



THE ASSAULT ON THE ASSUALTERS OF JUDICIAL ELECTIONS



Judicial elections may produce legitimacy, yet other systemic disadvantages remain. This essay reflects upon the differences in judicial decision-making across selection systems and their consequences.

by **LEE EPSTEIN**

For decades now, many law professors, judges, institutes, and professional associations (including the American Judicature Society), have been leveling an assault on judicial elections.¹ Their attack is multi-pronged but usually the words “special interests,” “judicial indepen-

dence,” “impartiality,” and “legitimacy” appear somewhere in their articles and speeches, and on their websites.

Now the assaulters are under assault.

The counter-attackers are mostly social scientists, with a sprinkling

of law professors. Armed with vast amounts of data, their point isn’t to show that judicial elections aren’t as bad as we’ve been led to believe; it is to demonstrate that forcing judges to face the electorate has substantial benefits. Based on a dataset of state high court opinions, law

professors Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner establish that “Appointed judges write higher quality opinions than elected judges do, but elected judges write more opinions, and the...large quantity difference makes up for the small quality difference.”² They also show that appointed judges are no more independent than elected judges. Drawing on data from more than 500 elections and retentions for seats on state high courts, political scientists Chris W. Bonneau and Melinda Gann Hall “throw empirical grenades”³ at the claim that voters are uninterested in judicial elections or unqualified to vote because they know so little about the candidates.⁴ Neither is true—especially not in “expensive and contentious” races.⁵

James L. Gibson, also a political scientist, picks up where Bonneau and Hall leave off. Using data from campaigns and their outcomes, Bonneau and Hall conclude that elections are good for democracy. From the results of experiments embedded in surveys, Gibson argues that, on balance, elections benefit (or at least do not harm) judges because they increase the legitimacy of their courts relative to other systems of selection.⁶ According to Gibson, this is to be expected: “Because elections are preferred by most Americans, elections, by themselves, with all their warts and odorous smells, contribute to the legitimacy of elected courts in the United States.”⁷

On this account, “policy talk” of the sort the Supreme Court enabled in *Republican Party of Minnesota v. White*⁸ works in service of—and not against—the legitimacy-enhancing function of elections. “If elections are employed as a means of selecting judges, then the elections must be legitimate, and all campaign activity that is allowed in elections for other offices must be tolerated in elections for judges.” So says Gibson,⁹ echoing the majority in *White*; and so say his data.

Gibson, along with Choi et al. and Hall and Bonneau, are not scholars with a political agenda; nor, as far as I know, have they received any

funding from the “super spenders”¹⁰ in judicial elections: “pro-business groups, pro-labor groups, doctor groups, insurance companies, and lawyer groups.” They are serious academics with a reputation for letting the data speak. When Bonneau and Hall say they “started out agnostic about the merits of electing judges,” I believe them. When Choi, Gulati, and Posner write, “We began this project with the assumption that the data would demonstrate that appointed judges are better than elected judges,”¹¹ I believe them too. Their article meets all the standards we use to assess the integrity of empirical work.¹² The same holds for Hall and Bonneau’s and Gibson’s books. I should also note that Gibson has made a career out of studying mass behavior, receiving many honors and awards along the way.

Gibson will also receive accolades for this book—as well he should. It’s timely, creative, clever, and quite accessible, despite its methodological rigor and sophistication. The election assaulters cannot and should not disregard it. Nor, for that matter, should they ignore Bonneau and Hall’s book and Choi, et al.’s article.

And yet, I’m not sure they’ve convinced me that the benefits of elections outweigh the costs. My uncertainty stems not from any normative commitment to life tenure for judges or from the fact that the U.S. states are virtually alone in the world in their use of judicial elections.¹³ Rather my concern follows from other work by social scientists (including by Gibson and Hall!¹⁴) demonstrating that elected (and retained) judges respond to their constituents by voting in ways that reflect their constituents’, not their own, preferences.

Scholarly papers along these lines are substantial in number and varied in scope.¹⁵ My interest is criminal cases. These studies too vary but their findings are uniform: judges who face the electorate to retain their jobs are especially tough on criminal defendants, in part because the public doesn’t like judges who appear soft on crime. The result is “an

informational environment in which judges have greater reason to fear voters perceiving them as too lenient than too severe,” as the political scientists Gordon and Huber note.¹⁶ And this, they continue, “creates an asymmetry: if the constraint of public opinion binds at all, it will tend to make judges weakly more *punitive* rather than more moderate with respect to constituent preferences.”¹⁷

Gordon and Huber’s research provides ample support for this claim. In one article, they examined over 22,000 criminal sentences imposed by Pennsylvania trial court judges. They find that, as the judges’ retention election grows closer, they are significantly harsher on defendants.¹⁸ Overall, the researchers “attribute at least 1,818 to 2,705 years of incarceration to the electoral dynamic.”¹⁹ A second study analyzed criminal sentencing in Kansas, selected because 14 districts in the state use partisan elections and 17, non-competitive retention ballots²⁰ and the findings are two fold. First, the judges in the partisan districts are overall more punitive; and second, “when election is imminent, judges in competitive districts are 7.1%...more likely to sentence a convict to time in prison and, conditional on incarceration, assign sentences 6.3 months longer than their counterparts in retention districts.”²¹

Gordon and Huber’s studies, although exceptionally thorough, are not the only ones to show a link between elections and more punitive sentencing. In the most recent work to date (and one that has received its fair share of media attention),²² Berdejo and Yuchtman analyzed 294,349 sentences imposed by 265 Washington State trial court judges.²³ Their overall conclusion parallels Gordon and Huber’s: sentences are significantly longer “at the end of a judge’s political cycle than [at] the beginning; deviations above the sentencing guidelines increase by 50% across the electoral cycle.” To validate their findings, Berdejo and Yuchtman examined the sentences of judges who retired at the end of the term and so were not subject to

constituency pressure. They found no evidence of “sentencing cycles” among the retirees.²⁴

Then there’s the death penalty. In one of the first studies of the kind, Hall (yes, of Hall and Bonneau), unearthed a connection between anti-defendant votes and the threat of electoral reprisal from interviews she conducted with each member of the Louisiana Supreme Court.²⁵ Here’s what Hall had to say about Justice “A,” a justice personally opposed to the death penalty:

Justice “A” acknowledged that his perception of his constituents was that they clearly preferred the death penalty as a punishment for murder and that they would retaliate against him at election time if [he] did not reflect constituent preferences in this set of judicial decisions... Since a liberal voting pattern in this highly visible and emotional set of decisions would place the justice at odds with his more conservatively oriented constituency, Justice “A” stated that he does not dissent in death penalty cases against an opinion of the court to affirm a defendant’s conviction and sentence, expressly because of a perceived voter sanction, in spite of his deeply felt personal preferences to the contrary.²⁶

Data collected by Hall on Justice “A’s” votes validated his remarks. He cast only one pro-defendant death penalty vote in the six years Hall studied and for the last four in her dataset, he never “expressed public disagreement with any death case decisions of the court.”²⁷

Two other liberal Justices who Hall interviewed didn’t seem to respond to constituent pressure but, going by other studies, Justice “A” seems more typical. Research (again by Hall) on four state courts of last resort—all in states with substantial public support for the death penalty²⁸—concluded that:

[U]nder restricted conditions, elected justices in state supreme courts adopt a representational posture. District-based elections, close margins of victory, approaching the end of a term, conditioning from previous representational service, and experience in seeking reelection influence liberal justices to join con-

servative majorities in death penalty cases...²⁹

Adding more states doesn’t change the picture. In a study of 4,116 votes cast in death penalty cases by supreme court justices in the four states in the earlier study plus four more,³⁰ Brace and Hall report:

While Democrats and Republicans generally exhibit behavior patterns that are quite distinct, these distinctions are blurred by variables related to retaining office. Having to face voters more frequently, thereby risking the chance of being removed from office, encourages justices in state supreme courts, who otherwise might vote consistently to overturn death sentences instead, to manifest conservative voting patterns in these cases. Stated differently, the political result of shorter terms of office is a decidedly more conservative bench, at least on the issue of the death penalty.³¹

I could go on but you get the point. Whether drawing a lesson from the 1986 electoral revolt against California Chief Justice Rose Bird and two colleagues for overturning death sentences³² or simply from reading the public opinion polls, Justice John Paul Stevens seemed to get it right when he wrote:

The “higher authority” to whom present day capital judges may be “too responsive” is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.³³

Despite their role in developing this literature, Gibson and (Bonneau and) Hall don’t offer of a response to it. As far as I can tell, Gibson devotes only a paragraph to the matter. In a section titled “Caveats and Limitations,” he asks, “Should state selection systems be judged only by their popular legitimacy?”³⁴ His response is “no” because “institu-

tional legitimacy is but one of many consequences that might flow from the methods by which judges are selected and retained.” Among those consequences—and the one that he finds “perhaps...worrisome”—is the finding, from the studies I’ve cited above, that judges cater to their constituents. Yet, Gibson acknowledges that his “analysis is not informative as to whether the behavior of legal actors... are (or should or should not be) altered as an election nears so as to the please the actor’s constituents.”³⁵

Bonneau and Hall also acknowledge many of the findings I’ve mentioned but suggest we need not worry too much about them. They tell us “Electoral independence does not guarantee impartiality or prudence in the exercise of power.”³⁶ True enough. Decades of research on the U.S. Supreme Court, in particular, suggest that the Justices tend to reach decisions in line with their ideology. As Landes, Posner and I demonstrate in our recent book, since 1937 Justices appointed by Republican Presidents vote more conservatively on average than Justices appointed by Democratic ones, with the difference most pronounced in civil rights cases and less so in federalism, privacy, and judicial power cases. These findings, we note, “support the realist understanding that many cases that reach the Supreme Court tend both to be highly charged politically and to be indeterminate from a legalist standpoint, forcing the Justices back on their priors—which often have an ideological component—to resolve the case.”³⁷

Still, this doesn’t much help Bonneau and Hall’s case. Their argument neglects the fact both Republican and Democratic presidents get to make appointments to the Court, resulting in a fairly heterogeneous body when it comes to the rights of the criminally accused. For every law-and-order type (the Rehnquists and now the Alitos)³⁸ there’s a justice more sympathetic to the rights of the criminally accused (the Douglasses and now the Sotomayors).³⁹ Sure, occasionally, even usually, the Court

tilts one way or the other—compare the Warren and Burger Courts.⁴⁰ But owing to a diversity of views, coupled with the lack of electoral constraints, even a Court tough on defendants will throw out a life or death sentence, unwind a search and seizure, toss a confession, and so on. More generally since the 1946 term, the Court has held for the criminal defendant in four out of every ten cases; even during the Burger Court years—the most law and order oriented during this period—the defendant prevailed in one-third of the cases. The Justices don't have to worry about electoral ouster by a public more worried about under, than over, punishment.

Of course, a diversity of sincere preferences (political or legal) too exists among state judges. I have no doubt that among the thousands in this country some are Brennans and Sotomayors. The problem is that to retain their job many vote as if they were Rehnquists and Alitos. That's what some state judges have told me and what they told Hall too;⁴¹ but much more important that's what the social science studies tell us all.

Perhaps a better response to my concern about serious bias against criminal defendants in states that use the ballot to retain or elect their judges comes in work not on the Supreme Court, where the justices get some utility from voting their preferences. It comes from research on the lower federal courts, where the judges may desire promotion to a higher federal court. These “auditioners,” my work with Landes and Posner demonstrates, tend to be harsher on defendants than non-auditioners⁴² perhaps for the same reason as elected judges: Being tagged as “soft on crime” would be sure to lengthen the odds of a judge's being promoted to the Supreme Court, and knowing this, some judges in the promotion pool seem to alter their voting in criminal cases.⁴³

If our research is right, then, yes, perhaps the benefits of elections outweigh the costs. Criminal defendants may not be faring much better in the federal courts than in the states; nor does the public (if Bonneau and Hall

and Choi et al. are right) or the courts themselves (if Gibson is right) accrue the *seemingly* substantial benefits of judicial campaigns and elections. But “may” and “seemingly” are the operative words; I'm still not sure.

Where I'm more certain is that the counter-assaulters raise serious questions about the continuing and costly efforts to eradicate judicial elections. At the least they have provided ample evidence that elections, to paraphrase a Chief Justice of Texas, are no more or less “worth a damn” than any other selection system.⁴⁴ ★

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1. Prominent examples include Charles G. Geyh, “Why Judicial Elections Stink,” 64 *Ohio State Law Journal* 4 (2003); Sandra Day O'Connor, “Take Justice Off the Ballot,” *N.Y. Times*, May 22, 2010, WK9; the Brennan Center for Justice, at: <http://www.brennancenter.org>; Justice at Stake, at: <http://www.justiceatstake.org/index.cfm>.

2. Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, “Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary,” 26 *Journal of Law, Economics and Organization* 290, 290 (2010).

3. Brandon Bartel's phrase, in <http://www.concurringopinions.com/archives/2010/06/bright-ideas-political-scientists-chris-w-bonneau-and-melinda-gann-hall-on-the-judicial-elections-controversy.html>.

4. Chris W. Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections* (2009). For arguments that voters are disengaged, ignorant or both, see Sandra Day O'Connor. “Keynote Address by Justice Sandra Day O'Connor,” 33 *Seattle University Law Review* 561 (2010); Geyh, “Why Judicial Elections Stink.”

5. Bonneau and Hall, *In Defense of Judicial Elections*, 47

6. James L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy*. (2013).

7. *Ibid.*, at 22.

8. 536 U.S. 765 (2002).

9. Gibson, *Electing Judges*, 56.

10. A term used in a Brennan Center report, at: <http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf>.

11. Choi, Gulati, and Posner, “Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary,” at 328.

12. Especially reliability, validity, and transparency. See, e.g., Lee Epstein and Charles Clarke. “Academic Integrity and Legal Scholarship in the Wake of Exxon Shipping, Footnote 17,” 21 *Stanford Law and Policy Review* 33 (2010); Lee Epstein and Gary King, “The Rules of Inference,” 69 *University of Chicago Law Review* 1 (2002).

13. See Jed Handelsman Shugerman, “Economic Crisis and the Rise of Judicial Elections and Judicial Review,” 123 *Harvard Law Review* 1061 (2010). For an explanation on why “judicial

elections are uniquely American,” see Melinda Gann Hall, “On the Cataclysm of Judicial Elections and Other Popular Antidemocratic Myths,” in Charles Gardner Geyh, ed., *What's Law Got to Do with It?* (2011).

14. See James L. Gibson, “Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision-Making,” 14 *Law and Society Review* 343 (1980). Hall is well-known for generating considerable research and interest in the judicial electoral connection, as I make clear later in the text.

15. See, e.g., Michael S. Kang and Joanna M. Shepherd, “The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions,” 86 *NYU Law* 69, 69, 86 (2011); Brandice Canes-Wrone, Tom S. Clark, and Jee-Kwang Park, “Judicial Independence and Retention Elections,” 28 *Journal of Law, Economics and Organization* 211 (2012); Richard P. Caldeira, Brandice Canes-Wrone, and Tom Clark, “Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions,” 71 *Journal of Politics* 560, 568 (2009); Eric Helland and Alex Tabarrok, “The Effect of Electoral Institutions on Tort Awards,” 4 *American Law and Economics Review* 341 (2002); Alexander Tabarrok and Eric Helland, “Court Politics: The Political Economy of Tort Awards,” 42 *Journal of Law and Economics* 157 (1999).

16. Gordon, Sanford C. and Gregory A. Huber, “The Effect of Electoral Competitiveness on Incumbent Behavior,” 2 *Quarterly Journal of Political Science* 107, 111 (2007).

17. *Ibid.* There is plenty of data supporting the claim that the public prefers overpunishment to underpunishment. E.g., “Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing,” *Review of Economics and Statistics*, forthcoming.

18. Gregory A. Huber and Sanford C. Gordon. 2004. “Accountability and Coercion: Is Justice Blind when It Runs for Office?” 48 *American Journal of Political Science* 247 (2004). Of course, they control for the many other factors that may affect sentences.

19. *Ibid.* p. 247.

20. Gordon, Sanford C. and Gregory A. Huber, “The Effect of Electoral Competitiveness on Incumbent Behavior,” 2 *Quarterly Journal of Political Science* 107 (2007), at 111.

21. *Ibid.*, at 129-130.

22. See, e.g., Christopher Shea, Elections Shape Judicial Sentencing, Study Finds, *Wall Street Journal*, August 16, 2012, at: <http://blogs.wsj.com/ideas-market/2012/08/16/elections-shape-judicial-sentencing-study-finds/>; David Brooks, “Social Science Palooza III,” *New York Times*, December 10, 2012, A13.

23. Berdejo and Yuchtman, “Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing.”

24. And, yes, prior to retirement, these same judges were handing down harsher sentences as election grew closer. *Ibid.* See also Melinda Gann Hall, “Representation in State Supreme Courts: Evidence From the Terminal Term,” paper delivered at the 2012 State Politics and Policy Conference, Houston, Texas, February 16-18, at 22.

25. Melinda Gann Hall, “Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study,” 49 *Journal of Politics* 1117 (1987).

26. *Ibid.*, at 1120.

27. *Ibid.*, at 1123.

28. Texas, North Carolina, Louisiana, and Kentucky

29. Melinda Gann Hall, “Electoral Politics and Strategic Voting in State Supreme Courts,” 54 *Journal of Politics* 427, 442 (1992).

30. Arizona, California, Illinois, Kentucky, Louisiana, North Carolina, Ohio and Texas

31. Paul Brace and Melinda Gann Hall, “The

Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice," 59 *Journal of Politics* 1206, 1223 (1997). See also Paul Brace and Brent Boyea, "State Public Opinion, the Death Penalty and the Practice of Electing Judges," 52 *American Journal of Political Science* 360 (2008).

32. The California Supreme Court reversed sentences in +90% of the cases at a time when about 80% of Californians approved of the death penalty. See Carol Ann Traut and Craig F. Emmert. "Expanding the Integrated Model of Judicial Decision-Making: The California Justices and Capital Punishment," 60 *Journal of Politics* 1166 (1998); Stephen B. Bright and Patrick J. Keenan, "Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases," 75 *Boston University Law Review* 759 (1995).

33. *Harris v. Alabama*, 513 U.S. 504, 519-520 (1995) (Stevens, J., dissenting). Other justices too have expressed concerns, if not downright hostility toward judicial elections. See, e.g., Justice O'Connor concurring in *Republican Party of Minnesota, et al. v. White* 536 U.S. 765, 792 (2002) ; Justices Kennedy concurring in *N.Y. State Board of Elections v. López Torres*, 552 U.S. 196, 212 (2008).

34. Gibson, *Electing Judges*, 139.

35. Gibson, *Electing Judges*, 139. See also his footnote 7, pp. 203-204, which suggest that elections tame ideological voting in capital punishment cases. The problem, once again, is lack of heterogeneity.

36. Hall and Bonneau, *In Defense of Judicial Election*, 138.

37. Epstein, Landes and Posner, *The Behavior of Federal Judges*, 8.

38. Of the 36 justices serving since the 1946 term (through the 2011 term), Rehnquist was the most supportive of the government (least supportive of defendants) in orally argued criminal cases (82.9% in 888 total cases); of the current Justices, Alito is the most supportive (80.2% in 131 cases). Calculated from the U.S. Supreme Court Database (<http://supremecourt-database.org>), using decisionType=1,6, or 7; and issueArea=1.

39. Of the 36 Justices serving since the 1946 term (through the 2011 term), Douglas was the least supportive of the government (most supportive of defendants) in orally argued criminal cases (13.6% in 626 total cases). Of the current Justices, Kagan is actually the least supportive (28.6%) but has participated in only 28 criminal cases. Next is Sotomayor (37.5% in 56 total cases). Calculated from the U.S. Supreme Court Database (<http://supremecourt-database.org>), using decisionType=1,6, or 7; and issueArea=1.

40. Of the five Chief Justice eras between the 1946 and 2011 terms, the Burger Court was the most favorable toward the government in orally-argued criminal cases (66% in 514 total cases); the Warren Court was the least (41.3% in 349 cases).). Calculated from the U.S. Supreme Court Database (<http://supremecourt-database.org>), using decisionType=1,6, or 7; and issueArea=1.

41. Hall, "Constituent Influence in State Supreme Courts," 1120.

42. Other things being equal, other things being equal, we find that: the probability of voting against the defendant in death penalty cases is 81 percent for auditioners and 71 percent for non-auditioners and ex-auditioners when the defendant is appealing his conviction. If the government is appealing, the probability of reversal and thus of a decision in the government's favor is 65 percent for auditioners compared to 51 percent for ex-auditioners and 52 percent for non-auditioners. Auditioners are also more likely to vote to affirm convictions of street crimes—the predicted probability is

64 percent, compared to 51 percent for ex-auditioners and 50 percent for non-auditioners. Epstein, Landes and Posner, *The Behavior of Federal Judges*, 362.

43. Paraphrased from *Ibid*, 359.

44. The Chief Justice purportedly said: No judicial selection system is worth a damn" (as reported in Roy A. Schotland, "A Plea for Reality," 74 *Missouri Law Review* 507, 508 (2009)); or "There are several ways of selecting judges and none of them is worth a damn" (as suggested in the Roscoe Pound Foundation report, *Preserving the Independence of the Judiciary* 15 (1994), at: <http://www.roscoepound.org/images/1993ForumReport.PDF>.)

I say purportedly because, as far as I can tell, no one seems to be quite sure when, where or even who or if the Chief said this. But the line is often quoted or paraphrased in the literature on judicial selection. See, e.g., Schotland, "A Plea for Reality;" Paul D. Carrington and Adam R. Long, "The Independence and Democratic Accountability of the Supreme Court of Ohio," 30 *Capital University Law Review* 455, 471 (2002).

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