

The Battle Over Judicial Elections: Right Argument, Missed Audience, or: The Book We Should Have Had

In Defense of Judicial Elections, by Chris W. Bonneau and Melinda Gann Hall. New York: Routledge, 2009. 190 pp.

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To defend state judicial elections, Bonneau and Hall, two leading scholars of state courts, examine 264 state supreme court elections in eighteen states and 210 retention elections for 1990-2004, when judicial elections moved from low to high salience and competition increased. They draw on literature on judges' decision making, on factors affecting turnout and election "roll-off," and on challengers to argue, counter to reformers' views, that judicial elections for state high courts are not subject to the host of reformers' complaints and are "as efficacious as elections to other political offices" (p. xv). They set out concerns about the purportedly malign effects of increasing competition for, and expenditures on, judicial positions and assert that judicial reform, particularly nonpartisan elections, may actually produce effects about which reformers themselves complain, like low turnout and high campaign expenditures. Judicial elections have become much more like elections for other positions, they tell us, with voter participation affected by much the same factors—contestation and well-financed campaigns.

The authors declare that they have arrived at "one striking conclusion: that the principal charges against judicial elections are factually inaccurate" (p. 129), and they further conclude that state supreme court elections, "far from being institutional failures," are "a highly effective means for promoting citizen control of government and should be reconsidered" (pp. 17-18). One proposition underlying their arguments is that state-high-court judges are important political actors with discretion to shape judicial decisions to their personal preferences, while they are constrained by strategic contingencies, contextual features, and institutional arrangements like selection method and length of term. On "politically volatile and highly divisive disputes" (p. 15) that are complex and have no one clear answer, judges will not be bound by law and precedent. Their other proposition is that judges seeking to retain office through election are not different from other political actors.

Basic Contents. The book's six chapters, effectively assisted by tables and figures, mix discussion of voter participation and campaign finance. Providing context, the first chapter presents arguments for and against having elected judges and a history of shifts in selection mechanisms. Reformers' assertions are reduced to hypotheses and subjected to "objective social science techniques" (p. 18) in chapters 2, 3, and 4, and the authors' earlier claim of depressed voting in judicial elections is juxtaposed with the current one that "vigorous competition"—challengers seeking to oust incumbents—"and expensive campaigns have deleterious effects on courts" (p. 20). Themes are that high participation occurs in judicial elections under certain conditions, including expensive campaigns, while judicial reform measures depress turnout.

Chapter 3 gives greater focus to campaign finance and television advertising, which has increased but lags behind higher electoral competition for judicial positions. Money, with more going to incumbents, is shown to be only one factor in elections, with nonpartisan elections more frequently higher-cost and partisan elections more likely lower-cost, a further indication that the same factors affect judicial and other elections. Chapter 4, about challengers, to whom unpopular judges are vulnerable and who act strategically, tells us that partisan judicial elections are more like gubernatorial elections than like congressional ones, while nonpartisan judicial elections are more like the congressional contests.

Chapter 5 is a state-by-state examination of five states that have changed or are contemplating changing to nonpartisan elections or the Missouri plan or adding or expanding public financing of judicial elections, and it presents a first look at effects of those recent reforms. In chapter 6, conclusions about judicial elections are focused on myths to be debunked. Those myths are that citizens are uninterested in judicial elections; expensive campaigns alienate voters; nonpartisan elections reduce costs and depoliticize selection; money buys elections; voters cannot assess judicial quality; *Republican Party v. White* increased contention in judicial elections; incumbent judges are opposed by single-issue challengers backed by high rollers; nonpartisan elections and Missouri Plan selection improve judicial quality; and appointment of judges eliminates politics.

Some Problems. One could surmise that elections to state intermediate appellate courts (IACs) are of lower salience than state-high-court elections and, thus, the IAC pattern would perhaps be closer to what has drawn reformers' complaints. This makes limiting this study to state high courts the book's greatest substantive defect, which is not adequately excused on the basis that "obtaining systematic data on lower court elections over any substantial period is a nearly impossible task" (p. 18), as the authors' students could have performed preliminary studies and funds for further work could have been sought. Presenting data limited to state high courts not only gives an incomplete picture, but also leaves the authors' paeans for elections to stand on only one use of a selection method. This is the same problem that results from overattention to the U.S. Supreme Court—making generalizations based on far less than all appellate courts, much less trial courts. (Also to speak of state high courts as "courts of last resort" is only partially accurate, because many cases go no further than the IAC.)

Another crucial lacuna is the lack of data on whether competitive elections and expensive campaigns harm citizens' perceptions of the courts. The properly cautious Bonneau and Hall say, "We cannot speak directly to the issue of whether citizen participation enhances positive short-term and long-term perceptions of courts, or whether the positive effects of aggressive spending . . . outweigh any negative consequences of contested elections and heated campaigns" (p. 47). Yet the last is a key part of the argument made by reformers. The authors' assertion that high, or increased, participation belies a negative perception of the courts is plausible, but, as in other elections, voting is likely affected by factors beyond views of system legitimacy. The

authors' inability to address this matter leaves them at best able to undercut some reform presumptions but not the reformers' basic argument. Moreover, the authors note throughout that polls indicate that voters are concerned about use of elections to select judges but also want judges elected, so the concern that the present situation harms system legitimacy coexists with the desire to continue judicial elections.

Application of the authors' findings is their real test, yet on the whole, their effort to evaluate recently enacted or proposed reforms is problematic. Most of their assessment comes too soon, a problem not obviated by conceding that not much time has elapsed since the reforms were put in place. The difficulty is most obvious for Arkansas and Minnesota, where reforms were only *proposed*. For New Mexico, only changes in reforms and speculative effects are reported, and for Wisconsin, there is only a description of the attempt to provide more public financing.

Less major concerns relate to information not provided. The threshold percentage required in retention elections is not mentioned, nor is whether recent contestation means that such thresholds increasingly affect retention. We are not told how many judges in elective positions reached the bench by appointment, important because appointment undercuts a formally elective system. Increased competition for high-court positions may now allow us to say that "elections are really elections," but only to the extent judges are *initially* elected, not appointed. Also underdeveloped is the quality of judges produced by nonpartisan elections and the Missouri Plan and the quality of challengers. And *Republican Party v. White* is given scant treatment, with its effects not well developed, making that crucial case relevant only for already cognizant insiders.

Why This as a Book? The authors certainly have extremely valuable material to offer. However, much of it had already been published in social-science journals, leading to the question, Has enough been added to warrant this *book*? Unfortunately, the book lacks a necessary new frame, perhaps either recent judicial system reforms (chapter 5) or the debunked reformists' myths (chapter 6), and it suffers from a lack of glue for the article-type segments the authors give us. If the book had been written "from scratch," repeated recitation of the judicial selection controversy or reformers' claims would have been avoided and an unclear focus in treatment of competition and money prevented. In chapter 4, for example, both topics are addressed but with awkward movement from money to competition to money to competition, etc. Juxtaposition of the style and tone of the clearly written bookend chapters (the first and last two) and the three data chapters' social science journal article approach leads to a disjointed book. Also, because so few scholars work on this topic, the authors not surprisingly draw very considerably on their own work, making for a heavily self-referential book, but novice readers are left at a disadvantage when at times they do not spell out findings from the referenced studies.

Audience Matters. Unfortunately, by speaking to only one audience, the authors dissipate much of their potential impact on the highly important debate about judicial elections. Even with much of this very important material already presented to social scientists, a book to make it available to those outside the academy would have been

justified. But the authors appear not to have considered their audience. Alternatively, if they did, I disagree with their choice, because their presentation will hinder getting their potentially exciting data and argument to those who need to hear it—judges, lawyers, and the educated lay community concerned about the judiciary, including the reformers whose premises and platitudes the authors attack. Lest I be thought to ask the authors to write a different book, my response is “No” for their argument, but (definitely) “Yes” as to recasting their materials.

The social science papers that are chapters 2 to 4 are each long on the windup, including the typical extensive discussion of variables—and tables on coding them that belong in an appendix—before they “short-hop” their pitch by devoting only a small proportion of each chapter to findings and discussion. (Four pages of presentation of findings in a twenty-one-page chapter, or five pages in a thirty-three-page one, are not enough.) That mode of presentation will not enthrall lay audiences or interested policy analysts. But there is more. A chapter that begins with a clearly written lead-in quickly becomes social science speak. Repeated discussion of “Heckman two-stage model strategy” (see, e.g., p. 33) and “an interactive term,” presentation of findings in terms of model stages, mention of OLS (what’s that? [just kidding]), and tables speaking of “robust standard errors” and “censored” and “uncensored” data (is this obscenity?), along with unfit talk of “fitted values,” will lead nonacademic potential readers not already snoring to say, “This book is not for us.” With an audience “there for the taking”—well, at least, open to intelligent discussion of the topic—Bonneau and Hall, rather than keep technical terminology to a minimum in the text and perhaps place some of it in an appendix, instead, like so many other social scientists, keep speaking primarily, if not only, to their colleagues, making this book further self-referential. (On the question of audience, see S. L. Wasby, “Silencing the Dummy Variable: A Plea to Heed One’s Audience and Publish More,” *PS. Political Science and Politics* 39 [2006]: 491.)

In short, while the authors could be effectively sticking empirical fingers in the eyes of reformers’ pretensions, their presentation means instead that they will be doing it with no one watching. (Giving your adversary the finger with no one present may be cathartic, but does it matter?) Telling political science colleagues is potentially important in persuading them to begin the long, slow process of changing teaching about judicial selection, but policymakers must be reached immediately, and a different approach not only would have made the finger-in-the-eye more satisfying but also could have produced a greater real-world policy discussion and noticeable effects on policy agendas. Thus, sadly, much good effort is squandered here.

Conclusion. This reviewer’s problem is *not* with Bonneau and Hall’s argument supporting judicial elections—that “[j]udges should defend their discretionary political choices that . . . demonstrat[e] their underlying personal preferences, and should pursue strategies to retain office, including advertising.” (p. 61)—as to which they have moved me at least to agnosticism. Here they have well educated someone who has generally agreed with the reformers, and they have indeed weakened the reform-

ers' claims, at least as to state high courts. They have shown that judicial elections are, in many respects, not different from elections for other positions. However, perhaps I have been moved only as far as agnosticism because of a somewhat inchoate normative bias for the notion that "judges are [or judging is] different," a bias that is shared by many others who study the legal system and is the central normative issue about judicial elections. If that is our belief, we now know that many of the prior justifications do not hold up, but perhaps Bonneau and Hall in a later volume will adduce material that will finally show that our belief cannot be sustained. That will begin to be accomplished only through greater appreciation of the normative component of judicial selection systems. **jsj**