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Independent and Accountable State Judges: Drawing Lessons from Past Attempts

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Executive Summary

In recent years, North Carolina has been looking closely at the manner of selecting its state judges. From switching to partisan elections in 2017, to debating the boundaries of judicial districts in 2018, and to defeating a constitutional amendment referendum on the 2018 ballot, Carolinians have been grappling with the best way to have judges who are independent of political influences but also answerable to the broader public. This issue brief details the historical experience of other states in grappling with the same problem, going back to the eighteenth century. Over the past 230 years, four main waves of reform have moved the states from legislative or gubernatorial appointment to partisan elections, then to nonpartisan elections, and most recently to a combination of appointment and retention elections known as the merit plan. This brief outlines the main experiences under these alternative arrangements. Based on this history, this brief then presents three lessons for today's debates. First, there is an inherent trade-off between independence and accountability. Second, special interests have a stronger motivation to monitor judicial performance than the general public does. And third, the independence-accountability trade-off is likely to be very different at the initial appointment stage compared to the retention or re-election stage. By understanding the historical experience and lessons from the fifty states, Carolinians can have a better basis for evaluating the available alternatives and the best approach for the state.

About the Author

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Introduction

American citizens want state judges who are both independent and accountable. Americans generally agree that achieving equality under the law requires sheltering judges from the potentially pernicious influence of politically powerful actors. They are also in accord that judges, like other public servants, should be responsive to the public they serve—particularly if the judges are prone to use their independence to engage in "activist" policy making that is at odds with the norms and values of the community at large. Judicial institutions must therefore be structured so as to make judges independent of political influence, but also answerable to the broader public.

The desire for judges who are both independent and accountable is understandable. The problem is that the two attributes conflict. Mechanisms that render judges more accountable to Party A (the general public, say) also make judges less independent of Party B (a special interest group, say). And correspondingly, mechanisms that render judges more independent of Party B also reduce their accountability to Party A.

In short, there is a fundamental trade-off that is at the heart of any procedure used to select state judges, and whatever choice one makes will inevitably—like it or not—require facing that trade-off. Failure to recognize this has too often led to the chimerical pursuit of the perfect way to select judges. In fact, the proper task is to determine how much independence one is willing to sacrifice for a given amount of accountability (and vice versa), and to develop the selection mechanism that comes closest to achieving it. This point is not new, although it is often overlooked. In fact, it has been at the heart of several fundamental

debates over how judges should be selected in the American states. Three broad forms of appointing judges and three broad types of judicial election are employed in the American states today. Each of these different procedures emerged as parts of waves of reforms intended to improve the perceived independence-versus-accountability balance. Each was also later superseded by a new procedure, as voters learned the painful but inescapable lesson that to make judges more accountable is also to make them less independent.

In what follows, I will provide a summary of the history of judicial selection in the American states. By understanding how we got to where we are today, we can better evaluate the alternatives that face us and better determine what will get us closest to where we want to be on the independence-versus-accountability balance. I will end the article by discussing the three principal lessons I see for current debate.

The History of Judicial Selection in the States[1]

The methods used to select state judges today developed in a series of waves. Between 1789 and 1847, all thirteen of the original states and all of the next sixteen states to join the Union enacted either legislative or gubernatorial appointment of judges. Between 1847 and 1910, twenty of the twenty-nine then-existing states switched to partisan judicial elections, and partisan judicial elections were adopted by the next seventeen states to join the Union. Between 1910 and 1958, seventeen of forty-six existing states switched to, and one of the two new states to join the Union adopted, nonpartisan judicial elections. Finally, between 1958 and 2010, twenty-three of the forty-eight then-existing states switched to the merit plan, and the two new states (Alaska and Hawaii) both chose to employ the merit plan.[2]

[1] This section draws heavily on my earlier work in F. Andrew Hanssen, "Learning about Judicial Independence: Institutional Change in the State Courts." *Journal of Legal Studies* 33, 2004, pp. 431–73. For more specific citations and a detailed bibliography, see that article.

[2] In addition, several states switched from partisan to nonpartisan judicial elections during this last wave.

What explains this pattern? I will argue that each new procedure was an attempt to correct perceived defects in the previous procedure, which were felt to have failed to balance adequately the desire for judicial independence with the desire for judicial accountability.

Wave 1: Legislative and Gubernatorial Appointment of Judges, 1790–1850

The fact that colonial judges had been appointed by, and were answerable to, the British Crown was a source of great anger to early Americans and considered a grave defect to be corrected when the judicial institutions of the newly constituted states were being designed. Although the nascent Americans were somewhat uncertain about the role state courts would play, there was nonetheless a strong consensus that the judges should be answerable to the citizenry and not to some distant ruler. To ensure this, the responsibility for appointing judges was delegated to elected representatives, particularly those in state legislatures. Colonial legislatures had been the heroes of the Revolution, and it was taken for granted that elected legislators would be faithful agents of the general public. Thus, making judges accountable to elected representatives would ensure accountability to the general public. In six of the original thirteen states, the legislatures appointed judges directly; in the other seven, legislatures shared the appointment process with governors (governors typically appointed, while legislatures confirmed). Furthermore, most state judges did not sit on the bench for fixed terms, but rather served during "good behavior," giving elected officials substantial discretion over how long a given judge remained on the bench. The impeachment of state judges—particularly those from the rival party—was a common occurrence.

These new procedures did indeed make state judges accountable to sitting politicians, but sitting politicians themselves proved to be less than fully accountable to the general public. As a number of state governments became embroiled in financial scandals, often involving infrastructure projects, a consensus emerged that a check on legislative actions was needed to ensure conformance with constitutional and statutory mandates and to punish corruption. The state courts were the logical (indeed, the only) candidate

to play that role. But they could only do so if they were made more independent of elected politicians. Thus, a procedure was sought that would render state judges both more independent of sitting officials and more accountable to the general public. The procedure that was devised was the partisan election of state judges.

Wave 2: Partisan Judicial Election, 1850–1910

Expecting partisan election to increase the political independence of state judges may seem odd today, but it was consonant with a general faith in elections as a disciplining device that animated the movement for Jacksonian democracy. Elections, it was believed, would provide judges with a base of power necessary to stand up to pressure from elected officials in the other branches. With the formal backing of the voters, judges, insulated from the partisan forces that elsewhere distorted policy making, could apply themselves to interpreting the law. Various other devices were employed to enhance this independence. Judicial elections were to be staggered to ensure that no sudden burst of partisan fervor would result in single-party control of the courts, and were to be held within judicial districts (or circuits) with the expressed intention of limiting the control that could be exercised by party leaders at the state level. Fixed terms (averaging nearly ten years, much longer than the terms served by legislators) replaced the "service during good behavior" standard, which had given legislators so much discretion over judges' careers.

In short, reformers would make judges independent of sitting politicians (and of partisan forces broadly) by providing them with a power base of their own: "the people." A delegate to the state constitutional convention in Ohio promised that judicial elections would bring about "swifter justice . . . greater economy. . . and a judiciary accountable to the people".[3]

[3] Hall, Kermit L. 1983. "The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860." *Historian* 45: 337–54, see p.344.

The new procedure proved as disappointing as the old. Partisan elected judges were no more accountable to the general public than had been appointed judges, and they were rendered even more responsive to partisan forces (that is to say, less independent). As public disgust with party machines and special interests grew, pressure mounted for a new round of reform. Calls resounded for a better means of selecting state judges: a means that would make judges independent of the partisan forces rampant in policy making, yet still accountable to the broader citizenry. A progressive remedy captured the fancy of reformers: nonpartisan elections.

Wave 3: Nonpartisan Judicial Elections, 1910–60

As partisan elections of all kinds (not just judicial elections) fell into disrepute, a push developed for finding ways to promote policy making by experts insulated from the hurly-burly of political competition. The emergent Progressive movement emphasized the need for scientific and rational policy management. Progressive reforms included registration requirements, the Australian ballot (which allowed ticket splitting), direct party primaries (rather than choosing candidates in smoke-filled rooms), and other devices intended to weaken party machines. As Richard Hofstadter, the famous historian of American politics, writes, Progressives "expected that the [neutral] state, dealing out evenhanded justice, would meet the gravest complaints. Industrial society was to be humanized through the law."[4]

Among the Progressive Era reforms were nonpartisan elections, which were soon applied to the selection of state judges. Partisan elections had rendered state judges both susceptible to political influence and unresponsive to the general public. Nonpartisan elections, by limiting the influence of party machines, would do the reverse.

Once again, the result disappointed. The lack of partisan labels appeared to check party influence only mildly, while reducing the already-meager information available to voters about judicial candidates.

[4] Hofstadter, Richard. 1955. *The Age of Reform: From Bryan to Roosevelt.* New York: Vintage Books, see p.248.

Faith in impartial rule by supposed experts was waning in any case with the rise of the administrative state. The government was increasingly perceived as remote and unresponsive—and overly powerful. The need for a check on policy makers and their unaccountable administrative agencies appeared more urgent than ever, and nonpartisan elections were not doing the trick. Calls for reform again resounded, and an entirely new procedure was devised: the merit plan, sometimes called the Missouri Plan, after the state that first put it into effect.

Wave 4: The Merit Plan, 1960–Present

In contrast to the previous wave of reforms (which were each inspired by broader social movements), the merit plan was a de novo procedure, devised specifically and uniquely for the selection of state judges. Its origin was a 1906 talk given by Roscoe Pound, in which he called for reforms to limit the political influences on state judges.[5] Several years later, Pound helped found the American Judicature Society, which took as its first task the design of a new means for selecting state judges. The merit plan typically has three elements: (1) the nomination of candidates (usually three) by a nonpartisan commission consisting of lawyers (appointed by the state bar) and nonlawyers (appointed by the governor), (2) the appointment of one candidate from that list by an elected official (usually the governor), and (3) uncontested reelection on a yes-or-no ballot—a retention election—at the end of a judge's term.

Today, the merit plan is the single most common judicial-selection procedure used for high court justices in the American states, and there is widespread agreement that it is the procedure that best protects judges from political influence. But (the other side of the coin) it is also criticized on the grounds that merit-plan judges need not pay much attention to the voters. For example, as legal historian Alan G.

[5] The talk was titled "The Causes of Popular Dissatisfaction with the Administration of Justice". For a reprint, see Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," *Journal of the American Judicature Society* 46, 1962, p.55.

Tarr writes of unopposed retention elections, "The lack of information virtually guarantees that judges will be returned."[6] That is the trade-off in a nutshell: merit-plan judges are more independent, and are therefore less accountable.

Three Lessons for Today's Debates

Thus, the history of judicial selection has been a long but ultimately futile search for a judicial-selection method that will make state judges both more independent of political influence and more accountable to the general public. From that history, I will draw three broad lessons.

Lesson 1: A more independent judge is a less accountable judge; a more accountable judge is a less independent judge.

A recognition of this trade-off should be the starting point for any debate regarding judicial selection in the United States. A procedure that makes a judge accountable to the general public (such as partisan elections) will also make the judge accountable to other forces (elected politicians, political parties, special interests), while a procedure that makes a judge more independent of those other forces (such as a nonpartisan nominating committee) is also likely to make the judge less accountable to the general public. Finding the right balance between accountability and independence is bound to be difficult because there are not many ways of rendering judges accountable to the general public (usually elections), while there are quite a few means by which political influence may be brought to bear on elections (campaign contributions, advertisements, and so forth).

Nonetheless, much of the history of judicial selection in the state courts has been the somewhat-chimerical pursuit of judges who are both independent and accountable in some absolute sense. A more effective approach would be to (1) consider carefully to whom one wants to make judges accountable (the

[6] Alan G. Tarr, *Judicial Process and Judicial Policymaking* (St. Paul, MN: West Publishing, 1994), see p.73.

general public, say) and from whom one wants judges to be independent (a special interest group, say), and (2) determine how much less accountability one is willing to accept in order to make judges more independent, and vice versa. The answer may vary with the type of judge. Perhaps a traffic court judge should face procedures that render him very accountable because the loss from a lack of independence is determined to be relatively small. By contrast, perhaps a high court justice, whose responsibilities include reviewing newly minted laws and policy for conformance with state constitutions, should face procedures that render her very independent, because freedom from the influence of politically powerful actors is deemed sufficiently important to be worth sacrificing a substantial amount of the judge's accountability to the general public. But the question "How much more independence for how much less accountability?" and vice versa should be at the heart of every exploration of alternative selection procedures.

Lesson 2: "The public" is not a very good monitor of judicial behavior, while special interests usually are.

For the average person, becoming informed about all of a judge's decisions would take a lot of time and effort. This information cost is an important reason why election procedures designed to make state judges accountable to the general public have principally made them less independent of politically powerful actors (politicians, special interests, political parties) . The benefit to the typical member of the general public of becoming fully informed is likely to be small: most people do not litigate, or see issues they care about litigated, very often, and even if an informed vote is cast, it is but one among many and unlikely to affect the final outcome. As a result, most people do not bother to become very informed; they are "rationally ignorant."[7] By contrast, the benefit to a particular entity (a firm or a special interest group, for instance) that litigates frequently or for very high stakes may be very large, so that becoming informed is worth the cost; these entities also typically have substantial resources to bring to bear. An informed entity

[7] Anthony Downs, *An Economic Theory of Democracy.* (New York: Harper, 1957).

will therefore vote or contribute to a judge based on the judge's decisions in a manner that the uninformed general public will not, and a judge has more incentive to pay attention to the informed entity, accordingly.

This phenomenon is not unique to elected judges; it extends to all elected officials, and helps explain the quantity of special interest legislation passed by legislative bodies (including Congress). Not all elected judges succumb, of course, but those that resist face steeper odds of being selected in the first places, or of retaining office once they are selected (because they will receive fewer contributions and face more vigorous campaigns to oust them).

In this context, it is worth giving some thought to retention elections. Retention elections are often criticized on the grounds that they provide voters with very little information and that sitting judges rarely lose. But that is of course the intention: the same features that make these judges less accountable to the public also make them more independent of partisan forces and special interests generally. Furthermore, as just discussed, because of rational ignorance even partisan elections do not ensure judges who are very accountable to the general public.

Nonetheless, retention elections can occasionally serve as important disciplinary devices. Most of the time, judges subject to retention elections do little to attract public attention, and are reelected with ease. But if a judge strays too far from what the public considers acceptable behavior, voters *will* pay attention and can respond. There are at least two well-known instances of voters using retention elections to remove high court justices from the bench. The first occurred in the mid-1980s, when the California Supreme Court, led by Chief Justice Rose Bird, refused to allow the death penalty, despite the fact that voters had expressly approved it in a referendum. The second occurred in Iowa in 2010, when the state's highest court ruled gay marriage a right under the state constitution before voters were willing to sanction it. One thing that most voters agree upon is that judges should not be policy makers, and the actions of each of these courts aroused substantial controversy. As a result, both sets of offending justices were voted

out in unopposed retention elections, to be replaced by new justices who carried out their duties in a manner more in accord with voter sentiments.

Thus, if the goal is not to make judges answerable for their each and every decision (which would certainly open them to the influence of a variety of political actors), but rather to reserve for the public an ultimate veto to be exercised when courts engage in policy making of the sort and to the extent that voters deem inappropriate, the retention election may work very well.

Lesson 3: Consider the initial selection and subsequent retention stages separately because the desired independence-versus-accountability balance may be different at each stage.

The level of accountability or independence desired when choosing initially to place Judge X on the bench may be different from the level desired when deciding whether Judge X should remain on the bench at the end of his term. For example, US Supreme Court justices are initially selected in a highly partisan appointment process. But once a justice takes the bench, she is very independent because she serves for life. In other words, the selection process emphasizes accountability, while the retention process emphasizes independence.

There is no reason up front to expect that the desired balance of independence and accountability will be the same for initial selection as for subsequent retention. Yet states often use the same procedures anyway. More careful consideration of how much independence one is willing to exchange for how much accountability at each stage, and more mixing and matching of procedures, might produce better results. For example, if a state wishes to involve the public in the initial selection but insulate judges from political influence thereafter, it might choose to employ partisan elections for initial selection and retention elections (or even life terms) subsequently.[8] If a state instead wishes to insulate candidates during the initial selection process but make judges on the bench accountable to the general public (recognizing this will

[8] For example, Illinois, New Mexico, and Pennsylvania all select high court justices initially through partisan elections but retain them through retention elections.

reduce their independence as well), it might employ the merit plan's nonpartisan nominating commission initially and partisan elections subsequently. The options extend to nonpartisan elections and other means of appointment as well.

Conclusion

The history of judicial selection in the state courts has been, in essence, a long search for a procedure that will make judges both independent (of partisan forces) and accountable (to the general public). In fact, as this issue brief has argued, the two goals are inimical. This is because the procedures that render a judge more accountable to the public render the same judge less independent of partisan forces. The procedures that render a judge more independent of partisan forces render that judge less accountable to the public. Reformers would do better if they began by acknowledging this trade-off, and then putting it at the center of their efforts to design selection procedures that are better suited to their state's needs. They should start by considering how much independence they are willing to give up for a little more accountability, and vice versa. They should also consider whether the answer to the question varies with the type or level of judge, and whether it differs for the initial selection process and the subsequent retention process. By proceeding in this manner, reformers are more likely to produce a system that works as they hope, rather than embracing a system that is bound to disappoint, as many have in the past.

Further Reading

Anthony Downs, *An Economic Theory of Democracy* (New York: Harper, 1957).

F. Andrew Hanssen, "Learning about Judicial Independence: Institutional Change in the State Courts," *Journal of Legal Studies* 33, 2004, pp.431–73.

Kermit L. Hall, "The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860," *Historian* 45, 1983, pp.337–54.

Richard Hofstadter, *The Age of Reform: From Bryan to Roosevelt.* (New York: Vintage Books, 1955).

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