

The Controversy Over Electing Judges and Advocacy in Political Science*

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There is perhaps no area of inquiry in the scientific study of politics that merits greater attention than the judicial elections controversy, where we see an extraordinary divergence in public discourse between the facts about judicial elections and the arguments commonly used to discredit them. Instead of a reasoned discussion, we are being bombarded with wildly speculative claims that American state courts are in imminent peril, at the same time that we are witnessing a single-minded interpretation of evidence that invariably leads to the condemnation of democratic processes. It also is with this controversy where we have not learned from studies of other elections or challenged the assumptions that underlie much of the thinking about this subject. Additionally, we have not achieved an acceptable level of conceptual clarity in discussing the central values of accountability and independence. As a consequence, every aspect of electoral politics now translates as a threat to judicial independence. Finally, political scientists (including this author) have shied away from entering into an advocacy role, resulting in a largely unchecked campaign to end judicial elections. For these reasons, it is essential that political scientists engage in this debate.

INACCURACY IS THE HALLMARK OF THE JUDICIAL REFORM MOVEMENT

Court reform advocates keep getting it wrong. Among other things, reformers promised that nonpartisan and retention elections would enhance the quality of the bench, provide a better basis than partisan affiliations for citizens to choose among candidates, and remove the stains of partisan politics. None of these promises has been realized. As we now know, judges do not differ at all in measurable qualifications across selection systems (e.g., Hurwitz and Lanier, 2003),¹ the removal of partisan labels from ballots suppresses voting dramatically and produces idiosyncratic outcomes (e.g., Hall and Bonneau, 2008; Dubois, 1980; Hall, 2001a, 2007a), and partisan politics persists in nonpartisan and retention elections (e.g., Dimino, 2004; Hall, 2001a, b; Squire and Smith, 1988; Streb, 2007).

The latest assault involves the purported consequences of *Republican Party of Minnesota v. White* (2002) and the claim that without restrictions on campaign speech,

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¹ There is an interesting study reporting that elected judges actually perform better than appointed judges (Choi, Gulati, and Posner, 2007).

judicial elections will become free-for-alls that destroy judicial legitimacy. As the story goes, challengers, interest groups, and big-money players increasingly will be drawn into the electoral arena in attempts to “purchase” seats and favorable court decisions, and incumbents’ reelection campaigns will be saturated with negative advertising and policy pronouncements harmful to judicial integrity.

Contrary to these doomsday forecasts, Gibson (2009) expertly has documented that neither position taking nor attack advertising has harmful consequences for the legitimacy of courts in states electing judges. Likewise, the predicted increases in competition and interest-group involvement have not been realized. For example, the overall defeat rate in 2006 in partisan supreme court elections was the lowest (8.3 percent) since 1984, and contestation rates from 2004 to 2006 in nonpartisan elections declined sharply (from 72 percent to 44.4 percent). Indeed, multivariate models show no meaningful changes after *White* in contestation or competition (Hall and Bonneau, 2008; Peters, 2009) but an actual decline in interest-group involvement in state supreme court campaigns (Hale, McNeal, and Pierceson, 2008).

ANOTHER PERSPECTIVE ON ELECTING JUDGES

According to prevailing wisdom, challengers are bad, campaigning is bad (especially if money and interest groups are involved), and electoral defeats are bad, all because they impair the independence and legitimacy of courts (e.g., American Bar Association Commission on the 21st Century Judiciary, 2003; National Center for State Courts, 2002; Sample, Jones, and Weiss, 2007). However, there is little evidence to support these claims. Instead, at least with supreme courts, evidence suggests that these elections are the prototype of what elections should be in the United States.² These races are competitive and interesting, and in many ways reflect smart political choices by voters (e.g., Bonneau, 2005; Bonneau and Hall, 2009; Hall and Bonneau, 2006, 2008; Hall, 2001, 2007a, b; Hojnacki and Baum, 1992). Moreover, the blatant exercise of judicial discretion is being curbed by democratic politics (e.g., Brace and Hall, 1997; Hall, 1987, 1992, 1995). To the extent that pressures from electoral politics are forcing judges to abandon their own political preferences and act in accordance with the rule of law, courts are strengthened and democracy is enhanced.³ Finally, there is no evidence that voters must see state court judges as above the fray where politics is concerned, particularly in states that have had healthy competition for decades.⁴ The assumption that state court judges must be seen as above campaigning and other partisan politics may be an ivory-tower myth.

² In this essay, I restrict my remarks to state supreme court elections. However, new work on intermediate appellate courts shows remarkably similar results across a host of dimensions (Streb and Frederick, 2009).

³ The absence of electoral processes does not ensure impartiality. Justices’ personal preferences can be just as biased and inconsistent with law as public opinion. However, in election systems, these biases are more readily exposed, and voters regularly have the option of removing these judges from office. Appointive systems lack an effective removal mechanism except under extraordinary circumstances.

⁴ For example, in nonpartisan elections, defeat rates in 1982 and 1984 (Hall, 2001a) were, respectively, 20 percent (four of twenty incumbents) and 15.8 percent (three of nineteen incumbents). In partisan elections, defeat rates in 1980 and 1986 (Hall, 2001a) were, respectively, 26.3 percent (five of nineteen incumbents) and 22.2 percent (four of eighteen incumbents). Intense competition in state supreme court elections is not new.

THE CALL FOR CONCEPTUAL CLARITY AND EMPIRICAL TESTS

Somehow we have gotten lost in a rhetorical muddle about independence and accountability while losing sight of the importance of the rule of law. Accountability can be defined in many ways but in its most basic form is a formal institutional arrangement where citizens control who holds office through elections. The primary mechanism for this control is electoral competition, whereby challengers take on incumbents and voters choose among candidates without deferring to incumbency. Alternatively, independence is the state of not having to face voters or any other political body once selected.

From these definitions, a simplistic formula has become lodged in contemporary public rhetoric: defining independence as freedom from elections and then decreeing that the integrity of the judiciary is being jeopardized when any form of electoral politics is present. This tautological loop tells us little without providing evidence that any negative effects actually occur and how any proposed solutions will correct the problem without introducing others that are worse.

A more complex view of accountability and independence relates to judicial decisions, particularly whether judges should adjust their behavior to constituency preferences in matters where they have discretion. "Accountable" judges would vote strategically by following constituency preferences, while independent judges would vote their own preferences. On this issue, the important point is this: the extent to which judges surrender to partisan pressures, political ambition, or any other force is entirely within their own control. While there may be added pressures on judges who are elected rather than appointed, it nonetheless is the case that each judge must decide which constituencies are to be served, even if that choice is at his or her own electoral peril. In this manner, independence and accountability are not inherently antithetical to each other.⁵

Moreover, whether these strategic considerations by judges are good or bad for society or for the American bench depends on the relationships between the justices' preferences, public sentiment, and the rule of law. When public sentiment and the rule of law coincide, curbing the blatant display of judicial preferences is beneficial. Evidence on this score is limited, but studies of the death penalty (e.g., Brace and Hall, 1997; Hall, 1987, 1992, 1995) and abortion (Brace, Hall, and Langer, 1999) in state supreme courts support the conclusion that public sentiment forced compliance with law rather than deviation from it. Strategic voting is evidenced by liberal justices in states with the death penalty and by conservative justices in states with liberal abortion statutes. Stated differently, we cannot accurately assume that public preferences always represent fiat instead of law, or that judges' unchecked preferences are any less dangerous than the threat of

⁵ The same can be said of impartiality. Many rightfully are concerned that judges might be swayed by large contributors to support the interests of those parties. But whether a judge is "for sale" is entirely within his or her control, at the same time that peddling favoritism is a serious breach of ethics that should not be expected of judges generally. Moreover, voters in elections readily can remove those who appear to breach norms of judicial conduct, as in the recent ousting of Justice Elliot Maynard from the West Virginia Supreme Court in the 2008 primaries.

majority tyranny.⁶ Indeed, unconstrained judicial preferences may be a much worse threat to the rule of law than citizen preferences, at least at the state level where law is designed by formal authority to reflect local values and traditions.

Of course, there are other definitions of independence. But as stated aptly, “independence is only a useful term if it allows observers to objectively determine whether it is present or not” (Tiede, 2006:133). Thus, conceptual clarity is paramount.

A NEW EMPIRICAL RESEARCH AGENDA

From these issues, three basic sets of questions emerge as essential cornerstones of a research agenda on the judicial elections controversy. First and foremost, it is necessary to explain why states choose particular methods for selecting judges. One might expect, for example, that states using partisan elections are more skeptical of government. Citizens less trusting of government, particularly in states with competitive two-party politics, will not want to surrender the power to recruit and retain judges to political elites and thus will prefer partisan elections.

Explaining state selection-system preferences will be important in its own right but also is a necessary step toward the next essential item on the judicial elections research agenda: explaining public confidence in courts, perceived impartiality, and other aspects of institutional legitimacy. In many types of cross-sectional tests of hypotheses about the effects of electoral politics, failing to control for why states have adopted elections in the first place might lead to biased estimates and incorrect inferences, in the same way that failing to account for the entry of challengers might lead to incorrect conclusions about the determinants of incumbency success or electoral margins. In other words, this is a classic selection-bias problem calling for two-stage estimation techniques.

In the example just provided about partisan elections, a basic cross-sectional analysis might find that states using partisan elections are less politically trusting than states using other methods and then conclude that partisan elections harm the legitimacy of courts. However, in this example partisan elections are an effect and not a cause.

The second essential task is to map the contours of legitimacy in state judiciaries, starting with the all-important need for conceptual clarity. What is institutional legitimacy, and how is that different from concepts like confidence in courts or perceived impartiality of the judiciary? Based on the political science literature on national institutions, one might expect legitimacy to be an enduring trait, while confidence in courts and perceived impartiality are short-term results with greater variability. Regardless, these terms

⁶ Brace and Hall (2001) show that elected courts are more likely to grant docket access to disputes between “have” and “have not” litigants. However, much more important in shaping dockets and wins are contextual factors unrelated to selection: the supply of legal services and the professionalization of the court system itself. Reforms aimed that these concerns seemingly would be more effective in improving the judiciary’s function as agent of redistributive change, or minority protector, than eliminating elections.

must be defined carefully and appropriate measures developed. As with independence, we must be capable of knowing these things when we see them and when we do not.

Even more so, we must identify the specific effects that any variations in legitimacy, confidence, and perceived impartiality actually will have on courts and individual behavior without relying exclusively on normative accounts. In the extreme, how will we know a crisis when we see one, especially in a modern stable democracy premised on the rule of law? *And why has there not been a crisis yet, particularly in states where highly competitive judicial races have been the norm for decades?*

There are many practical considerations with this work but very important is the need for national polling data beyond experimental vignettes that can be disaggregated to the state level. Experimental designs are enormously useful but often lack external validity.⁷ In practice, legitimacy and its components may be relatively immune to direct manipulation by brief events like judicial elections, especially for those not really paying much attention to judicial races or where judicial campaigns are occurring simultaneously with campaigns for many other political offices. Similarly, the states differ considerably, and these differences must be modeled. It is not likely that one size will fit all.

Some exciting work has begun on these issues. Using national survey data, Kelleher and Wolak (2007) recently refuted the notion that partisan elections reduce public confidence in state courts while documenting that frequent attention to news increases it. Using the same data but different modeling strategy, Cann and Yates (2008) show that only the politically uninformed in partisan election states are less confident in state courts, suggesting that information is a powerful antidote to negative perceptions.⁸ Each of these studies provides important evidence that in some way challenges the conventional wisdom and heightens skepticism about the dire predictions of the strongly anti-democratic court reform movement.

The third item on the judicial politics research agenda is assessing the behavioral consequences of contentious campaigns on the electorate. Do aggressive campaigns alienate citizens to the point that sizable proportions will not vote? Do attack ads by challengers and other interests cause voters to disfavor incumbents? Some new evidence about voters suggests the contrary. Highly competitive, expensive elections actually are a strong stimulus to voter participation (Hall, 2007a; Hall and Bonneau, 2008). However, these studies have yet to incorporate measures of campaign content or to measure the impact of negative advertising on the electoral performance of incumbents.

⁷ For example, survey research using experimental vignettes commonly presents a hypothetical situation and then asks for a conclusion. A typical scenario might be to tell respondents that a judge has received campaign contributions from a law firm, and then ask whether these contributions would undermine the judge's impartiality when that law firm later appears before the court. While intriguing, this hypothetical is a far cry from citizens simply observing campaigns and then deciding that democratic processes harm the integrity of courts. Stated differently, experiments do not show that campaign activities actually harm courts but merely demonstrate that such effects are possible.

⁸ Cann and Yates (2008) interpret their results as evidence that electoral politics harms the legitimacy of courts. However, partisan and nonpartisan elections are negatively related to confidence in courts only for respondents lacking knowledge of their court systems. Thus, it would seem easier and more appropriate to devise means to increase information and knowledge about courts than to eliminate judicial elections.

THE NEED FOR ADVOCACY

Political scientists are in an excellent position to serve as advocates for judicial elections and to provide balance to the public dialogue. Not only is the evidence gathered to date almost solidly on the side of electing judges (Bonneau and Hall, 2009; Hall, 2009), there is a need to integrate discussions of reforming judicial elections with reforming elections of all sorts. The potentially deleterious effects of money and negative tone are matters of concern in many types of American elections, and numerous reforms are being devised. Judicial politics scholars should strive to match solutions to the actual problems and stop the hyperbolic tendency to insist that judicial elections be eradicated because they manifest problems endemic to democratic processes generally.

Moreover, any solutions should begin with an honest assessment of the pitfalls of the alternatives. In other words, advocacy should focus on the advantages and disadvantages of each system and not just on the negative aspects of judicial elections.⁹ For example, if particularly caustic campaigns filled with attack ads decrease voter turnout, are those losses better or worse than what typically occurs in nonpartisan or retention elections, which we know substantially inhibit citizen participation (e.g., Hall, 2007a) yet are nonetheless favored by court reform advocates? And are these hypothetical negative effects on voter turnout better or worse than excluding voters from the process altogether?

In short, we must acknowledge that there is no perfect system for staffing the bench and that all selection systems are inescapably political. Appointive systems can be plagued by elitism, cronyism, and intense partisanship (e.g., Dimino, 2004; Epstein and Segal, 2005), and systems in which elites control retention can inhibit judicial review (e.g., Brace, Hall, and Langer, 1999; Langer, 2002). In fact, we should recall that elections themselves were a reform to appointive systems, as a means to protect judicial independence from executive and legislative encroachment and to give citizens a voice in the judicial selection process (e.g., Sheldon and Maule, 1997). We now have come full circle on this issue (Bonneau and Hall, 2009).

In sum, each selection system reflects underlying beliefs about the role of the judiciary in American democracy, and preferences about who should control accession to the bench and monitor judicial performance. The issues in this debate are enormously complex and challenging, but the nation deserves a more careful and balanced discussion than what currently is being offered. **jsj**

⁹ For example, is it really plausible that legitimacy will be enhanced by demanding that citizens relinquish to a political elite their long-standing power to elect judges? In every scenario, the question to ask is "compared to what?"

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