

The Case for Partisan Judicial Elections

Part 1: State Judicial Selection Series

by Chris W. Bonneau

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ABOUT THE PAPER

This paper is the first in a series of papers commissioned by the Federalist Society on the debate surrounding the leading methods of judicial selection in the states. Future papers will make the case for commission-based appointment (often known as the Missouri plan) and democratic appointment.

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Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organizational stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts, and criticisms by writing to us at info@fedsoc.org, and, if requested, we will consider posting or airing those perspectives as well.

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The Case for Partisan Judicial Elections

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THE CASE FOR PARTISAN JUDICIAL ELECTIONS

By Chris W. Bonneau

Of all the different forms of selecting judges, electing them in partisan elections enjoys particular scorn among academics,¹ media commentators,² and even judges themselves.³ Moreover, in recent years, several states have abandoned partisan elections in favor of electing judges without partisan labels in nonpartisan elections. Of all the methods of selecting judges—partisan elections, nonpartisan elections, commission-retention,⁴ gubernatorial appointment, and legislative appointment—partisan elections are the second least popular based on usage, ahead only of legislative appointment. Currently, only seven states hold partisan elections for at least some of their state supreme court judges: Alabama, Illinois, Louisiana, New Mexico, North Carolina, Pennsylvania, and Texas. Of these, Illinois, New Mexico, and Pennsylvania only use partisan elections for their judges' initial election to the bench; to retain their seats, judges run in uncontested retention elections. Thus, partisan judicial elections for state supreme courts are a rare breed, and getting even rarer. Since 2000, three states—Arkansas, North Carolina, and West

Virginia—have abandoned partisan elections for nonpartisan elections, though North Carolina returned to partisan elections in 2016. This White Paper lays out the reasons that partisan elections are the best way to select state court judges.

I. WHY ELECT JUDGES?

Of course, an argument for partisan elections rests on the premise that judges ought to be elected at all, rather than appointed like federal judges. The case for electing judges has been made elsewhere,⁵ and the persuasiveness of that case depends on how one rates the relative importance of different judicial values. Those who believe that judges ought to be completely independent will support a selection model similar to the one employed by the federal government, featuring appointment, confirmation, and life tenure; those who believe that judges ought to be held accountable to the people for their decisions and actions will favor a model involving judicial elections (or reappointment) at regular intervals. Different states and jurisdictions may balance their preferences between independence and accountability differently. This is one of the positive aspects of federalism: states are free to determine how they want their courts to operate. A big myth in the judicial selection literature is that there is a one-size-fits-all solution. There is not. State decision makers—legislators and constituents—must decide, first, if they want some level of public input into judicial selection, and then, if so, what kind of public input they want.

No empirical study can resolve this debate because it is a debate over the values that stakeholders wish to see reflected in the judiciary. But there are judicial elections, and they are not going away anytime soon; voters support them and generally prefer to keep things the way they are in their respective states.⁶ Given the reality that many states have judicial elections, it is worthwhile to discuss the best way to conduct those elections.

II. WHY PARTISAN ELECTIONS?

Where states have determined that they want public input into judicial selection, they should use judicial elections that inform voters of the political party affiliations of the judges on the ballot. Compared to the other two methods that involve public participation—nonpartisan elections and the commission-retention model—partisan elections are superior on three important measures: information, choice, and transparency.

A. Information

One of the most important distinguishing features of partisan judicial elections is that they provide important

1 See, e.g., David E. Pozen, *Are Judicial Elections Democracy-Enhancing?*, in WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE (Charles Gardner Geyh ed., 2011); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 43-79 (2003); Michael S. Kang & Joanna M. Shephard, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 929-49 (2016); Michael S. Kang & Joanna M. Shephard, *Partisanship in State Supreme Courts: The Empirical Relationship between Party Campaign Contributions and Judicial Decision Making*, 44 J. LEGAL STUD. 161, 161-85 (2015).

2 See, e.g., Billy Corriher, *Partisan Judicial Elections and the Distorting Influence of Campaign Cash*, CTR. FOR AM. PROGRESS (Oct. 25, 2012, 3:08 AM), <https://www.americanprogress.org/issues/courts/reports/2012/10/25/42895/partisan-judicial-elections-and-the-distorting-influence-of-campaign-cash/>; Jessica A. Levinson, *Why Voters Shouldn't Be Electing Judges*, L.A. TIMES (May 8, 2014, 5:31 PM), <http://www.latimes.com/opinion/op-ed/la-oe-levinson-end-judicial-elections-20140509-story.html>; Gene Miller, *A Few Arguments Against Partisan Judicial Elections*, HAZLETON STANDARD-SPEAKER (Sept. 10, 2017), <http://standardspeaker.com/opinion/a-few-arguments-against-partisan-judicial-elections-1.2240756>.

3 See, e.g., Jake Bernstein, *The Chief Reformer Steps Down*, TEXAS OBSERVER (June 4, 2004, 12:00 AM), <https://www.texasobserver.org/1663-the-chief-reformer-steps-down-the-texas-observer-talks-with-retiring-state-supreme-court-chief-justice-tom-phillips/>; Sue Bell Cobb, *I Was Alabama's Top Judge. I'm Ashamed by What I Had to Do to Get There*, POLITICO MAG., Mar.-Apr. 2015, available at <https://www.politico.com/magazine/story/2015/03/judicial-elections-fundraising-115503>; Andrew Cohen, *An Elected Judge Speaks Out Against Judicial Elections*, THE ATLANTIC (Sept. 3, 2013, 2:04 PM), <https://www.theatlantic.com/national/archive/2013/09/an-elected-judge-speaks-out-against-judicial-elections/279263/>.

4 In a commission-retention system, judges are initially appointed, but they are periodically subject to elections wherein voters choose whether to allow them to continue in office. This is also called "merit selection" or the Missouri Plan.

5 See, e.g., CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009); JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY (2012); Chris W. Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections* (The Federalist Soc'y State Courts White Paper, Mar. 14, 2012), available at <https://fedsoc.org/commentary/publications/a-survey-of-empirical-evidence-concerning-judicial-elections>; Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 267-304 (2005).

6 See, e.g., DAMON M. CANN & JEFF YATES, THESE ESTIMABLE COURTS: UNDERSTANDING PUBLIC PERCEPTIONS OF STATE JUDICIAL INSTITUTIONS AND LEGAL POLICY-MAKING (2016).

information to voters. Namely, they inform voters of the political party affiliations of the candidates.

Critics argue that providing such information is the biggest problem with these elections; judges should be nonpartisan, and it simply does not matter whether the candidate is a Democrat or Republican.⁷ These arguments are either naïve or disingenuous. Scholars have shown for decades that liberal judges and conservative judges decide cases differently.⁸ Legislators know this too. Why did Merrick Garland not get a hearing for the U.S. Supreme Court vacancy? Why did 42 senators vote against confirming Justice Alito? Why did 31 senators vote against confirming Justice Sotomayor? All three of these individuals were distinguished jurists who were highly qualified for the Supreme Court; if qualifications and fairness were all that mattered, all three would have been confirmed unanimously. But ideology matters. It shapes how judges see the law. The cases decided by high courts (including state high courts) are all difficult cases; reasonable people can see the law and facts differently, and their political ideologies often inform their interpretations.

The easiest way to convey this crucial piece of information about potential judges—political ideology as it might affect judicial decision making—is through publicizing the party affiliations of the candidates. In general, Democratic judges interpret the law more liberally than Republican judges. Judges, legislators, and lawyers all know this, and of course voters know it too. Indeed, this is the single most important fact for most voters to know about judicial candidates. Why should they be deprived of meaningful information?

We also know that information about party affiliation has important consequences. There is higher voter participation in partisan elections compared to other types of elections for judges.⁹ If a state is going to elect judges, it should want as many people participating in those elections as possible. Additionally, Democratic voters are more likely to vote for Democratic candidates and Republican voters are more likely to vote for Republican candidates.¹⁰ Thus, just like in legislative elections,

voters prefer to elect their copartisans to office. The presence of party identification on the ballot functions as it should.

It is important to note that these partisan effects are not limited to partisan elections. Indeed, scholars have found that voters in nonpartisan elections and retention elections can also identify their copartisans and therefore vote for them; however, fewer voters participate in these elections.¹¹ Thus, in nonpartisan and retention elections, states are paying a significant cost (lower voter participation), but getting no benefits since those voters that do participate can still identify which candidate is the Democrat and which candidate is the Republican. There is no evidence that removing the partisan affiliation of the candidates from the ballot does anything to alter the nature of judicial elections except cause fewer people to participate.

B. Choice

Another advantage of the partisan election system (one that is shared with nonpartisan elections) is that, unlike the commission-retention system, it gives voters meaningful choice in who gets to sit on the bench. Voters are able to choose the candidates they believe will be the best judges according to the criteria they think are important. This expanded range of choice transfers some decision-making power from state officials to voters.

This is important because what voters want out of judges varies, and it is not always what the elite lawyers who staff state governments want from them.¹² For years, scholars and political and legal elites believed the public simply wanted judges who would be fair and impartial. While these characteristics are desirable, recent work by James L. Gibson demonstrates that voters want other things more.¹³ Using a *Justice at Stake National Survey* with answers on a 10-point scale (with 10 meaning it is the “single most important responsibility of courts and judges”), Gibson reports that “Making impartial decisions” averages 7.58, behind more “subjective” items such as “Ensuring fairness under law” (7.85 average), protecting individual rights (7.69 average), and others. Indeed, “providing equal justice for rich and poor” had an average of 7.22. Focusing on voters in Kentucky, 72.9% of the respondents said it was very important for a judge to “protect people without power,” while 71.8% said it was very important for a judge to “strictly follow the law.” Additionally, 43.7% of the respondents said it was very important for a judge to “give my ideology a voice.” Voters do not want judges to strictly follow the law when they decide cases; they want judges to weigh multiple competing factors and use their judgment to render a “fair” or “just” verdict. These terms are not easily defined, and voters will often disagree on whether a decision was fair or just. This makes

7 See WHAT’S LAW GOT TO DO WITH IT?, *supra* note 1, for a collection of essays exploring this topic.

8 See, e.g., Lawrence Baum et al., *Measuring the Impact of Election Outcomes on Voting in State Supreme Courts*, in JUDICIAL ELECTIONS IN THE 21ST CENTURY (Chris W. Bonneau et al. eds., 2017); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2012); Charles Gardner Geyh, *The Judgment of the Boss on Bossing the Judges: Bruce Springsteen, Judicial Independence, and the Rule of Law*, 14 WIDENER L. J. 885, 885-905 (2005).

9 CHRIS W. BONNEAU & DAMON M. CANN, *VOTERS’ VERDICTS: CITIZENS, CAMPAIGNS, AND INSTITUTIONS IN STATE SUPREME COURT ELECTIONS* (2015); IN DEFENSE OF JUDICIAL ELECTIONS, *supra* note 5; MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* (2015); Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457, 457-70 (2008).

10 *VOTERS’ VERDICTS*, *supra* note 9; Chris W. Bonneau & Damon M. Cann, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections*, 37 POL. BEHAV. 43, 43-66 (2015).

11 *VOTERS’ VERDICTS*, *supra* note 9.

12 See, e.g., JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* (2012); James L. Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 64 POL. RES. Q. 545, 545-58 (2011).

13 *ELECTING JUDGES*, *supra* note 12; *Effects of Judicial Campaign Activity*, *supra* note 12.

direct voter involvement in the selection and retention of judges even more important.

Judicial elections result in voter-preferred judges being seated on the bench. Elections routinely involve multiple candidates, so voters actually have a choice. On this measure, partisan elections are better than nonpartisan ones; contested races are more common in partisan states than nonpartisan states.¹⁴

In contrast, in the commission-retention model, judges are selected by the governor from a list generated by a Judicial Nominating Commission (JNC), and voters are simply asked to rubberstamp these choices. The composition of JNCs varies by state, but they are all composed of a combination of elite lawyers, political officials, and other members of the community. JNC members are not accountable to the voters; in some states, their meetings and hearings are closed and voters are not even able to observe the meetings or provide input.

Perhaps this system and its secrecy could be justified if it produced better judges. However, there is no empirical evidence that judges selected by the commission-retention system are superior to those selected by partisan elections.¹⁵ Additionally, Brian T. Fitzpatrick has uncovered important evidence that the commission-retention system does not produce judges that voters want.¹⁶ Specifically, he found that in states where judges are selected using either nonpartisan elections or the commission-retention method, the judges who ascend to the bench are significantly more liberal or conservative than the electorate as a whole. The difference between the ideology of judges and the electorate was smallest in states that select judges through either appointment or partisan elections.

The system of retention elections—wherein voters simply vote “yes” or “no” on whether a candidate should remain on the bench, and judges who fail to get a certain percent of votes are removed¹⁷—puts both voters and judges at a disadvantage. Voters evaluating a judge do not know who will replace the judge if they vote “no”; they may not like the incumbent, but they have no idea if the replacement will be worse, so they cannot make an informed decision about whether to retain the judge. Retention elections, by design, deprive voters of meaningful choice. Not surprisingly, voters are less likely to participate in these types of elections,¹⁸ likely because of the lack of choice.

For judges, not having an opponent makes it difficult for them to campaign and make their case to voters. One of the

hallmarks of elections is the ability of candidates to contrast their records and their qualifications with those of their opponents. However, in elections with only one candidate, that is not possible. Judges running for retention are running against some kind of “ideal” or “mythical” alternative, which makes it more difficult for them to campaign. Furthermore, without multiple candidates, an incumbent judge may have no idea whether someone or some group will mount a challenge to his or her retention. With competitive elections, if no challenger files by a certain date, the incumbent knows there will be no opponent and thus does not have to worry about raising money and campaigning. This is not the case with retention elections. Two weeks before an election, an interest group or individual may take out several million dollars’ worth of ads encouraging voters not to retain the judge. The incumbent would be caught flat-footed, and unable to effectively respond. Thus, the commission-retention system can unfairly disadvantage incumbent judges who would be able to effectively campaign in competitive elections.

C. Transparency

One of the key components in any political system is transparency; in a democracy, we should prefer more transparent systems to less transparent systems absent compelling reasons for secrecy. Of course, too much transparency can be a bad thing. For example, we want advisers to be able to speak freely to the President, and we do not want the government to release troop locations. But when it comes to selecting judges, there is no compelling reason not to prefer transparency in how judges ascend to the bench and keep their jobs.

On the measure of transparency, partisan elections are superior to other methods of judicial selection. Voters are directly involved in selecting both the candidates who run in the general election and the judges who ultimately ascend to the bench. The provision of the party affiliation of the candidates on the ballot is an added measure of transparency, as it tells voters important and relevant information about the candidates running for office, as discussed extensively above.

Appointment systems are not transparent as there is no guarantee the public will even know who is being considered for a judgeship. In states that use a JNC, the public is often shut out from the selection process altogether. In states where the governor or legislature is in charge of filling judgeships, the public only has an indirect say in the staffing of the bench—they can punish or reward the governor or legislators at the ballot box—and even this say is retroactive and, at best, only one of many factors that voters consider when evaluating their governor or state legislator.

III. CONCLUSION

Partisan judicial elections are controversial, but their benefits outweigh their problems. They are effective mechanisms for providing voters with relevant information about judicial candidates, meaningful choice in elections, and transparency in the selection process. Indeed, on all of these criteria, they are superior to other forms of elections (nonpartisan and retention) and appointment schemes. And partisan elections accomplish

14 HERBERT M. KRITZER, JUSTICES ON THE BALLOT: CONTINUITY AND CHANGE IN STATE SUPREME COURT ELECTIONS (2015); IN DEFENSE OF JUDICIAL ELECTIONS, *supra* note 5; Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337, 337-349 (2003).

15 See, e.g., 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, 290-336 (2010).

16 Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 VAND. L. REV. 1729, 1729-54 (2017).

17 Judges in New Mexico need 57% to keep their seats; judges in Illinois need 60%. Most others need a majority.

18 VOTERS’ VERDICTS, *supra* note 9.

all this without suffering any decrease in the legitimacy of the courts,¹⁹ at least among those with knowledge of the courts.²⁰

This is not to say that partisan elections are perfect; they are not. And it is perfectly reasonable for states to decide they do not want to choose judges in this way. However, any discussion of judicial election should be based on empirical evidence and should contain a careful weighing of the strengths and weaknesses of each of the alternatives. There is no perfect method of selection. But partisan elections have several advantages over the alternatives, and the positive attributes of these elections should have a prominent place in any debate over judicial selection in the states.

19 ELECTING JUDGES, *supra* note 12; *Effects of Judicial Campaign Activity*, *supra* note 12; Michael J. Nelson, *Judicial Elections and Support for State Courts*, in JUDICIAL ELECTIONS IN THE 21ST CENTURY (Chris W. Bonneau et al. eds., 2017).

20 THESE ESTIMABLE COURTS, *supra* note 6.

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