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Voter Influencing in State Trial Court Judicial Elections in Los Angeles, San Francisco, and Houston

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VOTER INFLUENCING IN STATE TRIAL COURT JUDICIAL ELECTIONS IN LOS ANGELES, SAN FRANCISCO, AND HOUSTON

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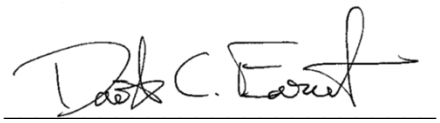
ABSTRACT

This dissertation examines select key factors that influence voter choices in state trial court judicial elections in three large, cosmopolitan counties in California and Texas. These include ballot designations (i.e., professional titles of candidates), "evaluations" of candidates by local bar associations, newspaper endorsements, political party affiliation, and gender. Focus here is on ballot designations and local bar association evaluations; the subjective opinions issued by local bar associations as official-sounding, objective and qualitative evaluations. In turn, local bar associations are private, voluntary associations consisting of fee-paying members and not overseeing state bar associations as many laypeople believe.

Judicial elections remain low-information, low-participation, and low-saliency affairs. Local bar associations do little to correct the misunderstanding that exists around the true nature of their "evaluations." Additionally, California operates with a disparity in its ballot designation-related election law as this features different rules for government and non-government attorneys running for office. While Texas judicial elections are partisan, this is not the case in California. Accordingly, California voters may have to rely on a narrower set of heuristics in voting unless they are political sophisticates. This is often not the case.

The present research results show that ballot designations and bar association evaluations have a significant impact on the outcome of judicial elections at the trial court level in the three counties examined: Los Angeles and San Francisco counties in California and Harris County, Texas (the greater Houston area). Each of these factors can make the difference between an election win and loss. Together, their effect presents statically significant evidence of voter influencing by powerful private, associations and positive state law in the areas examined. These concerns and others presented in this dissertation run afoul of American notions of democracy, transparency, and equality under the law. If the goal in the judicial election context in the areas examined and possible elsewhere is to optimize the quality of justice by seating the most qualified and least biased judges on the bench and to protect democratic and other minorities through inclusive governance, the sum of the answer is that judicial elections are fatally flawed.

Dissertation Advisor 

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Chapter I. Introduction and Research Questions

This research project examines the selection[1] of judges to state trial courts. Focus is on elections. In particular, the research centers around the effects of California election law as well as local bar associations and the media in both states. In California, candidates for elected office may list their professional titles on ballots. In combination with the other key variables analyzed in this project - in particular bar association evaluations - this creates a statistically significant effect on election outcomes. Not much research has delved into this issue recently. This dissertation seeks to shed renewed light on this issue of democratic and constitutional proportions. Although it is limited to three large counties, the research may be illustrative of similar concerns in similar and potentially even dissimilar geopolitical areas around the nation.

The project also examines the continued lack of inclusive governance (hereafter, also "diversity") in the judiciary branch of government. While "diversity" often refers primarily to issues of gender and race/ethnicity, the concept can and arguably should in addition be measured along several other important metrics such as professional backgrounds, immigration status, media endorsements, and more. However, the main study focus will is on professional diversity.

Much prior research has focused on state appellate and supreme courts. However, lower state courts warrant research as they handle the greatest number of cases in the American system. In turn,

> [s]tate court diversity is deserving of scholarly investigation because of state courts' increasingly important role and function in our federal system. The new judicial federalism has centered attention on the important policymaking role of state supreme courts in its emphasis on rights guarantees in state constitutions. (Graham, 2004, p. 171)

[1] In the judicial context, the phrase "selection" covers both appointments and elections.

In general, calls for an increased amount of representative governance abound in many parts of the nation. At the same time, systematic barriers arguably continue to present formidable barriers for people with untraditional backgrounds seeking to assume judicial and other office. This dissertation seeks add insight and renewed analyses to the debate about how to better modernize the judiciary.

The discussion of inclusive governance and the related notion of bias in this dissertation is by no means intended to insinuate that sitting judges, candidates for judicial office, district attorneys, attorneys in general, or any other professionals are consciously biased or deliberately discriminatory.[2] To be sure, most professionals including, of course, most judges are doing their best under often difficult circumstances to ensure justice for all and to perform their jobs well in general. Unless otherwise noted, this project presumes that all actors are fair or striving to be so.

However, unconscious bias is known to exist. This can and often does have unintended consequences that have been demonstrated to affect some people more than others in many contexts. It is that type of complex and perhaps systemic inclusive governance issue upon which this project seeks to shed further light. In doing so, the hope is that deliberate action will be taken for the continued improvement of the bench. This would benefit society at large. Knowledge about how to do so continues to surface. Such knowledge could be better used in practice. It is sometimes a criticism of academic research that it is performed in "silos." In other words, more intersectionality could help create better research results. However, in this author's opinion, legal and other "on-the-ground" practitioners could, in turn, also avoid silo effects by making better use of the rich knowledge that is created in academia and which helps shed light on issues

[2] While these terms may differ slightly in meaning depending on professional fields, they overlap sufficiently to be used interchangeably here.

which are of key societal interest. Inclusive governance – including among the judiciary – is among such issues.

With some nuances, two major methods of judicial selection exist in the United States today: elections and merit-based selections. To illustrate concerns that riddle both methods, this project critically examines and balances recognized advantages and disadvantages of elections versus merit selections of judges. In doing so, focus will be on democratic and normative judicial selection concerns, but as the judiciary functions and outcomes impact society in myriad contexts, other relevant issues will also be pointed out for further research purposes.

The project focuses on the selection of state trial court judges; an area of research which is somewhat under-analyzed in modern scholarship just as the general media pays little attention to state trial court elections. This is unfortunate as state courts process an overwhelming number of cases (more than 90%) in the American legal system (American Progress (Aug. 8, 2016)). Roughly one billion cases entered the state judicial system between 2006 and 2016 (George & Yoon, 2016, p. 3). Just in 2002, 96.2 million cases were filed in the state courts (Graham, 2004, p. 171; (U.S. Department of Justice, Bureau of Justice Statistics, 2004). For most of the cases filed in our nation's courts, state courts are the ultimate arbiters in a range of legal, political, and economic disputes (Streb, 2007). In other words, it is at the trial court level that rights are initially granted or denied. Few cases are appealed. Even fewer are actually heard on appeal. State trial courts are unquestionably relevant to "everyday justice."

Even when societal focus is on the judiciary, it tends to be on the U.S. Supreme Court. This leaves much of the judiciary unexamined with potential consequences for the rest of society:

> State judges may operate on a smaller canvas than the Supreme Court, but they handle the vast majority of the nation's judicial workload, they have a greater ability to make common law, they are more likely to decide cases on their own (rather than on a panel), they are not as constrained by federalism concerns, and "because state constitutions

> often include positive rights and regulatory norms, their texts explicitly engage state courts in substantive areas that have historically been outside the Article III domain." (Pozen, 2008, p. 43)

The importance of trial-level judges to overall justice in society at large is clear. This warrants the focus of this dissertation.

At the same time, citizens appear to remain largely disinterested in state court races. They also appear to lack knowledge about how judges performing the brunt of the nation's judicial work are selected, how to acquire such information, and even how to vote on individual candidates. This is problematic as the judiciary has broad and deep governance powers as a co-equal branch of the government.

Much focus in the field of political science and in society at large is on the executive or legislative branches of government. But while a member of Congress is just one of 535, a judge may be one of a few people – and is often the only person – responsible for a decision. Even though the jury is ultimately responsible for a verdict, the judge still has great discretion in terms of ruling on the procedural aspects of the case. He or she is also responsible for sentencing in many states. Although rare, judges can overrule a jury verdict and even issue a new trial. "Simply put, judges have more power and discretion than most office holders have" (Streb, 2007, pp. 3-4). This warrants this dissertation. Further, much modern scholarly focus has shifted from ballot designations and professional backgrounds to, for example, monetary concerns and party affiliations. To be sure, recent research highlights some important aspects of judicial elections, but more exist. As this dissertation will show, mere titles and other heuristics influence election outcomes in the three areas examined. Research into this has fallen slightly by the wayside in recent decades. This dissertation presents values by updating findings in this area. It also seeks to add value by questioning the desirability of as large a number of prosecutors currently sitting on and getting elected to seats on the California bench. With this research as a

springboard, potential effects on related issues of criminal justice – much debated in society currently – could and should be further researched.

In short, while it is true that state supreme courts and, of course, the United States Supreme Court are the ultimate arbiters of constitutional and other rights and obligations, lower courts remain a crucial part of this equation. The general public might benefit from a better understanding of the many known and relatively unknown factors which play a role in the modern judicial selection processes. Scholars have a crucial role to play in the development of more specific knowledge about this field in which many anecdotes abound.

The questions to be answered in this study are as follows:

1. How many judges of prosecutorial or other criminal law background sit in Los Angeles County, California?
2. In San Francisco and Los Angeles counties, is the designation Deputy District Attorney ("DDA") more likely to be associated with electoral success than other government and non-government attorney ballot designations?
3. Are other government attorney ballot designations than "DDA" more likely to lead to electoral success than a non-governmental ballot designation in the two California counties examined?
4. Is obtaining an evaluation of at least "qualified" by a local bar association significant in winning a judicial election in the three areas examined?
5. Is obtaining an endorsement by a major local newspaper significant in winning a judicial election in the three areas examined?
6. Is having a female-sounding name significant in the judicial election context?

While the research for this project focuses on state trial courts, the literature review section covers information about higher courts as well. This is because the newest literature on the latter, especially on state supreme courts, is more extensive than that covering trial courts. Of course, many of the issues overlap judicial levels and thus makes literature covering selections for one level relevant for other levels as well.

It should be noted that this research project often deliberately uses the term "evaluations" in quotation marks instead of "ratings." Most importantly, this is the case because the Los Angeles County Bar Association ("LACBA") – a major subject of study - refers to its own ratings as such. The quotation marks are also meant to indicate an amount of skepticism that should be established and maintained in relation to the findings of small, voluntary, self-selected groups of fee-paying members of private associations with, as will be questioned, other interests at heart than purely democratic and altruistic ones.

This research project uses the phrases "diversity" and "inclusive governance" somewhat interchangeably. The most frequently used of the two phrases in West Coast governance rhetoric is, however, "diversity." "Private" attorney or, occasionally, "regular attorney" is used about attorneys *not* in government employ.

Several inquiries remained unanswered by the organizations to whom they were directed. These questions were why the Houston Bar Association changed from categorizing judicial candidates into, for example, "qualified" and "well qualified" ratings, the immigration profiles, if any, of LACBA's judicial evaluation committee, and whether an official list of all the candidates endorsed by the Los Angeles County Central Democratic Party for the past ten or twenty years is publicly available. The Judicial Council of California's Leadership Services Division's Public Access to Judicial Administrative Records answered a request for information about how many

California state trial court judges were born overseas by stating that this question was outside the scope of what the Council can answer.

In sum, this project was designed to shed renewed light on existing institutional and organizational structures that influence judicial elections for state trial court office in the three counties examined. While findings from three large, diverse and somewhat politically similar counties may not be fully representative of democratic, political, and judicial trends around the nation, the concerns presented in this research product may, however, be illustrative of concerns elsewhere. At a minimum, the present discussion may help inform any future debate about how to improve the judicial selection system in areas that resemble the areas examined or even broader ones.

Chapter II. Literature Review

This chapter will review the literature relevant to the research questions of this study. Focus will, as mentioned, be on state trial court elections, but as literature analyzing state appellate and supreme court elections is also informative, the most relevant of that literature is included as well.

A. Judicial Selection Methods

1. History of judicial elections in the United States

The early history of the United States follows in the pattern of the nation's history as a colony of England in the judicial election context as well as other areas (Zaccari, 2004). In colonial times, the King appointed judges. The appointment of the judiciary was debated intensely during the ratification of the United States Constitution, ultimately resulting in life tenure for federal judges. The most often cited support for this method of judicial selection is the *Federalist Papers*. Alexander Hamilton justifies life tenure for judges as follows:

> [T]hat as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments … and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution.... (Federalist Papers, Number 78)

Most states followed English tradition and had judges appointed either by the executive or by the legislature.

> Until 1845, every state that entered the union did so with a state constitution that provided for appointed judges, but from 1845 until the early 1900s, the opposite was true - every state admitted provided for judicial elections. With the rise of Jacksonian Democracy, people began to attack the appointed judiciary as a bastion of the upper class, and many states instituted systems whereby judges would be elected. By the time of the Civil War, twenty-four of thirty-four states had an elected judiciary. (Zaccari, 2004, p. 139)

Whereas the Framers considered life tenure a necessary measure to protect federal judges from political pressures and were concerned with issues of judicial independence, state legislatures were concerned with issues of public trust. These legislatures believed that an elected judiciary would be more respected within and responsive to the community that elected them (Hayden, 2016).

However, "[w]ith the rise of the elected judiciary … came the ills of elective politics, and it seemed that the people had traded one set of problems for another" (Zaccari, 2004, p. 139). The qualifications of judges were often called into question with elections as they were with appointments just as voters often had a low level of knowledge of or interest in judicial elections (Zacarri, 2004). These issues are still the topic of debate in the judicial selection context today. Even in the late nineteenth century, issues of campaign funding and content were eroding legitimate arguments in favor of an elected judiciary. Legislators often recognized the problems and limits of judicial elections during this time, but it was not until the American Bar Association ("ABA") rose to prominence and started questioning this practice in the early part of the twentieth century that states also began to reexamine their judiciaries. "Such judicial luminaries as Learned Hand, William Howard Taft, and Roscoe Pound attacked the politicization of the judiciary" (Zacarri, 2004, pp. 139-140). It was not until the 1940s that states began to implement alternatives to the two traditional methods of either appointment or election of judges. In 1940, Missouri thus became the first state to adopt a commission plan whereby judges are appointed, but face retention elections (Zacarri, 2004). This is known as the Missouri Plan, a version of which is also currently used in California. Today, "the fundamental tensions still remain: an appointed judiciary may be contrary to democratic principles, whereas an elected judiciary appears to compromise its impartiality in the political process" (Zacarri, 2004, p. 140).

In addition to the concerns about impartiality and elitism mentioned above, there were other reasons for instigating judicial elections and avoiding judicial appointments by powerful political actors.

> [T]he key was a new movement to limit legislative power, to increase judicial power, and to strengthen judicial review. Over time, judicial appointments had become a tool of party patronage and cronyism. Legislative overspending … had plunged the states into crippling debt. In response, a wave of nineteen states called constitutional conventions from 1844 to 1853. In addition to direct limits on legislative power, most of these conventions adopted judicial elections. Many delegates stated that their purpose was to strengthen the separation of powers and empower courts to use judicial review. The reformers got results: elected judges in the 1850s struck down many more state laws than their appointed predecessors had in any other decade. These elected judges played a role in the shift from active state involvement in economic growth to laissez-faire constitutionalism … The rise of the elective system was part of a coherent program . . . to hobble the power of the executive, the legislature, and the courts." (Shugerman, 2010, pp. 1063, 1065-1066)

But this presents a puzzle that is still very relevant to the issue of whether judicial elections are truly the best method of selecting judges:

> If elected legislators were the cause of the problem, why would elected judges produce better results? In fact, opponents of judicial elections used this argument to mock the reformers' notion that 'the same people who appoint very bad [political] representatives would appoint very good judges.' The basic answer is that the supporters of judicial elections understood the principal-agent problem, the gap between the people and their elected officials. They believed the solution was (1) to separate judges from the legislatures and governors that they wanted judges to check; (2) to embolden judges and legitimize judicial review by connecting them directly to 'the people'; and (3) to allow 'the people' to elect judges who would defend their constitutional rights. (Shugerman, 2010, p. 1067)

This matches the constitutional set-up of a tripartite government system as well as early Supreme Court precedent holding that the courts are the ultimate arbiters of the law (*Marbury v. Madison*, 5 U.S. 137 (1803).

In short, judicial elections in the United States trace their origins to efforts to depoliticize the projects of selecting judges. Then and now, there were concerns about the role that political patronage played in judicial appointments. The shift to direct election was mainly an effort to

escape the politics of appointments and, additionally, to improve the quality of those serving as judges. Paradoxically, the current quest to shift *away* from judicial elections is argued to be a necessary response to the politics of elections and a quest for the most highly qualified judges. "While democracies generally rely on elections as political expressions of legitimacy, democracies also typically 'fence off' judges in an attempt to make them independent from pure partisan politics and thus from having to run for office" (Resnik, 2004, p. 594). These issues will be analyzed in the chapters below.

2. Current judicial selection methods in the United States

State trial court judges are selected via several different methods some of which overlap. Each state decides how its judges will initially be selected, the length of the judges' terms, and how they might be reappointed or reelected (Streb (Ed.), 2007). This has led to a complex pattern of judicial selection methods across the nation. However, there are four basic types of judicial selection methods: partisan elections, nonpartisan elections, the "Missouri Plan," and appointment schemes (Bonneau & Hall, 2017). State election methods can also be classified in slightly different ways just as they occasionally change, so the numbers below may vary slightly depending on the source.

First, some states elect their judges in partisan elections. In these races, candidates run for their party's nomination in primaries or conventions and, once selected, compete against the nominees of the other party. In these elections, political party affiliation is listed on the ballot next to each candidate's name (Bonneau & Hall, 2017; Streb (Ed.), 2007). Partisan elections are held in seven states: Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Tennessee, and Texas (Bonneau & Hall, 2017; Ballotpedia, (*n.d.*)).

Second, other states use nonpartisan elections to select their judges. In these races, political parties are neither officially responsible for nor officially involved in the nominations or campaigns of the candidates (Bonneau & Hall, 2017). Instead, candidates compete in primaries in which the partisan affiliations of the candidates are not listed and where all candidates compete regardless of party. Thus, several candidates from the same party could and sometimes do compete against each other. Such elections are similar to elections for local office. Generally, if no candidate receives a majority of the vote in the primary, the top two vote winners proceed to the general election, once again with no party affiliation listed. Nonpartisan elections are held in sixteen states including, for example, Georgia, Nevada, Wisconsin, and Washington (Bonneau & Hall, 2017).

A variation on nonpartisan systems are "hybrid" systems where the political parties select their nominees either in primaries or conventions, but in the general election, partisan affiliations are not shown on the ballot (Bonneau & Hall, 2017). Michigan and Ohio use this system.

Third is the "Missouri Plan" also known as the commission-retention system, assisted appointment method, or merit selection system (Bonneau & Hall, 2017; Ballotpedia, (*n.d.*)). This involves a process by which the governor appoints state judges with help from a nominating commission or board often known as the Judicial Nominating Commission ("JNC").

The composition of such commissions varies widely across the states, but typically consists of members appointed by the governor, the legislature, and the state bar association. These members are often state attorneys and judges (Streb (Ed.), 2007). The JNC presents a list of names to the governor for each vacancy and the governor then appoints someone from that list. After a period of time - usually the next general election - the judge must seek voter approval in a retention election in which the judge may face no opposing candidates. This type of retention

election is a simple vote on whether or not the judge should be retained (using "yes" or "no" votes). Retention elections are a compromise between judicial independence and judicial accountability efforts. They are, however, getting more expensive and "nastier," which raises questions about how independent judges selected via this method can truly be (Streb (Ed.), 2007). Sixteen states including Arizona, California, South Dakota, Utah, and the District of Columbia use some version of this system (Bonneau & Hall, 2017, Ballotpedia (*n.d.*)). (Iowa and Nebraska were the first states to provide for merit selection of all trial and appellate court judges (Fischer, 2003)).

California uses a system combining elections and gubernatorial appointments as just described. In particular, "[t]he California Legislature determines the number of judges in each court. Superior court judges serve six-year terms and are elected by county voters on a nonpartisan ballot at a general election. Vacancies [such as by death or for retirement] are filled through appointment by the Governor" (Judicial Council of California, 2022, p. 3). However, "[t]he vast majority of superior court judges initially reach the bench via gubernatorial appointment, and once on the bench, incumbents are rarely challenged for reelection" (Judicial Branch of California (*n.d.*)). Appointed judges do, however, face retention elections in connection with general elections, which in California are held every other year in even-numbered years. If a California superior court judge runs unopposed for re-election, his or her name does not appear on the ballot and he or she is thus automatically re-elected (Ballotpedia, *n.d.*)). In effect, this means that hundreds of judges in California are "re-elected" without even appearing on a ballot. In Los Angeles County, for example, there are approximately 560 judges on the Superior Court bench (The Superior Court of California, County of Los Angeles (*n.d.*)). A third are up for re-election every other year. Thus, approximately two hundred judges are up for

re-election every other year in one county alone. The logistics of placing two hundred names on a ballot may, of course, challenging, but on the other hand, it is democratically questionable to claim that judges are "re-elected" via the system just described when the general public does not have a realistic opportunity to find out about this.

Fourth, judges may be appointed to the bench by the state legislature (Bonneau & Hall, 2017). In this system, the judges never have to face the electorate to obtain or retain their jobs. Instead, the judges serve for fixed terms and must then seek approval from the legislative or executive branch to continue in office. For example, South Carolina provides a list of three candidates to the state legislature, not the governor. Virginia's judges are appointed and reappointed by the state legislature.

There can also be variation of judicial selections even *within* states. For example, in California, retention elections are held for all supreme court and appellate court justices after twelve years of service while trial court judges run for reelection every six years (Streb (Ed.), 2007).

In sum, judges face some sort of election in the vast majority of states. While sources vary slightly on actual numbers, Streb ((Ed.), 2007) found that thirty-nine states use elections to either select or retain some or all their judges and that no less than approximately 90% of all state court judges face elections to retain their seats on the bench. Similarly, Bonneau & Hall (2017) found that approximately twenty-four states hold elections for initial judicial positions while judicial retention elections are held in sixteen while another twelve states use an appointment system only.

Judicial elections are uniquely American: even though many countries have copied other American legal institutions, almost no other country in the world has ever experimented with the

popular election of judges (Shugerman, 2010). The only other nations that elect a very small number of judges are Switzerland, France, and Japan. These nations narrowly limit the scope of judicial elections.

In contrast to state court judges, the selection of federal judges is straightforward. Supreme Court justices, court of appeals judges, and district court judges are nominated by the President and confirmed by the United States Senate as called for by Article III of the United States Constitution (United States Courts, *n.d.*)). The names of potential nominees are often recommended by senators or sometimes by members of the House who are of the President's political party (United States Courts, *n.d.*)).

B. Regional Differences

Election outcomes are marked by a great degree of "sectionalism" or "tightness-looseness" cultures among the fifty states in the union (Harrington & Gelfand, 2014). This sectionalism involves alignments that are "the product of the historical, cultural, and economic spheres into which the country is divided" (Volcansek, 1983, p. 47). Volcansek and others divide the nation up into regions consisting of the greater Northeast, the greater South, and the greater West. Although such and other cultural and political differences exist in regions, states, and regions or cities within states and thus make it difficult to generalize from one area to another, there is still value in analyses such as that presented in this dissertation and the literature upon which it relies. This is so because despite differences, there is also regional cultural and thus political coherence within regions that feature similar demographic traits. For example, both Harris County, TX, and Los Angeles, CA, are multi-million voter districts (Texas Secretary of State (n.d.); Los Angeles

Almanac (n.d.).[3] Both Texas and California have liberal and more conservative pockets; but the three counties chosen are on the liberal side. The three studied areas are urban and host numerous government agencies, businesses, and other organizations. They are in part very densely populated. They still have major, local print newspapers. They are home to large segments of both Caucasian people and people of color and of immigration background. They have provided large datasets, which make observations and statistics more reliable. However, generalizing from just three areas, albeit large and nationally prominent ones, is not without concerns. It is always important to recall that in a nation as large and diverse as the United States, regional and even local differences among both people and their institutions. Still, although such variances exist, the large dataset and areas examined here provides value for similar large, densely populated, urban regions in the nation.

"Tightness" refers to the degree to which a state has many strongly enforced rules and little tolerance for deviance (Harrington & Gelfand, 2014). This may be exemplified by, among other things, the strength of criminal punishment applied in the states, stricter law enforcement, more authoritarian governments, fewer civil liberties, and greater use of the death sentence. Compared to lose states, tight states also have greater social stability and better "self-control," including lower drug and alcohol use; lower rates of homelessness, and lower social disorganization in general. At the same time, they also have lower sex equality, greater discrimination and inequality, decreased innovation and creativity, and lower happiness rates in general. Although they are two distinct constructs, tightness is positively related to conservative political orientation. However, Harrington & Gelfand (2014) demonstrate no relationship between tightness and crime. Thus, the notion of judges being "tough against crime," as is often brought

[3] Harris County, TX, had more than 2.5 million registered voters in 2022. Los Angeles County had almost 7 million registered voters in 2022.

up in the judicial election context, does not necessarily lead to a lesser amount of crime, contrary to general public opinion and judicial election rhetoric.

"Looseness" refers to states having fewer strongly enforced rules, greater tolerance for deviance, and more latitude and permissiveness in government decision-making, among other things (Harrington & Gelfand, 2014). "Lose" states have much higher levels of social disorganization and drug use, but increased creativity, cultural openness, and greater levels of happiness (Harrington & Gelfand, 2014).

The top ten tight states (from highest to lowest) are Mississippi, Alabama, Arkansas, Oklahoma, Tennessee, Texas, Louisiana, Kentucky, South Carolina, and North Carolina. The loosest ten states are (from lowest to higher) California, Oregon, Washington, Nevada, Maine, Massachusetts, Connecticut, Hawaii, New Hampshire, and Vermont. Of course, individual states may have pockets featuring an alternative degree of state looseness. For example, Orange County and Shasta County, California, are known to be more politically conservative than the state in general. San Francisco County is known to be more liberal than Los Angeles County, which in turn is more liberal than San Diego County.

These core cultural differences are ascribed to ecological and historical factors. Tight societies have experienced a greater number of ecological and historical threats including fewer natural resources, more natural disasters, a greater incidence of territorial threat (as in the South around the time of the Civil War), higher population density, and greater pathogen prevalence compared to loose societies. Looser societies feature the opposite characteristics.

Tightness-looseness has predictive and explanatory utility across levels of analyses of various policy-based issues such as those relating to judicial elections (Harrington & Gelfand, 2014). However, both tightness and looseness have relative costs and benefits, depending on

one's vantage point. They should thus not be used to denote which states are "the best" in any given context, but they are helpful in contemplating the types of judges that best reflect the overall degree of looseness in the state in question. This is so because judges should arguably reflect the cultural environment in which they hear cases and not be cultural aberrations on the looseness-tightness scale. For example, a judge who believes strongly in more severe methods or degrees of punishment, stricter law enforcement, and steps taken against homeless people would better reflect the political desires of voters in a stricter rather than a looser state.

Volcansek (1983) explains that the greater South is predominantly traditionalistic culture (p. 47). In this, people tend to take a pre-commercial attitude "which sees society as hierarchical, with those at the top of the social order taking a dominant role in government" (p. 47). "The greater West is dominated by a moralistic political culture … which perceives politics as a public activity designed to promote public good and the advancement of public interest" (p. 47). A tenet of this culture is "the avoidance of corruption or of private gain through public office … It also emphasizes the reward of confidence for a public service that is properly discharged" (p. 57). The Northeast is a hybrid of the moralistic culture and the individualistic culture, which "suggests that government was designed to handle specific functions; only those which the people so delegate" (p. 47).

Accordingly, Volcansek's research demonstrates that in the greater West – the geographical area of inquiry of this dissertation – "incumbency is the single significant factor related to percentage of vote won" (p. 55). Only eight out of 71 judges in her study were not incumbent judges (p. 55). "[T]hat high number of incumbent judges, indeed over eighty percent, are retained in office is in keeping with expectations of the moralistic political culture" that rewards public service that is properly discharged (to the extent that voters can find out the latter

about judicial performance) (p. 57). Again, the presence of variations across systems and political cultures makes it difficult to generalize about issues across the nation. At the same time, issues marring one area may also be present in another or at least call for more research.

C. Judicial Selection Concerns

This section will analyze advantages and disadvantages of judicial elections. These include concerns regarding judicial quality, legitimacy, accountability, impartiality, and independence. This section also briefly examines whether the nature of judicial elections has changed over recent decades.

As a threshold issue, it should be noted that

> Americans are conflicted about how we select our judges because we are conflicted about what we want them to do. We want judges to uphold the rule of law, to check the excesses of the legislature and the executive, and to protect constitutional rights and deep-seated values against majority encroachments—all functions associated with and facilitated by judicial independence—and yet we also want judges to be deferential to the "political" branches and to administer faithfully the laws on the books— functions protected by external accountability mechanisms. We want judges to be resolute but not activist. The debate over judicial selection, then, is to some extent a debate over the judicial role. (Pozen, 2008, p. 272)

It is outside the scope of this dissertation to further discuss the desired nature of the judiciary in the United States. However, judicial selection methods have an impact on the above considerations (and more). Selection methods are important no matter what the precise role of judges is or is desired to be.

First, it is relevant to examine whether the judicial election process has by and large remained the same over recent decades or whether elections for judges have taken on traits similar to those encountered in other elections. This informs the debate about whether there is a risk of judges assuming the bench without having appropriate and desired traits.

1. The "New Politics" of judicial elections

Some scholars find that judicial elections are indeed taking on many of the same characteristics as elections for higher-profile offices such as senators or governors. In other words, judicial elections are indeed becoming noisier, nastier, and costlier (Schotland, 1985, p. 78). "Even some judicial candidates, who for so long resisted the opportunity to look like other politicians, have become vocal on the campaign trail regarding their positions on issues and their opponents' weaknesses … This has become known as the "New Politics of Judicial Elections" (Bonneau & Hall (Eds.), 2017, p. 141). However, this concern mainly pertains to state appellate and supreme court races, not lower-level races. In those, attention paid by voters is still often relatively insignificant and voter rolloff is high, largely because the campaigns tend to fly under the radar of most people. (Bonneau & Hall (Eds.), 2017, pp. 141-155).

Other researchers agree that judicial elections, at least at the "higher" levels, are changing. While judicial elections have traditionally been "sleepy, low-key affairs" (Pozen, 2008, p. 266), a "New Era" has brought in intense competition, broad public participation, and high salience in elections for higher courts. Further, "contributions have skyrocketed; interest groups, political parties, and mass media advertising play an increasingly prominent role; incumbents are facing stiffer competition, and salience is at an all-time high." (Pozen, 2008, p. 268).

The most frequently stated reason for advocating the elimination of judicial elections still seems to be the argument that appointment of judges results in a bench with better judges. Continued research will help inform the debate about how to select the "best" judges possible at the trial court and upper levels. To be sure, the politics of judicial elections change with societal developments in general. Factors that once were significant may no longer be so. New factors are

surfacing. The issue is judges are best identified via selections or elections. Of course, both methods present some significant advantages and disadvantages. These will be reviewed next.

2. In favor of merit-based selections

Judicial elections are, by some key scholars, thought to be ridden with so many concerns that merit selections are preferable, although of course also not unproblematic. The nation's founders and recent judges have expressed concern about keeping the judiciary independent from the other two, arguably more political branches of government.

a. Impartiality and independence

Judicial independence can be defined in different ways, but

> most definitions include three interrelated concepts … (1) behavioral or decisional independence—sometimes referred to simply as impartiality at the case level; (2) formal or institutional independence, which describes the judicial system's institutional structure, including selection and retention methods, tenure, and salary; and (3) insularity from other political branches…." (Souders, 2006, p. 532)

Judicial independence is a foundational principle of the United States Constitution. In this system of government,

> the judiciary is a constitutional priesthood loyal to the sovereign will—the Constitution—in the face of majoritarian excess, executive encroachment, and legislative self-aggrandizement. Thus, judicial independence advances democracy by ensuring that the majority's long-term, constitutive values are represented in the heat of the moment. Second, judicial independence is predicated on a neutralizing distance between the judge and the legal dispute. Thus, under our federal scheme, judicial independence is attained by insulating judges from electoral pressure; indeed, federal judges need not fear losing their jobs or salaries even if their decisions contravene the popular will as expressed in congressional statutes, presidential orders, the press, and/or mass demonstrations. Impartiality is the rule of law. (Wynn & Mazur, 2004, p. 778)

In urging ratification of the Constitution, Alexander Hamilton wrote in Federalist 78, quoting de Montesquieu: "There is no liberty, if the power of judging be not separated from the legislative and executive powers" (Chin, 2018). In appointment letters to the first Supreme Court

justices, President George Washington described the judiciary as “the chief pillar upon which our national government must rest” as well as “the keystone of our political fabric” (Kenner, 1933). More recently, the Supreme Court has noted that “the legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship” (Chin, 2018). In the words of J. Anthony Kennedy, “The law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral” (Chin, 2018).

Judicial independence has been called "an elusive, multi-layer concept that is difficult to define” (Souders, 2006, p. 531). But “[a]lmost universally, scholars and judges recognize judicial independence as a legal ideal that correlates closely with judicial objectivity” (Souders, 2006, p. 531). Former Chief Justice Rehnquist once noted that

> [i]t is not enough to have an impressive catalogue of individual rights in the Constitution if the judges who are called upon to enforce these rights are not truly independent.” And so, judicial independence “is every bit as important in securing the recognition of the rights granted by the Constitution as is the declaration of those rights themselves.” Indeed, Rehnquist called the principle of giving independent judges responsibility for enforcing the guarantees of a written constitution “probably the most significant single contribution the United States has made to the art of government.” (Chin, 2018).

Thus, in the literature, “judicial independence and judicial accountability are at war … a fundamental conundrum in our constitutional republic is the method of creating a judicial branch that is both sufficiently insulated from republic concerns—to remain faithful to the Constitution—and democratically accountable” (Wynn & Mazur, 2004, p. 776).

One of the greatest concerns about judicial impartiality stems from the need for judicial candidates to raise money for their campaigns. This is particularly so at the appellate and supreme court levels, whereas many candidates at the trial court levels end up having to self-fund large parts of their campaigns simply because the general population tends not to fund judicial campaigns, but instead prefer giving campaign funds to, for example, candidates for City

Council or mayor who are seen to have a greater impact on everyday citizen's lives (and businesses). Further, citizens vastly underestimate how expensive a run for judge can be, at least in large areas such as Los Angeles County and its approximately 7 million registered voters. Scholars have, for example, argued that often, "[t]he most successful judicial election campaigns are the ones that raise the most money" (Hayden, 2016, p. 124).

> In turn, the need for judges to fundraise for successful campaigns has created: (1) an increase in campaign contributions by special interest groups, and (2) a surge in campaign spending by judges. The outcome of cases such as *Citizens United v. Federal Election Commission*, which held that corporations could provide funding for campaign advertising to persuade voters, has led to an increase of special interest groups' influence in judicial elections and a related growth in campaign spending, almost doubling the amounts within twenty years. (Hayden, 2016, p. 124)

Television advertising saw a major spending increase about ten years ago. One study revealed that

> candidates and interest groups have realized that television advertising is effective in increasing name recognition and support for favored candidates, or alternatively, attacking their opponents. As a result, different organizations have realized that they, or their cause, can benefit from judicial elections by supporting a particular judge in his or her election." (Hayden, 2016, pp. 124-125)

California Supreme Court Justice Chin notes that "campaign contributions in judicial races have skyrocketed, with some successful state supreme court candidates raising more money than candidates for the U.S. Senate" (Chin, 2018). "Cash has become king in judicial elections" (Chin, 2018).

Business groups are the largest contributors to at least television advertising. In 2006, they were responsible for more than 90% of interest group spending on judicial campaigns (Hayden, 2016, p. 126). There is a connection between the top fundraisers and candidates who win elections and the candidates who use the most television advertising. (Hayden, 2016, p. 126).

Although fundraising for election purposes is common in the United States, it raises a "concerning relationship between money and judging" (Hayden, 2016). The concern is whether fundraising may affect the neutrality of judges and thus affect courtroom decisions.

> A disturbing result of the influence of special interest groups in judicial elections is the compromised impartiality of judges in decision-making on the bench. Judges who receive campaign contributions have admitted that these contributions influence their decisions. Studies suggest a relationship between campaign contributions and favorable rulings in the courts, and that judges regularly hear cases from campaign supporters. Although judges should recuse themselves while in front of a campaign supporter, scholars cite weak recusal rules as allowing opportunities for this influence to persist. (Hayden, 2016, p. 125)

Themes in television ads vary between by types of elections. In the 2013-2014 state Supreme Court justice elections, while many candidates ran "traditional ads" focusing on their "experience, values, and qualifications," there was an increase in criminal justice "soft on crime" negative ads towards opponents (Hayden 2016, p. 125).

The "increasing effort to politicize the judiciary is partly a self-inflicted wound as advertising in judicial elections has taken an increasingly negative tone" (Chin, 2018, para. 5). For example, a 2008 race for Michigan's Supreme Court was called an "orgy of negativity" by one judicial watchdog group (Chin, 2018, para. 5). In another supreme court election, an Illinois State Bar Association committee concluded that the candidates' advertisements had been inflammatory and misleading (Chin, 2018, para. 5). A race for West Virginia's Supreme Court was called "the nastiest mudslinging in the history of modern American Court campaigns" (Chin, 2018, para. 5).

Other scholars agree that monetary interests and judicial elections do not go hand in hand. "Candidates' campaign statements and the influence of money and special interests will have pernicious effects not only on judicial impartiality, but also on the appearance thereof" (Pozen, 2008, p. 295). The same holds true in Los Angeles County, where prosecutors as judicial

candidates have admitted to the present researcher about having severe concerns about being able to remain neutral towards other prosecutors if (which, in effect, is "when," as will be demonstrated below) assuming the bench as fellow prosecutors contribute to each other's campaigns and law enforcement agencies tend to do so as well. This is, of course, problematic.

In short, justice should not be "for sale" (Streb, (Ed.), 2007, p. 78; Edwards, 2015, p. 1195; Tucker & Fisher, 2003, pp. 153-154) or even appear to be affected by monetary interests. But with the significant interface between campaign contributions and successful judicial elections, a serious concern exists in this context although it is outside the scope of this dissertation to go more in depth with this issue. More research is needed into the types of messages and amounts of money spent on, for example, social media. The above exemplifies the scholarly and judicial concerns about popular opinions having too great of an effect on who becomes judge. The monetary effect on, at bottom, the rule of law is a serious concern.

> As former Supreme Court Justice Harry Lee Anstead once said,"[t]he rule of law is not a liberal value or a conservative value and it certainly is not a Republican or Democratic value … it is an American value." Because of the inextricable link between independent judges, the rule of law, and democracy, threats to judicial independence necessarily threaten our democratic system. (Chin, 2018).

b. Judicial quality, accountability, and popular opinion

First, significant criticism marks judicial elections due to their negative impacts on state judiciaries and low qualifications of elected judges. Dating back to 1937, the ABA has highlighted negative implications of judicial elections. The Association has, for example, convincingly argued that "electors are without information or competency to appraise the real merits of a judge and are too sensitive to prejudices and to political manipulation" (Hayden, 2016, p. 121). The Honorable Charles M. Thomson, a Chicago judge, wrote about Illinois' judicial elections creating politicians out of judges that "[o]ur experience has been that by and

large, we have on our bench some good judges, I will admit, even in that unspeakably bad system, but in large measure a bunch of judicial politicians, who just play politics morning, noon and night" (Hayden, 2016, p. 3). Following these and many other discussions, the ABA published its first resolution in favor of merit selections and a judicial nominating commission "as the most acceptable substitute available for direct election of judges" (Hayden, 2016, p. 122). In short, the ABA – a nationwide association of employed or voluntary, fee-paying members with long-standing insight into the issue - supports the merit selection of judges. This should inform the debate significantly.

In *Williams-Yulee v. Florida Bar*, Chief Justice Roberts similarly opined that the role of a judge is different than that of an elected official: "Politicians are expected to be appropriately responsive to the preferences of their supporters. Indeed, such responsiveness is key to the very concept of self-governance through elected officials" (2015, p. 434). A judge's role is different, however, as the judge is "not to follow the preferences of his[/her] supporters, or provide any special consideration to his[/her] campaign donors" (p. 446). Instead, a judge instead must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or controul [sic] him but God and his conscience" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 447 (2015) (citing Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830)).

> Further differences between an elected official and a judge are that an elected official is a member of a governing body that develops broad social policies and laws, whereas a judge makes decisions that can directly impact an individual party. An elected official may act to please [his/]her constituency; a judge instead makes decisions against the majority and popular belief to defend individual and minority rights.
> If a judge is different from a politician, and both have separate roles in the creation and administration of laws, then how can a judge function differently from a politician if elected to his[/]her seat? Judicial elections can compromise a judge's role, which is to remain impartial when deciding cases, and be "completely independent" …. Studies reflect that campaigning and the nature of elections in general have led to numerous

> issues involving the quality of judicial decision-making, the quality of reputable judicial candidates, and the diversity of judges. (Hayden, 2016, p. 123)

Pozen (2008) finds that high quality candidates are less likely to run for office, but more likely to seek appointment. “Whereas appointments carry a certain prestige and insulate the judge to an extent from public scrutiny, elections breed self-selection of politically minded hacks” (Pozen, 2008, p. 294). This is of concern.

Scholars such as Lemennicier & Wenzel have researched accountability as it relates to judges. They argue that

> [j]udges are, by definition, institutionally unaccountable. This institutional unaccountability is particularly acute in the matter of determining the judge’s personal accountability. The judge primarily fears a reversal of his[/her] decision, and the ensuing loss of reputation for his[/her] career. When faced with a decision, the judge will thus make choices for which he[/she] anticipates that he[/she] will not bear the consequences. The judge will choose the action that minimizes the risks that are visible (or that are likely to attract public attention), while setting aside the hidden risks (or those to which public opinion is indifferent). We thus have the “judge’s illusion,” …: judges will always want to take the least risk possible. The jurisprudential principle of presumption of innocence in reality comes down to a choice (by the judge) not to make decisions of which peers, voters, or elected officials might take adverse notice. (Lemennicier & Wenzel, 2018, p. 240)

This speaks against elections where politically favorable sentiments may well influence the outcomes of even judicial races which ought not be, but often are, at risk of being subject to popular opinion at the time of the election. This is problematic because of the length of time for which judges typically sit. For example, Lemennicier & Wenzel (2018) used the death penalty in the United States to measure and compare the impact of different methods of judicial selection. They found that accountability is a factor in at least sentencing contexts (p. 252). Thus, in those areas of the nation in which the death penalty is acceptable, judges would be more inclined to impose it than those in which the death penalty is disfavored, outlawed, or – as in California –

subject to a gubernatorial moratorium; an uncomfortable balancing of electoral popularity vs. human life and death.

Streb (Ed., 2007) supports the troublesome finding that that the prospect of electoral defeat does in fact influence judicial decisions. For example, one study indicated that criminal defendants convicted of murder were approximately 15% more likely to be sentenced to death when the sentence was issued during the judge's election year (p. 76).

> The fact that pressures from the electoral arena penetrate courts can be construed as an affront to the rule of law and fundamental due process. After seeing evidence of responsiveness to public preferences brought about by elections, scholars, policy advocates, and the American public reasonably might conclude that appellate review should never be influenced by popular preferences or the justices' own desire for reelection, especially in death penalty cases where judicial votes represent life or death choices. Indeed, interpreting these results as convincing evidence for ending judicial elections altogether comports well with traditional theories of the judiciary. Interestingly, the opposite construction of these findings is equally plausible and compelling. In cases lacking reversible error, electoral pressures, including public preferences on the death penalty, may prevent justices from disregarding the law and imposing their own preferences that contradict the proper findings of juries and trial judges. (Hall, 2016, p. 455)

A delicate balance is necessary "to ensure that judges are independent enough to follow the facts and law without fear or favor, but not so independent as to disregard the facts or law to the detriment of the rule of law and public confidence in the courts" (Hall, 2016, p. 456).

In contrast, Lemennicier & Wenzel found that if judges are independent experts nominated and evaluated by their peers, they will be immune from the pressures of electoral rent-seeking, but unaccountable to the people. This may, however, be preferable because of the particular role performed by the judiciary. Judges should not be subject to popular notions and the whims of voters, but rather consider law and facts without fearing consequences thereof.

In other words,

> [i]f judges are elected, they will be democratically accountable, but subject to the redistributive pressures of the ballot box. If judges are nominated and controlled by

> politicians, they will face the temptations of bureaucratic self-interest and will not be democratically accountable, but they will be shielded from the Public Choice problems of elections. (Lemennicier & Wenzel, 2018, p. 239)

In one study (Souders, 2006), a state judiciary's susceptibility to the popular will was tested. It was proved that elected judges reacted more to public opinion than appointed judges who never faced popular confirmation. Furthermore, these results confirmed the researcher's hypothesis that appointed judges were more likely to take unpopular stands by reversing the convictions of criminal defendants for constitutional violations, whereas popularly and legislatively elected judges were the least likely to take these positions. The empirical evidence presented in the study, therefore, counters years of political science theory that otherwise argued that judicial selection methods have an insignificant effect on judicial behavior. The evidence for the study also supports the notions that selection methods matter and that appointed, not elected, judges will behave in the most independent manner (Souders, 2006). Souders' research adds support to the proposition that different selection methods will impact the behavioral motivations of judges differently. The findings also support the notion that judges who are elected and retained by partisan judicial elections carry the *least* amount of independence. Further research confirms this:

> [T]he ideological climate of the public or government may cause a judge to fear negative consequences based on an unpopular decision. An elected judge may worry that a particular decision will upset the public and may cost her[/him] votes or even a reelection. This belief contradicts the ideal role of a judge, which is to stand up against the majority in defense of the minority or individual. Judges often hear cases relating to controversial or high-profile issues with the understanding that they must make a correct decision, even if unpopular. As elected judges face a retention election for their seat, the fear of upsetting the public and being unseated based on an unpopular decision influences their decision-making in various cases. Judges that face reelection may avoid making unpopular rulings or may decide cases depending on the political ideology of the general public.
>
> Elected judges tend to decide cases according to the political preferences of voters - and [] when voters' preferences change, judges' behavior follows. While most in the legal

> profession believe that judges' correct yet unpopular decisions should not be used to penalize them or unseat them, this tactic has been successful in changing the ideology of various courts. (Hayden, 2016, p. 127)

Souders (2006) also notes that

> from a non-empirical standpoint, social psychology professor Lawrence Wrightsman has identified some of the potential dangers of an elected judiciary. Among the problems identified, Wrightsman noted that elected judges can fall into the trap of "playing to the grandstand" and making "outrageous sentencing decisions" to increase the likelihood of reelection. Wrightsman's psychological predictions emphasize the dangerous results that selecting and retaining judge by partisan election methods could have on these judges' behavior. (P. 542)

The increased pressure of decision-making and campaigning in retention elections has exposed judges to increased and "new pressures [for those] ... who had previously been largely insulated from politicized judicial elections" (Hayden, 2016, p. 127). The threat of politicized retention elections, combined with a perceived opportunity "to change the ideological composition of a court by replacing a judge with another, is an added stressor that may keep judges from ruling impartially or even ruling more harshly" (Hayden, 2016, p. 127).

Thus, "[w]hile in theory the method of selecting judges most consistent with popular sovereignty and majority rule is elections, in practice these elections tend to be democratic affairs only in the most superficial, formalistic sense" (Pozen, 2008, p. 267). "Elected judges are less independent than appointed ones in the sense that the public can vote them out of office if it does not like their decisions" (Pozen, 2008, p. 271). In other words, a major concern is that judges will, as other elected government representatives, be more concerned with what it takes to get elected and reelected than doing the "right thing;" judging based on the law, facts and potentially public policy rather than by taking into consideration what electors may want them to do at a brief moment in time. While the letter may be more acceptable in relation to the legislative and executive branches, this concern is of greater significance in relation to the

judiciary, which should be concerned about independence and precisely *not* bowing to popular political trends *just* in order to do so. "[A]n elective regime might influence jurisprudence at a sub-conscious level, such that its judges, without fully theorizing or even processing what they are doing, will be more prone to conflate electorally popular outcomes with legally sound ones" (Pozen, 2008, p. 277).

In the judicial retention context, elections present other significant problems. All states that use judicial elections at the initial selection stage also use some form of elections at the retention stage. Some use elections after initial appointments. Thus, "inasmuch as judges have decisional or procedural discretion, elections will give them a structural incentive to avoid unpopular rulings. In this way, judicial elections may tend to undercut the functional consequences of judicial supremacy in constitutional and statutory interpretation" (Souders, 2006). The jurisprudential philosophy of judges should not be such that they care more about the popular acceptance of their rulings to preserve their positions. This is what Alexander Hamilton referred to in Federalist Number 78 when he discussed judges being the "the citadel of the public justice and the public security," which is why he considered life tenure to be necessary for the independence of (federal) judges. Consequences of elections should not be on judge's minds. Of course, it is unrealistic to expect that sitting judges can simply shut out their inner voices worrying about consequentialist outcomes of their judging.

As for inclusive governance, elections present further problems. In 2010, for example, the Brennan Center reported that most judiciaries do not sufficiently reflect the populace in their states (Hayden, 2016). This harms the public confidence in the courts while at the same time creating "a jurisprudence uninformed by a broad range of experiences" (Hayden, 2016, p. 127). It is important to note, however, that both "[j]udicial partisan and nonpartisan elections are

criticized for frustrating judicial diversity, as many minorities who become elected face difficulty being reelected in retention elections" (Hayden, 2016, p. 127). However,

> [c]ritics of merit selection or appointment processes argue that these processes [also] do not contribute to diversity of state judiciaries because the recruitment efforts fail to attract potential minority or women applicants. The argument is that many do not want to leave their law firms, where they are highly valued and where the application processes are more transparent, or they do not want to risk the substantial pay cut from their law firm salary. This rationalization, however, does not criticize the selection process itself - the criticism is of a judge's salary or of the job security with a law firm. Merit selection systems have opportunities to amend procedures to increase transparency and to create pro-diversity initiatives. Merit selection does not reduce the number of minorities on the bench, unlike judicial elections, which have more opportunities to eliminate minorities and women with a "No" vote. (Hayden, 2016, p. 128)

Thus, despite the populist success, the Supreme Court's ringing endorsement, and the failure of legitimate alternatives, judicial elections have not produced the *sine qua non* of accountability: community representation. (Wynn & Mazur, 2004, p. 788).

Thus, scholars believe that the election of judges often falls short of many asserted democratic values. Further, many judges are also not elected in the first place, but appointed under, for example, the Missouri plan. They then run with a significant election advantage as incumbents in retention elections (Goldman, 1982). Unqualified people can and do run for office and win over more qualified candidates. (Goldman, 1982).

A merit-based system differs from other systems of judicial selections because of the powerful role it accords to lawyers, including those on state bar associations who may well be involved in the merit selection system. A typical argument in this context is that this system is preferable to general elections because state bar associations – in contrast to local voluntary bar associations – are less inclined to examine the personal ideological preferences of judicial candidates than are voters or elected officials. In other words, state bar associations may be less concerned with whether a candidate is a Republican or a Democrat, a conservative or a liberal,

which should not be of import in the selection of judges. Some scholars are, however, skeptical of this claim.

> Even if bar associations are better able to identify more intelligent or more qualified judges than are voters or public officials, it does not follow that they are less inclined to consider the political beliefs of judicial candidates. It is hard for me to believe that state bar associations accord those preferences any less weight than voters or elected officials when they select judges. In short, I am skeptical that merit selection *removes* politics from judicial selection. Rather, merit selection may simply *move* the politics of judicial selection into closer alignment with the ideological preferences of the bar. This will move the politics of the judiciary into closer alignment with the ideological preferences of the bar and away from the preferences of the public in the same way it would if state bar associations were trying to find judges who shared their ideological preferences. (Fitzpatrick, 2009, p. 676)

These are salient points. On balance, state executive officials may be more informed about the needs of the judiciary, the desired qualifications of judges, the desired societal policy direction, and other relevant aspects of selecting judges than are voters many of whom only vote based on mere official-sounding titles, local bar "evaluations" or, as some point out tongue-in-cheek, "the scientific method - eenie, meenie, mynee, moe" (Kyle, 2022).

Needless to say, only the most highly qualified persons should be able to assume the bench. This is a point on which most people will probably agree. Merit selections seek to select the most qualified people whereas this is not necessarily the case with elections. In merit selections, the emphasis is at least officially on professional qualifications. The assumption is that merit rather than political criteria will be given weight. (Goldman, 1982). If legislators elect judges or governors appoint them, there is accountability and greater policy coordination than via regular elections; [this is called] the "Responsible Party Model" (Goldman, 1982, p. 120). Full investigative resources are, as a starting point, better than voters simply relying on, for example, newspaper editors or local bar groups, as is the concern with electoral methods. Merit selections can also be "compatible with affirmative action, helping to avoid racial and sexual biases of the

past and bring well qualified women and minorities before the commissions" (Goldman, 1982, p. 121). It is, however, also important to note that politically based selection committees may, in turn, rely on the same type of attorneys with little interest in, for example, diversification and modernization of the bench as the ones currently "evaluating" candidates for elected office.

c. The majoritarian difficulty

Scholars believe that judges should exactly *not* take public opinion into account when reaching decisions. Rather, judges should judge based on existing law and the facts and circumstances before them. If they were to consider majority public opinion, that could too easily create a "tyranny of the majority" situation. This jurisprudential concern was discussed recently in connection with the United States Supreme Court holding overturning *Roe v. Wade* where the Supreme Court cited to legal analyses and foundations while 61% of Americans favor abortion rights in "all or most cases" (Hartig, 2022). However, this same situation makes judges democratically unaccountable to citizens in a direct manner. In other words, this is an issue of whether judges should be elected directly or appointed by government representatives who in turn are elected or appointed (such as governors or merit selection committee members). Political science literature is rife with arguments that politicians are not primarily concerned about doing "the right thing." Instead, their primary area of concern is getting elected or re-elected. The same concern pertains to elected judges. Society arguably does not benefit from judges taking into account what citizens, who are not well versed in the law and its impacts on society, would want in all situations. But sometimes, the common law does and should develop. This is a matter of case precedent on one side and the need for legal developments on the other.

Scholars generally point out that judges should come to what they consider to be the most correct legal decisions over time without being subject to electoral pressures. But conversely,

since judges are part of the government too, they should, it is also argued, not enjoy overly great privileges of isolation and separation from the people. All three government branches should represent the people and what they want within, in the judicial context, legal limits.

> The concern is that by making judges more responsive to majoritarian political influences, elections undermine (in a way that other selection methods do not) the interrelated values of judicial independence, judicial impartiality, the appearance of impartiality, due process, separation of powers, minority rights protection, constitutionalism, and the rule of law …. As interpreters of the law, courts have a special role to play in negotiating this tension and safeguarding constitutionalism … [T[he term "majoritarian difficulty" [] explains the central problem of elective judiciaries and to contrast it with the countermajoritarian difficulty that [has been] assigned to appointed, life-tenured federal judges. Whereas the countermajoritarian difficulty asks "how unelected/unaccountable judges can be justified in a regime committed to democracy," the majoritarian difficulty asks "how elected/accountable judges can be justified in a regime committed to constitutionalism. The answer is unclear, for elections entail democratic governance and "constitutionalism entails, among other important things, protection of the individual and of minorities from democratic governance over certain spheres. (Pozen, 2008, p. 279)

But "[a]s Hamilton suggested, the practice of judges facing periodic elections seems to sit in tension with some basic normative and institutional features that many seek in a judiciary" (Pozen, 2008, p. 279).

For the judiciary to fulfill its special role as "an essential bulwark of constitutional government, a constant guardian of the rule of law," Justice Ginsburg once suggested that the judiciary must be selected in a manner that insulates it to some extent from public opinion. Justice O'Connor made this suggestion more concrete: "Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." To ignore the political consequences of one's decisions would be "'like ignoring a crocodile in your bathtub" (Pozen 2008, p. 281).

At bottom, research demonstrates and judges acknowledge that judges do, in fact, take into account what voters want. As much more than popular opinion goes into determining case

outcomes, the argument that electoral pressures influence judicial decision-making in relation to case outcomes, sentencing contexts, accountability, and constitutional concerns is weighty.

d. Rolloff

In every election, some voters vote only for some races, but not others. This is known as "rolloff" (Bonneau & Hall, 2017). Typically, voters will vote for "top of the ballot" races such as those for president, governor, and city council members, but not "lower races" or "down ballot races" such as judges. (These names stem from the location of the particular race on actual or electronic ballots: at the top or in the beginning vs. at the bottom or later on electronic screens).

"One of the most paradoxical findings in American voter behavior is that citizens will incur all of the necessary costs of making their way to the ballot booth, and then abstain from registering a preference for a number of election contests" (Lamb & Perry, 2020, p. 1132). Having less information about the candidates on a ballot results in lower levels of ballot completion ("roll-off"). "Many voters vote on judicial candidates rather than abstaining from that part of the ballot when judicial party affiliation is included on the ballot" (Edwards, 2015).

Rolloff can be very significant indeed. On average, voters complete 19% less of their ballot when they possess low levels of information about the candidates involved (Lamb & Perry, 2020, p. 1134). At the half-level mark contrasted to full information levels, "[r]espondents with complete information have an average ballot completion rate of 95.6 percent; this rate falls to approximately 80 percent for respondents who only receive half of the available information" (Lamb & Perry, 2020 p. 1142). In an extreme example, the 2002 New York City elections, the average percentage of registered voters who voted for judges was typically between only 15-20% (Zeidman, 2005, pp. 717-718).

The rolloff in the 2020 judicial election in Los Angeles County followed this trend:

Table 1 - *Rolloff in Los Angeles County elections shown as percentage reduction in numbers of ballots cast for judge compared to the highest number of ballots cast for any elected position.*

Year	Primary	General
2022	21.8%	24.2%
2020	22.8%	21.9%
Avg	**22.3%**	**23.0%**

Judicial races often are not well covered by the media or the candidates themselves. When the candidates and mass media have generated little information about a contest, it is likely that a substantial proportion of voters will go to the polls without a preestablished decision about what to do in that contest (Klein & Baum, 2001). When voters actually reach the contest for judge on the ballot, their choices about whether to vote in that contest and the choice of a specific candidate is simultaneous rather than sequential (Klein & Baum, 2001). In other words, voters have typically not made up their minds about whether to vote for judges at all before actually voting. Instead, when they see a particular race and name, they then make up their minds virtually simultaneously indicating an exceptionally superficial decision-making process (Klein & Baum, 2001).

Some explanations for roll-off are the fact that voters have to make up their minds about a relatively large amount of ballot initiatives and individual races, that this amount is increasing in at least some states, and that "[a]s voters go line by line down the ballot, they experience diminishing enthusiasm and increased time constraints that limit their ability to fill out the entirety of the ballot" (Lamb & Perry, 2020, p. 1134).

Lamb and Perry (2020) use the phrase "under-voting" instead of rolloff for highly similar voting patterns. Their research found that

> [t]he saliency of the election contest, voter disinterest in less visible ballot contests, and the resulting lack of information about these ballot contests all outweigh institutional features, resulting in higher rates of under-voting. Even when technologically advanced

> equipment is used for the purpose of reducing under-voting, lack of interest in or knowledge about certain races could not be overcome. For example, when voters were alerted to the lack of a completed ballot by optical scan voting technology, [other researchers] still observed under-voting, and asserted that optical scan alerts were not enough to overcome voter apathy toward certain races.
>
> Apathy as an explanation has also been offered to explain under-voting in the literature examining absentee voting by mail ["VBM"]. With the exception of voters in states with universal VBM elections like Colorado, absentee mail voters must request a ballot before each election, a behavior that reflects greater voter awareness, interest, and information about ballot contests that is on par with, or perhaps even greater than, in-person voters. These characteristics should theoretically result in higher ballot completion rates, but varying rates of under-voting are still observed …. [I]f informed and interested voters who can take more time to complete their mailed ballot still abstain from some ballot contests, they do so not because they are uninformed or fatigued by a long ballot but because they are disinterested in some ballot contests. (Lamb & Perry, 2020, p. 1135)

Even very long election periods have not helped. In California, for example, starting with the 2020 election, every voter received a sample ballot via mail a week or so before receiving the actual ballot. Voters then had 30 days to either go to a voting center to vote, to mail in their ballots, or to drop their ballots off in designated voting ballot collection boxes resembling large USPS mailboxes and conveniently located at many locations throughout cities and rural areas. This still did not help: less than 20% of registered voters voted at all in the June 2022 California primary election cycle (Barabak, 2022, para. 20).

The notion that VBM, in particular, may reduce under-voting is premised on the idea that VBM would allow voters plenty of time to research candidates and carefully deliberate about their choices. To the contrary, research concerning VBM elections and their effect on ballot completion has produced mixed results. Studies of absentee mail-in voters actually displayed *increased* under-voting while a more recent study of Colorado's universal VBM system has shown decreased under-voting (Lamb & Perry, 2020).

In short, voting by mail has mixed results. Many voters may simply not care about voting in general. Conversely, it might also be that some deliberately do not vote because

> [w]hen voters are uninformed or possess little specific knowledge about a race or the candidates running, selecting a candidate provides significant risk, as voters may select a candidate who would pursue undesirable policies. Information, however, reduces uncertainty and risk by clarifying details on important issues and candidate positions. As a voter's level of information about the candidates and issues in a race increases, risk and uncertainty decrease. As a result, when presented with candidate choices in races for which they have little or no information, voters are likely to opt out of making a choice rather than casting a less informed, and thereby riskier, vote …. Concerns of risk, differentiation, and importance all motivate voters to only make choices in races where they possess information. (Lamb & Perry, 2020, p. 1136)

Weiksner (2010) points out that many efforts to get voters to vote for judges revolve around providing more high-quality information to citizens and that it is assumed, either directly or indirectly, that these efforts will have positive benefits such as educating voters, increasing turnout and reducing bias. However, results from Weiksner's three experiments also indicate that providing higher quality information than that typically found on a ballot does not increase turnout and that providing individuating information does not reduce explicit sexism (but that it does reduce implicit pro-male bias under certain circumstances).

Importantly, scholars agree that, by and large, voters tend to be politically unsophisticated. "Most voters are not policy experts nor, many have argued, are they ideologically constrained" (Bonneau & Loepp, 2014, p. 121). Thus, to participate effectively in politics, voters must first obtain sufficient information to make political decisions. This is particularly relevant in judicial elections where, even if voters preferred a certain political ideology in general, they are very unlikely to know about or be able to correctly identify a judicial philosophy, which is the closest to an ideology that judges come (at least officially).

> Yet information is costly, and voters tend to prefer cognitive shortcuts to infer information about political candidates rather than seek the complete information themselves. Indeed, … the cognitive demands of sifting through lots of information and extracting useful, substantive information about candidates' positions are probably so substantial as to outstrip most voters' incentives to do the work. (Bonneau & Loepp, 2014, p. 121)

The level of political sophistication of voters has an effect on rolloff. "[P]olitical sophisticates are more comfortable making a voting choice than nonsophisticates, even when they are operating under the exact same information constraints" (Lamb & Perry, 2020 p. 1132). These researchers also found evidence that informational constraints affect sophisticated and nonsophisticated voters very differently. "Under moderate amounts of missing information regarding candidates on a ballot, political sophisticates complete approx. 15 percent more of their ballot than their less politically sophisticated counterparts" (Lamb & Perry, 2020 p. 1134). This is because political sophisticates are better able to use whatever limited heuristics and cues that they do have available to them to make voting decisions.

Also affecting rolloff is whether the election takes place in a presidential election year:

> It is well established that ballot roll-off is higher in presidential election years. The reason for this is simple: Highly visible presidential elections motivate large proportions of the electorate to vote, but a significant number of these voters have no information about, or interest in, other races on the ballot, including judicial elections. Thus, [there are] higher levels of ballot roll-off in presidential election years than in non-presidential elections years. (Bonneau & Loepp, 2014, p. 124)

The emerging picture is clear: today, voting has to be easy for a lot of citizens to bother to vote at all. Some states go even further than others in making it easy to cast a ballot by allowing voters to select a straight-ticket (or "party ticket") option which records a vote for all candidates on the ballot who are members of the selected political party, regardless of the office for which they are running" (Bonneau & Loepp, 2014, p. 120; Edwards, 2015).

In short, rolloff presents an important election concern.

3. In favor of judicial elections

Some of the most commonly identified advantages of electing instead of selecting judges are that appointments have for a long time been and are still seen as a mechanism of elite entrenchment and special interests threatening representative democracy (Wynn & Mazur, 2004). Instead, elections are seen as the "highest expression of the democratic process," the "highest form of accountability" (Goldman, 1982, p. 120) and among the best types of independence (Pozen, 2008, p. 271). Key aspects of these ideals follow.

a. Democratic ideals

Some scholars consider elected judges to be more accountable than appointed ones (Resnik, 2005; Bonneau & Hall, 2009; Bonneau & Hall, 2017; Siegel, 2010). This is so because the general public can simply vote judges (and other elected government representatives) out of office if it does not approve of their decisions (Pozen, 2008). Importantly, the notion of democracy itself favors elections because of the commitment to majority rule in the United States. Under that theory, judges should be chosen by those over whom they hold power (Resnik, 2005). Further,

> [p]ublic participation should not be attenuated by an appointive scheme in which judges are chosen not by the voters but by the voters' representatives, or, worse yet, by a merit selection scheme, in which unelected cognoscenti are allowed to narrow the field. (Pozen 2008, p. 273)

Resnik (2005, p. 594) finds that "[g]iven democratic preferences for empowerment of leaders through the popular will, judicial election . . . nests easily inside democratic principles." Indeed, by expressly honoring our commitment to popular sovereignty and public accountability, judicial elections would seem to have a prima facie claim to democratic legitimacy [], a claim that any proponent of an alternative selection method needs to overcome." (Pozen, 2008, p. 273).

A typical argument against judicial elections is that this brings politics into the judicial sphere; an unacceptable cross-over over of functions (Pozen, 2008). Others assert that the judicial selection process is political, no matter what, and that there is thus not any inherent problem in electing judges (Taylor, 2009). Under this view, voter ignorance exists and voter misdirection can be performed by clever partisans in both spheres. Although these problems exist, at least the electoral system acknowledges these and other electoral problems. In merit selection systems, politics are driven underground, whereas the politics of elections are public and obvious (Taylor, 2009). Bonneau & Hall (2009) argue strongly for elections for democratic reasons while recognizing that elections are, of course, not perfect either. They note that "appointment schemes are characterized by intense partisanship, cronyism, and elitism and, depending on the method of retention, can significantly impair the function of judicial review or promote the unfettered exercise of personal preferences that may conflict with the rule of law" (p. 137). "Appointment schemes," they find, "are not a miracle cure for the ills of judicial elections. In many ways, the pathologies of appointment systems are worse. Stated differently, electoral independence does not guarantee impartiality or prudence in the exercise of judicial power" (p. 138). Still, this answers only part of the problem – the democratic aspect – whereas many other problems with elections at the trial court level such as voter information, rolloff, financing, diversity access, and more.

As shown, merit systems may be considered to be elites making decisions while operating in a "good government fog," which is largely a political decision in and of itself, whereas judicial elections give the choice to ordinary "rank and file voters" (Taylor, 2009, p. 99). Accordingly, proponents of judicial accountability, for example, argue that judges are *de facto* political actors anyway. According to them, "judges make policy daily . . . . [and,] with respect to some matters,

judges have more political power than legislators, because they have the ability to thwart the will of the majority" (Wynn & Mazur, 2004, p. 779). For such scholars, "the power of judicial review, coupled with the judiciary's lack of electoral accountability, threatens the concept of representative democracy" (Wynn & Mazur, 2004, p. 779). Thus, electing judges instead of appointing them through merit-based or other systems is preferable. Americans, it is thought, should be reluctant to assume incompetence in their fellow citizens to make judicial choices, especially because history has shown American citizens competent to make other difficult electoral choices in other branches of government (Taylor, 2009).

Pro-election thinkers also ask us to "[n]otice who is *not* calling for merit selection: it is not the business community, not labor unions, not farmers, teachers, retirees, or church pastors." (Taylor, 2009, p. 101). Further, there is little evidence that states with merit selection have better judicial decision-making than those that elect their judges. In other words, merit selection is argued to be an elitist concept that does not lead to substantively better judging. It is a solution that fails to acknowledge the real problem, namely that "[p]olitics will always play a role in the selection of judges. (Taylor, 2009, p. 101).

Further, the judiciary's electoral insulation is seen by some to be antithetical to democracy; a remnant of entrenched British aristocracy. Thus,

> the merit selection (political appointment) process is a wonderful public relations gimmick for disguising a power shift from the people to an elite crew—a completely undemocratic process that empowers non-elected lawyers and others to select judges with little or no accountability to the people. Our democratic tradition is built on the right to vote and those who seek to abolish that right should be required to meet a heavy burden of overwhelming evidence. If the issue is close it ought to be resolved in favor of this precious right. Not to value this fundamental right highly would present a serious erosion of our democratic form of government. (Wynn & Mazur, 2004, p. 779)

This area lends itself to further research and findings beyond that which can be and is presented here. In short, although elections nest easily inside democratic principles, elections are

an unusual way of selecting judges if seen from a global angle. “Democracies need adjudication to be legitimate, which in turn requires that mechanisms for selecting judges be understood to be legitimate” (Resnik, 2005, p. 593). This is not necessarily the case today, at least not in the three areas examined. Judicial elections are sometimes highly criticized. Of course, politics resides in all judicial selection techniques, but the form varies (Resnick, 2005). Elections are very visually political. From a democratic point of view, there is simply no reason that judges should have to be elected unless all governmental representatives are.

b. Legitimacy

Elections are often considered to enhance legitimacy even in the judicial context. Scholars generally agree on the contours of legitimacy theory: it is “a fundamental property of political institutions that enables them to make decisions that will be respected with neither fear of reprisal nor noncompliance …. [It is a] reservoir of goodwill” (Bonneau & Hall, 2017, p. 241).

However, the evidence about whether citizens in states with elected judges perceive their courts to be less legitimate than do citizens in states that do not use elections is mixed. 59% believe that the decisions of the state courts are too often mixed up in politics (Bonneau & Hall, 2017, p. 220). On the other hand, 34% believe that the state courts generally put politics aside in making their decisions (Bonneau & Hall, 2017, p. 220). The most obvious conclusion is that citizens living in states that elect their judges tend to report that their courts have more legitimacy than those who do not. In elective states, a model respondent is about 10% more likely to agree with all of the legitimacy-enhancing study statements than one who does not live in an elective state. This was tested using survey-based vignettes to investigate the effects of judicial campaigns on the perceived legitimacy of state supreme courts, but presumably, the

same findings would apply in relation to state trial and appellate court contexts. This should be studied further.

On balance, elections in general – and judicial elections in particular – seem to result in legitimacy-enhancing effects. This is known as a "legitimacy bump" (Bonneau & Hall, 2017, p. 228). Research on this point is, however, not unanimous. Positive consequences, if any, may not be the same for all elections and on all citizens. More research is also needed on this point.

At bottom, the pro-election arguments have proven successful so far: thirty-nine states have chosen, through constitutional convention, amendment, or otherwise, to use election as a method of selecting appellate judges (Wynn & Mazur, 2004, p. 779). In all, 87% of appellate and trial judges in the U.S. are elected. Given this, it is apparent to that there is a "lack of momentum for merit selection" (Wynn & Mazur, 2004, p. 787). Of course, that does not mean that elections are in fact the best method of judicial selections; it simply means that that popular opinion favors elections over merit-based appointments given the information that is available to and used by citizens in this context.

c. Citizen involvement considerations

Some of the scientific, academic, and popular literature discuss democracy in ways that make it appear that so long as citizens have the opportunity to be actively involved in the democratic process - even if only by voting – they will tend to do so. Democratic accountability and citizen engagement are, for example, emphasized in the theory of New Public Service (Denhardt & Denhardt, 2000). Giving citizens greater access to the political and policy processes and affording them a genuine voice in shaping these processes will, the theory posits, help citizens become meaningfully involved in democracy. "Most notably, [] the primary role of the public servant is to help citizens articulate and meet their shared interests rather than attempt to

control or steer society (Denhardt & Denhardt, 2000, p. 549). Consensus-building discussions with involved citizens are key. However, such deliberative governance far from always takes place in reality and certainly not in the judicial election context, as will be demonstrated in a subsequent chapter. For example, although voting must be said to be a relatively easy and not overly onerous task, many people do not even take that step. The amount of people currently not voting in some areas of the nation and at some points in time is high. For example, fewer than two in ten voters cast ballots in the June 2022 election in Los Angeles County despite a hotly contested mayoral election and deep voter frustrations about Los Angeles homelessness (Barabak, 2022). Several theories describe why citizens may be more inactive in political and thus election affairs than what may be presumed by some scholars and what may be seen as a more ideal type of democracy than that which is reality in the United States today.

First, most lay citizens in the U.S. neither possess the knowledge of public policy and its related processes nor have the expert administrative skills needed to successfully carry out "public work" such as a more active participation in public administration or policy in a manner that creates "public value" (Theodoulou & Roy, 2016). Even much less involvement such as voting is seen by some to be overly difficult and perhaps overly time-consuming compared to the benefits which some registered voters feel they get out of voting. For example, even the attempted gubernatorial recall election of California Governor Newsom in September 2021 was confusing for voters (Rosenhall, 2021). The ballot asked voters to first vote "yes" or "no" to the recall and subsequently answering who voters would prefer to be governor if Newsom was recalled (he was not). The Governor's campaign featured TV commercials asking voters to only focus on the first questions and to ignore the second if they found the choice among many potential successors too confusing or overwhelming. Thus, it may not be feasible to hope for

better voter engagement in judicial elections when even a gubernatorial recall election is seen as too difficult by many (Rosenhall, 2021).

A relevant dichotomy has presented itself here. One facet of this is the "rational choice theory" (Rothschild, 1994, pp. 319-322). This traces back to 18th century political economist and philosopher Adam Smith. The theory assumes that individuals make rational choices based on calculations of costs and benefit with the information that is available to them. The theory also assumes that individuals, the "rational actors," try to actively maximize their self-driven advantages in any situation. Further, that individuals have if not all, then certainly much information available to them upon which to base their deliberate decisions and that they consistently take the time and effort to do so.

Nobel laureate Herbert Simon, who rejected the assumption of perfect rationality in mainstream economics, proposed the alternate theory of "bounded rationality" (Simon, 1956). This theory holds that people are not always able to obtain all the information they would need to make the best possible decision. Simon argued that knowledge of all alternatives, or all consequences that follow from each alternative, is realistically impossible for most decisions that humans make. Instead, people and thus voters simply "satisfice" with the knowledge they have, making the best choices they think they can with the information they have sought out at a given point in time, whether or not it be sufficient, and thus may be seen to be an act of irrationality (Simon, 1945, pp. 118-120). This finds modern support: "The field of behavioral economics has greatly extended our understanding of human behavior" and the allied sciences of psychology and sociology, the experiments conducted on human beings have "long back trashed the imaginary *Homo economics* – the perfectly rational human being" (Pal, 2002, p. vi).

This could explain some of the arguably lax or outright lacking voter behavior in judicial contexts. On the other hand, it may not. With the easy access to information about candidates available modernly through the Internet, voters could easily find out relevant (to them) details about judicial candidates. Instead, some entirely refrain from doing so. Others find out at least a few basics from various sources, which is an example of "satisficing." For some, the simple fact that a candidate is a prosecutor will be enough information upon which to form a basis on whether to vote for or against that candidate. Whether or not this rises to the level of what Simon considered to be "satisficing" is beyond the scope of this research project, but merely paying attention to titles, names, or other heuristics does not fall within bounds of rationality. Rather, these are examples of "bounded rationality." It may also be that American voters with busy work weeks, loved ones to care for, homes, and many other aspects that demand or allure their time place more value on saving the time it might take them to educate themselves about election issues and candidates rather than spending the time on something that they may not perceive to have much – or any – effect on their daily lives. The time spent on social media, for example (often large amounts of time) may be perceived to have higher relative value than a similar amount of time spent on researching candidates or political issues. It is beyond the scope of this research project to verify how much time and effort voters exert on researching judicial candidates. However, subsequent chapters will demonstrate that judicial elections at the trial court level are not of high priority to many people today. A very large amount of "satisficing," even guessing or refraining from voting, takes place. That is an example of a context in which deliberative governance cannot be said to take place. In turn, this casts doubt on the democratic value of judicial elections.

Economist Richard Thaler pointed out further limitations to the assumption that human beings operate as rational actors (Thaler, 2015). According to Thaler, people think of value in relative rather than absolute terms. They derive pleasure not just from an object's value, but also the quality and timing of the deal – its "transaction utility" (Thaler, 1985). In addition, humans often fail to fully consider opportunity costs (tradeoffs). Thaler's idea of "mental accounting" details how people place greater value on some dollars than others, even though all dollars have the same value per amount. For example, people might drive to a store to save $10 on a $20 purchase, but they would not drive to another store to save $10 on a $1,000 purchase. People also tend to spend more money when they are paying with a credit card rather than with cash. Such "mental accounting" may well play into election time expenditure and considerations as will be described in the results section below. This dissertation will examine how the mental accounting theory helps describe why some voters advocate for, for example, professional and other diversity in some contexts, yet continue to place value on the alleged "experience" possessed by prosecutors and other trial attorneys in the judicial election context.

In somewhat stark contrast to the above-mentioned market- and cost/benefit-oriented models, Stone (2012) takes a "polis" model approach to her theories. Among other things, she characterizes the polis as an entity that is a community or multiple communities with ideas, images, will, and effort set quite far apart from individual goals and behavior. "Its members are motivated by both altruism and self-interest. It has a public interest, whose meaning people fight about and act upon. Most of its policy problems are commons problems" (Stone, 2012, p. 34). But "[i]n the polis, change occurs through the interaction of mutually defining ideas and alliances … Political conflict is never simply over material conditions and choices but also over what is legitimate and right. The passion in politics comes from conflicting senses of fairness,

justice, rightness, and goodness …. Problems in the polis are never 'solved' in the way that economic needs are met in the market model" (p. 36).

In Stone's opinion, many values matter as much as or more than mere market forces and economic considerations when we create policy and thus eventually law, including election law or common law via the election of judges. These more subjective values comprise considerations of equity, efficiency, and the general and direct welfare of citizens. Stone analyzes these notions from a range of different viewpoints, pointing out that what the notions stand for – "good" or "bad" – depends on one's worldview, political opinions, and many other factors.

In the judicial election context, there are certainly abstract, if not real, "costs" and "benefits" from electing, for example, prosecutors in contrast to non-prosecutors to be judges. A "cost" in this connection could be that some voters perceive there to be advantages to, for example, private businesses from having had an attorney from civil life become judge and subsequently preside over civil trials. Similarly, it might be a "benefit" to families from not having a family law attorney become judge. A perceived benefit to others might, when discussing the heavy election of prosecutors to judicial office, be the prosecutors' familiarity with criminal law and their potentially or perceived harsher sentencing tendencies based on their prior careers working with law enforcement in contrast to defense-side issues. In other words, some voters might prioritize criminal sentencing and other perceived "law and order" issues over other broader and perhaps more progressive socio-judicial issues and solutions thereto instead of traditional punishment methods. Notably, these issues are flip sides of each other since a benefit to one voter may present a cost to another. For example, a voter in an affluent, predominantly white neighborhood will, evidence shows, prefer a law-and-order style judicial candidate who may promote and truly believe in the values of being "tough on crime." However, a brown or

black voter in a low-income area more affected by crime (for which we know a relatively large share of brown or black defendants are tried) may well see the election of one more prosecutor to be the cost to the progression of equal justice. Further, costs and benefits run to different parties. In the example just given, the benefit of a "tough on crime" judge might actually not run to lower-income areas more predominantly inhabited by black or brown people. These areas may, instead, bear the cost of yet another of their community members being placed behind bars. Similarly, family law judges tending to find in favor of mothers against fathers may be a benefit to the mothers, but will probably be seen as a cost to fathers. Thus, many other factors than simply crime prevention or punishment ("being tough on crime," as is often a key phrase in the judicial election context) ought to be considered in judicial elections.

Finally, Schneider & Ingram (1993) argue that scholars tend to overlook the fact that the design of policies tends to benefit powerful, positively constructed target populations and to devise punitive, punishment-oriented policy for negatively constructed groups. How society perceives a group – positively or negatively – is framed place through culturally constructed images. For example, "positive" groups with strong powers might include the elderly, businesses, veterans, and scientists. Positive groups with weak powers might be children, mothers, and disabled people. Negative groups who nonetheless have much power could be seen to be wealthy people, large trade unions, cultural elites, or even minorities. Negatively constructed groups with little power could be gang members and other criminals, drug and other addicts, and "flag burners" or other highly opinionated political speakers. This theory informs us as to how some election results may be considered "desirable" or not by various socially constructed groups. It also helps explain how, even though every registered voter has one vote, some groups of people simply have less powers in society than others. Of course, far from all

powers stem from voting. This project focuses on the power of voting in the judicial election context and how such powers are arguably not well distributed given the lack of interest by today's voters in at least trial-level judicial elections.

d. Popular constitutionalism

Citizen involvement in judicial elections requires a brief look into the related theory of "popular constitutionalism." In 2004, law professor Larry Kramer vitalized a discussion on this, noting that

> [i]n a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law. Legal constitutionalism, in contrast, relocates final authority to interpret and enforce fundamental law in the judiciary. Although both principles have been with us from nearly the beginning, popular constitutionalism came first and was dominant for most of American history - leaving the judiciary, like the political branches, subject to ultimate supervision by "the people themselves." (Kramer, 2004)

The theory reaches more than only constitutional law interpretation, enforcement, and development: it also addresses democratic citizenship at a broader scale and the role of a powerful judiciary. The theory surfaces when considering whether, at bottom, the preferable method of societal organization and decision-making is to let citizens govern themselves as directly as possible (for example through petitions, juries, voting, and civil disobedience).

Under the theory, judicial and other governance authority being something beyond the comprehension of ordinary citizens best left to others is "an attempt to save us from ourselves" (Kramer, 2004). The fear that people cannot decide for and over themselves is "elitist and alarmist;" arguments that have been made throughout American history (Rosen, 2004). It is a reflection of broader and more long-term intellectual trends, like the heightened skepticism of democracy occasioned by fascism and other variants of twentieth-century totalitarianism and the

emergence of interest group and rational choice theory (Kramer, 2004, p. 1010). Kramer argues that progressive movements have typically been popular movements, which led progressives to embrace the "naïve" belief that they could achieve their goals through the courts rather than through politics. Kramer considers the embrace of judicial supremacy to be a "shortsighted" and "dangerous" strategy as well as an example of "nervous paternalism" (pp. 986, 1003, 1009).

The theory is, of course, critiqued by other scholars and even Kramer himself. For example, while Kramer views popular democracy favorably, he also worries about the fact that "[v]oter turnout in the USA continues to drop despite occasional bounces" (p. 1010). This presents a per se danger to democracy exercised by people themselves if they do not take the time to do so in one of the easiest manners possible. Further, Kramer also notes that in both the USA and Europe, the "electorate willingly embraces extravagantly implausible amateur politicians, while polls report persistently rising levels of mistrust in leadership and skepticism about the ability of politics to make life better" (p. 1010). A concern and potential logical fallacy exist in both arguing that people themselves can and will better govern society than some asserted "elite" and at the same time recognizing both people's lack of time and interest in doing so. Even if adopting the theory that people can better govern themselves than can governance "elites," a questionable result arises when voters elect into power arguably unqualified representatives, as has been seen around the world even in recent years. The result may be an increasing amount of mistrust in political leadership; an irony since that is one of the wellsprings of popular constitutionalism to begin with.

Noted constitutional scholar Laurence Tribe has implied that popular constitutionalism could even lead to mob rule (cited by Rosen, 2004). Others agree: "'The people' may exercise [their] power in different ways. In the colonial era, mobs were one method of popular

constitutionalism, and soon became critical elements of colonial opposition to imperial policy." (Marcum, 2019, p. 27). Rule of law and oversight by the judiciary, elected leaders, and the executive must said to be better than idealizing street-level democracy, however interesting the latter may be from a theoretical viewpoint.

In short, the theory of popular constitutionalism reminds us that "institutions—including the courts—rely on public confidence and legitimacy, which is lost far more quickly than it is gained" (Marcum, 2019). This is currently of major concern in relation to the judiciary.

e. Summary of (s)election concerns

In sum, some judicial selection scholars favor elections because they not only nest easily inside general notions of democracy, but actually reflect the highest expression of democracy itself. Elections are seen as the best way of holding elected officials, including judges, accountable. Scholars favoring elections find that politics infiltrate the judicial sphere anyway, so for reasons of transparency, judges may just as well be elected than selected. The appointment method is an elitist concept, such scholars believe while pointing out that regular people such as labor unions, farmers, teachers, or the business community tend to favor elections. Scholars on this side of the issue also consider elections to enhance the legitimacy of judges among citizens who often do not hold government in high regard. A "legitimacy bump" has been demonstrated in states where judges are elected.

In the political science discourse in general, the New Public Service theory posits that it is better to actively involve citizens in societal decision-making rather than try to "steer" society. Citizens themselves should "row." This can be accomplished by letting citizens govern themselves and rationally choose their own leaders, in this context judges. This neatly falls within the rational choice theory. Further, groups that are already seen as powerful such as

judges and government executives may have too much effective power to begin with. This could be counterbalanced by letting people themselves vote on judicial candidates.

An argument against judicial elections is typically that this brings politics into the judicial sphere; an unacceptable cross-over over of functions. Because, among other things, judges can deprive citizens of funds, freedom, and even life, judges occupy a special governance role that is best filled by experts such as those serving on merit-based appointment committees. Scholars favoring selections over elections point out that judges are institutionally unaccountable by design. Thus, they should be selected to add a barrier between popular demands and judicial holdings. Judges should be independent, which is best achieved, these scholars believe, by removing them from direct electoral pressures. Judicial elections have not produced many of the asserted democratic values. Rather, they have resulted in less diversity and quality on the bench. Severe roll-off further diminished the asserted value of judicial elections per these scholars. Greater policy coordination could be achieved via expert committee-assisted gubernatorial appointments. This could include the appointment of not only more qualified candidates than those often elected, but also a greater number of minorities such as women and non-prosecutors. In other words and importantly, selections may help reduce the known risks of a "tyranny of the majority" situation. Campaign financing issues and the appearance or reality of "justice being for sale" can be removed by selecting judges rather than judges running on par with other politicians, which scholars further see to negatively affect the image of the judiciary.

Political science theories point out that citizens "satisfice" rather than take closely considered, rational action. This disfavors elections and favors more rational or at least better-informed experts appointing judges. Although there is value in citizens performing public work by governing themselves, facts show that citizens may not even take the time to vote and may

thus actually not be expected to "steer" themselves. "Mental accounting" shortcuts may lead people to save time by not voting or not informing themselves sufficiently of candidate backgrounds and qualifications. People act under very bounded rationality constraints. In the "polis," many concerns surround what is "legitimate" and "right." Because individual goals and behavior may differ significantly from the implementation into the polis of important concerns just as justice and fairness, individuals with more insight, time, and resources than everyday voters may be better situated to address these issues, in the opinion of scholars of this view. In general, the most important concern in this context is arguably to identify the most highly qualified individuals to hold office. The method for doing so has not been agreed upon. As Dubois stated in 1993,

> [s]upporters of appointive selection methods argue that quality will be improved even if certain political pressures oblige a governor to observe party lines in selecting judicial appointees. If the bar and the public are alert to the importance of good judges, the appointing power is necessarily inclined to attempt to secure competent personnel within party limits, since [s/]he will be identified with the appointments …. In contrast, the elective method is criticized for failing to recruit quality judges. The rigors of competitive elections are thought to be a deterrent to the judicial ambitions of leading members of the legal profession. (P. 60)

The debate about how to best select judges is still ongoing twenty years later. Improvements to the selection processes could be implemented based on the knowledge that can be gleaned from rhetoric and practice in this area.

D. Candidate Attributes:

1. What Makes for a "Good Judge"

"The ideal judge is wise, intelligent, and compassionate, with a soul that is innocent, a mind that is practical, and a heart that is enduring" (Redfield (Ed.), 2017, p. 351). This quote - from a judge - demonstrates that the bar is indeed high for judges and judicial candidates. This is not new; great thinkers have, for a long time, opined on what constitutes "good legal reasoning." In turn, such reasoning is but one part of what makes for a "good" or "reasonable" judge and which selection method best identifies quality candidates.

> Not only has there been disagreement over which qualities are essential for judging, it has been difficult if not impossible to produce an objective comparison of the abilities of judges selected by different methods. Accordingly, scholars have been forced to rely upon readily available and quantifiable information regarding the prior educational and legal training of judges and their professional experiences before assuming the bench. (Dubois 1983, p. 61)

This section will outline key scholarly and practical considerations. Indisputably, voters, appointment officials, and legislatures voting on judges all want what they consider to be the "best" candidate to win. The issue is what the qualities sought are.

a. Scholarly considerations

Some scholars emphasize phronesis (Aristotelian practical wisdom) in considerations of what constitutes a good judge. (Mangini, 2017). However, phronesis may not be enough for legal reasoning in and of itself. "At least since Aristotle we know that good legal reasoning depends also on the qualities of the reasoner, his/her character" (Mangini, 2017, p. 176). Further, a good decision-maker has to exercise other qualities known as "craft" (techne) and "rhetoric" (Mangini, 2017, p. 176).

> Craft ensures that the judge is competent with regard to legal rules as the technical tools he[/she] has to apply to conflictual situations. Rhetoric, in turn, gives a sense of the degree to which the judge is socially aware that his[/her] decisions affect to some extent the whole society – in some cases more than others – and, therefore, they have to be presented so that they can attract consent and be persuasive on different grounds. Rhetoric is not only connected to external success in persuading those who have to deliberate or decide but it is a civic practical art that combines the properties of technè (craft) and those criteria of choice and decision appropriate to citizens that derive from the application of phronesis and the moral virtues within the context of a polis. The combination among phronesis, craft and rhetoric is the ideal at which the good judge should aim. (Mangini, 2017, p. 176-178)

That does not, however, fully answer the question of what a good (or reasonable) judge is. To some, a "formalist" judge would be a good one (Mangini, 2017, p. 186). The reasoning style of a formalist judge is "professional, neutral, objective, etc., escaping all references to reasons and values underlying his[/her] decisions" (Mangini, 2017, p. 188). On the other hand, a formalist judge employs "an obscure and evasive language; appeals to instrumental values, such as legal security and due process, neglecting underlying substantial values; often emphasizes questions of proceedings, abstracting from substantial problems" (Mangini, 2017, p. 188).

Some may prefer judges to be "consequentialists" (Mangini, 2017, p. 189). "Taking into account the anticipated consequences of a decision on the legal system or by considering the micro- and macro-economic and social consequences," a consequentialist judge employs arguments that entail fundamental assumptions of political philosophy and general criteria of justice and common sense" (Mangini, 2017, p. 189-190). "The consequentialist judge, then, is someone who deals with consequences and values on a larger scale than his[/her] EAL [economic analysis of the law] counterpart" (Mangini, 2017, p. 190).

Some desire the ideal of a "Herculean" judge (Mangini, 2017, p. 190). This type of judge "is called Hercules because he[/she] has to construct a scheme of abstract and concrete principle that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well" (Mangini, 2017, p. 190).

Additionally, a Herculean judge's task is "showing that the law is a seamless web" (Mangini, 2017, p. 190). Not a small task; hence, perhaps, the label used. Herculean judges believe that arguments of principle should always prevail over arguments of policy in hard cases because the former affirm individual rights which are irreducible to any consideration of policy – whatever its metric of value, wealth, utility or else. In short, a Herculean judge "brings in 'substance' that is political morality ---- [he or she] finds holes and elaborating a theory of error that explains how some law may be mistake n (Mangini, 2017, p. 191).

Recognizing that this may be asking for too much, especially from busy lower court judges, the somewhat relaxed norm of a "reasonable judge" may be more realistic (Mangini, 2017, p. 192). A "reasonable" judge displays judicial virtues such as courage, temperance, impartiality and justice. He or she has an understanding of what is morally required in a given set of circumstances. He or she can communicate persuasively his or her arguments:

> Rhetoric [is] the kind of "art of persuasion" that a good decision-maker should have in his[/her] baggage. The good judge should not only hit the target but also communicate persuasively to the parties and the public opinion his[/her] decision and the arguments that support it. (Mangini, 2017, p. 194)

Finally, a good judge is one who has good personal cognitive skills such as how to exercise a "means-end" analysis, balancing Aristotelian practical reasoning such as the United States Supreme Court does and as do constitutional courts in the EU, Italy, Germany, etc. He or she has the ability to perceive and feel appropriately; and the ability to discern what is "relevantly unusual," which is an enlargement of a "normal" person's perceptual framework and understanding" (Mangini, 2017, p. 193).

b. Citizens' expectations

The above theories – some of many on this topic – could inform judicial selection processes to a much greater extent than what is the case. Unfortunately, theory and practice are, in the United States, often seen as a duality, not an entity where each aspect could form positive synergies with each other and thus arguably create better results. Thus, it becomes important to examine what citizens, attorneys, judges, and other non-academics consider to be important for a judge to be considered "good" or "reasonable." One of the most difficult challenges in this work is defining quality and establishing objective indicators to measure it.

Objections to judicial elections are often based on an implicit assumption that all individuals believe that judges decide cases on the basis of "the law" as an almost fixed concept rather than on any preexisting ideological view. This assumption is at odds with a bevy of social scientific research on judging, which has demonstrated that whereas law can constrain judges in some circumstances, judges often decide cases that accord with their own ideological view (Bonneau & Hall, 2017). This is not necessarily a problem. Many citizens actually prefer that judges take their own personal belief system into account when judging cases. For example, 44% of Kentuckians believe that a "good" supreme court justice should give their ideology a voice in their decisions and nearly 20% said that a good justice should base their decisions on their party affiliations (Bonneau & Hall, 2017, p. 228). Those citizens are unlikely to be put off when judges express ideological views during the selection process.

Justice Sandra Day O'Connor also provided a list of qualities the public should seek from its judges. These qualities (which she identified as "core values") are: fairness and impartiality, competence, judicial philosophy, productivity and efficiency, clarity, demeanor and temperament, community, and separation of politics from adjudication. (Edwards, 2015, p.

1192). These qualities are, however, more in line with what states using merit- selection plans consider in judicial candidates than what is considered during elections. These qualities are more difficult to measure than, for example, case load, reversals, or instances of judicial ethics violations as some use as bases for judicial qualification determinations. Nonetheless, "these and similar factors used by states with merit-selection plans provide a general framework for the judicial mold that states should be attempting to fill through initial judicial-selection methods" (Edwards, 2015, p. 1192).

These traits are worth some exploration just as others are important as well.

c. Intelligence, craftmanship, and education

First, it is obvious that a judge should be intelligent. In the judicial context, this may be said to be "[t]he ability to know and apply legal rules, analyses and procedures to different facts and circumstances, and the ability quickly to perceive, comprehend, and understand new concepts and ideas" (Platt, 2007). Being well versed in the law and the ability to write logically and lucidly is also known as "craftmanship" and considered one of several traits of a good judge (Goldman, 1982).

But how is this measured? Whereas it might be more prestigious for an employer to hire or select a graduate of the top "elite" law schools in the nation, no literature or practice proves that a graduate from a "top" law school will for sure be a better legal thinker than, for example, a graduate from a middle-ranked or even bottom-ranked law school. "[S]imply looking at the institutions where judges were educated is too crude a measure of quality. Surely there are outstanding judges who did not attend elite law schools just as there are inept judges who did" (Bonneau & Hall, 2009, p. 136). In fact, much attention has, for good reason, been paid to the fact that until the recent appointment of Justice Amy Coney Barrett, the justices on the United

States Supreme Court all graduated from just two law schools; Harvard and Yale. This had been the case for a while. Literature casts doubt on the perceived better education provided by Ivy League and other "elite" law schools.

The risk of subjectivity is also a concern. What is important to one judicial candidate interviewer (whether for appointment or election purposes) may not be to another. More importantly, what may be important even to several interviewers may not be to the judiciary or further, to society at large. Giving power to just a few interviewers is risky. On the other hand, an evaluation process of some type may be of some value to the general public who are not familiar with which traits are preferable in judicial candidates and which are not (if the "evaluation" is for election purposes). If a judicial candidate evaluation is to be performed, it becomes

> necessary to rely on more subjective sources such as the views of those who have worked and associated with the candidate. The question arises whether such as survey should be confined to the friends and acquaintances of those conducting the survey or if a more systematic inquiry sampling a broad segment of the bar and bench is in order. The ABA Standing Committee on the Federal Judiciary bases its ratings of prospective federal judges on information gathered, for the most part, from surveys of the local and state bar and bench from the candidate's home state. In the early 1960s, the ABA Committee was found to have consulted only on a very narrow segment of the legal population, and as a consequence, the ratings were thought to be biased by the heavy reliance on the opinions of conservative bar establishment lawyers. Since then, the ABA Committee has sought to expand its contacts to include a broader spectrum of the bar. (Goldman, 1982, p. 115)

This concern is relevant in connection with the evaluations performed by the Los Angeles County Bar Association, as will be shown below. However, expanding the base of the respondents to a judicial examination survey does not change the fact that assessing, for example, the quality of experience, amount of intelligence, and neutrality of a person is an imprecise, subjective undertaking when based exclusively on reputational surveys as is the case, even assuming that the survey is a broad sampling of legal opinion (Goldman, 1982).

Finally,

> a judicial candidate's history of attendance at continuing legal education programs should be considered as a good indicator or a person's interest in remaining current in the law. This factor is perhaps the best indicator of whether a judge will be motivated to improve his or her knowledge, willing to continue with his or her "legal education" and be open to new ideas, evolving attitudes, legal developments, and change in general. (Platt, 2007, para. 17)

d. Experience

Prior professional activities, legal education, teaching, bar activities, and publications are important (Platt, 2007). The type and amount of experience necessary varies depending on the judicial position sought. A candidate for the trial bench should have engaged in an active courtroom practice and should almost always have had some litigation experience (Platt, 2007). Extensive experience in representing clients before administrative tribunals may qualify as litigation experience. However, non-litigation experience (e.g., teaching, government or corporate counsel background), combined with high ratings on other criteria, particularly intelligence and judicial temperament, should not be ignored.

Professional diversity is very important. "There is surely a contribution to the overall performance of [] courts when they have lawyers with a variety of professional backgrounds, including law professors, legislators, and executive branch officials" (Goldman, 1982, p. 118).

e. Judicial temperament

This character trait encompasses the ability to understand how a judicial decision will affect the human beings appearing before the court (Platt, 2007). It is the ability to communicate with counsel, jurors, witnesses and parties calmly and courteously, as well as the willingness to listen to and consider what is said on all sides of a debatable proposition.

> A candidate should exhibit the following aspects of proper judicial temperament: Patience, open-mindedness, courtesy, tact, courage, punctuality, firmness, understanding, compassion, humility and common sense. Those qualities should be demonstrated consistently. For applicants who already hold a judgeship, these qualities should have consistently manifested themselves to all the court's "stakeholders" interacting with the judge regardless of station in life, profession, type of case, representation by counsel or lack thereof.
>
> A judicial candidate should [also] be able to exercise forbearance under provocation, to deal with others with sensitivity and without giving offense, and to assimilate data outside the candidate's experience without bias and without undue difficulty or stress. A candidate should be able to handle personal stress without unloading on others; he or she should recognize that the position is not only stressful but an official governmental position of public trust, with its business conducted largely in full view; and that criticism and scrutiny are inherent in the position. Candidates fearful of or uncertain about these aspects of the job should be counseled to reconsider. (Platt, 2007, para. 4)

f. Character

Character has been said to be among the most important traits of judges-to-be:

> This most important overall quality is a key intangible. The applicant should be of the best character. He or she should have a positive reputation in every professional and residential community. His or her background should be free of references to immorality or indiscretions. He or she should be free of a history of substance abuse or substance dependence, and free of indications of domestic violence, publicly unacceptable conduct and the like. Candidates should be financially stable. (Platt, 2007 para. 24)

g. Ethics

> There should be no doubt about a [candidate's] personal or professional ethics. As a lawyer, a candidate should have maintained a standard of conduct above the minimum standard set forth in the disciplinary rules and should not have been disciplined by the Attorney Grievance Commission. A candidate should be aware of and abide by the ethical principles enunciated in the Code [of Judicial Ethics] as guidance in specific situations. [In short, a] candidate should have demonstrated a personal standard of ethical conduct that stands out among both the general citizenry and the applicant's fellow practitioners. (Platt, 2007, para. 9)

Character and ethics can be very hard to measure objectively. For example, the FBI investigates the backgrounds of federal judges, but the extent to which it is appropriate to probe into a candidate's life, lifestyle, finances, and even health is debatable. Still, some questions such

as those that can be and are asked of former and current employers, colleagues, and acquaintances may at least reveal the most problematic issues.

h. Courage and integrity

> Legal "[c]ourage" is the willingness to do what the law requires the judge to do even though the course the judge must follow is not the popular one. Integrity is not being influenced by the identity, race, gender, political status, wealth or relationship of the party or lawyer before the judge. More basically, it is not doing what the judge knows to be wrong. A judicial [candidate] should possess both courage and integrity. (Platt, 2007 para. 10)

Of course, judges should be fair-minded and open-minded to the arguments and viewpoints regarding both the facts and law as presented by parties before them. Judges should also be sensitive to the requirements of procedural and substantive due process. They should be willing to listen and treat all parties with respect and consideration by, for example, giving them the same level of attention and amount of time in presenting their arguments.

Judges should have high moral standards and be able to withstand political and economic pressures. They should also, when appropriate, have the courage to reach results that may, by some, be considered to be new or groundbreaking. Of course, case precedent must be followed unless a decision is overturned by a higher court. There are, however, numerous instances in today's complex legal world and society at large where there is no precise, on-point precedent or positive law. In such cases, judges should indeed be willing to create new law. However, people often err in thinking that judging is a

> "mechanistic enterprise" in which the legal materials alone determine case outcomes. Ever since the advent of legal realism, however, it has been untenable to believe in any such Langdellian conception of judging. Judges may be constrained in any number of ways—by the reactive nature of the judicial role, by the conventional legal materials, by professional norms, and so forth—but their interpretive discretion plainly implies that they "make" law as well as apply law, in state courts as well as federal courts. Even the Supreme Court, which has a vested institutional interest in downplaying its

> policymaking discretion, has acknowledged that "judges do engage in policymaking at some level." (Pozen, 2008, p. 316)

In the modern context, judges make more policy and law than ever before. For example, state and the United States Supreme Court have recently "inserted themselves into numerous social controversies, from school finance to affirmative action to same sex marriage, abortions, and more." (Pozen, 2008, pp. 274-275). The willingness to break legal ground with the past when the law and circumstances call for it could be seen to be a valuable trait in a judge.

The United States is a common law country. Judges form an independent part of our tripartite governance structure. Modernizing the law is not "legislating from the bar" or "judicial activism;" it is fulfilling the role that was assigned to the judiciary by the founders of the republic. Judges should have the courage to perform their role in this context even though it might initially open them up to risks of appeals. The law is not static. It must develop in sync with society. This takes some degree of judicial courage.

i. Civic and professional responsibility

In addition to pure judicial activities, judges should arguably also be willing to use their position to "go the extra mile" for society by contributing, as possible,

> to the public and the legal profession through [] Bar and non-Bar service organizations, volunteer activities, civic and cultural organizations. A candidate should receive favorable consideration for his or her pro bono, public service and or professional activities. (Platt, 2007, para. 22)

j. Motivation for seeking to become a judge

A candidate's attitude towards power is also important. It is poor motivation for a judge to seek a position on the bench simply to obtain power, prestige, or a higher salary. Nonetheless, these factors are frequently mentioned by potential candidates in informal contexts. A candidate should primarily seek to become a judge because he/she finds himself/herself able and willing to

contribute to an increasingly just society and finds that he or she has the skills and traits it takes to execute the role of a judge well. Granted, it is unrealistic to presume that candidates for judicial office will not also consider the higher salary that many may be able to obtain compared to their former positions, but money is a poor motivator if the person otherwise is not fit for the job measured along the many other benchmarks mentioned in this section. Similarly, the rush that some may feel when called "Your Honor" will probably – hopefully, in fact – only last so long. It is the match between society's needs and the person's traits that is important. These are very intrinsic and subjective aspects of a candidate's motivation, but can be probed.

k. Ability to communicate

> This is the ability to express oneself clearly, concisely, and grammatically, whether orally or in writing. It includes the ability to listen.
> All judicial candidates must have strong oral and written skills. Candidates for appellate position require superior writing skills. A candidate for the trial bench must be able to express him or herself well both orally and in writing.
> [There is also a] need for judges to communicate not just in the courtroom but also in the communities in which they serve and to the other branches of government. While not every judge must be a skilled and articulate public speaker, at least some should be. (Platt, 2007, para. 20)

Further than this, often overlooked is the benefit of judges having good interpersonal skills. This is an advantage to the judge's colleagues and supervisors, but of particular importance to the many people with whom the judge comes into contact on the bench. While a judge must, of course, be able to command the attention of everyone and remain in control of the courtroom, he or she can do that in a number of ways. Being as pleasant as the circumstances allow, mentally present, understanding, respectful, and flexible in dealing with a wide range of people is important. A judge is not a "king of the courtroom." It is not "his" or "her" courtroom, after all; it is that of society. Judges should be able to understand the fact that most people are probably somewhat uneasy if not outright nervous when in front of a judge. Acting in ways that ease such

trepidation can be helpful for everyone. Conversely, judges should of course also be able to determine when more control and an increased level of sternness may be required. This may, for example, be the case when defendants become confrontational, unresponsive, seemingly unwilling to speak the truth, or do not want to refrain from speaking when time or other restrains invariably present themselves. Judges should not be overly talkative themselves, but rather be willing to listen to the parties while of course probing into issues when necessary. In short, excellent "people skills" are an advantage to the system and the judge himself/herself.

Recently, there has been a breakthrough in this research with the use of behavioral indicators of judicial quality. Specifically, such research looks at productivity as being an indicator of "quality"[4] judges and candidates (Bonneau & Hall, 2009, pp. 135-136[5]). Productivity is measured as the number of opinions issued per judge per year, including dissents and concurrences. "Quality judges should work harder and produce more efficiently than less capable jurists" (Bonneau & Hall, 2009, p. 136). Second, the quality of judicial opinions is measured as the number of out-of-state citations. "Carefully argued and well-crafted opinions should be cited more often in other states than less impressive opinions" (Bonneau & Hall, 2009, p. 136). These viewpoints are, of course, debatable, but still demonstrate the importance of communication skills among judicial candidates and judges.

l. Health

> A candidate should be in sufficient physical and mental health to perform the duties of the office such that he or she will be able to render vigorous and effective service for the foreseeable future. A prior history of stress-induced illnesses, migraine headaches, chronic fatigue syndrome, or poor attendance in the present job should be warning flags

[4] Some of the judicial election literature uses the phrase "quality candidates" to denote those who have lower court experience before getting a higher seat on a state court bench, not to indicate which candidates have better skills or personal traits than others. Others use the phrase in its more traditional meaning referring to the latter. See, e.g., Bonneau & Hall (2009).

[5] In this publication, Bonneau & Hall only focus on state supreme court judges, but the same concerns relate to lower court judicial candidates.

> and a candidate having such a background should normally not be nominated [or selected], as the ability to tolerate conflict, pressure, and stress are essential. (Platt, 2007, para. 23)

It is also important to consider how to harmonize these goals with the Americans with Disabilities Act ("ADA") both in its letter, but also in its spirit aimed at ensuring that people who have disabilities have an equal chance of obtaining employment. The latter is also in the interest of society with today's focus on the valuable contributions provided by people from many backgrounds. In other words, it is possible to envision health-related circumstances that may actually add to a judge's diversity background and ability to identify with litigants. This should be taken into account in the (s)election of judges.

m. Miscellaneous

Judges should also have good administrative and managerial skills, PR skills within the legal profession, the media, and the general public, and political skills with public officials and legislatures (Platt, 2007). A certain amount of industriousness and ability to identify workable solutions to problems is also a plus as is the ability to think on one's feet.

In sum, myriad factors present themselves when considering what makes for a good judge. More than the above may be relevant. It is difficult, if not impossible, to measure all qualities objectively, but although some subjectivity is unavoidable, it is extremely important to attempt as best as possible to evaluate judicial candidates as to all relevant qualities, not just, for example, years in a particular professional position.

Character is also very necessary to the model of a good or even just reasonable judge. "We live in times of pluralism of values and frequent conflict between competing conceptions of the good," so a judge with a demonstrably good character is arguably the "best equipped to answer

the demands of reasonable decisions that come from the public opinion and from conflicting parties" (Mangini, 2017, p.200).

Finally, the good or reasonable judge model is complete only when it includes rhetoric.

> The balance between phronesis and craft is not easy to reach because it entails the ability of the judge to balance ethical and legal features in the concrete situation of each decision … but also in terms of consequences, [and] not only of an economic kind …. [R]hetoric should be taken not simply as the ability to persuade successfully the audience but as the civic art to argue, deliberate and decide in the public arena, employing all the best tools of our humanity: logos, pathos and ethos. The judge who is able to employ correctly these features and to show them to the public is the one who gives good reasons to believe him: it is the reasonable [or good] judge. (Mangini, 2017, p. 201)

That does not end the inquiry, however, it is not an easy task to identify "better judges" for initial selection or election processes. Some theories for improvement have, however, been made. For example, active search criteria should be defined to include modern concerns regarding, among other things, inclusive governance. "The ideal is to increase the mix of judges on our major trial and appellate courts (Goldman, 1982, p. 118). Goldman (1982) notes four principles for the improvement of judicial selections:

> 1. Openness – the more information about candidates, the better. An open system fosters a wide spectrum of candidates, all of whom should be given consideration.
> 2. Active recruitment of women, blacks, and other ethnic groups who have been the victims of discrimination. By expanding the net of possible candidates, it is likely that there will be more well-qualified people to choose from. A special effort to recruit more women and minorities can result in a strengthened judiciary whose presence can reassure certain segments of the population of neutrality and fairness of the political process. Their presence can also enhance the sensitivity of other judges on issues of race and sex discrimination, thereby enhancing those same qualities of neutrality and fairmindedness.
> 3. Thorough investigation of the candidate.
> 4. Some form of political accountability: the challenge is to place the judiciary within a democratic framework of accountability so that if the judges are not held accountable, those who selected them must be. (P. 119)

Although these principles were formulated decades ago, they are still relevant.

Once candidates are appointed or elected, retention elections still pose a risk for politics to corrupt the process (Edwards, 2015). Thus, states could give their legislature the power to decide whether to retain a judge. A neutral commission should evaluate judicial performance after an initial period in office, for example two to three years. The legislature would then vote, based on this evaluation, on whether to remove a judge. Removal of the judge would take place only if a supermajority of the legislature were to vote for removal. "Combining a commission recommendation and supermajority requirement will effectively insulate the judges from removal based on an 'unpopular' decision decided on the basis of existing law" (Edwards, 2015, p. 187).

2. Process of deciding to run for judge

The importance of female (and other minority) representation on the bench is well known. For example, in 2015, the National Women's Law Center released the following statement on its website:

> When women are fairly represented on our [] courts, those courts are more reflective of the diverse population of this nation and women, and men, may have more confidence that the court understands the real-world implications of its rulings. The increased presence of women on the bench improves the quality of justice: women judges can bring an understanding of the impact of the law on the lives of women and girls to the bench, and enrich courts' understanding of how best to realize the intended purpose and effect of the law that the courts are charged with applying. (Enoch, 2017, p. 9)

As Enoch also noted,

> [t]his statement reflects an understanding of the role of women jurists as representatives of a diverse population group in America. This conceptualization of women reflects a difference in the perception of blind justice of the court as one which embraces diversity and sees difference in the judiciary as a valuable attribute reflective of the diversity of the citizenry, rather than a court which assumes that impartiality must mean the inability to see race or gender. (P. 9)

However, this also demonstrates that women, other minorities, and people with untraditional backgrounds should pay particular attention to the challenges that still face them should they decide to run or apply to become judge (or justice).

The literature broadly describes how hidden power structures and stop gaps still exist and sometimes provide virtual veto powers built into female attorneys in general and the policy design of judicial elections. The cards are stacked against some minority candidates to such an extent that even though some have won their elections legitimately despite intense opposition during the election cycle, they continue to face extreme pressures while serving as judges. Some are even eventually removed from office. For example, Enoch (2017) studied the cases of three African American, Democrat, female judges in major cities Ohio from the time they ran for office until their removal from office.

> Each of the three judges in my study were treated differently from their peers[. T]hey all complained of having larger caseloads than their peers, and each of them experienced accusations of misconduct that were extreme, unusual, outlandish, and extraordinary. All three judges faced significant opposition from their election campaigns, through their service on the bench, and ultimately to the time of their removal from the bench. There was also evidence that there was secret, orchestrated, and coordinated efforts on the part of their Republican adversaries to build cases against them in an effort to have them removed from the bench. In each case, it was demonstrated that the intent in bringing disciplinary and criminal charges was to permanently prevent them from serving as judges. (Enoch, 2017, p. ii)

They were, in fact, eventually removed from office. Granted, the above example is arguably extreme, but the findings of Enoch's study "corroborate previous findings in the public policy literature, which suggests that Blacks and women experience backlash on the bench" (Enoch, 2017, p. ii). To be sure, problems of inclusive governance still exists around the nation. In Ohio, Democrats are in the political minority, so Enoch's study also presents an example of the extremely strong political powers that may not even stop surfacing if judicial candidates win

office. This is shocking to notions of democracy and the perception that elections are a fair, almost sportsmanlike way of obtaining office.

Little political science research work has focused on how actors move from the pool of potential candidates to becoming a candidate for the judiciary (Williams, K., 2004; Williams, M., 2008). A clearly defined pool of candidates can provide the researcher with insight into a selection process occurring *prior* to the election itself. The overwhelming conclusion is that while women may attain seats at the same rate as their male counterparts, all else being equal, their perceptions of the judiciary as well as the characteristics they more often possess decrease their likelihood of running for the judiciary in the first place. In effect, such self-deselection means that women still fare worse than men in judicial elections (Williams, K., 2004; Williams, M., 2008).

For example, Williams, M. (2008) found that women are still underrepresented on the state court bench: in 2005, only 22% were females (p. 68). She found a gender difference in ambition to serve in public life (p. 68) and noted that "political science has failed to explore the variation in the pool of attorneys who could become judges and the gender dimension to ambition is rarely considered" (p. 68). Most female political ambition explored in the scholarship so far has been about the legislative branch, leaving the judiciary an "underexplored institution of government" (pp. 68, 74).

Williams (2008) identified some of the reason why women may be attracted to serve as judges (some of these factors of course also pertain to men): There are relatively clear guidelines for serving on the bench, typically a minimum number of years practicing law, compared to serving in other elected positions (p. 68). Being a judge may be better than working as an attorney with the well-known high billable hour requirement (60-80 hour workweeks are not

uncommon) and limited advancement opportunities (pp. 68, 74). If the attorney works as another type of government attorney, they can earn higher salaries as judges (p. 68-69). If the candidate wishes to run for any type of elected office, judicial office may be more attractive than other offices (p. 70).

Factors potentially discouraging females from running for judicial office include the following: The burden of, typically, having to re-run for office every six years (p. 69). Women have typically not run for elected office in the same numbers as men, so it is more difficult for women to envision doing so (p. 70). They experience a lack of encouragement to run (p. 70). They feel more negatively about campaigning and competing (p. 70). The close ties of judicial office to the dominant political party necessary to win may not match the candidate's personal political views (p. 70). Williams' research analyzed Texas elections. She notes that women tend to be more liberal/Democrat than men, and because Texas has a very conservative political culture, female attorneys may be discouraged from even running for office in Texas (p. 70). In contrast to men, women often see barriers to a legal career to begin with (at least at the time of Williams' research) and thus also hesitate in desiring to run for judicial office (p. 70). If female attorneys are in successful practice, they may well hesitate in having to leave that income and relative security to campaign and re-campaign (p. 69). Williams also notes the traditional considerations of women often facing a different workload or burden than men in relation to family life, children, marriage, and home life (p. 70). Although Williams surveyed Texas, arguably a more "traditional" state than others (see also above for the closely related "tightness/looseness" considerations) and although her research was performed almost twenty years ago, many of those issues still exist around the nation.

Perhaps most interestingly, men are more likely to express ambition for running for office for judge as they know that women are deterred from doing so (p. 70). Conversely, women know they will face tougher competition from men, which is a deterrent for women (p. 70). In fact, "90% of female attorneys responding to [Williams'] survey said they saw women experiencing more barriers in their legal careers, and 68% of female attorney respondents saw women experiencing more barriers to becoming a judge" (p. 75). Thus, perception and encouragement may be key to increasing both female ambition for and representation on the bench (p. 75).

Williams notes that after controlling for all other factors, women appear to be more interested in obtaining a position on the judiciary than men to start with (p. 74) This may be because they see it as a more stable lifestyle, removing the pressure of billable hours (p. 74). Of course, females may also be attracted to becoming judges for many other and more intellectual reasons. Regardless, the literature shows the additional hurdles – perception-wise or otherwise – faced by women in attempting to become judges than men. Unfortunately, although the number of female judges and justices is rising, that result may still be skewed because so many more could become (s)elected if they did not self-select out of the process to begin with.

Politics are notoriously dirty. This is problematic in the judicial context as we expect our judges to be above the fray of politics once they ascend the bench. Many are, of course, but as shown, politics rears its typically ugly head even in the judicial election context. It is outside the scope of this research project to analyze steps that could be taken to better prevent that, but judicial elections do insert an arguably additional degree of politics – partisan or otherwise – into a profession that should be removed from politics. This holds true even in the pre-election context. In particular, the literature describes the additional hurdles faced by women and other minorities if deciding to express or pursue ambition for judicial office.

E. Heuristics and Cues

Despite thoughts about judicial attributes, skills, and backgrounds, voters often rely on simple heuristics and/or cues in making election decisions:

> [V]oters often rely on heuristics or cues, at least some of which are contained on the ballot such as party, sex, ethnicity, name recognition, incumbency status, and occupation. Indeed, the information provided on the ballot may be the most salient and readily available information voters encounter when making their voting decisions in low information contests. These contests often present voters with a conundrum because they may lack information, and even access to information, about the candidates. Ballot information thus may be the only information they have to make their decision. (Atkeson & Hamel, 2018, p. 60)

Gottfried (2012) found that while voters rely on certain campaign-specific information (i.e. issues and candidate traits) and make higher quality vote decisions in high-information elections, they rely more on simple vote cues (e.g. party) in low-information elections. This is not new: In 1981, Volcansek similarly pointed out that incumbency, bar ratings, endorsements (especially by major metropolitan newspapers) and even just location on the ballot (with a higher-up placement more favorable than a lower-down one) function as cues to voters (see also Edwards, 2015, setting forth research demonstrating that voters favor first-named candidates on the ballot). Los Angeles County has thus chosen to toggle the names of judicial candidates for various seats in different areas of the county when voters use voting machines.

In fact, voters who vote for judges rarely even know who are running for office until they see the names on the ballot. Volcansek (1981) found that even for a seat on a state supreme court, only 14.5% of voters could recall a single name of a candidate (p. 572). For the trial court level, only 2.5-4.9% could name a candidate (p. 572). In the words of one writer:

> At the bottom of the statewide ballot are the names of people who want to wear robes and dispense justice, and if you know your way around that roster, you're in the minority. If you know all of them, you either work in the courthouse or you're a campaign consultant. If we're going to elect judges, why do we make it so hard to learn

> enough about them to vote intelligently? It is hard for them to raise money from anyone who doesn't have business before them. They are supposed to remain impartial even while running as partisans. In a state with 26 million people [Texas], it's difficult to get past the standard of "That's a pretty good ballot name." (Ramsey, 2012, para. 6)

Thus, even just the connotation of names may be important. This will be analyzed next.

1. Names, gender, and ethnicity

As superficial as it may seem, a candidate's name matters greatly to his/her chances of electoral success. For example, in now predominantly Hispanic Los Angeles County, having a Hispanic-sounding name is thought to carry a positive advantage for the candidate. People who have been marginalized or at least been in the minority for generations may believe that a candidate with what they perceived to be background like their own is more likely to be a "good judge." Of course, a mere name may not reflect a person's heritage or background at all or accurately. For example, citizens may adopt a last name in relatively simple, legal name-changing processes just as spouses can take each other's last names upon marriage. Thus, a person running with, for example, a Hispanic last name may not actually be Hispanic at all. Future research could examine this area further.

In one example, people had only heard of a judge running for office because she rejected an appeal for being a few minutes late after a 5 p.m. deadline and another judge because that person had failed to list more than $2 million in real estate holdings in state ethics disclosures (Ramsey, 2012). In the 2020 Los Angeles County election, a candidate legally changed his name to "Judge Mike Cummins" in an apparent attempt to benefit from the title "judge" in combination with a folksy-sounding first name. (He lost).

Texas voters have elected accused felons who had familiar sounding names as candidates, as they did with Don Yarbrough in 1976 (Thielemann, 1993). That year,

> Don Yarbrough sought election to the Texas Supreme Court. Yarbrough shared the name of the former U.S. Senator Ralph Yarborough and promised voters that he would take his instructions directly from God. Yarbrough defeated an established judge with all the bar association endorsements by 290,000 votes in spite of a failed campaign to inform voters that he was not associated in any way with the former senator. (P. 473)

Further,

> [a] district court level study in Dallas County found that voters were able to recognize the name of only one of eight district judges with any regularity. The judge whose name was recognized shared the name of Dallas' leading disc jockey and a screening question revealed that most respondents thought that the judge was a disc jockey. (P. 473)

Some speculate that candidates with female-sounding first names have a greater chance of success than those with male-sounding names. This is troublesome:

> If the voter has no recollection of the candidates' names, coupled with no other knowledge of the candidate, it presents opportunities for the voter to insert personal bias, such as ethnicity or gender, into her decision by simply reading the candidates' names on the ballot. Basing a vote on ethnicity or gender proses two problems: first, the uninformed vote is not grounded in the candidates' qualifications or background; and second, the voter has the opportunity to negate candidates based on ethnicity or gender. If a voter is biased against an ethnic minority or female candidate, then the candidate is ruled out based on factors irrelevant to legal competency. When minimal information is provided to voters in judicial elections, the results are numerous opportunities for uninformed votes, or, rather, votes based on information irrelevant to the role of a judge. (Hayden, 2016, p. 129)

Furthermore,

> [t]he National Law Journal reported that nonpartisan judicial elections resulted in the least amount of diversity in those states, as the voters can only refer to candidates' names, but not political affiliations, when casting their vote. Nonpartisan election states, regardless of conservative, liberal, or moderate populations, all had low numbers of minority judges. On the contrary, partisan elections had slightly higher numbers of minority judges on the bench, with the exception of three low-minority-population states, which have no judges of color on their state courts. This implies that racial bias in judicial elections has some impact on the number of minorities on the bench. The A.B.A. argues that the same could be said about women judges; the jurisdiction and the ideology surrounding its electorate could minimize the number of women who are elected. (Hayden, 2016, pp. 127-128)

Perhaps the most preposterous example of name advantage comes from San Antonio, Texas. In 1990,

> an intermediate appellate judge who miraculously had the support of both the plaintiffs' and the defense bar lost the primary to a recent retiree from Army JAG whose name was Gene Kelly. In the general election, Kelly spent $7,595; his opponent spent $1,000,000 (mainly on TV ads saying "He's Not That Gene Kelly"), but Kelly, though losing, received 44 percent of the vote. (Schotland, 2000, p. 216)

In short, mere names are important in judicial elections. This presents a democratic concern as voting on a mere name cue cannot be said to be deliberative citizen participation. Potential bias issues also surface one way or another: ethnicity, race, and gender heuristics may, depending on the geopolitical location, work either for or against a minority candidate. More research on the latter would be fruitful, especially in the changing political climate in California, which has become a majority-minority state (Public Policy Institute of California (*n.d.*), California's Population).

2. Voter knowledge of candidate judicial philosophies

There are three major types of judicial philosophies: judicial restraint, judicial activism, and interpretation of the U.S. Constitution as a living document.[6] Not surprisingly, researchers find that voters have very little understanding of the various types of judicial philosophies and that at the same time, judicial elections are becoming increasingly contentious (Burnett and Tiede, 2015). Because "[i]nformed choices are the gold standard of democratic decisions" (Burnett and Tiede, 2015, p. 49), it would be much preferable if voters at least knew about the general judicial philosophies of the candidates. However, they typically do not.

> [E]ven if judicial candidates are broadcasting their beliefs about how they arrive at decisions, most voters lack the wherewithal to interpret and incorporate these messages

[6] "Generally, judicial philosophy refers to a judge's decision-making belief system. Such attitudes may include how to interpret the law ranging from an 'activist' to a more 'restrained approach' … A judicial philosophy may also involve the function of law. Under a realist approach to judging, judges view 'the law as purely instrumental' and are 'willing to decide cases on purely ideological grounds' … A more formalist approach implies that judges decide 'cases entirely on the basis of the authoritative legal sources (the text of the constitution and statutes and *stare decisis*)' … [Judicial] philosophy … may provide clues as to how candidates will approach a specific case" (Burnett and Tiede, 2015, p. 50-51).

> into their decision calculus. This finding is perhaps even more important for nonpartisan elections, where information about the candidates is often quite meager. (Burnett and Tiede, 2015, p. 50)

Judicial philosophy matters because "parties, special interest groups, and the [judicial candidates] themselves are expending significant resources to publicize their perspectives" (Burnett and Tiede, 2015, p. 51) in order to gain votes. Candidate websites add significantly to potential informational resources today in addition to the meager media coverage to be mentioned below. "It is unclear, however, if judges can state their decision-making philosophies in a way that voters can understand and, subsequently, use at the polls" (Burnett and Tiede, 2015, p. 51). Add to that the fact that, as will also be analyzed further below, some candidates will flat out refuse to answer any questions as to their philosophies (judicial or otherwise) as they may erroneously see that to be a violation of state canons of judicial ethics. On the other hand, while this matters much to answers to other types of questions, but in relation to judicial philosophies, it may actually not because

> knowledge of some of the most common judicial philosophies is quite weak. As a result, campaign messages that include references to a particular judicial philosophy will be difficult, if not impossible, for most voters to understand, rendering the political message ineffective. In other words, without the requisite base knowledge of judicial philosophies, voters will struggle to understand how these philosophies relate to their own preferences and how such philosophies can help them predict the future behavior of elected judges once they are in office. (Burnett and Tiede, 2015, p. 61)

If voters do have an understanding of judicial philosophies to begin with, they are more likely to be political sophisticates and thus less likely to need this information to begin with. The issue, however, has

> [l]arger concerns for nonpartisan elections. Despite wanting to encourage a more careful consideration of judicial candidates, nonpartisan elections clearly increase the burden on voters to make informed decisions (i.e., they cannot rely on party cues to substitute for specific knowledge). Our results demonstrated that voters cannot easily rely on judicial philosophies to reduce this burden … Thus, even increased campaign messaging and associated costs to broadcast a candidate's philosophy will not help voters because they

> lack the basic knowledge necessary to interpret the message they are receiving. If judicial philosophes are going to be a useful piece of information for voters—perhaps even acting as a cue—the electorate must first become comfortable and competent users of this vernacular. (Burnett & Tiede, 2015, p. 61)

Relevant heuristics may, for political sophisticates, be something as simple as the existence of media coverage or not (because a candidate who is not covered in the media may, in the sophisticate's opinion, not be a good choice).

> Similarly, when exposed to policy information about a candidate's position on one issue, sophisticated voters can likely make a credible and accurate inference about the candidate's position on a different issue. Nonsophisticated voters, however, are much less likely to have the capacity to make such inferences, and would thereby have less information upon which to select a candidate. (Lamb & Perry, 2020 p. 1138)

Increased voter sophistication may not be a realistic expectation in today's America. Thus, cues are likely to remain important in elections.

3. Ballot designations

Candidates' job titles ("ballot designations") may be important heuristics for voters. The research for this research project indicates that only California allows for ballot designations for political candidates. However, as Los Angeles County in particular provides many data points, it illustrates the potential effect of titles on voters. As scholars have recognized,

> In low-information elections, knowing whether candidates are, for example, judges, defense lawyers, prosecuting attorneys, or plaintiffs' lawyers may provide citizens with one way to judge their competence to hold judicial office and potentially their views on relevant issues. Indeed, citizens are more likely to vote in low information contests when they know the candidates' occupations because it allows them to cast a ballot for the candidate whose occupation suggests a higher degree of experience for the job. (Streb (Ed.), 2007, p. 126)

Other scholars agree:

> The job titles political candidates list on ballots influence voting behavior. I find evidence that American voters use several candidate attributes, including job titles, as heuristic cues when deciding between competing political candidates. These findings are especially salient for elections in which the professional experience of candidates

> may be one of the only sources of information available to voters on the ballot and provide an explanation as to why certain occupations are overrepresented in elected office. (Ruiz, 2018, p. iii)

Voters do not examine the backgrounds of judicial candidates to a very great extent, if at all. Ballot designations may simply indicate a level of expertise and experience that voters mistakenly consider to be indicative of the "best" candidate for office. Of course, it could also be argued that voters truly prefer most judges to come from one single particular background such as being a prosecutor. This, however, is implausible given the amount of literature describing the low saliency in relation to many voting decisions, especially in relation to judicial office, and the personal experiences from this researcher, which will be detailed in a chapter below.

Other research also demonstrates how professional experience signaled through occupation is a cue that voters can and do use to evaluate candidates' functional competence for office: when there is or, importantly, even when there just *appears* to be a clear connection between candidate qualifications and the particular elected office, voters are very likely to give weight to ballot designations (Atkeson & Hamel, 2018). Atkeson & Hamel's research was based on local school board elections. The scholars argue that occupational cues allow voters to assess one aspect of candidate quality: the candidate professional experience.

> Knowing a candidate's professional experience allows voters to evaluate the relative competency of candidates, linking professional experience to the office in question. In such settings, voters who value the functional competence of candidates – [defined] as the extent to which a candidate appears to have the background and experience that make them qualified to perform the duties of the particular elected office – will be more likely to support the candidate whose qualifications for office are more tied to the particular office they seek, and less likely to support those candidates whose qualifications do not connect them to the same office. We suggest that many electoral contexts grant voters the chance to discriminate among candidates of various professional backgrounds, and that voters consider and weigh a set of candidate characteristics and choose the candidate that is best suited to hold the political office. (Atkeson & Hamel, 2018, p. 60)

This research resulted in three central findings:

> First, candidates who work in education [in that study] fare best at the ballot box, relative to those working in other fields. But, importantly, we also find that voters distinguish even among candidates who work in education: those who work closest with students – teachers, tutors, etc. – fare the best. Most notably, those who work at a school, but are not truly associated with education - like a school finance analyst, school cafeteria worker, or janitor – receive no boost in vote share. Combined, these findings provide broad support for the idea that voters value functional competence and that they discriminate among candidates on the basis of their professional background and qualifications. Once partisanship is accounted for, the effect of this occupational preference does *not* disappear. We conclude that occupation cues – specifically, occupation cues that are closely tied to the particular office – may be an important heuristic independent of partisan and group loyalty cues in low information elections. (Atkeson & Hamel, 2018, p. 61)

In other words, voters use what they *think* is the functional competence of candidates in determining vote choice without, however, knowing whether or not this is true. Seen this way, "the use of occupational cues presents the voter as 'thinking,' and carefully considering the information that is available and presented to them. In this way, voters are not fools: they discriminate across information and select candidates in ways that are tied to the particular office" (Atkeson & Hamel, 2018, p. 75). But as the researchers themselves recognized, this type of decision-making may not only *not* be rational, it could lead to perverse effects. For example, the voters "do not bear the necessary information costs to determine which candidate is most consistent with their own policy beliefs or whether candidates are accountable for policy failures and successes" (Atkeson & Hamel, 2018, p. 75). While voting based on a title may be warranted in the election of school board candidates whose functions are likely more recognizable than those of judges, the same arguably does not hold true for judges. The roles of judges are so technical and complex that very few voters are familiar with all the relevant intricacies of what makes for a good judge and thus good judicial candidate. What is a "functional-enough" title for a judicial candidate is arguably a poor basis for decision-making.

Thus, while Atkeson and Hamel make the claim that "it is exactly [in] these low-information contexts where information about the professional experience and qualifications of

candidates, and the relevance of those experiences for the particular office in question, is both available *and* useful" (2018, p. 76), this dissertation argues that allowing judicial candidates to use ballot designations can and does lead to unfair advantages to some candidates. The findings chapter below will support this argument. This is a clear democratic deficiency.

As for judges who have already been elected or appointed, research further shows that

> [v]oters are more likely to reelect an incumbent candidate than a candidate who is not a judge likely because there is a voter bias in favor of the incumbent and incumbents have broader support. Incumbents are also likely to have more financial resources and a greater ability to raise campaign funds, leading to more spending which further raises the incumbent candidate's name recognition. (Edwards, 2015, p. 1193)

In short, professional titles are very important voting cues.

4. Paid advertisements

To communicate their candidacy, judicial candidates also use paid-for means of communication such as websites, newspaper and other media advertisements, social media, and slate mailers.

Not long ago, when official (or even unofficial) voter guides were made available at polling sites, rolloff dropped, and voters expressed higher levels of satisfaction with the information available to them about the candidates (Streb (Ed.), 2007). Where these exist, it may, however, be prohibitively expensive to purchase space in them. For example, the Los Angeles County Registrar-Recorder charged the following astonishingly high fees for having 200 words printed in the countywide sample ballots in March 2020 for the primary election only: $108,200 for one language in one column and $216,400 for one language in two columns (Los Angeles County Registrar-Recorder email, Aug. 30, 2022). For the November 2020 general election, the price – still for 200 words only – was $120,400 for one column, one language, and $240,800 for two languages in two columns (Los Angeles County Registrar-Recorder email, Aug. 30, 2022).

(Only one judicial candidate paid the hefty fee to be featured in the 2020 sample ballot throughout Los Angeles County.)

Only in 2022 did the Registrar-Recorder realize that

> given the size and diversity of Los Angeles County voters, the costs for printing candidate statements can be costly and burdensome for some candidates, leading to instances where voters only receive statements from candidates who have the resources to have them printed. (Los Angeles County Registrar-Recorder/County Clerk (*n.d.*))

Accordingly, candidates can now include their 250-word statements in an online version of the sample ballots for free; indisputably a democratic improvement.

Websites also convey information relatively easily and inexpensively, but very few voters take the time and effort to google the names of candidates to find out information about them. This is inexpedient and somewhat baffling as in other contexts, websites are becoming a prominent venue for political information and an important way for candidates to communicate with constituents (Bonneau & Hall, 2017). 35% of Americans regularly or sometimes get campaign news from the internet. This is up from 24% in 2000 (Bonneau & Hall, 2017, p. 162). Websites can be highly indicative of a candidate's qualifications and interest level in winning (for example, some judicial candidates do not bother to post very much information about their candidacy. A few do not even bother to create a website at all despite the relative ease and low expense of doing so today.). But unlike the "filtered editing of news mediums, websites present at least one aspect of the reality of judicial campaign rhetoric rather than a secondhand report" (Bonneau & Hall, 2017, p. 162). This is important. But because few voters investigate judicial candidates via online search engines, further analysis of the content of such websites is largely irrelevant to the present research. Bonneau & Hall (2017) do so on pp. 165-169.

5. Slate mailers

Slate mailers (or just "slates") are thin brochures or postcard-like document mass-mailed to large groups of recipients. They were used much traditionally as they were among the cheapest type of advertisements for political candidates per voter view.

Examples of California slate mailers with backgrounds that do not match the opaque (at best) names of the publications include "Non Partisan [sic] Voter Guide (issued by the "Party Central Committee"), the "Coalition for Literacy," the "COPS VOTER GUIDE," "Coalition for California," "Californians for Quality Education," "California Justice Voter Guide," "Parents for Progress," "Senior Voting Guide," and many more like these. If voters go to the trouble of investigating these names on the internet, they will see, for example, that the Los Angeles County Democratic Party's Central Committee is not the "Party Central Committee" that issued the "non-partisan voter guide" (a nonpartisan voter guide from a political party would fly in the face of logic anyway), that COPS are not issued by "cops" or their trade union, that the "Coalition for Literacy" is not the National Coalition for Literacy, but rather a now permanently closed organization on a dilapidated street in Torrance, California; and that "Parents for Progress" is owned by CA Slates, which is a slate committee and thus simply a political publication organization. Caveat emptor.

Political party cues

Even if party affiliation is not officially listed on the ballot, selective linguistic signaling can be used as a cue. Accordingly, judicial candidates wishing to indicate their political party affiliation can do so indirectly even in cases where they cannot, in nonpartisan elections, do so officially. The following two vignettes used in 2015 research conducted by Bonneau and Cann show how even under nonpartisan conditions, it is possible to indicate partisanship. Consider the

following two vignettes presented to study subjects in a test of whether voters can pick up on partisan cues:

> Judge Michael N. Watkin received his law degree from Yale Law School in 1989. Following law school, Judge Watkins completed a judicial clerkship with the Honorable David K. Winder of the United States District Court and currently serves as a stated district court judge. Judge Watkins believes judges should interpret the law rather than legislate from the bench. He supports the death penalty and believes in traditional family values. Judge Watkins thinks state courts should limit abortions. He firmly believes that longer sentencing for criminals is the best way to make them pay their debt to society and won't let criminals off on legal technicalities.
> Judge Marcus T. Simmons was appointed to the state supreme court in 2008 to fill out the final two years of former state supreme court judge Donna Howard, who retired. Judge Simmons, a graduate of Duke Law School, is now seeking election to his own full term on the state supreme court. Judge Simmons believes judges should use the power of the judiciary to promote equality and fairness in society. He is strongly committed to individual rights, including the right to have an abortion and the right of same-sex couples to marry. (Pp. 62-63)

In the first example, "judge Watkin" is clearly (to at least political sophisticates) a Republican candidate. This is clear from the typical Republican belief that judges should "interpret the law rather than legislate from the bench," support of the death penalty, support of "traditional" family values, opposition to abortion and longer sentences for criminals (often, in judicial election contexts, referred to as "being tough on crime"). In the second example, "judge Simmons" is clearly a Democrat as demonstrated by his interest in using his seat to "promote equality and fairness in society," commitment to individual rights including abortion rights, and the lights of LGBT people to marry.

The study subjects were, in fact, able to identify the partisan affiliations by the two "candidates" even despite the (thinly) veiled attempts at hiding this information (p. 61). Voters can pick up on the message as a covert cue (see also above) as to whom to vote for depending on which political party the voter prefers.

Some argue that there may be value in interest groups contributing to judicial elections. As mentioned, Bonneau and Hall (2009, 2017) support judicial elections in general and argue that part of a healthy democracy is vigorous debate about issues and candidates and information distribution to voters. Further, they find that the more information voters have at their disposal, the more registered voters will actually vote. "Information" includes advertisements which, as noted, are often funded by special interests or sympathetic individuals. Interest groups have thus been argued to effectively function as educators. Streb ((Ed.), 2007) makes this argument. For example,

> [a]fter White, candidates can announce their position on issues that may come before them after they are elected to the bench. Even so, some candidates still decline to do so, believing that such behavior is inappropriate for people who are trusted to serve as impartial arbiters of controversial disputes. But if the candidate will not tell you where they stand on the burning legal issues of the day, who else can do so if not interest groups. (P. 84)

Voters, Streb thus argues, can learn much from interest groups. The problem with that argument is that campaign information is far from always accurate or even truthful as demonstrated above. Further, while candidates and other political actors will not necessarily go so far as to present falsities, they will, of course, skew information and messages in their own favor. Sponsors' names also often obscure specifically who is funneling money through which groups. Slate mailers use vague or misleading names. Streb's argument may thus not follow. Voter misinformation takes place in politics in general as it does in judicial elections. Special interest groups cannot and should not be relied upon to function as educators in judicial elections.

6. Judicial candidate opinions and predispositions post-*White*

The above analyzed what others say about the candidates. Next, this research will turn to what the candidates *themselves* say - or do not say – about their own candidacies.

First, candidates are notorious for stating very little regarding their substantive views on the law and its development. Instead, they tend to repeat such bland statements as the fact that they will be "fair" and "neutral" just as they tout their "extensive experience" with criminal law (in the case of prosecutors). Some promise to be "tough on crime" when the audience seems to want to hear that. Minor procedural matters may be commented on. Seemingly most candidates who have even just a little experience defending and prosecuting notes this (career prosecutors typically do not have much, if any, experience defending people other than perhaps a few cases pro bono or during law school experience or former military careers).

There is a prevalent view that judicial candidates cannot state their personal opinions on *either* cases *or* issues that may before them as judge. Most candidates use this as a shield against having to opine on virtually any of the issues in which voters are interested and rightly expect judicial candidates to discuss. These issues often include prosecutorial discretion and potential racism, police reform, law enforcement misconduct, the death penalty, sentencing reform, and whether the candidates promise to be "tough on crime."

The notion that judicial candidates are not allowed to opine on issues (not cases[7]) that may come before them stems from, in California, the Canons of Judicial Conduct which also apply to candidates running for judge. Notably, the preamble to Canon 5 of the California Code of Judicial Conduct states:

[7] In Los Angeles County, it is unlikely that an actual case would come before a particular candidate given the fact that almost five hundred judges sit on the Los Angeles Superior Court and cases are distributed randomly among them.

> Judges and candidates for judicial office are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, not engage in political activity that may create the appearance of political bias or impropriety. Judicial independence, impartiality, and integrity shall dictate the conduct of judges and candidates for judicial office. Judges and candidates for judicial office shall comply with all applicable election, election campaign, and election campaign fundraising laws and regulations.

The Advisory Committee Commentary further notes that "[T]he term "political activity" should not be construed so narrowly as to prevent private comment.

Canon 5B(1) also states that

> [a] candidate for judicial office or an applicant seeking appointment to judicial office shall not … make statements to the electorate or the appointing authority that commit the candidate or the applicant with respect to cases, controversies, or issues that are likely to come before the courts….

Many candidates misinterpret this to mean that they cannot even comment on a very wide and deep range of issues. Those candidates typically state during, for example, endorsement hearings, they "are not allowed to comment on anything that may come before" them. However, in addition to the Advisory Committee clearly stating that "private comment" is allowed, the Committee also notes about Canon 5B that

> [t]he purpose of Canon 5B is to preserve the integrity of the appointive and elective process for judicial office and to ensure that the public has accurate information about candidates for judicial office. Compliance with these provisions will enhance the integrity, impartiality, and independence of the judiciary and better inform the public about qualifications of candidates for judicial office.

Thus, the democratic aspect seeking to ensure that "the public has accurate information about candidates for judicial office" and "better inform[ing]" the public about qualifications about the candidates is clear.

The American Bar Association's revised Canon 4 similarly states, "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary." The section "Political and Campaign

Activities of Judges and Judicial Candidates in General," prohibits judges and candidates "in connection with cases, controversies, or issues that are likely to come before the court," from making "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Rule 4.2 focuses on the campaign activities of elected judges, and specifically permits candidates, subject to exception by law, to "seek, accept, or use endorsements from any person or organization other than a partisan political organization" (American Bar Association, 2007).

Despite clear Supreme Court precedent on this issue, candidates still promote the view to laypeople who do not know better that the candidates cannot opine on very many things at all, thus precisely doing the opposite of what the Canons and the Supreme Court seek to ensure from a democratic angle.

The seminal case is *Republican Party v. White*. The Minnesota Supreme Court had adopted a canon of judicial conduct that stated that a "candidate for a judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues" (the "announce clause") (536 U.S. 765 (2002), p. 765). The Minnesota Code also contained a so-called "pledges or promises" clause, which separately prohibited judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," a prohibition that was not challenged in the case.

The question was whether the First Amendment of the United States Constitution prohibits candidates for judicial office from merely "announcing" their views on legal and disputed legal issues. It does not. Among other things, the case stands for the propositions that the Minnesota "announce clause" placed most subjects of interest to the voters off limits. The First Amendment does not permit Minnesota or other states to leave the principle of elections in place while

preventing candidates from discussing what the elections are about. The case also made it clear that merely "announcing" views on an issue covers much more than *promising* to decide an issue a particular way, which remains a violation of relevant judicial canons. The prohibition extended to the candidate's mere statement of his/her current position, even if he did not bind himself/herself to maintain that position after the election.

Minnesota contended that this still left plenty of topics for discussion on the campaign trail. These included a candidate's "character," "education," "work habits," and "how he/she would handle administrative duties if elected" (p. 774). The Minnesota Judicial Board had even issued a list of preapproved questions which judicial candidates were allowed to answer. These included how the candidate felt about cameras in the courtroom, how he or she would go about reducing the caseload, how the costs of judicial administration can be reduced, and how he or she proposed to ensure that minorities and women became treated more fairly by the court system. Said Justice Scalia in the opinion, which still stands:

> Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law. ("Judges of the supreme court, the court of appeals and the district court shall be learned in the law"). And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either. (P. 778)

> Further, J. Scalia noted that

> [d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance. It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign. We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election. (Pp. 781-782)

The Supreme Court expressly found that the difference between judicial and legislative elections is exaggerated. And although the Court agreed that the "complete separation of the judiciary from the enterprise of representative government might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature," the Court also held that this was "not a true picture of the American system" because "state-court judges possess the power to 'make' common law" and "the immense power to shape the States' constitutions as well" (p. 784).

An Eleventh Circuit Court of Appeals court has also found that a canon of judicial conduct was not narrowly tailored to serve the state's compelling interest (the applicable legal standard) because it failed to provide "breathing space" for judicial candidate speech (*Weaver v. Bonner* (2002), p. 1320).

In short, judicial candidates may indeed state their personal opinions on various legal issues. That they typically do not do so is either out of a mistaken interpretation of the law or to avoid upsetting potential voters. Neither can be said to be a desirable judicial trait.

After *White*, reform groups feared that

> public statements of policy positions could harm the legitimacy of state supreme courts by giving the impression that judges are prejudging cases. This fear is overblown. No evidence that respondents who learn that the judicial candidate is stating his/her policy positions are more likely to ascribe lower levels of legitimacy to a state supreme court. Fears were exaggerated. Just as voters expect other candidates for elected office to state their positions publicly, they do not penalize courts when their judicial candidates do the same. (Bonneau & Hall, 2017, p. 224)

While judicial candidates commenting on legal issues of the day may not harm the legitimacy of courts in general, some still fear that *White* "affected judicial campaign speeches, allowing for more questioning by special interest groups about candidates' personal opinions, shaping the outcomes of elections by focusing on controversial issues such as religion, same-sex

marriage, abortion, etc." (Hayden, 2016, p. 123). "The influence of wealthy special interest groups is problematic because these interests are able to shape the ideological direction of the courts by spending large amounts of money on judicial candidates who share their worldview" (Hayden, 2016, p. 123).

These statements were made in relation to supreme court candidates. At the trial court level, campaign rhetoric remains relatively static. Trial court campaigns have not undergone significant changes in practice, organization, or rhetoric (Bonneau & Hall, 2017, p. 161). Voter knowledge about trial court candidates remains low (Bonneau & Hall, 2017, p. 161). Trial court campaigns tend to be amateur operations, relying on friends and neighbors for volunteer help. Focus is still on traditional themes such as "experience and qualifications while avoiding negative attacks and substantive policy appeals" (Bonneau & Hall, 2017, p. 161). Candidates tend to avoid controversial issues that cleave the two parties. Instead, they have

> an incentive to focus on valence issues on which there is broad agreement among voters such as legal qualifications, experience, vague judicial values of impartiality and fairness, and promoting efficient court administration. These issues do not run afoul of either pre-*White* canons of judicial conduct or norms of voters, bar associations, or other judicial elites. If candidates do focus on hot-button issues, they will most likely focus on crime. (Bonneau & Hall, 2017, p. 163).

Judicial scholars know little about the state of lower court campaigns because studies of the campaign organization and behavior of lower court candidates are relatively sparse compared to supreme court and even appellate court races. Research could shed more light on whether the above concerns may also be valid in the modern trial court context. However, a 2008 study of trial court and intermediate appellate court elections in six states shows that the "new style" of more aggressive, competitive, and expensive judicial campaigning for supreme court office has not yet reached the lower court races (Arbour & McKenzie, 2010, p. 151).

> Lower court campaigns remain low key friends-and-family affairs …. Campaign messages focus either on the experience and qualifications of judicial campaigns or on the relatively mundane issue of court administration. Hot button issues and attacks are used infrequently. (Arbour & McKenzie, 2010, p. 151)

Lower court campaign themes tend not to focus on particular socio-legal issues (Arbour & McKenzie, 2010).

> Instead, over half of respondents' campaigns in one study focused on their "experience" or "qualifications." The second-most common set of themes (18%) concerned broader judicial values such as "fairness," "justice," "impartiality," and "equality." Small percentages of campaigns discussed scattered themes – personal values (7%), court administration (6%), change (5%), and partisan balance (4%). All of the above categories would have passed muster under pre-White judicial canons. (Arbour & McKenzie, 2010, p. 155)

Only 12% of themes in Arbour and McKenzie's research concerned the opponent's experience or competence (p. 155). Examples of the attacks made on opponents in this study include "take the training wheels off [the particular court]," or "incumbent works only part time and leaves work to other judges" (p. 155). Only 5% of the campaign themes focused centrally on a specific issue (e.g. "tough on crime" or "reduce frivolous lawsuit") (p. 155).

> These numbers stand out for what is missing. Lower court campaigns are not focusing on issues, particularly divisive and attention-getting issues such as abortion or tort reform …. This is not to say that attacks and issue- based appeals do not occur in lower court campaigns from time to time, but they are certainly not the primary focus of lower court campaign rhetoric. (Arbour & McKenzie, 2010, p. 156)

One scholar finds that "on highly divisive issues, wise political candidates should refrain from answering queries that will alienate a substantial bloc of voters. While candidates can use the First Amendment [under White] to express their personal opinions freely, that same fundamental right permits candidates not to speak when their words will cast doubt on their independence and integrity as members of the bench" (Salokar, 2007, p. 355).

F. Bias on the Bench

Bias may take the form of implicit or explicit bias. It is a strong word often associated with some degree of unfairness or even hostility. The word can be used as such. It may, however, also simply refer to "[a] tendency (either known or unknown) to prefer one thing over another that prevents objectivity, that influences understanding or outcomes in some way" (Open Education Sociology Dictionary, (*n.d.*)). Even implicit bias is important at the population level among judges as it may influence case outcomes. Judging is, of course, to some extent always subjective and should be so: judges lend their critical thinking skills, legal training, experience, and more to the work they perform. However, there is a difference between proper subjectivity – that where the judge evaluates all the law and facets of the case before him/her – and that which is improper, such was where bias (implicit or explicit) plays an unmitigated role and perhaps even influences case outcomes.

Bias is highly prominent among us: "A seemingly endless set of studies indicate that even the most minimal, most meaningless distinctions between people facilitate ingroup favoritism." (Redfield (Ed.), 2017, p. 98). We tend to favor "ingroups"[8] and disfavor or even be hostile to "outgroups" (Redfield (Ed.), 2017, pp. 18, 161-162). The tendency to favor ingroups is perhaps one of the most widespread and oldest findings in social science (Redfield (Ed.), 2017, p. 98). Said William Graham Sumner more than a century ago:

[8] "More studies have demonstrated discrimination resulting from ingroup favoritism than from outgroup hostility—an unexpected observation in light of the prevailing wisdom that discrimination typically occurs in the form of hostility directed toward outgroups. For whatever reason, it is apparently easier to demonstrate discrimination in the form of differential favoritism than in the form of differential hostility. The most parsimonious and plausible explanation is that, indeed, discrimination more often takes the form of ingroup favoritism than outgroup hostility. However, some portion of this imbalance in findings may also be due to the greater ease of meeting ethical research standards in laboratory studies that use measures of benign behavior than in ones investigating hostile behavior" (Redfield (Ed.), 2017, p. 175).

> [Ethnocentrism is] the view of things in which one's own group is the center of everything and all others are scaled and rated with reference to it…. Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders. (Sumner, 1906, p. 13)

The ability to differentiate between "them" and "us" starts at an early age. Perhaps we are even born with the ability to discriminate against each other. "Classic social psychology experiments in which researchers divided children in obviously random ways produced enormous discrimination between the groups." (Redfield (Ed.), 2017, p. 98).

Research on ingroup and outgroup responses points out that

> [w]e all are part of cultural groups defined by traits such as race, ethnicity, religion, gender, sexual orientation, national origin, family, or social or professional status. Such group identities are one of the major categorization mechanisms that all humans use to process information, and they link to our decision making …. We tend to prefer our own, no matter how we define our own, even if the group is defined "by flimsy and unimportant" characteristics or by no similarities. Indeed, even if we know the group to have been randomly constituted, these loyalties can appear. We treat ingroup members more favorably, and we [even] think it is "fair" that we do so. (Redfield (Ed.), 2017, p. 17)

We also consider those in our ingroups to have a host of favorable traits such as being more competent, cooperative, intelligent, good-natured, and concerned with group goals (Redfield (Ed.), 2017, p. 17).

This human tendency is well researched and established. In the early 1970s, Tajfel et al. proved the "minimal group paradigm" (MGP) (Tajfel, et al, 1971). They found that

> even when subjects were assigned arbitrarily to groups in a laboratory study, they preferentially allocated resources to members of their own group rather than to those in another group. Later studies found that this occurred even when subjects knew that the basis for assignment was random. It also occurred when subjects did not know which of the other subjects who were present were members of their own group and which were members of the other group (Billig & Tajfel, 1973). [Other researchers], using the MGP, showed that subjects expect and believe it is fair for an ingroup member to treat all ingroup members fairly. But they also tend to expect and believe it to be fair for an ingroup member to favor another ingroup member over an outgroup member. Not surprisingly, ingroup members cannot be expected to identify their ingroup favoritism

> as discrimination when they see their behavior as legitimate, normative, and even procedurally fair. (Redfield (Ed.), 2017, p. 160)

"Empirical research indicates that—like jurors, lawyers, and other non-judges—judges possess implicit biases" (Redfield (Ed.), 2017, p. 88).

Bias can and does affect many social and professional contexts. In relation to judicial elections, research demonstrates how even "just" questionnaires, which are used extensively to determine bar association "ratings" or "evaluations" as well as endorsements by political parties and other groups, can and likely do lead to significant amounts of bias among questionnaire readers. For example,

> Byrne [] introduced a method for investigating attraction as a function of attitude similarity. In an initial session, experimenters obtained subjects' responses to 26 attitude questions. Two weeks later, the same subjects were asked to evaluate an otherwise unknown person for whom the only available information consisted of that person's responses to the same 26 questions. Unknown to subjects, the attitude responses of these "strangers" had been filled out by researchers so as to vary systematically, in four levels, ranging from exactly agreeing with all of the subjects' own responses to exactly disagreeing with all of them. Byrne's finding, which proved to be robustly replicable, was that liking and attraction toward the strangers were strongly a function of attitude similarity. In Byrne's [] report, across six dependent measures, effect sizes for the greater positivity of evaluations for most versus least similar strangers averaged a Cohen's d of 3.40, constituting a *very* large effect. As a reference point, Cohen (1977) described a d of 0.80 as a large effect. Subsequent studies showed that Byrne's similarity—attraction principle was not limited to effects of attitude similarities; it occurred equally for similarities in personality traits and similarities in behavior. (Redfield (Ed.), 2017, p. 159)

In other words, while the questionnaires used in judicial election and probably also in merit selection contexts are meant to create a standard platform on which to evaluate the candidates' background and, importantly, attitudes to various sociolegal issues as well as judicially related issues, the questionnaires thus in effect create "very large" amounts of bias in favor of or against the candidates; so strong that it measures no less than 3.40 on a scale where 0.80 is a "large effect" (Redfield (Ed.), 2017, p. 159). This ought to be a significant concern in the judicial

selection context. Bias is created – even if unwittingly so – by the organizations using such questionnaires. While bias can be "unlearned," the research for this study has not identified any interest in doing so by judicial candidate endorsing or evaluating organizations. Quite the opposite: as data below will support, the organizations seem quite content with the status quo. This is seen in other professional contexts too:

> In work settings, evaluations have often been shown to be more favorable when the evaluator and evaluatee (e.g., a hiring manager and a job applicant) are similar, rather than different, in race or gender [in this particular study]. Interpretation of this demographic similarity effect as a form of discriminatory bias has been made plausible by reports that the effect can be minimized or eliminated when highly structured interview methods are used. Highly structured interviews are understood to minimize discriminatory effects because they leave little to the interviewer's subjectivity or discretion. The interesting question as to whether effects of demographic similarity in the workplace are due to ingroup favoritism or outgroup hostility has not been directly addressed in most of the available research. However, the [earlier] studies … are supportive of a favoritism interpretation. In sum, the similarity— attraction principle is consistent with an expectation that attitudes toward members of one's own group (ingroup) will typically be more positive than attitudes toward members of other groups (outgroups). (Redfield (Ed.), 2017, p. 160)

Both explicit and implicit bias is problematic in society in general including in professional contexts. Few people will admit to being explicitly biased against other people. This is arguably even more so among attorneys and thus judges who have been trained to treat everyone fairly and equally unless the law requires otherwise. But implicit bias exists and can be tested via, among other tools, implicit bias tests or implicit association tests. Judges and others can take steps to avoid implicit bias successfully (thus, "unlearn" the bias) (Redfield (Ed.), 2017, pp. 104-119), WebMD (*n.d.*)), but unless they deliberately do so, biases exist outside of our control, but may actually *not* match how we feel if we give conscious thought to a given subject. This is because "[i]mplicit biases guide how you respond to people or situations without you realizing they're part of your thinking" (WebMD (*n.d.*)).

As noted, bias plays a role for everyone in private and professional life. This includes attorneys before they even assume the bench and the professionals with whom they work. Relevant examples follow. It should, however, be noted that while much bias research has focused on racial and gender bias, more should be conducted in relation to professional and other types of bias. Again, implicit bias is just that – implicit - and, is thus not always rational. Useful analogies can be drawn from bias towards or against one human characteristic or the other in the legal profession as analyzed below. These are cause for concern.

1. Public defenders

Implicit bias may adversely influence today's very busy public defenders' judgments in three ways: biased evaluation of evidence, biased interaction with clients, and biased acceptance of punishment (Redfield (Ed.), 2017, pp. 69).

> First, like all lawyers, public defenders begin evaluating cases upon the initial assignment. However, because of their unique caseload pressures, their initial evaluations likely impact their future case decisions in more significant and potentially undesirable ways than in other practices …Their initial evaluations will affect a variety of subsequent decisions important to the ultimate resolution of the case. For instance, after reviewing the discovery, they may decide that expending resources to conduct a fact investigation would be a waste of time because the state's evidence is strong. On the other hand, if attorneys determine that the state's case has weaknesses they can exploit, they may expend more resources to defend the client, including investigating the case and engaging in vigorous plea bargaining. Thus, early appraisals of cases can become self-fulfilling prophecies. While attorneys must evaluate a case's merits, the problem is that [] implicit biases may influence these judgments. (Redfield (Ed.), 2017, pp. 68-69)

Such bias could lead to worse results for some defendants.

2. Prosecutors

> With the possible exception of police officers, it is unassailable that prosecutors in state and federal courts possess greater and broader unreviewable discretion than any other actor in the criminal justice system. [N]umerous studies established that prosecutors interpret and respond to identical criminal activity differently based on the offenders' race. [It has been shown how] implicit racial biases may unknowingly affect prosecutors

> and the myriad discretionary decisions they daily encounter. (Redfield (Ed.), 2017, pp. 68-69)

For example, prosecutors make the fundamental, initial decision of whether to charge a suspect with a crime or not. Given conflicting testimony by a victim and an alleged perpetrator of whether, for example, a rape occurred or not, a prosecutor may see the mug shot of a Black male and may implicitly and subconsciously associate aggressiveness and even rape with the particular suspect because, research indicates, people associate Black perpetrators with the crime of rape. (Redfield (Ed.), 2017, p. 71).

Pretrial decisions such as whether to agree to or oppose pretrial release, the amount of bail or personal bond (if any), and which evidence to turn over to the defense may also be affected by prosecutorial bias. At each of these stages, it is "likely that implicit biases to some degree will affect these important discretionary decisions." (Redfield (Ed.), 2017, p. 72).

Trial strategies such as how to use peremptory challenges can also be affected by prosecutor bias. In fact, even the

> judge's own conscious or unconscious racism may lead him[/her] to accept [explanations regarding potentially race-based peremptory challenges] as well supported ... Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels – a challenge that [it is doubtful] all of them can meet. (Redfield (Ed.), 2017, pp. 72-73)

For this and myriad other reasons, it is important to obtain greater diversity in the legal profession including on the bench. Other research has shown that this could help counterbalance any existing systemic bias whether implicit or explicit.

3. Policing

Although law enforcement personnel are not the topic of this study, they work closely with prosecutors, many of whom become judges. The following is thus relevant as bias does not stop

simply because a person assumes an arguably more powerful professional role. Bias in policing has amply been established in the literature. Just one example follows:

> Large bodies of data on discrimination in policing have been accumulated in studies of profiling by police []. Discrimination is evident when there is a greater probability of searching or issuing a citation when the driver is Black or Hispanic rather than White and when there is a greater probability of subjecting Black or Hispanic pedestrians to search …. In summarizing available profiling data, The Leadership Conference on Civil and Human Rights [] concluded that (a) Blacks and Hispanics were stopped more frequently than Whites; (b) among those stopped, higher proportions of Blacks and Hispanics than Whites received citations; (c) among those stopped, higher proportions of Blacks and Hispanics than Whites were subjected to searches; and (d) among those searched, a smaller proportion of the searches of Blacks and Hispanics than of Whites yielded contraband (e.g., drugs or weapons). The lower yields of contraband from searches of Blacks and Hispanics establishes that the greater searching of Blacks and Hispanics is not justified by greater criminal activity of Blacks and Hispanics than of Whites among those who are stopped. The greater rate of discovering contraband from searches of vehicles driven by Whites suggests that White drivers are being stopped and searched at inappropriately low rates. This is consistent with the proposition that discrimination reflected in profiling data is in part—perhaps large part—due to favorable acts of either not stopping White drivers or (as the data show) not searching their vehicles after they are stopped. (Redfield (Ed.), 2017, p. 164)

Other research supports this bias:

> African Americans comprise roughly 40 percent of the prison population in the United States, even though they constitute only 13 percent of the overall population. To be sure, some of this disparity arises from other structural aspects of society, including disparities in poverty and access to educational opportunities. Careful studies of the criminal justice system that control for the background of offenders, however, still reveal pervasive racial disparities. African-American suspects are more likely to be arrested, more likely to be indicted when they are arrested, more likely to be convicted when they are indicted, and serve longer sentences on average than their White counterparts. Studies of "departures" in the federal system (in which a judge deviates from the sentencing guidelines) show that downward departures are much more common for White defendants than for Black defendants—even for identical crimes. (Redfield (Ed.), 2017, p. 164)

Prosecutors are presented with potential defendants who were first identified by law enforcement. Prosecutors see a large and, compared to the population at large, disproportionate amount of people of color. Unless prosecutors were to deliberately make decisions *more* favorable to such people because of their color, which the data does not show is the case and

which, of course, would also be highly questionable professional behavior, the bias against people of color is enhanced via the initial selection bias by law enforcement. Prosecutors may be personally influenced by law enforcement decision-making bias because of the above-mentioned ingroup favoritism that we all carry with us. At bottom, the professional relationship is close, maybe even too much so. Further research could demonstrate whether the large amount of prosecutors who become judges is connected to sentencing concerns. For example, analyses of whether judges who stem from prosecutorial backgrounds issue longer sentences than those who have other professional backgrounds could inform current debates about sentencing reforms.

Crucially, a reasonable concern is whether judges who often immediately before ascending the bench were prosecutors working closely with law enforcement personnel can simply "turn the other cheek" when subsequently judging cases. As mentioned, implicit bias is an important concern in relation to the judiciary as well as other professions. Further research could shed light on this complex psychological issue, but it is reasonable to posit that obtaining a greater share of professionally diverse judges would help alleviate some of the current appearance of a somewhat prosecutorially-friendly bench in at least Los Angeles County where approximately 40% of the sitting judiciary were prosecutors or had other criminal law backgrounds before taking the bench.

4. Judges

As demonstrated, concerns about bias in the justice system are clearly justified. This does not automatically stop when attorneys become judges. For example, a

> study of the link between a federal judge's race and the outcome in Title VII racial harassment cases show a [] clear relationship between a judge's race and case outcome. African American judges were found to rule in favor of the plaintiff in such cases 46% of the time, while chances of success fell drastically if the judge is white (only 21% success rate) or Latina/o (19% success rate). When ideology of judges is considered in addition to their race, results show that Republican white and Latina/o judges rule significantly below the baseline level of likely success. At least with respect to racial

> harassment cases, drawing a white or Latina/o judge versus an African American judge, as well as judge appointed by a Democrat versus a Republican significantly impacts the chances of plaintiff's success. (Vargas, 2008, p. 1473)

Judges are, of course, not immune from this problem; they too "hold implicit biases that can influence their judgment" (Redfield (Ed.), 2017, p. 17). In two empirical studies on implicit bias and judges, both found that judges are either equal to members of the general public or have greater implicit biases (Redfield (Ed.), 2017, p. 66). Steps can and should be taken to ameliorate such bias. That, in turn, presumes that judges recognize the need to do so in the first place. This may not be the case because, importantly,

> [j]udges also are likely to succumb to the "overconfidence effect, " where [they] believe that [they] are better than average in a whole host of different ways" including being less biased …. [R]esearch demonstrates that judges are inclined to make the same sorts of favorable assumptions about their own abilities that non-judges do." (Redfield (Ed.), 2017, p. 17)

In one study, for example, state administrative law judges rated their own ability to "avoid racial prejudice in decision-making" to be in the top half of other judges (Redfield (Ed.), 2017, p. 66). In a national empirical study, the researcher – also a judge - found that 92% of senior federal district judges, 87% of non-senior federal district judges, 72% of U.S. magistrate judges, 77% of federal bankruptcy judges, and 96% of federal probation and pre-trial service officers ranked themselves in the top 25% of their colleagues in their ability to make decisions free from racial bias (Redfield (Ed.), 2017, pp. 66-67). As Justice Anthony Kennedy once pointed out: "Bias is easy to attribute to others and difficult to discern in oneself" (Redfield (Ed.), 2017, p. 67). "Because of this very strong cognitive [] bias, judges are unlikely to question whether their decisions and actions are influenced by either explicit or implicit bias" (Redfield (Ed.), 2017, p. 67). Further,

> [b]ecause invidious influences often arise as emotional reactions, the influence that emotion has on judges has the potential to undermine judges' egalitarian commitments.

> Research suggests that judges do not easily set aside their intuitions, even when their intuitions are misleading and even when doing so is essential to being impartial. (Redfield (Ed.), 2017, p. 98)

Bias not only affects judges once they are on the bench; it also affects their ability to get there in the first place as well as their ability to obtain higher office. Questionnaires probing into judicial candidates' backgrounds – professional and even personal - form an integral part of such candidates obtaining favorable bar association ratings and further endorsements by key organizations. In many states, judicial performance evaluations ("JPEs") are a critical part of selecting judges. This is especially so in states using merit-based selection systems. These evaluations can also apply in states with retention voting by the public (Redfield (Ed.), 2017, p. 73). However,

> there is significant cause for concern about JPE attorney surveys. The sex and race disparities in the Judging the Judges survey act as a thumb on the scales, systematically disadvantaging groups that have been traditionally underrepresented on the bench. There is not a single category of questions that escapes this problem; the effects of judge sex and race are significant, large, and consistent across all of the dimensions of judicial performance evaluated by the Judging the Judges survey. (Redfield (Ed.), 2017, p. 74)

This should be of great concern to the legal profession, academic researchers, and the general public. It is critical to counteract the fact that implicit biases are affecting judgments about electing judges or about the merits of selecting or retaining judges.

Researchers do not claim that outright hostile prejudice plays a marked role in judicial discrimination. Judges are, needless to say, just people too. Unfortunately, some people are simply hostile towards what they perceive to be their "outgroups." However, "much discrimination occurs without hostile intent; it occurs either as a consequence of social structures … or as a consequence of mental processes that lack animus." (Redfield (Ed.), 2017, p. 177).

This makes it important to further examine and counteract bias on the bench. This is even more so because

> a common denominator in these discrimination-producing societal and mental processes is that [] they all tend to result in favoring already advantaged groups. In this way, discriminatory outcomes will often occur without the intergroup animus that, traditionally, has been a defining feature of prejudice. We do not suggest that prejudice should therefore be reconceived without reference to hostility. That would be too radical…. The important, and perhaps no less radical, conclusion is that in contemporary American society, intergroup discrimination has a potent life that now can occur without intergroup hostility. (Redfield (Ed.), 2017, p. 177)

Worse yet, psychological studies have recently uncovered the phenomenon of "motivated cognition" (Rowell & Bilz, 2021, p. 122). Because human desires encompass much broader goals than simply cognitive accuracy, learning and believing are guided by motives. "A crude way to put this is that people tend to believe what they want to believe" (Rowell & Bilz, 2021, p. 122). "The desire for specific outcomes affects memory, processing, and inferences. That is, people literally perceive the world differently depending on what they wisht to perceive" (Rowell & Bilz, 2021, p. 122). "Changing attitudes and behaviors in domains of strongly motivated cognition is one of the biggest problems the law faces" (Rowell & Bilz, 2021, p. 123). This is relevant in the judicial selection context in general, but especially so in the bar association "evaluation" process where time and time again, the evaluation committees find only trial attorneys – and typically mainly prosecutors – to be "qualified" or "well qualified" despite the presence of other evidence about other types of candidates and literature on the topic (see Results chapter). It appears that the committee members selected (in effect, self-selected) to serve *want* to so strongly believe that they are right that they come to believe that they are. The consistency in rating only trial attorneys and not, for example, attorneys representing NGOs, law professors, or attorneys in private practice, but not conducting trials, demonstrates this bias and

the difficulty in changing bias. Again, correctness in opinions ("accuracy," as it is known in the literature) is not determinative to the opinion-forming; outcomes are.

This may also be relevant to voting behavior demonstrated by voters consistently voting for prosecutors in California (see Results chapter). Voters may simply not scrutinize their own knowledge and belief system to find out if they are right or wrong in so consistently selecting an overwhelming number of prosecutors to be judges. Even if they did, they may be so strongly motivated to believe that it makes sense to be "tough on crime" as they believe prosecutors are and that, for example, the current great homelessness problem in Los Angeles County can be solved via policing, prosecutorial, and judicial action. We are "cognitive misers" (Rowell & Bilz, 2021, p. 35). In most circumstances, we "only attend to features of a decision that are most obvious, pressing, and large – not those that are hard to detect, distant, and incremental" ((Rowell & Bilz, 2021, pp. 35-36). Judicial elections are notoriously difficult for everyday voters to figure out just as judicial decisions are far from easy to trace to various aspects of society with which voters may be dissatisfied. Voters are simply not, when voting for judges, conducting a rigorous, in-depth analysis of the likelihood of positive or negative events occurring if they vote for certain types of candidates or not (in contrast with non-judicial politics where voters can at least identify with most of the rhetoric, arguments, and partisan messages). "In a perfect world with no limits on our resources, we would all be perfect Bayesian analysts. But as cognitive misers who live in a world of physical and cognitive scarcity, it is essentially impossible to live up to that standard on any kind of consistent basis" (Rowell & Bilz, 2021, p. 81). The problem is evident when asking voters to continually determine who gets to sit on a branch of government that addresses some of the most recalcitrant and complex societal problems.

In short, the implications of human psychology for the legal field including the selection of judges are many and serious. Bias may well affect who becomes judge and how judges actually judge cases once they are on the bench. Society wants justice to be blind. (Think the symbol of a blindfolded Lady Justice holding the scales of justice.) We further presume that defendants are innocent until proven guilty in a court of law. We presume and demand equality before the law. We insist that no one is above the law. But many researchers, legal professionals, and everyday citizens are unaware of or, alternatively, choose to ignore how bias in the legal profession may affect these crucial societal aspects. This study was conducted to shed more light on these issues.

G. Inclusive Governance

When President Barack Obama was criticized for appointing a white male (Judge Merrick Garland) to replace Justice Scalia on the United States Supreme Court, he defended his choice by noting that he had, by and large, appointed more African Americans, Hispanics, Asian Americans, and LGBT judges than any other president in history and that the United States now has a majority of women and/or minorities on the circuit courts (Bonneau & Hall 2017). Senator Elizabeth Warren responded,

> I believe that diversity of experience matters. It matters that someone has represented someone other than corporate clients. That they've had real experience with people who can't afford lawyers, that they've had real experience trying to fight for the public interest, that they've had real experience doing something other than representing corporate clients. (Bonneau & Hall, 2017, p. 233)

From these and similar statements, it is clear that "diversity" is a concept that has multiple meanings to different people. Before discussing why diversity is seen as desirable in judicial contexts, it is relevant to note how social scientists define the concept.

First, it becomes important to define "diversity" in this context. The University of California at Berkeley defines diversity as follows:

> "Diversity" refers to both an obvious fact of human life—namely, that there are many different kinds of people—and the idea that this diversity drives cultural, economic, and social vitality and innovation. Indeed, decades of research suggest that intolerance hurts our well-being—and that individuals thrive when they are able to tolerate and embrace the diversity of the world. In North America, the word "diversity" is strongly associated with racial diversity. However, that is just one dimension of the human reality. We also differ in gender, language, manners and culture, social roles, sexual orientation, education, skills, income, and countless other domains. (The Greater Good Science Center at the University of California, Berkeley (*n.d.*), para. 2).

Social scientists usually talk about diversity in at least four different ways:

- *Counting diversity* refers to empirically enumerating differences within a given population. Using this definition, social scientists take a particular population and simply count the members according to specific criteria, often including race, gender, and ethnicity. In addition, it is possible to take a particular unit within a society like a school, workplace, or government and compare its race, ethnic, or gender distribution to that of the general population.
- *Culture diversity* refers to the importance of understanding and appreciating the cultural differences between race, ethnic, and gender groups. Since members of one culture often view others in relation to their own standards, social scientists using the culture diversity definition would argue that it is important to show that differences do not have to be evaluated along a good-bad or moral-immoral scale. With greater tolerance and understanding, the argument goes, different cultural groups can coexist with one another in the same society.
- *Good-for-business diversity* refers to the belief that businesses will be more profitable and government agencies and not-for-profit corporations will be more efficient with diverse labor forces.
- *Conflict diversity* refers to understanding how different groups exist in a hierarchy of inequality in terms of power, privilege, and wealth (Darity, W.A., Jr., 2008, p. 419-420).

In the more specific context of attorneys, the American Bar Association defines diversity as the phrase that describes

> the set of policies, practices, and programs that change the rhetoric of inclusion into empirically measurable change. Diversity includes more than just racial or ethnic diversity. The concept of diversity encompasses all persons of every background, gender, race, sexual orientation, age, and/or disability. (ABA (*n.d.*), para. 4)

As for judicial diversity in particular, three metrics come into play. First, "descriptive diversity" is the "making present of something absent by resemblance or reflection, as in a mirror or in art" (Pitkin, 1967, p. 11). In the words of Bill Clinton, the judiciary should "look like

America" (Vargas, 2008, p. 1428). In other words, it should come to more closely reflect modern citizen demographics. This aspect is important to judicial legitimacy: Citizens are more likely to obey laws that they believe stem from the notion of "we the people;" in other words, citizens themselves and not (only) a remote, top-down governance structure that does not sufficiently address their needs, concerns, and values.

Second, "symbolic diversity" communicates values about what our society stands for or, perhaps more precisely, what ideals presidents and political parties champion and thus believe society should come to stand for (Vargas, 2008, p. 1430). It is the most powerful when a president or other government executive appoints the first minority to a certain position such as what happened recently when President Biden appointed the first African-American female to the United States Supreme Court. In doing so, a "symbolic barrier" is broken signaling that the executive believes in righting the wrongs of the past and in the values of diversity (Vargas, 2008, p. 1430).

The phrase "viewpoint diversity" is self-explanatory. The concept is discussed in judicial and other societal contexts. In the former, it promotes inclusiveness, credibility of the rule of law, and enhanced decision-making (Vargas, 2008). Diverse life experiences and world views will add to traditional and identity viewpoints, thus promoting both more balanced judicial deliberations (when panels of judges decide cases) and judicial decisions better reflecting the experiences of everyone in modern American society.

In the judicial selection context, much has, for good reason, been written about race and ethnicity as well as gender aspects. However, while this research project will examine gender diversity, it mainly focuses on gender and professional diversity which, in turn, encompasses age and immigration status, among other aspects. Other types of diversity are, of course, also

relevant to the discussion, but outside the scope of this work. More research would complement and inform the debate about judicial diversity. For example, this goes to sexuality and gender identification identity, survivors of serious diseases, veterans, sole family providers and/or sole caregivers of seriously ill family members. In this research project, "diversity" is interpreted broadly and is thus not considered to be only an issue of gender, race, or ethnicity. Of course, this is not to downplay the continued importance of the lack of diversity in relation to women and people of color on state court benches, but rather to point out that other aspects of a person's background can add much needed diversity to state court benches and thus make them more representative of the people they serve.

Inclusive governance is important in relation to issues of overall representation in government contexts (Graham, 2004; Bonneau & Hall, 2017), gender and race/ethnicity (Wynn & Mazur, 2004, Vargas, 2008; Bonneau & Hall, 2017; George & Yoon, 2016; Frederick & Streb, 2008), thought and idea representation and imagination (Wynn & Mazur, 2004), viewpoint diversity (Wynn & Mazur, 2004; Vargas, 2008), judicial quality (Vargas, 2008), transparency in judicial appointment and election processes (Vargas, 2008), immigration background (Newsom, 2022), professional backgrounds (Resnik, 2005; Bobelian, 2022), political desirability (Frederick & Streb, 2008), equality and justice (Frederick & Streb, 2008), and more. Scholars have extensively examined inclusive governance and continue to do so. It is beyond the scope of this dissertation to provide a more comprehensive list than the examples just mentioned. Suffice it to say that literature abounds on this important topic. It is also outside the scope of this dissertation to go in full depth with the notion of inclusive governance on the bench. A few aspects are highly relevant here, though.

First, an emergent theme in democratic and judicial selection theory is that

> all kinds of people are entitled to participate as political equals and that access to judgeships ought to be more fairly distributed across groups of aspirants. The composition of a judiciary – if all-white or all-male or all-upper class becomes a problem of equality and legitimacy … That democracy does not impose a particular system on a country does not decide the legitimacy of a particular processes if proven to be systematically unfair to identifiable segments of a polity. (Resnick, 2005, p. 597)

"[L]egitimacy may be enhanced by non-traditional judges as their decisions are more infused with traditionally excluded perspectives and their presence enhances the appearance of impartiality for litigants who appear before the court and for the public at large" (Bonneau & Hall, 2017, p. 235).

The goals of obtaining an inclusive judiciary also relate to the independence/impartiality dichotomy. Just as jury diversity is considered important to fairness in trials, "judicial diversity promotes impartiality by ensuring that no one viewpoint, perspective, or set of values can persistently dominate legal decision making … [I]n our pursuit to attain an independent and impartial judiciary, we [also] cannot escape the reality – and consequences – that each judge brings to the bench a sum of life experience" (Wynn & Mazur, 2004, pp. 785, 783). This may be seen to be a plus to the modern judiciary which must be able to address an ever-increasing number of complex problems involving many types of stakeholders in today's diversifying society.

At the trial level, judges combine the law with facts that may be perceived differently by judges with different background. Inclusive governance and the importance of closely considering how to further improve the bench (as other professions) are clear.

> On the trial court level, judging is substantially a discretionary affair and the art of judging begins with the portrayal of the facts … The entire criminal and civil justice system, from the trial to every appellate level, is predicated on the uncontrollable power of trial judges to choose the facts ... to believe one witness rather than another. In this fact-finding process, judges function as representatives and articulate, engage and affirm the familiar narratives that they share with their constituent communities. (Wynn & Mazur, 2004, p. 788)

As for the judicial deliberation process, Judge Posner, who otherwise took a pragmatic approach to the law and shied away from a more normative model, noted that "different judges, each with his[/her] own idea of the community's needs and interests, will weigh consequences differently" (Wynn & Mazur, 2004, p. 789). Further, Posner noted that a diverse "judiciary is more representative, and its decisions will therefore command greater acceptance in a diverse society than would the decisions of a mandarin court" (Wynn & Mazur, 2004, p. 789). Other judges back up this notion. For example,

> in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion. It provides for constant input from judges who have seen different kinds of problems in their pre-judicial careers, and have sometimes seen the same problems from different angles. A deliberative process enhanced by a broad range of perspectives necessarily results in better and more nuanced opinions—opinions which, while remaining true to the rule of law, over time allow for a fuller and richer evolution of the law. (Vargas, 2008, p. 1436)

As for professions – one of the main variables examined in this dissertation - some believe that the U.S. Supreme Court would benefit from persons having held political office or served as trial attorneys (Resnik, 2005). Others believe that all appellate justices should be culled from lower court benches (Resnik, 2005). Some countries require that candidates for judgeships be of a certain age or have had specific kinds of professional training (Resnik, 2005). Such criteria are often too general to be useful. Instead, they may be constraining, such as for example expecting judges (or justices) to have only one particular background (Resnik, 2005). Instead, broad professional experience, competence, and integrity are more useful criteria. At bottom, "a majority with untrammeled power to set government policy is in a position to deal itself benefits at the expense of the remaining minority even when there is no relevant difference between the two groups" (Resnik, 2005, p. 600). This goes for professions as well. The American court system could, in general, benefit from greater professional diversity. For example,

> the institution would benefit from an injection of members with expertise in federalism, legislative interpretation and regulatory authority — contentious topics that frequently come before the [appellate and supreme court] justices. A governor might provide unique perspectives on federalism and the contours of states' rights. A seasoned member of Congress could offer lessons in legislative decision-making and statutory construction. The head of a federal agency could possess an insider's account of the complex nature and scope of regulatory authority. The benefits of having justices with wide-ranging backgrounds extends beyond their expertise. The insights Thurgood Marshall shared from his work as a civil rights advocate enlightened his white colleagues who had never endured racism. Sandra Day O'Connor credited her time in the Arizona legislature for her ability to build coalitions and arrive at narrowly tailored compromises on the court. (Bobelian, 2022, para. 14)

President Biden's pick(s) for future Supreme Court justices, if any, could also "reach[] beyond the political ranks for accomplished lawyers from academia, the private sector and advocacy groups" (Bobelian, 2022). In August 2022, President Biden nominated law professor Sarah Cleveland to the International Court of Justice; a promising step on a hopeful path towards more professional diversity on tribunals near and far (Blinken, August 23, 2022). Other law professors have been appointed to executive functions in the Biden administration as well.

In a commentary on this, one prosecutor noted her support of the incoming Biden administration's call for more federal judicial candidates with backgrounds as public defenders and civil rights attorneys (George, 2021). Her reasoning follows.

> Prosecutors are the most powerful players in the criminal legal system. Prosecutors decide whether to bring charges, what charges to bring, and recommend what the punishment should be … But there is another reason law students and lawyers are told to become prosecutors: Judges are much more likely to have been prosecutors than public defenders and civil rights attorneys. For every public defender on the federal bench, there are a little more than four former prosecutors. The ratio is seven to one if you compare lawyers who represented the government versus lawyers who represented individuals fighting the government. At the Supreme Court level, Ruth Bader Ginsburg was the only recent justice who practiced solely as a civil rights attorney. Thurgood Marshall, who retired from the high bench nearly three decades ago, was the last justice with criminal defense experience
> .
> The lack of professional diversity on the bench has ensured that our courts can disproportionately reflect the viewpoints of the most powerful institutions and individuals in our country. Prosecutors' jobs often depend on maintaining good

> relationships with police which means that prosecutors who become judges bring that experience with them. The extent to which a prosecutor turned judge's prior professional experience impacts their view of the law has grave implications for regulating law enforcement and holding police accountable for misconduct, including the near impossibility of suing police and prosecutors for civil rights violations under the judge-made doctrine of "qualified immunity."
>
> As Justice Sandra Day O'Connor wrote, reflecting on Justice Marshall's impact on the court, "His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. … At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences."… A Biden administration should appoint more justices like Marshall and Ginsburg on the bench by committing to nominate more civil rights attorneys, public defenders, and lawyers with an innate understanding of how the deck has been stacked against marginalized people in our country. (George, 2021, para. 9)

In short, professional diversity is often overlooked in both literature and practice. This dissertation seeks to remedy some of that.

For gender, women comprise roughly one-half of the U.S. population and one-half of American law students, but in 2022, only 33% of state general jurisdiction courts were females (National Association of Women Judges, (*n.d.*)).

In 2017, Bonneau and Hall noted that numerous efforts had been made in the late twentieth century to increase the number and proportion of women and other minority judges on both the state and federal courts. This period of time also saw a reform movement in the states toward greater use of merit selection based on the Missouri Plan. However, "[t]he Missouri Plan may be problematic for non-traditional judges because these potential jurists are not part of the status quo and may not have the same experiences or opportunities as other judicial candidates, which decreases their chances of being selected" (p. 235). In other words, even the Missouri plan may actually diminish inclusive governance on the bench in its current form instead of promoting it as called for by some stakeholders and communities in society.

From 1985-2005, there was, however, an overall improvement in minority statistics on the state appellate court bench. In all states, the share of "non-traditional judges" (women and

minorities collectively) grew by 21.1%. Of that percentage, the number of female judges increased by 19.4%, but other minority judges by just 5.2% (Bonneau & Hall, 2017, p. 242). For all non-traditional candidates, the Missouri Plan actually did *not* lead to the highest increase. The overall increase in all non-traditional judges was 22.5% (bearing in mind the fact that, as analyzed below, even more females might have been appointed had they had a more traditional background) (Bonneau & Hall, 2017, p. 242). In contrast, pure "elite nominations" led to a minority increase of 15.5%, but judicial elections to a 25.2% increase (Bonneau & Hall, 2017, p. 242). For females in particular, the highest increase (22.8%) took place via judicial elections, elite nominations led to a 19.2% increase, and the Missouri plan to an increase of "only" 16.8% (Bonneau & Hall, 2017, p. 242). For other types of minorities, the Missouri Plan led to an 8.8% increase, judicial elections 6.6%, and elite nominations only 0.6%, (Bonneau & Hall, 2017, p. 242).

White women rather than minority female judges saw the greatest improvements. However,

> [w]hereas the rates of judicial diversity have increased over the twenty-year period examined, they still remain below the numbers of these political minorities in the overall population and the bar. The fact remains that the highest levels of the legal profession do not yet appear to be fully open to women and minorities who aspire to become state court judges and justices, or at least this was the case as of 2005. (Bonneau & Hall, 2017, p. 229)

Some scholars find that the reality of how stereotypes work against females and other minorities means that minority candidates in judicial elections often lose (Vargas, 2004).

Others note that although women continue to be numerically underrepresented in elected office at all levels of government, there is no systematic bias against women candidates in state appellate court races (Frederick & Streb, 2008). They find that there is, in fact, some evidence that women may actually perform slightly better than men in elections and that at least, judicial

elections do not hinder gender diversity on the state appellate bench. When women run for public office, they tend to win at the same rate as men, *ceteris parebus*. This is also supported by Bonneau & Hall (2017) who, as mentioned, found that by 2005, women and minorities were just as likely or more to reach the bench via election or the Missouri Plan as they were from elite nominations. But importantly, another explanation for why women do not win elections in higher numbers than they do that

> since women comprise a small share of the candidate pool in [appellate court] elections, there may be a winnowing process where only the strongest female candidates are running in these races. Women may face discrimination from political elites at the entry stage of the campaign process, as they do in state legislative races, which leads to a situation where only the most effective female candidates enter [appellate court] races. Hence, if women did run for judicial offices at the same rate as do men, the results in this study may not hold. (Frederick & Streb, 2008, p. 951)

"Women may not experience any less success achieving representation on the judiciary in an elective system than in a merit system, but they may still win at lower [overall] rates than men. Indeed, women may do equally poorly across all systems" (Frederick & Streb, 2008, p. 951). Again, this theory can be explained by considering females self-selecting out from running in the first place in larger numbers than men do. More research could shed relevant light on this.

Some scholars find that the reality of how stereotypes work against females and other minorities means that minority candidates in judicial elections often lose (Vargas, 2004). Stereotypes may well affect the election of female and other minority judicial candidates. For example, research suggests that female candidates and officeholders are perceived as more liberal than are men in the same positions (Frederick & Streb, 2008). "In the context of judicial campaigns, this propensity may cast women in a negative light and impair their chances for electoral advancement, particularly among voters who support the death penalty and harsher

sentencing or are skeptical of the prospect of a more liberal, activist judicial branch in general" (Frederick & Streb, 2008, p. 939).

> Gender differences exist in the traits voters assign to male and female politicians. In general, men are thought of as stronger leaders, possessing a higher level of self-confidence and being more assertive, while women gain the edge on compassion, empathy, and trustworthiness. In the process of evaluating judicial candidates, voters may see a male judicial candidate as more likely to fit the image of someone with the strength and leadership needed for this position … [T]he role of judge may be perceived as a man's job by the voters. On the other hand, perceptions that women are more honest and trustworthy than men may mean that female candidates are viewed by voters as better suited to be judges because they would administer justice in a more impartial fashion. (Frederick & Streb, 2008, p. 939)

In comparison, "women tend to hold an advantage on handling education, social welfare, and gender equity issues in contrast to male candidates, who voters stereotypically see as being stronger in areas such as crime and national security" (Frederick & Streb, 2008, p. 940). As voters predominantly consider criminal issues and "being tough on crime" to be relevant in the judicial election context, men thus arguably still have an advantage over women. This may well be amplified by the ballot designations chosen by many male candidates as will be described in the Findings and Discussion chapter below.

It cannot reasonably be said that the justice system in the United States is yet truly fair to all citizens. This is a problem which, of course, extends beyond the judiciary, but to be fair, the judiciary must be seen as still forming part of the problem. This is, of course, not a matter of placing blame at any individuals. Rather, it is a matter of thinking about one aspect of our governance system that must change with changing demographics and notions of quality, fairness, diversity, and more. In other words,

> [l]aw is about conflict and dialogue, and reaching tentative resolutions through the tools of legal analysis. If we can commit to such an integrative process, the rule of law that judges fashion will eventually yield rules and understandings that seem believable to all members of our society. To get there, we must be willing to structure a selection and confirmation process that purposefully inserts a critical mass of dissenters [and other

> diverse candidates] into the bench, and not be content with a system that homogenizes voices, ideologies, and experiences. (Vargas, 2008, p. 1474)

The public discourse on judicial diversity has suffered from at least two important shortcomings.

> First, calls for increased diversity from advocates, bar associations, the executive and legislative branches, and judges are often couched in terms of the value of minority role models and of increased public confidence in the judicial system. By failing to articulate fully the substantive benefits of diversity, these discussions reduce the debate to a matter of counting the number of people of color on the bench. The value and need for diversity is far more complex and pressing than those calls suggest. Above all, diversification is essential to a fair and impartial justice system. (Williams, 2005, p. 1)

Scholars disagree on whether elections or merit selections, respectively, improve inclusive governance. For example, Bonneau and Hall (2009) find that

> diversity on the bench is not affected by the particular methods for staffing the bench. In other words, state supreme court justices tend to have the same overall characteristics, regardless of the method by which they were initially recruited. Partisan elections do not produce less qualified judges or disfavor women or minorities relative to nonpartisan elections, the Missouri Plan, or appointment systems. (P. 136)

While this may be the case, it is then perhaps also conversely the case that elections – partisan or otherwise – do not yet give women or other minorities the support that might work to better improve inclusive bench representation.

In short, "[d]iversity on the bench must go beyond token appointments and instead achieve critical mass so that courts can become pluralistic dialogic institutions" (Vargas, 2004, p. 138). This is so because "[i]n the absence of diversity, the goals of obtaining an impartial and representative judiciary are credibly challenged" (Wynn & Mazur, 2004, pp. 776, 791). Overall,

> [o]ur courts must be representative in order to fulfill their purposes. Our laws are premised in part on the idea that our courts will be staffed by judges who can understand the circumstances of the communities which they serve. Our judicial system depends on the general public's belief in its legitimacy. Both of these foundational principles require a bench that is representative of the people whom the courts serve. (George & Yoon, 2016, p. 3)

H. Gatekeeping: The Role of Institutions in Judicial Elections

This section will identify the key governance and private institutions in judicial elections - legislatures, state bar associations, local bar associations, and political parties – and analyze the formal and informal gatekeeping and signaling functions played by these institutions.

1. Legislative requirements

In Texas, "district courts" are the state courts of general jurisdiction (Texas Judicial Branch (*n.d.*)).

> The judges of the Texas District Courts are chosen in partisan elections. They serve four-year terms, after which they must run for re-election if they wish to remain on the court. To serve on the district courts, a judge must be: a U.S. citizen; a resident of Texas; licensed to practice law in the state; between the ages of 25 and 75; a practicing lawyer and/or state judge for at least four years; and a resident of his or her respective judicial district for at least two years. While no judge older than 74 may run for office, sitting judges who turn 75 are permitted to remain on the court until their term expires … The district courts fill vacancies by gubernatorial appointment with senate approval. Judges serve until the next general election, at which point they may compete to fill the remainder of the unexpired term. (Ballotpedia – Judicial Selection in Texas (*n.d.*), para 10)

In California, the state trial courts are known as "superior courts" (California Courts – the Judicial Branch of California (*n.d.*).

> The California Legislature determines the number of judges in each court. Superior court judges serve six-year terms and are elected by county voters on a nonpartisan ballot at a general election. Vacancies are filled through appointment by the Governor. A superior court judge must have been an attorney admitted to practice law in California or have served as a judge of a court of record in this state for at least 10 years immediately preceding election or appointment. (California Judicial Council (*n.d.*))

In California, however, candidates may list their professional titles on the ballots. However, different rules apply to attorneys in non-governmental and those in governmental employ. This inequality stems from the following rules, which took effect starting with the 2018 election cycle.

Non-governmental candidates for judicial office in California may use only three words in their ballot designations (California Elections Code § 13107(a)). These may not be descriptive. Rather, they must designate either "the current principal professions, vocations, or occupations of the candidate, or the principal professions, vocations, or occupations of the candidate during the calendar year immediately preceding the filing of nomination documents." In particular,

> a candidate for superior court judge who is an active member of the State Bar and practices law as one of his or her principal professions shall use one of the following ballot designations as his or her ballot designation: "Attorney," "Attorney at Law," "Lawyer," or "Counselor at Law." The designations "Attorney" and "Lawyer" may be used in combination with one other current principal profession, vocation, or occupation of the candidate, or the principal profession, vocation, or occupation of the candidate during the calendar year immediately preceding the filing of nomination documents. (California Elections Code § 13107(c))

Ballot designations may not "mislead voters," "suggest evaluations of the candidates," use words indicating former professional status, use names of political parties or words referring to religious affiliations, among other limits (California Elections Code § 13107(e)). Thus, one may, for example, run as "attorney," "attorney at law," "attorney/law professor," or other true titles which one holds or has held for up to the year-limit just mentioned. One may not, however, run as, for example, "civil rights attorney," "attorney/community organizer," or "anti-eviction attorney." (See also Appendix C. for the official California Ballot Designation Cheat Sheet on the wording of ballot designations (presumably, no pun was intended in selecting that particular form title)).

While non-governmental attorneys can only use three words for their ballot designations, prosecutors (typically constituting the majority of candidates for office in each cycle) and other government attorneys may use more. This is so because in addition to the three words denoting current or recent titles, their designations must also contain relevant qualifiers, as follows:

A. If the candidate is an official or employee of a city, the name of the city shall appear preceded by the words "City of."

B. If the candidate is an official or employee of a county, the name of the county shall appear preceded by the words "County of."

C. If the candidate is an official or employee of a city and county, the name of the city and county shall appear preceded by the words "City and County."

D. If the candidate performs quasi-judicial functions for a governmental agency, the full name of the agency shall be included. (California Elections Code § 13107(b)(3)).

Prosecutors thus very typically use the ballot designation "Deputy District Attorney, County of Los Angeles;" a total of seven words. In June 2022, one candidate ran as "Supervising Administrative Law Judge, California Department of Social Services" (but lost); a total of nine words (County of Los Angeles, Official Ballot, June 7, 2022). While it may appear trite to mention a mere number of words on ballots in election contexts, cues are important. Titles function as such cues.

2. State and local bar associations

In general, people confuse "state bar associations" with local "bar associations." The difference, however, is vast: the former are the government regulating agencies overseeing admittance to the "bar;" i.e., the practice of law in every state. Accordingly, state bar associations also oversee potential attorney discipline, continuing legal education requirements, and more. To be licensed to practice in a state, attorneys have to pay a membership as, typically "active" or "inactive" members (other rules may apply to retired attorneys). In stark contrast, local bar associations are voluntary, nongovernmental organizations consisting of fee-paying members. Local bar associations often "evaluate" or "rate" candidates for judicial elected office. They are also sometimes called upon by executive offices to conduct background investigations of candidates for appointment. They do not "endorse" candidates as do some media outlets and

other private associations. Similarly, state bar associations do not "evaluate" candidates for office. Again, they "simply" oversee that attorneys follow existing law and ethical guidelines.

In election years in Houston, the Houston Bar Association ("HBA") distributes a judicial preference poll before the general election, asking, notably, all its members to vote for their preferred candidates in contested races (HBA (*n.d.*)). The total number of votes for each candidate is listed without any categorial descriptions. This system changed after the 2016 election. For the 2016 election and elections prior to that, the Houston Bar Association would also use the categorical descriptors "well qualified," "qualified," "not qualified," and not rated" (HBA, 2016).

The Judicial Elections Evaluations Committee ("JEEC") of the Los Angeles County Bar Association "evaluates" judicial candidates to be "exceptionally well qualified," "well qualified," "qualified," or "not qualified" (LACBA (*n.d.*)). LACBA's President appoints the JEEC Chair, who in turn appoints twenty or more volunteers to serve on the JEEC (LACBA Rules of Procedure (2015)). The Los Angeles County Bar Association's evaluation standards are demonstrably vague:

> To be "Exceptionally Well Qualified," the candidate must possess qualities and attributes considered to be of remarkable or extraordinary superiority so that, without real doubt, the candidate is deemed fit to perform the judicial function with distinction. To be "Well Qualified," the candidate must possess professional ability, experience, competence, integrity and temperament indicative of superior fitness to perform the judicial function with a high degree of skill and effectiveness.
>
> To be "Qualified," the candidate must possess professional ability, experience, competence, integrity and temperament indicative of fitness to perform the judicial function satisfactorily.
>
> To be "Not Qualified," the candidate lacks one or more of the qualities of professional ability, experience, competence, integrity and temperament indicative of fitness to perform the judicial function satisfactorily.
>
> These standards necessarily contemplate a quantitative and qualitative evaluation. The

> standards are, therefore, very different from the eligibility provisions for Superior Court judicial officers set forth in the California Constitution, which merely require that the individual be a member of the State Bar or have served on a court for ten years. (Final Report of the 2022 Judicial Elections Evaluation Committee of the Los Angeles County Bar Association, April 27, 2022, p. 3)

While these descriptions may, at first blush, seem fairly specific, they are not. For example, it is not clear what, from year to year, with varying self-selected members identified from a pool of candidates by one single person – the JEEC chair of the committee – may be thought by the committee members to be, for example, "superior fitness," "high degree of skill and effectiveness," "experience," "competence," or the lack thereof. And while the rules acknowledge a "quantitative" component, they entirely fail to state what that consists of and what numbers acceptable to the committee members would be. Candidacy evaluation votes are held in secret. An "appeal" to the entire committee from a subgroup thereof is possible, but candidates are only given their blank rating and a very sparse supportive reasoning, but no guidelines as to what may actually change the body's mind on an appeal. The appeal follows a few short weeks after the first hearing. Guessing and a great lack of transparency taints the process. Bias among committee members or diversity, as called for by LACBA, measured along many scales, are apparently not taken into account just as no guidelines exist upon which the committee members or candidates could otherwise rely.

The "evaluation" results are published on the association's website and distributed widely through email without, importantly, stating reasons why the association chose the different "evaluations." Thus, candidates may publicly be labelled "not qualified" without any publicly available explanation why the committee members thought so. The candidates may, of course, chose to disclose such information if asked, but very typically in a low information race, general voters do not go through the trouble of finding and contacting an individual candidate about a bar evaluation. The Findings chapter below will examine the effects of local bar "evaluations."

3. Organizational endorsement procedures

Typically, groups that endorse candidates will, soon after the candidacies have formally declared their candidacies via registrations in the pertinent government election databases, distribute questionnaires via email to the candidates, asking them to return these within a given and often relatively short deadline. The questionnaires range from the short to the exceptionally long. Candidates are asked for information ranging from what is to be expected to the obscure and irrelevant. Questionnaires are often worded in such a way that they can be distributed to both judicial and non-judicial candidates alike, making it easier for the associations and parties to use only one questionnaire, but making it more difficult for judicial candidates to balance between what they can say under ethical canons and what they cannot after the 2002 U.S. Supreme Court Decision in *Republican Party v. White* ("*White*"). After the written questionnaires have been issued, candidates are typically invited to individual interviews with the associations' judicial endorsement committees (see also Salokar, 2007, pp. 347-348).

Some bar associations strongly appear to be biased in favor of trial attorneys. The Results chapter below will determine whether or not this is the case, but of note here is the wording of many of the questions on, for example, the Los Angeles County Bar Association's Judicial Elections Evaluation Committee. Examples follow. The full questionnaire is reproduced as Appendix A. The association's heavy interest in trial practice experience is clear when seen in juxtaposition with the fact that other questions do not inquire into other types of professional backgrounds that are equally, if not more, relevant to a judicial position than trial court experience:

> With respect to each legal job you have held after being licensed to practice, state the following: The name of the law firm, law office, company, governmental entity or other group with which you were practicing … The nature of your employment relationship, e.g., whether an associate, partner, self-employed, house counsel, assistant public

> defender, etc. … If you have practiced law during the last five years but have not appeared in court regularly during such time, provide the following information: [] Describe the nature of your practice during the last five years …. State whether your practice ever included regular court appearances and, if so, [which courts] …. State the approximate number of cases in courts of record that you have tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel. Have you ever held a position as a judge, commissioner or other bench officer? …. Provide the names, addresses and telephone numbers of 75 lawyers, judges or other persons with whom you have had professional contact over the past ten years, including everyone listed in this document. After each name, identify your relationship to the reference, i.e., opposition attorney, co-counsel, appeared before, bar association, etc. (Judicial Elections Handbook (*n.d.*), pp. 29, 35, 38, 42, 51)

As regards the information on the questionnaires,

> [i]t has generally been the case that organizations that endorse judges know there are boundaries to the kinds of information a judicial candidate can, and would, provide … Candidates may answer questions that probe their personal opinions, provided that the candidate makes it clear that as a member of the judiciary, the judge will be bound to follow the law and not personal inclinations …. The [Florida] Ethics Advisory Committee habitually warns candidates that the revelation of their personal opinions can jeopardize the public's perception that the judge can remain fair and impartial in cases involving the topic on which the judge has spoken. In such an event, the judge would be forced to recuse himself. (Salokar, 2007, p. 351)

However, many trial court candidates refuse to answer questions that conceivably could indicate their opinions on relevant issues of law and court opinions about issues such as abortions, the death penalty, police reform, sentencing issues, assisted suicide, and gay adoption (see, e.g., Salokar, 2007, p. 351). Salokar (2007) reports that "[w]hile most of the responding trial-court candidates marked "decline," [to such questions], [only] fourteen of the fifty-three respondents named a U.S. Supreme Court justice who reflected their philosophy, and [only] seventeen apparently gave more substantive answers…." (p. 352). Practical experience and anecdotal evidence shows that most candidates are afraid of listing their opinions about specific issues of law that could be seen as controversial. In contrast, some are not afraid of identifying with the "judicial philosophy" of Supreme Court justices, which in turn is an easily identifiable political aspect as the justices fall into only two categories – liberal or conservative – which

typically reflects the views of the president who appointed them. Salokar (2007) further finds that "[j]udicial candidates [may] reveal their personal beliefs and politics in a variety of ways during the typical campaign. Many revelations are discreet, requiring the astute observer to engage in a bit of critical thinking" (p. 353).

The juxtaposition here is voter's interest in knowing about candidates' stances on relevant issues on one side and on the other, existing, but often misinterpreted, canons of ethics prohibiting candidates from committing themselves to certain case outcomes or issue resolutions. But it may not only be fear of violating judicial ethics rules that cause candidates to refuse to answer certain questions. It may also well be a tactical political decision: by leaving some things unspoken, candidates at least do not lose votes on that account. (Of course, candidates could gain others by being more candid).

Judges are required and expected appear to be fair and open-minded to both or all sides of matters. This means that they should not come across as having pre-judged cases or issues. But it does not mean that they should hide behind the shield of judicial canons. State bar associations have, as demonstrated, attempted to narrow what judicial candidates may comment on, but the U.S. Supreme Court has given clear direction on the issue. That ought to be taken into account by candidates and other players. However, that is far from always the case. Where secrecy may prevail, democracy suffers.

Endorsements even without underlying candidate answers have a similar potential for signaling views on the law (or politics) such as a belief in a "law and order agenda." For example,

> Imagine how a former prosecutor who is running for judge might answer a voter's question as to whether he or she will be tough on crime. "I'm sorry, I really can't answer that question. As a judge, I will be obligated to follow the law and treat each case fairly and impartially. I can tell you, however, that I have a lot of courtroom experience; I

> have been a prosecutor for eight years. Here is a brochure, by the way. You might want to see who has endorsed my candidacy." Prominently displayed are the endorsements of organizations like Mothers Against Drunk Driving, Crime Watch, the Police Benevolent Association, the Fraternal Order of Police, a local victims' advocacy organization, and a list of local sheriffs. In this scenario, the candidate has not explicitly stated a position with respect to how he or she, as a judge, would deal with criminals. There is no explicit pledge or promise to be tough on crime, nor is there a commitment. However, the candidate has certainly sent an implicit message to the voter by discussing prosecutorial experience and displaying endorsements. The candidate should also seek out endorsements from groups that advocate for the accused. This is, however, problematic because few exist, even fewer of them make judicial endorsements, and given our hypothetical candidate's professional experience, it is unlikely she would secure such an organization's backing. (Salokar, 2007, p. 353)

The very names of local attorney associations – in short, “bar associations” – are highly problematic because experience shows that every day voters tend to believe that those are government-run state bar associations, not, as is the case, mere voluntary associations of professionals. Only people relatively familiar with the practice of law will know the difference. It might not be realistic to expect that the bar associations will do anything to rectify such confusion. This is so because they are also “political” entities (although not necessarily so from a partisan point of view) and wish to have “their” candidates elected. But from an ethical and democratic point of view, it is a concern that they do not do more to educate the general public about what they are and, importantly, what they are not. Having said that, the general public are, of course, also responsible for their own information-gathering and -processing before voting. As demonstrated, though, the literature shows that voters simply do not educate themselves much, if at all, about judicial and other “low information” races. Hence the name. The reality is that some bar associations enjoy voter ignorance and use this to weigh very heavily in on who gets elected to be judge and thus eventually justice itself as will be demonstrated with the data below. This is of concern in the democratic process.

4. Endorsements by sitting judges

A few states, like California, Wisconsin, North Carolina, and Oregon permit sitting judges to publicly support candidates in judicial races. But importantly, "[w]e do not know whether endorsements by sitting judges are given on the basis of that judge's professional evaluation of the candidates, political preferences, or simply collegial and social relationships (Salokar, 2007, p. 346). Some judges appear to endorse candidates "simply because they have daily or frequent contact with each other" (Salokar, 2007, p. 347), as is the case with incumbents endorsed by other sitting judges. Of course, this does not render an in-depth evaluation of professional skills, despite what voters may believe. Worse,

> [e]ndorsements by sitting judges may have significant value to the public, but they can also present an ethical conflict or the appearance of a conflict when the endorser sits on a court that reviews the successful candidate's later rulings. The endorsing judge has publicly expressed a personal bias in favor of the now-sitting judge and, therefore, has a vested personal interest - in his or her own reputation - in that judge's success. To overrule the endorsed judge's decision would be to suggest publicly that one was wrong in evaluating the candidate. Thus, judicial endorsements can potentially undermine the confidence of parties to litigation that they will be treated fairly when challenging judicial decisions. (Salokar, 2007, p. 347)

5. Political party affiliation and involvement

Political parties are key institutional players in elections. Paradoxically, most elections – judicial and otherwise - in the United States are nonpartisan. "Indeed, scholars have found that three-fourths of municipal elections in the U.S. are nonpartisan and over half of all elections in the U.S. do not contain the party identifications of the candidates on the ballot" (Bonneau & Loepp, 2014, p. 122). Judges are expected to be above the fray of party politics. At the same time, scholars have demonstrated that parties are taking an increasingly larger role in judicial elections, even in nonpartisan ones (Streb (Ed.), 2007). Nonpartisan judicial elections are becoming nonpartisan in name only: "Parties are more active participants in partisan elections

than nonpartisan elections, but are still quite active in nonpartisan contests. Local parties are the spokes in candidate-centered wheels" (Streb (Ed.), 2007, p. 100).

Salokar (2007) notes that "in states that hold nonpartisan elections, judicial candidates are generally not permitted to identify or announce endorsements from political parties or associations identified with political parties … and candidates may not declare their own party affiliation" (p. 345). This is the case in California, for example. But while judicial candidates do not list their official partisan affiliations or beliefs, judicial elections are arguably only *officially* nonpartisan. Candidates very typically announce all endorsements, including those from political parties, to earn as many votes as possible. In fact, approximately 60% of county chairs report that their party organization at least sometimes endorse candidates for judicial office (Streb (Ed.), 2007, p. 108). Further, approximately 56% of county chairs are at least "somewhat involved" in the recruitment[9] of judicial candidates (Streb (Ed.), 2007, p. 103). Even in counties with nonpartisan elections, close to half of the chairs have a role in the recruitment (Streb (Ed.), 2007, p. 103). "Interestingly, because many country chairs are lawyers themselves and, therefore, have connections with the local legal community, they indicate having significant influence over which candidates run" (Streb (Ed.), 2007, p. 103).

Not only are political parties involved even in nonpartisan elections in general, but they are, as described becoming increasingly involved in judicial elections in particular. "While most supporters of judicial elections believe that parties should take no role in them, these results indicate that just the opposite is true. There is also no evidence that parties are going to lessen their involvement. (Streb (Ed.), 2007, p. 110). Thus, nonpartisan elections do not have the effect

[9] Streb uses the word "recruitment" although from an outside point of view, candidates self-select and decide on their own participation in judicial elections. However, as political parties play as large of a role in judicial selections and might even be able to determine the frontrunners in races, if not also the winners, it is not incorrect to think of it as a recruitment process.

of keeping a significant number of party organizations from trying to get "their" candidates to run for judge and to win when they do (Streb (Ed.), 2007, p. 103). This may not be surprising to political sophisticates. It is impossible to keep party affiliation information away from even only moderately politically sophisticated voters. But this may actually not be a problem from a democratic angle as party identification is the most crucial of all indicators of ideology: "As political scientists have highlighted for decades, the partisan cue is essential for voters to make decisions in a low-information environment" (Bonneau & Hall, 2017, p. 154). Judicial elections are the epitome of low-information elections.

A 1998 Ohio study demonstrated the importance of names, party affiliations, city of residence, and occupation, albeit in the context of a Supreme Court election (Klein & Baum, 2001). Incidentally, the researchers noted what is still the case, namely that "specific characteristic[s] of the ballot - the information it provides about candidates - has received very little systematic study. This is true even though ballot information varies greatly across jurisdictions and has been extensively debated by policymakers and reformers" (p. 709).

In the study, one group was given no information about the candidates other than their names, which is the same as what was provided on the actual Ohio ballots. A second group was told the candidates' names and party affiliations. A third learned the names and occupations (including incumbency) of the candidates, while the fourth group was told their names and cities of residence. These researchers found that city and incumbency had almost no effect on the vote with the exception of one candidate (pp. 716-718). However, "partisan information on the ballot has a powerful impact on voter participation (p. 720). When accounting for whether the study respondents were political sophisticates, the researchers still found the impact of party

information “striking” (p. 721). The average impact of the effect of obtaining party information was, on average, 15% (p. 722). Thus,

> [s]imply providing respondents with the candidates' party affiliations had an enormous impact on their willingness to choose a candidate and on the choice of one candidate over another. Not only do a great many voters come to the polls uncertain about what they will do in particular contests, but they are willing to choose a course of action at the last possible moment on the basis of one piece of information. Importantly, however, voters will not be influenced by just any information. Informing them of candidates' incumbency status and their cities of residence seemed to have little effect on their behavior. Rather, party had a unique relevance in voters' eyes. (Klein & Baum, 2001, p. 725)

As for occupational cues in combination with party affiliation, however, Klein & Baum’s study featured a significant weakness: all of the incumbents' opponents were also sitting judges at lower levels. Still,

> [v]oters might not make a sharp distinction between lower court judges and incumbent members of the supreme court. Where one candidate is not a sitting judge, the effects may be greater …. Nevertheless, it seems safe to conclude that, on the whole, the impact of incumbency information is substantially less than that of party information (Klein & Baum, 2001, p. 725)

Other researchers agree that voters’ decisions are influenced strongly by party identification in both partisan and nonpartisan elections (Bonneau & Cann, 2015):

> Partisanship is a critically important heuristic for voters because it provides simple meaningful cues for complex political decisions and is relevant to a wide range of political choices. While our understanding of the role of partisanship in electoral behavior continues to go through expansions and refinements, it is clear that partisanship is a critically important part of understanding political behavior in the USA. (P. 44)

This, of course, also holds true for judicial elections many of which are, however, officially nonpartisan. Traditional party politics thus should arguably not play a role in the election of judges because the role of judges is not a partisan one. But politics do play a role: “Some offices are only nominally nonpartisan … These elections are conducted in the same manner as partisan

elections … with the sole exception that the candidates' respective partisan affiliations are not listed on the ballot." (Bonneau & Cann, 2015, p. 44).

Recognized advantages of nonpartisan elections follow. "The stated goal of nonpartisan elections, for better or for worse, is to remove voters' abilities to bring their partisan identification to bear on their voting decision" (Bonneau & Cann, 2015, p. 61). This is often considered to be particularly important in judicial elections as judges should remain above political fray, in the opinion of numerous scholars and laypeople. At the same time, however, "nonpartisan elections are ineffective at achieving the [] goal of [preventing partisanship from effecting voting decisions] in state supreme court elections," (Bonneau & Cann, 2015, p. 61). This is a concern in lower court decisions too. Further,

> nonpartisan elections do a poorer job of promoting accountability (contestation and competition) and involve a smaller proportion of the electorate (higher ballot roll-off) while at the same time not removing partisanship from the decision making of the voters. Moreover… judges having to stand for election in nonpartisan states may be more likely to make decisions consistent with popular will than judges in partisan states. Nonpartisan judicial elections fail to meet their stated goal of minimizing the role of political factors like partisanship and ideology in judicial selection. The weight of this evidence should give states pause before changing their method of selecting judges from partisan elections to nonpartisan elections (Bonneau & Cann, 2015, p. 62)

Nonpartisan elections may simply not mitigate the influence of political factors such as partisanship and ideology in judicial elections. Further,

> [a]lthough political science typically takes a dismal view of voters' capacities, [] results suggest that in both experimental and real-world contexts, voters are able to identify the partisan identification of candidates from ideological and issue-based cues even when candidates' explicit partisanship is omitted from the ballot. (Bonneau & Cann, 2015, p. 61)

Thus, even if party affiliation is not featured on the ballot, it may still impact voter choice to the extent that the affiliation is known from other contexts or even just presumed (Edwards, 2015). Additionally, an increasing amount of campaign spending in nonpartisan judicial

elections means that the cues voters need to infer candidate partisanship become available in other ways.

Overt partisan affiliation may have an adverse effect on the influence of candidate quality, of obvious importance to the judiciary and society in general:

> [W]here candidates' party affiliations are listed on the ballot, party drives voting behavior and candidate quality has little effect on outcomes. In nonpartisan elections, where party affiliation is not on the ballot, party has a much smaller influence on voting behavior and candidate quality has a substantial effect on outcomes. [This] suggest[s] that strong partisan voting in partisan general elections suppresses the influence of candidate quality. (Lim & Snyder, 2015, p. 121)

Additionally,

> If voters make their decisions mainly on the basis of party or ideology, then they might elect low-quality officials of the "right" party or ideology over high-quality politicians with the "wrong" party or ideology. This suggests that the potential cost of the partisan electoral system needs to be considered seriously when designing electoral systems for public officials who perform relatively bureaucratic, less ideological tasks. (Lim & Snyder, 2015, p. 122)

An argument may be made that judges are actually not administering justice. Rather, they may be said to be mere bureaucrats too, albeit ones who are selected in unusual ways (through general elections). If so, bureaucracies give better service if those who provide the administration is similar to those receiving the benefits. This is known as "representative bureaucracy" in the literature and will be addressed below.

Partisan elections may impede the goal of producing quality judges. As also noted by Lim and Snyder (2015),

> [p]artisan elections may be a good idea for some types of public offices, especially those offices with a large ideological, policy-making component. Trial court judges do not have a large policy-making role, and it is not clear that party considerations should loom large. (P. 122)

On the other hand, so long as elections of judges continue to take place, key democratic concerns also speak in favor of the elections being openly partisan. For example,

> Much [] research suggests political parties are essential to the system of American democracy, creating not only a linkage between the government and the governed, but providing information at the most basic level to voters and other electoral participants. Additionally, [a] theory of political parties and elections reasons that political parties are important to citizens because of their uninformed nature. For most citizens only casually interested in politics, parties serve as information shortcuts that allow citizens to link themselves to the operation of government and to candidates by their personal attachments to party labels. This "rational" approach to elections and gathering information, therefore, serves as an informational shortcut thereby reducing the individual costs of citizen participation. Therefore, the determination by some states to remove partisan labels from elections likely makes the jobs of citizens, both voters and contributors alike, more costly … By removing party identification [], voters and contributors alike lose much of the essential information that guides political behavior at the public level. (Boyea, Bonneau & Cann, 2009, pp. 15-16)

In short, partisan elections may be said to "facilitate intelligent, meaningful participation by citizens" (Boyea, Bonneau & Cann, 2009, p. 23). In contrast, "[w]here states adopt election formats such as nonpartisan elections, the linkage between citizens and the court is weakened" (p. 24). These two opposing viewpoints should be considered in potential judicial election reforms.

6. Connections between party affiliation, information in general, and judicial holdings

Since party affiliation knowledge is important to outcomes of judicial elections, the question becomes whether any connection between a candidate's political party affiliation and subsequent judging can be demonstrated. If no such connection exists, it would make more sense to conduct judicial elections in a partisan manner. This is so because if there is a connection, voters should, for reasons of transparency and democracy in general, be able to see the candidate's party affiliation so that they can vote accordingly (see also above). This is especially so given the very little amount of time and energy voters spend on judicial elections. Of course, allowing candidates to list their party affiliations in the ballots presumes honesty in so doing. This presumption does not always match reality. Candidates may and sometimes do switch their official partisan affiliation with the voter registration office until very shortly before an election.

For example, former mayoral candidate Rick Caruso "evolved" from being a life-long Republican to being a Democrat less than a month before filing to run (Wick, 2022). (In Los Angeles election contexts, it is typically considered to be "political suicide" to run as a Republican candidate).

It is beyond this study to go in depth with the connections between political party and judicial holdings. However, such an interface has been proved at both the state and federal levels. "Some studies find systematic relationships between the decisions made by U.S. district judges and the party affiliation of their appointing president. Other studies … find that the inter-party differences across judges in U.S. district courts are statistically significant, but substantively quite small…." (Lim and Snyder, Jr., 2015, pp. 121-122).

Because U.S. federal district court judges are appointed and life-tenured rather than elected, voter preferences are likely to have only a small influence in their initial selection. Life tenure also renders freedom for judges to indicate their views more strongly in their decisions. Career concerns might be more likely to exacerbate partisan differences. If judges know that they are more likely to be promoted by a U.S. president of the same party, they might want to make their partisan "loyalty" clear. Therefore, it is more likely that judges from different parties will exhibit significant differences in their decisions when they are appointed than when they are elected (Lim and Snyder, Jr., 2015). But

> [o]f all personal attributes, political ideology seems to be the most influential attribute in predicting a judge's decisions. For example, a study on judicial sentencing shows that a significant factor in predicting whether judges would strictly adhere to sentencing guidelines [in criminal cases] is the political party of the president that appointed that judge to the bench. A study of labor cases showed that prior experience representing management and graduation from an elite college were significant factors in predicting whether a judge would rule in favor of management. Yet another empirical study found that judges who were former law professors were more consistent in their rulings (whether conservative or liberal) and more forceful in making ideological points in their decisions. (Vargas, 2004, pp. 131-132)

At the state court level, the connection between political ideology and actual judicial rulings has been tested and proved in the context of the death penalty. The research question posed was whether elected judges would be more or less likely to give weight to public opinion about capital punishment when sentencing convicted criminals or upholding their death sentences upon appeal. (Public support for the death penalty reached a high in the 1990s, when almost 80% of the American population supported it (Streb (Ed.), 2007, p. 186)).

Elected judges are indeed sensitive to public opinion and electoral pressures regarding the death penalty:

> Of the patterns that exist within the state courts, few are as strong as the apparent linkage between the death penalty and the behavior of state supreme court judges. Most important, in elected states with strong public support for the death penalty, judges are much less likely to reverse the death penalty than in states with less support for capital punishment or within appointed courts … [J]udicial elections expose judges to public sentiment. Judges adjust their own voting on issues in a manner that is consistent with public opinion … Elections thus function in a manner commonly valued in some democratic theories, producing elite responsiveness to mass opinions. When it comes to judicial elections, however, our findings may give pause to those who value judicial impartiality, particularly when it comes to a matter of life and death. (Streb (Ed.), 2007, p. 199)

While other researchers have not been able to prove a definite connection between public opinions and case outcomes, some have found evidence thereof. The risk is present.

> This is undesirable, because there is widespread agreement that judges should pay attention to the law and case facts when they make decisions …. Electing judges in contests where voters have particularly little information, such as in nonpartisan elections, can increase pressure on these judges to follow public opinion … This may negatively impact their ability to also pay attention the facts of the case when making decisions. (D'Elia-Kueper, 2016, p. 89)

This potentially close connection between judging and public opinion should also give great pause to those who consider direct elections of judges to be the best selection method. Although "the law" is far from a mechanically applicable concept, elections take things quite far in the other direction towards, at least in some contexts, almost turning the matter into a

popularity context. This is questionable in the judicial context where popular opinions should be further removed from selections and where, instead, intellectual values, cognitive skills, education, and other professional aspects should be more important. But the interface between the mores of the time in a given location and getting reelected (or even just elected) is also seemingly unavoidable given the fact that political science has amply demonstrated that of major concern to people having obtained their positions through elections is to get re-elected (or otherwise elected in the first place).

In short, providing a candidate's partisan affiliation on the ballot is more transparent and democratically sound than not doing so in a (failed) attempt to make judicial elections appear nonpartisan. It is a "myth" that nonpartisan elections "depoliticize" campaigns and reduce the costs to candidates of seeking these seats (Bonneau & Hall, 2009, pp. 131-132). In fact, nonpartisan elections raise the costs of seeking office because candidates must work harder to educate and mobilize voters to their particular candidacies.

7. Partisan endorsement process

The method used for party endorsements is, in California, very similar to that used by bar associations. The party sends out a questionnaire with numerous questions that the party considers to be important. The candidates get a deadline to respond in writing and are subsequently invited to an interview to meet the endorsement committee and elaborate on the questions. Such endorsement hearings end in endorsements that sound a lot more thought-out than they are. As with bar association interviews, the interviewers can and do convey – with calculated questions, tone of voice, and body language - to the candidates and, importantly, other interviewers present whether or not the candidates are likely to get a favorable evaluation (in the case of bar association interviews) or endorsement (in the case of parties). The processes are

highly subjective and value laden. They are not always conducted with respect for the candidate and/or their professional backgrounds. Said one observer and political science professor of a similar legislative election process, "[f]rom a human perspective, it was the most demeaning process*"* because of a lack of willingness by the legislators [in that case] to treat the election as real and not a predetermined process with ongoing voice commentary during the process (Cosby, 2012, p. 112). Further, the professor noted that real change would result in a system that would be open and transparent and find the greatest amount of talent that would not be based on existing relationships.

As with the Los Angeles County Bar Association, questions used for at least the 2020 Los Angeles County Democratic Party judicial endorsement process also indicated a preference for attorneys in traditional practice over other types of attorneys (examples include, "Indicate all [employers] for whom you have ever practiced law," "What has been the general character of your employment or legal practice during the last five years? If applicable, describe your typical client," "State the approximate number, nature and approximate length of cases you have tried to conclusion or in substantial part during each of the last five years," "Approximately what percentage of your practice in the last five years has been devoted to litigation?," "List the five most significant cases in which you have been involved during your legal career and the nature of your involvement….," and, at a point in time when mainly judges before candidates appeared and few others had issued their endorsements, "Who has endorsed your candidacy?")

Seemingly irrelevant question such as "Do you have a campaign consultant? If so, who is it?" were also posed (instead of simply being irrelevant, these questions might aim at identifying support or the lack thereof by traditional campaign managers unpopular with the main interviewer on behalf of the political party in question) (see Appendix B.).

8. Media endorsements

Given a long history of party-subsidized newspapers and a growing number of scholars pointing to an increasing "mediatization" of politics, political science is often including news media in the studies of "institutions" (Schudson, 2002). News media – especially newspapers – continue to play a role in the judicial election context. However, the literature covering this field is, naturally, likely to change as the relevance of traditional news outlets (printed and even online ones) changes. Nonetheless, existing literature still presents valuable information as certain demographic groups still refer to traditional newspapers for voting information:

> Perhaps the most visible and frequent endorsements are those made by the local newspaper editorial boards … Readers who use editorial endorsements as cues to their voting decisions believe that the endorsements are the product of a reliable investigation that fully vets the candidates on issues that ought to be important to the community, and they trust the editors as a source of quality information in making their voting decisions. (Salokar, 2007, p. 344)

As with bar association and political party questionnaires and subsequent interviews, however, newspaper questions to judicial candidates are drafted by editors based on what the editors perceive is important, not what experts know to be important professional qualifications. The newspaper interview process may well be affected by the same or other types of bias for or against a candidate held by bar associations and parties.

One example of an editorial judicial questionnaire was used by the *Miami Herald* in 2004 which contained

> thirty-six questions that ranged from demographic information, including the candidate's financial and employment history, to open-ended questions like, "What is your opinion of sentencing guidelines? As a rule, do they help or hurt the administration of justice? Explain." "When should court files be sealed?" and "What makes you the most qualified candidate in this race?" The submission of a candidate's written responses to the questionnaire is followed by a thirty-minute interview in which the candidates for a seat appear together before the newspaper's editorial board. Reports from candidates who have participated in these interviews suggest that each interview session is unique in

> that its direction is largely dependent upon the candidates' personalities, as well as the board members' inquiries. (Salokar, 2007, p. 348)

The newspaper endorsement process is, at bottom, a subjective process conducted by laypeople – journalists and/or editors - who cannot reasonably be said have sufficient insight into the qualities and attributes needed and desired by the judiciary itself and voters. Editors may think they know what it takes to be a "good judge," but they have not demonstrated any expertise in this:

> While many major newspapers engage in a rigorous endorsement process, value judgments remain at the heart of any editor's decision making, just as they do for organizations' endorsement decisions. Some editorial boards, for example, are viewed as pro-incumbent, and have a history of supporting judicial incumbents even when the incumbent judge has lost the confidence of the community. Other editorial boards are known for their partisan leanings, which come through even when the election is formally nonpartisan. As with politics in any venue, the coveted editorial endorsement may be attained through personal connections; the candidate who hires a political consultant who is also the legislative lobbyist for the newspaper undoubtedly enjoys a marked advantage with the local press over her opponent. (Salokar, 2007, p. 348)

At the same time, some people still rely on newspaper endorsements in judicial and other elections. "One study of judicial elections found that justices who were endorsed by their regional newspapers garnered an additional 6.11 percent of the vote over those who were not endorsed" (Salokar, 2007, p. 344). A 6% difference is far from negligible given the occasional very close win/lose margins in judicial races.

An older study came to the same conclusions. Between 6-10% of study subjects reported being influenced by newspaper endorsements (Goldstein, 1989, p. 110). Another 11% stated that the endorsement caused them to give some thought to voting for the newspaper's pick, but in the end did not (p. 110). Only 1% reported that they were negatively influenced by the newspaper endorsement (p. 110). The examined newspapers' record for both circuit court and district court races over six elections was 55 wins and only 15 losses; a "win rate" of 89% (p. 110).

Newspaper editorials seemed to have greater influence on the better educated, more ideological voters; in other words, the people who participate in judicial elections (Goldstein, 1989, p. 108). They have the greatest effects on the less committed. Endorsements are both positive and negative referents for people. In other words, either readers agree with the newspaper and vote accordingly, or know they dislike the political views of the paper and thus do not vote accordingly. Newspapers may also have both direct and indirect effects. "Direct" effects take place when readers according to the newspaper endorsements; "indirect" effects happen when newspapers influence other people to whom the voter looks for political advice (Goldstein, 1989, p. 108).

"[N]ewspaper editorial endorsements will have greater impact the smaller the turnout for the election because the better educated, more ideological and more efficacious voters are more likely to turn out when the electorate is small" (Goldstein, 1989, p. 112).

The Los Angeles Times, for example, also notes that "[o]ur endorsements in races that tend to get overlooked — think Superior Court judges … — tend to get readership levels that rival our recommendation for president" (Thornton, 2020). Incidentally, the paper is flip-flopping on whether or not its endorsements have an actual effect on the composition of the court. In 2020, for example, it noted that

> positions like judicial seats on the Los Angeles County Superior Court — the largest unified trial court in the nation — loom large as building blocks in a foundation of justice. While the governor fills most of the court's more than 450 judicial offices, voters have a chance to help shape this critical tribunal. (Sept. 25, 2020)

However, in 2022, the paper found that "[b]ecause voters fill only a very narrow portion of the bench, they have no hope of changing the court's composition and would be wise to simply pick the best candidate in each race" (May 13, 2022).

Some newspaper endorsements overtly refer to bar association evaluations. The total number of articles is small, however. For example, one study found that from 1996-2008,

> the average number of articles [referencing bar association evaluations] in six major newspapers in three states with partisan elections (Birmingham News, Mobile Register, Chicago Sun-Times, Chicago Tribune, Chicago Sun-Times, Chicago Tribune) was 72.8. The average number of articles in nine major newspapers in six states with nonpartisan elections (Los Angeles Times, San Francisco Chronicle, San Diego Union- Tribune, Atlanta Journal-Constitution, Minneapolis Star Tribune, Portland Oregonian, Seattle Post-Intelligencer, Seattle Times, Milwaukee Journal Sentinel) was 36.1. (Lim & Snyder, 2015, p. 121)

That is not many articles at all (7.26 articles per paper per year). More may have been printed *not* referring to bar associations, but it still stands to reason that newspaper articles have an outsized importance on voting patterns (as mentioned, between 6-11% of voters are influenced by newspapers). It is an area of concern that judicial candidates have a lack of access to adequate communication channels and suffer from a lack of media coverage (Zuercher, 2015). This opens the arena to external group involvement and influencing.

Further findings bear on this issue:

> [E]stimates do not imply that a large fraction of the electorate takes candidate quality[10] into account in their voting. Rather, the percentage is probably only about 10–20% of those who vote in judicial elections. This is an even smaller fraction of the voting age population, since turnout in primary elections is typically only around 20–25%, and in nonpartisan general elections it is only around 25–40% (due to roll-off). It is plausible that 5% of U.S. adults follow elections closely enough that they are exposed to information about judicial candidate quality during an election. Second, political psychologists argue that voters store much of the information they see and hear during campaigns as [only] impressions. Voters form impressions about candidates, and can remember and use these impressions, even though they are unable to remember the exact set of facts or events that led to these impressions. It is therefore difficult to know what facts or falsehoods – that is, what combination of newspaper stories, campaign advertisements, conversations with friends, family and co-workers – shape voters' impressions. Psychologists would call this a form of "gist" memory – the ability to remember the gist of a story without being able to remember many or even any details

[10] Lim and Snyder appear to use the term "quality" in its traditional sense and thus, as some scholars, not to indicate whether the candidate is already a sitting judge. See, e.g., p. 107 "Second, in many states, one or more bar associations routinely evaluate the 'quality' of judges and judicial candidates and publish these evaluations."

> … Third, in many cases a bad rating can lead to a more vigorous campaign by the opposition (either a candidate or an interest group), and this will dramatically increase the number of people who might hear something bad about the judge with the bad rating and thus store an unfavorable impression. (Lim & Snyder, 2015, p. 121)

Finally, there are

> "magical endorsements" that appear out of thin air, unsolicited and usually unknown to the candidate until after they have been made. These [] endorsements are unplanned and can be quite a surprise to the candidate, particularly if they come from unexpected sources like fringe political groups or individuals with agendas that the community views as controversial. A candidate can ask a group to withdraw its endorsement, but the damage may have already been done by the time the candidate is aware of the endorsement and its distribution. (Salokar, 2007, p. 349)

In short, what is popularly known as "endorsements," "evaluations," or "ratings" cannot reasonably be said to constitute a reliable indicator of a candidates' qualifications for judicial office. However, voters typically do not have this insight and, instead, rely on such information given the lack of other information or the interest in finding it independently. This is voter influencing of a significant kind. Whether this should remain acceptable to society and, from an ethical point of view, to the endorsing and evaluating organizations themselves is beyond the scope of this research. However, because of the great amount of misconception surrounding evaluations and endorsements by voters, evaluating or endorsing organizations ought to look to their own internal directions and ethical codes for guidance. Of course, judicial elections are a political game too. When someone has the power to sway voters, as institutions do, it is questionable whether they will voluntarily give it up. This is a concern in the debate about how to improve the judicial selection process.

9. Voter qualifications, participation, and diversity effects

Voters are, as the literature describes, often not only unmotivated to vote for judge, but may, realistically, be unqualified to do so:

> Because it requires specialized legal knowledge and familiarity with the facts to evaluate a judge's work in any given case, much less several years' worth of cases, citizens cannot monitor judicial performance in any rational or robust way. Nor will the public be motivated to improve its knowledge of the candidates, given the extreme unlikelihood that any particular voter will have to come before any particular judge. Public opinion will therefore be driven by media soundbites and irrelevant or inappropriate factors; politics and appearances will win out over substance. Low quality judges are more likely to be selected. The parity gap in competence and fairness between state courts and federal courts will widen. (Pozen, 2008, p. 294)

It should, however, be noted that some scholars have questioned the argument that citizens are not interested in or willing to participate in judicial elections. Many of these studies were, however, undertaken in relation to higher offices than trial courts. For example, Bonneau & Hall (2009) argue in the supreme court election context that voters do actually vote when they have interest, readily available information, and choice. This is, the scholars assert, the case when races are more "interesting" than typical races such as when there are aggressive challengers and well-financed campaigns. Other highly motivating factors are partisan ballots and, when elections are not partisan, geographically narrow district-based constituencies instead of larger ones such as counties.

Perhaps most importantly in this context, "[p]artisan ballots reduce informational costs to voters and provide a relatively rational basis upon which to select among candidates. Nonpartisan elections remove this important resource and as a consequence dramatically decrease citizen participation" (Bonneau & Hall, 2009, p. 130). In other words, these scholars contradict the stereotype that voters are ignorant and ineffective in relation to judicial elections. Instead, they found that voters in state supreme court elections make fairly sophisticated candidate-based evaluations. They conclude that "statewide partisan races and district-based nonpartisan elections are excellent agents of democracy" but also note that "nonpartisan elections are an attack on the democratic process and meaningful citizen participation in the selection and retention of judges" (pp. 130-131).

The latter is particularly relevant to judicial elections in California which are both nonpartisan and conducted on a county-wide basis. In particular, judicial elections in the vast county of Los Angeles – home to slightly less than seven million registered voters (Los Angeles Almanac, (*n.d.*)) – present a quality and democratic issue.

Second, judicial elections may actually reduce, not increase, diversity. "Given the United States' pervasive background conditions of racially polarized voting, disproportionately low turnout among minority voters, and the importance of candidates' access to money, elections will generate a less diverse bench than well-designed appointive systems" (Pozen, 2008, p. 294). This is a common concern in at least California.

Finally, judicial elections may also simply be seen as unseemly. Campaigning by judicial candidates is, the literature shows, undignified, superficial, is not taken sufficiently seriously by voters or candidates, and thus "brings the judiciary into disrepute. This is bad for social cohesion and respect for the law, and it makes the judiciary less efficacious relative to the other branches" (Pozen, 2008, p. 295). However, although the literature and studies deconstructing the issues with judicial elections are plentiful, robust, and offer numerous arguments against judicial elections, many states still continue to elect their judges. In reality, they may simply continue to do so.

Instead of seeing this issue as a binary choice between appointments and elections, as the literature has demonstrated to often be the case, the matter may be one of how to better incorporate improvements to the selection system in general.

At bottom, if the purpose behind employing judicial elections is to enable the electorate to select the "best" judges to represent society as it exists in any given location at any given time

("inclusive governance"), the literature demonstrates that this goal is not met in practice. Too many concerns exists in the various election systems currently employed by the states.

Chapter III. Methodology and Data

A. Methodology

To assess the influence of candidate job titles and bar association endorsements on election outcomes in large, diverse, metropolitan areas, this study uses data from 453 candidates for district judge in three counties: Los Angeles and San Francisco in California, and Harris County (metropolitan Houston) in Texas. The sample includes candidates who competed in at least one biennial election between 2010 and 2022. The study measures two outcomes of elections: whether a candidate won the election, and the percentage of the total vote the candidate received. To test for effects on the likelihood of a candidate winning an election, the models use the maximum-likelihood estimator. To test for effects on the percentage of vote received, the models use ordinary least squares.

The study's primary interest is the hypothesized impact of two factors on a candidate's prospects for winning a judicial election: the candidate's job title as listed on the ballot, and the endorsement of a local bar association. The following statistical analysis tests for two additional hypothesized impacts on election outcomes: candidate gender and endorsement from a local newspaper.

Statistical estimates that rely on time-series cross-sectional data tend to suffer from biased estimates arising from three potential sources of heteroscedasticity: serial correlation; contemporaneous correlation among panels; and panel heteroscedasticity. To correct for these sources of bias, the analysis uses two techniques. First, the models include several different control variables. Dummy variables for the different counties control for panel heteroscedasticity, while dummies for the year of the election control for serial correlation. The models also include a dummy variable differentiating primary from general elections because, by

definition, candidates in two-candidate general elections will receive more votes than candidates do in multi-candidate primaries.

Second, the analyses estimate six different models to assess the sensitivity of estimated findings to modeling assumptions. A "consistent" variable is one whose statistical significance and direction of effect do not change across the specifications. Such consistency indicates that the hypothesis test is insensitive to modeling assumptions—that is, that the statistical findings are robust. Such robust results give one greater confidence in the inferences drawn from such statistical tests. By contrast, an inconsistent variable requires more caution when drawing inferences. To examine such robustness, the six model specifications vary in the inclusion or exclusion of estimators. Because omitted variables may create biased estimates, the presumption is that the fully specified models (i.e. those that include all hypothesized variables and controls) produce the best, linear unbiased estimates. The six models are specified as follows.

Model I tests only for the effect of a candidate's job title on the probability of winning the election and the percentage of the vote received. Model II tests only for the effect of a local bar association rating on the probability of winning the election and the percentage of the vote received. Because neither Model I nor Model II contains any control variables, they are the most parsimonious but also the most likely to produce biased estimates.

Model III tests for the effects of candidate job titles and local bar association ratings but does not include any control variables. The absence of dummies for election year and jurisdiction suggests these estimates may suffer from serial correlation and panel heteroscedasticity.

Model IV tests for the effects of candidate job titles and local bar association ratings while controlling for candidate gender; newspaper endorsements; the county of the election and

whether the candidate was competing in a primary or general election. This specification allows Model IV to control for panel heteroscedasticity but not serial correlation.

Models V and VI are the fully specified models that include controls for candidate gender; newspaper endorsements; the county of the election; whether the candidate was competing in a primary or general election; and the year of the election. As such, the models control for both serial correlation and panel heteroscedasticity. One expects models V and VI to produce the best, linear, unbiased estimates.

Models V and VI differ only in the inclusion or exclusion of a test for the impact of a candidate's job title on the outcome of the election. Because Harris County does not include candidate job title on the ballot, the inclusion in a model of the job title variable drops all Harris County observations from the statistical tests. For this reason, model V excludes the test of candidate job titles but includes all observations from Harris County (for a total of 415 observations). Model VI includes the test of job titles but excludes observations from Harris County (for a total of 200 observations). With the inclusion of all control variables, the expectation is that models V and VI are the most likely to produce unbiased estimates.

B. Data collection

The data for this research project was collected from election cycles in Los Angeles County, California; San Francisco County, California; and Harris County, Texas, between 2010 and 2022.

In Los Angeles County, the professions held by the approximately 500 judges sitting on the Los Angeles County Superior Court before assuming the bench whether via appointment or election were retrieved from publicly available sources. This information was categorized into groups of prosecutors ("DDAs") or other persons holding government positions in the criminal

law field, public defenders or similar positions, other government attorneys, attorneys in private practice, attorneys working for NGOs, law professors, and judges.

The research did not identify other states allowing for professional ballot designations than California. Hence, only Los Angeles and San Francisco counties were compared for possible effects of ballot designations; comparable Texas results are simply not available.

For the professions of judicial candidates and sitting judges, mutually exclusive professional designations were applied throughout. Thus, candidates were treated as, for example, "judges," or "other government attorneys," but not both. In California, any candidate running with the word "judge" in their ballot designations were included in the statistics for such. (There are several types of judges in California: those on the Superior Court as well as judges of specialized government branches and agencies (for example, "administrative law" judges")).

It should be noted that the Los Angeles County dataset does not include results from 2010 as insufficient information was publicly available for that year. The many other data points from the County attempt to make up for that. Very few candidates for whom full relevant information was not available were removed from the analyses.

For Harris County, Texas, similar data was collected from 2012 to 2020 with the exception that primary election results were not available for 2018-2020. Three things should be recalled: As mentioned, Texas election law does not allow for professional ballot designations. Judicial races in Texas are partisan. The Houston Bar Association ("HBA") changed its rating method after 2016 from using the categories "not qualified," "qualified," and "well qualified" as well as listing the number of "not rated" ballots. In 2018 and thereafter, the HBA simply lists the total number of votes cast for judicial candidates. It is also important to note that the HBA lets all its

members vote on the candidates for state office. In contrast, "evaluation committees" in Los Angeles and San Francisco counties determine the candidate "evaluations."

The word "won" was used about both proceeding from the primary to the general elections and winning the latter, when relevant. If a candidate won a seat outright in the primary, that person was thus of course not included in the general election dataset, but the opposite was the case at the data collection stage: if a candidate proceeded from the primary election to the run-off election, that candidate was measured twice as a participant in, seen that way, two elections. A candidate could thus lose or win in the primary election,[11] win in the primary election and subsequently lose in the run-off contest, or win in the primary and again win in the run-off election. (Se above for how the statistical models accounted for this.)

For reasons that remain undisclosed publicly, some prosecutorial candidates run without opposition in California. They thus "win" a seat on the bench without having to undergo "evaluations," seek endorsements, or any other or the myriad other steps that candidates running in contested seats have to do.

Approximately one third of the judges in California run for re-election every two years. Because of the sheer size of the bench in Los Angeles County, they are not listed on any ballots and thus automatically win their re-election bids unless challenged.

Apart from ballot designations and local bar association "evaluations" for all years, the datasets collected also include representative information from some years regarding newspaper endorsements and political party endorsements (despite the fact that judicial races in California are officially nonpartisan, candidates still obtain coveted political party endorsements), race/ethnicity, and gender. Gender was analyzed by name association in a binary manner (thus,

[11] In at least California, anyone with at least 50% plus one vote in a primary election wins the election outright.

not taking categorizing for potential LGBTQ and other sexual identification statuses). Because of resource scarcity, not all data on these variables could be collected or analyzed.

The figures mentioned in this project are to be considered against the number of registered voters in the three examined areas: In Los Angeles County, there were 6,129,494 registered voters in the 2020 general election, for example. The total number of votes cast was 4,338,191; thus a total of 74.6% of registered voters actually in that election (Los Angeles Almanac (*n.d.*)). In San Francisco County, there were 521,099 registered voters in the 2020 general election. The turnout was 449,866; thus 78.95% (City and County of San Francisco, Department of Elections (*n.d.*)). In Harris County, TX, there were 2,480,522 registered voters in 2020. Of those, 1,633,557 voted, thus a voter turnout of 65.86% (Texas Secretary of State (*n.d.*)). These numbers were higher in 2020 than in other election years as 2020 was a presidential election year. Primary elections have a much lower voter turnout but were included in the calculations because of the possibility of outright election wins at that stage. This is particularly so for judicial candidates. In the June 2022 primary election cycle, for example, fewer than 20% of registered voters cast a ballot (Barabak, 2022, para. 20).

Chapter IV. FINDINGS & DISCUSSION

A. Findings

This chapter presents the results of the statistical analyses of the independent variables in logit and OLS model formats. Separate models analyzing the effects of candidates labelled "not qualified" in contrast to those labelled at least "qualified" by the local bar associations will also be set forth. Raw numbers and their breakdowns into percentages will also be presented for laypeople's ease of comprehension.

First, a breakdown of the approximately 500 judges sitting on the Los Angeles Superior Court is in order by way of background.

Table 2 - *Los Angeles County Judge Backgrounds*

	Sum	**Mean value**
DDA or other criminal law background	194	.39
Public defenders	44	.09
Other government atty	27	.06
Attorney in private practice	120	.24
NGO	7	.01
Law professor	2	.00
Judge or other	96	.19
M	291	.59
F	202	.41
N=493		

Table 2 shows that 39% of the trial court judges sitting in Los Angeles County had a background as prosecutors or otherwise worked in the criminal law field for government employers before becoming judges (194 individuals, most of whom were county prosecutors). 9% were public defenders (44 persons). 5% were other types of government attorneys (27 persons). 24% were attorneys in private practice (120 individuals). 19% had a background as

judge (96 people). 1% were attorneys formerly representing NGOs (7 individuals). 0.004% were law professors (2 individuals). Approximately 60% are males, 40% females.

If considering prosecutors, public defenders, judges, and other types of government attorney to be just one category - government attorneys - it holds true that 73% (361 individuals) of all judges already worked for the government in a legal role before assuming the bench.

Government attorneys of course fulfil many different functions, but this is a very low amount of professional diversity. For example, Deputy District Attorneys all work and are thus all trained by one single "law firm" - the District Attorney's office. Viewpoints from the private sectors, NGOs, academia, philanthropist organizations and more could contribute much professional diversity as has been recognized to be desirable. It is arguably even more so in California with its highly diverse population measured from not only a gender and race/ethnicity angle, but from broader ones as well such as, precisely, professional backgrounds.

Table 3 - *Logged odds likelihood of candidates winning an election*

COMPARISON OF LOGIT MODEL SPECIFICATIONS												
DV: Likelihood of candidate winning election												
	Models											
	I		II		III		IV		V		VI	
Candidate job												
Other Govt Attorney	0.98				0.95		0.80				0.49	
Public Defender	1.10				1.01		0.71				1.15	
Deputy DA	**1.45**	***			**1.41**	***	**1.21**	**			**1.14**	*
Judge	**2.04**	***			**1.44**	*	**1.19**	*			1.06	
Candidate rating												
Qualified			**0.68**	*	0.67		0.62		0.51		0.57	
Well qualified			**1.27**	***	0.72		0.60		**1.12**	***	0.61	
Exceptionally well qualified			**3.61**	***	**3.05**	**	**2.38**	*	**2.83**	*	**2.74**	*
Candidate female							**0.78**	*	**0.56**	*	**0.80**	*
Endorsement							**1.46**	*	**0.96**	***	**1.49**	*
City												
San Francisco							-0.21		-0.25		-0.87	
Houston									**-0.86**	***		
Election							0.34		0.29		0.14	
Year												
2012											-2.41	
2014											-1.55	
2016											-1.79	
2018											-1.76	
2020											-1.88	
2022											-2.36	
Constant	**-1.10**	***	**-1.13**	***	**-1.64**	***	**-1.89**	***	**-1.04**	***	0.10	
N	213		413		200		200		413		200	
chi2	24.89		36.32		34.53		46.7		64.23		50.52	
											legend: *p<.05; ** p<.01; *** p<.001	

Table 3 above shows the logged odds probability of a candidate winning an election. (Recall that the results from Houston do not include effects of job titles (ballot designations) as Texas law does not allow for candidates to list these.)

Model I demonstrates the effect of titles only. The model used "regular," in other words "private," attorneys (i.e., those not in government employ) as the baseline and shows the ratios between those and other types of attorneys. The logged odds of "Other government attorneys"[12] winning an election is 0.98. For public defenders, the logged odds are 1.10. Neither of these is statistically significant. However, the logged odds of Deputy District Attorneys ("DDAs") winning in comparison with private attorneys is 1.45. This is statistically significant at the 99.9% level. The logged odds of judges winning an election over regular attorneys is 2.04, which is also statistically significant at the 99.9% level.

Model II shows the effect of local bar association ratings on a candidate's probability of winning an election. The number of observations is now 413 as Houston results are included (in model II and V only).[13] This model was calculated to show the logged odds of candidates receiving a bar evaluation of at least "qualified" in comparison to the baseline of candidates rated "not qualified." The logged odds of a "qualified" candidate is 0.68 in comparison to "not qualified" candidates. This is statistically significant at the 95% level. Candidates rated "well qualified" enjoy a logged odd advantage of 1.27, which is statistically significant at the 99.9%

[12] "Other government attorneys" include public defenders, deputy district attorneys (DDAs),

[13] While including data from three different urban areas, the assumption and rules of homoscedasticity may be violated. On the other hand, doing so allowed for a larger dataset and, indeed, comparisons across different geopolitical areas to find out possible effects of the variables chosen here. The same effects were identified. This is noteworthy. While localized research brings about some advantages, broader-scale research may be said to be informative, testing for effects of the same variables and demonstrating effects despite even *despite* differences in local politics, judicial election rules, etc.

level. The logged odds of "exceptionally well qualified" candidates are 3.61, which is also statistically significant at the 99.9% level.

Model III uses samples from California only. It shows the logged odds results when analyzing titles and bar evaluations together. The most notable findings follow: When controlling for the effect of bar evaluations, the logged odds of DDAs winning over private attorneys becomes 1.41, which is statistically significant at the 99.9% level. For judges, the logged odds are 1.44, which is statistically significant at the 95% level. When including both titles and bar evaluations, only "exceptionally well qualified" candidates enjoy a statistically significant effect, which is 3.05 at the 99% level. ("Other government attorneys" and public defenders do not enjoy any statistically significant advantage under this model. This is also true of "qualified" and "well qualified" candidates.)

In this context, it should be noted that some government candidates obtain "well qualified" evaluations, but none get rated "exceptionally well qualified" unless they are sitting Superior Court judges. See Table 4 below setting forth raw numbers and percentages.

Table 4 - *Connection between Superior Court ballot designations and "exceptionally well qualified" ratings in numbers and percentages*

Judicial Candidates - LA	**2022**	**2020**	**2018**	**2016**	**2014**	**2012**	**Total**	**Total %**
Exceptionally Well Qualified and Superior Court Judge or Superior Court Commissioner	2	0	1	0	1	2	**6**	**100.0%**
Exceptionally Well Qualified and neither Superior Court Judge nor Superior Court Commissioner	0	0	0	0	0	0	**0**	**0.0%**

Model IV tests the effects of the variables job titles, bar association ratings, gender (with males as the base category), media endorsements (with none as the base category), urban area (with Los Angeles County as the base category), and type of election. For the latter, many elections have three or more candidates. If one candidate wins an outright majority in connection with the primary election, that candidate wins the seat. If, however, no candidate wins a majority, the top two vote-getters proceed to a run-off election. This variable tests for whether the election was a primary election (likely with more than two candidates) or a runoff election (between the top two vote-getters). None of the models finds a significant effect of the election variable. What this indicates is that, *ceteris paribus*, the type of election (primary or run-off) has no impact on the likelihood of a candidate winning an election independent of the effects of job title, bar association endorsement, or other factors. Thus, the variables tested in this model are indeed the ones that best seem to explain why candidates win elections.

In Model IV, the advantage of being a DDA shrinks to 1.21, which is, however, still statistically significant at the 99% level. The logged odds ratio for the "judge" category shrinks to 1.19, which is statistically significant at the 95% level. The logged odds of females winning over males is 0.78. This is statistically significant at the 95% level. The logged odds of candidates receiving an endorsement by a major, local newspaper over those that do not receive such an endorsement is 1.46. This is also statistically significant at the 95% level.

Model V controls for all the variables apart from titles in Texas. The logged odds of "well qualified" candidates winning an election are, here, 1.12, which is statistically significant at the 99.9% level. "Exceptionally well qualified" candidates enjoy a logged odds advantage of 2.83, although this is now, "only" statistically significant at the 95% level. Females enjoy a 0.56 logged odds advantage over males, which is statistically significant at the 95% level in this

model. The logged odds of media-endorsed candidates over those not so endorsed is 0.96, which is statistically significant at the 99.9% level.

The "city" variable controls for differences between Los Angeles (still the baseline category), San Francisco and Houston. This is an important control for statistical reasons. Using data from three different cities probably violates the assumption of homoskedasticity and hence creates biased estimates. To correct for this, dummy variables were inserted for each of the cities. These dummies control for unobserved differences between cities such as political culture (see literature review above), demographic composition, and the number of registered voters. These dummies create confidence that the remaining estimates are unbiased.

Model VI shows that the variables DDA, exceptionally well qualified, gender, and media endorsement all result in a statistically significant election advantage for candidates at the 95% confidence level. This model included dummies for each election year, but because none of them is significant, there is no unexplained temporal variation in the probability of winning an election.

Model V may, in one sense, be said to be the "best" because it includes observations from Houston (N = 413), but thus also cannot test for the effects of job titles. Model VI, in contrast, may also be said to be the "best" as it tests for both the effects of job titles and bar association endorsements – the two primary hypotheses in this study - while excluding observations from Houston (N = 200). As a statistical principle, a model that includes all relevant controls will produce estimates that are unbiased.

In sum, the goal of using multiple models is to assess whether variables behave consistently across a range of modeling assumptions and specifications. Here, several variables behave consistently irrespective of the inclusion or exclusion of controls. These are the Deputy

District Attorney title; the "exceptionally well qualified" ranking; the gender of the candidate; and the role of endorsements. The title of judge is also significant in three of the four specifications. The robustness (i.e., consistency) of these estimates suggests confidence in the inferences that can be drawn from them.

It is also noteworthy that Deputy District Attorneys are statistically more likely to win an election than all the other job types, including even judges. Further, only one bar association rating – "exceptionally well qualified" – has a statistically significant effect on the probability of a candidate winning an election. Newspaper endorsements have a significant and positive impact on the likelihood of winning. Finally, female candidates are more likely than male candidates to win than men, *ceteris paribus*.

A simplified chart shows the winners of Los Angeles County Superior Court Judge elections and their categorized ballot designations over the past ten years:

Table 5 - *Los Angeles County Superior Court Election Winners (raw numbers)*

Year	Candidates	DDAs	Other gov't atty (incl. judges)	Regular atty
2022	9	4	5	0
2020	12	11	1	0
2018	11	5	6	0
2016	7	3	4	0
2014	15	14	1	0
2012	6	3	3	0
Totals	**60**	**40**	**20**	**0**

In 2022, for example, three incumbent judges were challenged, but won. For the first time in ten years, public defenders ran for office (five). Two won. The DDAs took the remaining seats. In 2020, twelve judicial seats were filled by no less than twelve candidates from prosecutorial backgrounds. Eleven out of twelve were DDAs. One was a city prosecutor. Not a

single regular attorney won. In 2018 (the first year for which the new California election law took effect prohibiting judicial candidates from using descriptive phrases in their ballot designations), eleven judicial seats were filled via the election. Six seats went to DDAs, two to existing judges, two to commissioners (also a judicial function), and one seat to a senior deputy county counsel. Again, not a single candidate *not* already in government service won.

In other words, of 60 judges elected over the past ten years, *none* were private sector attorneys. These simply cannot, in effect, win elections in Los Angeles County. This presents a justice concern as far from all cases heard by the trial courts are criminal cases; civil cases of course also take up part of the docket. But the civil sector does not see judges elected to represent these cases. It has to rely on judges being able to successfully transform from a career in criminal law to one hearing civil cases. The effectiveness of that could be subject to further study, but at a minimum, it presents a professional diversity issue.

Based on the researcher's visual observations and estimates in 2020, the average age of prosecutors running from office is approximately 40 (judicial candidates are not required to and rarely chose to disclose their age). If state court trial judges retire at age 63, on average (as also appears to be the case), approximately 138 "judge years" of service is added in every election cycle just in Los Angeles County, California (36 persons adding 23 years of service each over six cycles). That is significant given the fact that an already large number of judges – approximately 40% - hailed from prosecutorial backgrounds when assuming the bench as shown above.

Table 6 - *Comparison of OLS Model Specifications*

COMPARISON OF OLS MODEL SPECIFICATIONS												
DV: Percentage of vote received												
	Models											
	I		II		III		IV		V		VI	
Candidate_job												
Other Govt Attorney	8.50				7.28		5.68				3.65	
Public Defender	**12.15**	*			10.48		7.44				**14.05**	**
Deputy DA	**18.64**	***			**13.87**	***	**12.67**	***			**11.16**	***
Judge	**26.32**	***			**20.04**	***	**18.52**	***			**16.37**	***
Candidate rating												
Qualified			**11.82**	**	5.12		4.71		**13.34**	***	3.94	
Well qualified			**29.94**	***	4.49		3.08		**21.40**	***	4.00	
Exceptionally well qualified			**20.35**	*	**19.21**	**	**12.61**	*	**27.61**	***	**14.72**	*
Candidate_female							**5.37**	*	**4.75**	*	**4.80**	*
Endorsement							**7.84**	*	**13.64**	***	**11.24**	**
City												
San Francisco							3.46				-7.69	
Houston									**28.57**	***		
Election							13.77	***	**12.96**	*	**12.67**	***
year												
2012									4.06		-5.79	
2014									8.87		1.51	
2016											-12.59	
2018									4.30		-2.69	
2020									0.41		-3.78	
2022									-12.67		**-19.38**	*
_cons	**26.89**	***	**39.42**	***	**24.08**	***	**20.93**	***	**20.26**	**	**28.72**	***
N	218		415		200		200		415		200	
chi2												
							legend: *p<.05; ** p<.01; *** p<.001					

Table 6 above shows the OLS models testing the same hypotheses resulting in the percentage of votes a candidate receives using the same independent variables as for Table 3 above.

The base category for Model I is still private attorneys. Model I shows that "merely" being a government attorney does not result in any statistically significant advantage in judicial elections in California. However, the title "public defender" results in a candidate receiving 12.15 percentage points more votes than private attorneys. This is statistically significant at the 95% level. DDAs receive 18.64 percentage point more votes than private attorneys, which is statistically significant at the 99.9% level. Judges receive 26.32 percentage point more votes than private attorneys. This is also statistically significant at the 99.9% level.

Model II, which includes Houston data, shows that candidates evaluated to be at least "qualified" in contrast to "not qualified" gives them an 11.82 percentage point advantage. This is statistically significant at the 99% level. "Well qualified" candidates receive no less than 29.94 percentage point more votes than those candidates labelled "not qualified." This is statistically significant at the 99.9% level. "Exceptionally well qualified" candidates receive 20.35 percentage point more votes than "not qualified" candidates, which is statistically significant at the 95% level.

Model III shows the combination of titles and evaluations on the percentage of votes earned. Once again, running with the title "DDA" or "judge" results in a 13.87 and 20.04 percentage point advantage, respectively. This is statistically significant at the 99.9% level. Similarly, "exceptionally well qualified" candidates enjoy an advantage of 19.21 percentage points, which is statistically significant at the 99% level.

Model IV includes the variables gender, media endorsement, and city. As for Table 3 above, Model IV tests the effects of the variables job titles, bar association ratings, gender (with males as the base category), media endorsements (with none as the base category), urban area (with Los Angeles County as the base category), and type of election. The model shows that females receive 5.37 percentage point more votes than males, which is statistically significant at the 95% level. Earning an endorsement by a major newspaper results in the candidate earning 7.84 percentage point more votes than those not so endorsed. This is statistically significant at the 95% level.

Model V introduces all variables apart from job titles in Houston. Again, the variables for bar association evaluations as well as gender and media endorsement are statistically significant at the 99.9% level apart from gender, which is statistically significant at the 95% level.

Model VI shows the following effects introducing all variables (but excluding data from Houston): public defenders earn 14.05 percentage points more votes than private attorneys. This is statistically significant at the 99% level. DDAs earn 11.16 percentage points more than private attorneys. This is statistically significant at the 99.9% level. Judges earn 16.37 percentage point more votes than private attorneys; also statistically significant at the 99.9% level. “Exceptionally well qualified” candidates earn 14.72 percentage point more votes than “not qualified” candidates. This is statistically significant at the 99% level. Females earn 4.75 percentage point more votes than males, which is statistically significant at the 95% level. Candidates endorsed by major regional newspapers earn 11.24 percentage point more votes than those not so endorsed. This is statistically significant at the 99% level.

Once again, the variables that behave consistently are the deputy DA title; the title “judge”; the exceptionally well qualified ranking; the candidate’s gender; and the effect of newspaper

endorsements. Additionally, the "election" variable behaves consistently: in all three specifications it is significant, positive, and is approximately 13 percent. This is, however, unsurprising. By definition, runoff elections have fewer candidates, which means that each participating candidate will by definition get more votes than they did in the primary election. In turn, this also means that the inclusion of the significant election variable gives us greater confidence in the theoretical variables. That is, the marginal effects of job title and candidate rating are significant and positive when controlling for the difference between primary and runoff elections.

Notably, public defenders, Deputy District Attorneys and judges all receive a significantly higher percentage of the vote than regular attorneys (there is no gain from being "only" a government attorney in general outside the just mentioned specific title holders). Although public defenders, Deputy District Attorneys, and judges receive more votes than regular attorneys, only DDAs have an advantage in winning. The OLS models also how that only the "exceptionally well qualified" rating has a significant effect on the percentage of votes a candidate receives. As with the logit models, the OLS models find significant and positive effects for female candidates and a newspaper endorsement.

The variable present consistently both across model specifications and between MLE (logit) and OLS estimators. This warrants confidence in the findings.

Table 7 - *Effects of bar association ratings*

Logistic Regression					N =	200
					LR chi2 (17) =	50.52
					P > chi2 =	< .001
Log likelihood = -113.36					Pseudo R2 =	0.18
	Coeff.	*Std. Err.*	*z*	*P* > | *z* |	*LCB*	*UCB*
Candidate Job						
Other Govt Attorney	0.49	0.69	0.71	0.48	-0.86	1.84
Public Defender	1.15	0.87	1.32	0.19	-0.56	2.86
Deputy DA	1.14	0.45	2.52	0.01	0.25	2.03
Judge	1.06	0.62	1.7	0.09	-0.16	2.28
Candidate Rating						
Not qualified	-2.74	1.27	-2.16	0.03	-5.23	-0.25
Qualified	-2.18	1.23	-1.77	0.08	-4.59	0.24
Well qualified	-2.13	1.22	-1.75	0.08	-4.52	0.26
Female?	0.80	0.34	2.34	0.02	0.13	1.48
Endorsement?	1.49	0.69	2.16	0.03	0.14	2.83
City						
San Francisco	-0.87	0.81	-1.08	0.28	-2.45	0.71
election	0.14	0.54	0.25	0.80	-0.93	1.20
Year of Election						
2012	-2.41	1.70	-1.42	0.16	-5.74	0.92
2014	-1.55	1.59	-0.98	0.33	-4.66	1.56
2016	-1.79	1.58	-1.13	0.26	-4.88	1.31
2018	-1.76	1.53	-1.14	0.25	-4.76	1.25
2020	-1.88	1.58	-1.19	0.24	-4.98	1.22
2022	-2.36	1.67	-1.41	0.16	-5.64	0.91
Constant	2.84	2.15	1.32	0.19	-1.38	7.07

Table 7 above shows the results of local bar association evaluations testing for the hypothesis that "not qualified" candidates are significantly less likely to win elections. The base category is "exceptionally well qualified" candidates.

This hypothesis is correct. When compared to an "exceptionally well qualified" candidate, a "not qualified" candidate is significantly less likely to win an election at a ratio of -2.74. This is statistically significant at the 95% level of confidence. "Qualified" and "well qualified" candidates are also less likely to win at -2.18 and -2.13, respectively.

The marginal effects of a candidate being evaluated to be "not qualified" follow:

Table 8 - *Marginal effects of a "not qualified" evaluation*

```
Average marginal effects                        Number of obs   =        200
Model VCE    : OIM

Expression   : Pr(win), predict()
dy/dx w.r.t. : 0.candidate_rating 1.candidate_rating 2.candidate_rating candidate_female endorsement
```

	Delta-method dy/dx	Std. Err.	z	P>|z|	[95% Conf.	Interval]
candidate_rating						
Not qualified	-.4825749	.1536904	-3.14	0.002	-.7838025	-.1813473
Qualified	-.3660295	.1374252	-2.66	0.008	-.6353779	-.0966811
Well qualified	-.3569564	.1362062	-2.62	0.009	-.6239157	-.0899972
candidate_female	.155091	.0628973	2.47	0.014	.0318145	.2783674
endorsement	.286962	.1271619	2.26	0.024	.0377294	.5361947

```
Note: dy/dx for factor levels is the discrete change from the base level.
```

As demonstrated, "not qualified" candidates are no less than 48 percentage points less likely to win an election than "exceptionally well qualified" candidates. In other words, an "exceptionally well qualified" candidate is approximately twice as likely to win than a "not qualified" candidate (i.e., 1/0.48 = 2.08).

The hypothesis thus holds: A "not qualified" candidate is very unlikely to win an election to state court judge. It is worth noting that "not qualified" candidates are also less likely to receive a newspaper endorsement. Only 3 percentage point of "not qualified" candidates in the sample received a newspaper endorsement compared to 40 percentage point of "well qualified" candidates and 62 percentage point of "exceptionally well qualified" candidates. This suggests a strong correlation between career "evaluations" by bar associations and newspaper endorsements.

Table 9 below visualizes the effect an endorsement by the Los Angeles Times may have. However, because of the low number of observations (data from years prior to 2018 was no

longer publicly available from the Los Angeles Times), the following chart has limited significance, but presents an area for potential further research.

Table 9 - *LA Times – success rate of endorsed candidates*

Year	Endorsed	Won	Win rate
2022	7	7	**100%**
2020	9	8	**89%**
Total	**16**	**15**	**94%**

As the literature section demonstrated, much existing research probed the party affiliations of judicial candidates where this is available. This dissertation was, however, unable to establish a statistically significant effect of party affiliation listing in relation to winning as Table 10 below will show.

Table 10 - *Logit model demonstrating the effects of party affiliation in Houston*

```
Logistic regression                             Number of obs   =        208
                                                LR chi2(5)      =      30.17
                                                Prob > chi2     =     0.0000
Log likelihood = -121.45521                     Pseudo R2       =     0.1105

------------------------------------------------------------------------------
         win |      Coef.   Std. Err.      z    P>|z|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
candidate_rating |
   Qualified |  -.5410001    .516087    -1.05   0.295    -1.552512    .4705119
Well qualified |   .9153592   .4330585     2.11   0.035     .0665801    1.764138
               |
candidate_party |
  Republican |  -.635477    .3328174    -1.91   0.056    -1.287787    .0168331
candidate_female |   .0752811   .3201799     0.24   0.814    -.5522599    .7028222
  endorsement |   .9156959   .3486752     2.63   0.009     .2323051    1.599087
              |
         city |
      Houston |          0  (omitted)
     election |          0  (omitted)
        _cons |  -.9850578   .4257485    -2.31   0.021    -1.819509   -.1506062
------------------------------------------------------------------------------
```

Table 10 above shows that the logged odds of Republicans winning an election was -0.635477 with Democrats as the base, but with no statistical significance. Although party affiliation is not a significant predictor of *winning* an election, it does appear to be a significant predictor of the *percentage* of votes received as shown below:

Table 11 - *Regression of percentage of votes testing for political party affiliation in Houston*

Source	SS	df	MS		
Model	68839.5819	7	9834.22598	Number of obs =	208
Residual	135887.081	200	679.435406	F(7, 200) =	14.47
Total	204726.663	207	989.017696	Prob > F =	0.0000
				R-squared =	0.3363
				Adj R-squared =	0.3130
				Root MSE =	26.066

candidate_pct	Coef.	Std. Err.	t	P>|t|	[95% Conf.	Interval]
candidate_rating						
Qualified	16.65863	5.458397	3.05	0.003	5.895233	27.42202
Well qualified	31.22699	5.014737	6.23	0.000	21.33844	41.11553
candidate_party						
Republican	-14.30509	3.804547	-3.76	0.000	-21.80726	-6.802919
candidate_female	3.374315	3.772932	0.89	0.372	-4.065515	10.81415
endorsement	15.09726	4.180047	3.61	0.000	6.854646	23.33988
city						
Houston	0	(omitted)				
election	0	(omitted)				
year						
2014	2.552374	4.556391	0.56	0.576	-6.432356	11.5371
2016	-9.156011	4.448386	-2.06	0.041	-17.92777	-.3842549
_cons	56.02495	5.538092	10.12	0.000	45.1044	66.94549

When controlling for candidate ratings, candidate gender, and newspaper endorsements, it appears that Republican candidates in Harris County receive, on average, 14.31 percentage point fewer votes than Democratic candidates.

This raises the question of how Republicans can receive a significantly lower percentage of the votes, but not be less likely – statistically speaking - to win elections. The answer may be that when Democrats win, they tend to win by large margins, but Republicans tend to win in close elections. Regardless, despite what the literature discussed as being an important cue, it is not certain that there is a meaningful partisan advantage in the greater Houston. This could also be, as the literature discussed, because although Texas overall tends to be a politically conservative-leaning state, there are pockets of more liberal-leaning areas in that as well as in other states. Harris County might be one of them.

In Los Angeles County, candidates run in nonpartisan races, but may still earn the endorsement by a political party and may display this in their election materials, albeit not on the ballot. More research could shed light on the importance of an endorsement by the Democratic Party in Los Angeles; a liberally leaning city where, as mentioned, few candidates will chose to run as Republicans. The Los Angeles County Democratic Party ("LACDP") did not reply to this researcher's request for information about endorsed candidates over the past ten years. Over the past two years, however, the following few numbers demonstrate a potential connection between a party endorsement and a candidate win:

Table 12 - *Recent success rate of winners endorsed by the LACDP*

Year	Endorsed	Won	Win rate
2022	4	3	**75%**
2020	9	8	**89%**
Total	**13**	**11**	**85%**

Because of the scarcity of data publicly available, the above is only an indication of an area suitable for future research.

Overall, the results of this study show strong correlation between job titles, bar association evaluations, and newspaper endorsements. In fact, in at least Los Angeles County, the effect

cascades: If first (as the sequence unfolds) a candidate is labelled "not qualified" by the local bar association, that candidate is also less likely to earn the endorsement of the one of the two major political parties in Los Angeles County (see numbers and percentages below). That cascades into it being highly unlikely that the candidate will earn an endorsement by the major newspaper. In effect, that trio of events and results appears to, *ceteris paribus*, terminate a candidate's chance of winning an election.

A final item of caution is in order here. The above analyses demonstrate correlations between the independent variables and outcomes. Correlation is not the same as causation. The bar for proving causation is much higher when it comes to data and methodology than demonstrating correlation. Nonetheless, with the above strong correlation effects, it is fair to surmise that the variables analyzed here may also well cause the results shown because of the strength of the statistical results.

B. Discussion

1. Informational gaps, informational asymmetries, and voter roll-off

In times of low participation in elections in general, it is reality, but also a concern, that judicial elections continue to be low-information and low-saliency elections. The idea behind democracy is to enable citizens to broadly decide on their own governance models and representatives. When only few and very uninformed voters make crucial decisions on positions which, in the case of judges, typically turn out to be life-time positions, voices are lost that might better have represented general sentiments in society about how it should be run. Public participation – including voting – is known to result in better buy-in to and acceptance of governance models, representatives, and decisions (Dellinger, 2012). Low judicial election participation and the high degree of mistrust in government today, including the judiciary, may

be related. It is outside the scope of this dissertation to analyze that. The rolloff numbers of the literature and findings sections above demonstrate that voters still take an even lower interest in voting for judges than for more visible races such as governors, mayors, and of course presidents. At the same time, judges are also known to sit for very long periods of time, often until retirement or death. This dissertation mentioned the same. It must be said to be a concern that as few voters as is the case take an interest in placing candidates in what turn out to be positions for decades until retirement. It is also a concern that voters perceive voting for judge to be as untransparent and outright difficult task as many say they do given the wealth of information readily available modernly via websites and other internet technology.

It is, of course, impossible to entice politically unsophisticated and disinterested voters to take a greater interest in voting in low-information races if they do not take an inherent interest in so doing. Voters are either interested in certain races or they simply are not. That has been the situation for a long time in relation to other elections as well. Expecting an improvement in this situation is unrealistic, however desirable it may seem from a political science, justice, and broader democratic points of view.

Information channels and contents could be improved. For example, slate mailers could, while they still exist, be improved to be more correct and more transparent than they currently are. As mentioned, a problem with slate mailers is that they typically bear very official-sounding names, but are issued by organizations that are very often not regularly operating organizations such as, for example, the two major political parties or a number of real grassroots and/or special interest organizations. Instead, the organizations listed as slate issuers are typically either individual persons or small, politically sophisticated companies who profit from issuing and mailing out slates via candidate payments. In short, slates are typically just advertisements. The

issuing entity often exists only in connection with one single election cycle. They then purposefully discontinue business operations under the particular slate name after each election. At the next election, new slates appear with equally opaque or outright misleading names. Alternatively, the same names may be used by the same organization, but with the chance of typical voters finding out the true nature of the issuers very low. Anecdotally, many voters believe that at least some of the formerly large numbers of slates were, in fact, issued by "real" organizations matching their chosen names. *Caveat emptor*.

A potentially mistaken or perhaps deliberately adopted opinion exists that candidates can neither speak on issues nor cases that may come before them. Only the latter is correct as analyzed above in connection with the *White* case. It is undesirable from a democratic and broader substantive, societal point of view that judicial candidates shy away from stating their opinions on the very matters that voters wish to inquire about as often as experience shows to be the case in at least in Los Angeles County. So long as some judges are elected, it stands to reason that voters should have a chance to learn about the candidates' stances on various legal issues that the voters consider relevant. Judges shape the development of society in a common law nation such as the United States. That is precisely why voters ought to be able to learn about judicial candidates' opinions about various legal issues. A great deal of courage and integrity is required from judges. A candidate not wishing to state his/her opinion on a relevant legal issue creates the impression that he or she does not have the courage to do so for fear of losing votes. Instead, candidates typically pander to both camps, relying on inaccurate understandings of codes of judicial conduct as analyzed above. Such conduct does not bode well in a system that expects judges to come to the right decisions *and* publicly stand by them despite potential push-back from society. It indicates weakness, scheming, and the lack of integrity; not laudable traits

in any candidate for elected office and much less so for judicial officers. Of course, this is not to say that judicial candidates should commit themselves to a particular outcome of particular types of cases. This could attract the wrong type of attention and support by special interests. But they could opine on the legal issues of the day in generalized ways that give voters an impression of the type of judicial thinking each candidate represents.

Further,

> [a]s Justice Scalia stated for the majority in *White,* lack of judicial predisposition is neither desirable, nor possible. Taking that statement as true, it seems evident that a judge's predisposition is inextricably bound to the judge's racial, gender, and ethnic experience. Likewise, a judge's representative capacity is contingent on the ability to hear, understand, and articulate diverse views. Thus, without substantive ideological and narrative judicial diversity, any discussion touting the relative advantages to accountability or independence of elective or appointive judicial selection methods is largely irrelevant. Efforts to obtain a diverse bench, whether in a system of merit selection or popular election, foster the complementary interests of judicial independence and judicial accountability. (Wynn & Mazur, 2004, p. 776)

Past judicial decisions, if any, may be the most helpful piece of information to help guide voters. But first-time judicial candidates have obviously not issued any such decisions. Even if they had, and for incumbent candidates, it is doubtful whether very many citizens take the time and effort to research such materials if they even know where to find them. Q&A sessions in any format such as in “meet the candidates”-type of events or published questionnaires on Ballotpedia and Voter’s Edge should be answered with more sincerity and depth than what is currently the case.

Judicial candidates themselves could and arguably should take a more active role in informing voters about their platforms than what they currently do.

2. Financing issues

Elections are expensive. Arguably, judicial elections are even more so on the background of the low interest in judicial elections in general and the resulting interest in everyday people - not special interest organizations – contributing to fundraising efforts. As analyzed, this precisely creates the risk and unwarranted appearance of special-interest involvement in elections of government representatives that are, when elected, expected to be neutral and render blind justice to everyone.

Importantly, the nation is not one that is founded on elite-only leadership. But relatively wealthy individuals are often the faction of the population with funds enough to spare to spend on campaign contributions in general, and arguably in particular in connection with low-saliency judicial elections. This presents a situation of disquietude because often, judges precisely do *not* deal with elite parties; quite the opposite. The current interface between monetary interests, relatively wealthy candidates, and election outcomes is neither in alignment with the notions upon which this nation was founded nor desirable seen from comprehensive governance representation angle. Spending limits may be warranted. Public financing of candidates may be a solution to enable less financially able candidates to run.

However, expensive judicial races, even if only a symptom of a deeper problem, are not likely to fade from the judicial landscape without broad, serious campaign finance reform (Champagne & Cheek, 2002, p. 938). The risk currently presented is that the general public may stop believing that courts are impartial (Champagne & Cheek, 2002). Rather, the general public may come to think that judges (too) are beholden to the interests that won them the election (Champagne & Cheek, 2002). “In extreme cases, the new judicial politics may result not just in the appearance of impropriety, but in real judicial misconduct … There is a real public sense that

the electoral selection system renders justice to those able to gain influence by contributing to judges' campaigns" (p. 939). This situation is undesirable and needlessly creates a risk of judicial impropriety. Again, election reform allowing for public financing could be a solution. So could using merit-based appointments instead of elections.

3. Cues

a. Parties

As the literature demonstrates, partisan identification may serve as an important cue in select judicial as well as in other elections. However, in some states, partisan labels were removed from judicial elections to provide for a more "neutral," considerate judicial election process. This has arguably resulted in the opposite: a democratic charade. This is among other reasons so because, at least in California, candidates can and do switch party affiliation up until even a very short period of time before officially declaring their candidacy. Further, political parties endorse candidates despite the formal nonpartisan nature of races such as those in California. Just as Texas is known to be politically conservative, California is known to be politically liberal. It takes a strong will for a candidate to attempt to defy that reality by announcing a candidacy for whichever in the location is the less popular party. It may also simply be too naïve to do so, hoping to win at the same time. Accordingly, candidates may simply pretend to be of a certain political leaning even if not so given the typically strong desire to win judicial elections. Party politics no longer play an open role in the performance of the actual job of judge. Regardless, it is an uncomfortable thought that judicial candidates, who are subject to ethical rules that other political candidates are not, can switch party affiliation in publicly available voting records in order to appeal to voters or their organizations, should they look into official registration records (the major political parties do). In Texas too can judicial

candidates register to run as a candidate for either party without truly affiliating with the party of their choice, albeit perhaps with some careful rhetorical skills if participating in party endorsement processes as those in California. Judicial candidates can, if anyone, carefully phrase messages to come across a certain way and thus lean into certain political rhetoric if they want to. These speculative strategies could be avoided by having merit-based appointments. In that case, politics will also be at play as recognized in the literature review above, but at least it is to be expected that political winners such as governors take "the spoils" such as being able to appoint judges. In low-information judicial races, however, voters may simply not be sophisticated or interested enough to realize the unsavory tactics that can and do play out in the judicial as well as other local election arenas. The literature section amply demonstrated these concerns. The findings above set out a few facts for potential further analyses.

b. Titles

As demonstrated with the data above, titles become overridingly important in judicial elections when the display thereof is allowed. In particular, Deputy District Attorneys enjoy a marked advantage that is statistically significant across several models. So do sitting judges. While the latter may be to expected as incumbency advantages have been identified and described in prior research, it is perhaps surprising and certainly a new finding that the DDA title has a strong of an effect on voters as it does. This effect is, in part, created for them by the wording of California Election Law. This is so because the law allows government employees to, in addition to the three-word designation all candidates may use, also add their location of work. (Evidently, the "judge" and "DDA" titles are more appealing to voters than other government titles, all of which do, however, enjoy some election advantage over private-sector attorneys whether statistically significant or not). In other words, in a nation that prides itself on equality

before the law, the law pertaining to the election of the judiciary actually renders *in*equality before the law. This is in the democratic context, no less.

While Atkeson and Hamel (2018) see California as a leader in providing ballot designations for voter decision-making, this is thus arguably not so. It would arguably be better not to indicate any professional titles on ballots at all. That way, voters would have to look up the candidates to discern this information (or simply guess on candidates which voters often do anyway per anecdotal and popular material evidence). But at least guessing without state-provided advantages would be fairer than the state rendering clear election advantages to some candidates over others in the form of disparate ballot designations rules. All judicial candidates could be required to run only as "attorney at law." The sample and real ballots now issued in California 30 days (or more) before the end of the election could feature a QR code with a link to a website with candidate information. Some states, including California, already allow for a free (for now) candidate statement to be made in government-provided materials. Granted, voters may not spend the time reading the candidate statements, but may be more enticed to do so with modern technology and features such as QR codes.

In short: in California, the State Legislature has chosen to allow for inequal ballot designation rules favoring some candidates (government attorneys) over private sector attorneys. As the data demonstrates, this is correlated with election outcomes and may thus be said to create or maintain a type of bias rather than limiting it. This is a democratic and governance-related concern that ought to be addressed by the Legislature for a greater amount of candidate fairness.

While the choice to re-elect judges who are supposedly already performing the job in an acceptable manner - presuming that the media would have brought an unacceptable judicial performance to the attention of voters as has happened in California and beyond - even the

reelections of incumbents is not without problems. Beyond the mere presumption that the candidate is either performing the job acceptably or so egregiously that the media and thus perhaps the general population would have heard of it (if further assuming that everyday citizens follow judicial news), democratic shortcomings can all too easily take shape. In Los Angeles County, for example, sitting judges running unopposed are not even listed on the ballot due to the large number of judges in the county. Such an "election" process is not a choice by voters at all. It is a democratic charade. This could be solved by not having judges run for office and reelection throughout such a vast county, but rather in smaller districts. This would also result in other democratic advantages such, the literature shows, better knowledge of the candidates, lower costs for running for office or re-election, and closer connections between the candidate and the areas in which he/she might sit. Of course, judges could be appointed in merit-based procedures instead of having to run. This dissertation supports a change to such an outcome.

c. Local bar association "evaluations"

The names of local attorney associations – in short, the very phrase "bar associations" – are highly problematic because citizens to a very large extent believe that these are government-run entities ("state bar" associations) and not, as is the case, mere voluntary associations of fee-paying individuals; in other words, private clubs.

For example, citizens in Los Angeles County are, anecdotal but extensive evidence shows, largely unable to differentiate between "the State Bar of California" and the "Los Angeles County Bar Association." Only people relatively familiar with the practice of law will know the difference; that the "state bar" is one thing and the local "bar association" quite another. At the pragmatic level, it might be unrealistic to expect the bar associations to do anything to rectify this information gap. This is so because they bar associations are also "political" entities -

although not necessarily so from a partisan point of view - and wish to have "their" candidates elected as do all politically interested entities. Political science and other history shows the reluctance of any person or entity in power in giving up such power. From an ethical and democratic point of view, however, it is questionable that these private associations do not do more to educate the general public about what they truly are and, importantly, what they are not.

Having said that, the general public may, of course, also said to be primarily responsible for their own information-gathering and -processing before voting. Then again, the literature demonstrates that voters simply do not educate themselves much, if at all, about judicial and other "low information" races. They vote largely spontaneously and based on cues and heuristics. This leads to the reality that bar associations use voter ignorance to impact who gets elected to be judge and who not via subjective "evaluations" based on demonstrable bias in favor of one type of attorney only - trial attorneys. This may have an impact on justice itself, which should be researched further. However, this is a major concern in what should be a more unbiased democratic process. It presents yet another reason why judges arguably should not be elected.

Local bar associations could, instead, take the chance to better educate the public on the merits of each candidate from varied perspectives and on the needs of the local judiciary in general. In today's overcrowded media sphere where most people only focus on a few informational providers some of which are not even news outlets (think private Facebook comments) or tend to be more entertainment- than news-related, it is, however, questionable whether voters would truly go to the effort of educating themselves about judicial candidates even if local bar associations went to greater lengths to explain the role of the judiciary and candidate qualifications. At a minimum, however, local bar associations ought to revise their

internal “evaluation” criteria and methodology. In doing so, they ought to consider their own calls for greater inclusion of untraditional candidates in the legal profession. This includes judicial candidates. They also ought to make it clearer who they will not find to be “qualified” of office at all and why based on more objective and well informed criteria than what is currently the case. At bottom, at least LACBA seems to be believe that only one single type of attorney – trial attorneys – can fulfil the role of being judge. This even in times of fewer and fewer cases going to trial and more and more to, for example, alternative dispute resolution or settlements.

As shown, when a candidate is not rated at least “qualified” (in at least Los Angeles County), that candidate simply can no longer, with modern internet search engine optimization (“SEO”) results, win an election for judge. This has been the case for, now, at least ten years. Adding injury to insult (literally) is the fact that it subsequently becomes very difficult to get rid of the label “not qualified” online in the U.S. This is because in contrast to the European Union, for example, United States law does not offer a “right to be forgotten” and thus have negative publicity removed from online search engines. This situation may well lead to untraditional candidates deciding not to run in the first place. Further research could shed more light on this.

At the other end of the spectrum, the rating “exceptionally well qualified” goes hand in hand with the title of judge to create an even more powerful cue that also, in effect, determines the election, but this time in favor of the candidate. Moreover, local bar association ratings not only go hand in hand with state-provided advantages given to government attorneys, they also escalate to newspaper endorsements, which still have an effect on election outcomes as demonstrated above.

It seems unusual that private associations have as much power in the election context as bar associations do. Research for this dissertation did not discover other private associations with

that much power over government elections. Local bar associations are, in effect, private clubs of attorneys with extraordinary powers over government affairs. They are also private clubs able to enjoy the ability to relatively easily and inexpensively broadcast their largely subjective opinions via today's internet technology. Because of voter ignorance in general and a lack of understanding of the nature and functions of state and local bar associations, the effect becomes stealthy. In turn, that violates modern notions of democracy and public participation.

The bar association bias in favor of traditional trial attorneys in at least Los Angeles is also one that goes against the grain of the association's own stated goals and ideals. On its website, LACBA, for example, claims that it has "a dedication to addressing equity and inclusion and [is] the conduit to underrepresented members of the legal community." Further, it touts the fact that it is "one of the first bar associations to have a Vice President for Diversity, Inclusion, and Outreach as well as an active Diversity in the Legal Profession Section. (Los Angeles County Bar Association (*n.d.*)). In short, the association outwardly ascribes to obtaining greater diversity in the profession:

> The Diversity in the Profession Section is dedicated to facilitating full and equal participation in the legal profession by members of communities that historically have been underrepresented, based on differences in age, color, physical and mental (dis)ability, ethnicity, family or marital status, sex, gender identity or expression, geographic location, language, national origin, political affiliation, race, religion, sexual orientation, socio-economic status, military and veteran status, learning styles, and other characteristics that make people unique. The mission of the Diversity in the Profession Section is to increase and promote diversity, equity, and inclusion in the legal profession, including by advancing the careers of diverse lawyers and legal professionals, providing leadership and educational opportunities, promoting policies and programs that advance diversity, equality, and inclusion, and providing mentorship opportunities for lawyers and students in the diversity pipeline. (Los Angeles County Bar Association (*n.d.*)).

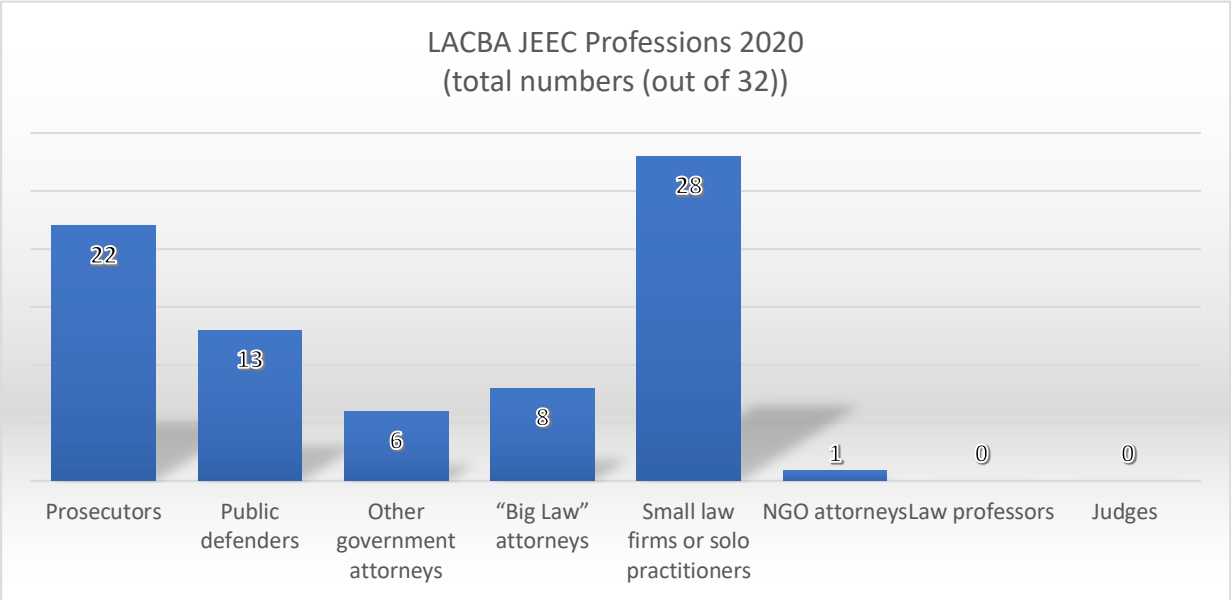
However, recent figures showing the composition of its judicial "evaluation" committees and the resulting "evaluations" paint an entirely different picture of the association in this context.[14]

d. Evaluation committee members[15]

In the 2019-2020 election cycle, for example, the judicial elections evaluation committee ("JEEC") comprised 32 persons. Of those, approximately seven were prosecutors (from various government offices but most from the District Attorney's office) (22%), four were public defenders (13%), two worked in other government attorney functions (6%), eight were employed by "Big Law" firms (for purposes of this research; those employing more than ten attorneys) (25%), nine worked in smaller law firms or as solo practitioners (28%), one worked for an NGO (3%), none were law professors (0%), and none were judges (0%). Three were persons of color[16] (0.09%). See Figure 1 below:

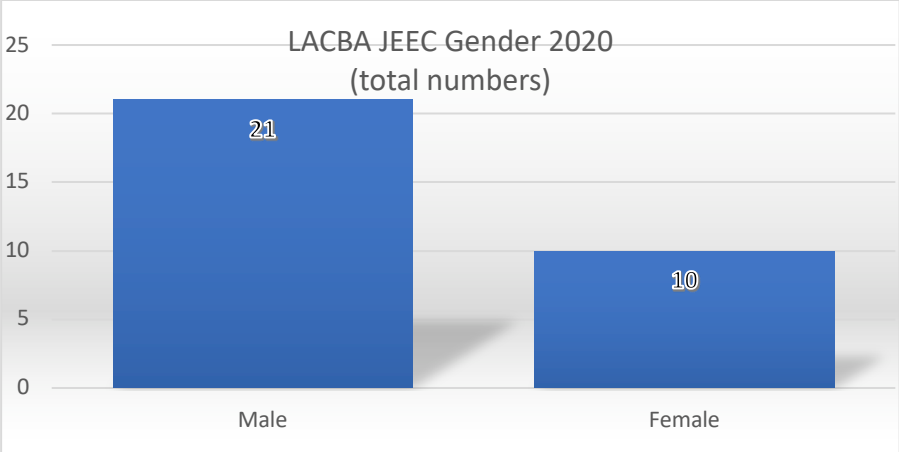
[14] These figures stem from the researcher's observations and calculations as LACBA does not publicize information about the minority backgrounds of their own evaluation committees.
[15] The data in this section is based on the researcher's participation in the 2020 elections as a judicial candidate and reflects her private opinions on this matter.
[16] Not included per U.S. Consensus methodology: People of Middle Eastern descent. The race composition here and in the 2022 chart was estimated based on online images where available and, in the case of the 2020 cycle, the researcher's personal observations. A vast majority of online images were available. The ones that were not were removed from the calculations here.

Figure 1 - *LACBA JEEC Professions 2020*



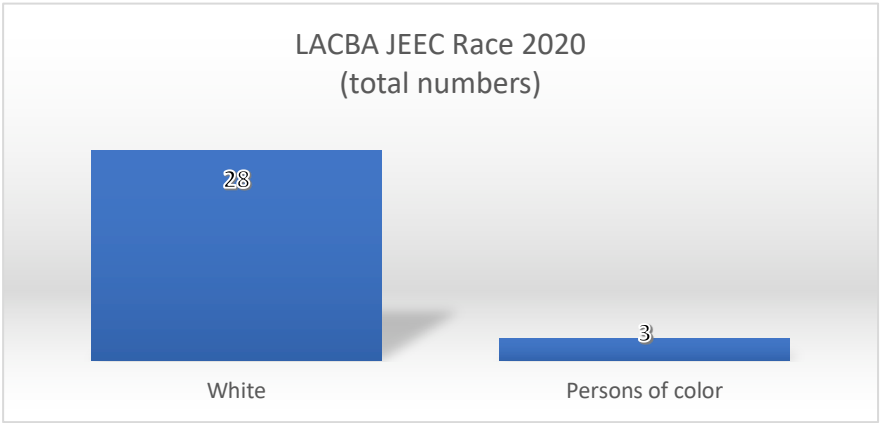
Twenty-one were males (66%). Ten were females (30%). See Figure 2.

Figure 2 - *LACBA JEEC Gender Composition 2020*



The race distribution was as shown in Figure 3 below.

Figure 3 - *LACBA JEEC Race 2020*



In the 2022 election cycle, the judicial evaluation committee comprised 39 persons. Of those, approximately eleven were prosecutors (from various government offices but most from the Los Angeles County District Attorney's office) (28%), three were public defenders (8%), no one worked in other government attorney functions (0%), seven were employed by "Big Law" firms (for purposes of this research; those employing more than ten attorneys) (18%), 18 worked in smaller law firms or as solo practitioners (46%), no one worked for an NGO (0%), none were law professors (0%), and none were judges (0%). Eight were persons of color (20%). Twenty-three were males (59%). Sixteen were females (41%). The corresponding results for 2022 are charted below (see Figure 4, Figure 5, and Figure 6 below).

Figure 4 - *LACBA JEEC Professions 2022*

Figure 5 - *LACBA JEEC Gender 2022*

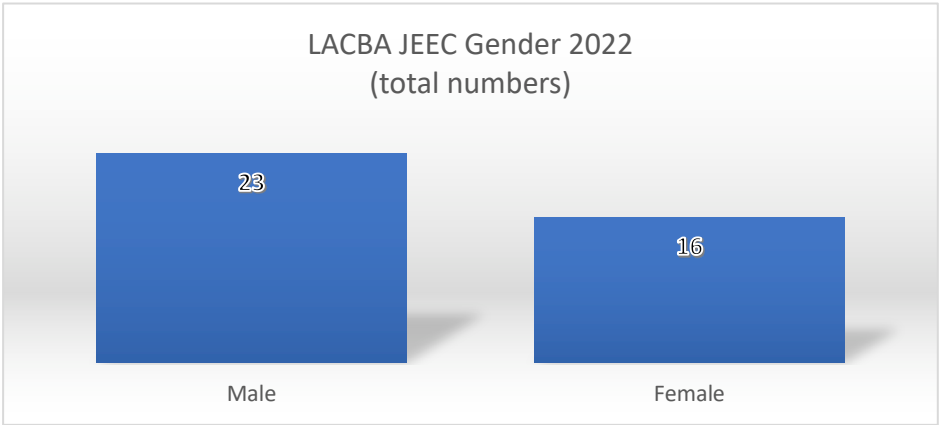


Figure 6 - *LACBA JEEC Race 2022*

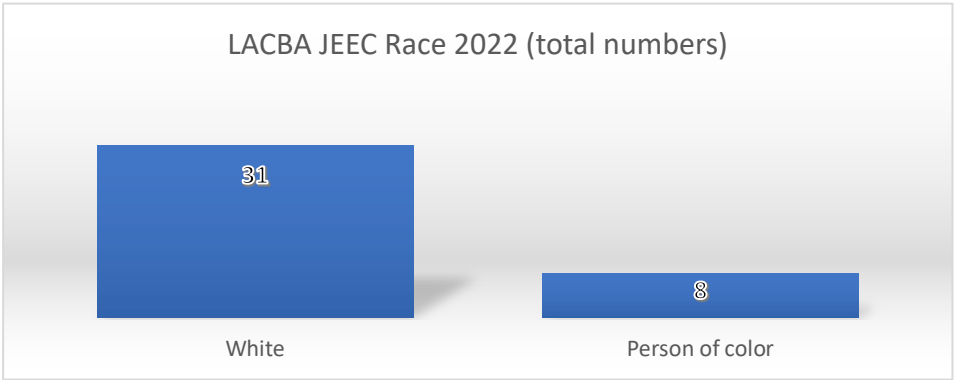


Table 13 - *Los Angeles County Bar Candidate "Evaluations" in numbers and percentages, 2012-2022*

LACBA	2022	2020	2018	2016	2014	2012	Total	% total
Exceptionally Well Qualified	2	0	1	0	1	2	**6**	**4.0%**
Well Qualified	13	6	6	8	7	3	**43**	**28.7%**
Qualified	11	13	16	11	11	5	**67**	**44.7%**
Not Qualified	9	4	4	4	7	6	**34**	**22.7%**
Total evaluated	**35**	**23**	**27**	**23**	**26**	**16**	**150**	**100.0%**

Table 14 - *San Francisco County Candidate "Evaluations" in numbers and percentages, 2010-2022*

San Francisco Bar	Evaluation	% total
Exceptionally Well Qualified	6	**27.3%**
Well Qualified	6	**27.3%**
Qualified	9	**40.9%**
Not Qualified	1	**4.5%**
Total evaluated	**22**	**100%**

Table 13 above shows that of 150 candidates "evaluated" by LACBA over the past ten years, no less than 22.7% were considered to be "not qualified" for office over the past ten years. (In contrast, the San Francisco County Bar association considered only 4.5% of its candidates "not qualified" (Table 14 above)). 48.7% of the candidates in Los Angeles were rated

"qualified," 26.1% "well qualified," and 3.5% "exceptionally well qualified." In the two largest urban areas in California, running for judge may thus – in otherwise somewhat similar circumstances and under the same state law – have greatly different outcomes based on the opinions of private clubs. The soundness of this is questionable. Table 13 compares the bar evaluation results in San Francisco and Los Angeles.

It is implausible to think that at least the Los Angeles County Bar Association, for example, has not, when evaluating candidates for office, noticed the strong bias among its own ranks in favor of prosecutors, in particular, as well as other trial attorneys more broadly. At worst, professional associations otherwise touting the values of diversity deliberately support one particular profession in what should be more neutral and more democratically decided processes without powerful organizations favoring a particular subset of professionals in professional evaluations. At best, the organizations are woefully ignorant about best practices and modern norms of bias training and avoidance. This may stem from the jobs of the evaluators themselves. When these individuals hold powerful professional positions such as being prosecutors and attorneys in large law firms and, additionally, are given the powerful role of "evaluating" candidates for judicial office, also a position of much power, the problem becomes clear: ingroup members favor other ingroup members and consciously or unconsciously help position the *already* powerful in ways that will help those obtain more power. This is known as "system justification theory" (Redfield (Ed.), 2017, pp. 166-167). It is beyond the scope of this study to go in more depth with this issue, but it should, for the results of the study, be noted that

> [i]f ingroup favoritism is practiced equally by all, then the greatest benefits will necessarily flow to members of a society's more powerful groups. Their greater power, along with their (typically) greater numbers, translates to their being better positioned to benefit from ingroup helpers. System justification theory [] explains how a complementary form of favoritism, rooted in existing status, adds to the benefits accruing to high-status groups. (Redfield (Ed.), 2017, pp. 166-167)

e. Quality concerns

The literature review described some of the numerous factors that can help create a "good judge." No one disputes the fact that all stakeholders want to seat "good" judges. But in at least California, only one background factor seems to be of almost overriding importance in existing institutional power structures spilling over into voter influencing: being a prosecutor. The private endorsements associations ought to be aware of the effect they create by so consistently and overwhelmingly "evaluate" prosecutors highly whereas attorneys from private practice, academia, and NGOs are consistently rated "not qualified." The latter operates to terminate a bid for a seat; a democratic influencing concern that does not reflect real qualifications of candidates coming before these evaluation committees. Rather, it reflects a subjective preference among evaluation committee members. Bias exists, as the literature section demonstrates, among almost all of us. It can also be unlearned. LACBA and other local bar associations may wish to contemplate this concern more deeply, using the wealth of knowledge available in the area. It is, at best, naïve to believe that only prosecutors and other government attorneys can fulfill the myriad requirements of judges modernly. It is at worst a deliberate result based on severe misunderstandings of the needs of the judiciary and society at large in modern, urban areas of the nation. This is simply not warranted given the many calls for inclusive governance measured from many scales including professional backgrounds demonstrated in the literature research section.

Further, the heavy preference in at least California election contexts on seating trial court judges with a criminal law background is not warranted given the fact that trial judges hear both civil and criminal cases as well as family, probate, mental health, juvenile, and traffic cases (California Courts – the Judicial Branch of California; About California Courts (*n.d.*)).

In sum, both inclusive governance theories and on-the-ground action items typically include notions of gender and race/ethnicity. This is highly warranted in today's America. Modernly, issues of sexual identification are also prevalent and equally warranted. However, there are other issues upon which this dissertation has sought to shed further light. These are also important and include the professional backgrounds of judicial candidates. This is an issue that may currently be resulting in disparate and perhaps inequitable justice results. The concern thus warrants not only this study, but also further research.

Further aspects of inclusive governance should also be studied. These could include disability backgrounds and, in a nation with significant and increasing numbers of immigrants, research into the national backgrounds of judicial officers. The researcher's attempts to retrieve such information from the California judicial system were not fruitful. As with race, national issues of national backgrounds are surrounded by some sensitivity because of constitutional concerns. This is laudable. However, a lack of transparency can also lead to at least a risk of inexpedient results if not such results outright. This concern could inform both internal (to government agencies and private associations) and external research and work in the future.

An argument may be made that since judges at the trial court level do not sit in panels, each judge is thus the only judicial officer the litigants encounter unless, of course, when seeking an appeal. Although this may be true, it is equally true that the judiciary is still, on balance, an entire government branch presenting myriad composition and overall representation concerns. Further, improved inclusive governance and heightened quality internal to even "just" the judicial trial court system may well help enhance overall judiciary thinking, practice, and outcomes for the betterment of all society. The issue is not one of complete judicial officer isolation and outcomes. Rather, it is one of synergisms and cooperation among judges who do,

after all, interact with each other if not on the bench, then in other contexts. Time has come to consider a modernization of the background composition of the judiciary as it did in other professional contexts. The failure to do with better results is a systemic one. Systemic issues are as important as, if not more important than, only individual representation concerns. The implications of this are outside the scope of this particular dissertation, but are necessary for modern political science and judicial quality and diversity discussions.

4. Newspapers

From the correlation between bar association evaluations and newspaper endorsements, it appears that newspaper editorial boards – the entities that endorse candidates or not – somewhat uncritically concur with most bar association evaluations instead of, as one otherwise might have expected from major, established media outlets familiar with fact-checking and critical thinking, evaluating the candidates based on the newspapers' own criteria. This at least appears to be the case judging the correlation between bar evaluations and newspaper endorsements in the areas examined.

It seems fair to opine that newspaper criteria instead ought to take into consideration true professional qualifications and backgrounds as well as the political and other needs of the region if they conduct endorsements at all (some no longer do so for a variety of different offices, even presidential and gubernatorial ones). Newspapers are, after all, still informing the debate about local affairs. While American media has been known to take political stances throughout modern history and while that is to be expected, perhaps even desirable, from a partisan point of view, judicial races are precisely not political measured from a traditional angle. They arguably should be treated with more focus on the traits that may add to inclusive governance, better judicial qualifications, and other traits potentially called for in the areas covered by the newspapers.

Chapter V. Conclusion

The research for this dissertation delved into the effects of voting heuristics and cues in what are still low-information, low-saliency, low-interest elections for state trial court judgeships. It focused on the large urban areas of Los Angeles, San Francisco, and Houston. The data retrieved covered a decade. The focus of the research for this dissertation was on cues stemming from ballot designations (professional titles) in California and local bar association evaluations in the three areas. Some analyses also centered around the effects of local newspaper endorsements and, to some extent, gender.

Existing literature has not recently demonstrated the effects of, in particular, ballot designations and bar association endorsements. Since the late 1980s, focus seems to have shifted towards partisan influences as well as the increasing cost of judicial elections and the appurtenant risks associated with monetary/special interests to the judiciary. While important, the pros and cons of judicial elections versus appointments have been examined extensively in existing literature. That includes crucial considerations into judiciary branch legitimacy, accountability, impartiality, and independence. In this context, roll-off concerns abound and have also been investigated as have the other pertinent factors in this dissertation.

This dissertation seeks to add new value to existing discussions and literature covering professional diversity among judges, judicial quality concerns, and the role played by local bar associations, state legislatures, and newspapers in the judicial election context. The research demonstrated an almost stealthy effect (because of the low-information nature of judicial elections and voters' general disinterest in these) created by state election law (in California) and local bar associations in the three major urban areas examined. This effect starts with bar association evaluations and cascades into the party political and media endorsement arenas. The

effect predominantly benefits Deputy District Attorneys and sitting judges. The effect is so strong that it can virtually terminate a candidate's bid for office unless that candidate fits the particular mold that established institutions – local bar associations, the two major national political parties, and major local newspapers – deem to be necessary background criteria for judges. This is the situation despite broad calls for more inclusive governance including among bench officers in the areas examined.

This dissertation interpreted "inclusive governance" to include more than the traditional aspects of race/ethnicity and gender. As mentioned, it focused to a great extent on professional diversity while recognizing that yet other aspects should also, in future research, be covered under this umbrella.

The dissertation demonstrated that at least one major bar association – the Los Angeles County Bar Association – is equivocating greatly on the issue of inclusive governance (diversity). On one hand, LACBA touts its efforts to help achieve great diversity measured along many scales among legal professionals and thus judges, yet at the same time brings about - via its highly subjective "evaluations" - election situations that repeatedly functions to terminate the candidacy of attorneys *not* hailing from government positions and traditional "trial attorney" titles. The statistically significant effect of bar association evaluations was demonstrated with the Houston results as well.

At the same time, California election law allows for government attorneys to add their locations of service to the three-word ballot designations that they may use. In contrast, attorneys not in government employ may only use three words in their ballot designations (their titles). This was demonstrated to create a statistically significant advantage to government attorneys over non-governmental attorneys in the two counties examined.

The duad of, in California, the legislature allowing for longer and apparently more appealing job titles and more favorable bar association endorsements being given to government attorneys, in particular DDAs and judges, is a situation of inequality under the law in the case of the California legislature and, in the case of bar associations, uninformed evaluation procedures at best or deliberately skewed ones at worst. Not much in politics can be said to be chance and certainly not these effects created by and among very highly educated individuals. This dissertation has demonstrated that the situation works as follows: virtually only government attorneys (in California) candidates approved by private, voluntary associations of fee-paying individuals (in both states) can win elections to become state trial court judge. This is a situation of democratic and election transparency concerns: Purely private clubs influence elections in stealthy manners. The constitutional concern of, literally, inequality under the law adds to the concern in California.

The American Bar Association serves a role in giving advice on the selection of judges, including those appointed to the United States Supreme Court. It states,

> [f]or more than 70 years, the ABA has been on record in favor of jettisoning judicial elections and replacing them with merit selection and retention on the ground that elections endanger the independence and impartiality of the judiciary. The ABA is not alone in this belief, as many elected judges and politicians have also endorsed replacing judicial elections with merit selection systems relying on appointment. (Streb, 2007, p. 205)

As set forth in the literature section, many scholars agree. For example, after considering various election reforms that have been proposed to better protect judicial independence in the election process, McCleod concludes with the argument that

> in light of the empirical evidence about the deleterious effect of judicial elections and the vital importance of a judiciary that is impartial in both appearance and in fact to the maintenance of the rule of law, the only reform that makes sense is to eliminate popular elections, and [to instigate] other forms of judicial tenure review as a means of deciding who sits on the bench. (McCleod, 2004, pp. 4-5)

When voters are poorly informed and likely to directly or indirectly impose high costs on a minority, as is the case with judicial elections (Lemennicier & Wenzel, 2018), officials should arguably *not* be directly accountable and thus *not* elected (Lemennicier & Wenzel, 2018). Direct democracy – voting for judges – has thus arguably stretched the accountability notion to the point that it may be said to have become taken on a perversely significant role in this context.

Arguably worse is the situation of low voter participation modernly and high roll-off when it comes to judicial elections in particular. As analyzed, many registered voters simply do not bother to vote. If they do, they may not vote in low-information elections such as those for judge. Further, "the phenomenon of rational ignorance [analyzed above] can ultimately culminate in lack of voter participation." This dissertation demonstrated this to be the case in some areas of the nation. Importantly, the lack of voter participation may be "the death note for a democracy" (Pal, 2002, p. iii). This should be taken seriously in the judicial election context and thus in further research in this area.

Beyond the interest in and arguments for an expert and independent judiciary, scholars note that "politicians" (including elected judges) do indeed impose higher negative externalities on minorities than merit-based election plans (Lemennicier & Wenzel, 2018, p. 253). Further, "since we can assume that vested interests – from politicians to the judges themselves – do indeed have large stakes in the policy outcome, [scholars] [] lead us to reject politicians" in certain governance contexts including the judiciary (Lemennicier & Wenzel, 2018, p. 253). Rejecting judicial elections seems logical and "entirely reasonable" (Lemennicier & Wenzel, 2018, p. 252) for the reasons mentioned above. Again, not all governance members need be elected for a society to function in democratically and other sound ways. This theory is, of course, not without the counterpoints also noted above, but it is one that numerous experts

support. Voters seem to be suspicious of surrendering their rights to have direct electoral control over the selection of judges, but given their simultaneously large disinterest in informing themselves about the candidates and even voting for judges (the rolloff problem), this concern must be said to be ill informed and, on balance, to have little merit.

This dissertation concludes that although even judicial elections on the surface nestle nicely within democratic theory, so many problems have been identified in this and prior research that doubt exists as to whether judicial elections can said to be the best way of assuring, in a realistic timeframe, more inclusive governance among the judiciary. Quality concerns abound as well.

If the goal in the judicial election context in the areas examined and possible elsewhere is to optimize the quality of justice by seating the most qualified and least biased judges on the bench and to protect democratic and other minorities through inclusive governance, the sum of the answer is that judicial elections are fatally flawed. Other methods should be devised. At a minimum, judicial election reform should be undertaken. This should examine the roles played by local bar associations.

It may be tempting to argue that committee-based, executive branch, merit-based appointments are preferable to judicial elections. However, it should be noted that because one system – in this case elections – is fatally flawed, that does not necessarily make another option preferable per se. Further, the option is not a binary one; changes to either model could be made.

More research is needed in this area as mentioned above. Notably, this should not be done in the academic "silos" as has traditionally been the case. A larger degree of interdisciplinary action would be fruitful in identifying needs and effective solutions. In particular, the judiciary itself could prove key in this area:

> It is important to note that researchers are often delighted to have an opportunity to work on "real-world" issues and appreciate forming partnerships with practitioners in the justice system such as judges. Partnerships between researchers and practitioners involved in court programs provide both parties with resources to develop a[] [bias] intervention assessment that has rigorous methodology and the appropriate data sources to properly evaluate intervention effectiveness. Judges are essential to assessment efforts because they can help researchers understand the legal process and key legal issues. Additionally, judges can provide researchers with information that will aid in making legally relevant measures as well as prevent them from violating any judicial rules. Researchers and system improvement experts at organizations such as the National Council for Juvenile and Family Court Judges, the National Center for State Courts, the American Bar Association, and local universities are eager to work with judges to make positive changes in the justice system. (Redfield (Ed.), 2017, p. 327)

Relatively broad judicial selection reform may be needed. To the extent this is the case,

> an important lesson from the Texas experience is that reform is best pursued in incremental steps. Wholesale reform efforts pose major threats to established interests, but incremental reform will temper the severity of that threat, making reform easier to accomplish. Even in the wake of scandal and national scrutiny of the Texas judiciary in the late 1980s, wholesale reform efforts were never a serious prospect. However, the same circumstances that led to calls for wholesale reform in Texas were the basis for later incremental changes in judicial campaign finance (Champagne & Cheek, 2002, p. 939).

However, Texans still hold fast to voting for judges (Champagne & Cheek, 2002). So do Californians and citizens in many other states. “This, coupled with the other difficulties of reform, makes it unlikely that Texas will abandon its elective process for selecting judges. [But] it also serves to heighten the importance of incremental reform efforts” (Champagne & Cheek, 2002, p. 939). The Texas experience provides an outline for other states to consider as they find themselves entering the new era of judicial election politics (Champagne & Cheek, 2002, pp. 939-940. The California data above sheds further light on the reform efforts that could improve judicial selection processes. This project strongly supports such reform.

Given the above, the author of this study believes that if one of the two main current methods must be chosen, committee-assisted, merit-based appointments by the executive branch is preferable to elections. This is so because although committees may also, as the institutions

and organizations analyzed above, be narrowly focused on seeing candidates of a particular type and judicial and/or political persuasion seated, there could be significant advantages to this method so long as reforms were made. This would be relatively easy to do. Relevant changes could include involving private "watchdog" organizations in turn composed of a variety of professionals and others, the committees factoring in (in a constitutionally sound manner, of course) how to best obtain inclusive governance measured along the metrics analyzed above and more, the committee consulting with the judiciary on its needs, the general public on its desires, and more. The counterpoint can be made that the very same types of people who currently "evaluate" candidates for elected office in, for example, Los Angeles County and who have, there, been demonstrated to be biased in favor of trial attorneys, may be seated on the executive branch committees. In other words, the political issue – seen broadly – is real and a complex one to solve in this context. It is beyond the scope of this dissertation to do so, but safeguards could be incorporated into legislative and executive branch merit-based appointments. As the situation stands, professional merit is not safeguarded in the election systems in the three areas examined.

Politics seem to be about the power to decide. Democracy may be said to be about spreading decision-making powers among as many members of the governed as possible. Tensions between the two naturally exist, especially given what may be an inherent human trait of wanting to amass and retain power. At the same time, individual as well as organizational and institutional self-scrutiny can and should also be expected in our modern republic. The power structures mentioned above may take the findings and data of the present research into account when considering much needed future improvements to their systems.

Relatively easy steps could and arguably should be taken to counteract, in at least major California counties, the tendency by voters to elect, primarily, prosecutors and, secondarily,

other types of government attorneys to be judges. For example, California election law ought to be reworded once again. A change was made with effect from 2018. This outlawed using misleading phrases such as “tough gang prosecutor” as had been the case before then (Economist’s View, 2012). This research project points out, in two major counties in California, the effects of legislative differences in relation to ballot designations based on whether or not a candidate works for a government agency. The law ought to be creating true equality in this respect. A solution could be to require attorneys to only run as such (“attorney”). The author will propose this change to lawmakers, Governor Newsom, and others.

A more difficult issue is how to expect the local bar associations in at least the two California counties mentioned here to more broadly consider their evaluation criteria. The author plans to submit this study to the chairs of the respective associations and their diversity, equity, and inclusion committees for their internal consideration. In doing so, the author will point out that the Houston Bar Association considered its evaluation process and shifted away from a committee-based to a member-based vote. Other bar associations may do the same or better.

Finally, it bears reiterating that the above findings are based on three voting districts with both similarities (for example, they are large, diverse, metropolitan, and relatively liberal) and dissimilarities (for example, one state allows for ballot designations, the other does not; one state is, overall, more liberal with conservative pockets whereas the other is more conservative with liberal pockets, one allows for party designations, the other does not). The United States is a large nation with myriad geopolitical and other differences. The findings of the present research thus does not necessarily indicate that the same effects relate to other areas than the ones examined in this project. More research is warranted. However, this project aims at illustrating some of the effects played by institutional and organization actors in judicial elections for the

state trail court level in select areas serving as illustrators of a problem that may exist in other areas as well. As demonstrated, these are significant, yet little research has been focused on these power structures in modern literature and research. In a democracy, it is of concern that power structures have as much effect as they have in at least the urban areas examined here without more general knowledge about this than what appears to be the case. It is, further, a constitutional concern that one state – California – allows for inequality before the law in the election context. In turn, this is also a democratic concern.

Appendices

Appendix A. Endorsement questionnaire from the Los Angeles County Bar Association

2020 - PERSONAL DATA QUESTIONNAIRE
JUDICIAL ELECTIONS EVALUATION COMMITTEE
OF THE LOS ANGELES COUNTY BAR ASSOCIATION

1. Full name and any other names you have been known by:

2. For what position (LASC Office No.) are you running:

3. Are you a bench officer? If yes, please identify the position you currently hold:

4.

   a. What is your current office address and telephone number:
   b. What is your current home address and telephone number:
   c. Please indicate to which address or telephone number you wish communications addressed:
   d. If you would prefer notice via telecopy, provide your FAX number and initial the following Disclaimer:

I hereby permit the Los Angeles County Bar Association Judicial Elections Evaluation Committee to send notices and correspondence to me by fax or email.

5. Date and place of birth:

6. Have you had any military service? No. If yes, describe the nature of your service and discharge.

7. List each college and law school you attended in chronological order beginning with the earliest college, including dates of attendance and the degrees awarded. Please explain any gaps in time during which you were not in school. Further, if you left any institution without receiving a degree, please state the reason for leaving.

8. List all courts in which you have been admitted to practice, with years of admission. Give the same information for administrative bodies which require special admission to practice.

9. With respect to each job of any kind held by you since 21 years of age, whether in the field of law or otherwise, state:

   a. the nature of your job;
   b. the identity of your employer, including its current address and telephone number. If you were self-employed, state the address(es) for same;
   c. the nature of the business;
   d. the time period of your employment;
   e. if applicable, the reason why your employment was terminated

List your jobs in chronological order starting from the earliest job and put an asterisk beside each job in the field of law. **Do not omit any job regardless of how long you were an employee.**

10. Over the past ten years, have you been an officer or director or otherwise engaged in the management of any business or nonprofit corporation?

11. Did you serve as a clerk to a judge?

    If yes, identify the judge, the court, and the period(s) of your service.

12. With respect to each legal job you have held after being licensed to practice, state the following:

    a. The name of the law firm, law office, company, governmental entity or other group with which you were practicing.
    b. The period of time of your affiliation.
    c. The nature of your employment relationship, e.g., whether an associate, partner, self-employed, house counsel, assistant public defender, etc.
    d. The principal nature of your practice, including a description of any significant changes and when they occurred and any specialties you have had.
    e. Any other information that might be considered relevant.
    f. Please explain any gaps in your employment when you were **not** practicing law.

13. If you have not practiced law over the past five years, please describe the nature of your work and what steps you have taken to remain familiar with substantive and procedural law.

14. If you have practiced law during the last five years, provide the following information:

15. If you have practiced law during the last five years but have **not** appeared in court regularly during such time, provide the following information:
    a. Describe the nature of your practice during the last five years:
    b. State whether your practice ever included regular court appearances and, if so,

3. Approximately what percentage of these appearances was in:
    1. Superior Court
    2. State Appellate Court
    3. Federal Courts
    4. Other Courts (Identify)
    5. Administrative Bodies (Identify)
4. Approximately what percentage of your court matters were:
    1. Civil
    2. Criminal
    3. Other (Identify)
5. State the approximate number of cases in courts of record that you have tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
6. Approximately what percentage of your trials were:
    1. Jury
    2. Non-Jury

7. List the names and case numbers of five cases you tried to verdict or judgment (rather than settled) and for each:
   a. provide the names and addresses of all other counsel;
   b. identify the name of the judge who presided at the trial;
   c. describe the nature of the trial.

16. Have you ever held a position as a judge, commissioner or other bench officer? If yes, then state which.

17. Have you ever been charged with a violation of any federal, state, county or municipal law, regulation or ordinance? If yes, please give particulars, including the nature of the charge, the ultimate disposition and the nature of any punishment imposed. (Do not include traffic violations for which a fine of $100.00 or less was imposed).

18. Has a tax lien or other collection procedure ever been instituted against you by federal, state or local authorities?

19. Have you ever been sued for legal malpractice?

20. Have you ever been a party in any legal proceedings other than those referred to in Question Nos. 17, 18, and 19? "Legal proceeding" includes any civil or criminal matter before a court, administrative agency or if you appeared as the subject of a grand jury proceeding. If so, please identify:

    a. the name of the case and number;
    b. the tribunal before whom you appeared; and
    c. the disposition of the action.

21. Have you ever been disciplined for a breach of ethics or unprofessional conduct including sanctions required to be reported to the California State Bar by any court, administrative agency, bar association, disciplinary committee, or other professional group? If so, please give particulars.

    Has your membership to the California State Bar ever been suspended or have you ever resigned, voluntary or involuntary? If so, please give particulars.
    Have you ever been held in contempt or declared a vexatious litigant? If so, please give particulars.

22. Do you know of any impairment that would prevent you from performing the judicial function satisfactorily, e.g., health, substance abuse, etc.? If so, please explain:

23. Have you published any legal books or articles? If so, please list them, giving the citations and dates, and provide copies of any articles. If you have written numerous items, please provide a representative sample.

24. Have you taught, lectured or participated as a panelist on legal subjects? If so, please list the sponsoring organizations, subject matters and dates.

25. List all bar associations and professional societies of which you are a member, and give the titles and dates of any offices which you have held.

26. List all clubs, groups and organizations (other than bar associations or professional societies listed in your answer to the preceding question) of which you now are or have been a member within the last five years:

27. List all honors, prizes, awards or other forms of recognition you have received other than those mentioned in answers to previous questions.

28. In the Excel form provided entitled "Candidate Reference Contact List," provide the names, addresses and telephone numbers of 75 lawyers, judges or other persons with whom you have had **professional** contact **over the past ten years**, including everyone listed in this document. After each name, identify your relationship to the reference, i.e., opposition attorney, co-counsel, appeared before, bar association, etc. If the reference is a blood relative, spouse or personal friend, please so state following the name.

29. State any other information that you think might fairly be considered pertinent to evaluating you as a candidate for judicial office.

Appendix B. Endorsement questionnaire from the Los Angeles County Central Democratic Party (2020)

2020 Candidate Questionnaire – Los Angeles Central Democratic Party

1. State your full name, office and home addresses, e-mail addresses, and telephone numbers.
2. For what position are you running?
3. Are you a bench officer? If yes, please identify the position you currently hold.
4. Are you currently registered to vote as a Democrat? State the dates you have been registered as a Democrat. If you have been registered as a member of another political party, state which party, when, and why.
5. Name and address of each college, graduate school and law school attended, dates of attendance, degree awarded and reason for leaving school if no degree was awarded.
6. Year admitted to the California Bar.
7. Courts to which you are currently admitted to practice and year of admission.
8. Describe chronologically your employment or legal practice since becoming a member of any[17] state bar. Include dates, names and addresses of all law offices, firms, companies or government agencies with which you have ever practiced law, the nature of your affiliation with each, the general nature of your practice, and any other relevant particulars.
9. What has been the general character of your employment or legal practice during the last five years? If applicable, describe your typical client. Please describe legal specialties, if any.
10. State the approximate number, nature and approximate length of cases you have tried to conclusion or in substantial part during each of the last five years.
11. Approximately what percentage of your practice in the last five years has been devoted to litigation?
12. List the five most significant cases in which you have been involved during your legal career and the nature of your involvement. Alternatively, if your practice does not involve litigation, describe the five most significant matters in which you have been involved during your legal career and the nature of your involvement. If currently a judge, list the five most significant matters with which you were involved prior to your appointment.
13. Have you ever been involved in a particularly noteworthy or controversial case or matter? Please describe.
14. Describe your participation in pro bono or public interest legal work.
15. List all memberships in bar association or law-related organizations in the last five years and any leadership positions held.

[17] Note that I worked for a year as a law clerk in the United States Virgin Islands before taking the California bar. Per your instructions, however, I have not included that employment here although it was past my law school graduation.

16. List all clubs, groups and organizations (other than bar associations or professional societies listed in your answer to the preceding question) of which you now are or have been a member within the last five years.
17. Do you currently belong, or have you belonged to any organization that discriminates on the basis of race, gender, sexual orientation, or religion?
18. Have you held any appointive or elective public office, or have you been a candidate for elective office? If so, give details, excluding information regarding political affiliation.
19. List any significant civic, educational or charitable activities, community agencies or social programs in which you have taken part in the last five years and, if you wish, prior to the last five years, giving dates and leadership positions held. Include all non-profit organizations with which you have been affiliated in the last five years as an officer, member, director or trustee.
20. List any other honors or community activities that you believe may be relevant.
21. Have you been convicted of violating any federal, state, county or municipal law, regulation or ordinance (other than traffic violations for which a fine of $500 or less was imposed)? To the best of your knowledge, are you currently under investigation for any alleged violation of any law, regulation or ordinance? If so, give details.
22. Have you ever been a party to or been involved in any other legal proceedings other than as counsel? If so, give details. Do not list proceedings in which you were a guardian ad litem, executor or administrator, but do include all bankruptcies and proceedings in which you were a party in interest, or any grand jury proceeding.
23. Have you ever been disciplined for a breach of ethics or unprofessional conduct including sanctions required to be reported to the California State Bar by any court, administrative agency, bar association, disciplinary committee, or other professional group? If so, please give particulars.
24. Has your membership to the California State Bar ever been suspended or have you ever resigned, voluntarily or involuntarily? If so, please give particulars.
25. Have you filed all state and federal tax returns in each year since you became a member of the Bar? If not, give reasons. Have federal or state authorities ever instituted a tax lien or other collection procedure against you? If so, give details.
26. Is there any other information tending to reflect adversely on your personal or professional background or qualifications, or which you think might be so interpreted by others, which the Judicial Interview Committee should know in the interests of the fullest possible disclosure? If so, please describe.
27. Is there any information in your medical history in the past seven years, such as treatment for mental illness, alcoholism or drug abuse, which might tend to affect, or appear to others to affect, your fitness for election? If so, please describe.
28. Have you run for a judicial seat before? If so, please state when, the result, and any ratings you received from any bar associations.
29. Why do you want to be a judge?

30. What actions would you take as a judge, if an attorney in your courtroom said or did things which showed prejudice, including but not limited to on the basis of sexual orientation?

31. Who has endorsed your candidacy? Please list your major endorsers.

32. Do you have a campaign consultant? If so, who is it?

33. How much money do you expect to spend on this race? Who has been your largest contributor to date?

34. The Judicial Interview Committee may request additional input from other groups, including the Los Angeles County Bar Association and other Bar Associations. Are you aware of any information that any of these groups might have about you which you consider incorrect, unfair, or in need of additional explanation? If so, please explain.

35. Please state in your response that you have reviewed the 2020 California Democratic Party Platform, as found at https://www.cadem.org/our-california/platform.

    Yes, I have.

Optional: Please feel free to describe any experience, attributes, or accomplishments not covered by your other responses that you believe might aid the Judicial Interview Committee.

Appendix C. Official cheat sheet, ballot designations

BALLOT DESIGNATION CHEAT SHEET

There are five categories of ballot designations. A candidate can choose from ONE of the designated categories listed below:

1. **EC §13107(a)(1): words designating the elective office which the candidate currently holds.** It can be the office title and or the jurisdiction name. There are **no word limit requirements** for this category. Appointed-in-lieu can use office title or "Incumbent."

   EXAMPLES: Governing Board Member, East Side Union High School District
   Member, Santa Clara County Board of Supervisors
   Director, Cupertino Sanitary District

2. **EC §13107(a)(2):** The word **"incumbent"** can be used if the candidate is currently running for and holding the **same office**. ***The word "incumbent" must stand alone.***

3. **EC §13107(a)(3): No more than 3 words** designating either a candidate's current occupation(s) or profession(s), or the occupation(s) or profession(s) of the candidate during the calendar year immediately preceding the filing of nomination documents. Geographical names are counted as one word.

4. **EC §13107(a)(4):** The words **"appointed incumbent"** if the candidate was appointed to fill the remainder of a vacant seat and running for same office. ***The words "appointed incumbent" must stand alone.*** The words **"appointed [name of elected office]"** if the candidate was appointed to fill the remainder of a vacant seat and running for same office. ***The words "appointed [name of elected office]" must stand alone.***

5. **"Community Volunteer"** may be used if the candidate has no current occupation and is a volunteer. ***The words "Community Volunteer" must stand along.***

13107.

(a) With the exception of candidates for Justice of the State Supreme Court or court of appeal, immediately under the name of each candidate, and not separated from the name by any line, unless the designation made by the candidate pursuant to Section 8002.5 must be listed immediately below the name of the candidate pursuant to Section 13105, and in that case immediately under the designation, may appear at the option of the candidate only one of the following designations:

(1) Words designating the elective city, county, district, state, or federal office which the candidate holds at the time of filing the nomination documents to which he or she was elected by vote of the people.

(2) The word "incumbent" if the candidate is a candidate for the same office which he or she holds at the time of filing the nomination papers, and was elected to that office by a vote of the people.

(3) No more than three words designating either the current principal professions, vocations, or occupations of the candidate, or the principal professions, vocations, or occupations of the candidate during the calendar year immediately preceding the filing of nomination documents.

(4) The phrase “appointed incumbent” if the candidate holds an office by virtue of appointment, and the candidate is a candidate for election to the same office, or, if the candidate is a candidate for election to the same office or to some other office, the word “appointed” and the title of the office. In either instance, the candidate may not use the unmodified word “incumbent” or any words designating the office unmodified by the word “appointed.” However, the phrase “appointed incumbent” shall not be required of a candidate who seeks reelection to an office which he or she holds and to which he or she was appointed, as a nominated candidate, in lieu of an election, pursuant to Sections 5326 and 5328 of the Education Code or Section 7228, 7423, 7673, 10229, or 10515 of this code.

The Following are Examples of Ballot Designations Identified as Acceptable or Not Acceptable

ACCEPTABLE	NOT ACCEPTABLE
Homemaker	Taxpayer Advocate
Mother	Volunteer
Father	Veteran
Retired Sergeant	“Anything”, Retired
Minister	Ret. Anything *(NO abbreviations of word “Retired”)*
Priest	Dad or Mom
School Board Member	Housewife
Governing Board Member	Honorary Professor
Retired *(Must Precede the Profession)*	Goodwill Ambassador
Incumbent	Activist
Appointed Incumbent	Taxpayer
Community Volunteer *(Must Stand Alone and be Primary Occupation)*	Philanthropist
Parent/Educator	Husband or Wife
Student	Expert, Honest, or Virtuous Anything
Businessman/Father	Incumbent/Business Owner
EC §13101(a) Different Rules for Candidate for Judicial Offices	School Board
	Civil Servant
	Director, Smith Foundation *(no specific names)*
	UCLA Professor *(no specific names: IBM, Nike, SJSU*

tentative evaluations. Ten candidates filed such appeals and all ten appeared before the Committee.

Evaluation Standards

The Committee evaluated the candidates as "Exceptionally Well Qualified," "Well Qualified," "Qualified," or "Not Qualified." These standards are described in the Committee's Rules as follows:

> To be "Exceptionally Well Qualified," the candidate must possess qualities and attributes considered to be of remarkable or extraordinary superiority so that, without real doubt, the candidate is deemed fit to perform the judicial function with distinction.
>
> To be "Well Qualified," the candidate must possess professional ability, experience, competence, integrity and temperament indicative of superior fitness to perform the judicial function with a high degree of skill and effectiveness.
>
> To be "Qualified," the candidate must possess professional ability, experience, competence, integrity and temperament indicative of fitness to perform the judicial function satisfactorily.
>
> To be "Not Qualified," the candidate lacks one or more of the qualities of professional ability, experience, competence, integrity and temperament indicative of fitness to perform the judicial function satisfactorily.

These standards necessarily contemplate a quantitative and qualitative evaluation. The standards are, therefore, very different from the eligibility provisions for Superior Court judicial officers set forth in the California Constitution, which merely require that the individual be a member of the State Bar or have served on a court for ten years.

Bibliography

American Bar Association, The (*n.d.*). Diversity in Law: Who cares? Retrieved from https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2016/spring2016-0416-diversity-in-law-who-cares/

American Progress (Aug. 8, 2016). State or Federal Court? Retrieved from https://www.americanprogress.org/article/fact-sheet-state-or-federal-court/

Arbour, B. & McKenzie, M. (2010). Has the new style of judicial campaigning reached lower court elections. *Judicature 93*(4), 150-160.

Arrington, N. (2018). Inference, accountability, and gender diversity on the bench. (Doctoral dissertation). Retrieved from https://etd.library.emory.edu/concern/etds/47429922r?locale=fr

Atkeson, L. & Hamel, B. (2018). Fit for the job: Candidate qualifications and vote choice in low information elections. *Political Behavior 42*, 59-82.

Ballotpedia (*n.d.*). Assisted appointment (judicial selection). Retrieved from https://ballotpedia.org/Assisted_appointment_(judicial_selection)

Ballotpedia (*n.d.*). California judicial elections. Retrieved from https://ballotpedia.org/California_judicial_elections

Ballotpedia (*n.d.*). Local trial court judicial elections, 2021. Retrieved from https://ballotpedia.org/Local_trial_court_judicial_elections,_2021

Ballotpedia (*n.d.*). Partisan election of judges. Retrieved from https://ballotpedia.org/Partisan_election_of_judges

Ballotpedia (*n.d.*). Judicial Selection in Texas. Retrieved from https://ballotpedia.org/Judicial_selection_in_Texas

Barabak, M. (2022). California election takeaways: Big money dominated as voters didn't show up. *The Los Angeles Times* (June 8). Retrieved from https://www.latimes.com/politics/story/2022-06-08/california-primary-election-chesa-boudin-rick-caruso-takeaways

Blinken, A. (2022). The nomination of professor Sarah Cleveland for the International Court of Justice. U.S. Department of State, Office of the Spokesperson, Press Releases (Aug. 23, 2022). Retrieved from https://www.state.gov/the-nomination-of-professor-sarah-cleveland-for-the-international-court-of-justice/

Bobelian, M. (2022). Why Biden should look beyond the judiciary for his Supreme Court nominee. *The Los Angeles Times* (Feb. 15). Retrieved from https://www.latimes.com/opinion/story/2022-02-15/supreme-court-biden-nominate-justice

Bonneau, C. & Cann, D. (2015). Party identification and vote choice in partisan and nonpartisan elections. *Political Behavior 37*(1), 43-66.

Bonneau, C. & Hall, M. (2009). *In defense of judicial elections*. New York, NY & Oxon, UK: Routledge.

Bonneau, C. & Hall, M. (2017). Judicial elections in the 21st century. New York, NY & London, UK: Routledge.

Bonneau, C. & Loepp, E. (2014). Getting things straight: The effects of ballot design and electoral structure on voter participation. *Electoral Studies, 34*, 119-130.

Boyea, B., Bonneau, C., & Cann, D. (2009). Contributions to judicial campaigns: Assessing comprehension in an environment without partisan signals. *2009 Annual Meeting of the American Political Science Association*, Sept. 3-6, Toronto, Ontario, Canada.

Brace, P. & Boyea, B. (2007). Judicial selection methods and capital punishment in the American states. In Streb, M. (Ed.), *Running for judge,* (pp. 186-199). New York, NY and London, UK: New York University Press.
Burnett, C. & Tiede, L. (2015). Voter knowledge of candidates' judicial philosophies. *Justice System Journal 36*(1), 49-62.
California Ballot Designation Cheat Sheet (*n.d.*). Retrieved from https://sccvote.sccgov.org/sites/g/files/exjcpb1106/files/Ballot%20Designation%20Cheat%20Sheet%20rev%207.3.20.pdf
California Code of Judicial Conduct. Retrieved from https://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf
California Courts – the Judicial Branch of California (*n.d.*). Superior Courts. Retrieved from https://www.courts.ca.gov/superiorcourts.htm
California Secretary of State (Sep. 17, 2022). CalAccess – Campaign Finance. Retrieved from https://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1422934&view=general&session=2019
California Secretary of State (Sep. 17, 2022). CalAccess – Campaign Finance. Retrieved from https://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1418314&session=2019&view=general
Caufield, R. (2007). The changing tone of judicial election campaigns as a result of *White*. In Streb, M. (Ed.), *Running for judge,* (pp. 34-56). New York, NY and London, UK: New York University Press.
Champagne, A. & Cheek, K. (2002). The cycle of judicial elections: Texas as a case study. *Fordham Urban Law Journal, 29*(3), 907-940.
Chin, M. (2018). Judicial independence needs to be protected from both internal and external threats. ABA (September 27). Retrieved from https://www.abajournal.com/news/article/protecting_judicial_independence_from_both_internal_and_external_threats
City and County of San Francisco, Department of Elections (*n.d.*). Historical Voter Turnout. Retrieved from https://sfelections.sfgov.org/historical-voter-turnout
COPS VOTER GUIDE (*n.d.*). Retrieved from https://copsvoterguide.com/about/
Cosby, T. (2012). Picking the Supremes: The impact of money, politics, and influence in judicial elections. *Faulkner Law Review 4*(1), 73-136.
County of Los Angeles (June 7, 2022), Official Ballot, Statewide Direct Primary Election.
CPI Inflation Calculator (*n.d.*). Inflation Calculator. Retrieved from https://www.in2013dollars.com
Cullen, J. (2018). The history of mass incarceration. Brennan Center for Justice (July 20). Retrieved from https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration
Economist's View (2012). The need for countervailing power. Retrieved from https://economistsview.typepad.com/economistsview/2012/05/the-need-for-countervailing-power.html
D'Elia-Kueper, J. (2016). Is there such a thing as too much democracy? The downsides of democratizing state courts. (Doctoral dissertation). Retrieved from ProQuest (10168340.)

Darity, W. A., Jr. (2008). Diversity. *International Encyclopedia of the Social Sciences* (2nd ed.) (419-420).
Dellinger, M. (2012). Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law. *Colorado Journal of International Environmental Law and Policy 32*, 309-366.
Denhardt, R. & Denhardt, J.V. (2000). The new public service: Serving rather than steering. *Public Administration Review, 60*(6)*,* 549-559.
Dubois, P. (1983). The influence of selection system and region on the characteristics of a trial court bench: The case of California. *The Justice System Journal, 8(*1), 59-87.
Dubois, P. (1984). Voting cues in nonpartisan trial court elections: A multivariate assessment. *Law & Society Review, 18*(3), 395-436.
Dubois, P. (1986). Penny for your thoughts? Campaign spending in California trial court elections 1976-1982. *The Western Political Quarterly, 39*(2), 265-284.
Edwards, A. (2015). Finders' keepers: Selecting and retaining state judicial candidates. *Lewis and Clark Law Review, 19*(4), 1183-1208.
Enoch, V. (2017). *Ascendency denied: The removal of African American female judges in major cities in Ohio, a case study* (unpublished doctoral dissertation). Union Institute & University, Cincinnati, Ohio. Retrieved from https://www.academia.edu/38231026/Ascendency_Denied_The_Removal_Of_African_American_Female_Judges_In_Major_Cities_In_Ohio_A_Case_Study
Fischer, T. & Tucker, T. (2003). Merit selection: A better method to select South Dakota's Circuit Court judges. *South Dakota Law Review 49*, 182-216.
Folkenfilk, D. (2020). L.A. Times to settle suit over race and gender bias, as editor promises change. NPR (June 25, 2020). Retrieved from https://www.npr.org/2020/06/25/883185996/journalists-file-bias-complaint-against-l-a-times-as-editor-promises-change
George, T. & Yoon, A. (2016). The gavel gap – who sits in judgment on state courts? Retrieved from https://eduhelphub.com/blog/wp-content/uploads/2021/11/gavel-gap-report.pdf
George, S. (2021). There are too many prosecutors on the bench. Take it from me, a prosecutor. *The Appeal* (Jan. 8). Retrieved from https://theappeal.org/there-are-too-many-prosecutors-on-the-bench-take-it-from-me-a-prosecutor/
Goldberg, D. (2007). Interest group participation in judicial elections. In Streb, M. (Ed.), *Running for judge,* (pp. 73-92). New York, NY and London, UK: New York University Press.
Goldman, S. (1982). Judicial selection and the qualities that make a "good" judge. *The Annals of the American Academy of Political and Social Science 462,* 112-124.
Goldstein, J. (1989). The impact of the Louisville Courier-Journal's editorial endorsements on the outcome of local judicial elections. *Judicature 73*, 108-112.
Gottfried, J. (2012). Get a cue already! How election campaigns matter in different informational environments (Doctoral dissertation). Retrieved from ProQuest (3551191.)
Graham, B. (2004). Toward an understanding of judicial diversity in American courts. *Michigan Journal of Race & Law*, *10*(1), 153-194.
Greater Good Science Center at the University of California, The, Berkeley (*n.d.*). Diversity Defined. Retrieved from https://greatergood.berkeley.edu/topic/diversity/definition

Greenwald, A. & Pettigrew, T. (2017). With malice toward none and charity for some. In Redfield, S. (Ed.), *Enhancing justice, reducing bias* (pp. 155-194). Chicago, IL: American Bar Association.
Hall, W. & Aspin, L. (1987). The roll-off effect in judicial retention elections. *The Social Science Journal, 24*(4), 415-427.
Hall, M. (2016). Partisanship, interest groups, and attack advertising in the post-*White* era, or why nonpartisan judicial elections really do stink. *Journal of Law & Politics 31*, 429-456.
Hamilton, A. (1788). The Federalist Papers: No. 78. Retrieved from https://avalon.law.yale.edu/18th_century/fed78.asp
Harrington, J. & Gelfand, M. (2014). Tightness-looseness across the 50 united states, *PNAS, 111*(22), 7990-7995.
Hartig, H. (2022). About six-in-ten Americans say abortion should be legal in all or most cases. Pew Research Center (June 13, 2022). Retrieved from https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/
Hayden, S. (2016). Electing the bench: An analysis of the possible negative effects of judicial elections on Hawaii's legal community. *Asian-Pacific Law and Policy Journal 18*, 114-162.
Houston Bar Association (*n.d.*). Judicial Poll Results. Retrieved from https://www.hba.org/?pg=Judicial-Poll-Results
Houston Bar Association (2016). Houston Bar Association 2016 Judicial Candidate Qualification Questionnaire. Retrieved from https://www.hba.org/docDownload/1469410
Investopedia (*n.d.*). Invisible Hand. Retrieved from https://www.investopedia.com/terms/i/invisiblehand.asp
JEEC Handbook Final (*n.d.*). Retrieved from https://drive.google.com/file/d/1hm_egn6__doGE13W60RsFEa6KKQDvZH2/view
Judge Bennett, M. (2017). Manifestations of implicit bias in the courts. In Redfield, S. (Ed.), *Enhancing justice, reducing bias* (pp. 63-82). Chicago, IL: American Bar Association.
Judge Donald, B. & Redfield, S. (2017). Framing the discussion. In Redfield, S. (Ed.), *Enhancing justice, reducing bias* (pp. 5-24). Chicago, IL: American Bar Association.
Judge Hall, S. (2017). Combating bias through judicial leadership. In Redfield, S. (Ed.), *Enhancing justice, reducing bias* (pp. 335-351). Chicago, IL: American Bar Association.
Judge Wistrich, A. & Rachlinksi, J. (2017). Implicit bias in judicial decision making. In Redfield, S. (Ed.), *Enhancing justice, reducing bias* (pp. 87-121). Chicago, IL: American Bar Association.
Judicial Branch of California, California Courts – Newsroom (*n.d.*)). Retrieved from https://newsroom.courts.ca.gov/branch-facts/judicial-selection-how-california-chooses-its-judges-and-justices
Judicial Council of California, The (2022). Fact Sheet – California Judicial Branch. Retrieved from https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf
Judicial Selections in the United States (*n.d.*). Retrieved from http://www.judicialselection.us/judicial_selection/index.cfm?state=CA
Kenner, S. (1933). Some phases of Washington's life of particular interest to lawyers. *Indiana Law Journal 8*(7) 428-439, 434.
Klein, D. & Baum, L. (2001). Ballot information and voting decisions in judicial elections. *Political Research Quarterly, 54,* 709-726.

Kramer, L. (2004). Popular constitutionalism, circa 2004. *California Law Review* 92(4). 959-1011.
Kramer, L. (2004). The people themselves: Popular constitutionalism and judicial review. *Oxford University Press*. Oxford, England: Oxford University Press.
Kyle, S. (Sept. 4, 2022). How do you know which judge to vote for? LA Progressive. Retrieved from https://www.laprogressive.com/law-and-the-justice-system/how-do-you-know-which-judge-to-vote-for
Levi, D., Sutton, J., Wood, D. & Lohier, Jr., R. (2022). Losing faith: Why public trust in the judiciary matters. *Judicature, 106*(2), 70-77. Retrieved from https://judicature.duke.edu/wp-content/uploads/2022/09/FAITH_Summer2022-1.pdf
Lamb, M. & Perry, S. (2020). Knowing what you don't know: The role of information and sophistication in ballot completion. *Social Science Quarterly, 101*(3), 1132-1149.
Lanier, D. & Hurwitz, M. (2017). Elections and judicial diversity. In Bonneau, C. & Hall, M. (Eds.), *Judicial elections in the 21st century* (pp. 233-244). New York, NY & Oxon, UK: Routledge.
Lemennicier, B. & Wenzel, N. (2018). The judge and his hangman: Judicial selection and the accountability of judges in the U.S. *ICL Journal 12(3)*, 239-256.
Lim, C. & Snyder, Jr., J. (2015). Is more information always better? Party cues and candidate quality in U.S. judicial elections. *Journal of Public Economics 128*, 107-123.
Los Angeles Almanac (*n.d.*). Election Turnout in Los Angeles County. Retrieved from https://www.laalmanac.com/election/el02.php
Los Angeles County Bar Association (*n.d.*). Judicial Elections Evaluation Committee. Retrieved from https://lacba.org/?pg=judicial-elections-evaluation
Los Angeles County Bar Association (*n.d.*). About Us. Retrieved from https://lacba.org/?pg=About-Us
Los Angeles County Bar Association (2015). Rules of Procedure – JEEC – LACBA – Adopted by the Board of Trustees. May 27, 2015. Amended December 15, 2021. Retrieved from https://s3.amazonaws.com/membercentralcdn/sitedocuments/lacba/lacba/0677/2093677.pdf?AWSAccessKeyId=AKIAIHKD6NT2OL2HNPMQ&Expires=1677438194&Signature=Nhdq3OJO9IoFINMZG5bmFsSqDNw%3D&response-content-disposition=inline%3B%20filename%3D%22jeec%2Drules%2Dof%2Dprocedure%2D2021%2Epdf%22%3B%20filename%2A%3DUTF%2D8%27%27jeec%252Drules%252Dof%252Dprocedure%252D2021%252Epdf&response-content-type=application%2Fpdf
Los Angeles County Bar Association (*n.d.*). Diversity in the Profession Section. Retrieved from https://lacba.org/?pg=diversity-in-the-profession-section-home-page
Los Angeles County Registrar-Recorder email, August 30, 2022, at 10:09 a.m. Email retained in the office of Myanna Dellinger.
Los Angeles County Registrar-Recorder/County Clerk (*n.d.*). Online Candidate Statement Pilot Program. Retrieved from https://apps.lavote.gov/candidate-statements/ (statements have been removed since time of research)
Los Angeles County Registrar-Recorder/County Clerk, LA County Election Results, 2020 Election Results Text Version. Retrieved from https://results.lavote.gov/text-results/4193
Los Angeles Times, The (2020). Opinion: Endorsements, The Times' recommendations for Superior Court judge in Los Angeles County (Sept. 25, 2020). Retrieved from https://www.latimes.com/opinion/story/2020-09-25/superior-court-endorsements

Los Angeles Times, The (2020). Opinion: The Times' recommendations for Superior Court judge in Los Angeles County (Feb. 21). Retrieved from https://www.latimes.com/opinion/story/2020-02-21/the-times-endorsement-superior-court-judges-in-los-angeles?_amp=true

Los Angeles Times, The (2022). Opinion: The Times' recommendations for Superior Court judge in Los Angeles County. (May 13, 2020). Retrieved from https://www.latimes.com/opinion/story/2022-05-13/endorsement-judicial-candidates

Mangini, M. (2017). Ethics of virtues and the education of the reasonable judge. *International Journal of Ethics Education 2*, 175-202.

Manweller, M. (2005). The "angriest crocodile": Information costs, direct democracy activists, and the politicization of state judicial elections. *State & Local Government Review, 37*, 86-102.

Marcum, A. (2019). Popular constitutionalism: But how would the people rule? LegBranch.org (Oct. 23). Retrieved from https://www.legbranch.org/popular-constitutionalism-but-how-would-the-people-rule/

Marbury v. Madison, 5. U.S. 137 (1803).

McKenzie, M. & Rebe, R. (2017). Trial court campaign messaging in a post-*White* environment. In Bonneau, C. & Hall, M. (Eds.), *Judicial elections in the 21st century* (pp. 158-170). New York, NY & Oxon, UK: Routledge.

McLeod, A. (2004). An excess of participation: A critical examination of judicial elections and their consequences for American democracy. (Doctoral dissertation). Retrieved from ProQuest (3137896.).

Migration Policy Institute (March 17, 2022). Frequently requested statistics on immigrants and immigration in the United States. Retrieved from

National Association of Women Judges (*n.d.*). 2022 US state court women judges. Retrieved from https://www.nawj.org/statistics/2022-us-state-court-women-judges

Nelson, M. (2017). Judicial elections and support for state courts. In Bonneau, C. & Hall, M. (Eds.), *Judicial elections in the 21st century* (pp. 217-229). New York, NY & Oxon, UK: Routledge.

Office of Governor Gavin Newsom (August 10, 2022). Governor Newsom announces historic Supreme Court nominations. Retrieved from https://www.gov.ca.gov/2022/08/10/governor-newsom-announces-historic-supreme-court-nominations/

Open Education Sociology Dictionary, (*n.d.*). Retrieved from https://sociologydictionary.org/bias/

Pew Research Center (June 29, 2021), Newspapers Fact Sheet. Retrieved from https://www.pewresearch.org/journalism/fact-sheet/newspapers/

Pitkin, H. (1967). *The concept of representation* (11). Berkeley, Los Angeles, London: University of California Press.

Platt, S. (2007). The qualities of a good judge. *A pursuit of justice*. Retrieved from https://www.apursuitofjustice.com/the-qualities-of-a-good-judge/

Post, R. & Siegel, R. (2004). Popular constitutionalism, departmentalism, and judicial supremacy. *California Law Review (92).* 1027-1044.

Pozen, D. (2008). The irony of judicial elections. *Columbia Law Review 108*(2), 265-330.

Public Policy Institute of California (*n.d.*)). Immigrants in California. Retrieved from https://www.ppic.org/publication/immigrants-in-california/

Public Policy Institute of California (*n.d.*)). Immigrants in California. Retrieved from https://www.ppic.org/publication/californias-population/
Ramsey, R. (2012). Need for more thought in electing judges. The New York Times, Late Edition (Nov. 2), A.23A.
Republican Party v. White, 536 U.S. 765 (2002).
Resnik, J. (2005). Judicial selection and democratic theory: Demand, supply, and life tenure, *Cardozo Law Rev. 26*, 579-658.
Rosenhall, L. (2021). Recalling a California governor, explained. *CalMatters* (Jan. 27). Retrieved from https://calmatters.org/explainers/recalling-california-governor-explained/
Rosen, J. (2004). Popular constitutionalism. New York Times (Dec. 12). Retrieved from https://www.nytimes.com/2004/12/12/magazine/popular-constitutionalism.html
Rothschild, E. (1994). Adam Smith and the Invisible Hand. *The American Economic Review, 84*(2), 319-322.
Rowell, A. & Bilz, K. (2021). *The psychology of environmental law*. New York, NY: New York University Press.
Ruiz, A. (2018). *Political candidate job titles & voter perceptions: Evidence from 2 online experiments* (Doctoral dissertation). Retrieved from ProQuest. (10841762.)
Salokar, R. (2007). Endorsements in judicial campaigns: The ethics of messaging. *Justice System Journal 28*(3), 342-357.
Schneider, A. & Ingram, H. (1993). Social construction of target populations: Implications for politics and policy. *American Political Science Review 87*(2), 334-347.
Schotland, R. A. (1985). "Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?" *Journal of Law & Politics 2*, 57-167.
Schotland, R. A. (2000). Financing judicial elections." In Magleby, D. (Ed.), *Financing the 2000 election* (pp. 213-228). Washington, DC: Brookings Institution Press.
Schudson, M. (2002). The news media as political institutions. *Annual Review of Political Science 5*(1), 249-269.
Sentencing Project, Research and Advocacy for Reform, The (2007). Uneven justice: State Rates of Incarceration by Race and Ethnicity (p. 8). Retrieved from https://www.jstor.org/stable/pdf/resrep27349.pdf
Shaffner, B. & Diascro, J. (2007). Judicial elections in the news. In Streb, M. (Ed.), *Running for judge,* (pp. 115-136). New York, NY and London, UK: New York University Press.
Shortell, C. (2013). "Voting in trial court elections: Ballot roll-off in partisan, nonpartisan, and retention elections in high-population counties." *Justice System Journal 34,* 153-170.
Shugerman, J. (2010). Economic crisis and the rise of judicial elections and judicial review*, 123 Harvard L. Review 123,* 1061-1150.
Siegel, M. (2010). In defense of judicial elections (sort of). *Litigation* Vol. *36*(2), 23-29.
Sillito, D. (2022). Teens shun traditional news channels for TikTok and Instagram, Ofcom says. BBC (July 21, 2022). Retrieved from https://www.bbc.com/news/entertainment-arts-62238307
Simon, H. (1956). Rational choice and the structure of the environment. *Psychological Review*, *63*(2), 129–138.
Simon, H. (1997). *Administrative behavior: A study of decision-making processes in administrative organizations*. New York, NY: The Free Press.
Smith, K. & Larimer, C. (2017). *The public policy theory primer*. Boulder, Colorado: Westview Press.

Souders, R. (2006). A gorilla at the dinner table: Partisan judicial elections in the United States. *The Review of Litigation 25*(3), 529-574.
State Bar of California, The (*n.d.*). About Us. Retrieved from https://www.calbar.ca.gov/About-Us
Stone, D. (2012). *Policy paradox.* New York, NY: W. W. Norton & Company
Streb, M. (2007). Partisan involvement in partisan and nonpartisan trial court elections. In Streb, M. (Ed.), *Running for judge,* (pp. 96-114). New York, NY and London, UK: New York University Press.
Streb, M. & Frederick, B. (2008). Women running for judge: The impact of sex on candidate success in state intermediate appellate court elections. *Social Science Quarterly, 89*(4), 937-951.
Streb, M.; Frederick, B.; LaFrance, C.; & Rice, K. (2017). The latest trends in intermediate appellate court elections. In Bonneau, C. & Hall, M. (Eds.), *Judicial elections in the 21st century* (pp. 141-155). New York, NY & Oxon, UK: Routledge.
Suciu, P. (2022). Teens increasingly rely on social media for news – but they don't trust it. *Forbes* (July 22, 2022). Retrieved from https://www.forbes.com/sites/petersuciu/2022/07/22/teens-increasing-rely-on-social-media-for-newsbut-they-dont-trust-it/?sh=59704f9219ff
Sumner, W. G. (1906). *Folkways: A study of the sociological importance of usages, manners, customers, mores and morals*. New York, NY: Hesperides Press.
Superior Court of California, The, County of Los Angeles, Divisions (*n.d.*). Retrieved from https://www.lacourt.org/division/DV0001.aspx
Superior Court of California, The: County of Los Angels (*n.d.*). Judicial Officers. Retrieved from https://www.lacourt.org/judicialofficers/ui/SearchResult.aspx
Supreme Court of the United States, About the Court, FAQ – Supreme Court Justices (*n.d.*). Retrieved from https://www.supremecourt.gov/about/faq_justices.aspx
Tajfel, H.; Billig, M.; Bundy, R P. & Flament, C. (1971). Social categorization and intergroup behaviour. *European Journal of Social Psychology 1*, 149-178.
Taylor, C. (2009). Merit selection: Choosing judges based on their politics under the veil of a disarming name. *Harvard Journal of Law & Public Policy, 32*(1), 97-101.
Texas Secretary of State (*n.d.*). Harris County Voter Registration Figures. Retrieved from https://www.sos.state.tx.us/elections/historical/harris.shtml
Texas Judicial Branch (*n.d.*). About Texas Courts – Trial Courts. Retrieved from https://www.txcourts.gov/about-texas-courts/trial-courts.aspx
Thaler, R. H. (1985). Mental accounting and consumer choice. *Marketing Science, 4*(3), 199-214.
Thaler, R. H. (2015). *Misbehaving: The making of behavioral economics.* New York, NY: W. W. Norton & Company.
Theodoulou, S. & Roy, R. (2016). *Public administration – a very short introduction*. Oxford, England: Oxford University Press.
Thielemann, G. (1993). Local advantage in campaign financing: Friends, neighbors, and their money in Texas supreme court elections. *The Journal of Politics, 55*(2), 472-478.
Thornton, P. (2020). Opinion: Yes, you have to vote for judges and college trustees too. The Los Angeles Times (Oct. 31). Retrieved at https://www.latimes.com/opinion/newsletter/2020-10-31/opinion-newsletter-endorsements-2020-election-opinion

Tucker, T. & Fischer, C. (2003). Merit selection: A better method to select South Dakota's circuit court judges. *South Dakota Law Review 49*, 182-216.
United States Census Bureau, The (*n.d.*), Quick Facts, Los Angeles County, California. Retrieved from https://www.census.gov/quickfacts/fact/table/losangelescountycalifornia/RHI725221
United States Courts (*n.d.*). FAQs: Federal Judges. Retrieved from https://www.uscourts.gov/faqs-federal-judges
United States Department of Justice, Bureau of Justice Statistics (2004). Examining the work of state courts, 2003 (Jan. 2004). Retrieved from https://bjs.ojp.gov/library/publications/examining-work-state-courts-2003
University of La Verne (*n.d.*). Thomas Allison. Retrieved from https://laverne.edu/directory/person/thomas-allison/
Vargas, S. (2004). Does a diverse judiciary attain a rule of law that is inclusive: What Grutter v. Bollinger has to say about diversity on the bench. *Michigan Journal of Race & Law 10*(1), 101-152.
Vargas, S. (2008). Only skin deep? The cost of partisan politics on minority diversity on the federal bench. *Indiana Law Journal, 83*, 1423-1479.
Volcansek, M. (1981). An exploration of the judicial election process. *The Western Political Quarterly 34*(4), 572-577.
Volcansek, M. (1981). Money or name? A sectional analysis of judicial elections. *The Justice System Journal 8*(1), 46-58.
Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).
WebMD (*n.d.*). Retrieved from https://www.webmd.com/balance/features/how-to-unlearn-unconscious-bias
Weiksner, G. (2010). Complicating the ideal of an informed citizenry. (Doctoral dissertation). Retrieved from Stanford Libraries, https://purl.stanford.edu/qb076rx9059.
Williams-Yulee v. Florida Bar, 575 U.S. 433 (2015).
White, J. (2022). San Francisco district attorney ousted in recall election. Politico (June 8). Retrieved from https://www.politico.com/news/2022/06/08/chesa-boudin-san-francisco-district-attorney-recall-00038002
Wick, J. (2022). News analysis: Rick Caruso was a Republican 3 years ago. Will voters care? The Los Angeles Times (June 2). Retrieved from https://www.latimes.com/california/story/2022-06-02/rick-caruso-2022-mayoral-election-republican-transformation
Williams, K. (2004). Brennan Center for Justice symposium introduction: Diversity, impartiality, and representation on the bench. *Michigan Journal of Race and Law 10*, 1.
Williams, M. (2004). Women judges: Accession at the state court level. (Doctoral dissertation). Retrieved from Retrieved from ProQuest (3141685.)
Williams, M. S. (2008). Ambition, gender, and the judiciary. *Political Research Quarterly, 61*(1), 68-78.
Wynn, J., Jr. & Mazur, E. (2004). Judicial diversity: Where independence and accountability meet. *Albany Law Review*, 67, 775-791.
Zaccari, L. (2004). Judicial election: Recent developments, historical perspective, and continued viability. *Richmond Journal of Law and the Public Interest 8*, 138-156.
Zeidman, S. (2005). Making the case for merit selection. *Albany Law Review 68*, 713-721.

Zuercher, R. (2015). Campaigning for judicial office, 2012. (Doctoral dissertation). Retrieved from http://uknowledge.uky.edu/comm_etds/32 (Paper 32).