Discovering the Best Method of Judicial Selection: How Should State Supreme Court Justices be Placed onto the Bench?

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Abstract

As the American Judiciary becomes a more active vehicle for progressing policy and partisanship, this paper examines what method of judicial selection we ought to prefer. That is, how we should prefer that state supreme court justices get to the bench. To answer this question, I first analyze the empirical data surrounding each of the four main and general selection methods used across states today (partisan elections, nonpartisan elections, merit selection, and appointment) and identify what general trends exist. Once these trends have been established, I then move into a philosophical discussion that asks what trends we ought to prefer in a given selection method, and what traits we ought to avoid. The question ends up being one of whether we should advocate for an independent judiciary, or one accountable to public opinion. I advocate for the former and the most independent selection method: merit selection.

Part 1: Introduction

As the American Judiciary becomes a more active vehicle for progressing policy and partisanship, people are beginning to take a new-founded interest in the judicial processes of the United States. One of the big two-fold questions that constantly gets floated around is: who are these justices and how did they get onto the bench? From this people begin to ask: granted that these justices are making such influential decisions, do we want them to be hidden from the public eye, or should they be held accountable to it? I seek to answer this latter question at the state level, and deliver a prescription with regards to what method of judicial selection we ought to prefer in today's America.

Judicial selection is the process by which judges are placed onto the bench in their state's supreme court. Judicial selection methods vary across states, but they tend to follow one of four main structures: partisan elections, nonpartisan elections, merit selection, or appointment. In partisan elections, judicial candidates have designated party affiliations and run in general elections, which typically come with primaries prior to the general election. The 6 states that use partisan elections include: AL, IL, LA, NC, PA, and TX. Nonpartisan elections function in a similar fashion but the candidates do not have a designated party affiliation. The 15 states that use this method are: AR, GA, ID, KY, MI, MN, MS, MT, NV, ND, OH, OR, WA, WI, and WV. Appointments are typically made through gubernatorial appointment where a governor chooses a judge, though a couple of states use legislative appointment where the legislature votes on a judge. For our purposes, both forms of appointment will be lumped into a single category. When lumping these two categories together, the 12 states that use appointment are: CT, DE, HI,

ME, NH, NJ, NY, RI, SC, VA, and VT...

In this paper I am going to argue that merit selection is the best method of judicial selection for state courts in the current American system. That is to say, I will present the case for why in today's political landscape we should prefer that state judges get to the bench by means of merit selection rather than appointments or elections. My inquiry will not concern what the best method of judicial selection would be given a set of hypothetical circumstances different from those that exist today. Instead, I am aiming to make a prescription that would be delivered if someone asked me at this moment: given the current state of politics and U.S. institutions, if you had to choose a single method of judicial selection to be used going forward across various states courts, which method would you choose?

To reach this argument, I will begin by surveying recent empirical data surrounding judicial selection and the different methods of selection. I will find what trends exist between the different selection methods with regards to five main criteria: productivity (how much work a judge accomplishes in a given amount of time), quality (how good is the work these judges are producing), independence (how much of a role do strategic considerations and irrelevant influences play on a judge deciding a given case), perceptions of legitimacy (what selection methods do the people find more or less legitimate), and diversity (does any selection method favor or disfavor minority judges more than another). The empirics will give us confident results in terms of independence, perceptions of legitimacy, and diversity, to show that merit selection produces the most independent judges, perceptions of legitimacy suffer when judicial selection becomes too political, and no method particularly advantages or disadvantages minorities. Some issues will arise with the indicators of productivity and quality that prevent us from reaching confident conclusions about them and using them for extrapolation into a larger philosophical discussion.

Once these empirical trends are established, I will turn to a philosophical discussion that attaches normative judgements to these trends and argues that we ought to prefer an independent judiciary because it is the most likely to deliver us optimal outcomes and a healthy democracy. The former claim will rely on the idea that though there may be a truly right answer in a given case, there is a wide range of cases in which the right answer is either ambiguous or we are unable to track down the right answer. Thus, in such cases (which make up the bulk of the cases that supreme court justices deal with) we must rely on appealing to the decision-making processes that were used to form an opinion to indicate whether a judge is giving his most earnest efforts to uncover the right decision. This is to say that when rightness is tough to pin down (as it is for just about every case that hits a state supreme court justice's desk), all we can rely on is the most sound and rational line of reasoning. Such a decision-making process will be an independent one guided by rationality and free from strategic considerations. The latter claim about a healthy democracy will rely on the idea that to be truly democratic, a nation must account for the potential issues that can arise with pure majoritarianism and have an institution free from majoritarian influence where the minority can make his case on a level playing field. I will also mention that though elections can have some beneficial effect on democracy in terms of legitimacy, their politically charged nature tends to decrease aggregate legitimacy. From this I will conclude that the best method of judicial selection is merit selection because it is the most independent and least political one.

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