

# Choosing a judiciary

*A scholar finds differences between electing and appointing judges.*

BY RICK BALES

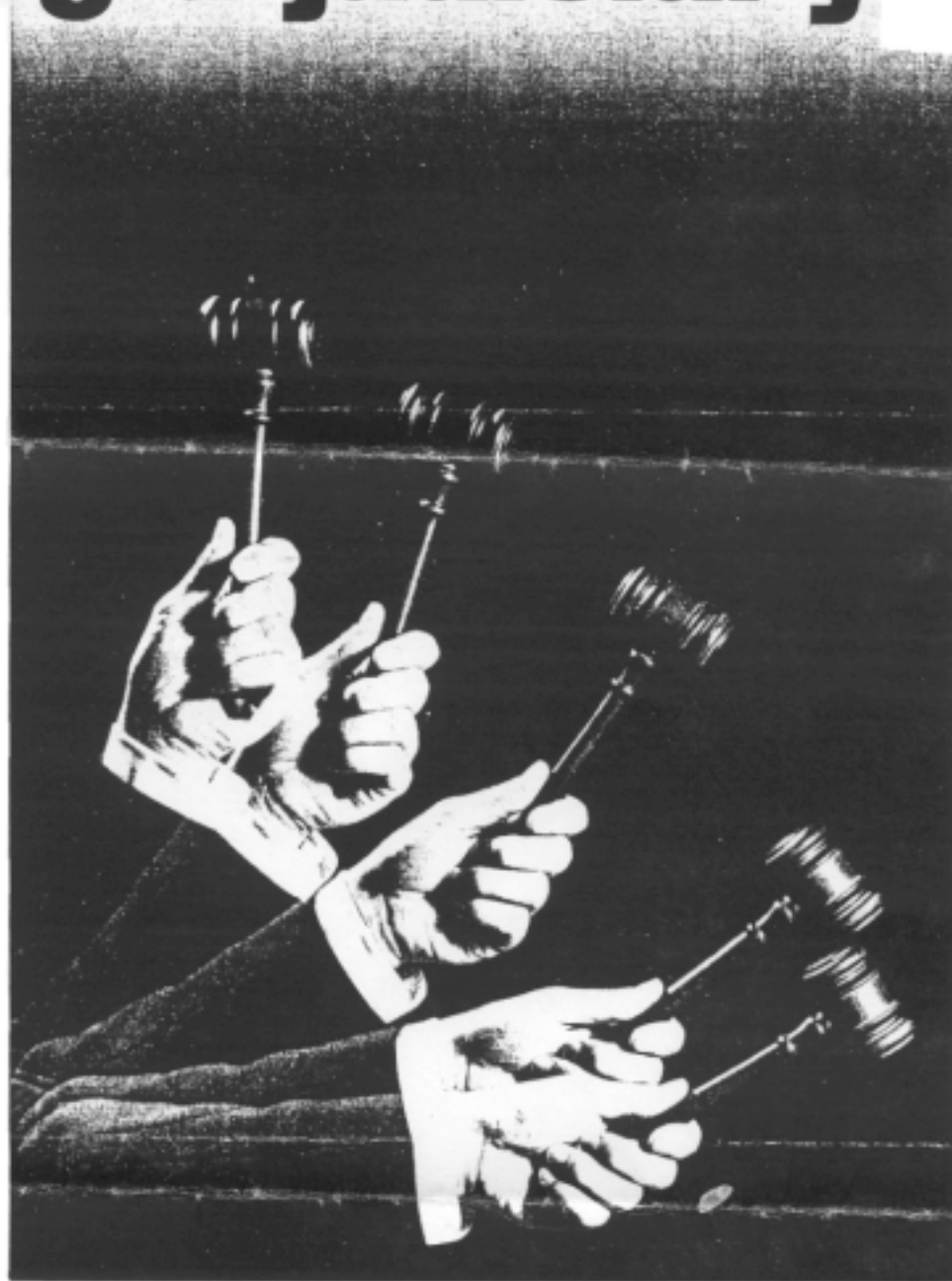
**R**esearch comparing the way states select their judges often is equivocal because states use a wide variety of methods, each state is politically unique and states have a limited number of judges to study. Nonetheless a review of the literature shows that whether judges are appointed or elected does make a difference in the ways they rule — although whether that's good or bad depends on whether it's more important that judges be accountable to the public or independent in their decision-making.

## The death penalty

In 1992, political scientist Melinda Gann Hall examined the prevalence of death-penalty dissents in four state supreme courts. Each state elected high-court justices, and in each state the voters strongly favored the death penalty. Hall, now of Michigan State University, found that election considerations affected the probability that liberal justices would side with a conservative majority to uphold the death penalty if: (1) the liberal justice had won by a narrow margin in the last election, (2) the liberal justice was in the last two years of his or her term, and (3) the liberal justice previously had campaigned for election.

Despite these conclusions, Hall's study does not prove that the different voting patterns would have resulted in different case outcomes. Instead, the liberal justices may simply have decided that the political cost of dissenting wasn't worth the trouble, since the defendant's appeal would have been denied regardless.

In 1993, Hall and Paul Brace of Rice University expanded Hall's original study



*Studies have found that elected and appointed judges tend to rule differently in death-penalty cases and cases involving government regulation.*

by adding four more states, two of which appointed justices. Hall and Brace found, first, that Democratic justices were more likely than Republican justices to vote to overturn a death penalty. Second, the professors found that elected Democratic justices were less likely to overturn a death penalty than appointed Democratic

justices. Third, the professors found that Democrats serving for shorter terms tended to vote more like Republicans.

These studies suggest that political factors affect elected judges more than appointed judges. But that does not necessarily mean that appointing judges is the ideal method of selection. Appointed

judges arguably are best if we want judges to decide cases according to the "rule of law" or according to their consciences. Ultimately, one's choice on the selection method may depend on whether one's political philosophy is more closely aligned with the majority of voting constituents or with the minority.

### Litigation rates

In a 1999 study, F. Andrew Hanssen of Montana State University compared litigation rates — the rates of lawsuits going to trial — in appointed and elected courts to determine which judges rendered more predictable decisions. Hanssen assumed that the litigation rate would be higher when decisions were less predictable, because if litigants had a good idea of how a judge would rule, they would be more inclined to settle.

Hanssen also theorized that selection methods could affect predictability in one of two ways: Appointment could increase predictability because appointed judges tend to stay on the bench longer than elected judges, or appointment could decrease predictability because appointed judges are not as subject to political pressure. As it turned out, Hanssen found that litigation rates were higher in appointed appellate (though not trial) courts than elected appellate courts. Thus, he concluded that, at least with respect to appellate courts, the appointment of judges decreases predictability.

Again, this begs the question of which method of selection is preferable. Other things being equal, predictable decisions are a good thing because they promote settlement. However, if decisions are predictable because all the lawyers know that the defense bar contributes 80 percent of the judges' campaign funds, unpredictability may be the better policy option.

### Government regulation

Also in 1999, Hanssen compared state court decisions involving utility regulation in states that elected and states that appointed judges. He found that appointed courts were significantly more likely to side with consumer groups, while elected courts were significantly more

likely to side with regulated firms and their large commercial customers.

Similarly, Stephen J. Ware of the Cumberland School of Law at Samford University, in examining arbitration cases decided by the Alabama Supreme Court over a five-year period, found an extraordinarily strong correlation between the justices' votes and their sources of campaign funds. Justices whose campaigns were funded by business interests were significantly more likely to favor arbitration than justices whose campaigns were funded by plaintiffs' lawyers. This was true even when

---

*Although the method of selecting judges does make a difference, that doesn't mean one system is better than the other.*

---

the case turned on ideologically "neutral" legal issues such as contract formation.

Finally, in a 2000 study, Hanssen investigated three types of state administrative agencies: utility commissions, insurance commissions and the state educational bureaucracy. He found that the agencies in states with appointed courts employed a significantly larger legal staff than the agencies in states with elected courts. This was linked to efforts to make agency decisions "litigation proof" in the face of a more independent judiciary.

### Women and minorities

Different methods of judicial selection can also affect the representativeness of judges. The judicial-selection system should result in a judiciary that is representative of the members and values of the community. One might think an electoral-selection system would be the most representative, because any person could be a candidate. However, the evidence indicates exactly the opposite.

A 1985 nationwide survey by the Fund for Modern Courts Inc. compared states that chose judges through partisan elections to states that appointed judges through nonpartisan commissions and

then required judges to sit in nonpartisan retention elections. The study found that in states using the commission system, 17.1 percent of the judges were women or minorities, compared to 11.2 percent in states using partisan elections. Similarly, research shows that after New Mexico changed its judicial-selection process from partisan elections to a commission-election system, the percentage of female judges increased markedly. The percentage of minority judges also increased, though not by as much.

The probable reason an appointed judiciary would include more minority judges than an elected judiciary is that judicial districts usually are large, resulting in the dilution of minority voting strength. This obviously is not true for women, who likely make up about half the constituency, regardless of how district boundaries are drawn. Appointments are probably more favorable to female candidates than are elections because the people making the appointments are more likely to recognize the need for fair representation than is the general voting constituency. In other words, the governor or a commission may realize "Hey, my last three appointees have been men — I'd better look hard at appointing a woman or I may catch some political flak." This consideration probably would not occur to an average voter, particularly if the voter is voting to fill a single judicial office.

The studies discussed above indicate that the method of judicial selection does make a difference. However, the studies do not necessarily tell us which method of judicial selection is best. Correlation does not prove causation. It is unclear whether elected judges change their votes according to the political wind or flow of campaign money, or whether the wind and money facilitate the election of judges who are predisposed to vote accordingly. Even if the former is true, one can view that as either good or bad, depending on whether one prefers judicial accountability or judicial independence. ★

---

*Rick Bales is an associate professor at Salmon P. Chase College of Law at Northern Kentucky University. This article was originally published in the Summer 2001 issue of Kentucky Journal.*