

“Responsive versus Independent Justice: Public Opinion and Judicial Selection”

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Abstract: Many states continue to use candidate elections to place judges on their highest courts; yet, merit selection with retention elections has been proposed as a reform that, according to some, has substantial public support. Using a combination of survey experiments and survey data we show that, although the judicial community may have negative views on the value of elections as a means of choosing judges, we are able to demonstrate that question-wording effects are sizable when it comes to methods of judicial selection, complicating claims about the public’s supposed-preference for merit systems over traditional candidate elections. Specifically, our research reveals that people understand that different methods facilitate distinct institutional qualities, i.e., our respondents associated appointed judges with an independent judiciary, and elected judges with a responsive judiciary. Further, when elections are framed in partisan terms, respondents were more likely to view a merit system as facilitating independence and responsiveness. And while proposals for merit selection were viewed somewhat favorably, support dissipated when this was framed as a move away from the status quo of electing judges. Prospects for reforming judicial selection may depend on how much voters – who are accustomed to a delegate view of representation – value judicial independence over responsiveness. Our results suggest that preferences for a responsive court may trump attempts to promote judicial independence via merit selection.

The United States Supreme Court ruled in June 2009 that large contributions in state supreme court races can create an unconstitutional “probability of bias” that may force some elected justices to recuse themselves. The ruling in *Caperton v. Massey* has implications for how state judges are selected, as it gives new leverage to critics of judicial elections. The *Caperton* case involved West Virginia Supreme Court of Appeals Justice Brent Benjamin. Benjamin refused to recuse himself in the appeal of a jury decision that directed Massey Energy to pay coal company owner Hugh Caperton \$50 million in damages. Massey's chief operating officer spent \$3 million to elect Benjamin, then Benjamin cast a decisive vote to overturn the verdict. The U.S. Supreme Court ruled that, in light of the election contributions, Caperton was denied due process.

The West Virginia case is but one of the more dramatic instances that have led some to question the value of using candidate elections as a means to select judges. Doubts about the value of judicial elections are expressed by members of the judicial community, legal scholars, the American Bar Association and the American Judicature Society (see Geyh 2003). The ABA, for example, filed an *Amicus* brief in *Caperton* that concluded, “Judicial elections and judicial campaign contributions in the normal course do not violate due process. However, implicit ... is that, at some contribution level, fundamental fairness concerns of actual or apparent bias are triggered” (ABA Amicus Brief in *Caperton v. Massey* 08-22: 15).<sup>1</sup> Advocates of reforming, or abandoning, judicial elections also note widespread public cynicism about this method of selecting judges, and some polls reveal substantial public support for a merit system of appointment with retention elections.<sup>2</sup>

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<sup>1</sup> The ABA brief may be found at [http://www.abanet.org/judind/pdf/caperton\\_brief.pdf](http://www.abanet.org/judind/pdf/caperton_brief.pdf)

<sup>2</sup> A 2002 poll for the advocacy group Justice at Stake reported 71% of respondents supported an appointment / retention method. A 2008 Washington state poll for the American Judicature Society (Brody and Lovrich 2009)

This paper examines public opinion towards judicial elections and demonstrates that public support for adopting a merit system is less robust than critics have asserted. Broadly speaking, we aim to move the study of the public's thinking about institutions away from the most familiar territory, i.e., descriptions of how people reason about political institutions generally flow largely, if not exclusively, from research on how they reason about legislative representation. Here we are interested in how generalizable this sort of thinking is, and how (or if) such attitudes affect the preferences people have for the way *judicial* institutions should be structured. Using a combination of survey experiments and other public opinion data we show that, although the judicial community may have negative views on the value of elections as a means of choosing judges, citizens have somewhat different views. Furthermore, we are able to demonstrate that question-wording effects are sizable when we seek to assess public opinion about methods of judicial selection. We begin with a discussion of public attitudes towards democratic institutions broadly.

### **Attitudes Towards Democratic Institutions: Voters, Legislatures, and Courts**

In general, American voters place tremendous value on “having a say” in politics. Numerous surveys show that people feel government does not “pay attention” to them, that government is responsive to “special interests” rather than “people like me,” and that many want “more say” in politics (for a reviews see Norris 1999; Nye et al 1997; Craig 1996). Yet there is ample evidence to suggest that disaffection does not correlate with interest in taking active and regular advantage of opportunities to participate directly (Hibbing and Theiss-Morse 2002). Put differently, many people are often frustrated by the performance of their political institutions,

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found 69% viewed an appointment / retention method positively, compared to just 29% positive for candidate elections.

and want them to somehow function “better.” But they are not eager to tackle political pursuits as a regular part of their daily activities. They value the *potential* to “have a say,” so that they might affect the political process if it is moving in a direction of which they do not approve; most of the time however they prefer to leave the job in the hands of others (Hibbing and Theiss-Morse, 2002; Dalton et al 2001).

Relatedly, when evaluating legislative institutions people seem to value elements of both the trustee (independence) and the delegate (responsiveness) models of representation.<sup>3</sup> Yet, where voters land on evaluating this mix of delegate and trustee roles is not well understood and it is conceivable that, depending on the issue and context, they may prefer their representatives play either role. The lesson from Burke’s own experience<sup>4</sup> – eloquent champion of the trustee model though he was – is that voters quite often prefer delegates and thus will value some institutional designs, such as frequent elections, limits on tenure of representatives (Karp 1995), and mechanisms of direct democracy (Dalton et al 2001), that promote a delegate model of representation.

It is not clear how this delegate model of representation may apply to public perception of judicial institutions. Clearly, people see the judiciary differently than executive and legislative institutions. Civics curricula and popular discourse instill the value that the judiciary, more than other branches of government, should be “independent” from “politics.” Voters may also have limited information about what courts do.<sup>5</sup> In contrast to what they may hear about a legislature, people generally lack exposure to news about a judiciary's inner-workings and dirty laundry.

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<sup>3</sup> One of our surveys, for example, found that 85% of respondents agreed that “representatives should do what is best for everyone and not just their district.” The same survey also found that 60% agreed that “representatives should do what their district wants them to do even if they think it is a bad idea.”

<sup>4</sup> Burke’s phrase in 1774: “Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion” is still one of the most eloquent defenses of the trustee principle. In 1780, however, Burke failed to be re-elected.

<sup>5</sup> Surveys commonly find that voters admit they lack information about what courts and judges do, and that they lack information when considering judicial elections. See Greenberg et al 2001; Brody and Lovrich 2009).

This may increase the judiciary's standing in public assessments of the institution (Hibbing and Thesis-Morse 1995). As a result, people may not prioritize institutional arrangements that facilitate judicial responsiveness.

To be more specific, state supreme courts are much less visible than the United States Supreme Court, but are occasionally focal points for public attention, particularly when decisions affect issues of social and moral questions.<sup>6</sup> Interest groups (Goldberg 2007) and parties (Streb 2007) are regularly active in partisan and non-partisan judicial elections, and campaign spending in these races escalated dramatically after 2000 (Streb 2007). High profile judicial contests generate media coverage (Schaffner and Diascro 2007), with almost half of all stories discussing substantive issues and ideology and even more focusing on the horse-race aspects of the contest (Baum and Klein 2007). By some standards, judicial contests are more competitive than US House races (Bonneau 2003). Thus, even if people are not aware of high profile examples – as in *Caperton v. Massey* – where judicial integrity may be compromised, public expectations about courts may be particularly politicized given the contemporary context of judicial elections.

In sum, although courts are fundamentally different from legislatures, we assume that there are public expectations that courts, like legislatures, be at least somewhat responsive to public opinion. The question is, what does this mean in terms of people's preferences regarding judicial selection? This is a query with substantial practical relevance. During the latter part of the 20th century 15 states changed their selection method from candidate elections to merit appointment with retention elections (Hanssen 2004).<sup>7</sup> The American Bar Association, American Judicature Society, and others advocate merit appointment plans (with retention

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<sup>6</sup> Prominent examples include decisions over abortion, gay marriage, the application of the death penalty, busing, and desegregation.

<sup>7</sup> Six others changed from gubernatorial appointment to appointments recommended by commissions (Hanssen 2004). High court judges in five states are still appointed by the legislature or governor without nominating commissions or retention elections.

election), if not outright appointment-confirmation arrangements, for the remaining 22 states that continue to use elections for the initial selection of judges on the state's highest court.<sup>8</sup> In a more abstract sense, knowing more about how citizens think about judicial selection methods can tell us something both about how citizens reason about the judicial branch and how they view democratic processes more generally.

### **Public Reasoning About Judicial Selection: What Role for Elections?**

A major critique of judicial elections is that they threaten the independence and impartiality of the judiciary, as was alleged in *Caperton*. Elections are designed to represent public preferences. Courts, by one set of standards, are expected to be insulated from such political pressure. Judicial elections require candidates to compete against each other in the public area, and, indirectly or directly, to promote themselves to the public. It is not clear how voters, particularly voters who already have the ability to elect judges, may view tradeoffs or differences associated with different judicial selection methods.

Indeed, we do not actually know if voters have the capacity to reason such that they associated one particular selection method with facilitating responsiveness or independence better than another method. Evidence of this would suggest that preferences for alterations to democratic institutions might have grounding in reasoning that reflects something other than (or more than) individual self-interest. It might also suggest that when proposals for changing judicial selection methods are placed on state ballots, voters may be able to translate their preferences for qualities they expect of the courts into specific institutional features they expect may produce a desired quality. In other words, if we find that people reason such that they expect a merit appointment / retention method to facilitate judicial independence better than

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<sup>8</sup> See statements by American Judicature Society, the American Bar Association, and Justice at Stake Campaign.

other selection methods, then we may expect people who value independence over responsiveness to support a change to a merit / retention selection method. Conversely, if people see connections between responsiveness and elected judges, we may expect those who prioritize responsiveness to oppose switching from elections to a merit system.

The analysis that follows focuses primarily on the first part of this process and examines whether citizens can make the connection between selection method and judicial responsiveness and independence. One problem in assessing citizen responses to these kinds of alternatives, of course, is that citizens often know relatively little about courts and selection methods. Moreover, the status quo institutional design may well influence judgments. It may be one thing to ask voters to approve a switch from a system of gubernatorial appointments without retention elections to a merit appointment / retention system but quite another thing to ask them to switch from non-partisan elections to a merit appointment / retention system. Put differently, the former case may be seen as adding an element of responsiveness to a judiciary that may be seen as operating independent of public opinion, while the latter case may be seen as deleting a feature that facilitates responsiveness, and increasing independence.

Given low levels of knowledge and the possible confounding of status quo positions it can sometimes be quite hard to interpret survey answers as meaningful opinions as opposed to just answers to questions that have been posed by a survey researcher. For this reason our empirical work examines both survey evidence and question wording experiments to assess opinion towards methods of judicial selection. In particular, in an experimental format we are able, by altering question wording, to test how opinions may shift either towards or away from the various possibilities in judicial selection.

## Question Wording Experiments

We begin with a four-group survey experiment conducted on 360 university undergraduate students in 2008. The experiment was designed such that respondents were asked to evaluate three distinct methods of selecting state court judges. In this experiment, all respondents were asked to read an identical summary to inform them that different states use different methods for selecting their judges. Appendix A displays the prompts given to the control group. Subjects were given descriptions of three methods, with the control conditions given as: 1) "judges are chosen by the governor on the advice of legal experts and serve until retirement;" 2) "judges are chosen by the governor on the advice of legal experts and then - every few years - an election is held where voters decide to retain the judge or not;" and, 3) "judges run for election, and then - every few years - an election is held where voters decide to retain the judge or not."<sup>9</sup> Respondents were then presented two questions, to which they had the option to select *just one* of the three methods (or "it doesn't matter"). They were asked: 1) which method is likely to "produce judges who are independent of political concerns?" and, 2) "which method is likely to produce judges who are responsive to community standards?"

Respondents were randomly assigned to either a control group that received descriptions of selection methods and the questions as listed above, or to one of three treatment groups. The first treatment group simply had the phrase "merit system" added to the description of the first selection method.<sup>10</sup> The second treatment group had the phrase "non-partisan contest" added to the description of candidate elections,<sup>11</sup> and the final treatment group had the phrase "Judges can

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<sup>9</sup> The word "retain" is used in both the second and third condition to isolate effects associated with "judges are chosen by governor" vs. "judges run for election."

<sup>10</sup> The second selection method described above is actually closer to a real-world merit appointment / retention model, but adding the "merit" prompt to the first condition allows us to better isolate the effects of labeling a process as one of "merit" as a cue.

<sup>11</sup> As follows, with the treatment in bold: Judges run for election in a **non-partisan contest** and then – every few years - a **non-partisan** election is held where voters decide to retain the judge or not

run in the election under a party label (Democrat, Republican or whatever)" added to the description of elections. The subjects were undergraduates from several different classes at a large, public university in California. Overall, these respondents were young (traditional university age), disproportionately liberal, and largely Democratic in their political affiliations. As residents of California, they lived in a state that uses an appointment/retention method for selecting judges for the state's highest court. We assume they had little knowledge of judicial politics in the state.

The cues we added to the descriptions of different selection method were designed to test how specific characteristics of judicial selection methods (an emphasis on "merit," the potential for non-partisan elections, and the possibility of partisan elections) affect how (and if) people see that these features make judges more or less responsive or independent. If people do link features of selection methods to expectations about how a judiciary might perform, we expect that they would associate the "merit system" prompt with selection methods that facilitate judicial independence, and the "partisan" election prompt with selection methods that facilitate responsiveness. Our expectations about the "non partisan" election prompt are less concrete. People may see "non-partisan elections" as something that is less politicized than just "elections" described generically, and thus associate "non-partisan" with a selection method that facilitates independence. Conversely, the "non-partisan" cue may trigger greater affect for elections generally, and thus be associated with methods that facilitate responsiveness.

## **Results**

How did cues prompting people to consider these aspects of judicial selection affect how they might reason about the relationship between selection methods and judicial behavior?

Results of these experiments are presented graphically - with responses from the "no cue" control group reflected in the first set of bars in Figure 1 and Figure 2. Figure 1 displays how different treatments affected reasoning about judicial independence and Figure 2 displays how the treatments affected reasoning about judicial responsiveness.

In each figure, the cluster of bars on the left side represents the distribution of opinions when no cues are added to the control conditions. The first bar (blue) in each cluster of bars represents support for the idea that gubernatorial appointment best facilitates independence (Figure 1) or responsiveness (Figure 2). The second (red) bar in each cluster reflects the level of support for the idea that the appointment with retention elections best facilitate either characteristic, and the third bar in each group (yellow) represents the level of support for the idea that elected judges are most likely to produce either characteristic. The final bar (green) in each group are the "it doesn't matter" responses.

Figure 1 about here

Responses in the "no cue" (control group) in Figure 1 reflect the distribution of opinions when the three selection methods were proposed without the additional prompts about how the selection method might operate. When the word "merit" was not used to describe a system of gubernatorial appointments, and the nature of election methods (for retention or candidate contests) was not described, respondents were divided evenly in how they assessed which method would "produce judges who are independent from political concerns." Without points of reference provided by the cues, 38% indicated they thought gubernatorial appointment "until retirement" would best produce independence, with 40% responding that elections would.

One notable point from Figure 1 is that under each treatment, respondents became more likely to view gubernatorial appointments as the method that produced judges who are

independent of politics. The second cluster of bars in Figure 1 illustrates that, when compared to the control group, this sentiment became stronger among people who were told the gubernatorial appointment method was called a "merit system." This simple cue was associated with an 8% increase in support for the idea that gubernatorial appointment until retirement facilitated an independent judiciary,<sup>12</sup> and a 14% ( $z = 1.8$ ,  $p = .07$  two-tail) drop in support for the idea that elections were the best method at producing judicial independence.

The final two sets of bars in Figure 1 display the effects that the "non partisan" and "partisan" election cues have, respectively, on how people see these selection methods as promoting an independent judiciary. Recall that descriptions given to the control group of the straight candidate election method simply mentioned "elections." When a "non-partisan contest" cue is added to the description of candidate elections, we find a 14% ( $z=1.8$   $p = .07$  two-tail) *decline* in support for the idea that candidate elections were associated with an independent judiciary. It may be that adding the "non-partisan contest" prompted people to be more likely to recognize that candidate elections were just elections could be politicized. Whatever the case, additional detail about election method corresponded with fewer respondents seeing elections as producing independence.

We see something similar, but more pronounced, in the last set of bars in Figure 1. When elections were described as being explicitly partisan, respondents were much less likely than the control group to see candidate elections as being best at promoting independent judges and more likely to see appointment as producing independence. When judicial elections were described in partisan terms, support (compared to the control group) for the idea that appointment best facilitates independence increased by 18% ( $z = 2.2$   $p = .03$  two-tail), with a corresponding 14%

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<sup>12</sup> We expect that we could have attached the merit cue to the description of the retention elections and produced a similar effect in support of that method.

decline ( $z = 2.5$ ,  $p = .01$  two-tail) in the proportion who saw elections as associated with independence. In short, the emphasis on "merit" and reference to partisan elections increased perceptions that an appointed judiciary would be more independent of political concerns.

Figure 2 about here

Figure 2 displays results of our second experiment, where the same cues were used to evaluate how people might reason about the relationship between judicial selection methods and judicial responsiveness. Respondents were asked to decide which of the three methods would "produce judges who are responsive to community standards." The most common response under each condition was that candidate elections would produce responsiveness. The most notable experimental effect in Figure 2 is, again, generated by describing judicial elections in partisan terms. This prompt dampened enthusiasm for the idea that candidate elections produce a judiciary responsive to "community standards." Support for the idea that elections make judges more responsive dropped (7%), while support for the idea that retention elections make judges more responsive increased (10%), when elections were framed in partisan terms. Assuming that voters place some value on responsiveness, this result suggests that they may view proposals to change from partisan judicial elections to appointment / retention more favorably than proposals to change from non-partisan elections (or "non partisan contests"). We return to this point below.

Overall, a comparison across Figure 1 and Figure 2 demonstrates that these respondents appear to reason about the effects of rival selection methods in a manner that reflects the discussion within the legal community. Under every condition, most respondents viewed candidate elections as producing responsiveness. A fair proportion also viewed judicial elections as facilitating independence, however this perception was much weaker when people were

prompted to consider appointments as based on merit, and when election methods are described in partisan terms.

One striking finding that emerges is that under all conditions, respondents were largely unlikely to connect the appointment / retention system (as described here) with either of the qualities (independence or responsiveness) about which we were asking. It may be that the appointment / retention system is perceived as embodying elements of both responsiveness and independence. If it is seen as some middle ground, even a preferred middle ground, experiments asking which methods facilitate *only* responsiveness or *only* independence could under-state how much people appreciate an appointment / retention method of judicial selection.<sup>13</sup> For this reason, and for the fact that these results rely on classroom experiments, we also conducted experiments with standard random sample public opinion surveys.

### **Generalizing Beyond the Experiments**

None of the results presented above should be interpreted to suggest that judicial candidate elections or gubernatorial appointments (without retention elections) were the most preferred method of judicial selection. Respondents do associate these methods with judicial responsiveness (candidate elections) and independence (appointment), but these experiments were not designed to reveal if people prioritized responsiveness or independence as traits that a judicial selection method should maximize. The point is that these are qualities that are often presented in discussion of the courts, and any campaign to convince the public to adopt a merit appointment / retention election method in the name of judicial independence would likely have

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<sup>13</sup> Unfortunately, we did not include a question that asked which method would produce the best ‘balance’ between independence and responsiveness – one of the things we will follow up in future work.

to reconcile that message with whatever value the public assigns to the responsiveness that they see as produced by judicial elections.

If voters do give some priority to judicial independence, our experimental results suggest they could view appointment methods favorably. One random sample survey of voters in Washington state (Brody and Lovrich 2009) found that 88% of respondents attached high importance to the idea that judges remain "independent." But 63% of respondents also valued judges who "share my values" and 46% found it very important that judges were "responsive to public opinion."<sup>14</sup> We also know that respondents in the university undergraduate experiments placed a very high priority on responsiveness - and on a delegate model of representation - at least when they are assessing how they think "state elected officials" should behave.<sup>15</sup> It may be then, that responsiveness and independence are valued in a state judiciary.

Respondents in the experiments clearly connected candidate elections with judicial responsiveness. To assess how 'real-world' voters might reason about adopting judicial retention elections, we placed questions on statewide polls in two states (Arkansas and Washington) that were using non-partisan candidate elections to select justices to their highest courts. The goal in this experiment is to isolate how much voters value the election aspect (or the responsiveness component) of an appointment/retention proposal, and to assess how receptive they might be to a proposal to change from electing judges to an appointment/retention method. Our experiment on the 2008 Arkansas Poll randomly assigned respondents one of three split-samples that used different versions of a question about judicial selection.

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<sup>14</sup> Many people clearly value both judicial independence, and judicial responsiveness. It is not clear what this means. A person may want judges who are "independent" of forces that lead to judicial outcomes that are not representative of what the person prefers; that is, independent of "special" interests.

<sup>15</sup> When asked how "state-elected officials" should decide on new laws and public policies, 73% said they "should pay attention public opinion polls," and just 15% said they should "decide what they think is best by their own judgment."

One-quarter of the Arkansas respondents received a version of a question that described a method where "a non-partisan panel of citizens, legal professionals and civic leaders would recommend potential judges to the governor. The governor would then appoint a nominee from the list. After each term, the public then votes on whether a judge should keep the seat, or be removed from office." This language is nearly identical to question wording used in a national sample, and in a state sample conducted where the appointment/retention method was being used (Arizona). One-half of respondents received a second version phrased the same way, but without the sentence mentioning that voters could remove judges from office. One-quarter received a question that altered the response options such that respondents were asked: "should things change so the governor appoints judges, or should we leave things the same and elect judges" (see Appendix B for wording).

Figure 3 about here

Figure 3 compares results from respondents in the two random split samples who were given description of the merit appointment/retention system, one with reference to "after each term, the public then votes on whether a judge should keep the seat or be removed from office," and one without this sentence. When the retention election prompt is included, 64% of respondents said they favored the proposal. However, when the sentence referencing the public vote and removing judges from office is omitted, support for this method drops to 51% ( $z=2.2$ ,  $p = .03$  two-tail). This suggests that a substantial component of what is being measured with this question is support for an institutional mechanism that promotes responsiveness. This result, and results from the student experiments, also demonstrate that minor changes in how a selection method is framed (or perceived) can have major effects on survey responses - and by extension, on voter response to proposals for altering selection methods. Public campaigns (by proponents

and opponents) and ballot question wording may thus produce substantial effects on how voters decide on these proposals.

Experimental research has demonstrate that framing proposals for institutional reforms as a change that prompts considerations of what is lost (or gained) can have substantial effect on how voters evaluate the proposal (Bowler and Donovan 2007). The Arkansas random assignment experiment illustrates that the effect of framing a proposal to adopt an appointment/retention method of judicial selection as a change away from the judicial candidate elections is huge. When the proposal is framed as an explicit choice between “change so the governor appoints judges” versus “leave things the same and elect judges,” we find only 16% support for changing from candidate elections to merit appointments with retention elections. In other words, support for an appointment / retention election method in Arkansas dropped from 64%, (when framed to emphasize that there would be retention elections) to just 16% when framed as a change in the status quo - even when retention elections are mentioned as part of the proposal.

Figure 4 about here

This effect of framing the appointment / retention method as a change in the status quo is not limited to Arkansas, nor to a particular moment in time. We placed this same question on two polls in Washington (one in 2000, another in 2006). Like Arkansas, Washington is another state where a proposal for an appointment / retention system would be a change from a status quo where judges are elected in candidate contests. Figure 4 illustrates that there is virtually no variance in responses to this question across time and across states.

Why then, do some polls show high levels of support for the merit appointment / retention selection method? Figure 5 illustrates there is tremendous variation in support for an

appointment/retention method, depending on where the question is asked, and how it is asked. Survey results showing high support for a merit system can be obtained if the question is not framed as a change in the status quo and if respondents are given cues about negative aspects of judicial elections.<sup>16</sup> Indeed, our experiments shown in Figure 1 and Figure 2 find that describing elections as partisan produced substantial deterioration the number of people who perceived that judicial elections were associated with an independent or responsive judiciary. As noted above, one version of the question we asked in Arkansas was virtually identical to questions used in Arizona in 2005 and in a 2001 Justice at Stake national sample survey. These questions used nearly identical wording to describe the process of identifying an appointment process as in our split-sample Arkansas experiments.<sup>17</sup>

Figure 5 about here

In a state where appointment and retention is already used, the question is essentially measuring support for the status quo and does not present voters with a choice about giving up mechanism that produces a responsive judiciary. In this context, 84% of respondents in an Arizona sample were found to support appointment / retention. High levels of support for appointment with retention in a Justice at Stake national sample (71%) may also reflect that many respondents were surveyed in states already using that process (so the proposal did not change the status quo) *and* that the question was placed after 79 other survey items, most that dealt with problems associated with judicial elections. When the Justice at Stake question was asked in Arkansas (where it did represent a change in the status quo) support dropped to 63%. When the question was asked in states that used candidate elections to select judges (framed as a

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<sup>16</sup> see note 3.

<sup>17</sup> We used the words "the governor would then **appoint** a nominee from a list..." in reference to the governor's role. The other questions used the words "the governor **chooses** a nominee from a list...". We assume this trivial wording difference is not driving the different levels of support measured in these surveys.

choice about giving up candidate elections), support for appointment with retention nearly disappeared.

## **Discussion**

The legal community's skepticism of judicial elections is thorough-going. Public cynicism about the role of money and interest groups in judicial elections seems to validate that skepticism. In referring to an Autumn 2008 poll on judicial elections, for example, ABA President H. Thomas Wells said: "Americans recognize that justice is too important to be controlled by party politics, or by interest groups with big bankrolls" (Weiss 2008).

To some extent our results confirm some of Mr. Wells' interpretation, but in a quite specific way. Our findings suggest cynicism about judicial elections reflects a dislike of *partisan* elections as much – if not more than – a regard for a judiciary that is independent of the pressures of competitive candidate elections. Of course, one other lesson that may be drawn from this study is that responses to questions on judicial elections are subject to quite marked question wording effects. When public opinion is adduced in support of – or in opposition to – a particular system of judicial selection we should be careful to note just what question was asked, and in what context it was asked.

But our question wording experiments do show a strong public commitment to having an electoral component in judicial selection. Even the survey Mr. Wells commented upon found that 55% of respondents thought elections of one kind or another should be used to select judges. Our study demonstrates sheds some light on how voters reason about judicial selection methods, and why they give some priority to elections. The student experiments illustrate that people do understand how to produce an independent court, and that they associate elections with a more

responsive judiciary. Our random-sample survey experiments demonstrate that voters may be very reluctant to part with candidate elections. It would seem these voters, then, give a high priority to having a mechanism that makes state judges responsive to public opinion. As noted above, this is consistent with how voters seem view legislative institutions.

Our broader conclusion, then, is that although there are reasons to expect that the public may view judicial independence as valuable, they nevertheless want courts to be responsive to people: after all, judicial independence from "political concerns" probably means something quite different to people than being independent from "the people," and elections remain a central mechanism of responsiveness. Prospects for changing from judicial selection via elections to using appointment/retention may depend on how much people who are accustomed to a populist, delegate view of representation will value judicial independence over judicial responsiveness, and how they see proposal for reform in terms of what is lost by changing from the status quo of selection by elections.

**Appendix A.** Question wording for experimental control group, student population.

States have many different ways of selecting judges for state courts. They also have several different ways of deciding to keep (“retain”) them. Some methods involve appointment and some involve elections, and the methods can be mixed and matched in different combinations.

There are three main methods of selection and retention.

In no particular order:

- **Method 1:** Judges are chosen by the governor on the advice of legal experts and serve until retirement.
- **Method 2:** Judges are chosen by the governor on the advice of legal experts and then – every few years - an election is held where voters decide to retain the judge or not.
- **Method 3:** Judges run for election and then – every few years - an election is held where voters decide to retain the judge or not

In your view which method is like to:

	<b>Method 1</b>	<b>Method 2</b>	<b>Method 3</b>	<b>Doesn't matter</b>
produce judges who are independent from political concerns?				
produce judges who are responsive to community standards ?				

**Appendix B.** Random sample survey question wording:

**Arizona, 2005** (Arizona Judicial Council Survey; O'Neil and Associates)

Under this proposal, a non-partisan panel of citizens, legal professionals and civic leaders evaluates and recommends potential judges to the governor. The governor then chooses a nominee from the list. After each term, the public then votes on whether a judge should keep the seat or be removed from office. If a judge is rejected, the selection process starts again

Favor	84%
Oppose	16%

National sample, 2001 (Justice at Stake survey, Greenberg, Quinlan, Rosner. N = 1000)

Under this proposal a non-partisan panel of citizens, legal professionals and civic leaders evaluates and recommends potential judges to the governor. The governor the chooses a nominee from the list who must be confirmed by the state legislature. After each term, the public then votes whether a judge should keep the seat or be removed from office."

Favor	71%
Oppose	27%

**Arkansas, 2008** (University of Arkansas survey, Arkansas Poll.)

**Random assignment split-sample Group 1:** (Group n = 119)

Under one proposal, a non-partisan panel of citizens, legal professionals and civic leaders would recommend potential judges to the governor. The governor would then appoint a nominee from the list. After each term, the public then votes on whether a judge should keep the seat, or be removed from office"

Favor	64%
Oppose	26%

**Arkansas, 2008** (University of Arkansas survey, Arkansas Poll)

**Random assignment split-sample, Group 2** (Group n = 208)

"After each term, the public then votes on whether a judge should keep the seat, or be removed from office" deleted from version given to Group 1.

Under one proposal, a non-partisan panel of citizens, legal professionals and civic leaders would recommend potential judges to the governor. The governor would then appoint a nominee from the list.

Favor	51%
Oppose	39%

**Arkansas, 2008** (University of Arkansas survey, Arkansas Poll)

**Random assignment split-sample, Group 3** (Group n = 103)

Framed as a change in selection method

Under one proposal, the Governor would appoint judges from a list compiled by legal experts. After a few years, citizens could vote to approve or reject the Governor's appointee. Do you support changing things so the governor appoints judges, or leaving things the same as they are and electing judges:

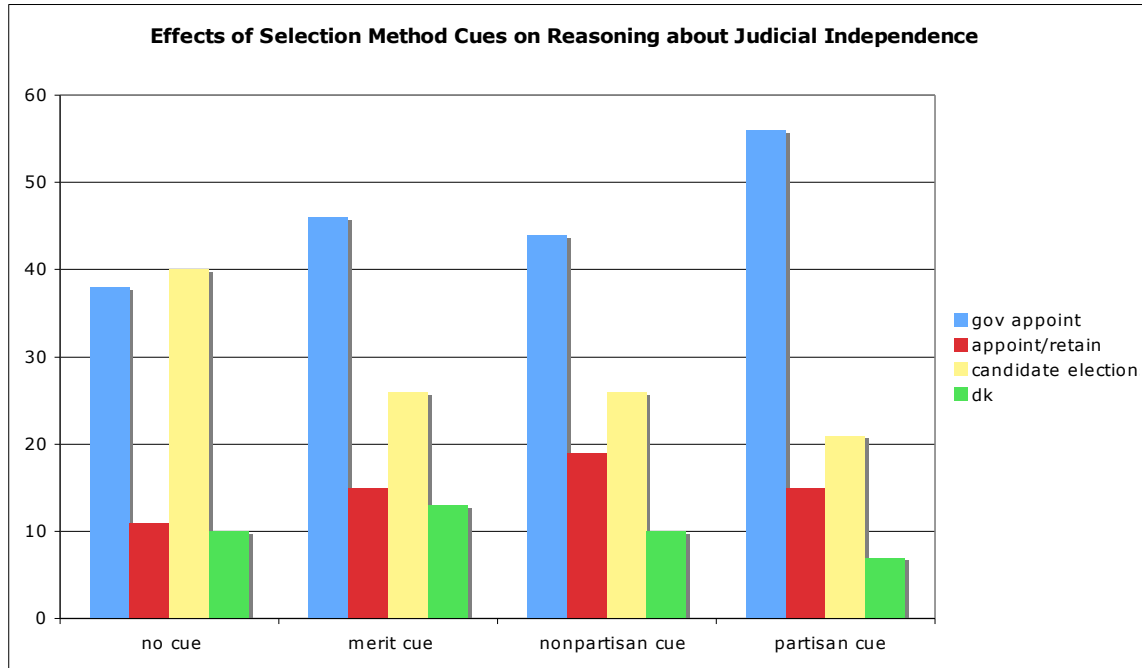
Favor	16%
Oppose	78%

**Washington, 2006.** (University of Washington, The Washington Poll. N = 700)

A proposal would have the Governor appoint judges from a list compiled by legal experts. After a few years, citizens could vote to approve or reject the Governor's appointee. Should we:

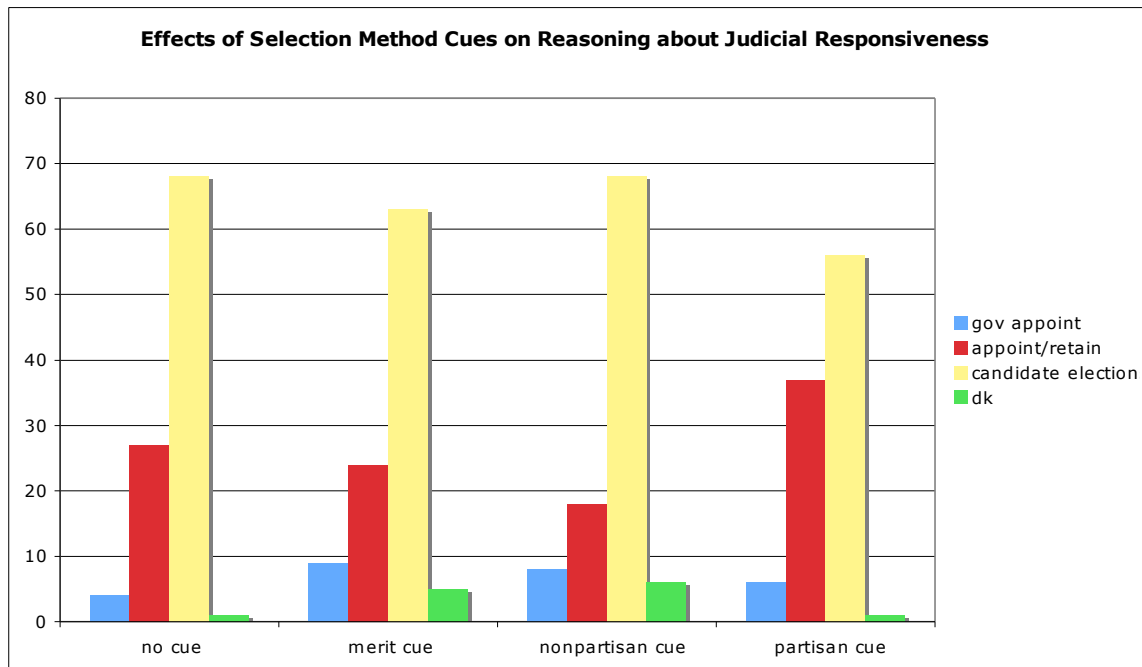
change things so the Governor appoints judges?...	15%
leave things as they are and elect them?	81%

Figure 1: Which Selection Method Produces Judicial Independence?



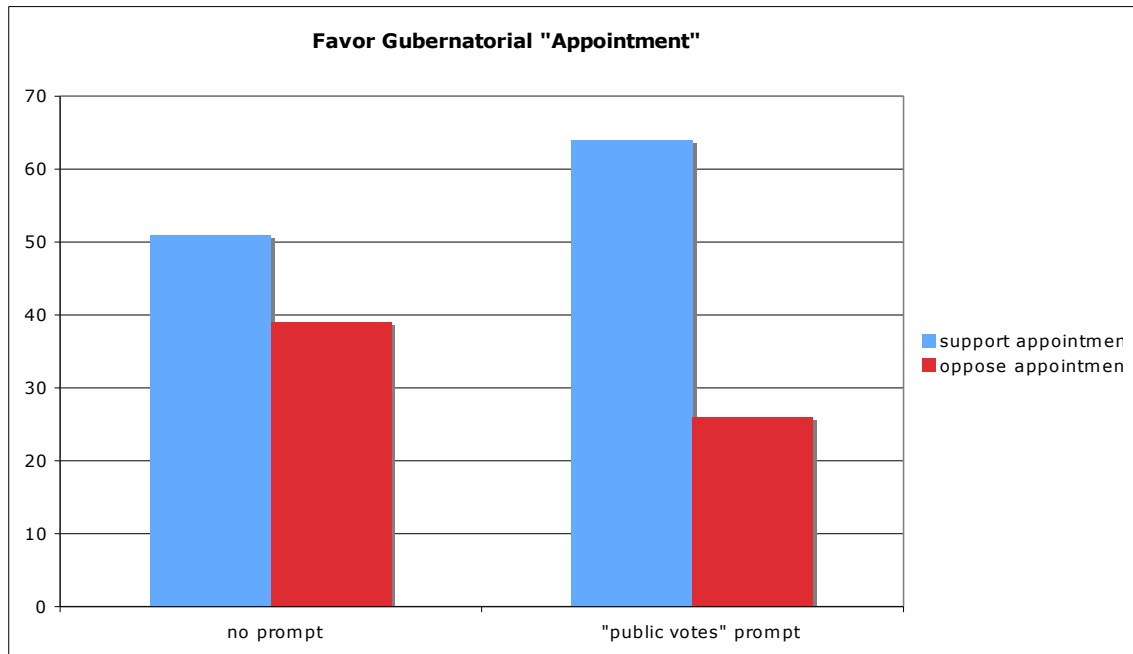
Note: See Appendix A for question wording

Figure 2: Which Selection Method Produces Judicial Responsiveness?



Note: See Appendix A for question wording.

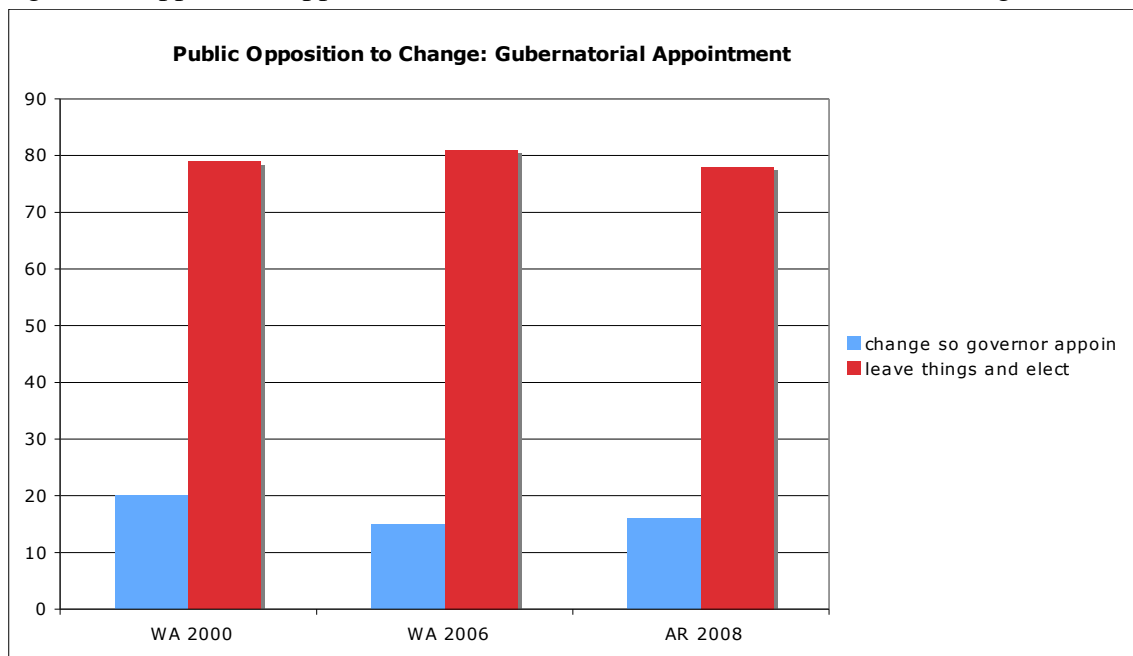
Figure 3: Effect of Retention Elections on Support for Appointment with Retention



*Note:*

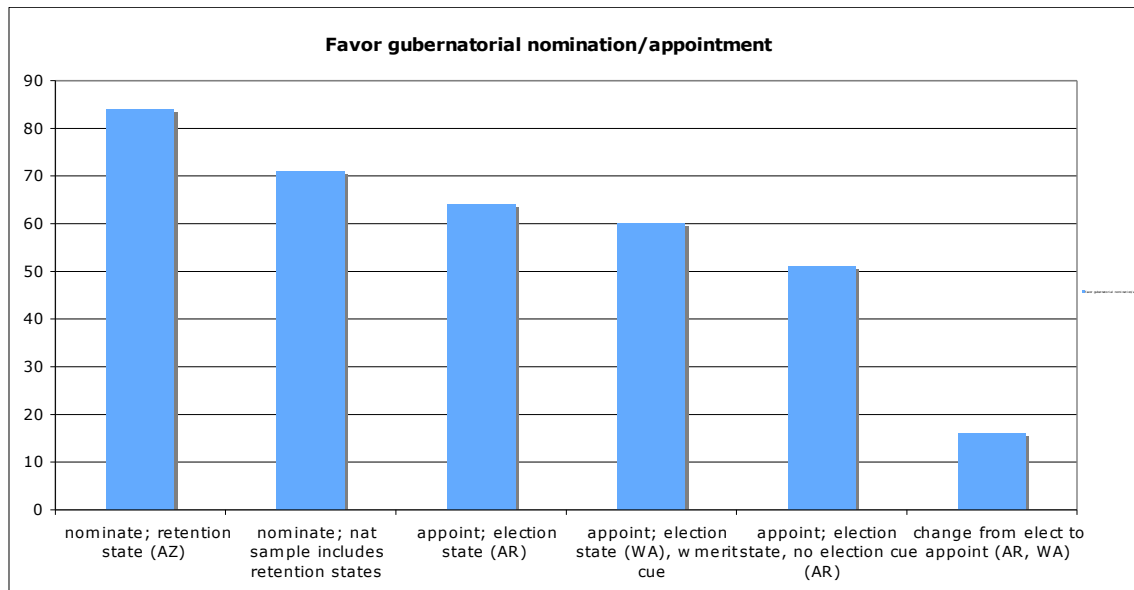
In both conditions, respondents are told "a non-partisan panel of citizens, legal professionals and civic leaders would recommend potential judges to the governor. The governor would then appoint a nominee from the list."

Figure 4: Support for Appointment with Retention Elections, Framed as Change in Status Quo



*Note:* See Appendix B for question wording and survey details.

Figure 5: Variation in Support for Appointment with Retention Elections



*Note:* See Appendix B for question wording and survey details.

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