

Against Judicial Election: A Considered Approach

In contemporary legal discourse, selecting state supreme court judges has been a considerable debate—from Wisconsin to North Carolina to Pennsylvania. While some advocate for the direct election of judges to enhance democratic accountability, democratic clamors of "we the people" ignore the pitfalls and potential detriments to judicial independence and impartiality.

At the outset, it's important to recognize these courts' foundational role in the American legal system: it is indisputable that state courts adjudicate the vast majority of legal disputes in the United States, ranging from civil rights litigations to commercial litigation and family law.¹ Given this vast purview, the integrity and impartiality of state courts are generally far more critical to most Americans' lives than federal courts.

Judicial Independence vs. Electoral Accountability

Judicial independence, a cornerstone of the American legal system, ensures that judges can make decisions based on law and conscience, free from political pressures. However, when judges are subject to electoral pressures, their decision-making may inevitably be influenced by the electorate's preferences or the specter of electoral retribution, which is borne out empirically.² This concern is not merely theoretical; studies have shown that elected judges may issue harsher

¹Geyh, Charles G. "Why Judicial Elections Stink." *Ohio State Law Journal*, vol. 64, 2003, pp. 43-79.

²Baum, Lawrence. "Judges and Their Audiences: A Perspective on Judicial Behavior." Princeton University Press, 2006.

criminal sentences in election years—a phenomenon attributed to political pressures to appear "tough on crime" in the weeks leading up to elections.³

Special Interests:

The influx of campaign contributions from parties with vested interests in court outcomes not only appears to, but studies show that it actually does, undermine the principle of impartial justice.⁴ This is not to say that appointed judges are immune to external influences, but the direct link between electoral support and judicial decision-making poses a unique threat to the integrity of the judiciary.

These concerns are necessary for merit selection systems, including those with nominating commissions, to provide a bulwark against special interests. Evidence suggests that these systems offer a balanced approach to selection because they involve a diverse set of legal professionals in the process, minimizing the influence of just one single group—or one single qualification or political consideration.⁵

All of this exists without drawbacks—including arguments about promoting democracy, which are ultimately illusory. The argument for judicial elections often rests on the notion of democratic accountability. Some argue that the complexity of legal issues and the specialized knowledge

³Huber, Gregory A., and Sanford C. Gordon. "Accountability and Coercion: Is Justice Blind When It Runs for Office?" *American Journal of Political Science*, vol. 48, no. 2, 2004, pp. 247-263.

⁴James Sample, *Court Reform Enters the Post-Caperton Era*, 58 *Drake Law Review*. 787, 791 (2010).

⁵Geyh, Charles G. "Why Judicial Elections Stink." *Ohio State Law Journal*, vol. 64, 2003, pp. 43-79.

required to adjudicate them mean that the average voter may lack the necessary information to make informed decisions about judicial candidates, but that itself seems not to give voters the benefit of the doubt and could even be interpreted as itself anti-democratic.⁶ More importantly, low visibility of judicial races often results in elections dominated by name recognition or partisan cues. There is generally no substantive evaluation of qualifications, judicial philosophy, or anything else when voters cast their ballots.⁷

Cascading Effects

A significant concern with judicial elections is the influence of campaign contributions on judicial decisions. Necessarily, the need to raise funds for electoral campaigns opens judges to influence from donors, raising questions about the impartiality of their rulings: research shows a correlation between campaign contributions from business interests and pro-business rulings by judges.⁸ Undermining public confidence in the judiciary's ability to provide equal justice under the law, a judge's actions can be perceived to favor those with the means to support judicial campaigns financially. Instead of dealing with these issues head-on, the problems cascade, distorting other elements of constitutional law as the Supreme Court grappled with campaign finance issues in the context of judicial elections in *Williams-Yulee v. Florida Bar* (2015).

⁶Gibson, James L. "Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy." University of Chicago Press, 2012.

⁷Bonneau, Chris W., and Melinda Gann Hall. "In Defense of Judicial Elections." Routledge, 2009.

⁸Shepherd, Joanna. "The Influence of Retention Politics on Judges' Voting." *Journal of Legal Studies*, vol. 38, no. 1, 2009, pp. 169-203.

As the Founders envisioned, giving meaning to the principle of "we the people" requires an impartial judiciary. A campaigning judiciary inverts this very principle.