Judicial Elections:
Judges and Their "New-Style" Constituencies

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Abstract

Most judges in the United States retain their judgeships through periodic popular elections. In recent years, these judicial elections have become more salient, with high-profile television advertising becoming commonplace. This article discusses the effects of judicial elections, particularly in an age of salient campaigning, on the choices judges make. It reviews existing findings about the influences other institutions of state government, interest groups, and the public have on judges, before discussing the effects of high-profile judicial elections on the information available to voters and the institutional legitimacy of the judiciary.

Keywords

Judicial Elections, Judicial Selection, State Courts, Legitimacy, Judicial Decisionmaking, Courts and Public Opinion

The American people love elections. Although perhaps there is a natural tendency for citizens in all democracies to believe in some form of the consent of the governed, as expressed through elections, the Americans are unusual in the degree to which they rely on elections to select an astonishing variety of public officials (Ellis 2012; Kritzer 2015). This penchant for elections extends not just to the executive and legislative branches of government, but to the judiciary as well. Today, approximately 90 % of American judges must face the electorate in one fashion or another. Perhaps democrats worldwide favor elections, but, with only a handful of exceptions, the Americans are exceptional in holding judges accountable to the people for their actions.[1]

For most of American history, the processes of electing judges have not been interesting to scholars; the elections had few attributes of bona fide contests. Campaigning was tepid, at best, competition was often non-existent, and voter interest was practically nil. Gibson and his colleagues (2011, 545) described these elections as "decent, docile, and dirt cheap, even if drab and dull." Scholars studying elections all but ignored judicial elections.[2]

In the last few decades, however, the landscape of judicial elections has changed dramatically, with Schotland (1998, 150) now characterizing these elections as "nastier, noisier, and costlier." The descriptor "new-style" has firmly entered the lexicon among those studying judicial elections (Hojnacki and Baum 1992; Gibson 2008). Some date the onset of "new-style" elections with the decision by California voters to remove Justice Rose Bird and two of her colleagues from office via a 1986 retention election in California (e.g., Canes-Wrone, Clark, and Kelly 2014); others (e.g., Bonica and Woodruff 2012) emphasize the Supreme Court's 2002 ruling in *Republican Party of Minnesota v. White* as the starting point for this sea change in

judicial elections.[3] Whatever the exact date of origin, some of the most interesting elections in the U.S. today pit candidates seeking judgeships against each other.

These "new-style" elections have indisputably changed the way the state courts function. In the past, judges thought little about how their judging would affect their chances of being retained or promoted, and state judgeships attracted lawyers seemingly more interested in law than in politics. In the past few decades, all that has changed (see, e.g., Hall 1987). The rules for how judicial elections are contested have changed; the political importance and salience of the state high courts has vastly increased; other state political actors (e.g., governors and legislators) now feel more threatened by the rulings of state courts, as their rulings increasingly constrain the actions of state government; interest groups now devote a great deal more attention and effort to influencing who serves on these courts; to at least some degree, state courts have become nationalized, especially given the nationalization of law and processes of diffusion of legal innovations across state borders; the mass media provides greater coverage of the rulings of these courts; and the judges sitting on the state benches have found it necessary to think about their "constituents" in ways not true of the past. A new era in the politics of state judiciaries has unquestionably emerged.

This new era has ignited great interest among scholars in the methods by which state judges are selected and retained. No question, however, is more interesting and important than that of how state judges relate to a variety of "new-style" constituencies, many of which (e.g., interest groups) have heretofore been irrelevant.

Our purpose in this chapter is to assess what the growing body of research has discovered about how the state courts influence and are influenced by the emergence of these

new constituencies. Most obviously, the role of the electorate in the selection and retention of state judges has become dramatically more influential of late. So too have interest groups, political parties, campaign contributors, and the mass media become more relevant, often in conjunction with judicial campaigns. But state courts have also become considerably more intertwined with other institutions of state government, as separation-of-powers issues become more politically relevant. Perhaps never have we witnessed the sort of inter-branch conflict that has become commonplace in many states. In the past, state courts were independent because they were able to act with few constraints from their constituents. Today, state courts are entangled with a largely new constellation of institutions and actors. Ours is not a comprehensive review of all aspects of judicial elections.[4] Instead, we focus on these new interconnections and constraints associated with the new-style constituencies.

The Electorate and Public Opinion

The most "new-style" attribute of state judicial elections is that they have come to resemble true elections. As Bonneau and Hall (2009) have so amply demonstrated, judicial elections today attract large percentages of voters, who seem as well informed as possible given institutional constraints, who are often presented with policy-relevant campaigns, and whose actions affect the behaviors of judges. Much of this research focuses on state high courts.[5,6] Hall (1987, 1992) was the first to systematically investigate the responsiveness of state supreme court justices to public opinion, studying state judicial decisionmaking in capital punishment cases. In an early study, Hall (1987) interviewed justices of the Louisiana Supreme Court and analyzed their votes, finding empirical evidence that justices who perceive their views to be incongruent with the

public's or who find themselves in the minority on salient issues may suppress their dissent in order to avoid providing an eventual challenger a potent campaign issue. Hall (1992), studying death penalty decisions in four state supreme courts, found that "constituency influence in state supreme courts is enhanced by competitive electoral conditions and experience with electoral politics" (427, see also Hall 1995; Brace and Hall 1990, 1997).

Brace and Boyea (2008) contributed to this literature as well, finding that public opinion and judicial voting patterns on death-penalty cases co-varied. In particular, they find that elected, but not appointed, judges are directly affected by constituency opinion. While some studies (e.g., Bruhl and Leib 2012; Shepherd 2009) suggest that partisan elections seem to produce the highest levels of judicial responsiveness, the most thorough treatment of this issue comes in a series of studies by Canes-Wrone, Clark, and their colleagues. Canes-Wrone, Clark, and Kelly (2014) have investigated the effects of selection/retention systems in the most detail, focusing in particular on non-partisan selection methods and death penalty decisions by state supreme courts. Following up on the finding that non-partisan and retention elections seem to be connected to heightened judicial responsiveness on setting public policy on abortion rights (Caldarone, Canes-Wrone, and Clark 2009; Canes-Wrone, Clark, and Park 2012), Canes-Wrone, Clark, and Kelly conclude that the information deficit created by non-partisan elections heightens the effects of highly salient death penalty decisions, and consequently that, in this policy domain, non-partisan selection/retention systems maximize responsiveness to public opinion. Thus, perhaps not unconditionally, the elective state judiciaries seem to at least some degree to represent the preferences of their constituents.

In addition to this work on the decisionmaking of state supreme courts, research on the

responsiveness of state trial courts has generated some provocative and controversial findings. In a paper published in 2004, Huber and Gordon continued a line of inquiry focusing on the responsiveness of trial judges to their constituents' preferences.[7] They discovered that the sentences of Pennsylvania trial judges – who are subject to retention elections after an initial partisan election – became more severe as the retention elections approached. Indeed, they claimed that the electoral dynamic "added" approximately 2,000 additional years of prison time for the guilty defendants.[8]

This finding has been partially reproduced with Kansas judges (Gordon and Huber 2007). Kansas allows its counties to decide how to select and retain their judges. In counties using partisan elections, this election-cycle effect was present; in counties using retention elections, it was not observed. In an analysis of Washington state trial judges, Berdejó and Yuchtman (2013) report a finding similar to Pennsylvania: the judges – selected and retained via non-partisan elections – seemed to alter their sentences for the most serious crimes as the election season approached.[9] Following up on the research of Kuklinski and Stanga (1977), Nelson (2014) discovered that Colorado judges became more responsive to their constituents' preferences on the legalization of marijuana after a referendum made those preferences clear.

This variation is not unique to elected judges in the states; career concerns similarly affect federal judges. Black and Owens (2015) find that, during periods of a Supreme Court vacancy, individuals likely to be nominated to fill the vacancy are more likely to vote in accordance with presidential preferences. Similarly, Epstein, Landes, and Posner (2013) demonstrate that U.S. Courts of Appeals judges with viable chances to be nominated to the Supreme Court vote more punitively in death penalty cases. District court judges seeking to

become appeals court judges may exhibit similar behavior. Furthermore, Epstein, Landes, and Posner (2013) find that harsh sentencers are more likely to be promoted. Thus, it seems apparent that variation in sentencing that corresponds with career concerns is not an issue specific to judicial elections; rather, career concerns affect judges of all stripes, irrespective of the method of selection/retention.

Beyond their specific empirical findings of changes in sentencing, most of these authors seem to assume a decision-making process of which they disapprove. The logic goes as follows. (1) The American people favor their judges imposing punitive sentences.[10] (2) Judges believe that sentences should be less severe. (3) But the fear of being turned out of office causes judges to alter their behavior during the period when they under greatest scrutiny – as the election approaches. (4) To please the voters, judges penalize those convicted of crimes.

Most authors assume (or imply)[11] that a shift toward harsher sentencing decisions made in proximity to an election are improper, and, conversely, that decisions made outside the electoral period, however defined, are "proper". Of course, "proper" and "improper" are normative judgments and are not empirical findings. All the data show is that the behavior differs at different points-in-time.

Are there legitimate reasons why a judge might vary her or his sentences over time and across cases? For example, should judges use individual defendants (e.g., Martha Stewart) to make an example so as to try to deter others who might commit the same crime (e.g., inside traders) in the future? Should judges ignore public opinion completely, as in maintaining the same rates of incarceration for draft evaders when a war is popular as compared to when it is wildly unpopular (e.g., Cook 1977; Kritzer 1979)? Is it appropriate for judges who ride circuits

to take into account variability in the degree of affront a particular crime might represent to local community values (e.g., drugs, pornography[12]) when issuing a sentence (Gibson 1980)? When public opinion changes over time (e.g., family law and the rights of gays), should judges evoke doctrines of equity to change their decisions to recognize changing social values and mores (Jacob 1988)? For that matter, should defendants who plead guilty get lighter sentences than defendants who plead innocent but who are convicted at trial, even though the conviction is on the very same charge? Should judges seek guidance from the preferences of voters in a marijuana referendum when considering how severely to sentence those convicted of marijuana crimes (Kuklinski and Stanga 1979; Nelson 2014)? It is actually not at all difficult to continue to imagine circumstances when (a) deviation from equal treatment is acceptable if not desirable,[13] and (b) the exercise of judicial discretion appropriately takes into account the general preferences of the constituents.

At least some of the critics' concerns about variation in sentences across a judge's electoral cycle have to do with worries about equal treatment and justice. These worries, in turn, are grounded in larger normative understandings of justice and the rule of law. Is a just decision one that treats equally situated defendants equally, or is a just decision one that takes into account a variety of defendant-specific circumstances? In thinking about the rule of law, this debate is typically framed as one between "particularism" and "universalism" (e.g., Gibson 2007). Many critics seem to ignore the justice associated with particularism, claiming instead that equal treatment is the only appropriate criterion.

Variation in the law should not be surprising. After all, in a federal system like the U.S., there exists no guarantee that the law will be the same, or even will be enforced the same,[14]

across jurisdictions. For example, in some states, citizens have ready access to class-action lawsuits, while in other states, practically no reasonable access exists. The existence of a well-established federal system in the U.S. renders many equal protection claims impotent from a legal point-of-view (and perhaps from a normative one as well).

Aside from cross-jurisdiction variability in the law, a more serious question these studies raise has to do with within-jurisdiction variability. To our knowledge, being sentenced by a "hanging judge" instead of a "bleeding heart judge" is not grounds for an equal protection claim in any jurisdiction (absent any abuse of discretion on the judge's part). Despite the fact that we know that Democratic and Republican judges differ markedly in their decisions (Epstein, Landes, and Posner 2013), Democratic defendants have no equal protection right to be tried before a Democratic judge. Women have no right to be tried or sentenced by female judges. Even the concept of a jury of one's peers refers to the outputs of the mechanisms by which juries in the aggregate are selected, not the individual jury one draws in one's own case. Getting strictly equal sentences is not a defendants' right recognized in any legal jurisdiction in the U.S.

Having discussed why judges' sentences may vary across cases and over time, let us return to the specific findings of Gordon and Huber on the electoral cycle. In doing so, we will navigate a different route on both the Gordon and Huber and Berdejó and Yuchtman findings.

For simplicity, let us assume two periods of decision making – a period under external scrutiny (the election period) and a period not under external scrutiny (the non-election period).[15] Assume that prosecutors are motivated by producing as high a "conviction rate" as possible, defense attorneys (and defendants) primarily want the lightest possible sentence, and judges shoot for a record of not ever being overturned on appeal. All of these motivations fuel the plea

bargaining process.

Plea bargaining is a messy process. Crimes typically are associated with a "going rate," around which increments and decrements are sought. An important goal of the process is conflict minimization and maintenance of the relationships among the repeat players – the courtroom workgroup. Under these circumstances, the average sentence for a second conviction on burglary might be a very far cry indeed from the maximum sentence for the crime provided by the state legislature.

Assume these authors are correct about temporal variability in sentencing. Could it not be that the sentences issued under periods without scrutiny are sentences that primarily serve the interests of the courtroom workgroup, and that those sentences are "too low" (whatever that means)? When under scrutiny, the actors in the workgroup are compelled to consider societal interests more strongly, and therefore cannot "give away the store" just to secure a guilty plea from a defendant. To treat sentences in the non-electoral period as somehow more "correct" does not at all fit with the reality of plea bargaining in American criminal courts. If the workgroup is simply negotiating self-serving sentences in the non-election period, then the scrutiny that comes during the electoral period may actually be desirable from the point-of-view of the public good. Regardless, future work is essential to determine conclusively whether the more punitive sentences issued near election time result from a judge "overpunishing" to burnish her credentials to her constituents or from a judge "underpunishing" during the rest of the electoral cycle in order to further the interests of the courtroom work group.

The most general conclusion to emerge from research on constituency influence on courts is that the nature of the selection/retention mechanisms influences the degree of judicial

responsiveness to public preferences. Whether this is desirable or undesirable, this chapter cannot judge.

Legislatures, Governors, and Bureaucrats

Though the majority of state supreme court judges keep their seat on the bench through elections, most state supreme court judges reach the bench *through appointment* (Reddick, Nelson, and Caufield 2009).[16] All judges, regardless of how they are selected and retained, have an interest in ensuring compliance with their decision, and the state legislature, the governor, and the state bureaucracy are key implementing populations for many judicial opinions.[17] Thus, though only a minority of state supreme court judges owe their continued service on the bench to the governor or the legislature, all judges have an interest in considering the reactions of other branches of government in order to ensure acceptance and eventual implementation of their decisions.[18]

As discussed above, the use of judicial elections as a retention mechanism affects judicial decisionmaking by increasing the effect of public opinion in a judge's decisionmaking calculus. Judges who face reappointment feel a similar pressure, though reappointment creates a linkage between judges and the other branches of state government, and not necessarily to the mass public. To this end, Shepherd (2009) finds that judges who face reappointment by the legislature or the governor, rather than to voters, are more likely to vote in favor of governmental litigants when they come before the Court. Importantly, this effect increases as a judge's reappointment date approaches and dissipates in a judge's last term before mandatory retirement, providing

particularly stark evidence that this effect is driven by their desire to decide cases in a way that maximizes their chance at reappointment.[19]

Perhaps the most direct conflict between the decisions of state supreme courts and the other branches of government comes when the judiciary exercises its power of judicial review over laws duly enacted by the legislature and governor. Support for the claim that appointed judges are more likely to defer to state legislatures comes from Shugerman's (2010; 2012) careful analysis of the adoption of judicial elections in the United States. Briefly, Shugerman shows that, in the mid-1800s, state legislatures were recklessly overspending their states' funds. At this point in time, legislatures also appointed and reappointed judges, and, because they relied on the legislature for their continued tenure on the bench, judges were reluctant to use their power of judicial review to curb this legislative overspending. To remedy this problem, states adopted judicial elections as institutions of judicial selection and retention, thereby increasing judges' independence from the legislative branch of government and emboldening them to check the legislative branch. In response to this increased independence, Shugerman shows, the use of judicial review by state supreme courts increased markedly.

The most comprehensive study of judicial review in state supreme courts comes from Langer's (2002) examination of judicial behavior in four issue areas: election law, workers' compensation, unemployment compensation, and welfare legislation. Langer's results indicate that, conditional on the salience of the issue area, judicial retention institutions affect both judges' decision to docket a case and their eventual vote on the merits. In particular, Langer finds that judges who face reappointment are less likely to docket cases in highly salient issue areas (which, in Langer's study, are election law and workers' compensation cases), but the

effects of judicial selection methods are unclear for less-salient issues. Likewise, Langer finds that, when elected and appointed judges behave differently, as they often do in salient issue areas, judges who face reelection are more likely than judges who face reappointment to vote to find a law unconstitutional.

Other work has corroborated this finding. Graves and Teske (2003), studying judicial review of administrative regulations, present similar findings: judges who face reappointment are less likely to overturn state regulatory actions than judges who face uncontestable retention elections. Likewise, Lindquist (2013) finds that judges who face nonpartisan or partisan elections are more likely to invalidate legislative enactments than judges who rely upon retention or reappointment to keep their jobs.

As this short review demonstrates, this area is ripe for future investigation. Much has been made of the effects of prior experiences of U.S. Supreme Court judges, particularly their professional background and prior occupational experience (Epstein, Martin, Quinn, and Segal 2009), yet we know little about how state judges' prior political experience affects both their ability to obtain a seat on a state supreme court and their eventual behavior once they reach the bench. Likewise, our understanding of the strategic environment at the state level is incomplete. Clark (2011), for example, shows that legislative threats against the U.S. Supreme Court make it less likely to exercise its power of judicial review. Though state judges are increasingly threatened with impeachment for unpopular decisions (Raftery 2011), we know little about how the decisions of state supreme courts are affected by these threats. It seems clear, however, that abolishing judicial elections would not necessarily increase judicial independence.

Interest Groups as Constituents

Perhaps one of the biggest changes in judicial elections over the past two decades has been the explosion of participation by interest groups in these elections. Whereas interest group involvement in judicial campaigns in the mid-1900s was mainly limited to unions and trial attorney groups, interest groups across the spectrum of American politics have now become key players in judicial campaigns (Shugerman 2012). In recent times, interest group participation in state supreme court elections has become commonplace, with these groups' efforts becoming both "more visible and very likely more influential" (Goldberg 2007, 91).

Before the 1980s, interest groups, particularly those affiliated with business, had devoted their energies on campaigns to change state methods of judicial selection and retention; but, as the 20th century drew to a close, "businesses returned to trying to win judicial elections outright, and they did so by… pouring money into key races" (Shugerman 2012, 241). Although left-leaning groups have remained active in judicial campaigns (Hojnacki and Baum 1992), attention has largely shifted toward a focus on the actions of right-leaning groups. This shift happened, in large part, because key Republican Party strategists began to devote their energies toward building Republican majorities on state supreme courts. Karl Rove, for example, harnessed unpopular anti-business and pro-plaintiff rulings by state high courts to engineer successful judicial campaigns in key southern states, like Alabama and Texas, that flipped the high courts in these two states from Democratic to Republican control (Shugerman 2012).

Legally, the landscape of judicial elections has been altered by changes in election law brought about by the U.S. Supreme Court. Most notably, in 2002, the U.S. Supreme Court ruled in *Republican Party of Minnesota v. White* -- a case concerning the constitutionality of the

American Bar Association's code of judicial ethics, adopted in various forms by many states, including Minnesota,-- that judicial candidates cannot be prohibited from providing voters with information on their issue positions, even when those issue positions were likely to come before the Court. Various interest groups and scholars (e.g., American Bar Association Commission on the 21st Century Judiciary 2003; Caufield 2005, 2007) have argued that the *White* decision had injurious effects on the judiciary. While the data necessary to test this assertion directly do not exist, Bonneau, Hall, and Streb (2011) examine changes in judicial elections pre- and post-*White* on a variety of metrics, such as incumbent vote shares, the costs of campaigns, and voter participation. Their analysis reveals no significant changes in state supreme court or intermediate appellate court races on any of these measures before and after *White.* Moreover, Gibson (2012) reports that large proportions of voters want to know the policy positions of candidates for judicial office. If more information on candidates' policy positions assists voters as they make their decisions at the polls as much as research on vote choice (e.g. Delli Carpini and Keeter 2004) generally has shown, then liberalized speech codes, like those allowed by *White*, may aid voters seeking to make informed choices on election day. Perhaps as significant, policy talk is quite unlikely to have any legitimacy-threatening consequences for the state courts (Gibson 2012).

We note, however, that Bonneau, Hall, and Streb's (2011) analysis only examines aggregate changes in elections before and after 2002, the year that the U.S. Supreme Court decided *White*. Not all states had adopted the portion of the canon of ethics in question when the Court decided *White*, so not every state was directly affected by the *White* ruling (Caufield 2007). Studies that have examined the effects of the presence or absence of particular canons of

ethics have found that the presence of these canons do shape judicial races. Peters (2009) finds that the presence of ethical prohibitions on candidate actions tends to make individuals less likely to challenge incumbents and that a prohibition on the ability of candidates to make pledges or promises to voters reduces incumbent vote shares. Likewise, Hall and Bonneau (2013) find that restrictive speech codes tend to make voters less likely to participate in judicial election: perhaps, again, because voters want to know the policy positions of judicial candidates in order to make reasonable decisions about for whom to vote. Bonica and Woodruff (2012), also examining the effects of *White*, find that the decision made it more difficult for ideologically extreme candidates to hide their true policy preferences from constituents. In short, the extant literature strongly suggests that reducing restrictions on candidate speech serves to assist voters, embolden challengers, and improve the quality of judicial elections.

These legal developments have been brought about by interest groups' attempts to shape the rules by which elections are fought. For instance, Jim Bopp, representing The Family Trust Foundation, has been at the forefront of efforts to allow judges to state their policy preferences during campaigns. The Family Trust Foundation sued to overturn Canon 5B(1)(c) of Kentucky's Code of Judicial Conduct after failing in its effort to survey all candidates for judicial office in Kentucky in 2004 on a variety of contentious legal issues. The foundation succeeded in getting the Canon declared to be in violation of the First Amendment to the U.S. Constitution *(Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004)).[20] Bopp then successfully argued *Republican Party of Minnesota* v *White* before the U.S. Supreme Court. Thus, interest groups are supporting candidates in elections, but they are also actively seeking to shape electoral rules.

Research on judicial elections is clear that the costs of campaigns have dramatically increased over the past two decades. Bonneau and Hall (2009) report, for example, that the average cost of a partisan judicial election more than doubled, accounting for inflation, between 1990 and 2004; the average campaign cost $404,937 in 1990 and $1,097,978 in 2004. The trend is the same, though moderated, in nonpartisan elections, with the average 1990 race costing $303,464 and the average 2004 race costing $452,575 (52). Importantly, not all spending in judicial campaigns comes directly through the candidates; interest groups often make substantial independent expenditures, and these independent expenditures are increasing.[21] Kritzer (2014) notes that approximately 30% of campaign expenditures in state supreme court campaigns in 2009-2010 were independent expenditures not funneled through candidates' official campaigns.

How do increasingly expensive judicial campaigns effect judicial politics? One vitally important, but extraordinarily difficult to answer, related answer involves the extent to which judges' decisions are affected by campaign contributions. The issue is a tricky one for scholars, as it is difficult to ferret out a causal effect of receiving a campaign contribution on a judge's vote from the fact that savvy donors may choose to give funds to judges who are already predisposed to support the donor's position. Some studies have found a correlation between decisions and dollars. Across a range of cases, Shepard and Kang (2011) find a positive relationship between campaign contributions from business groups and elected judges' votes for businesses, although, as we have noted, the specific causal structure of this relationship is highly ambiguous. The clearest evidence on this point comes from Hazelton, Montgomery, and Nyhan (2014), who rely on North Carolina's implementation of a voluntary public financing system to compare judges funded by campaign contributions to those who took public financing and were

thus not tied to individual donors. They find some suggestive evidence that public financing makes elected judges less responsive to donors' desires. Whether this finding is generalizable to all state courts is at present unclear, especially in light of the widespread lack of enthusiasm in the states for public financing of judicial campaigns.

Moreover, contributions from these groups (as well as from individual donors) have played an important mobilizing role. Bonneau and Hall (2009) write that "money is a necessary condition for educating and mobilizing voters and for publicizing the candidacies of challengers" (133). To this end, Bonneau and Hall (2009) report that, as more money is spent in a judicial election, citizen participation in these contests increases, as measured by the rate of ballot roll-off.

Of course, aside from any mobilizing effect it might have, campaign funds are primarily useful when they are spent, and a primary expenditure of modern state supreme court campaigns is television advertising; Kritzer (2014) notes that, until recently, television advertising constituted about 50% of the total amount of money raised by campaigns until the 2011-2012 election cycle, when (due to independent expenditures by interest groups), the total amount of money spent on campaign advertising was more than the total amount of money contributed to candidate campaigns. In this cycle, outside groups, including political parties, sponsored 60% of the cost of television advertising. Television advertising in judicial campaigns has exploded since the year 2000, with over 60,000 television advertisements aired during the 2011-2012 election cycle (Kritzer 2015). Still, as Hall (2014) notes, television advertising—let alone attack advertising—is absent in a large proportion of contested state supreme court elections.

Importantly, these television advertisements play a significant important role in shaping citizen participation in state supreme court elections. In their analysis of state supreme court elections held between 2002 and 2006, Hall and Bonneau (2012) find that campaign advertisements tend to mobilize voters, making them more likely to participate in judicial elections. Likewise, examining the electoral fates of candidates, Hall (2014) finds that attack advertising does not reduce incumbent vote shares in partisan elections, but that incumbent vote shares are reduced in the presence of attack advertising if their party affiliation is not listed on the ballot. This is another piece of empirical evidence that non-partisan election formats impede the electoral process. As Hall aptly put it (2014): "Nonpartisan elections are influenced to a greater extent by hard-fought campaigns not because judicial elections are intrinsically different but because nonpartisan elections alter some of the most fundamentals rules governing the conduct of these races" (6).

Aside from their consequences for who participates in judicial elections, judicial elections have vital effects on the esteem in which the public holds the Courts. Gibson (2012) shows in Kentucky and Gibson et al. (2011) show in Pennsylvania that judicial elections seem to have legitimacy-boosting effects on the courts' constituents. That is, from before the election to after it, citizens in these states increased the legitimacy they accorded their state high court. This is most likely due to the fact that most Americans want some degree of direct accountability from their judges. When they are reminded that their judges are elected, as they are during the election season, their regard for the institution increases.[22]

It is certainly true that some campaign activities can "cross the line," having detrimental effects on judicial legitimacy (Gibson 2012). This happens when courts and judges are portrayed

as ordinary politicians, as in the legislators and legislatures that attract the disdain of their constituents (e.g., Hibbing and Theiss-Morse 1995). Indeed, Gibson and Caldeira (2009) have shown that the campaigns for and against the confirmation of Samuel Alito to a seat on the U.S. Supreme Court harmed the institutional legitimacy of the Court. Certain campaign activities – especially campaign contributions that imply that candidates are being "bought" by interest groups – are thought despicable by the American people, and these campaign activities harm *both* judicial and legislative institutions (Gibson 2012).[23]

However, the crucial finding of the Kentucky and Pennsylvania research is that the *net effect* of judicial elections is positive. That is, the positive lift to judicial legitimacy that comes from electing judges outweighs the negative knock from churlish campaign activities. When the good of elections (from the viewpoint of enhancing judicial legitimacy) is balanced against the bad, the result is still positive. It is unclear whether every type of system for selecting and retaining judges has this effect – we would be surprised if retention elections, in which voters do not have the opportunity to select among candidates, have this legitimacy-reinforcing effect. And, of course, the type of election structures some aspects of campaigning, meaning that the quantity of detrimental campaign activity may vary by method of selection (although Kentucky uses non-partisan elections, and the Pennsylvania election studied by Gibson et al. was a partisan one). If there a difference across selection systems, it most likely has to do with the degree of experience citizens have accumulated with politicized campaigns (Gibson 2009).

Information and Judicial Accountability

Emerging from the research on these constituencies—particularly with respect to interest

groups and the mass public—is a clear concern with political communication. Constituents must rely upon elite competition (i.e., elections) to learn about the behavior of their judges. When elites are not in competitive mode, information is difficult to come by. This information deficit can be overcome when cases become salient (e.g., Cann and Wilhelm 2011), but salient cases are uncommon, unrepresentative, and perhaps not even especially important. Nelson concludes from his study of Colorado judges' responses to a marijuana referendum (2014, 140): "These results suggest that access to information is a crucial precursor to judges' abilities to respond to public opinion. . . If one wishes one's judges to be more responsive to public opinion, these results would suggest that one seek to develop new ways for judges to learn about public preferences." At present, citizens' ability to monitor the behavior of their judges is not great, although it seems to be increasing as a result of scholarly studies and greater willingness of state administrative agencies to make performance data available.

It may also be that different methods of selection and retention stimulate different information streams that affect the criteria upon which voters make their decisions about who should serve as judges. Indeed, as Hall and Bonneau (2009) have argued, partisan elections are more likely to generate competition, that competition is enhanced by candidate and interest group spending, and, consequently, that partisan elections provide the greatest amount of information to voters and consequently may be the most rational form of election.[24]

At the very least, voters want to know the party associations of candidates for judicial office (e.g., Iyengar 2002; Klein and Baum 2001), and in the absence of that information, they seek other rational ways of making their decision on which candidate to support. This opens the door to influence from interest groups (e.g., Baum 2003), but also to a heightened effect of a

small number of highly salient decisions (typically in criminal justice, as in the claim that "the judge let the rapist go free due to legal technicalities").

Indeed, while Cann and Wilhelm (2011) emphasize case salience as a key mechanism of judicial accountability, they also found that the method of judicial retention strongly affected the strength of the electoral connection between state supreme court judges' voting behavior and the general preferences of their constituents. Judges who must face contestable elections are more responsive to public opinion in their states. Similarly, Bonica and Woodruff (2012) find that partisan selection systems are more likely to select judges who are ideologically congruent with the other political actors in the state. Judges elected by non-partisan elections are decidedly less representative than those selected by partisan systems.

These studies are consistent with the view that, when deprived of partisan labels, voters are less able to match their policy and ideological preferences to the list of candidates for judgeships (Canes-Wrone and Shotts 2007), which may increase the influence of interest groups (e.g., Baum 2003). To this end, the impact of *Republican Party of Minnesota v White* (2002) (and the accompanying changes in state judicial speech codes) seems to be significant. Regardless of whether *White* caused an increase in campaign advertising, the post-*White* era is indisputably one where television advertising—a medium in which voters have access to high-quality information about candidate's positions—has increased. Indeed, with campaign advertising becoming more common, judicial races becoming salient enough to garner significant media coverage, and candidates becoming more likely to share their policy views openly to voters, the inescapable conclusion seems to be that "new-style" judicial elections have done much to ameliorate the information deficit in state judicial elections.

The Importance of Judicial Legitimacy

As we have just noted, the net effect of electing judges seems to be positive from the standpoint of the legitimacy of state courts. However, the evidence of this effect is limited to studies of only two states (although we recognize that Gibson (2012) replicated some but not all of his findings using nationally representative survey data). It is therefore useful to consider broader (but perhaps less valid) evidence of the legitimacy of state high courts, and to speculate a bit about the consequences of that legitimacy.

In 2001, the group Justice at Stake Campaign conducted a national survey on public attitudes toward the state and local courts (for earlier analyses of these data, see Cann and Yates 2008). One of the questions they asked their respondents is: "How much trust and confidence do you have in courts and judges in your state?" Responses were collected on a four-point scale that varied from "nothing at all" to "a great deal." The data reveal that most Americans think quite highly of their state courts, with 25 % asserting a great deal of trust and confidence and another 53 % expressing some confidence, for a total of 78 % asserting at least some confidence in the institutions.

All 50 states are included in the Justice at Stake data set, although many states are represented by a tiny number of respondents. The average number of interviews per state is 19.3 (with a standard deviation of 18.1), with the number ranging from 1 to 84. A total of 16 states had fewer than 10 respondents in the sample. Of the states with 10 or more respondents, the average percentage of citizens expressing at least some confidence in their state judiciary is 78.4. Figure 1 reports the distribution across these states.

[PLACE GIBSON FIGURE 1 ABOUT HERE]

The first conclusion from this figure is that *not* a great deal of variability in court confidence exists across the states. Moreover, in every state, a majority of the respondents express confidence in their state courts, and in most states the majority is a quite sizable one. Although this survey question is not a very good indicator of the legitimacy of the state courts in the U.S. (it is probably a better indicator of performance satisfaction), it does at least suggest that these courts enjoy considerable support from their constituents (see also Benesh 2006).

This survey evidence may go some distance toward explaining how the state courts are able to fend off attacks on their basic structure and functions. These days, state legislatures are awash with proposed legislation attacking the state courts, ranging from bills that would prohibit the courts from citing foreign precedents to efforts to alter the fundamental structure of the judiciary (just as is also true of the U.S. Congress and the federal judiciary – see Clark 2011). Although research on this point is scant (but see Leonard 2014), it seems that many of these institutional attacks fail (just as FDR's attack on the U.S. Supreme Court in 1936-1937 failed; see Caldeira 1987). It may well be that the legitimacy these courts derive from judicial elections actually strengthens the institutions, making them more resilient to the most powerful constraints on judicial independence, the state governments—a point which Shugerman (2012) notes was the reason that states started adopting judicial elections in the first place. It is useful to explore the logic of these relationships just a bit further.

There can be no doubt that judicial elections have made state judges more accountable for their decisions, and this fact is decried by many legal interest groups. But just as judicial elections were implemented in the 19th century as a means of *enhancing* judicial independence

(e.g., Shugerman 2010, 2012), that may still be the role that these elections play today.[25] The support of their constituents – the mass public – enhances the power of courts; that has always been the function of institutional legitimacy. To the extent that courts are legitimate, they are insulated to some degree from attacks from elites. We submit that state governments – legislatures and governors – constitute a far greater threat to judicial independence than does the electorate. It may well be that one reason why so many attempts to rein in the state courts have failed is because these institutions are perceived as legitimate by their primary constituents, the mass public. It may also be that many people do not support institutional change because they realize that personnel change is possible through the electoral process. In this sense, judicial elections enhance the independence of state courts.

Concluding Thoughts

The American people strongly support electing their state judges, so it is unlikely that elite attempts to do away with judicial elections will succeed, at least in the short term. Still, there is a great deal of tinkering with selection/retention systems, with the result that a fairly wide variety of institutional designs currently exist. This variability is a boon to researchers, offering the opportunity to pinpoint just what the consequence of different selection/retention systems are. This research is just beginning, but it is beginning in earnest (as documented by the recent publication of three major books on state judicial elections: Bonneau and Cann 2015; Hall 2014; and Kritzer 2015).

Our most minimalist conclusion from the current research is that judicial independence in these courts has been significantly constrained. Much of the scholarship focuses on the role of the electorate, but substantial constraints from the other institutions of state governments exist,

and the mass media and interest groups scrutinize state courts far more than in the past. The important issue no longer seems to be "whether state courts should be independent," but is instead "to whom should these courts be accountable." These "new-style constituencies" are undoubtedly changing the ways state courts function, although not always in entirely predictable ways. Whether these changes are desirable or not reflects observers' ideological positions, especially the relative weight they assign to the two halves of the democratic equation: majority rule and minority rights.

The larger question raised by all of this research is a normative one: to what extent are judicial elections "good" or "bad"? There are clear costs and benefits to any institutional design, and judicial elections are no exception. The simplistic dismissal of judicial elections because they seem to determine outcomes in some types of cases, without consideration of the benefits of such elections, is just as inappropriate as touting the legitimacy-enhancing power of elections without considering whether some litigant classes bear significant costs. Clearly, every selection/retention system generates benefits for some and costs for others. Research indicates that judicial elections provide some real benefits, including increased legitimacy of the state judicial branch and increased information about that branch of government among the public. On the other hand, the burgeoning literature on the effects of campaign contributions and spending on judicial decisionmaking and the survey evidence indicating that judicial campaign conduct can be harmful to courts suggests that judicial elections can impose real costs on litigants in some types of lawsuits. As with any normative question, individuals will choose to weigh the costs and benefits, and normative judgments about the wisdom of institutional design hinge on the weight to which individuals ascribe these costs and benefits. In the end, whether one

prefers or opposes judicial elections ought to be determined by the *net* benefits or costs of such systems, instead considering the costs or benefits in isolation from one another.

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[1] Bolivia became the first country in the modern era to popularly elect their national-level judges in 2011, though the French also elected their judges from 1790-1799 and several Latin American countries used popular elections in the 1820s (Driscoll and Nelson 2013, 2015). The Japanese use uncontestable retention elections to retain their Supreme Court, and a handful of other local jurisdictions use elections to elect local judges (Driscoll and Nelson 2012).

[2] The works of Dubois (e.g., 1980) and Watson and Downing (e.g., 1969) are notable exceptions.

[3] Schotland (2011, 119) argues that "new-style" legal elections actually began in Los Angeles in 1978 when deputy district attorneys organized to try to defeat an incumbent trial court judge.

[4] See Bonneau 2012 for a concise and insightful overview of recent empirical findings. For a masterful documentation of how judicial elections have changed in the U.S. over the last several decades, see Kritzer 2015.

[5] For studies of elections to lower state courts, see Nelson (2011) and Streb and Frederick (2009).

[6] States vary in the terminology they use to describe their high courts. The New York Supreme Court, for example, is a trial (rather than appellate) court. We use the terms "state supreme court" and "state court of last resort" interchangeably in this chapter to refer to the court in each state with the final say over state constitutional law.

[7] Research on this specific question dates at least as far back as Kuklinski and Stanga (1977) and Gibson (1980).

[8] Studying analogous behavior in civil cases, Tabarrok and Helland (1999) demonstrate that elected judges redistribute dollars to their constituents by ruling against out-of-state defendants in tort suits brought by in-state plaintiffs.

[9] They also found that the judges did not alter their sentencing behavior for the more numerous less-serious crimes.

[10] Because they do not have direct measures of constituents' preferences, these authors must assume that public preferences for punitiveness are uniform in all judicial districts. Nelson (2014), using votes on an initiative to legalize marijuana, shows that, at least in Colorado, an assumption of cross-district uniformity is not valid.

[11] There is still some use of the term "pandering" to refer to representative linkages (e.g., Canes-Wrone, Clark, and Kelly 2014, 25), although the usage of the term seems to be on the decline. Huber and Gordon (2004, 248) use the term "whims of public opinion."

[12]Obviously, any "community standards" criterion for pornography explicitly admits of cross-community variation in the severity of the offense, as determined by local public opinion.

[13] Berdejó and Yuchtman (2013) summarize their findings as indicating that: "essentially the same defendant (based on observable characteristics), having committed the same crime, facing the same judge, with his case ending in the same sentencing guidelines cell, receives a significantly longer prison sentence if he is sentenced at the end of the judge's political cycle rather than the beginning." (749-750) Of course, without changing their empirical evidence, their summary could be modified to say ". . . receives a significantly shorter prison sentence if he is sentenced during a period in which the judge's constituents have little or no information about the judge's sentencing behavior."

[14]The amount of discretion granted to judges in deciding what sentence to impose pales in comparison to the unfettered statutory discretion given to prosecutors when it comes to the decision to charge or not charge for a criminal offense. Dyke (2007) found that district attorneys prosecute more cases during their election years. Nelson's (2014) analysis of prosecutorial dismissal decisions suggests the same finding.

[15] What we mean by "external" is that in the period not under scrutiny, the courtroom workgroup (the prosecutor, the defense attorney, and the judge) is able to implement its preferences without the constraint of any external visibility or review.

[16] This occurs because vacancies in elective states often, due to retirement, resignation, or death, happen in the middle of a term; states typically fill these vacancies through some sort of legislative or gubernatorial appointment (Holmes and Emrey 2006).

[17] State courts often face vocal threats of noncompliance from other branches of government and legislative threats of impeachment in response to unpopular decisions. For example, in March 2014, "a constitutional crisis appeared to be brewing" when Oklahoma governor Mary Fallin, in response to a stay of execution issued by the Oklahoma Supreme Court, instructed that the execution would proceed as scheduled, and state legislators threatened all of the Oklahoma justices who stayed the execution with impeachment (Eckholm 2014). The justices reversed their decision, and the execution proceeded as planned. The Iowa justices faced similar threats (Schotland 2011; Buller 2012). Leonard (2014) finds that court curbing legislation is most likely to be introduced in states where judges face neither reappointment nor retention.

[18] Savchak and Barghothi (2007) demonstrate that judges are more influenced by prospective, rather than retrospective concerns; they respond more heavily to the preferences of their retaining population than their appointing population.

[19] There is some debate on this point, however. Johnson (2014), examining judicial deference to administrative agencies, finds that appointed courts are no more or less likely to find in favor of administrative agencies after taking into account the level of control the governor holds over administrative agencies in a state.

[20] For a discussion of campaign speech by candidates for judicial office, see Bopp and Woudenberg 2007.

[21] The U.S. Supreme Court dealt with the responsibilities of sitting judges hearing cases involving individuals who made independent expenditures on their behalf in a 2009 case: *Caperton v. A.T. Massey Coal*, holding that judges must recuse themselves when there is "a risk of actual bias" which may occur when a judge has a "direct, personal, substantial pecuniary interest." The contribution that caused so much consternation was an independent expenditure: one by an individual acting in his private capacity (though that individual was the CEO of Massey Coal). Gibson and Caldeira (2012) have shown that this sort of independent expenditure can weaken perceptions of impartiality and the recourse—recusal—can restore some faith in the judiciary, but it cannot completely ameliorate the harm done by the presence of a conflict of interest (see also Gibson and Caldeira 2013).

[22] Gibson (2009) reports an important amendment to this general conclusion. He found that policy talk had a delegitimizing influence in states in which judges are not subject to elections. Gibson speculates that (2009, 1299): "Politicized judicial campaigns may provide a 'shock' to an electorate, but that shock may not have enduring consequences as citizens alter their expectations of proper behavior for candidates." As citizens acquire experience with politicized campaigns, they come to see them as normal and therefore not objectionable.

[23] Gibson (2009) shows that the effects of campaign activities on citizen assessments of political institutions do not vary across courts and legislatures.

[24] Of course, parties play a larger role in partisan elections than simply providing a ballot cue: they help with candidate recruitment, often provide financial resources, and help candidates with their campaign organizations (Nelson, Caufield, and Martin 2013).

[25] Driscoll and Nelson (2013), comparing the political and historical circumstances surrounding the adoption of judicial elections in both the United States and Bolivia find strikingly similar circumstances. Importantly, in both cases, judicial elections were adopted as methods of judicial selection primarily to increase the institutional power of the judiciary vis-à-vis other branches of government. Those pushing for the adoption of judicial elections in Bolivia argued that adopting elections would increase public esteem for the judiciary.

Figure 1. Confidence in State Courts, by State,. Source: Justice at Stake Campaign Survey, 2001