

Testimony of Professor Chris W. Bonneau to the Kansas House of Representatives Judiciary Committee—March 13, 2025

My name is Chris Bonneau, and I am a Professor of Political Science at the University of Pittsburgh, where I have been since 2002. I received my PhD in Political Science at Michigan State University, and the focus of my scholarly career has been on the election of judges. To date, I have co-authored 2 books, co-edited 1 book, and published 25 peer-reviewed articles and book chapters on the topic of judicial elections. I have testified about these elections before bar associations, state legislative committees, and as an expert witness in federal court.

My testimony today is focused on certain facts regarding the election of judges. My research, as well as the research of other scholars, has found the following to be empirically true:

- Campaign spending allows candidates to provide voters with information. This information is then used by voters to help them decide in the race. In this way, campaign spending benefits voters by allowing candidates to run a vigorous campaign and make their case to the voter.
- challengers receive more votes for each additional dollar they spend than incumbents do. This is because the incumbent is already well-known, has a track record, etc. There is only so much new information the incumbent can provide voters. Challengers, on the other hand, are lesser known and thus can use their campaign spending to inform voters about their qualifications, views, and so forth. Campaign spending for challengers, then, is more efficacious in terms of attracting votes than incumbent spending. So, while incumbents, on average, spend more money than challengers, challengers receive higher returns on their spending than incumbents.
- There is no systematic evidence that judges are “for sale.” While there is certainly a correlation between how judges vote and the preferences of their contributors (just as there is for legislators and contributors), the data fall far short from establishing any kind of causal relationship.
- Political scientist James Gibson has found “candidates for judicial office can engage in policy debates with their opponents without undermining the legitimacy of courts and judges.” He additionally finds that, “When attack ads are used in judicial campaigns, few consequences for institutional legitimacy materialize.” Thus, there does not appear to be any legitimacy penalty for courts that utilize judicial elections. Indeed, he has even found that elections can *enhance* the legitimacy of courts.

- The evidence that judges consider their likelihood of reelection when making judicial decisions is persuasive. However, what this means, exactly, is far from clear. One could conclude that judges are not following the law because they are afraid of losing their jobs, but one could also argue that the evidence shows that the electorate is forcing the judges to do their jobs (instead of following their own personal predilections) or risk losing an election. For example, consider the issue of sentencing. Judges have discretion in sentencing. This means there is a range of punishment that the state legislature has determined is appropriate for a crime. So, whatever decision a judge makes within that range is permissible. If the public desires a judge to be more punitive than she would otherwise want to be, there is nothing wrong with that from a legal or constitutional standpoint. Likewise with the death penalty: the Supreme Court has determined that the death penalty is a constitutional form of punishment for some crimes. If a judge in a state with the death penalty categorically refuses to use it, then that judge is not following the law; that judge is substituting her own policy preferences for the constitutionally permissible laws of the state. If an election makes that judge more likely to uphold a death sentence, then the election is forcing the judge to do her job and follow the law. The general point is that while there is evidence that judges behave differently in the face of elections, it is unclear what this change in behavior means or if it is problematic.
- More voters participate in elections (partisan and nonpartisan) for judges compared to retention elections.
- I have found that a challenger who has prior judicial experience performs about 4.7% better against an incumbent than a challenger without such experience. This is substantively important because “given that the average incumbent’s vote is only 56.8 percent during the time frame of our study, the challenger’s relative experience or inexperience could well mean the difference between an incumbent’s reelection and defeat in many of these contests.” Thus, it appears that voters can recognize incumbents who are ideological outliers (at least in partisan elections) and distinguish between higher qualified alternatives to incumbents and lower qualified alternatives. In the aggregate, then, voters appear to have enough information to make an informed decision in the election.
- Regarding judicial quality, Choi, Gulati, and Posner found that, “elected judges are more productive. And although appointed judges write opinions that are cited more often, the difference is small and outweighed by the productivity difference. In other words, in a given time period, the product of the number of opinions authored and citations-per-opinion is higher for elected judges than for appointed judges.”
- The bulk of the evidence suggests that there is no relationship between diversity on the bench and the method of selection.

I also want to highlight some issues with utilizing retention elections:

- Fitzpatrick has found, “merit systems select judiciaries with ideological preferences to the left of those that would have been selected by the public or its elected representatives.” This leads one to be skeptical that “merit selection *removes* politics from judicial selection. Rather, merit selection may simply *move* the politics of judicial selection into closer alignment with the ideological preferences of the bar.”
- Hall found that “retention elections are not impervious to partisan pressures, contrary to the claims of reformers.” Interestingly, as the election grows closer, the behavior of these judges’ changes: “In states where citizen preferences are conservative, judges’ decisions become more pro-government as retention elections draw closer, but in states where citizens are more liberal, judges’ decisions become more pro-defendant in the face of retention.” When it comes to keeping their jobs, these judges are responsive to the public, just like judges in partisan and nonpartisan states.
- Aspin reports that the average percentage of the vote received by candidates standing for retention in 2010 was 69.5%; this is the lowest percentage of “yes” votes in the period 1964-2010. That is, since 1964, candidates standing for retention have received, on average, more than 70% of the vote.
- It is also worth briefly discussing what happens in the event an incumbent is challenged in a retention election. Often, these challenges emerge late in the election season. This makes it very difficult for the incumbent who is being challenged to respond effectively. Since most candidates are not anticipating opposition, they do not raise money, so if a challenge emerges late in the process, they are defenseless. Moreover, it is very difficult to campaign against nobody, which is what an incumbent must do in a retention election. If an incumbent has an opponent, he can contrast his record with that of the opponent. But who is the opponent in a retention election? There is none; the opponent is a nameless, faceless abstraction. The incumbent is severely constrained in the kind of campaign he can run. Finally, retention elections deprive the voter of a meaningful choice. The voters might not like Justice A, but they have no idea who her replacement would be if they voted her out of office. Perhaps Justice A is preferable to potential Justice B, but not potential Justice C. How should the voter vote? These elections deprive the electorate of meaningful choice.

Thank you for your time today and I look forward to your questions.

For Additional Information

Andersen, Seth. 2004. "Examining the Decline in Support for Merit Selection in the States."

Albany Law Review 67 (Spring): 793-802.

Aspin, Larry. 2011. "The 2010 Judicial Retention Elections in Perspective: Continuity and

Change from 1964 to 2010." *Judicature* 94 (March-April): 218-232.

Benesh, Sara C. 2006. "Understanding Public Confidence in American Courts." *Journal of*

Politics 68 (August): 697-707.

Bonneau, Chris W. 2005. "What Price Justice(s)? Understanding Campaign Spending in

State Supreme Court Elections." *State Politics and Policy Quarterly* 5 (Spring): 107-125.

Bonneau, Chris W. 2007a. "The Effects of Campaign Spending in State Supreme Court

Elections." *Political Research Quarterly* 60 (September): 489-499.

Bonneau, Chris W. 2007b. "Campaign Fundraising in State Supreme Court Elections."

Social Science Quarterly 88 (March): 68-85.

Bonneau, Chris W. and Damon Cann. 2011. "Campaign Spending, Diminishing Marginal

Returns, and Campaign Finance Restrictions in State Supreme Court Elections." *Journal of Politics* 73 (October): 1267-1280.

Bonneau, Chris W. and Damon Cann. 2015. "Party Identification and Vote Choice in Partisan

and Nonpartisan Judicial Elections." *Political Behavior* 37: 43-66.

Bonneau, Chris W. and Damon M. Cann. 2015. *Voters' Verdicts: Citizens, Campaigns, and*

Institutions in State Supreme Court Elections. Charlottesville, VA: University of Virginia Press

- Bonneau, Chris W. and Eric Loepp. 2014. "Getting Things Straight: The Effects of Ballot Design and Electoral Structure on Voter Participation." *Electoral Studies* 34 (June): 119-130.
- Bonneau, Chris W. and Melinda Gann Hall. 2009. *In Defense of Judicial Elections*. New York: Routledge.
- Hall, Melinda Gann and Chris W. Bonneau. 2013. "Attack Advertising, the White Decision, and Voter Participation in State Supreme Court Elections." *Political Research Quarterly* 66 (March): 115-126.
- Bonneau, Chris W. and Melinda Gann Hall, editors. 2016. *Judicial Elections in the 21st Century*. New York: Routledge.
- Brace, Paul and Brent D. Boyea. 2008. "State Public Opinion, the Death Penalty, and the Practice of Electing Judges." *American Journal of Political Science* 52 (April): 360-372.
- Cann, Damon M. 2002. "Campaign Contributions and Judicial Behavior." *American Review of Politics* 23 (Fall): 261-274.
- Cann, Damon. 2007. "Justice for Sale? Campaign Contributions and Judicial Decisionmaking." *State Politics and Policy Quarterly* 7 (Fall): 281-297.
- Cann, Damon M. and Jeff Yates. 2008. "Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for State Courts." *American Politics Research* 36 (March): 297-329.

- Choi, Stephen J., G. Mitu Gulati, and Eric A. Posner. 2009. "Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges." *Duke Law Journal* 58 (April): 1313-1381.
- Choi, Stephen J., G. Mitu Gulati, and Eric A. Posner. 2010. "Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary." *Journal of Law, Economics, and Organization* 26 (August): 290-336.
- Dimino, Michael R. 2004. "The Futile Quest for a System of Judicial 'Merit' Selection." *Albany Law Review* 67 (Spring): 803-819.
- Dimino, Michael R., Sr. 2005. "The Worst Way of Selecting Judges—Except All the Others That Have Been Tried." *Northern Kentucky Law Review* 32 (2): 267-304.
- Fitzpatrick, Brian T. 2009. "The Politics of Merit Selection." *Vanderbilt Law Review* 74 (Summer): 675-709.
- Geyh, Charles Gardner. 2003. "Why Judicial Elections Stink." *Ohio State Law Journal* 64 (1): 43-79.
- Gibson, James L. 2008a. "Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and 'New-Style' Judicial Campaigns." *American Political Science Review* 102 (February): 59-75.
- Gibson, James L. 2008b. "Campaigning for the Bench: The Corrosive Effects of Campaign Speech?" *Law and Society Review* 42 (December): 899-927.
- Gibson, James L. 2009. "'New-Style' Judicial Campaigns and the Legitimacy of State High Courts." *Journal of Politics* 71 (October): 1285-1304.

- Gibson, James L., Jeffrey A. Gottfried, Michael X. Delli Carpini, and Kathleen Hall Jamieson. 2011. "The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-based Experiment." *Political Research Quarterly* 64 (September): 545-558.
- Gordon, Sanford C. and Gregory A. Huber. 2007. "The Effect of Electoral Competitiveness on Incumbent Behavior." *Quarterly Journal of Political Science* 2 (May): 107-138.
- Hall, Melinda Gann. 1992. "Electoral Politics and Strategic Voting in State Supreme Courts." *Journal of Politics* 54 (May): 427-446.
- Hall, Melinda Gann. 1995. "Justices as Representatives: Elections and Judicial Politics in the American States." *American Politics Quarterly* 23 (October): 485-503.
- Hall, Melinda Gann. 2001. "State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform." *American Political Science Review* 95 (June): 315-330.
- Hall, Melinda Gann. 2007. "Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives." *Journal of Politics* 69 (November): 1147-1159.
- Hall, Melinda Gann and Chris W. Bonneau. 2006. "Does Quality Matter? Challengers in State Supreme Court Elections." *American Journal of Political Science* 50 (January): 20-33.
- Hall, Melinda Gann and Chris W. Bonneau. 2008. "Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections." *American Journal of Political Science* 52 (July): 457-470.

Huber, Gregory A. and Sanford C. Gordon. 2004. "Accountability and Coercion: Is Justice Blind when It Runs for Office?" *American Journal of Political Science* 48 (April): 247-263.

Klein, David and Lawrence Baum. 2001. "Ballot Information and Voting Decisions in Judicial Elections." *Political Research Quarterly* 54 (December): 709-728.

Kritzer, Herbert M. 2011. "Competitiveness in State Supreme Court Elections, 1946-2009." *Journal of Empirical Legal Studies* 8 (June): 237-259.

Rock, Emily and Lawrence Baum. 2010. "The Impact of High-Visibility Contests for U.S. State Court Judgeships: Partisan Voting in Nonpartisan Elections." *State Politics and Policy Quarterly* 10 (Winter): 368-396.

Savchak, Elisha Carol and A.J. Barghothi. 2007. "The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking." *State Politics and Policy Quarterly* 7 (Winter): 394-415.