesota vs. White*, 32 JUST. SYS. J. 1, 19 (2011).

103 Brian K. Arbour & Mark J. McKenzie, *Has the “New Style” of Judicial Campaigning Reached Lower Court Elections?*, 93 JUDICATURE 150, 158 (2010).

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104 O'Connor, *supra* note 42, at 563.

105 Bonneau & Hall, *supra* note 5.

106 Interestingly, looking at elections from 1946-2009, Herbert Kritzer finds:

[M]uch of the change has been concentrated in the southern states that hold partisan elections for their state supreme courts. In fact, for elections involving incumbents, virtually all the change that has occurred has been in those states; whatever change there has been in contestation and competitiveness in nonpartisan states and in non-southern partisan states is minimal at best.

Herbert M. Kritzer, *Competitiveness in State Supreme Court Elections, 1946-2009*, 8 J. EMPIRICAL LEGAL STUD. 237, 255 (2011).

107 Matthew J. Streb et al., *Contestation, Competition, and the Potential for Accountability in Intermediate Appellate Court Elections*, 91 JUDICATURE 70 (2007).

108 Streb & Frederick, *Conditions*, *supra* note 31.

109 Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation in Trial Court Elections*, 94 JUDICATURE 208, 214-15 (2011).

110 Streb et al., *Contestation*, *supra* note 107.

111 Nelson, *supra* note 109.

112 *Id.* at 216.

113 Gordon & Huber, *supra* note 60; Huber & Gordon, *supra* note 60.

114 Bonneau & Hall, *supra* note 5.

115 Streb et al., *Contestation*, *supra* note 107.

116 Dimino, *The Worst Way*, *supra* note 94, at 294.

117 Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2010).

118 *Id.* at 292.

119 Cann finds that, “on balance, using elections to select judges actually diminishes the performance of state courts.” Damon M. Cann, *Beyond Accountability and Independence: judicial Selection and State Court Performance*, 90 JUDICATURE 226, 232 (2007). However, unlike Choi, Gulati, and Posner, who focused on the actual performance of judges and courts, Cann’s data comes from a survey of judges who were asked “to rate how well courts and judges in their state perform their duties.” *Id.* at 229. Thus, while Cann gets at perceptions of performance, Choi, Gulati, and Posner get at actual performance. In this case, the perceptions do not square with reality.

120 Stephen J. Choi et al., *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313 (2009).

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- 121 *Id.* at Table 11.
- 122 *Id.* at Table 13.
- 123 Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 Soc. Sci. Q. 504, 514 (2002).
- 124 Mark S. Hurwitz & Drew N. Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 ST. POL. & POL'Y Q. 329 (2003); Mark S. Hurwitz & Drew N. Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 Jus. Sys. J. 47 (2008).
- 125 Hurwitz & Lanier, *Explaining*, *supra* note 124, at 345.
- 126 Hurwitz & Lanier, *Diversity*, *supra* note 124.
- 127 Brian Frederick & Matthew J. Streb, *Women Running for Judge: The Impact of Sex on Candidate Success in State Intermediate Appellate Court Elections*, 89 Soc. Sci. Q. 937, 950 (2008).
- 128 Hall, *State Supreme Courts*, *supra* note 62.
- 129 Chris W. Bonneau, *Campaign Fundraising in State Supreme Court Elections*, 88 Soc. Sci. Q. 68 (2007).
- 130 Margaret Williams finds that “nonpartisan elections affect women’s representation on trial courts, while merit selection affects representation on appellate courts.” Margaret Williams, *Women’s Representation on State Trial and Appellate Courts*, 88 Soc. Sci. Q. 1192, 1200 (2007). However, it is unclear what to make of this finding given the way she codes the method of selection. As mentioned above, some states use one method of selection for trial courts and another method for appellate courts. Williams codes these “based on the method by which a majority of the judges at that level reached the bench.” *Id.* at 1196-97. Since the state is the unit of analysis here, this means that if a state elects trial court judges in partisan elections but appoints appellate court judges, the state is coded as partisan since there are more trial court judges than appellate court judges. This makes it difficult to ascribe any influence to method of selection.
- 131 Bonneau & Hall, *supra* note 5.
- 132 Bonneau & Hall, *supra* note 5; Hall, *State Supreme Courts*, *supra* note 62; Kritzer, *supra* note 106.
- 133 Nelson, *supra* note 109.
- 134 Bonneau & Hall, *supra* note 5.
- 135 Emily Rock & Lawrence Baum, *The Impact of High-Visibility Contests for U.S. State Court Judgeships: Partisan Voting in Nonpartisan Elections*, 10 ST. POL. & POL'Y Q. 368 (2010).
- 136 Bonneau & Hall, *supra* note 5; Hall, *Voting*, *supra* note 69, Hall & Bonneau, *Mobilizing*, *supra* note 70; Streb & Frederick, *When Money Cannot Encourage Participation*, *supra* note 24.
- 137 David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709, 725 (2001).
- 138 Hall, *State Supreme Courts*, *supra* note 62.
- 139 Richard P. Caldarone et al., *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J. POL. 560, 571 (2009).
- 140 Seth Anderson, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793 (2004).
- 141 SKAGGS ET AL., *supra* note 1, at 23.
- 142 Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 VAND. L. REV. 675, 699 (2009).
- 143 *Id.* at 676.
- 144 Hall, *State Supreme Courts*, *supra* note 62, at 324.
- 145 Elisha C. Savchak & A.J. Barghothi, *The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 394, 408 (2007).
- 146 Larry Aspin, *The 2010 Judicial Retention Elections in Perspective: Continuity and Change from 1964 to 2010*, 94 JUDICATURE 218 (2011).
- 147 Fitzpatrick, *supra* note 142, at 684.
- 148 Bonneau & Hall, *supra* note 5.
- 149 *Id.*
- 150 Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 811 (2004).
- 151 Doug Bend, *North Carolina’s Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597 (2005).
- 152 This changed in 2011, when three of four candidates opted into the system, which was revised to provide more meaningful sums of money to candidates who wanted public financing. However, this program was eliminated by the Wisconsin legislature after the election. SKAGGS ET AL., *supra* note 1.
- 153 *Id.*
- 154 Bonneau & Hall, *supra* note 5.
- 155 SKAGGS ET AL., *supra* note 1.
- 156 Owen G. Abbe & Paul S. Herrnson, *Public Financing for Judicial Elections? A Judicious Perspective in the ABA’s Proposal for Campaign Finance Reform*, 35 POLITY 535 (2003).
- 157 Bend, *supra* note 151, has a very nice discussion of the financial issues the program has (and will likely continue to have).
- 158 Bonneau & Cann, *Campaign Spending*, *supra* note 25.
- 159 *E.g.*, Geyh, *supra* note 32; O’Connor, *supra* note 42.



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