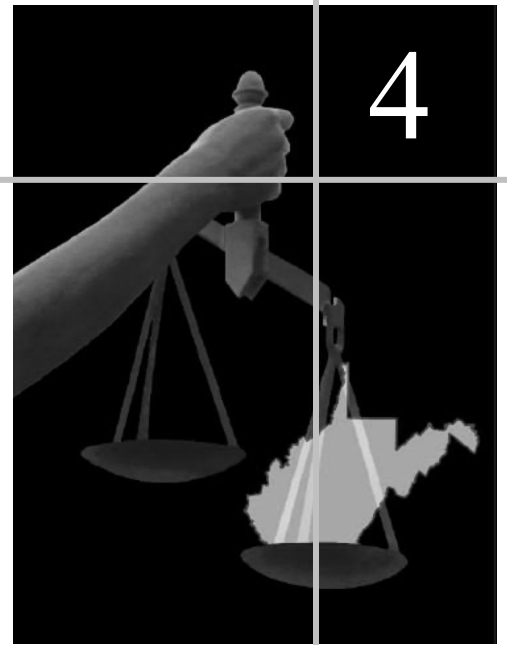


CHAPTER 4

JUDICIAL SELECTION METHODS AND LEGAL SYSTEM QUALITY

by Joshua C. Hall and Russell S. Sobel

The Rule of Law



4

JUDICIAL SELECTION METHODS AND LEGAL SYSTEM QUALITY¹

Joshua C. Hall and Russell S. Sobel

Since West Virginia achieved statehood in 1846, partisan elections have been used to select nearly all its judges.² In choosing partisan judicial elections, West Virginia was squarely in line with the trends regarding judicial selection at the time. Many states were abandoning their previous method of judicial selection – appointment by the governor or legislature – for direct elections, both partisan and nonpartisan. One reason for this change was it was thought at the time that elected judges would be more accountable to voters.

In 1940, the state of Missouri amended its constitution to allow for the merit selection of judges and in doing so became the first state to attempt to minimize the impact of electoral politics on judicial selection. The reasons for the change were many, but public concern about the involvement of political parties in the election of judges played a large role.³ Many felt that elected judges were too partisan and too influenced by political pressures to apply the law in a fair and even-handed manner. By switching from an elected to an appointed system of choosing judges — to increase “judicial independence” — Missouri began a nationwide trend. So many states followed in its footsteps that the merit system of judicial appointment is frequently referred to as the “Missouri Plan.” Today, 26 states use some form of merit system to appoint judges to their highest courts.⁴

Many of these states use slight variations of the original Missouri Plan. Most have a nominating commission comprising several citizens and lawyers, with the citizens typically appointed by the governor and the lawyers appointed by the state bar association. The nominating commission submits several candidates to the governor, who then selects one to

¹ This is a revised version of Hall and Sobel (2008). We thank Joe Haslag and the Show-Me Institute staff for their insightful comments and permission to incorporate material from that study into this essay.

² The one exception would be municipal judges, whose method of selection varies by jurisdiction. For more, see American Judicature Society (2008b).

³ For a nice discussion of the history of state changes in judicial selection procedures, see Hall (2001) and Hanssen (2004). On this point, Hall states, on page 316, “Reformers assert that the Missouri Plan, of which retention races are a part, and to a lesser extent nonpartisan elections remove judges from the vicissitudes of interpartisan competition....”

⁴ See Figure 4.1 for a list of the 26 states.

be appointed to the court. Some states require an additional step, like ratification by the state senate. After the judge has served on the court for a certain period of time, many states require a retention election in which voters may cast a ballot for or against a justice in an up-or-down vote. This merit method of appointive system is in contrast, however, to the other forms of judicial selection used in many states, such as direct appointment by the legislature, or partisan or nonpartisan statewide judicial elections.

In West Virginia, election to the West Virginia Supreme Court of Appeals has become quite contentious in recent years. In 2004, special interests lined up behind both candidates in the election between incumbent Warren McGraw and challenger Brent Benjamin. A group called “And for the Sake of the Kids,” primarily representing business interests, spent over two million dollars trying to get Benjamin elected. In addition, other special interests such as West Virginians Against Lawsuit Abuse and the West Virginia Chamber of Commerce were involved in the election. On the other side, a group financed primarily by trial lawyers and labor unions called West Virginia Consumers for Justice spent over a million in television ads during the race. While the rhetoric has been toned down some in more recent elections, special interests and partisanship continue to play a large role in West Virginia’s judicial selection process.

While these races can seem like mere partisan bickering, the issue of judicial selection and its effect on the quality of courts is important. Judicial independence is critical to a well-functioning legal system, and the quality of a state’s judicial system is an important determinant of economic growth.⁵ States with highly regarded legal systems better protect and define property and contract rights, providing the proper foundation for entrepreneurial activity and economic growth.⁶ Bad court systems, on the other hand, can impede economic development by creating uncertainty, driving up the costs of doing business (such as liability insurance or worker compensation), and infringing on the liberties that underpin a free and prosperous market economy.

A growing literature in economics has found that judicial independence and quality matter for economic growth across countries and states. Economist Abdiweli Ali (2003) found that the quality of a country’s judicial system is a significant determinant of the country’s economic growth.⁷ Using a different data sample and a different measure of judicial

⁵ The economic literature typically defines judicial independence as freedom from the other branches of government. Judicial independence can manifest itself in many ways, such as a judge’s permanence in office. As Alexander Hamilton ([1788] 1996) pointed out in Federalist Paper no. 78 (p. 491), “nothing can contribute so much to [the judiciary’s] firmness and independence as permanency in office.” When formally measuring independence, scholars tend to focus on how judges are insulated from political pressures through appointment procedures and tenure length (see La Porta et al. (2004) for an example).

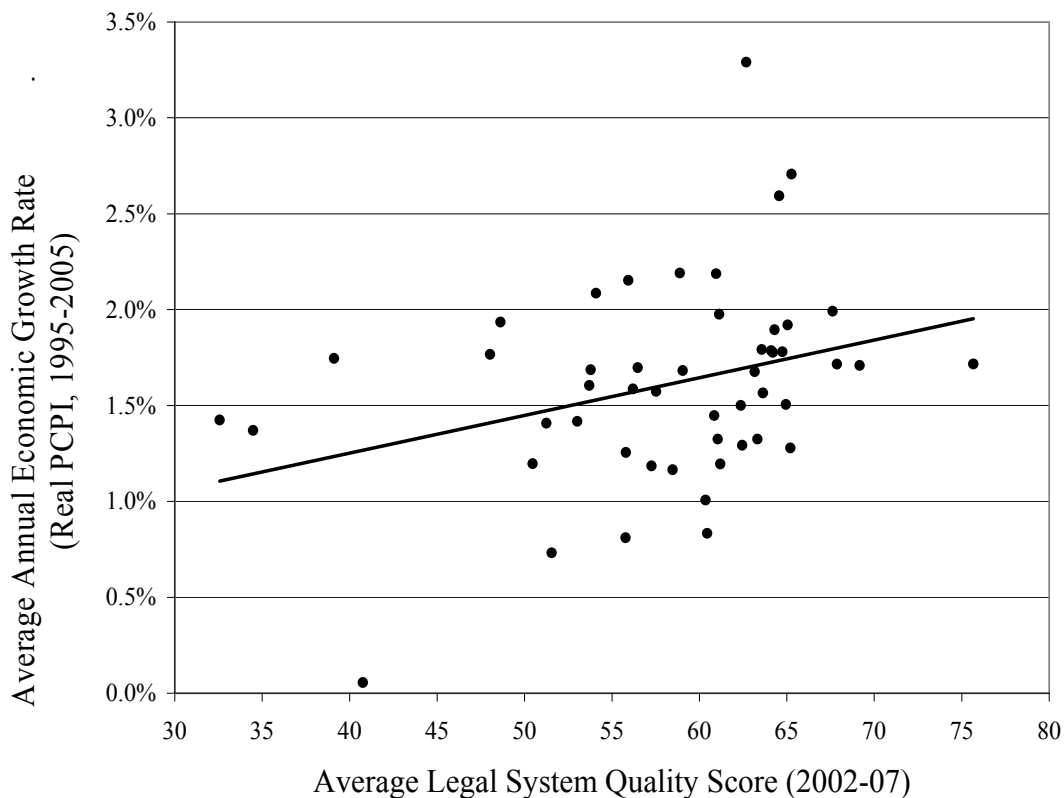
⁶ According to Gray (1997), a well-functioning legal system is one that has: 1) market-friendly laws; 2) adequate institutions (such as independent courts) to implement and enforce them; and, 3) a demand for those laws from citizens. Market-friendly laws clearly delineate the rights *and responsibilities* of market participants so they can go about the business of economic life without uncertainty about the legality of their actions.

⁷ Ali measures the quality of a country’s legal system in using data from the International Country Risk Guide and Business Environmental Risk Intelligence. These variables try to measure the rule of law (the extent to which citizens are equal under the law), the likelihood that private property will be confiscated by the government, the effectiveness of the judiciary, and the risk of contract repudiation without recourse. Ali finds a positive relationship between both of these measures of legal quality and a country’s economic growth as measured by the average annual growth rate of GDP from 1974–1989.

independence, economists Lars Feld and Stefan Voigt reached a similar conclusion.⁸ At the U.S. state level, Berkowitz and Clay (2004) found a positive relationship between the quality of a state's legal system and median household income in the state. They estimated that a one-and-one-third standard deviation increase in state legal quality would increase median income by 11.3 percentage points. Thus, this literature clearly shows that an independent and well-regarded judicial system is an important determinant of economic growth.

Further evidence is presented in Figure 4.1 and Figure 4.2. As discussed in further detail later in the report, there exists one survey-based measure of state-legal system quality—the Institute for Legal Reform's *State Liability Systems Ranking Study*. The study is produced annually for the U.S. Chamber of Commerce by the Harris Poll and tries to derive a measure of “how reasonable, fair and balanced” the tort liability system in each state is perceived to be by American business. Based on a survey of over 1,000 corporate attorneys, each state's legal system is given a score (from zero to 100 with higher scores meaning higher quality) and ranked from one to fifty.

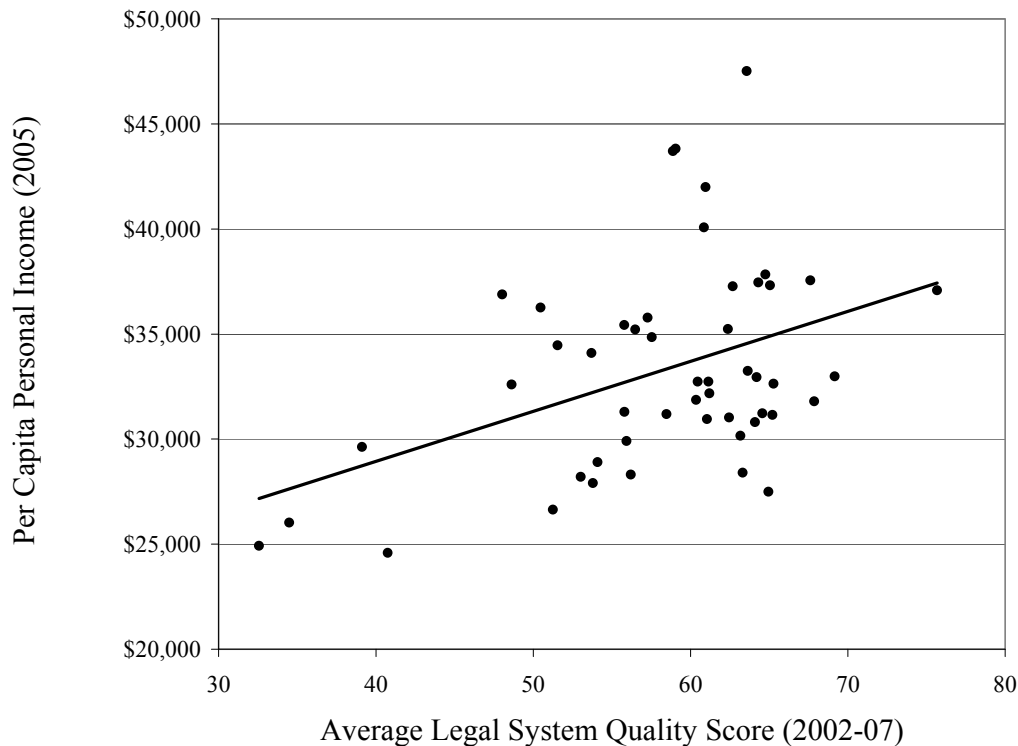
Figure 4.1:
State Legal System Scores and State Income Growth



⁸ Feld and Voigt (2003). They are primarily interested in the difference between *de jure* and *de facto* judicial independence. They calculate their *de jure* measure according to the independence given judges in that country's legal documents concerning the judiciary (usually their constitutions). An example of a *de jure* measure of independence would be whether judges have life terms. They find a strongly positive relationship between *de facto* judicial independence and growth of GDP per capita from 1980 to 1998.

Figure 4.1 shows the positive relationship between the average legal system quality score of a state between 2002 and 2007 and its average annual growth rate in per capita income during the past decade. Figure 4.2 provides this information from a different perspective, showing the positive relationship between a state's average score from 2002 to 2007 and its level of per capita income in 2005.⁹ Thus states with higher scores in this legal index have higher incomes *and* grow faster. It is clear that the quality of a state's legal system is important for growth. The question of interest is how the method of judicial selection influences the quality of a state's legal system.

Figure 4.2:
State Legal System Ranking and State Income Level



Many studies show that the method of judicial selection does influence judicial independence, which should impact the overall quality of a state's legal system. Most of this work, however, focuses primarily on the difference between elected and appointed systems, with some recent work focusing on the difference between partisan and nonpartisan elections.¹⁰ Almost no empirical research looks at whether there are any differences among *all* types of judicial selection mechanisms, from partisan elections to different versions of the

⁹ We also find a positive and statistically significant relationship between a state's legal quality and its average annual per-capita income growth. The following statistically significant result was found using ordinary least squares (t-statistics in parentheses): Average annual growth in per capita income 1995–2005 = 0.01957 State Legal Quality Score 2002–07 (2.339). Similar results were found using state rankings instead of scores, and for different time periods.

¹⁰ Sobel and Hall (2007a).

Missouri Plan of appointment. The intense public debate surrounding judicial reform in West Virginia makes it imperative that policymakers and voters have accurate evidence about the relationship between different mechanisms of judicial selection and the quality of a state's legal system. To this end, we provide a closer look at how different features of judicial selection mechanisms, especially the difference between partisan elections and versions of the "Missouri Plan," affect the quality of legal systems across the states.

METHODS OF JUDICIAL SELECTION: A HISTORY AND OVERVIEW

At the federal level, judicial selection is fairly straightforward. The U.S. Constitution lays out the selection procedure for federal judges, which involves the president nominating a candidate by submitting his or her name to the U.S. Senate for confirmation.¹¹ At the state level, however, there are numerous differences in the method of selecting judges. Even within states, there are differences in how judges are selected at different levels of the state judiciary. In West Virginia, for example, judges on all courts above the municipal level are chosen using partisan elections.¹² At the municipal level, however, judicial selection methods vary from municipality to municipality.

In general, there are two ways of choosing judges: appointment and election. In addition to being the method chosen for the federal government in the U.S. Constitution, appointment was also the method chosen by each of the original 13 states. In fact, until 1832, all states delegated the responsibility of judicial appointment to the governor or legislature (with perhaps a requirement that the other confirm).¹³ Virginia, for example, chose judicial appointment by the state legislature as its method of judicial selection for its highest court shortly after ratification of the U.S. Constitution, and has used that method ever since.¹⁴

Some have argued that judicial appointment was popular during this period because the Founding Fathers recognized the importance of judicial independence.¹⁵ More likely, the opposite is true. Americans had developed a suspicion of both the executive branch and the judicial branch during the colonial period because they tended to be faithful agents of the British Crown, in stark contrast to the colonial legislatures. When one observes that the federal and state constitutions afford tremendous powers to the legislature, this perspective becomes clear. In fact, as Alexander Hamilton points out in *Federalist No. 81*, the judiciary was considered to be the weakest of the three branches of the government.¹⁶ Instead of cultivating independence, judicial appointments would keep the courts subordinate to the

¹¹ See Stratmann and Garner (2004) for an excellent overview of the federal judicial selection process.

¹² See American Judicature Society (2008a) for more information on how other states select their justices at each level and American Judicature Society (2008b) for more information on West Virginia.

¹³ Of the 13 original states, seven used legislative appointment and six used gubernatorial appointment (Streb 2007). For a discussion of the evolution of state judicial selection procedures, see Hanssen (2004).

¹⁴ Streb (2007), p. 6.

¹⁵ See, for example, Streb's invocation of Alexander Hamilton (2007), p. 8: "After all, Alexander Hamilton was quite clear that if a judge were forced to run for re-election, judicial independence — and hence the judiciary itself — would be threatened."

¹⁶ Hamilton argues that this is a good thing, because it means that the judiciary will not be able to usurp the policymaking role of the legislature (Owsiany 2001).

legislature.¹⁷ Legislatures were seen as faithful agents of voters because they were directly elected by voters, and thus directly accountable to them.

Beginning with Mississippi in 1832, however, most states amended their state constitutions to mandate judicial election instead of appointment.¹⁸ In 1850 alone, seven states made the switch.¹⁹ The preference for partisan elections over appointive systems was nearly universal during this time; 20 of the 29 states already in the Union in 1847 switched to partisan judicial elections at some point during the next half century, and every state that joined between 1847 and 1910 adopted partisan judicial elections.²⁰ Thus, by 1910, 80 percent (37 of 46) of the states were using elections to select judges.

The conversion to partisan judicial elections was part of a larger movement toward direct elections. In the 1830s and 40s, legislatures were seen as being too powerful and beholden to special interests. Bad state investments in railroads, highways, and canals had resulted in growing state debts, which led to dissatisfaction with legislative performance and recognition that additional checks were needed on state power.²¹ According to law historian Kermit Hall, “The populist and antigovernmental stirrings of the late 1840s and 1850s climaxed in an outburst of constitutional reform that diminished legislative power.”²² These constitutional reforms needed to be enforced, however, and that enforcement could only come from a more independent judiciary.²³ While it is true that partisan elections made judges directly accountable to voters, reformers at the time were more interested in making judges more independent of legislative influence.²⁴ Reformers thought that partisan elections would give judges the political power necessary to act as faithful agents of voters in checking legislative power.²⁵

The notion that elected judges would act as an independent check on the legislature because they were beholden directly to voters was soon found to be incorrect. Just as the legislature was captured by special interests, the judiciary was now viewed as having been captured by political parties.²⁶ Judicial reformers, believing that it was the partisan nature of the elections that were causing much of the problem, now advocated nonpartisan elections in which candidates would run without any party affiliation. From 1910 to 1958, 17 states switched to nonpartisan elections, so that by the end of the period more states (17 of 47) were using nonpartisan elections to select judges than any other method.²⁷

During the nonpartisan period, however, the groundwork was being laid for yet another transformation of judicial selection procedures. In 1913, the American Judicature Society was founded to help improve the justice system in the United States by promoting an

¹⁷ Hanssen (2004) p. 444.

¹⁸ Streb (2007) p. 9.

¹⁹ Haynes (1944).

²⁰ Hanssen (2004) p. 436.

²¹ Hanssen (2004) pp. 445-446.

²² Hall (1989, p. 89), quoted in Hanssen (2004).

²³ The ideal of judicial independence from the will of the other two branches is at the heart of the principle of “checks and balances” (La Porta et al., 2004). Constitutions are written to guarantee citizen freedoms against encroachment by government. Historically, the courts have been thought of as the bulwark against overreaching executive and legislative branches (Hayek, 1960; Buchanan, 1975). For an alternate perspective on judicial independence, see Anderson, Shughart, and Tollison (1989).

²⁴ Hall (1983).

²⁵ Hanssen (2004) p. 448.

²⁶ Hanssen (2004), p. 450.

²⁷ Hanssen (2004), p. 437.

independent judiciary free of political influence. The society's co-founder, Albert Kales, drafted a procedure for merit-based selection of judges that would give them greater independence from political pressures, but would also retain enough political control to be palatable to populists.²⁸ His plan was first enacted in Missouri in 1940, and from there it spread to more than two dozen states.²⁹ Today, it is the most popular method of electing justices at the state supreme court level.

DOES JUDICIAL SELECTION MATTER?

While history can tell us what individuals were saying when judicial selection policies were changed, it tells us very little about the effects of different selection methods. During the 19th century, judicial reformers thought that switching to partisan elections would make judges more independent by giving them a power base apart from the legislative and executive branches. When in the 20th century partisan elections were dropped in many states, in favor of nonpartisan elections, the rationales amounted to little more than normative appeals or responses to a crisis, such as judicial corruption or failure to check an out-of-control legislature overstepping its constitutional boundaries. That is, the change was not informed by evidence that partisanship per se was impairing voters' ability to elect judges who would serve more virtuously or effectively. Nor did the actual experience with nonpartisan elections provide such evidence.

In many states, including West Virginia, state supreme courts have come under fire as being too "politicized." For example, business interests have suggested that West Virginia court decisions have made the state a "judicial hellhole."³⁰ Regardless of whether this pejorative description is correct, the bottom line is that West Virginia's court system – and consequently, the method of judicial selection used in the state – has come under intense scrutiny.³¹

West Virginia is not alone in this regard. Intense debate has surrounded the election of judges in both Wisconsin and Ohio. Appointive systems are not immune from controversy either. Consider the fact that Missouri — the home of the non-partisan, appointive system known as the Missouri Plan — has recently seen considerable debate over whether the system is in need of modification.

At issue in all of these debates is the relationship between judicial selection, jurisprudence, and economic outcomes. In Missouri, for example, a recent report argues that the court's composition has changed considerably over the past two decades and that the court's jurisprudence changed (for the worst).³² The authors suggest that the first change explains the second:

It is clear ... that the court has taken a new direction in recent years, and this shift followed changes in the court's composition. The seeds of some of today's majority opinions can be found in earlier dissenting opinions.

²⁸ Hanssen (2002), p. 81.

²⁹ Here, we will use the terms "merit plan" and "Missouri Plan" interchangeably.

³⁰ American Tort Reform Association (2008).

³¹ For a detailed analysis of the labeling of West Virginia as a judicial hellhole, see Thornburg (2008).

³² Eckhardt and Hilton (2007).

Partisanship and personal preferences aside, the obvious lesson is that judicial selection has consequences.³³

Similar reasoning appears to have motivated West Virginia Governor Joe Manchin to suggest a switch to nonpartisan elections.

While “thick” legal analysis can shed much light on what is going on in a particular case or series of cases, it is difficult to draw broader conclusions from such a case-by-case analysis.³⁴ The Missouri report implies that it is the current method of judicial selection in that state which led to the change in court composition and hence the change in jurisprudence.³⁵ But we do not know whether this is true, because we cannot examine or be certain of the counterfactual. We do not know who would have been selected if Missouri had used a different judicial selection system. It’s therefore unclear whether the result can be attributed to the method of judicial selection or to some other trend. Consider Ohio, which has also seen considerable change in jurisprudence during the last decade.³⁶ As in Missouri, concern over changing jurisprudence has spawned intense public battles over judicial selection. In Ohio, though, the debate has inspired calls to switch from a mixed election system to a merit system — the very system now found wanting in Missouri.³⁷ So, the undesirable changes in jurisprudence might be a function of judicial selection or they might be the product of some underlying trend.

Judicial selection can influence judicial outcomes mainly by: (a) changing which people are chosen as judges; and/or, (b) changing the incentives judges face. That is, different processes may result in the selection of different individuals, in turn resulting in different judicial outcomes; or judicial behavior may be influenced by the desire to be reelected or reappointed, causing judges to cater to different groups depending on how they are selected.

Legal reformers often contend that both factors are important. Advocates of judicial elections, for example, frequently talk of “holding judges accountable” through elections, which implies that judges have an incentive under this system to cater directly to voters. Likewise, such advocates object to the appointment of judges who do not “represent the people’s interests.”

Because there is only weak evidence that the method of judicial selection results in different kinds of people becoming judges, economic research on judicial selection typically focuses on how judicial selection affects incentives.³⁸ Whether judges should be elected or appointed is probably the most discussed topic in legal scholarship.³⁹ This literature points to a substantial difference in outcomes between the two, caused by the differing incentives faced by judges in each system. Two excellent recent examples of this work are by economists Alex

³³ Eckhardt and Hilton (2007), p. 21.

³⁴ Hanssen (2000).

³⁵ Note that we are not saying that the method of judicial selection in Missouri changed during this period. Rather, the argument we are restating is that the Missouri Plan *allowed* for these changes in the composition and jurisprudence of the Missouri Supreme Court.

³⁶ For criticism of the “new” Ohio Supreme Court, see Owsiany (2001b).

³⁷ In Ohio, judges run in partisan party primaries but the general election is non-partisan. For law review articles on calls for reform, see Link (2004) or Geyh (2003).

³⁸ See Hanssen (2000), who argues that “[w]ith respect to judicial institutions, it does not appear that this ‘self-selection’ effect is important — various studies have found few significant differences in such things as where the judge went to school, the years of education, religious affiliation, etc.” Also see the work of Alozie (1990) and the overview of the literature in Baum (1995).

³⁹ Dubois (1986).

Tabarrok and Eric Helland. Tabarrok summarizes their work in detail in Chapter 3 of this volume.

Economists Tim Besley and Abigail Payne hypothesize that more discrimination cases will be filed in states that elect their judges because: 1) voters are more likely to elect pro-worker (and anti-business) judges that will rule in their favor; and, 2) elected judges are more likely to appeal to potential voters by using their discretion to make pro-worker awards.⁴⁰ Analyzing employment discrimination charges filed in state courts over a 27-year period from 1973 to 2000, Besley and Payne found considerably more filings in states that elect their judges than in states that use a purely appointive system. Interestingly, they also found evidence that retention elections are enough to discipline appointed judges into acting like directly elected judges.

More recently, Daniel Berkowitz, Chris Bonneau, and Karen Clay looked at the effect of judicial independence on minority interests, specifically the interests of children with disabilities.⁴¹ The authors proposed that promoting the interests of children with disabilities can be politically difficult for state judges because of the high financial cost of complying with special education litigation, and the concomitant mainstreaming of children with disabilities into regular classrooms. They found that a state's method of judicial selection helps to explain increases in special education litigation and enrollments following the passage of the Individuals with Disabilities Act (IDEA) in 1975. Controlling for a variety of other factors, Berkowitz, Bonneau, and Clay found that states with elected judges had far lower student enrollment under the IDEA than states with appointed judges. They concluded that appointed judges are more independent, and thus more able to promote minority interests that may conflict with majority preferences.

These studies are part of a large and growing literature showing that there are differences in judicial and legal outcomes between states that elect their judges and states that appoint their judges. Political scientist Melinda Gann Hall found that liberal Democratic supreme court judges in Texas, North Carolina, Louisiana, and Kentucky were more likely to vote with the conservative Republican majority if their previous election was close.⁴² In a later paper, Melinda Gann Hall and Paul Brace found that Democratic state supreme court judges in elective states are less likely to overturn death penalty cases than Democratic supreme court judges in appointive states.⁴³ Similarly, in a previous paper, we (the authors of this chapter) used a nationwide ranking of the quality of state legal systems to conclude that judicial quality is lowest in states with partisan judicial elections.⁴⁴

Judges appointed under the Missouri plan (or some variant) seem to be more "independent" than elected judges. This was confirmed by economist Andrew Hanssen, who noted that because more-independent judges have greater discretion, there will tend to be greater uncertainty about the outcomes of cases they decide.⁴⁵ If the outcomes could be predicted with certainty, the two parties would simply settle and go home. When the outcomes are more uncertain, however, it's more likely that each side will think they have something to gain by going to court. A higher percentage of cases going to court rather than

⁴⁰ Besley and Payne (2003).

⁴¹ Berkowitz, Bonneau, and Clay (2006).

⁴² Hall (1992).

⁴³ Brace and Hall (1993).

⁴⁴ Sobel and Hall (2007a).

⁴⁵ The idea, which Hanssen (1999) applied to the state judicial election issue, was first introduced by Priest and Klein (1984).

being settled is, therefore, an indicator that the judicial system is less predictable (and thus more independent). Hanssen looked at utility regulation cases from 1985 to 1994 and found that there is indeed more litigation where judges are appointed.⁴⁶ In later work he found that states using some form of the Missouri merit plan to select supreme court justices have far more litigation than states using judicial elections.⁴⁷ He suggests that the discrepancy could help explain the widespread support of lawyers and the American Bar Association for the Missouri Plan.

While there has been a tremendous amount of research about the differences between elected and appointed systems, there has been almost no empirical work about the differences among appointive systems.⁴⁸ The main differences among appointive systems pertain to whether a nominating commission and/or legislative confirmation are used.

The use of a nominating commission to select the slate of judicial candidates from which the governor must choose can affect which candidate is eventually chosen. In the economics literature, this process is known as agenda control.⁴⁹

Let's consider a simple example: Suppose there are five judicial candidates (call them A, B, C, D, and E) and the nominating commission selects three for the governor to pick from. Further, suppose that the governor's own ranking of the candidates, from most to least preferred, is A, B, C, D, and E. Without a nominating commission restricting his choices, the governor would pick candidate A. With a nominating commission presenting a restricted subset of three candidates, the governor's choice will be the most preferred among the subset — a subset that might not include his most preferred candidate. If the preferences of the nominating commission differ from those of the governor, the commission can manipulate the choice set in their favor. For example, if the nominating commission most wants candidate C to be appointed, they could submit a list containing only C, D, and E, from which the governor would select C. In this case, it is the preference of the nominating commission, not that of the governor, that determines the judicial selection.⁵⁰

When the nominating commission has the same preferences as the governor, the commission would submit their top three candidates, A, B, and C, which are also the governor's top three choices. The governor would then select candidate A, the same outcome had there been no nominating commission at all. Thus, the extent to which a nominating

⁴⁶ Hanssen (1999).

⁴⁷ Hanssen (2002).

⁴⁸ One exception is McLeod (2007). Unfortunately, the study's sample size is so limited that it is unclear whether the findings are best explained by differences in state law or by differences in how the states in the sample select judges.

⁴⁹ See Romer and Rosenthal (1978).

⁵⁰ According to an unattributed study made public by the Adam Smith Foundation, this is what happened in Missouri recently (2007, p. 4):

“After reviewing all thirty applicants in just two days (giving an appallingly scant half hour interview for each applicant to the Supreme Court), the Commission forwarded three nominees to the Governor for his consideration. Two of the three were Democrats and one was a Republican. In and beyond Missouri, it is a political truism that a governor of one party, Democrat or Republican, will be loathed [sic] to appoint a person from the opposite party to the highest court. In Missouri, it has not happened in the last half century, and the last time a Governor of one party was implicitly forced to appoint a judge from the other party was nearly three decades ago during Governor Kit Bond's administration. Operating under this truism, after the Commission nominated two Democrats and one Republican, even the most generous interpretation is that the Commission had gamed the system by de facto making the choice of judge.”

commission changes the outcome depends on how closely aligned its preferences are with the governor's.⁵¹

How likely is it that the preferences of the nomination commission and the governor will coincide? In virtually all states with a nominating commission, the governor appoints some or all of its members, so the commission will likely align with the governor to some degree. However, the term lengths of these appointments may run such that appointees from governor are choosing the candidates submitted to a subsequent governor with different preferences.

Just as a nominating commission may affect the outcomes of the judicial selection process, so may a legislative confirmation process. If the legislature, for example, would decline to confirm candidate A (the governor's most preferred candidate in the above example), the governor must submit the most preferred candidate who can garner legislative approval — perhaps candidate B or C. Again, how much this additional process matters depends on how different are the preferences of the legislature and the governor. This depends, in turn, on such factors as the rate of turnover in the state Senate, the extent to which judicial appointment is a salient electoral issue, and many others.

Thus, there is reason to believe that differences in judicial and legal outcomes among appointive states are substantially influenced by variations in the appointment methods — for example, whether they use nominating commissions, legislative confirmation, or both.

JUDICIAL SELECTION AND THE QUALITY OF STATE COURTS

In this section, we inquire whether there is evidence that a state's method of judicial selection is a significant determinant of the quality of its legal system. To do so, we must classify states into groups based on their methods of judicial selection, and then find an empirical measure of legal system quality to compare across the groups.

Based on a careful reading of the selection methods for state supreme court judges, we have identified seven major groups. Our information on selection methods comes from two sources: *Methods of Judicial Selection*, published by the American Judicature Society; and *The Book of the States*, published by the Council of State Governments.⁵² There are, of course, many minor variations within each grouping, and we point the reader to the original sources for additional details on each state's method of judicial selection. A listing of the major groups, with the associated states, is given in Figure 4.3.

The first two groups are composed of those states using elections as the method of judicial selection. In the first group are the 13 states using nonpartisan elections, in which judicial candidates run for office without being identified or selected based on political party affiliation. In the second are the nine states, including West Virginia, that use some form of partisan elections in which candidates are affiliated with a political party.⁵³ The third group

⁵¹ There are three states in which the governor must get the approval of a council for judicial appointments. In two of them, the governor appoints the members of this council, so the analysis would be similar to the case in which he appoints the members of the nominating commission.

⁵² American Judicature Society (2008a) and Council of State Governments (various years).

⁵³ Michigan and Ohio use nonpartisan general elections, but the candidates are selected in partisan processes so they are generally classified as partisan election states.

comprises the two states that use the legislature to elect judges. The remaining four groups are composed of states using some form of gubernatorial appointment process, further differentiated according to whether a nominating commission is present and whether legislative confirmation is required. Thirteen states use a process involving only a nominating commission and the governor. Eight states add some form of legislative confirmation process to these other two steps.⁵⁴ Two states have gubernatorial appointment with legislative confirmation, but no nominating commission. Finally, the selection procedures of three states involve neither nominating commissions nor legislative confirmation, but do have some form of (usually governor-appointed) executive council that must grant approval.

Figure 4.3: States Grouped by Method of Judicial Selection

Method of Judicial Selection (number of states using it)	States Using This Method
Nonpartisan elections (13)	Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, Wisconsin
Partisan elections (9)	Alabama, Illinois, Louisiana, Michigan, New Mexico, Ohio, Pennsylvania, Texas, West Virginia
Elected by legislature (2)	South Carolina, Virginia
Gubernatorial appointment from nominating commission (13)	Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Wyoming
Gubernatorial appointment from nominating commission with legislative confirmation (8)	Connecticut, Delaware, Hawaii, Maryland, New York, Rhode Island, Utah, Vermont
Gubernatorial appointment with legislative confirmation (2)	Maine, New Jersey
Gubernatorial appointment with council approval (3)	California, Massachusetts, New Hampshire

Note that there are many minor differences among the states within each grouping. See text and sources for additional details.

With our groups compiled, we must now find a measure of legal system quality to compare across the groups. While, unfortunately, there is no objective or widely accepted measure of the quality of state legal systems, one survey-based measure does lend itself to empirical analysis: the Institute for Legal Reform's *State Liability Systems Ranking Study*.⁵⁵ This study, conducted annually for the U.S. Chamber of Commerce by the Harris Poll, is based on a representative national sample of more than 1,500 senior attorneys, in-house

⁵⁴ Most states with legislative confirmation require only state senate approval.

⁵⁵ See Institute for Legal Reform (various years).

general counsel, and senior litigators at companies with annual revenues of at least \$100 million. The stated purpose of the study is to derive a measure of “how reasonable, fair and balanced” the tort liability system in each state is perceived to be by American business.

The survey focuses on 10 areas: (1) overall treatment of tort and contract litigation; (2) having and enforcing meaningful venue requirements; (3) treatment of class action suits and mass consolidation suits; (4) punitive damages; (5) timeliness of summary judgment/dismissal; (6) discovery; (7) scientific and technical evidence; (8) non-economic damages; (9) impartiality and competence of judges; and, (10) predictability and fairness of juries. Based on survey responses, the index scores state legal system quality on a scale of 0 to 100. The state with the highest score is given a ranking of 1, and the other states are ranked accordingly.

While many of the factors included in this index may seem irrelevant to a state’s method of judicial selection, the opposite is likely true. For example, in West Virginia the state supreme court ruled that legislation enacted by the state legislature establishing meaningful venue requirements is unconstitutional; justices elected in heavily partisan elections cast the deciding votes. It is therefore likely that the use of partisan elections for judicial selection affects West Virginia’s score on questions about meaningful venue requirements. Given the broad ability of state supreme courts to interpret and overrule legislation, the composition of a state’s high court (and thus the type of selection process used) can clearly have widespread consequences for the overall quality of a state’s legal system.

There are potential problems with any measure of legal system quality, but the *Ranking Study* is the only empirically based index that exists across states and through time. Admittedly, the index has a bias in that it attempts to gauge how the state legal systems are viewed by large public corporations. But this bias is also one of its advantages. Most legal reforms are enacted with an eye toward promoting economic growth and development, and it is precisely the perception of the state’s legal climate toward business that is being measured by this index. Other research examining this index has found that it is significantly correlated with per-capita income and other measures of economic performance across states (like poverty and unemployment rates).⁵⁶ Earlier in this chapter we presented graphical evidence showing the clear correlations between this index and measures of income and economic growth. Therefore, we can be reasonably certain that states scoring better in this index do indeed enjoy a legal climate more conducive to economic growth and prosperity.

Figure 4.4 shows the 2002 through 2007 index scores and Figure 4.5 the associated rankings, for all 50 states. The averages for the period are also given. During those six years, West Virginia earned an average ranking of 49 out of 50 — never scoring better than 49th in any year of the survey. In 2006 and 2007 in fact, West Virginia ranked dead last at 50th, with an overall index score of below 40 (out of 100) in both years. The states scoring most similarly to West Virginia in terms of being persistently ranked as having one of the worst state legal systems during this period are Alabama, Louisiana, and Mississippi. Conversely, consistently scoring at the top of this index are Delaware, Nebraska, Iowa, and Virginia. Delaware, in fact, tops the ranking in every year.

⁵⁶ See Sobel and Hall (2007b). See also Berkowitz and Clay (2004), who use this study to find a positive relationship between legal quality and median state income. They also showed that states with higher-quality courts have lower poverty rates, everything else being equal.

Figure 4.4: State Liability System Scores, 2002–07

State	Index Score						2002–07 Average
	2002	2003	2004	2005	2006	2007	
Alabama	37.8	31.6	34.3	35.9	44.4	50.7	39.1
Alaska	53.8	55.8	56.5	56.4	56.2	56.0	55.8
Arizona	63.2	59.7	63.8	60.9	65.1	66.3	63.2
Arkansas	49.3	44.9	52.5	50.2	54.1	56.5	51.3
California	48.6	45.6	45.2	45.5	49.8	53.5	48.0
Colorado	65.3	62.3	63.9	63.6	65.6	65.1	64.3
Connecticut	63.4	60.3	62.5	62.0	66.9	66.3	63.6
Delaware	78.6	74.5	74.4	76.0	74.9	75.6	75.7
Florida	55.2	48.6	54.1	50.9	55.2	58.2	53.7
Georgia	59.9	52.7	57.6	58.4	61.0	61.2	58.5
Hawaii	52.0	47.8	53.7	51.5	48.0	56.3	51.6
Idaho	62.4	61.8	66.2	64.2	64.0	61.3	63.3
Illinois	55.1	53.1	50.5	44.1	49.2	50.8	50.5
Indiana	62.8	65.1	64.4	65.5	65.2	68.2	65.2
Iowa	65.8	68.8	68.6	66.3	68.8	68.9	67.9
Kansas	66.0	61.0	64.4	62.6	64.5	66.7	64.2
Kentucky	53.5	54.0	56.0	54.9	58.0	60.8	56.2
Louisiana	41.3	37.3	40.5	39.1	39.0	47.3	40.8
Maine	61.0	60.9	64.1	64.2	65.5	68.9	64.1
Maryland	60.6	58.8	61.4	59.8	63.4	61.7	61.0
Massachusetts	54.0	59.1	57.7	57.8	59.0	65.7	58.9
Michigan	58.2	56.3	61.3	59.6	63.1	64.2	60.5
Minnesota	61.0	63.5	65.0	65.2	65.0	70.6	65.1
Mississippi	28.4	24.8	25.7	30.7	39.7	46.1	32.6
Missouri	56.8	55.4	52.9	51.9	57.8	60.0	55.8
Montana	49.6	56.4	51.7	54.8	54.8	57.2	54.1
Nebraska	65.4	69.3	69.1	69.7	71.5	70.0	69.2
Nevada	56.7	54.1	56.4	58.4	56.0	62.0	57.3
New Hampshire	61.9	63.2	65.2	64.0	66.0	68.2	64.8
New Jersey	55.4	56.1	60.2	57.8	61.4	63.4	59.1
New Mexico	52.8	48.6	55.1	54.5	54.2	57.5	53.8
New York	58.9	57.2	61.4	58.8	63.2	65.6	60.9
North Carolina	61.9	59.5	61.9	60.3	65.2	65.9	62.5
North Dakota	59.4	65.1	63.8	68.5	65.2	65.4	64.6
Ohio	59.4	58.6	57.2	59.5	63.5	63.9	60.4
Oklahoma	51.2	53.9	57.5	56.5	58.8	57.7	55.9
Oregon	62.5	61.2	58.4	59.6	59.8	65.7	61.2
Pennsylvania	56.2	55.9	57.5	55.5	59.3	60.8	57.5
Rhode Island	55.0	53.2	55.7	55.4	61.1	58.5	56.5
South Carolina	50.9	48.0	53.0	54.2	53.9	58.1	53.0
South Dakota	63.9	66.5	63.6	64.9	65.7	67.0	65.3
Tennessee	59.9	57.7	60.7	59.9	59.9	68.2	61.1
Texas	45.2	41.1	49.9	49.2	52.0	54.3	48.6
Utah	64.2	64.5	65.8	63.3	64.2	67.7	65.0
Vermont	60.6	59.6	61.5	60.3	62.3	62.5	61.1
Virginia	67.9	64.0	68.7	67.1	71.1	66.9	67.6
Washington	66.6	59.4	60.7	63.1	60.7	63.7	62.4
West Virginia	35.6	30.9	31.9	33.2	37.3	38.0	34.5
Wisconsin	62.1	62.7	64.4	62.5	62.6	67.5	63.6
Wyoming	60.7	58.0	63.8	64.7	64.2	64.7	62.7

Note: In this table, higher numbers indicate “better”-quality legal systems (i.e., a score of 100 is best, while 0 is worst).

Figure 4.5: State Liability System Rankings, 2002–07

State	State Ranking						2002–07 Average
	2002	2003	2004	2005	2006	2007	
Alabama	48	48	48	48	47	47	47.7
Alaska	37	32	33	33	36	43	35.7
Arizona	11	18	14	19	13	15	15.0
Arkansas	44	45	42	43	41	41	42.7
California	45	44	46	45	44	45	44.8
Colorado	7	12	13	13	8	21	12.3
Connecticut	10	17	18	18	5	14	13.7
Delaware	1	1	1	1	1	1	1.0
Florida	33	40	38	42	38	36	37.8
Georgia	23	39	29	28	27	31	29.5
Hawaii	40	43	39	41	46	42	41.8
Idaho	14	13	5	10	18	30	15.0
Illinois	34	38	44	46	45	46	42.2
Indiana	12	5	11	6	11	8	8.8
Iowa	5	3	4	5	4	4	4.2
Kansas	4	15	9	16	15	13	12.0
Kentucky	38	35	35	36	34	33	35.2
Louisiana	47	47	47	47	49	48	47.5
Maine	18	16	12	11	9	5	11.8
Maryland	22	23	21	23	20	29	23.0
Massachusetts	36	22	28	31	32	18	27.8
Michigan	28	29	23	24	22	23	24.8
Minnesota	19	9	8	7	14	2	9.8
Mississippi	50	50	50	50	48	49	49.5
Missouri	29	33	41	40	35	34	35.3
Montana	43	28	43	37	39	40	38.3
Nebraska	6	2	2	2	2	3	2.8
Nevada	30	34	34	29	37	28	32.0
New Hampshire	17	10	7	12	6	6	9.7
New Jersey	32	30	26	30	25	26	28.2
New Mexico	39	41	37	38	40	39	39.0
New York	27	27	22	27	21	19	23.8
North Carolina	16	20	19	20	10	16	16.8
North Dakota	25	6	16	3	12	20	13.7
Ohio	26	24	32	26	19	24	25.2
Oklahoma	41	36	31	32	33	38	35.2
Oregon	13	14	27	25	30	17	21.0
Pennsylvania	31	31	30	34	31	32	31.5
Rhode Island	35	37	36	35	26	35	34.0
South Carolina	42	42	40	39	42	37	40.3
South Dakota	9	4	17	8	7	11	9.3
Tennessee	24	26	25	22	29	7	22.2
Texas	46	46	45	44	43	44	44.7
Utah	8	7	6	14	17	9	10.2
Vermont	21	19	20	21	24	27	22.0
Virginia	2	8	3	4	3	12	5.3
Washington	3	21	24	15	28	25	19.3
West Virginia	49	49	49	49	50	50	49.3
Wisconsin	15	11	10	17	23	10	14.3
Wyoming	20	25	15	9	16	22	17.8

Note: In this table, lower numbers indicate “higher” ranks, or “better”-quality legal systems (i.e., being ranked 1st is best, while 50th is worst).

The main question of interest is whether there is a clear correlation between these scores (or rankings) and the method of judicial selection used by states. Using the groups described above, we calculated the average index scores and average rankings by judicial selection method. Throughout our analysis we will examine both the index scores and the associated ranking numbers. There are advantages to each. The index scores tend to provide more information because the rankings do not accurately reflect the magnitude of the differences in the underlying data. On the other hand, because the underlying questions in the survey have changed over time, the index numbers may not be directly comparable across years, whereas the rankings would be.⁵⁷ Fortunately, both measures lead to the same conclusions, so we find no reason to belabor the advantages and disadvantages of each.

Figure 4.6: Average State Legal System Quality Score by Method of Judicial Selection

Method of Judicial Selection	2002	2003	2004	2005	2006	2007	2002–07
							Full Panel
Nonpartisan elections	56	55.1	56.9	57.8	58.9	61.8	61.2
Partisan elections	50.4	47.3	48.7	47.8	51.3	54.2	53.4
Elected by legislature	59.4	56	60.9	60.7	62.5	62.5	63.8
Gubernatorial appointment from nominating commission	60.8	60.2	61.8	61.1	63	64.4	65.3
Gubernatorial appointment from nominating commission with legislative confirmation	61.7	59.5	62.1	60.9	63	64.3	65.3
Gubernatorial appointment with legislative confirmation	58.2	58.5	62.2	61	63.5	66.2	65
Gubernatorial appointment with council approval	54.8	56	56	55.8	58.3	62.5	60.7

Notes: In this table, higher numbers indicate “better” legal systems (i.e., in the underlying data, a score of 100 is best, while 0 is worst). Full-panel averages use regression methodology to adjust for the differing mean values of the index across years.

In order to facilitate testing whether there are *statistically* significant differences among the groups, we obtain our averages and statistical confidence intervals by estimating an ordinary least squares regression, in which the index score (or rank) is used as the dependent variable and a set of indicator (0/1) variables are used for each different method of

⁵⁷ We use three techniques to ensure that variations in the questions do not affect our conclusions: (1) the use of the rankings rather than the index scores; (2) the use of year indicator variables in the subsequent regression analysis, to control for differences in the mean value of the index through time; and, (3) performing the analysis for each year individually, to ensure the results are robust across years.

judicial selection.⁵⁸ We perform this analysis for each year's data individually, and also for the pooled cross-section of data for the full 2002–07 period.⁵⁹ The analysis of annual data simply asks whether there are differences across states in each particular year's index score or rank, while the full period analysis asks whether these differences are consistently present during the entire period of data, from 2002 through 2007. The results of our analysis are presented in Figures 4.6 and 4.7.

To get a handle on what these numbers mean, let's look at one example from the figures in detail. Examining the first row of data in Figure 4.6 shows that states using nonpartisan elections to elect supreme court justices had an average score of 56.0 in the index in 2002, an average score of 55.1 in 2003, and so forth, on the 0- to 100-point index scale.⁶⁰ The first row of Figure 4.7 shows that during 2002, states using nonpartisan elections had an average ranking in the index of 26.4 (interpreted as an average rank of 26th out of the 50 states), and average ranking of 25.4 in 2003, and so forth.

Figure 4.7: Average State Legal System Ranking by Method of Judicial Selection

Method of Judicial Selection	2002	2003	2004	2005	2006	2007	2002–07
							Full Panel
Nonpartisan elections	56	55.1	56.9	57.8	58.9	61.8	61.2
Partisan elections	50.4	47.3	48.7	47.8	51.3	54.2	53.4
Elected by legislature	59.4	56	60.9	60.7	62.5	62.5	63.8
Gubernatorial appointment from nominating commission	60.8	60.2	61.8	61.1	63	64.4	65.3
Gubernatorial appointment from nominating commission with legislative confirmation	61.7	59.5	62.1	60.9	63	64.3	65.3
Gubernatorial appointment with legislative confirmation	58.2	58.5	62.2	61	63.5	66.2	65
Gubernatorial appointment with council approval	54.8	56	56	55.8	58.3	62.5	60.7

Notes: In this table, higher numbers indicate “better” legal systems (i.e., in the underlying data, a score of 100 is best, while 0 is worst). Full-panel averages use regression methodology to adjust for the differing mean values of the index across years.

⁵⁸ The constant was omitted so that all groups could be included. In this manner, each coefficient estimate corresponds to the group mean. For the 2007 cross-sectional regression, only the indicator variables for the method of judicial selection were included. For the full panel regression of 2002 through 2007 data, the regression also includes indicator variables for each year (with 2007 omitted) to control for the differing mean values in the index across years (this also controls for any variation in the survey questions between years).

⁵⁹ Only one state, North Carolina, changed its grouping during the 2002–07 period (from partisan to nonpartisan elections in 2004), and this is appropriately coded in the data.

⁶⁰ Changes in the composition of the survey make it difficult to say why average state legal quality seems to be rising over time. Most of the increase seemed to occur in 2006, when two new elements were added to the survey, about having and enforcing meaningful venue requirements and non-economic damages.

Perhaps the most illuminating set of columns in the figures are the final two, showing the averages for the 2002–07 full panel of data. For states using nonpartisan elections, the average index score over the entire sample was 61.2, which resulted in an average ranking of 26.2 during the entire period. Using this information, it is now fairly easy to compare nonpartisan selection to the alternatives. For example, comparing the first two rows for nonpartisan and partisan elections respectively shows that for each and every year individually, as well as in the full panel, states using nonpartisan elections had higher index scores, and thus also better average rankings. (Recall that higher index scores — e.g., one closer to 100 — are better; while a lower numerical rank — e.g., being ranked 1st — is better. So the scales in Figures 4.6 and 4.7 move in opposite directions.)

For the full panel, states using partisan elections had an index score of 53.4, which is 7.8 points lower than the average index score of 61.2 for states using nonpartisan elections. The average rankings show that the average state using partisan elections ranked 38th in the index over the period, 12 spots below the 26th average ranking for states using nonpartisan elections. Therefore, based on these numbers it appears that using nonpartisan elections to select judges results in a better-quality legal system than using partisan elections.

While it is possible to strictly compare the numbers in the figures, an appropriate comparison asks whether the differences between the numbers are large enough to be considered *statistically* significant. Statistical testing takes into account not only the size of the difference in the averages, but also the number and variance among states within each group in the underlying data, to indeed ensure that at least the vast majority of states using one method all score higher (or lower) than the vast majority of states using another method. Based on conventional techniques and significance levels, our statistical tests show that in terms of average rankings a statistically significant difference does exist in the above example between these two groups (nonpartisan and partisan elections) for each and every year's data, both individually and for the entire panel. For the index scores, the difference is significant for the full panel — and for all years individually except 2002, where the difference in the average index scores is not statistically significant, although only slightly so. Therefore, it is possible to conclude *statistically* that states using nonpartisan elections do tend to score and rank better in this index of legal system quality than do states using partisan elections like West Virginia.

With one fully explained example behind us, we now consider the results in Figures 4.6 and 4.7 more comprehensively. In Figure 4.6, for the full panel of data, two methods of judicial selection tie for having the highest average index scores: gubernatorial appointment from a nominating commission and gubernatorial appointment from a nominating commission with legislative confirmation. Coming in only slightly below these top two is gubernatorial appointment with legislative confirmation but without a nominating commission. In the individual year analyses, the method receiving the highest average score varies across the years, although it is always one of these three types (although gubernatorial appointment with legislative confirmation takes the top spot in three of the six individual years). Partisan elections handily receive the worst scores both in the full panel and in every individual year.

Figure 4.8: Summary of Statistical Differences among Methods of Judicial Selection

Method of Judicial Selection	Scores and Ranks Statistically Better Than	Scores and Ranks Statistically Worse Than	Scores and Ranks Statistically The Same As
Nonpartisan elections	Partisan elections	Gubernatorial appointment from nominating commission and gubernatorial appointment from nominating commission with legislative confirmation	Elected by legislature, gubernatorial appointment with legislative confirmation, and gubernatorial appointment with council approval
Partisan elections	None	Nonpartisan elections, elected by legislature, gubernatorial appointment from nominating commission, gubernatorial appointment from nominating commission with legislative confirmation, gubernatorial appointment with legislative confirmation, and gubernatorial appointment with council approval	None
Elected by legislature	Partisan elections	None	Nonpartisan elections, gubernatorial appointment from nominating commission, gubernatorial appointment from nominating commission with legislative confirmation, gubernatorial appointment with legislative confirmation, and gubernatorial appointment with council approval
Gubernatorial appointment from nominating commission	Nonpartisan elections, partisan elections, and gubernatorial appointment with council approval	None	Elected by legislature, gubernatorial appointment from nominating commission with legislative confirmation, and gubernatorial appointment with legislative confirmation
Gubernatorial appointment from nominating commission with legislative confirmation	Nonpartisan elections, partisan elections, and gubernatorial appointment with council approval	None	Elected by legislature, gubernatorial appointment from nominating commission, and gubernatorial appointment with legislative confirmation
Gubernatorial appointment with legislative confirmation	Partisan elections	None	Nonpartisan elections, elected by legislature, gubernatorial appointment from nominating commission, gubernatorial appointment from nominating commission with legislative confirmation, and gubernatorial appointment with council approval
Gubernatorial appointment with council approval	Partisan elections	Gubernatorial appointment from nominating commission and gubernatorial appointment from nominating commission with legislative confirmation	Nonpartisan elections, elected by legislature, and gubernatorial appointment with legislative confirmation

An analysis of the average rankings in Figure 4.7 produces results similar to those using the underlying index scores, as would be expected. For the full panel, gubernatorial appointment from a nominating commission averages the best ranking, with gubernatorial appointment with legislative confirmation and gubernatorial appointment from nominating commission with legislative confirmation following closely behind. At the bottom of the list are partisan elections (which consistently score and rank as the worst by a wide margin), gubernatorial appointment with council approval, and nonpartisan elections.

Again, it is important to ask which of these differences, if any, are statistically significant. For each method of judicial selection, Figure 4.8 summarizes which other methods were found to have averages and rankings that were statistically different (or the same) based on our tests using the results from the full panel. All of these results were the same for both the index scores and the rankings.

Our primary interest here is in which other systems are either better or worse than (or statistically the same as) West Virginia's current system of partisan elections. When examining the full panel, we see that states using partisan elections, on average, *do statistically score and rank lower than states using all other methods of judicial selection*. Based on this analysis, West Virginia seems to have little to lose by moving away from partisan judicial elections to another method of judicial selection. That is, all other methods of selecting judges score and rank statistically better than partisan elections, suggesting that West Virginia would at least be no worse off if it wanted to experiment with selecting judges by either: (a) nonpartisan elections; (b) election by the legislature; (c) gubernatorial appointment from a nominating commission; (d) gubernatorial appointment from a nominating commission, with legislative confirmation (i.e., adding legislative confirmation to the existing process); (e) gubernatorial appointment with legislative confirmation (i.e., no nominating commission but with legislative confirmation); or, (f) gubernatorial appointment with council approval.

Two important caveats must be noted in interpreting our empirical results. First, conducting such a meta-analysis across state judicial selection methods required us to place states into groups, which may mask the impact of smaller differences within each group — for example, differences in the sizes and compositions of state nominating commissions or the type of legislative confirmation required.⁶¹ Second, to conduct an empirical analysis requires the use of a numerical measure of state legal system quality, and we are severely limited by the uniqueness in this regard of the *State Liability Systems Ranking Study*. To the extent that this measure does not reflect the true quality of state legal systems, our analysis may suffer from bias.

CONCLUSION

Judicial selection mechanisms matter for legal system quality. Our research points toward partisan elections—the method used in West Virginia—as being inferior to all other methods of judicial selection. This probably explains why so many states—including North Carolina—

⁶¹ We did attempt to see whether requiring appointed judges to run in retention elections mattered. Of the 26 states using some form of gubernatorial appointment, 16 have some form of public retention elections. The results showed that retention elections are associated with a slight reduction in the average quality of the legal system index scores, but in no case was the difference statistically significant.

have moved away from them. In fact, West Virginia is one of only a handful of states who have not yet done away with partisan elections. It is clear that viable alternatives exist, and they all involve insulating the judicial selection process from partisan politics. This can be done by moving to non-partisan elections, or by moving towards some form of appointive system.

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