# UNCONTESTED and UNACCOUNTABLE?

# RATES of CONTESTATION in TRIAL COURT ELECTIONS

by MICHAEL J. NELSON

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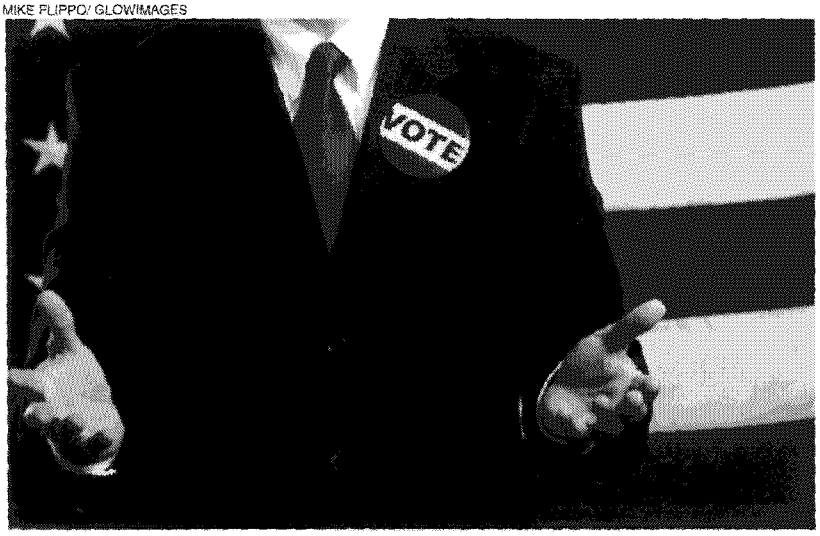


Although electoral competition is an important indicator of the ability of judicial elections to promote judicial accountability, a study of trial court elections in 29 states found that over three-quarters of elections fail to provide voters the opportunity to make a choice in the voting booth.

The empirical literature on judicial accountability has focused almost exclusively on appellate courts.[1] While state appellate courts play a crucial role reviewing trial court decisions, setting precedent, and interpreting law, their ranks represent less than 5 percent of the number of authorized judgeships.[2] Though they typically do not make precedent and are ostensibly bound by the rulings of higher courts, trial court judges exercise immense discretion.[3] Decisions made by appellate judges have important effects on citizens, but trial courts are typically citizens' first, and often only, direct interaction with the judicial branch. Trial court judges determine the amounts of child or spousal support that must be paid in a divorce settlement and who must pay it, set bail when a suspect is arraigned, and, in many instances, determine the length and type of sentence for a convicted defendant.

Moreover, judicial selection reform efforts in recent years have targeted trial courts. The November 2008 ballot contained attempts to change methods of judicial selection on the general jurisdiction trial courts in counties in Kansas and Missouri.[4] In 2009, the governor of Indiana vetoed legislation that would have changed the selection method for the St. Joseph County

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1. *E.g.* Chris W. Bonneau & Melinda Gann Hall, IN DEFENSE OF JUDICIAL ELECTIONS (New York: Routledge, 2009); Philip L. Dubois, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (Austin: University of Texas Press, 1980); Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315-330 (2001); Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in Matthew J. Streb, ed., RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165-85 (New York: NYU Press, 2007); Matthew J. Streb and Brian Frederick, *Conditions for Competition in Low-Information Judicial Elections: The Case of Intermediate Appellate Court Elections*, 62 POL. RES. Q. 523-37 (2009); Matthew J. Streb, Brian Frederick, & Casey LaFrance, *Contestation, Competition, and the Potential for Accountability in Intermediate Appellate Court Elections*, 91 JUDICATURE 70-78 (2007); *but see, for e.g.* Gregory A. Huber and Stanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247-63 (2004).

2. Court Statistics Project, STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2007 STATE COURT CASELOADS (National Center for State Courts, 2009) http://www.ncsconline.org/d_research/csp/2007_files/ StateCourtCaseloadStatisticsFINAL.pdf.

3. *See, e.g.*, Huber and Gordon, *supra* n. 1; Stanford C. Gordon and Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q. J. POL. SCI. 107-38 (2007). Additionally, throughout the article, the phrases "trial court" and "general jurisdiction trial court" are used interchangeably even though limited jurisdiction courts (which are beyond the scope of this study) are also trial courts.

4. *See* Am. Judicature Soc'y, *Voters in Four Jurisdictions Opt for Merit Selection on November 4* (2008), http://www.ajs.org/selection/sel_voters.asp

Superior Court from merit selection to contestable elections.[5] In the 2010 general election, a change in the state's judicial selection system for both trial and appellate court judges was rejected by Nevada voters.[6] The sheer number of trial court judges, the important role these individuals play in citizens' interactions with the judiciary, and recent efforts to change trial court selection mechanisms make it imperative to build an improved understanding of judicial selection and retention mechanisms at the trial court level.

This study examines general and primary electoral contests in the 29 states that used contestable elections to select and retain judges for general jurisdiction trial courts in 2000, 2002, 2004, 2006, and 2008.[7] The dataset includes 10,890 trial court elections. After exploring various conceptions of judicial accountability, it assesses the ability of general jurisdiction trial court elections to promote the type of accountability often touted by proponents of contestable judicial elections.

Additionally, this article provides the first comprehensive examination of trial court elections to acknowledge the effects of electoral rules on the measurement of contestation rates. The results indicate that over 75 percent of contestable judicial elections used to fill seats on general jurisdiction trial courts are uncontested. These results call into question arguments made by proponents of judicial elections and suggest that future research should explore the similarities and differences between trial and appellate court elections.

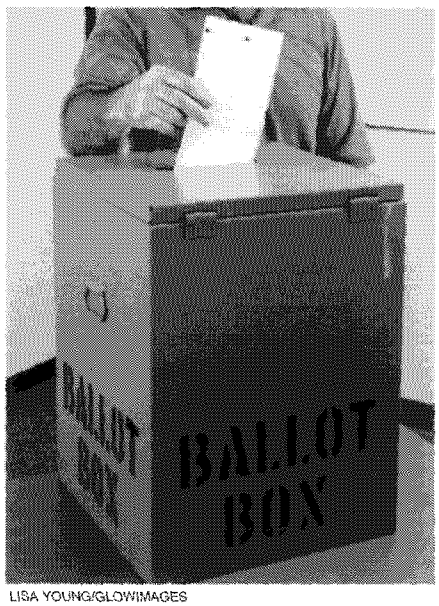
## Parsing judicial accountability

Much of the judicial selection discourse has been framed as a debate over the definition of judicial accountability. As one prominent reform advocate has written, "[i]f courts and those who care about them can learn to make accountability their friend and define judicial accountability properly before the other side corrupts it, they'll go a long way toward turning back the onslaught of attacks on the independence and impartiality of our courts."[8] As this statement suggests, court commentators generally agree that some form of judicial accountability is desirable, but they disagree about which definitions of accountability are "proper" and which are "corrupt." As a result, judicial accountability has become, in the words of retired Supreme Court Justice Sandra Day O'Connor, "misunderstood at best and abused at worst."[9]

Broadly speaking, these conceptions of judicial accountability can be divided into two categories.[10] First, judicial accountability can be partitioned into two groups, indirect and direct accountability, based on the public's role in ensuring judicial accountability. Second, direct accountability can be subdivided into role-based accountability and results-based accountability according to the different standards that proponents of each system encourage voters to use when they evaluate judges.

**Indirect accountability.** Indirect judicial accountability represents the view that judges should be held responsible by elected officials and other jurists for their conduct and their ability to make legally sound decisions. As summarized by a former justice of the Tennessee Supreme Court, "Judges are accountable. Their accountability, however, is not political accountability to individuals, party platforms, majority preferences, or public pressure. A judge's accountability is to the law."[11] In other words, those who adopt this view contend that legislative overrides of judicial decisions, constitutional amendments passed to nullify judicial decisions, impeachment, and formal disciplinary actions are examples of tools used to ensure judicial accountability.

For example, proponents of this form of judicial accountability would argue that judges are held accountable for their decisions when they are reviewed by a higher court; if a higher court finds a lower court ruling in conflict with the law, the higher court can reverse it. Similarly, citing literature that suggests that lower court compliance with higher court rulings is not guaranteed, proponents of this method of accountability may also suggest that lower court behavior might also, in some sense, hold higher court



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5. Ed Ronco, *Governor Nixes Bill to Elect Judges*, South Bend Tribune, May 14, 2009, at A1.

6. Doug McMurdo, *Voters Reject Changing Judge Selection*, Las Vegas Review-Journal, Nov. 3, 2010, at 7B.

7. While it would have been ideal to collect information from elections 2000-2008, the comparatively few elections held in odd-numbered years, coupled with the fact that odd-year elections are typically managed at the county level, would have required a great deal of personal contact with county election officials in many states. Given the difficulty that county election officials had providing information for elections in even numbered years, obtaining reliable information about elections in odd-numbered years was infeasible.

8. Bert Brandenburg, *Seizing the Accountability Moment: Enlisting Americans in the Fight to Keep Courts Fair, Impartial, and Independent*, 42 Ct. Rev. 22 (Fall-Winter 2006).

9. Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence*, 86 Denv. U. L. Rev. 1-6, 1 (2008).

10. Other scholars have also proposed judicial accountability taxonomies. Two major attempts in this vein have divided judicial accountability into institutional (or political) accountability, decisional accountability, and behavioral accountability. The approach taken in this article results in a classification system that is similar to these earlier attempts, but it more explicitly links conceptions of judicial accountability to arguments made by judicial reform advocates. *See* Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 Case W. Res. L. Rev. 911-15 (2006); Wendell L. Griffen, Comment, *Judicial Accountability and Discipline*, 61 Law & Contemp. Probs. 75-7 (1998).

11. Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 Fordham Urb. L.J. 1059 (2002).

judges accountable to the law.[12]

Under this view, the public has no immediate role in evaluating members of the bench; proponents of this form of accountability tend to oppose all forms of judicial elections. According to this conception, judges need not necessarily consider the policy preferences of other politicians in their decision-making calculus because they should be held responsible for the legal merits of their decisions and not the substantive policy outcomes that follow from their decisions. External actors only take action to hold judges accountable when judges step outside the bounds of the law; this form of judicial accountability resembles "fire alarm" oversight.[13]

**Direct accountability.** In jurisdictions that utilize judicial elections, the public can have a direct role in maintaining judicial accountability, but advocates differ on the metric that the public should use to evaluate judges.[14] The first view, role-based direct accountability, posits that the public should hold judges responsible for their performance without regard to particular judicial decisions. In other words, judicial elections should not invite discussions of particular substantive outcomes; instead, the public should be concerned with a judge's ability to perform the judicial role, broadly construed. As stated by Justice Sandra Day O'Connor,

> [J]udges must be accountable to the public for their constitutional role of applying the law fairly and impartially... [A] simplistic understanding of accountability—judicial accountability for the majority's desired substantive outcomes—ignores the role of the judiciary and indeed the very structure of our democratic governments, State and federal.[15]

Typically espoused by proponents of merit selection and retention elections, this form of judicial accountability suggests that voters should base their decisions on factors including judicial temperament, courtroom demeanor, and the jurist's speed and efficiency in deciding cases. Since the general public typically lacks the information necessary to evaluate a judge on these characteristics, proponents of this view of accountability often endorse nonpartisan judicial performance evaluations as a means to educate the public and promote informed voter choice.[16]

The other type of direct judicial accountability, results-based accountability, is rooted in the claim that "at the state level, law should represent public preferences and political culture, as long as the mandates of the United States Constitution and other federal law is *[sic]* observed."[17] This view holds that judges should be responsive to the public's political will in their judicial decisions; like they do in contests for legislative and executive offices, voters should cast their ballots with substantive policy outcomes in mind. This notion of accountability, typically adopted by proponents of contestable judicial elections, suggests that judges' service on the bench can be and should be dependent on their ability to follow public opinion.[18]

This view is more fully explicated in definitions provided by judicial elections scholars who adopt the results-based accountability framework. In early work, Dubois argues that electoral accountability is present only when informed voters have the opportunity to choose among multiple candidates at the polls and when judges who are elected in such a system act in a manner that represents voters' wishes.[19]

More recently, Hall defines accountability as "a formal institutional arrangement where citizens control who holds office through elections. The primary mechanism for this control is electoral competition."[20] Finally, in their book-length treatment of judicial elections, Bonneau and Hall write that "accountability is 'a product of electoral competition, produced by the willingness of challengers to enter the electoral arena and the propensity of the electorate not to give their full support to incumbents.'"[21]

Given these definitions, results-based accountability has clear empirical implications. All three definitions suggest that the presence of voter choice, as measured by contestation rates, is a metric of judicial

12. *See, for e.g.*, Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 Am. Pol. Sci. Rev. 1017-1031 (1959); Donald R. Songer, Jeffrey A. Segal, and Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 Am. J. Pol. Sci. 673-696 (1994); Chad Westerland, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, and Scott Comparato, *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 Am. J. Pol. Sci. 891-905 (2010).

13. Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am. J. Pol. Sci. 165 (1984).

14. Of course, there is a difference between the metrics that reform advocates hope the public will use to evaluate judges and the metrics a voter may actually use. For example, while proponents of Iowa's merit selection system typically adopt role-based accountability, a prominent politician in the state urged voters in the 2010 judicial retention elections to adopt a results-based view of accountability. *See, for e.g.* Jason Clayworth. *Vander Plaats Seeks to Eject 3 Justices* Des Moines Register, August 7, 2010, *available at* http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=20108070320.

15. O'Connor, *supra* n. 9, at 1; *see also* Rachel P. Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 Mo. L.Rev. 573-604 (2009).

16. *See* Kevin M. Esterling, *Judicial Accountability the Right Way*, 83 Judicature 206 (1999); David C. Brody, *The Relationship between Judicial Performance Evaluations and Judicial Elections*, 87 Judicature 168 (2004); Rebecca Love Kourlis and Jordan M. Singer, *Using Judicial Performance to Promote Judicial Accountability*, 90 Judicature 200 (2007).

17. Bonneau and Hall, *supra* n. 1, at 15; *see also* Dubois, *supra* n. 1, at 35 ("judges should be sensitive and responsive to the political, economic, social, moral, and ethical views held by a majority of citizens"); Melinda Gann Hall, *The Controversy Over Electing Judges and Advocacy in Political Science*, 30 Just. Sys. J. 284-91, 286-7 (2009).

18. *E.g.* Hall, *Competition as Accountability*, *supra* n. 1. Recent research has used empirical techniques to assess the effects of public opinion on state court decision making. The results of these studies support a key argument made by proponents of results-based accountability; they show that judicial selection mechanisms condition responsiveness to public opinion. *See* Damon M. Cann and Teena Wilhelm. *Case Visibility and the Electoral Connection in State Supreme Courts*. Available at SSRN: http://ssrn.com/abstract=1445612 (2009); Paul Brace and Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360-372 (2008).

19. Dubois, *supra* n. 1; Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31-52, 41-42 (1986) (stating "[a]s long as voters are allowed to exercise this judgment at regular and periodic intervals, are provided with a choice among opposing candidates, and are able to identify officials with the broad differences they represent... elections can be said to secure the popular accountability of elected officials").

20. Hall, *supra* n. 17, at 286.

21. Bonneau and Hall, *supra* n. 1 at 78 quoting Hall, *Competition as Accountability*, *supra* n. 1, at 166.

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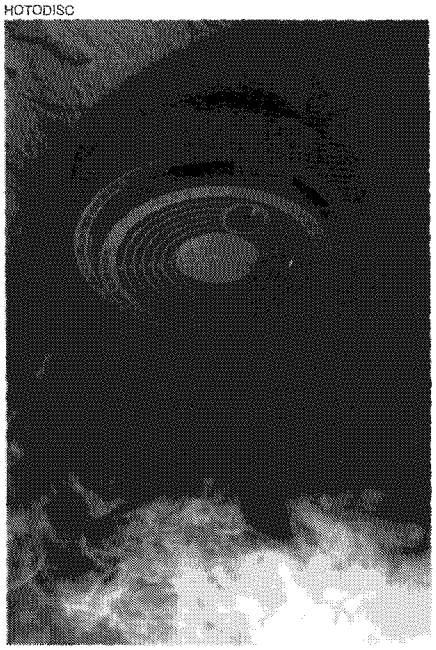


condition for results-based accountability. Candidate competition must be present in order for the voter choice necessary to promote this form of accountability, but the presence of candidate competition does not, by itself, guarantee results-based accountability.[22] An examination of electoral competition allows some practical measure of whether trial court elections have the potential to promote results-based accountability.

Choosing which form of accountability is "proper" and which conceptions are "corrupt" or "abused" is a normative exercise based on one's views of the role of the judiciary, democracy, and the rule of law; such judgments are beyond the scope of this article. However, the ability of a selection method to promote a particular vision of accountability is an empirical question. The remainder of this article investigates the ability of contestable general jurisdiction trial court elections to promote the form of judicial accountability touted by the supporters of this selection method.[23]

**External actors only take action when judges step outside the bounds of the law; this form of judicial accountability resembles "fire alarm" oversight.**

accountability. In the absence of candidate competition, a jurist will be reelected whether or not she shares the policy preferences of a majority of the electorate; in this situation, results-based accountability cannot be achieved. Thus, candidate competition is a necessary, but not sufficient,

## Contestation

Like the majority of work on judicial selection, most studies that assess competition in judicial elections have examined appellate court elections, and these studies have, at least implicitly, adopted the framework of results-based accountability. Hall examines contestation in state supreme court elections between 1980 and 2000 and concludes that overall contestation rates have increased over time. Hall's results indicate that most supreme court races during this time period featured candidate competition, and she argues that partisan elections are substantially more likely than nonpartisan elections to feature two or more candidates on the ballot.[24] Given this evidence, Hall concludes that elections to state supreme courts are able to promote judicial accountability.

In a similar study, Streb et. al. examine nearly 1000 intermediate appellate court races held from 2000-2006.[25] Finding that 64 percent of open seat races during this time were contested while only 27 percent of intermediate appellate court incumbents faced a challenger, Streb et al. conclude that elections to intermediate appellate courts are able to promote judicial accountability.[26] Like Hall, Streb et al. suggest that incumbent intermediate appellate court judges in partisan electoral systems are more likely to face challengers than their counterparts in nonpartisan electoral systems.[27] Taken together, these studies suggest that appellate court elections may be able to provide the contestation rates necessary to promote results-based accountability, and they indicate that ballot type might condition contestation rates.

There are strong theoretical reasons to suggest that trial court elections might provide levels of competition necessary to promote results-based judicial accountability. For example, the barriers to entry in trial court elections are lower than those faced by appellate court candidates; some of the practical concerns that might underlie a potential candidate's decision to run for judge (such as the undesirability of moving one's family to the city where the court of last resort sits) may be attenuated by the local nature of trial court elections. Furthermore, given that most general jurisdiction trial court judges are elected within a small geographic area, typically a county, the comparatively lower costs of campaigning may encourage more candidates to seek office.

Some empirical support for this theory comes from a multi-state study of trial court elections. Abbe and Herrmson reported the results of a survey of approximately 200

22. Of course, candidate competition is only one of a number of different metrics that can be used to assess levels of results-based accountability; other studies have explored defeat rates and candidates' vote shares to assess accountability, as well. *See, for e.g.* Streb, Frederick, and LaFrance, *supra* n. 1.

23. In assessing this particular vein of judicial accountability, I do not mean to endorse it; rather, I assess this conception of accountability exclusively because it is the conception of accountability most often subjected to empirical scrutiny by scholars. *See, for e.g.* Hall, *Competition as Accountability*, *supra* n. 1; Streb et al, *supra* n. 1; Bonneau and Hall, *supra* n. 1.

24. Hall, *Competition as Accountability*, *supra* n. 1, at 175-181.

25. Streb, Frederick, and LaFrance, *supra* n. 1.

26. *Id.*

27. However, Streb et. al. find the converse to be true in open seat races. Given that their sample only included 14 nonpartisan open seat elections, this finding, as they acknowledge, is likely attributed to a small sample size. Streb, Frederick, and LaFrance, *supra* n. 1, at 75.

## Table 1. Electoral rules governing nonpartisan general jurisdiction trial court elections

| State | Trial court(s) | Win in primary? | Races appear on a ballot? |
|---|---|---|---|
| Arkansas[1] | Circuit Court | Majority of Votes Cast | Always |
| California[2] | Superior Court | Majority of Votes Cast | Unopposed incumbents do not |
| Florida | Circuit Court | Majority of Votes Cast | Unopposed races do not |
| Georgia[3] | Superior Court | N/A | Always |
| Idaho | District Court | Majority of Votes Cast | Always |
| Kentucky | Circuit Court | No | Always |
| Michigan | Circuit Court | No | Always |
| Minnesota | District Court | No | Always |
| Mississippi | Circuit Court | N/A | Always |
| Montana[4] | District Court | No | Always |
| Nevada | District Court | If an unopposed candidate receives at least one vote | Always |
| North Carolina | Superior Court | No | Always |
| North Dakota | District Court | No | Always |
| Oklahoma | District Court | Majority of Votes Cast | Unopposed races do not |
| Oregon | Circuit Court | Majority of Votes Cast | Always |
| South Dakota | Circuit Court | No | Always |
| Washington | Superior Court | Majority of Votes Cast | May not[5] |
| Wisconsin[6] | Circuit Court | No | Always |

Source: American Judicature Society, "Initial Selection, Retention, and Term Length," *State election laws, memoranda, and communication with election officials*

1. Circuit Court elections moved from partisan to nonpartisan in 2002.
2. Results for California in this article do not include races from Alameda County that did not appear on the ballot. Neither the county elections office nor the superior court was able to provide the necessary information.
3. Since 2000, Georgia has used a variety of different rules to determine the point in the electoral cycle in which a superior court race is decided. This table discusses practices used in 2008.
4. Montana uses contestable elections, but, if a candidate is unopposed, he or she competes in an uncontested retention election. Since all candidates have the opportunity to run in a contested race and the presence of a retention election indicates an unopposed candidate, I count retention elections as uncontested elections.
5. If a county's population is less than 100,000 residents, unopposed candidates always appear on the ballot in both the general and primary elections. If the county's population is greater than 100,000 residents, the unopposed candidates do not appear on the ballot.
6. Circuit court judges are elected in spring elections.

candidates who sought trial court judgeships between 1996 and 1998.[28] Presenting findings similar to the appellate court studies discussed above, Abbe and Herrnson find that 30.8 percent of the trial court races in their sample were uncontested.[29]

However, the results of a number of single-state studies differ from those reported by Abbe and Herrnson; these studies indicate that the potential for trial court elections to provide results-based accountability is slight. First, studying elections to all trial courts in Miami-Dade County between 1962 and 1978, Volcansek finds that 63 percent of elections were uncontested.[30] Second, examining general jurisdiction trial court elections in Ohio between 1962 and 1980, Baum concludes that 71 percent of incumbent Court of Common Pleas judges did not face opposition in either the general or primary election.[31] Third, Kiel, Funk, and Champagne's analysis of Texas trial court elections held in the 1980s illustrates that the vast majority of these races were uncontested.[32] Finally, studying superior court judges in California between 1958 and 1980, Dubois finds that 92.9 percent of incumbents retained their seats without facing opposition.[33] Also studying California trial court elections, Schotland examines contestation rates from 1972 to 2002 and notes that the percentage of superior court judges facing electoral opposition exceeded 2 percent in only two of those 30 years.[34]

Thus, the empirical literature on contestation rates in judicial elections presents two contrasting views. Research on appellate court elections, combined with Abbe and Herrnson's multi-state study, suggests that trial court elections may be able to promote results-based accountability through electoral competition. On the other hand, the more comprehensive (but single-state) studies

28. Owen G. Abbe & Paul S. Herrnson, *How Judicial Election Campaigns have Changed*, 85 JUDICATURE 286-95 (2002).
29. *Id.* at 288.
30. Mary L. Volcansek, *An Exploration of the Judicial Election Process*, 34 W. POL. Q. 572-577, 573 (1981).
31. Lawrence Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 JUDICATURE 420-430, 424 (1983).
32. L. Douglas Kiel, Carole Funk, and Anthony Champagne, *Two-party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290-3, 291 (1994).
33. Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 LAW & SOC'Y REV. 395-436, 399 (1984).
34. Roy A. Schotland, *The Crocodile in the Bathtub: Achieving the Right Balance Between Judicial Accountability and Judicial Independence in Terms for Trial Court Judges*, California Courts Review, Fall 2005, 10-13, 12; *See* Charles Price and Charles Bell, *Anti-Bird Fervor Has Little Effect on Lower-Court Races*, CAL. J. 447 (Sept. 1986).

## Table 2. Electoral rules governing partisan general jurisdiction trial court elections

| State | Trial court(s) | Win in primary? | Races appear on a ballot? |
|---|---|---|---|
| Alabama | Circuit Court | No | Always |
| Arizona[1] | Superior Court | No | Always |
| Indiana | Circuit Court[2] | No | Always |
| | Superior Court[3] | No | Always |
| | Probate Court | No | Always |
| Kansas[4] | District Court | No | Always |
| Louisiana | District Court | Majority of Votes Cast | Unopposed races do not |
| Missouri[5] | Circuit Court | No | Always |
| New York | Supreme Court | N/A | Always |
| Ohio | Court of Common Pleas | No | Always |
| Tennessee[6] | Chancery Court | Always | Always |
| | Criminal Court | Always | Always |
| | Circuit Court | Always | Always |
| Texas | District Court | No | Always |
| West Virginia | Circuit Court | No | Always |

Source: American Judicature Society, "Initial Selection, Retention, and Term Length," *State election laws, memoranda, and communication with election officials*

1. Pima and Maricopa counties use merit selection; candidates are elected in partisan primaries, but their partisan affiliation does not appear on the general election ballot.
2. Vanderburgh County uses nonpartisan elections; this table discusses procedures in partisan elections.
3. Lake and St Joseph counties use merit selection; Allen and Vanderburgh counties use nonpartisan elections; this table discusses procedures in partisan elections. The data do not include the 2000 election cycle for this court because neither the Indiana Secretary of State's office nor the Indiana State Archives were able to provide primary election returns.
4. Seventeen districts use merit selection; fourteen districts use partisan elections.
5. Jackson, Clay, Platte, Saint Louis, and Greene counties use merit selection.
6. Elections are held in August.

imply that trial court elections may not be able to provide levels of competition high enough to promote results-based judicial accountability.

## Methodology

This study utilizes an original dataset from all 29 states that use contestable elections to both select and retain judges for their general jurisdiction trial courts to provide a comprehensive examination of contestation rates.[35] The general jurisdiction trial court(s) in each state were identified using the Survey of State Court Organization compiled by the Bureau of Justice Statistics and the National Center for State Courts, as well as the classification system utilized by the American Judicature Society.[36] Because some states have multiple general jurisdiction trial courts and the classification of these courts varies, the names of the courts included in the study are available in Table 1 (for states that utilize nonpartisan elections) and Table 2 (for partisan election states).

The data come from elections held in 2000, 2002, 2004, 2006, and 2008 and were compiled using election returns and candidate filing information provided by state and county officials, state blue books, newspaper articles, communication with county and state election officials and court administrators, and third-party sources (such as the California Elections Data Archive and voter information guides produced by the League of Women Voters). The result is a new dataset including nearly 11,000 general jurisdiction trial court races.

## Measuring contestation

The measurement of contestation rates in general jurisdiction trial court races is difficult. The California studies and Abbe and Hernson's multi-state study all confine their analyses to the general election; this approach is not adequate because it only includes a biased subset of elections. This measure does not include races that were on the ballot and contested in the primary election but, due to electoral rules, did not appear on the general election ballot.[37]

The electoral system used in California provides an example of the problematic nature of this approach. If a candidate for California Superior Court receives a majority of the votes cast in the primary election, he or she is automatically elected, and the race does not appear on the ballot in November.[38] As a result, only the most competitive superior court races appear on the California general election ballot. Other races

35. While they select their judges using contestable elections, Illinois and Pennsylvania retain their judges through uncontestable retention elections. Since I do not differentiate between elections to select and to retain judges in my sample, percentages obtained from these states would not be directly comparable with the other states. Thus, to ensure comparability, I limit my study to those states that use contestable elections for both the selection and retention of judges.

36. Am. Judicature Soc'y, Judicial Selection in the States: Appellate and General Jurisdiction Courts (2010), http://judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

37. Schotland, *supra* n. 34.

38. Cal. Elect. Code § 8140.

in which a candidate is unopposed or in which one candidate receives a majority of the votes cast in the primary election do not, under California law, appear on the general election ballot. By extension, none of these races are counted as contested under this measure even if two or more candidates sought the same seat.

The fact that many trial court elections can be decided in the primary election is not unique to California. As Tables 1 and 2 indicate, 10 of the 29 states under study allow regular election of judges in primary or spring elections. Furthermore, as the tables indicate, five of these states allow judges to be "elected" without ever appearing on the ballot; in these states, unopposed judges can be elected *without receiving a single vote on any election day.* Because judges in many states can be elected in contests that occur before November, the use of only general election results as a measure of trial court competition results in an inaccurate metric of competition; to accommodate these electoral rules, a successful measure needs to include both general and primary elections.

A simple comparison of primary and general elections is also inappropriate as a metric of contestation. While it provides a useful way to differentiate between levels of intraparty competition (by examining the amount of competition in the primary election) and interparty competition (by examining competition in general elections), this measure does not account for the fact that, in many jurisdictions that utilize nonpartisan elections, the appearance of a race on the general election ballot depends, in large part, on the amount of contestation in the primary election. Whereas in most systems that utilize partisan elections a race will appear on the general election ballot regardless of the outcome of the primary election, in many nonpartisan systems (as illustrated in the California example above), some races may appear on the primary election ballot without appearing on the general election ballot. Thus, separate measures of competition in the general and primary elections would provide misleading results for general elections in these states. A desirable metric of competition should summarize the amount of competition in a race over the entire electoral cycle.

Given the variation in electoral rules among states, only a measure that examines primary and general elections in tandem is able to provide comprehensive measures of electoral competition. An appropriate measure needs to assess whether or not a race was contested at any point in the electoral process in order to provide results that are comparable across the various electoral rules employed by the states. Such a measure provides equivalent information about races that never appeared on the ballot, races in which the winner was chosen in a primary election, and races in which the winning candidate was selected in the general election. In short, an appropriate metric should indicate whether or not voter choice was present at any point in the electoral cycle.

To determine the presence of electoral competition, all potential contests that could be used to fill a seat on a general jurisdiction trial court in a given electoral system were coded. Because voter eligibility requirements differ between partisan and nonpartisan primaries and among states within a given electoral system, I examined all possible primary contests that could have been used in a particular jurisdiction to fill a seat; in jurisdictions that utilize nonpartisan elections, I examined the nonpartisan portion of the primary ballot, and, in jurisdictions that utilize partisan elections, I examined each party primary individually.[39]

After examining the entire electoral history for a seat in a single electoral cycle, I counted a race as contested if, at any point in the electoral process, any eligible voter was given the opportunity to choose between at least two candidates. In the case of multimember districts, I counted as contested all races in which there were more candidates on the ballot than there were seats to fill.

This is an admittedly broad measure of contestation that is similar to one mentioned briefly in Baum's study of the Ohio Court of Common Pleas.[40] To understand the variety of races counted as contested using this measure, consider three hypothetical races. In Race #1, Candidate A is an unopposed Republican and Candidate B is an unopposed Democrat in a closed partisan primary system. Candidates A and B meet in the general election where all voters have the option to choose between these two candidates; thus, this race is contested.

In Race #2, Candidate C and Candidate D face each other in a closed Democratic primary and the winner is unopposed in the general election. This race is counted as contested even though Republican voters did not have the opportunity to exercise choice at the polls; it is counted as contested because one set of eligible voters (registered Democrats) had the opportunity to make a choice on a ballot.

In Race #3, Candidates E and F face each other in a nonpartisan electoral system (like that used in California) which allows the election of candidates in the primary election. If Candidate E receives more than 50 percent of the vote in the primary election, she is elected and does not appear on the general election ballot. Even though the race did not appear on the general election ballot, the race is counted as contested because all primary voters had the opportunity to make a choice between two candidates.

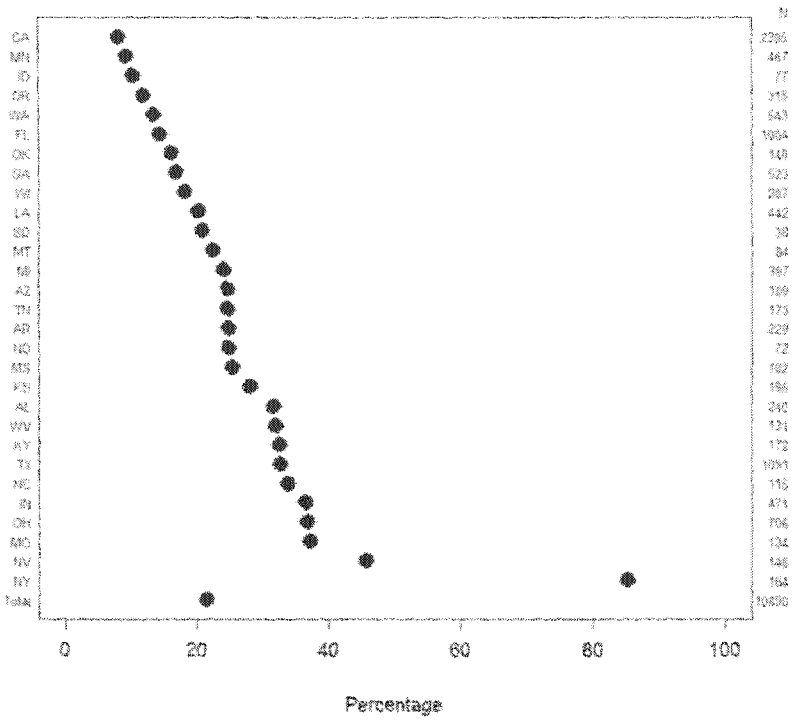
## Assessing accountability

Figure 1 provides a visual representation of total contestation rates by state. Notably, the number of contested seats is quite low; less than 22 percent of the trial court races studied provided voters with a

39. I also examined runoff elections; however, since the presence of a runoff necessarily requires contestation in the previous election, the inclusion or exclusion of runoff elections does not change the results.

40. Baum, *supra* n. 31.

## Figure 1. Total contestation rates, by state




The contestation rate shown is the percentage of all races in which two or more candidates appeared on the ballot.

choice at either stage of the electoral process.[41] The contestation rates vary greatly from state to state; over 80 percent of general jurisdiction trial court races were contested in New York while less than 10 percent of races were contested in California and Minnesota.

In fact, New York is the only state where it is more likely than not that voters have the opportunity to choose between candidates on the trial court portion of the ballot. There are at least two likely reasons for the high level of contestation in New York. First, New York has more third-party candidates running for judge than any other state in the data. Second, whereas judges in most states are listed on the ballot if they file a petition with enough signatures and pay a filing fee, candidates for the New York court are nominated in partisan conventions.[42] This unique nomination process (which is held instead of a primary election) increases party involvement in the formal nomination process. This enhanced role might encourage the parties to nominate candidates for a higher percentage of races.

In addition to individual, state-level comparisons, these data permit the examination of changes in contestation rates over time. As Figure 2 shows, contestation rates have remained remarkably stable overall and across ballot types; examing all races, the most and least contested election years have contestation rates that differ by only 4.06 percent In fact, the only identifiable trend in Figure 2 is the slight *decrease* in partisan contestation rates since 2000, although this difference is not statistically significant. While judicial elections have, in Schotland's words, "become nastier, noisier, and costlier" in recent years, any changes in the vigor and intensity of trial court elections have occurred without increasing contestation rates.[43]

As discussed above, studies of appellate court elections have found that ballot type conditions contestation rates.[44] This finding holds at the bottom of the judicial hierarchy. Figure 2 shows differences in contestation rates between these two ballot types. Overall, 34.18 percent of partisan races in the data were contested while only 14.80 percent of nonpartisan races featured two or more candidates. This difference was statistically significant at the $p < .001$ level indicating that partisan elections are more likely to be contested than nonpartisan elections. Thus, if proponents of contestable elections want to increase contestation rates in general jurisdiction trial court elections, these results indicate that they should advocate for the adoption of partisan, instead of nonpartisan, elections.

Additionally, these data provide insight into a facet of judicial elections that has been largely unrecognized in the literature: in some states, trial court judges can be elected without ever appearing on a ballot. Table 3 lists the five states that allow this unique electoral process and gives the percentage of races in these states in which general jurisdiction trial court jurists were elected without facing voters.[45] In these states, over 85 percent of general jurisdiction trial court judges were "elected" without ever receiving a vote.

This fact becomes all the more striking when one considers the

41. By contrast, if a less generous measure of contestation—the percentage of races in the data which featured candidate competition in the general election—was used, the results would be starkly different. Only 13.9% of the races in the data were contested in the general election.

42. Am. Judicature Soc'y, JUDICIAL SELECTION IN THE STATES (2010), http://judicialselection.us.

43. Roy Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L. J. (2007) 1077-105, 1081.

44. Hall, *Competition as Accountability supra* n. 1; Streb et. al. *supra* n. 1.

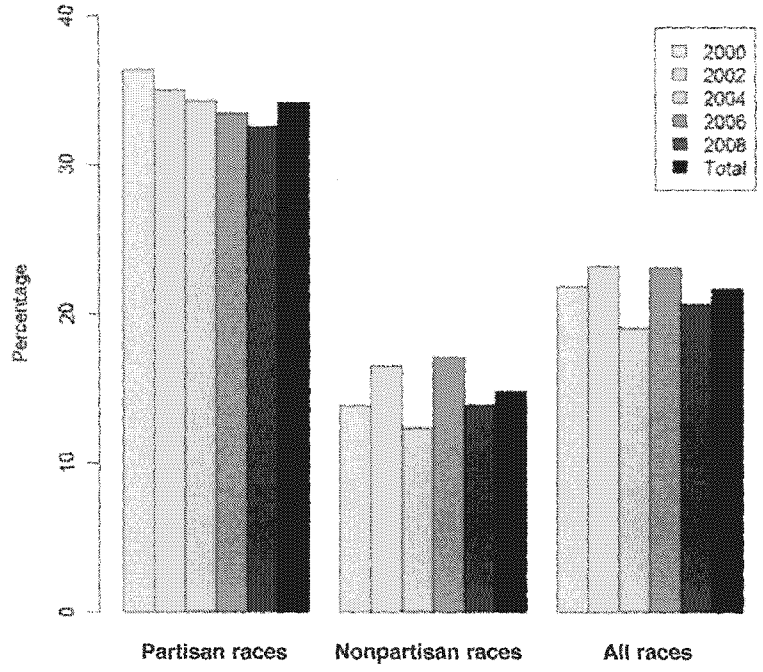
45. Additionally, Arkansas groups all unopposed candidates together on the ballot; voters cast an up-or-down vote on the entire slate of unopposed candidates (*see* ARK. CODE ANN. § 7-5-207(a)(3)(A)).

methods used by these states to fill interim vacancies. In four of these states, interim vacancies are filled by appointment.[46] Research on judicial selection methods has routinely shown that, in states that formally use contestable elections to select judges but fill interim vacancies by appointment, most judges actually reach the bench through appointment.[47]

Dubois, studying accession to the California Superior Court from 1959 to 1977, finds that 89.6 percent of judges were initially appointed to their seats.[48] More recently, Reddick, Nelson, and Caufield examine patterns of accession in a 10 percent random sample of general jurisdiction trial court judges sitting in 2008; they find that, in states that formally use contestable elections to select general jurisdiction trial court judges, most trial court judges are initially appointed.[49] While a full-scale examination of career patterns is beyond the scope of this study, these findings strongly suggest that, even though these states formally use contestable elections to select judges, many judges in these states are selected and repeatedly retained without ever appearing on a ballot.

Additionally, research on state supreme court elections has shown that the presence of an intermediate appellate court in a state may condition important aspects of judicial elections.[50] In the context of trial court selection, one might expect contestation rates to be higher in states without an intermediate appellate court; in these states, there is no middle tier to the judicial hierarchy to attract qualified judicial candidates. To this end, I compared contestation rates in states with an intermediate appellate court to contestation rates in the five states in the data (Montana, Nevada, North Dakota, South Dakota, and West Virginia) that do not have an intermediate appellate court. Table 4 shows the percentage of races in each category that were contested. This difference is statistically significant at the $p < .001$ level. This suggests that trial court elections in states without an intermediate appellate court are significantly more likely to be contested than similar elections in states with such a court.

**Figure 2. Contestation rates by year and ballot type**




There are 7052 nonpartisan and 3838 partisan races in the dataset.

## Conclusion

These findings suggest that, at the local level, contestable elections are unable to promote the form of judicial accountability espoused by advocates of this method of judical selection. According to this conception of accountability, electoral competition is an important indicator of the ability of judicial elections to promote judicial accountability; yet, over three-quarters of general jurisdiction trial court elections fail to provide voters the opportunity to make a choice in the voting booth.

While one cannot pinpoint a particular contestation rate as an accountability threshold, these results indicate that the majority of trial court races are contested in only one state. Moreover, in some states, a high percentage of trial court judges have been initially selected and subsequently reelected without ever appearing on a ballot; the fact that contestation rates have not increased over the past decade

46. Am. Jud. Soc'y, Judicial Selection In The States, (2010) http://www.judicialselection.us.

47. *See* Jacob Herndon, *Appointment as a Means of Initial Accession to Elective State Courts of Last Resort*, 38 N.D. L. Rev. 60-73 (1962); Lisa M. Holmes and Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 Just. Sys. J. 1-13 (2006).

48. Philip L. Dubois, *The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California*, 8 Just. Sys. J. 59-87 (1983).

49. Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Examining Diversity on State Courts: How does the Judicial Selection Environment Advance—and Inhibit—Judicial Diversity?*, (2010). http://judicialselection.us/uploads/documents/Examining_Diversity_on_State_Courts_2CA4D9DF458DD.pdf at 3; *See* Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Racial and Gender Diversity on State Courts—An AJS Study*, 48 Judges J. 28 (Summer 2009).

50. *E.g.* Bonneau and Hall, *supra* n. 1, at 101

## Table 3. Appearance of races on the ballot

| State | Number of races not on ballot | Total number of races | Percentage |
|---|---|---|---|
| California | 2,170 | 2,395 | 90.61% |
| Florida | 858 | 1,004 | 85.46% |
| Louisiana | 352 | 442 | 79.64% |
| Oklahoma | 123 | 148 | 83.11% |
| Washington | 373 | 543 | 68.69% |
| Total | 3,876 | 4,532 | 85.53% |

## Table 4. Number of contested races, by presence of intermediate appellate court

| Institutional structure | Number of contested races | Total number of races | Percentage |
|---|---|---|---|
| With IAC | 154 | 471 | 32.7% |
| Without IAC | 2,202 | 10,419 | 21.1% |

suggests that the ability of trial court elections to promote results-based direct accountability will not rise dramatically in the foreseeable future. Not only do these elections fail to provide a basic component of results-based judicial accountability, but they also fail to provide voters with an opportunity to express their dissatisfaction.

Should states decide that increased levels of contestation in state trial court elections would be desirable, these results indicate that institutional changes may be effective. The findings that ballot type and the structure of the judiciary affect contestation rates suggest that other institutional changes, such as public financing for judicial candidates or comprehensive and publicly distributed judicial voter guides, may also facilitate candidate competition. Public financing would reduce the amount of personal funds a candidate would need to expend in their campaign while publicly distributed voter guides would provide information about all judicial candidates to all voters at no additional cost to any single candidate. By reducing the costs associated with a judicial campaign, both of these measures might increase the number of candidates who run for judge. Further research should address the ability of these (and other) measures to condition contestation rates in trial court elections.

Future research should also investigate the implications of local party activity on judicial accountability. The high rates of contestation exhibited in New York Supreme Court races suggest that, when party organizations are particularly active, contestation rates may be higher. Moreover, the finding that partisan races are more likely to be contested than nonpartisan elections might also suggest that the strength of local party organizations could condition contestation rates.[51] Still, research on the involvement of local party organizations in trial court elections has found that party organizations are active in both partisan and nonpartisan trial court races, although the extent of their involvement varies.[52] More research is needed to determine the extent to which local party involvement affects both local judicial elections and the subsequent decision making of judges elected in jurisdictions with strong local party organizations. If strong party organizations do facilitate results-based accountability, future normative scholarship on judicial elections should address the prudence of party-dominated judical contests.

Finally, these findings suggest that trial court elections might function differently than elections to fill seats on appellate courts. Given the comparatively larger number of elections held every year, trial court elections provide a much larger population of elections to study. Future work should continue to explore the ways in which trial court elections are similar to appellate court elections and the unique situations in which they are not; by examining trial court elections on their own merits, comparing them to other types of national, state, and local elections, and examining the ability of different types of judicial selection mechanisms to promote accountability (in all of its different forms), future scholarship will strengthen our understanding of the important role that trial court elections play in both the electoral and judicial processes. ⚖

**MICHAEL J. NELSON**
is a Ph.D. student in the Department of Political Science at Washington University in St. Louis. (mjnelson@wustl.edu)

51. I thank an anonymous reviewer for this suggestion.

52. Matthew J. Streb, *Partisan Involvement in Partisan and Nonpartisan Trial Court Elections*, in Streb, ed., RUNNING FOR JUDGE, *supra* n. 1, at 96-114.