

BOXED IN

**Does the prospect of re-selection
influence judicial decision making?**

article by Ann A. Scott Timmer
introduction by Amelia Ashton Thorn



WHEN JUSTICE ANN A. SCOTT TIMMER WAS GIVEN THE OPPORTUNITY TO WRITE on a topic of her choosing as part of Duke Law’s Master of Judicial Studies program, she gravitated toward something she had experienced first-hand: re-selection. Timmer, now the vice chief justice of the Arizona Supreme Court, was first appointed to serve as a judge on the Arizona Court of Appeals in 2000. She has since been retained three times. Over the course of nearly two decades as a sitting judge, she had often wondered if the specter of re-selection influenced judicial decision making.

Her observations, however, had been limited to the anecdotal: She had not observed that re-selection affected substantive outcomes, but she noted with some interest that judges often seemed to recuse themselves from hearing hot-button issues. Other judges she spoke to, particularly those in partisan-election states, acknowledged that the pressure existed but did not believe it affected them. The LLM thesis presented an opportunity to put her questions to both a qualitative and quantitative test.

As Timmer explains, “I thought, ‘I will try to come up with something that has some empirical evidence that I can try to measure, but also add a little of what I can do, which is interviews, because I figured I would be trusted.’”

She received a substantial response. “With only an exception or two, people were very forthcoming and candid and enjoyed talking about the issue.”

Timmer ultimately conducted extensive interviews with 37 sitting state supreme court justices — about 10 percent of all state high court justices — representing states with a mix of election and retention policies. She also examined justices’ overall dissent and special concurrence rates in the year before a re-selection event as compared with the rates the year after, as well as justices’ criminal dis-

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sent and special concurrence rates in the year before a re-selection event as compared with the rates the year following re-selection. The following excerpts from her article *The Influence of Re-Selection on Independent Decision Making in State Supreme Courts* focus on judicial interviews (find the full piece in *Law and Contemporary Problems*, Vol. 82 No. 2).

Timmer found the study heartening. Only in rare instances did judges say they believed that re-selection pressure affects outcomes. “There were very few occurrences of that kind of

thing in my interviews,” she says, “but I wouldn’t have expected even a few.”

The vast majority of conversations suggested that judges were not influenced by re-selection and, for Timmer, demonstrated judges’ indelible commitments to their principles.

“No matter how people come to the office, via election, appointments, whatever, the people that make it there are of a pretty good character and recognize the real danger to the institution if you start putting your personal welfare into the decision making process,” she says. She finds similarities in this context to her observations about jurors. “You get all kinds of people from all kinds of backgrounds, but once they sit in the box and they take an oath, they want to do the right thing. And I think that that’s the same with the people who make it to these positions.”

Many judges she spoke to accepted that they risked re-selection by rendering disfavored decisions. “They realize that this is much bigger than an individual. If they are, in fact, kicked out of office because of an unpopular position, so be it — they can go with their conscience clean,” she says. “That was confirmed to me, over and over again.”

Timmer remains eager to see study of the topic evolve. “There is no perfect system,” she says. “But what is the best system to find that balance between accountability and independence?” She hopes future research will begin to answer that question. ▶

The Influence of Re-Selection on Independent Decision Making in State Supreme Courts

Ask people what they desire in a state supreme court¹ justice and they will most likely say something that suggests a fair and independent decision-maker. But do our judicial re-selection methods pressure justices to consider their personal welfare when making decisions at the cost of independence?

I hypothesize that the re-selection methods — elections and reappointments — imposed on most justices tempt them to act strategically to maximize their prospects of maintaining their positions. To test this hypothesis, I conducted confidential interviews with 37 sitting justices and seven former justices, one of whom was also retired from a federal court bench, from 25 states.² Twenty justices are from states with partisan or nonpartisan elections, eighteen are from states with retention elections or retention by a government authority, and two are from states with no re-selection processes. To gain a slightly different perspective, I also interviewed four sitting federal judges who formerly served as state court judges or justices.³

FINDINGS AND ANALYSIS

Although each justice expressed his own opinion about the influence of re-selection events on deciding cases, some common themes emerged.

Re-selection pressures exist but don't typically affect how justices vote in cases. All justices were initially asked whether the prospect of a justice losing a re-selection bid impacts deci-

sion making. Most justices said no but recognized that justices facing re-selection naturally worry about being unseated. As one justice observed, the influence of elections on state supreme court justices is “subtle” as “no one is going to say, ‘if I rule one way I won’t be reelected.’ But in private conversations, judges will express concern about being reelected.” Another justice in a retention state said that “justices feel safe until shortly before the retention . . . [t]hen anxiety sets in and you start to worry about a number of things including retention.” Indeed, almost all justices in their last terms and retired justices reported feeling worry-free after their last re-selection event (“I heaved a sigh of relief”; “It takes the load off when deciding high-profile cases”). But does this anxiety affect votes? “I’ve never seen it,” said one justice, summing up the majority view.

Several justices accepted that re-selection pressures are simply part of the job and must therefore be taken in stride. As one put it, “[p]olitics are so nasty, dirty, awful, that if someone wants to find a decision to use against you in an election, they will. So don’t worry about it.” A justice in a partisan-election state acknowledged that he thinks about how a decision will impact his constituents but has not voted on a case in an attempt to further his constituents’ interests. This sentiment was echoed by a justice in a retention-election state: “We’ve had

two contentious retention elections here [centered on the justices’ ideology]. It hasn’t changed our thinking about decisions, but it has caused concerns about the future.”

Some justices gave examples of the types of pressures brought to bear. One justice in a retention-election state related that after his court decided a case against the governor who had appointed him and another colleague, the governor’s office contacted them to convey disappointment with the decision. The justice “thought this was highly inappropriate.” Another justice recalled that concerns about re-selection entered his mind when legislators on one side of a case came as a group to sit in the front row of oral argument and stare at the court, although he was more concerned with how the outcome would affect court funding.

A minority of justices admitted that the prospect of being re-selected affects votes in cases. One justice explained:

I have been surprised by that revelation. I have been surprised by some of the language used by my colleagues when discussing how the outcome of the decision would impact elections and how that’s part of their consideration in making decisions. I researched the issue independently because I wondered about it and was and am concerned.

[excerpted from Ann A. Scott Timmer, *The Influence of Re-Selection on Independent Decision Making in State Supreme Courts*, LAW AND CONTEMPORARY PROBLEMS, VOL. 82 NO. 2]

A justice in another partisan-election state who does not plan to seek re-election elaborated:

I think it's always in the justice's mind. You can't take politics out of anything whether you get to the court through election or appointment, and it depends on the politics of the state and how justices are selected. . . . I'm mindful of the groups of people who supported me and the people who are in my district. I feel I'm as pure as anyone because I was supported by everyone with no opposition. But still, I am mindful of politics. I want to know how the decision is going to make the court and judiciary as a whole look; how does the decision square with my philosophy and what I ran on? I'm a Republican and I can issue the most liberal decisions and have no consequence. But I won't. If someone says politics don't enter into it, they're lying.

One justice didn't hesitate to say, "you bet" re-selection makes a difference and "[a]most everyone is in denial about it."

No justice said he had ever voted on a case in a way to appease the public. But even among the justices who had never seen others do so, many believed it had happened. One justice's answer to the question of whether re-selection affects decision making typified others:

I think it can and it has and it will. It doesn't impact as often as people think. I see a lot of judicial independence and courage on the part of justices here. There's been a few times, less than five times, I stopped and thought "this is going to come back and haunt me," but it didn't change my decision.

Another justice remarked that re-selection concerns "shouldn't" impact

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decision making, "[b]ut human nature being what it is, it probably flits though justices' minds, particularly in big cases and in ones with publicity. But for justices trying to be neutral and impartial, it's recognized but shouldn't impact decision making."

Some justices said the impact of re-selection pressures depends on a state's re-selection method. One justice in a retention-election state remarked:

Based on my discussions with other justices from other states, I think [partisan and nonpartisan] elections can definitely shape their decisions. In Michigan, Illinois, and Wisconsin, opposition groups will use justices' opinions to go after them. This is much less likely in a retention election unless there is a high-profile controversial case like same-sex marriage out there.

The justices sitting in states with no re-selection methods took a "grass is always browner" view of the pressures put on justices in other states. As one answered when asked whether the decision making process for justices on his court would be different if they had to stand for retention or re-election:

I don't see how it could be otherwise, I really don't. That's the problem with elections. There

is an inherent coercive effect; you're always looking over your shoulder wanting to get elected or re-elected. If you write opinions that the public doesn't agree with, it affects you. We've had to write controversial decisions, and if I had to worry about re-election, it would have been awful. If I had to worry about being vilified by an opposing party, it would have been awful. It's freeing being able to decide these matters without the personal worry.

A few justices related that concerns about re-selection have impacted votes on whether to grant discretionary review in a case. One explained:

I don't think [re-selection concerns] impact our actual decisions because we rise above it. But are we concerned about that when deciding whether to grant review? Maybe. I can't say we don't consider it. If it's something controversial like same-sex marriage, we might want to deny review or decide [the case] on a procedural issue to avoid deciding the merits. We try to avoid the issue sometimes.

Another justice said he has "heard people say, 'why grant review when all this is going to do is anger the legislature or people?' It's made me mildly uncomfortable that this was a consideration."

The federal judges likewise expressed concern about the impact of re-selection events. When asked whether he felt less constrained in making decisions now compared to when he served in the state court system, one federal district court judge responded: "Absolutely. I get a whole lot more press now, so everything I do is subject to much more coverage. But I recall when I transferred over here, I remember feeling relieved. And I didn't ►

even realize I had felt constrained. But I did.” All the other federal judges echoed this expression of relief from worry over re-selection. As one said, in making decisions now, “[t]here isn’t in the background the possibility of losing your job.”

Justices combat pressures attendant to controversial cases by tapping a deep-seeded drive to “do the right thing.” The question I posed that prompted the most thoughtful answers was whether the justices considered how the outcome of a controversial case might affect their chances for re-selection and, if so, how they dealt with it.

Most justices said they were acutely aware of the controversial nature of pending decisions. “It has to be a consideration; it has to enter your mind. I am aware of media and social media,” said one justice, echoing others’ comments. Another noted, “I’m not oblivious to it. One can’t close their mind to knowing that a decision will help or hurt in the re-election effort.”

But others did report being oblivious to controversy. “Ninety-nine percent of the time, I never thought what I was doing was controversial,” said one justice, “so I can’t take credit for being brave as I thought I was being logical.” Another justice sheepishly chalked up his obliviousness to egotism: “I was fairly arrogant in that respect. I assumed that my decisions would be met with general approbation.” And one justice expressed surprise about the public’s negative reaction to his court’s decision in a social-issue case: “I don’t remember consciously thinking about it. It floated through my mind that people would be unhappy. I followed the law, the [issue] was clear cut, and we never talked about it being a problem for the [election].”

Many justices remarked they never considered how an unpopular vote might affect them, but others recognized the threat and disregarded it or embraced it. One justice said, “You do think about it, but there is nothing wrong with that. It makes you more scholarly [in your decisions].” To deal with perceived public pressure, these justices spoke sincerely, and often passionately, about their desires to preserve the independence of the judiciary by ignoring personal concerns. No one thought their actions extraordinary, just necessary for the greater good. These comments by various justices are emblematic of this sentiment:

In the end, my refusal to yield to public pressure is a combination of wanting to do the right thing and being rebellious.

....

It’s inconsistent with my job to be guided by [re-selection pressures]. I believe that being independent is the most important thing to being a judge. If I wasn’t, I feel I would let all judges down.

....

I deal with it with courage. I push it out of my mind. In part, too, because all judges have faced it. We get strength from each other.

....

I just remember my oath to steer clear of any influence.

Many justices also said they accepted that they could lose their jobs for making an unpopular decision but reassured themselves with the knowledge that they could make a living elsewhere. One justice shared his pragmatic view:

How do I deal with the knowledge that I’m up for retention next year? I think, “what’s the worst that can happen?” I had a good run, and I’ll go back to practice. And I

can look myself in the mirror. Not even a close call. I would rather go down being true to myself and my profession than stay here and manufacture a position for fear of being thrown out.

Justices also described what it was like to be challenged in re-selection events and how those experiences affected them. One justice recalled a challenge early in his judicial career:

[A colleague] wrote [a controversial social issue] decision and I joined. The Republican Party came after us both. I raised money just from family and friends. Very tough. When I signed off on the case, I didn’t consider the consequences. I had to travel all over the state and interview with newspapers. So many people stepped up because they wanted to preserve judicial independence. It was a distraction from my duties, but it was nice to meet people and it was good to preserve the system. I wouldn’t want to do it again, though! I was [easily retained]. In the next election, I did nothing to campaign and was retained with no problem.

Another recounted being targeted by an outside group during his re-selection bid:

A group went after me . . . based on a dissent in a case concerning . . . [a law about monitoring] sex offenders. I had written . . . that the new law was [unconstitutional]. The group ran attack ads that played constantly, showing children on a playground and saying ‘Justice [X] sides with child molesters.’ It was funded by dark money. The ad was so over the top that people were outraged. I was interviewed by the media about it a half-dozen times. I won by the largest margin I had ever had. . . . One of the unfortu-

nate impacts from that election is that a lot of people have told me that they have thought of running for the court or other courts, but they changed their minds after watching what I went through.

Some justices discussed the impact of prior challenges to their colleagues' re-selection bids. Most of these justices characterized the prior challenges as aberrant events that were not predictive, and if anything, these events, although worrisome, caused these justices to double down on their resolve to block out any considerations of personal imperilment when deciding controversial cases.

Re-selection does not generally affect how decisions are written. When asked whether re-selection events impact how opinions are written, about 50 percent of justices with views on the issue answered no.⁴ One justice's response typified others: "It's not judicial elections. Is public perception influencing opinions? Yes. We're careful to explain and reduce unnecessary flourishes. No need to use colorful language to provoke. That's why you find more colorful language in dissents."

The other half of justices thought that re-selection affects opinion drafting. Most in this group spoke about clarity and tone. As one thoughtful justice explained:

I think we alter the writing by softening the language to make it more clearly understood and palatable to the public and our constituents. But there is nothing wrong with that. I want to leave a good legacy, and I want the court to look great. I will do an additional concurrence to provide more rationale in a softer way when I think the public or media might

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misunderstand the reasons for the majority. Often, my concurrence might be picked up by the press. Why did I do that? Maybe to make people think I really care about it. I wouldn't do any differently if I was a federal judge. We need to make sure that the public has faith in the judiciary.

Some in this group also spoke to the need to handle high public-interest cases with care. "With hot-button cases, I want to acknowledge the [legitimacy of] the other side," explained one justice. So, for example, in overturning a death sentence, he might say something like "the court does not take this action lightly" to show consideration to victims. One justice candidly acknowledged that some decisions issued from his court are written in a way to maximize a justice's chances for re-selection:

Some of what is written is written with the next election in mind, particularly in death penalty cases. One member [of my court] is always intent on writing on death penalty cases as more of a political statement. . . . As the election year draws near, his writing becomes more rabid.

Language in dissents is sometimes included solely to appease justices' supporters. These justices "'wave the bloody flag,' meaning they play to their group," said one justice about a

few colleagues, "for example decrying that the majority has made a threat to democracy. It's playing to your base. Whether done consciously for the election, I'm not sure. It's just saying to the base, 'we're still on your side.'" Another justice also noted that justices will occasionally insert "disclaimers" about whether a result reflects a good or bad policy, especially when upholding legislation.

Surprisingly, more than one justice said that re-selection concerns can muddy opinion drafting. One observed that "if the majority wishes to yield to the public view, the decision is typically poorly written and conclusory. It avoids directly taking on precedent that challenges the decision's outcome. It just declares the result." One justice expressed more outrage at the practice:

It's a reality that politics play a role in the judiciary when justices are elected. . . . I've been amazed at some of the antics in drafting and crafting the opinion to support [a politically popular result]. It goes on during the election seasons and in high-profile cases like when the governor sues the legislature for X power.

Re-selection does not generally tempt justices to recuse from controversial cases. I asked whether the justices ever suspected that a colleague had recused from a controversial case to avoid deciding it before an election. Overwhelmingly, the answer was no. But seven justices answered yes. In one instance, a justice was suspicious because "the decision wouldn't have gone over well in the recusing justice's district." Another justice was more than suspicious when a colleague running in a hotly contested partisan re-election bid recused in many cases ►

and sometimes announced “ridiculous” reasons for doing so.

Interestingly, some justices reported that recusal is much more of an issue with judges on lower courts. As one put it, “[r]ecusals are disfavored at the Supreme Court because it has to be explained,” but “I have seen it at the trial level on occasion.” Three justices said that some of those judges have reportedly recused to avoid deciding controversial cases when they were seeking appointment to either the intermediate courts of appeal or the state supreme court. One justice said that while he was on an intermediate appellate court, “I saw people constantly getting off high-profile cases” and noted that this was “a pattern with people applying for this court.” Another justice, who had once served on an intermediate appellate court, volunteered that successive chief judges knew when people were up for re-selection and purposefully avoided assigning controversial cases to those judges’ panels.

Justices do not generally avoid authoring dissents to strategically protect against being singled out for possible electoral sanction. In the mid-1980s, Melinda Gann Hall theorized that the low dissent rate in state supreme courts could be explained, in part, by justices using a strategy of not dissenting in cases of high public visibility to avoid being singled out for “possible electoral sanction.”⁵ To test her theory, Hall conducted in-depth, confidential interviews with each justice sitting on the Louisiana Supreme Court in 1983. Justice “A” told Hall that although he “professed a personal abhorrence of executions and the death penalty,” because his constituents supported capital punishment and would retaliate against him at the polls for tak-

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ing a contrary view, he did not dissent in cases affirming a defendant’s death sentence.⁶ Indeed, although Justice “A” filed dissents in favor of criminal defendants’ claims in 26 percent of non-capital cases decided in a single term, he dissented in favor of criminal defendants’ claims in only 3.3 percent of capital cases decided that term.⁷

I related Hall’s findings to the justices I interviewed and asked whether they had seen evidence that justices avoided being singled out in controversial dissents to maximize job security. The majority answered no. A few took issue with application today of Hall’s theory. As one justice said: “With controversial cases, if we have sharply different views, we’re more likely to write separately.” Another justice expressed a similar sentiment: “I’ve stuck my neck out and so have my colleagues. We try to find consensus where we can on high-profile cases but we have no qualms about dissenting. But we try to bring folks on board.” Still another said: “I wrote a dissent in a case concerning the Governor’s desire to put something on the ballot The majority allowed it, but I was the lone dissenter. I didn’t care about going against the grain.”

Some justices discussed other reasons for not dissenting even when a justice disagrees with the majority

opinion. “In writing a dissent, a justice has to pick his battles. I don’t see people doing that for political reasons,” said one justice, while another pointed out that “[t]here is no point in dissenting when doing so wouldn’t make a difference.” Another justice addressed the costs of dissenting:

Stronger forces militate low dissent rates. Primarily, the culture of the court. Internally, we are collegial and get along. Being a frequent dissenter carries other costs. It identifies you as someone not effective at getting others to agree with you. Dissention is a concession of defeat. We’re always faced with the quandary of trying to join the majority and trying to make it better or exiting and dissenting.

Conversely, a justice explained an incentive to try and reach consensus: “Part of the calculus is wanting to be part of the majority to temper it.” And another noted that when the opinion is taking a view contrary to public consensus, “[w]e try to be as strong as possible to present a united front.”

One justice had a unique, and disturbing, explanation for what dissuades some justices from dissenting:

A bigger problem is that there are some justices who are perceived as persuasive among the public and the legislature. They have pull. So, it’s more convenient and expected to side with whatever the position is taken by those justices even if justice says otherwise. And if you’re up [for re-election] soon and need help from those justices, you’re likely under pressure to agree. The reason is that this justice can help with grassroots support and getting legislative support. Statewide elections are expensive. If justices have that kind of pull, the inclination is to vote with them even

when the justice's personal inclination is otherwise.

Another justice mentioned that his dissent rate was used against him in his re-election bid. "When I was attacked in the election, [my opponent] said I was an outlier and he counted the dissents and tried to use it against me. He also tried to use it to show I wasn't liked by the court."

Several justices reported evidence supporting Hall's theory. Most of these justices reported conversations with justices from other courts. One justice said:

I've attended national events. In private discussion with other judges, some who are elected are very concerned about voter reaction. I remember one judge saying that if a dissent wouldn't matter, why bother dissenting if it would only impact re-election chances.

Another justice had a similar experience, observing that "[c]ourt culture varies. A judge from another state once candidly told me that he had to decide a case a certain way because he had an election coming up. I was shocked."

Some justices reported first-hand experiences that supported Hall's theory. One complained that the electoral process "incentivizes justices to refrain from expressing an unpopular opinion." He resists this temptation:

I try to write dissents/concurrences all the time if warranted. I do know that some colleagues feel differently because they don't want to highlight that the majority thinks their position defective. I don't feel that way. If people want to judge me, I want them to judge me on what I decide. I'm not enthusiastic about consensus. I won't dissent just to embarrass someone, but I will if I feel strongly on an issue.

Courts rarely delay the release of opinions preceding an election.

Most justices reported that they had not seen a controversial opinion's release delayed in the weeks before an election. But several justices recalled instances when this occurred. Some courts openly discussed the practice. "I don't remember which [case, but] I remember discussions about the appropriateness of releasing an opinion before an election," remarked one justice. Another justice stated that "I've seen people hold them and, at least twice, the justices were candid in saying that the case is controversial, and the justice is going to hold it until after the election." This practice is justified, explained a justice, to "avoid releasing cases that would cast a justice up for retention in a bad light." Another court discussed the matter and held a "number of cases" before an election over the objection of one of the justices I interviewed.

In other courts, the practice of delaying opinion releases is not discussed but sometimes occurs at the authoring justice's behest. And a few justices said they had suspected that a colleague sat on a case to avoid releasing it before an election. "I've noted a time or two that the case is held a little bit longer than necessary," commented a justice, who echoed others. One justice reported observing more blatant displays:

I see decisions get right to the point of issuance and then pulled from the [release list] because an election is impending. I've also seen how an individual on the court seeking a federal appointment handled a controversial case. The decision was ready to go, but all of a sudden he pulled it from the [list] to "study it." It's still being studied and he's awaiting the outcome of the appointment.

Justices are divided on what the best methods are for their selection and re-selection.

No consensus emerged from the justices about the best way to select and re-select state supreme court justices. Justices in retention/re-appointment states questioned the wisdom of permitting voters to select judges. One justice viewed voters as unqualified to make these decisions:

Electing judges is the worst idea. Lay people aren't qualified to decide if judicial candidates are qualified. And they have no real understanding that most laws protecting rights, most notably state and federal bill of rights, are designed to be counter-majoritarian. And that's antithetical to the notion that it's a good idea to elect judges.

Justices in this group more frequently lamented the campaign fundraising attendant to partisan and nonpartisan elections. A justice who had formerly run in partisan elections as a trial court judge commented, "I know from experience that the people who want to give money are lawyers and corporate entities. So that's the danger. You have to raise big bucks to run." Other justices questioned the independence of justices in states with partisan and nonpartisan elections. One recalled his experiences as a trial lawyer practicing in multiple jurisdictions:

[M]y track record with partisan-elected judges was worse than with retention-election judges. I think there was a bit of "pay to play." I walked into one courtroom in Texas and all the attorneys were talking about whether they were current in their contributions to the judge. The judge was not in the courtroom. Things did not go well for me.

One justice's experience as a lawyer litigating a series of education-issue cases before another state's supreme court during an election year made him a life-long advocate of merit selection:

We went to the [state] supreme court [multiple] times. We watched the results carefully and actively encouraged people to make contributions to the candidate that favored our position. All the decisions in our cases were [close calls] and a change of one justice would have made a difference. There was absolutely no question that the election would decide our case. [The justices we backed] won and we won. I have become such a militant about merit selection as a result.

Retention-election states were also criticized for the potential influence of funded campaigns. Justices from those states that have not had challenges mounted against sitting colleagues nevertheless expressed concern about how future challenges would affect their courts. Regardless of the possibilities of challenges, most justices in retention states don't mount campaigns. This justice's *laissez-faire* attitude was typical:

One justice told me [in the year of my retention bid] that I should do nothing because there is nothing to do. [My state] is a huge state, so what am I going to productively do? I could spend a lot of time raising \$1 million, but that won't go far. And who is going to raise money to beat me? And to what end? Just to appoint someone else like me? Structural factors militate against a justice making any effort in a re-election unless he hears of a campaign.

Justices in retention-election states generally opined that retention elections strike the right balance because

they permit people to have some voice in judicial re-selection and take political pressure off the judicial system. "Having a retention election, merit system, is a liberating factor," said one justice, "you don't have to worry about how a decision impacts you personally. I would like to hope that justices in partisan-election states don't worry about it, but that would be naïve."

Justices in partisan and nonpartisan-election states acknowledged that some influences exist due to elections. One justice noted, "Does the court change during an election year? Yes." Another justice said about the impact of elections:

I've heard other judges and justices say, "I can't do that because an election is coming up" and that's frightening to me. It's alarming and I respond that people would respect the integrity behind the decision even if they disagree with the result. I also ask them whether, regardless, they feel they have an obligation to do what they think is right. The prevailing answer is "but I have to think about my own election." I've heard this from judges and justices in other states as well.

This sentiment was echoed by other justices. "One justice [on my court] has said that my constituents want me to vote for it, so that's the second reason for voting for it," related a justice.

Another justice in the elected-justices group was most concerned with public perception:

I think there are virtues with electing justices. But the problem with elections is (a) justices actually adjusting a decision to satisfy the electorate or contributors, and (b) a perception that this is what occurs. And there are concerns about where the campaign contributions come from. I'm more certain

that the appearance problem is the real concern. . . . When there is a decision with political impact, the media reports the party affiliation of the justices. For example, they say "three Republicans voted one way and four Democrats voted the other," which perpetuates the perception that party affiliation drives the decision.

But many justices in partisan and nonpartisan-election states touted popular elections over retention and re-appointment systems. One justice in a nonpartisan-election state decried the "political litmus test" that exists when a justice is appointed. He was once asked by his state governor whether the latter's vacancy-filling appointments to the appellate courts needed to be more balanced. The justice candidly told the governor, "yes." He elaborated:

Ninety percent of appellate judges here start with an appointment. . . . In my state . . . one [political] party has run the table for so long. Almost all the political weight is behind the scenes in the appointment selection process. You just know that the governor will select someone who is passionate about how to decide things a particular way. Governors appoint "fellow travelers" and judges are in denial about how objective they are. . . . Some justices on the court wouldn't have been appointed by a governor because they are independent in their decisions. But they're on because they won an election.

Others were likewise concerned with being beholden to an appointing authority. "The initial reaction of a new justice is to stay close to the ideology of the appointing authority," observed one justice when discussing his court's mid-term appointees. "Maybe the fur-

ther the justice gets in time from the appointment, he or she might go away from that. People do that. When the justice gains a sense of independence from the executive branch, he or she is more likely to decide the case only on the law.” Two justices drew on their own experiences to emphasize this point. The first recounted:

Having been through two elections and one appointment, I found the appointment process just as political but behind closed doors. You would never be appointed in [my state] if [you are a member of] a different party from the governor. The voters are more engaged and wanting to know about the candidate and that’s more refreshing. . . . Since *Citizens United*, there are more opportunities for outside groups to influence the election. Scary. But they influence the appointment process, too. The voters, like juries, do the right thing.

The second justice concurred:

I wouldn’t want a lifetime appointment. I don’t believe in appointments. I’ve been elected [multiple] times and through the appointment process [multiple] times. There are more politics in the appointment process. Only the governor appoints with no citizen nominating commission. . . . I’m not fond of the appointment process. . . . I also don’t like retention because both sides might want to vote you out. I would rather have a flesh-and-blood opponent.

Many justices in this group also applauded that elected justices are more accountable to and in touch with the public. These comments are representative:

I think state court judges are also people who are active and known

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in their respective districts and counties. I’m not a fan of our current U.S. Supreme Court because they’re out of touch.

. . . .

I have to raise money here, and I don’t like it, but I do the best I can to do it right. The good things about the electoral process [are] that I have to go among the people of the state, I have to hear about what people are concerned with — not in the sense of casting votes. People want judges who are honorable and run a system that keeps them safe. The thought that a judge can ignore sentiments, the opinions of the public, that’s not a good thing. It’s

healthy to have honorable judges, raising money appropriately, and deciding cases responsibly.

. . . .

My observation is that some of the most politically unpopular and arguably wrong decisions have been made by unelected judges, primarily federal judges. Without some type of accountability, some of these judges feel empowered, apparently, to do what they want.

Unique in his comment, one justice welcomed the prospect of an ineffective colleague being given the boot by voters:

With elections, there’s some accountability. It might not necessarily be better. . . . Sometimes I saw justices that I was glad would probably only serve one term. There are lots of problems with lifetime appointment. . . . If perfect people were in the job with a lifetime appointment, it would probably be great. But that’s not going to happen.

And at least one justice didn’t blink about being affiliated with a political party. “Shouldn’t the public know about candidates? Isn’t there a benefit to people to know about political affiliation?” he inquired. “It’s not a hard and fast way to predict votes, but it’s useful information in light of the political decisions sometimes made,” he concluded.

Justices from every system reported concerns about the increase of outside funding affecting a justice’s re-selection bid. The combination of *Citizens United v. Federal Election Commission*⁸ and *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*⁹ has been “problematic,” bemoaned a justice in a partisan-election state. He described the first supreme court race in his state after those decisions, wherein a single outside entity raised more ▶

“The best judges are the ones who know they can make a living elsewhere,” said one justice.

than \$3 million to defeat the candidate whose hands were tied by the public financing system. “After *Citizens United*, more money poured into [my state’s] court races. Despite the group’s agenda, they usually pick a hot-but-ton social issue to attack with, usually tarring the justice by saying he helps criminals. Everyone who runs dreads the prospect of being a target.”

Citizens United was brought up several times in the interviews and never in a positive light. A justice in a sparsely populated state still favored the electoral process but lamented the changes wrought by *Citizens United*:

The election process has changed here, as it has in other states. The outside groups, because of *Citizens United*, give independent expenditures. This is a cheap media market and a small state, so a little goes a long way. Advocacy groups . . . have been here for three cycles unsuccessfully. It has changed the election process quite a lot because candidates are now required to raise more money whereas before they didn’t. Also, now there are more contested elections.

A justice in a retention-election state noted a year in which “[t]here was a concerted effort to run off several supreme court justices” by people outside the state. Although the effort was unsuccessful, it lowered the typical retention percentages. “The people behind [the campaign] disappeared.” Another justice lamented the difficulty of raising money for a retention election when there is no opponent, making it more difficult to counter challenges.

Despite the pitfalls of each type of selection and re-selection system, most justices did not think their courts would operate differently if justices had life tenures. Surprisingly, many justices did not want life tenure. Most,

like this justice, preferred a system that holds a justice accountable for his performance:

I think in general terms, we should hold judges accountable for what they do. We want judges who make good decisions on the law, have the ability to write, and who conduct themselves with integrity. We need a system that insures that judges perform how we want them to while minimizing political influence.

Another justice thought the electoral process improved his judicial performance:

The electoral process is an accountability tool. I wouldn’t be here if it didn’t exist. I disagreed with the former chief justice so I ran against him. My awareness of the other branches’ concerns and the community’s concerns is broader for running. It means you write a better opinion because you have these concerns in mind. The decision doesn’t change, though.

Some justices also expressed discomfort with unchecked decision making. For example, one offered his opinion that, “state judges are more reasonable than federal judges, not as pompous. I wouldn’t want to become that.” Another commented that he sees “activist judges” in the federal courts because they aren’t accountable. “Most of us think being closer to the people is good,” remarked another. And another believed that lifetime appointments cause federal judges to

lose their “filters” and “say whatever pops into their heads.”

A few justices thought that the culture of their courts might change if they were appointed for life, like federal judges. One justice said he and his colleagues might be less sensitive or less empathetic and more outspoken like some federal judges, thereby affecting how decisions are written but not how they are decided. A thoughtful justice supposed that a life tenure would cause the justices to perceive themselves as more independent. He thought that federal judges know this internally. “It’s more talked about in terms of a tradition, i.e., the tradition of the federal judiciary.” This unrestrained independence may also exist among justices serving in their last terms. One such justice reported that his colleague, also in his last term, commented that “we both have a free shot to do what we want to.”

Good character is the key characteristic for an independent justice.

Although I did not ask about key characteristics for high-caliber justices, the topic of character continuously popped up when discussing the pressures placed on justices by the re-selection process. This justice’s comment echoed others: “It takes character to be a judge. He or she must ‘compartmentalize’ the outside, personal concerns to make decisions that they might not even like.” Another phrased it this way:

If you put honorable people on the court, who understand the rule of law, they would more likely make decisions without considering how it might impact their chances for re-election. If you put people of lesser capabilities on the bench, maybe you would get a different result. There is always a temptation to change a bad policy, but we

don't have the authority to change it. The answer to the problem is to structure the system of selecting judges in such a way to make sure that the best people available are the ones put on the bench.

A federal judge who used to sit on a state intermediate court of appeals was candid in his views:

I think there is risk that [the possibility of losing a re-selection bid] would impact decision making. It has a lot to do with the integrity of the judge. As a former state court judge, there is no way you can't not think that your job is at issue. It risks affecting the substance of the opinion and definitely does affect the logic of the decision and perhaps its timing of release. The risks are there; it just depends on the integrity of the justice to do what's right.

Some justices mentioned other important characteristics for justices.



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"The takeaway," said one justice, "is that we should always have people on the bench who don't really want the job so much that they'll compromise their views to retain it. The best judges are the ones who know they can make a living elsewhere." Another noted that justices who view themselves as politicians are more likely to vote in a way to maximize their chances of re-selection.

A few justices proposed taking the pressure off them by having longer terms. Justices with longer terms uniformly felt less anxious than justices with shorter terms. "The prospect of losing is so remote, temporally," said one, "that you don't really think about it." But even longer terms don't fully immunize justices from the anxiety of re-selection. One justice with a long term related that a colleague is running in a non-partisan election in 2020 "and he is now mentioning it all the time, so he's worried."

CONCLUSION

The information gained through the interviews suggests that re-selection methods tempt most state supreme court justices to act strategically to maximize their prospects of maintaining their positions. But this temptation is generally ignored. Most justices have come to terms with the prospect of losing their jobs and use tactics to compartmentalize their personal

welfare concerns when making decisions. These justices can prioritize the importance of the rule of law and an independent judiciary. Other justices slip from time to time, particularly in the run-up to a re-selection event, and are consciously or unconsciously strategic in their decision making. In the end, it is the character of the justice that will matter most in determining whether he can resist the temptation.

- ¹ Texas and Oklahoma have two courts of last resort, one for civil appeals and one for criminal appeals. Other states have courts of appeals as courts of last resort. For ease of reference, I refer to each court of last resort as a "Supreme Court." See *Court of Last Resort*, BALLOTPEdia, https://ballotpedia.org/Court_of_last_resort (last visited Sept. 22, 2018).
- ² I also performed several empirical evaluations. My complete article covers this aspect of my study as well as other related issues. See Ann A. Scott Timmer, *The Influence of Re-Selection on Independent Decision Making in State Supreme Courts*, 82 LAW & CONTEMP. PROBS. 27, 27-62 (2019).
- ³ For ease of reading, and to protect confidentiality, I use masculine pronouns when referring to the justices regardless of their gender. And unless otherwise noted, I include the federal judges in the term "justices."
- ⁴ Four justices were unsure whether re-selection impacts opinion writing, and two justices expressed no opinion.
- ⁵ Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1117 (1987).
- ⁶ *Id.* at 1120.
- ⁷ *Id.* at 1122.
- ⁸ *Citizens United v. FEC*, 558 U.S. 310 (2010) (lifting restrictions on independent expenditures by organizations communicating about a candidate).
- ⁹ *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (striking matching funds provision of state public campaign financing act).