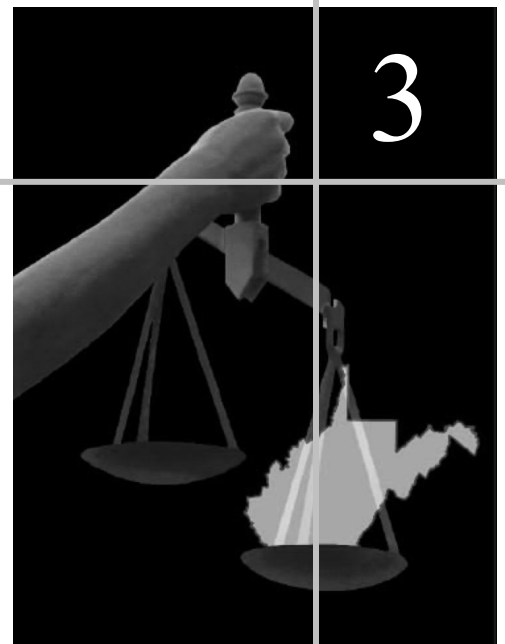


# CHAPTER 3

## JUDICIAL ELECTIONS, ELECTORAL INCENTIVES, AND CHECKS AND BALANCES

*by Alexander Tabarrok*

**The Rule of Law**





# 3

## JUDICIAL ELECTIONS, ELECTORAL INCENTIVES, AND CHECKS AND BALANCES

*Alexander Tabarrok*

Politicians serve the people who elect them. But in serving the people who elect them do politicians serve the common interest? Not necessarily. A Senator from Alaska serves the people of Alaska, a Senator from West Virginia serves the people of West Virginia, and a Senator from California serves the people of California. We hope that with debate, compromise, and trade these divergent interests will converge to produce something approximating the common interest. But we also recognize that politicians are rewarded for bringing home the bacon. Or in more scholarly terms, politicians pursue policies that concentrate benefits on their own constituents while diffusing costs over everyone else's constituents—even when the concentrated benefits are considerably less than the sum of the diffused costs. All of this is familiar to students of political science. What is less well recognized by legal scholars is that judges, especially elected judges, are also politicians.

Just like other politicians, elected judges have an incentive to serve their constituents. Since plaintiffs typically sue in the state in which they live, elected judges have an incentive to transfer wealth from out-of-state defendants to in-state plaintiffs. In particular, an elected judge has an incentive to transfer wealth from out-of-state corporations with deep pockets to in-state plaintiffs. Some evidence that judges might act in this way is provided by Richard Neely, a retired West Virginia Supreme Court judge, who was unusually frank about the incentives he thought were faced by elected judges. Neely wrote:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone's else money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me ((Neely 1988), 4).

And, he continued, “it should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can't even be relied upon to send a campaign donation ((Neely 1988), 62).”

## WHAT ABOUT JURIES?

Judges decide only a minority of tort cases directly (i.e. in non-jury trials) and occasionally they decide cases by overruling juries. But judges are always influential in the courtroom. Judges must interpret the law for juries, instruct the juries, allow or disallow objections, rule on motions and counter-motions, limit or not limit the lawyers to certain theories of liability and damages, etc. In order to transfer wealth to in-state plaintiffs, elected judges need not make blatantly biased rulings or often interfere in jury decisions. Judges have significant control over the trial outcome even without making use of their highest powers.

## BACKGROUND ON ELECTORAL SYSTEMS

The dominant methods of judicial selection are partisan elections, non-partisan elections, gubernatorial appointment, legislative election, and merit plans. The “merit plan,” however, is gubernatorial appointment from a slate of candidates put forward by a nominating commission. Furthermore, the governor typically appoints at least some members of the nominating commission. The governor also plays an important role when the legislature elects judges, a process used in only three states. The main categories are thus partisan elections, non-partisan elections, and appointment systems.

Elected judges must cater to the demands of the voters, and they must seek campaign funds from interested parties. Appointed judges, by contrast, do not answer to the voters in competitive elections nor do they need to raise significant campaign funds. Furthermore, appointed judges tend to have longer terms than elected judges, on average 21 percent to 27 percent longer for general and supreme courts, respectively (Hanssen 1999). Appointed judges are also more secure than elected judges; they are returned to the bench—through reappointment or a retention election—more often than are elected judges.<sup>1</sup> Appointed judges are thus more insulated from direct political pressure than are elected judges and will tend to be more independent ((Hanssen 1999), (Posner 1993), (Dubois 1990)).

In a partisan election state, judges run under a party banner, just as do other politicians. In a non-partisan election state, judges do not run under banners and are required by law to be independent of party. Elections tend to be more competitive in partisan than in non-partisan states. Although judicial elections in non-partisan states are more competitive than retention elections, they are still not very competitive. Many judges run unopposed, and when they are opposed, few incumbents are defeated. Partisan elections tend to be contested more often and as a result voter turnout is higher and incumbents are defeated more regularly than in non-partisan elections ((Dubois 1979), (Glick 1983)). Of elected states, ten use partisan elections.<sup>2</sup>

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<sup>1</sup> Many judges in appointed states maintain their office by running in a retention election. These elections are *unopposed* elections in which the judge is either voted up or down. Hall and Aspin (1987) find that retention elections return the incumbent to office 98.8 percent of the time. Carbon (1980) points out that retention elections were designed to create lengthy judicial tenures and to insulate judges from the public. Retention elections also insulate appointed judges from pressures from the governor. Since retention elections are essentially perfunctory we define states using initial appointment followed by retention elections as appointed states.

<sup>2</sup> There are a few states with mixed systems that are sometimes classified differently across studies (e.g., New York has a mixed system). For more details on our classification of electoral systems see *The Book of the States*

Tabarrok and Helland (1999) find that the primary difference between electoral systems with regards to tort awards is between partisan systems and all other systems. Thus, the focus here will be on the effect of partisan electoral systems on awards.

Although awards vary by electoral system, electoral systems appear to have very little effect on the demographic characteristics of judges. A large literature has tested whether judicial elections or appointments bring more minorities, women, conservatives, and so on to the bench or whether the American Bar Association ratings of appointed judges are higher or lower than those of elected judges. Almost unanimously, this literature concludes that selection mechanisms have no significant effects on any judicial characteristics (see, for example, (Flango and Ducat 1979); (Glick and Emmert 1987); (Alozie 1990); and the reviews of the literature in (Baum 1983); and (Stumpf and Culver 1992)). Notice that the hypothesis here, however, is that selection mechanisms affect outcomes through incentives even if they have little or no effect on measurable judicial characteristics.<sup>3</sup>

## EVIDENCE

Helland and Tabarrok (2002) use data on over 52,000 tort trials to examine how awards vary with judicial electoral systems. Figure 3.1 looks at the average award in five types of cases, non-business cases and the four types of cases we have a special interest in. We have labeled the types of cases Partisan Out, Partisan In, Non Partisan Out, and Non Partisan In. Partisan Out denotes cases in states that use partisan elections to select their judges when the defendant was an out-of-state business. The other variables are defined similarly. The primary idea is to compare Partisan Out with Non Partisan Out. In other words is the bias against out of state businesses bigger in states that use partisan elections to select their judges than in other states?

Figure 3.1 indicates that in partisan states, the average award against an out-of-state business defendant is \$936,190 but in non-partisan states the average award against an out-of-state business is only \$272,780. The difference (Partisan Out – NonPartisan Out) measures the total “partisan effect.” Awards against out-of-state businesses are on average \$663,410 higher in partisan than in non-partisan states. The difference is statistically significant at the (far) greater than 1 percent level, ( $F[1,52540] = 16.31$  with  $p = 0.0001$ ). This evidence supports the hypothesis that awards against out-of-state businesses are significantly higher in states with partisan elections than in states that use other selection mechanisms.

Awards against out-of-state companies in partisan elected states may be higher than similar cases in non-partisan states because awards are higher against out-of-state companies in partisan states (the partisan out-of-state effect) or because awards against businesses in general are higher in partisan states (the partisan business effect). The two effects can be decomposed. The partisan out-of-state effect is measured by (Partisan Out – Partisan In) – (NonPartisan Out – NonPartisan In). By subtracting out awards against in-state businesses, we control for any increase in awards against businesses in general in partisan elected states, thus isolating the partisan out-of-state effect. The partisan out-of-state effect has value

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and the discussion in Tabarrok and Helland (1999). Our conclusions are robust to reclassification of any states with significant mixing of elected and non-elected elements.

<sup>3</sup> The discovery that sociological characteristics do not differ across selection mechanisms strengthens our conclusion that the primary independent variable is the incentive structure. Ashenfelter et al. (1995) find that sociological characteristics of judges are of no help in predicting outcomes.

\$393,690 ( $F[1,52540] = 4.84$  and  $p = 0.027$ ). The partisan business effect is measured by (Partisan In – Non Partisan In) and has a value of \$269,720 ( $F[1, 52540] = 15.7801$ ,  $p = .0001$ ). Awards against businesses in general are larger in partisan states than in non-partisan states, but the majority of the partisan effect is due to a particular bias against *out-of-state* business defendants.

Figure 3.1 Differences in Mean Award

Variable	Total Award (all awards)
Constant (Non-Business Cases)	\$252,540 *** (19,524)
Partisan Out	\$936,190 *** (143,800)
Partisan In	\$408,450 *** (60,090)
Non Partisan Out	\$272,780 *** (84,070)
Non Partisan In	\$138,730 *** (43,003)
Number of Cases	53,545
Partisan Out - Non Partisan Out	$936,190 - 272,780 = 663,410$ ***

\*\*\* denotes statistical significance at the 1 percent level.

Although suggestive, these differences in means awards raise the question of whether the larger awards in partisan states are caused by differences in the electoral system or by some other differences which are merely correlated with differences in the electoral system. Helland and Tabarrok (2002) refine the above analysis to control for a large variety of factors other than the electoral system that could influence awards. Helland and Tabarrok include controls for the type of injury (e.g. death, major injury, minor injury, emotional distress, rape, sexual assault and other types of injuries), the type of case (e.g., product liability, medical malpractice), and the major tort laws in a state (e.g., weakened joint and several rule, collateral source rule, punitive cap rule). In addition, they control for case selection via settlement and winning.

The inclusion of a large number of control variables and procedures does not eliminate the partisan effect although it reduces it in size. The best evidence is that moving a case with an out-of-state defendant from a non-partisan to a partisan state raises the expected award by 40 percent or about \$362,988 evaluated at the mean award. The large size of the partisan effect indicates the potential profitability of forum shopping.

As a further test of the partisan electoral hypothesis, Helland and Tabarrok (2002) look at awards when federal judges, who are appointed not elected, use state law to decide cases. The U.S. Constitution (Article III, Section 2(1)) gives the federal courts the power to decide controversies between citizens of different states. Historically, federal diversity jurisdiction was supported by out-of-state businesses that feared they would be disadvantaged in pro-plaintiff/pro-debtor state courts (Friendly 1928). Today lawyers continue to cite out-of-state and anti-business bias as one reason for removing cases to federal court (Miller 1992). For more than a century, federal judges decided diversity-of-citizenship cases based on federal common law. The Supreme Court, however, overturned this rule in the 1938 case *Erie Railroad v. Tompkins* (304 U.S. p. 64). Since the 1938 Supreme Court decision, diversity-of-citizenship cases have been decided on the basis of state law.<sup>4</sup>

Helland and Tabarrok (2002) find that when federal judges decide tort cases there is little or no bias against out-of-state firms even when these judges are using the law of partisan states to decide the cases. This is further evidence that the partisan electoral effect is caused by judicial incentives and not by any differences in state law that happen to be correlated with electoral systems.

## DISCUSSION

Electoral incentives encourage judges to redistribute wealth from out-of-state business defendants to in-state plaintiffs. It's difficult to see how these incentives cohere with justice. If all tort cases were local, the incentive to redistribute wealth from out-of-state firms would be moot. But in today's economy state judges and juries are often called upon to decide cases involving out-of-state firms.

Consider, for example, *Garvey v. Roto-Rooter Services Co.* a class-action case filed in Madison County, Illinois.<sup>5</sup> The single Madison County resident named in the suit is suing "on behalf" of customers of Roto-Rooter in thirty other states. The complaint does not allege a defect in service, but instead that the individuals performing the service were not licensed plumbers. Put aside the concern that many economists, not to mention consumers, would consider the resulting lower prices a blessing, and consider the absurdity that a judge and jury from Madison County, Illinois, will in effect be deciding plumbing laws and regulation for thirty other states. Not surprisingly, judges in Madison County are elected.

Class-action cases like this can be decided in state courts only because of an anomaly in federal law. The Constitution provides that cases between citizens of different states be decided by federal judges, but in implementing this constitutional requirement, Congress and the courts decided that a case would be subject to federal diversity jurisdiction only if there

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<sup>4</sup> The definitive source for diversity of citizenship law is Wright (1994), Posner (1996) and Lieberman (1992) give short overviews.

<sup>5</sup> No. 00-L-525 (Ill. Cir. Ct. Madison County filed June 13, 2000). See Beisner and Miller (2001) for this case and others.

was “complete diversity”—every defendant had to be an out-of-state defendant.<sup>6</sup> As a result, it becomes quite easy to “defeat diversity” by suing a local defendant. In Jefferson County, Mississippi, for example, the Bankston Drug Store has been sued hundreds of times—not because the pharmacy did anything wrong, but simply as a way to defeat diversity in lawsuits against out-of-state pharmaceutical manufacturers.

Keeping the amount in controversy below \$75,000 can also defeat diversity. Unfortunately, this common-sense provision has been interpreted to mean that so long as none of the plaintiffs, numbering possibly in the millions, asks for more than \$75,000, the case can be kept in state court even if it involves millions of dollars in total (Beisner and Miller 2001).

Some of the defects in 28 USC S. 1332 have been remedied by the Class Action Fairness Act (CAFA), first introduced into Congress in 1999. CAFA requires federal diversity jurisdiction if the class has at least one hundred plaintiffs and damages exceed an aggregate of \$5 million. CAFA is a modest step in the right direction toward tort reform. It is especially appropriate because as compared with other, cruder reforms, it is consistent with American legal tradition. The framers of the U.S. Constitution gave federal judges control over cases between citizens of different states precisely because they feared that local courts would use their powers unfairly against out-of-state defendants (Friendly 1928). In 2000, a Senate Report on the CAFA emphasized this point:

Clearly, a system that allows State court judges to dictate national policy from the local courthouse steps is contrary to the intent of the Framers, when they crafted our system of federalism.<sup>7</sup>

The defects of elected judges are being remedied in part at the federal level. But should more be done at the state level?

First, it’s important to understand that the out-of-state bias problem is not caused by elections that work poorly. Indeed, the better that elections work the worse we can expect the out-of-state bias problem to get—which is one reason we see the effect most strongly in states which use partisan elections to select their judges. Thus a defense of judicial elections based upon their similarity to other elections (e.g. (Bonneau and Hall 2009)) does not counter the problems raised here. Moreover, the out-of-state bias problem will not be solved by better informed voters or more transparency in campaign contributions.

There is a fundamental difference between electing judges and electing other politicians. As noted in the introduction, we hope that the divergent interests of politicians from different states or regions will—with debate, compromise, and trade—converge to produce something approximating the common interest. But we cannot rely on this hope for judicial elections. Judges from West Virginia and judges from Alabama do not meet to debate, compromise and trade. Nor, even if this were to occur, does it seem likely that two wrongs (biases) would make a right. Plaintiffs and defendants in West Virginia and Alabama have more than a right to be heard and their interests weighed. Plaintiffs and defendants throughout the United States have a right to justice.

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<sup>6</sup> The key statute is 28 U.S.C. Section 1332. For court interpretation see *Strawbridge vs. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Note that the legislation and its interpretation long predate modern class action law.

<sup>7</sup> Class Action Fairness Act of 2000, S. Rep. No. 106-420, 106<sup>th</sup> Congress (2000) at 20. Quoted in Beisner and Miller (2001).

Judicial elections do not necessarily promote justice. On the positive side, electing judges may be thought of as part of the U.S. checks and balances system—a way of keeping judges “closer to the people.” One problem with this interpretation, however, is that in most tort cases the people are on both sides. Most tort cases are disputes between private parties and it’s not obvious why we would want to make judges more responsive to one party, the voting party, typically the plaintiff.

In criminal cases the case for elected judges may have more merit and is similar to the case for juries. Elected judges and juries provide a check on the government. The founders thought the jury trial was important enough to be guaranteed in the Bill of Rights because they were impressed with the jury as a form of check and balance against oppressive government. One person’s check on the government, however, is another person’s “nullification.”

From a larger perspective, however, it’s not obvious that checks and balances require that all political actors be elected. Consider the complicated issue of political representation. Does a politician best represent the people when she does what the people want? Or does she best represent the people when she does what the people would have wanted had they been as informed as the politician? If the former is the right notion of representation then why not submit all decisions to referenda? If the latter is the right notion then at some times and places citizens can be better off if they *do not* have the right to decide an issue.

How can citizens be better off without the right to decide an issue? We all face dilemmas between our short-term and our long-term selves. The short-term self makes decisions that our long-term self may regret. Our long-term self fights back with commitment devices that take away our opportunities to make short-term choices that we may regret. In the public arena, it seems wise to also have such commitment devices. The Founders gave federal Senators longer terms than Representatives and they staggered the terms so that our short-term political selves would not control all decisions. In a sense, the Supreme Court is the ultimate commitment device in that it gives power to a part of the polity who are long departed. Nevertheless, the long departed may better represent our long-term interests than will our short-term selves. Perhaps instead of insulating judges from “the people” we should think of appointed judges with long terms as a commitment device to better represent the people’s long-term interests.

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