



# THE POLITICAL ORIGINS OF JUDICIAL ELECTIONS

## EVIDENCE FROM THE UNITED STATES AND BOLIVIA

*Comparative analysis of the adoption and implementation of judicial elections in Bolivia and the U.S. The study identifies four commonalities between the U.S. adoption of judicial elections in the 1800s and the recent Bolivian move to judicial elections.*

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Judicial elections have been described as a “uniquely American” institution.<sup>1</sup> Initially adopted by a handful of states in the mid-1800s, judicial elections quickly diffused across the country as many U.S. states began rewriting their state constitutions. By 1860, 21 of the 30 American states elected their judges.<sup>2</sup> Today, the vast majority of judges in the United States must stand for election.<sup>3</sup> Yet, while the American legal style is “going global,” judicial elections are rarely used to select or retain judges outside of the United States.<sup>4</sup>

With the adoption of its new constitution in 2009, Bolivia became the first country in the modern world to use judicial elections to select judges for courts with national jurisdiction. On October 16, 2011, Bolivian citizens cast ballots to elect 56 judges to the Bolivian Supreme Court (*Tribunal Supremo de Justicia*), the Plurinational Constitutional Tribunal (*Tribunal Constitucional Plurinacional*), the Bolivian Agricultural Court (*Tribunal Agroambiental*), and the high administrative body of the national judiciary, the Bolivian

1. Jed Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARVARD L. REV. 1061-1150, 1064 (2010).

2. Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections* 35 IND. L. REV. 659-667, 661 (2002).

3. Jeffrey Rosinek, *Some Thoughts on the Problems of Judicial Elections*, 41 COURT REV. 20-24 (Summer, 2004).

4. R. Daniel Kelemen and Eric C. Sibbitt, *The Globalization of American Law*, 58 INT'L ORG. 103-136, 131 (2004). Outside of the United States, the direct election of judicial authorities is rare and generally reserved only for courts with limited jurisdiction. The most prominent exception comes from Japan, whose Supreme Court judges are subject to retention elections. To date, no Japanese judge has ever lost an election. David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TX. L. REV. 1545-1594 (2009).

Judicial Council (*Consejo de Magistratura*). Candidates competed in nonpartisan, nationwide contests in which voters cast a single vote for their preferred candidate for each judicial office.<sup>5</sup> The top vote-earning candidates were elected as judges and magistrates and sworn into office on January 3, 2012.

What explains the adoption of judicial elections? In this article, we compare the circumstances under which judicial elections were adopted in the United States and Bolivia. In spite of vast differences in terms of time, institutional arrangements, political history and geographic location, we identify four similarities in the political circumstances and normative debates surrounding their adoption in the two countries.

This research contributes to the literature on judicial elections by leveraging the U.S. and Bolivian experiences to identify a set of common political conditions which may explain the adoption of judicial elections. Our comparative research design provides a contrast by which the general applicability of causal explanations advanced by U.S. scholars might be assessed in cases outside of the context in which they were developed.<sup>6</sup> In our comparison of the U.S. and Bolivian cases, we argue that not only are judicial elections no longer a “uniquely American” institution, but the political circumstances that explain the adoption of judicial elections are also not unique. Indeed, the radical differences between the two countries make the commonalities we identify all the more striking. While judicial elections in the United States are so commonplace the question of their adoption is seen as “manifest political destiny,” the Bolivian comparison underscores the contentious circumstances surrounding their adoption to highlight their political origins and intended effects.<sup>7</sup>

In what follows, we introduce our cases and the political climate in which judicial elections were adopted in the United States and Bolivia. We then identify four commonalities between the two cases,

drawing explicit comparisons between the two cases. Next, we discuss one prominent difference between the U.S. and Bolivian cases: the level of support that elections had from the legal community. We conclude by offering some directions for future research.

### The U.S. Context

Early American history indicates a general skepticism of appointed judges. Indeed, in the Declaration of Independence, Jefferson argues that the King “has made Judges dependent on his Will alone.”<sup>8</sup> Because colonial judges relied exclusively upon the Crown for their continued tenure, the judiciary had been a faithful agent of the Crown throughout the Revolutionary War. In contrast, state legislators had been the primary source of opposition to English rule and were extraordinarily popular among citizens. The public’s distrust of the judiciary and favorable opinion of the other branches of government was institutionalized in early judicial selection systems: state judges in early America were chosen through legislative or gubernatorial appointment.<sup>9</sup> Once appointed, judges were institutionally vulnerable because state legislatures could unilaterally eliminate judgeships, shorten judges’ terms, create new courts, or impeach judges to punish those who impeded legislative action.<sup>10</sup> As one scholar describes, “state courts were made subservient to state legislatures” in original state consti-

tutions.<sup>11</sup> To compound the issue, judicial posts were often distributed as a form of political patronage. Judges’ political ties to governors and legislators discouraged the use of judicial review to reign in the elected branches of government because it could compromise judges’ continued tenure in office by triggering legislative reprisal.<sup>12</sup>

This judicial subservience continued through the first quarter of the nineteenth century, and judges were reluctant to curb even the most unpopular legislative actions. This unbridled legislative power was called into question in the late 1830s when it became apparent that many state legislatures vastly overspent on internal improvements. This fiscal recklessness left states in financial ruin, and eight states defaulted on their loans. Overspending, according to one historian, “left the legislatures disgraced as corrupt and incompetent, so new constitutional provisions and new institutions were believed to be necessary for limiting legislative power.”<sup>13</sup>

What sort of an institution could curb legislative power effectively without creating a new source of unchecked power? Seeking to reconfigure the institutional structure of state governments, constitutional conventions were summoned to revise their states’ governing documents. In these conventions, delegates largely agreed that judicial elections provided a solution to the problem they faced. Proponents

5. The exception to this rule were judges elected to the Bolivian Supreme Court, who were selected from gender-stratified candidate lists from each of the 9 departments. Voters cast two votes, one for a male and one for a female candidate. Amanda Driscoll and Michael Nelson, *The 2011 Judicial Elections in Bolivia*, 31(3) *ELECTORAL STUD.* 628-632 (2012).

6. While our case selection is non-random, we instead compare two cases in which judicial elections have been successfully adopted as methods of judicial selection via structured case study comparison. We acknowledge that this research design provides us tractability but, because our design does not include any cases where judicial elections were considered but not adopted, we cannot make any definitive causal claims about the conditions that are necessary or sufficient to lead to the adoption of judicial elections. However, since the number of cases where judicial elections have been successfully

adopted is so small, such inferences would be difficult to make with any degree of certainty even if additional cases were incorporated into our research design. Alexander L. George and Andrew Bennett, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* (MIT Press: Cambridge, MA, 2005).

7. Shugerman, *supra* n. 1, at 1073.

8. *The Declaration of Independence* P. 11; Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. CHI. L. REV.* 689-794, 714 (1995).

9. Croley, *supra* n. 8 at 714.

10. Jed Handelsman Shugerman, *THE PEOPLE’S COURTS* 57 (Harvard University Press: Cambridge, MA, 2012)

11. F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 *J. LEGAL STUD.* 431-473, 445 (2004).

12. Shugerman, *supra* n. 1, at 1067.

13. Shugerman, *supra* n. 1, at 1067.

hoped that judicial elections would ensure sufficient control of the legislative and executive branches of government by a court whose authority, institutional legitimacy and independence would derive from judges' direct connection to the voting public. At the same time, the electoral connection between the public and the judiciary promised public oversight of judicial behavior and judicial accountability.

Mississippi was the first state to elect its state supreme court, in 1832. Over a decade passed before the next state, New York, adopted the practice in 1846. However, legislative indiscretions and fiscal ruin drove more and more states to revise their constitutions to allow for the direct election of judicial authorities in the years following New York's adoption of judicial elections. The pace of adoption quickened, and twenty more states would move to the direct election of jurists in the eight years that followed.<sup>14</sup>

### The Bolivian Context

Bolivia is a constitutional democracy located high in the Andes Mountains of South America. Though she is the most unequal of her South American neighbors, Bolivia was for many years a vision of stable democratic rule. Governing majorities were negotiated through a system

of "parliamentarized presidentialism," which fostered an environment based on elite coalitions within the traditional party structures.<sup>15</sup> Political power in Bolivia, as in the United States, is divided among a president, a bicameral legislature, and formally independent courts through a system of separated powers. A unitary (rather than federal) system, Bolivia is divided into nine departments, akin to states in the U.S.

By the turn of the 21st century, this system of pacted democracy showed signs of decline. Generational replacement of the "old guard" left a vacuum of political power, and unpopular austerity programs antagonized the majority of Bolivians who already felt unrepresented by the government and excluded from the political process. At the same time, reforms meant to bolster public participation and direct democratic enfranchisement were adopted, opening the door to new parties, social movements and political leaders.

As a result, the political influence of the country's indigenous population—a segment of society that has historically been marginalized from the democratic process—has grown dramatically. Demographically, an estimated 75 percent of the population descends from one of more than thirty indigenous groups within

the country.<sup>16</sup> Emerging grassroots movements have mobilized indigenous and mestizo Bolivians on the basis of their racial, ethnic and linguistic heritage at a time when the traditional parties have struggled to convince Bolivians their political program remained relevant to the needs of a rapidly transforming nation.<sup>17</sup>

At the forefront of this political transformation has been the *Movimiento al Socialismo* (Movement to Socialism, or MAS) party, led by President Evo Morales Ayma.<sup>18</sup> Morales claims to be the first Bolivian president of indigenous descent, and he has presented himself and his party as a credible alternative to the traditional party rule. As president, Morales has proven himself both capable and willing to refound Bolivia as a new "plurinational democracy" with the aim of revitalizing Bolivian democracy in the vision of the emergent indigenous majority. Morales and the MAS have won repeated and sweeping electoral victories, most recently securing two-thirds control of the bicameral national legislature.

Traditionally, judicial selection in Bolivia was a power vested in the national legislature. In order to attain a seat on the bench, prospective judges needed to win the support of two-thirds of the bicameral National Congress.<sup>19</sup> The supermajority requirement for judicial selection meant that no party could unilaterally nominate their judge of choice, and political bargaining to build coalitions around preferred candidates was an essential part of the process. In practice, judicial nominations were frequently negotiated according to an informal political *cuoteo* (patronage-based quota) among the major parties represented in the National Congress such that each party was allocated judicial posts in proportion to their representation in the National Congress.<sup>20</sup> Without these carefully brokered political deals, vacancies in high courts would simply go unfilled. This periodically resulted in inquorate courts.<sup>21</sup>

14. Shugerman, *supra* n. 1, at 1066.

15. Eduardo A. Gamarra, *Hybrid Presidentialism and Democratization: The Case of Bolivia*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA*, Cambridge University Press, 363-393 (1997). This hybrid system resembled parliamentary government in that the legislature would indirectly select the president from among the top candidates from the popular vote. Though this frequently meant the 2nd or 3rd place popular vote winner would be selected as president, the practice ensured presidents a stable and workable legislative majority which necessitated coalition building and power sharing. This system is commonly pointed to as an example of "pacted" democracy.

16. United States Department of State. *Background Note: Bolivia*. (October 18, 2011) <http://www.state.gov/r/pa/ei/bgn/35751.htm>.

17. Miguel Centellas, *Electoral Reform, Regional Cleavages and Party System Stability in Bolivia*, 1 *JOURNAL OF POLITICS IN LATIN AMERICA*, 115-131, 116 (2009); Herbert Klein, *A CONCISE HISTORY OF BOLIVIA* (Cambridge University Press, New York, 2011).

18. James Dunkerley, *Evo Morales, the 'Two Bolivias' and the Third Bolivian Revolution*,

39 *J. LATIN AM. STUDIES* 133-166 (2009); José Antonio Quiroga Trigo, *El Estado Plurinacional y el fin de la República*, in Álvaro García Linera, ed., *MIRADAS: NUEVO TEXTO CONSTITUCIONAL*, 273-359 (Vice-Presidencia del Estado Plurinacional de Bolivia, Universidad Mayor de San Andrés and IDEA-International: Institute for Democracy and Electoral Assistance: La Paz, 2010).

19. BOLIVIAN CONST. 1994 REFORMS; Andrea Castagnola and Aníbal Pérez-Liñán, *Bolivia: The Rise and Fall of Judicial Review*, in Gretchen Helmke and Julio Ríos-Figueroa eds., *COURTS IN LATIN AMERICA*, 278-305 (Cambridge University Press, 2011).

20. According to former President Carlos Mesa, this practice was "dogma" amongst legislative leaders who regarded it as inevitable political compromise to guarantee their political influence. Carlos D. Mesa Gisbert, *PRESIDENCIA SITIADA, MEMORIAS DE MI GOBIERNO*, 66-67 (Fundación Comunidad, 2008); *Elaboran estrategia para evitar el cuoteo*, *EL DIARIO*, September 30, 2003; Álvaro García Linares, quoted in *Congreso intentara elegir hoy a miembros de Corte Suprema*, *EL DIARIO*, May 17, 2007.

21. Castagnola and Pérez-Liñán, *supra* n. 14.



Against this backdrop of expanding mobilization, politicized divisions, inordinate courts and the decline of the traditional party system, Bolivians elected a MAS-led constitutional assembly tasked with the rewriting of the nation's founding constitutional document. Judicial elections emerged as an inconspicuous proposal on a 2006 MAS party manifesto for this constitutional assembly though no direct motivations were offered to justify the change.<sup>22</sup> The constitution was drafted in 2007, and it was ratified by 65 percent of voters via public referendum in January 2009. The new constitution inaugurates an era of the Plurinational Bolivian state providing for increased local control of government, a new electoral code, reforms to bolster the influence of emergent social movements and the national, nonpartisan and direct election of judges for each of the four national courts.

Thus, approximately 160 years after judicial elections were adopted en masse by U.S. states, Bolivia became the first country in the modern era to elect jurists to serve on courts with national jurisdiction. Judicial elections have been celebrated for their comparative novelty and for their promise of placing judicial selection directly in the hands of the Bolivian people. The direct election of judges, official propaganda

would later explain, endows the Bolivian justice system "with a new democratic quality," and promises to restore legitimacy to a branch of government which had long been maligned by and was foreign to the majority of Bolivian citizens.<sup>23</sup>

### Comparing the Adoption of Judicial Elections

What can the adoption of judicial elections in the U.S. states tell us about this institutional change in Bolivia? Four commonalities stand out. First, the adoption of judicial elections coincided with the rise of expanded and direct electoral democracy. Second, external crises made the need for widespread reforms evident and crystalized the opinion of a broad coalition in favor of the reforms. Third, judicial elections enjoyed wide support across the ideological spectrum. Finally, advocates argued that the direct election of judges promised the courts an independent base of institutional legitimacy while opponents decried elections as politicizing which would undermine judicial neutrality.

### Direct Democracy and Populism

A common explanation for the adoption of judicial elections in the United States is the ascendance of populism and a broader democratic ideology—Jacksonian Democracy—which prioritized the devolution of power away from traditional elites and toward the public.<sup>24</sup> Dissatisfied with an incongruence between public opinion and policy, citizens sought institutional reforms that would force government to reflect public will more accurately. This movement privileged the experience and knowledge of commoners while the Populists met intellectual expertise and "rule by elites" with malaise and general skepticism.

A variety of institutional reforms emerged from this movement. Popular reforms in the Jacksonian portfolio included the expansion of suffrage to all white men and the

routine replacement of bureaucrats and judges to prevent entrenched interests. Disappointed with state legislative decisions that were both wasteful and unpopular, Jackson's supporters and other political groups sought to make policy more responsive to the public, lobbying for an increase in the number and type of political offices that would be subject to popular election.<sup>25</sup>

At the same time, state judiciaries had become filled with patronage appointees. In the words of Samuel Smucker, a Pennsylvania lawyer writing in 1850, "many of the vacant Judgeships [have] been conferred upon those faithful, but obscure friends of the Executive, who, for long years, had groped with him shoulder to shoulder, amid the obscure drudgery of some country law-office, or worked up with him the petty county politics of some remote section of the state."<sup>26</sup> Because the judiciary was filled with close friends and associates of the very politicians who had led to the political unresponsiveness that angered much of the public, judgeships were targeted as offices that should be subject to direct popular election.

Since the early 1990s, Bolivia has undergone a democratic transformation not unlike the changes that took place in the states during the Jacksonian era. Reformers sought to put Bolivian democracy more squarely

22. *Refudar Bolivia: Propuesta para la Asamblea Constituyente Movimiento al Socialismo Instrumento Político por la Soberanía de Pueblos*, 2006.

23. Órgano Electoral Plurinacional, La Paz, 2011.

24. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345-369, 347 (1984). See also Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190-224 (1993); Hanssen, *supra* n. 11. Indeed, even scholars who doubt that Jacksonian democracy was the sole cause of the adoption of judicial elections in the U.S. acknowledge the effects of the movement. Indeed, Shugerman writes that "the momentum for expanding democracy was a necessary cause of judicial elections, but it was not a sufficient cause." Shugerman, *supra* n. 1 at 1070.

25. Shugerman, *supra* n. 10 at 77.

26. Samuel M. Smucker, *POPULAR ARGUMENTS IN FAVOR OF AN ELECTIVE JUDICIARY* 4 (Philadelphia, 1850).

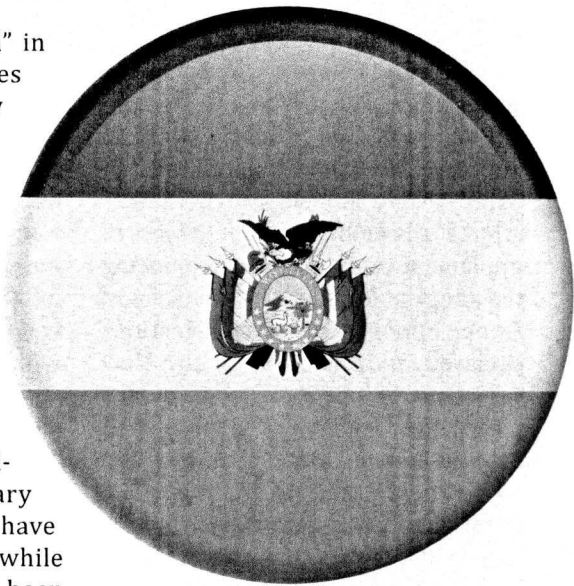
in the hands of the voters, vilifying the previous system of pacted government rule as “colonial,” elitist and exclusionary. As a former MAS party leader described, “it is no longer the era of technocrats, that time has passed Bolivia: the ‘doctors’ and ‘lawyers’ are the ones responsible for screwing Bolivia up.”<sup>27</sup> Within the context of the judicial elections, the MAS eventually eschewed a candidate vetting process that relied on professional meritocracy. Criticizing a candidate scoring system that would award the maximum points to candidates with advanced degrees, one MAS insider claimed that “the people ought to re-evaluate the type of meritocracy which for twenty years has only worsened the crisis of our judiciary.”<sup>28</sup>

Institutional reforms have both reflected and deepened this ideological shift. The devolution of power to subnational governments has debased and dismantled traditional strongholds of entrenched elite power, and new mechanisms of direct democracy put government decisions in the hands of common Bolivians. Over the course of more than a decade, the Constitution of 1967 was reformed to extend suffrage for all Bolivians above the age of 18, and for the first time, would overtly recognize Bolivian state as

“multiethnic and pluricultural” in 1994.<sup>29</sup> Constitutional changes to the electoral code allow half of the lower chamber of the national legislature to be directly elected by citizens, while new instruments of direct democracy, such as citizens’ initiatives and public referenda enhance public participation in the proposal and ratification of national legislation.<sup>30</sup> Measures in place to protect political elites, such as parliamentary and presidential immunity, have been drastically curtailed while local citizen taskforces have been formally empowered to oversee local administration and governance.<sup>31</sup>

In addition, the Decentralization and Popular Participation laws enacted in the mid-1990s devolved power away from the central government, establishing 311 municipal governments throughout the country.<sup>32</sup> Overnight, the number of elected offices expanded more than tenfold, from 262 nationwide to more than 2900. Each local government was granted political, fiscal and administrative autonomy, which provided new opportunities for grassroots organizations, political mobilization and the distribution of political patronage. Politically speaking, these changes bolstered the emergent indigenous movements while challenging the traditional national parties to establish viable footholds in local political arenas. By one estimate, two-thirds of the 1624 newly established municipalities elected indigenous or peasant leaders to their local councils or mayoral posts.<sup>33</sup>

Though these political reforms sought to expand democracy and localize politics, the process by which these reforms were adopted revealed a closed, exclusive, and increasingly fragile political system. Party leaders brokered these reforms behind closed doors, with deals struck amongst parties to ensure the Congressional supermajority necessary to adopt the constitutional reforms.



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This intensified demands for more profound and fundamental reforms, and eventually led to the constitutional assembly that enshrined the direct election of judges into the Bolivian constitution.<sup>34</sup>

### **Crystalizing Public Opinion**

A second commonality between the U.S. and Bolivian cases is the presence of an external crisis that crystalized public opinion against the legislative branch and in favor of judicial elections. These crises served as a “trigger” which, when coupled with the ascendant democratic ideology discussed above, led both the U.S. states and Bolivia to adopt elected judiciaries.<sup>35</sup>

In the United States, the adoption of judicial elections came at a time when the state legislatures had vastly mismanaged state funds. These fiscal crises of the 1830s solidified public opinion against established parties in state legislatures, and judicial elections were advocated as a way to dismantle the connection between state legislature and state courts. Historians suggest that judicial elections arose in the U.S. out of a desire to make state courts independent from state legislatures by separating courts from patronage.<sup>36</sup> By providing state judges a base of support independent of legislatures, convention delegates reasoned, they could incentivize judges to use

27. Santos Ramírez, *Interview with Marta Harnecker*, MAS-IPSP de Bolivia: Instrumento Político Que Surge Los Movimientos Sociales. Centro Internacional Mirada (2008).

28. Lucio Marca, in *El MAS elimina la meritocracia en la selección de postulantes*. Página Siete, April 26, 2011.

29. Ley N° 1585 del 12 de agosto, 1994

30. Ley N° 2410 del 8 de agosto, 2002 and Ley N° 2631 del 20 de febrero, 2004

31. Klein, *supra* n. 17.

32. Klein, *supra* n. 17; Centellas, *supra* n. 17.

33. Klein, *supra* n. 17 at 258.

34. Calls to reform the constitution via democratically elected constitutional assembly reached a climax in late 2003: Violent clashes between the government and indigenous protestors forced the resignation and self-imposed exile of President Sanchez de Lozada with his successor, vice-President Mesa, forced into resignation only 19 months later. When the president of the Supreme Court Eduardo Rodríguez Veltzé, stepped in as interim President, his first order of business included calling elections to elect a constitutional assembly.

35. Shugerman, *supra* n. 1; Shugerman, *supra* n. 10.

36. Hanssen, *supra* n. 11 at 447.

judicial review to impede legislative excesses, thereby restoring the states' fiscal health.<sup>37</sup>

Public and elite opinion in favor of judicial elections was so well consolidated that opponents turned their efforts to modifying the rules of implementation rather than blocking the adoption of elections themselves. As one opponent of judicial elections declared midway through the New York convention: "A majority of this Convention have doubtless decided that the judicial office shall be filled by election, and with that decision, so far as this body is concerned, I am not to quarrel."<sup>38</sup> Indeed, the New York delegates did not even vote on whether the state's judges should be elected or appointed.<sup>39</sup> Instead, the debate focused upon the mechanics of the electoral process, such as whether judges should be elected in a district-based or statewide system.<sup>40</sup>

In Bolivia, widespread disaffection for the "old guard" of politics crystallized public opinion regarding the need for constitutional reform. In addition, legislative dysfunction over the appointment of judges made plain the need for judicial reform: high profile conflicts over judicial nominations were a prominent show of partisan antagonism, political polarization and the contentious nature of judicial appointment processes. Tensions reached an apex over the summer of 2007, at the same time the constituent assembly was embroiled in tense negotiations over the constitutional text.<sup>41</sup> After the arrest of several constitutional magistrates sparked a fistfight in Congress, the opposition-controlled Senate blocked the MAS-led impeachments of four constitutional magistrates.<sup>42</sup> Citing an unwillingness to continue under circumstances of high political controversy and professional duress, all four constitutional judges ultimately resigned.<sup>43</sup> Against this backdrop of institutional antagonism and political stalemate, many parties in the constituent assembly contended that the direct election of judges was the only way these nomination processes could truly be depoliticized.

Much like the opposition in the U.S.

states, the opponents to judicial elections in Bolivia targeted key procedural and institutional aspects of the judicial elections clause in advance of the constitutional ratification referendum of January 2009.<sup>44</sup> The text that was approved by the Constitutional Assembly in December of 2007 called for the direct election of judges who would be vetted by the judicial council, with few specifics regarding judicial qualifications, partisanship and campaigning.<sup>45</sup> In the constitutional text that was eventually subjected to public approval, the candidate selection process remained in the hands of the National Congress and each candidacy required approval by two thirds of the legislature before the candidate could appear on the ballot. In theory, this legislative pre-selection process would prohibit any one party from selecting its favored candidates and ensure opposition parties the opportunity to participate in the candidate vetting process. In addition, later drafts of the constitution stipulated higher levels of magistrate qualifications and stricter

regulations on candidate campaigns and party affiliation.<sup>46</sup>

### **Not a Partisan Reform**

A third commonality between the cases is the lack of a strong ideological motivation for the adoption of judicial elections. While it may be tempting to think of judicial elections as part of a strategy by a weakening majority party who sought to "stack the deck" to protect itself from future minority status, this does not seem to be supported by the evidence in either case. In both the U.S. states and Bolivia, judicial elections were supported by parties across the ideological spectrum with little, if any, explicit partisan motivation.

In the U.S., convention delegates argued that judges who had been appointed by state legislatures had been chosen because of their strong partisan ties as patronage appointees. Delegates further claimed that appointive systems of judicial selection left more room for partisan politics than judicial elections. The

37. Shugerman, *supra* n. 1; Shugerman, *supra* n. 10; Hanssen, *supra* n. 11.

38. Shugerman, *supra* n. 1 at 1083 (quoting DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION 587 (S. Crowell & R. Sutton reporters, Albany, Albany Argus 1846)).

39. Shugerman, *supra* n. 1 at 1083.

40. Shugerman, *supra* n. 10 at 95.

41. Following a presidential decree that filled four vacancies on the Supreme Court, opposition leader and Senate President Oscar Ortiz challenged the constitutionality of the appointed jurists. The Constitutional Tribunal affirmed the president's constitutional right to fill vacancies, but ruled the judges' tenure could not surpass 90 days, a term which had already expired. In response, the MAS majority in the lower chamber of Congress sought impeachment of four Constitutional judges for their votes against the president, arguing they had overstepped the bounds of their constitutional mandate. Decreto Supremo 28993; Resolución Constitucional 0018/2007; *Evo pide aclarar su fallo al Tribunal Constitucional*, LOS TIEMPOS, May 12, 2007; *Evo pide enjuiciar a magistrados del Tribunal Constitucional*, LOS TIEMPOS, May 16, 2007; *Comisión ignora fallo y remite juicio a tribunales*, LOS TIEMPOS, August 17, 2007.

42. *Pleno de Diputados avaló juicio contra cuatro tribunales*, EL DIARIO, August 23, 2007; *Presidencia del Congreso, Vice-Presidencia del Estado, 61 diputados apoyaron el Proyecto de acusación a cuatro tribunales*, NOTICIAS, August 25, 2007; *Senado sepultó el tema de juicio a cuatro tribunales*, EL DIARIO, September 9, 2007.

43. *Tribunal Constitucional sin cabeza tras renuncia de dos magistrados*, EL MUNDO, October 27, 2007; Andrea Castagnola and Aníbal Pérez-Liñán, *supra* n. 22.

44. This text was approved by a two-thirds vote of those present at the assembly, though widespread allegations of procedural violations and an intentionally absent opposition called the legitimacy of the constitutional draft into question. In light of the hostile environment in which the original constitutional text had been drafted and approved, the MAS opened the door to continued negotiations with members of the opposition, allowing the National Congress to modify the text before it was subjected to public ratification. Little is known of the negotiations over the constitutional text except that concessions were brokered by party insiders and the reforms were not widely debated in Congress. However, the opposition, headed by PODEMOS, brought to the table a list of 14 key demands and succeeded in amending 105 articles. Reforms targeting the procedures of the judicial elections were a top priority (*Bolivia: Morales maneuvers three fronts at once*, LATIN AMERICAN WEEKLY REPORT, October 16, 2008; Luis Vásquez Villamor, Sixteenth Ordinary Session of 2008-2009 Congress, Monday, October 20<sup>th</sup>, 2008, La Paz, Bolivia.)

45. *Nueva Constitución Política del Estado*, (Text of the new Bolivian Constitution as it was approved by the Constitutional Assembly in December 9, 2007), in ENCICLOPEDIA HISTÓRICA DOCUMENTAL DEL PROCESO CONSTITUYENTE BOLIVIANO, INFORMES POR COMISIONES—TOMO IV, 947 (Biblioteca y Archivo Histórico de la Asamblea Legislativa Plurinacional, 2012); and final text of the BOLIVIAN CONSTITUTION as it was ratified by the public in January 25, 2009.

46. A comparison of the approved text from the constitutional convention and the constitution it was publicly ratified is available on our online appendix at <http://jedi.wustl.edu/data-bolivia-dataset.php>.

best way to sever partisan ties, they argued, was to eliminate the legislature's role in judicial selection and put the power in the hands of the public.

Moreover, supporters of judicial elections were often members of strong legislative majorities. Indeed, according to one prominent historian of judicial elections,

[s]ome delegates surely believed that judicial elections would give their party a better chance of winning seats on the bench than appointments had, but this partisan strategy was probably a minor factor, because many pro-election delegates belonged to the party already securely in power and expected to retain power.<sup>47</sup>

In many of the states that adopted judicial elections, a single party held a strong control over both the governorship and the state legislature, and minority parties had a better chance at winning local or statewide elections than they did convincing the legislature to appoint one of their own members to those judgeships. As mentioned above, support for the adoption of judicial elections was so widespread—even among delegates of varied parties—that only five state conventions held roll call votes over whether or not judges should be elected under their new constitution.<sup>48</sup>

Moreover, convention delegates believed that, given the option to select their own judges, voters would not approve of explicitly partisan judges. Samuel Smucker, a Philadelphia lawyer, argued in 1850 that

party preferences, however it may operate in inducing legislators to



## THE MOST NOTABLE DIFFERENCE BETWEEN THE CASES LIES IN THE SUPPORT OF JUDICIAL ELECTIONS BY THE LEGAL COMMUNITY.



vote for party measures in the halls of legislation, cannot possibly operate upon the Bench where the whole sphere of the incumbent is altogether professional, scientific and extra-popular... [When the public votes, they] will have no eye to reward, or interest; for there are too many, and too unknown to the candidate, ever to afford him an opportunity even if the nature of his functions allowed it, to reward those to whom he was under obligations.<sup>49</sup>

Likewise, in the words of Ira Harris, a delegate to the New York convention, "Nothing in this country would sooner seal the political doom of any judge, by all parties and every honest man, than the attempt to bend his decisions from the line of justice to make political capital."<sup>50</sup>

One might think that some parties supported a move to judicial elections in an attempt to give themselves an influence in judicial selection that they lacked in the current system. If the power of judicial selection was given to the public rather than to legislators, smaller parties may have been able to earn seats on the bench that they could not secure through legislative means. However, the most vocal proponent of judicial elections, the MAS party, was the largest party in the Constituent Assembly and held a comfortable majority of the lower house of the National Congress. MAS members had every reason to expect their party would be influential in future appointment processes had the selection procedures remained the same, and their electoral successes showed no signs of slowing. Moreover, though many small

parties supported the direct election of judges, an equal number of small parties opposed them.

In the Bolivian constitutional assembly, support for judicial elections was widespread but not universal. Of the sixteen parties in the constituent assembly, seven parties included the direct election of judges as a central component of their party platform while seven parties explicitly stated they were against the direct election of judges or proposed alternative appointment procedures. Nearly every party manifesto made plain the need for a new constitution in light of the "crisis" situation brought about by the decline of the traditional party system and the need for new democratic politics. However, the parties in favor of judicial elections enjoyed a clear majority, controlling 65 percent of assembly seats.

The adoption of judicial elections had widespread support from across the political spectrum in Bolivia. The President of the Constitutional Assembly Justice Committee, Rebeca Delgado, noted that judicial elections were suggested in nearly every public forum held in advance of the constitutional drafting process. For that reason, she argued, parties advocating for judicial elections were simply obliging the demands of the Bolivian people.<sup>51</sup> Likewise, though many advocates of judicial elections in Bolivia were politically liberal, National Convergence (CN), a prominent political force from the conservative end of the ideological spectrum, also supported judicial

47. Shugerman, *supra* n. 10 at 113.

48. Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary 1846-1860*, 45 *The Historian* 337-354, 342 (1983).

49. Smucker, *supra* n. 26 at 4-5.

50. Shugerman, *supra* n. 10 at 112 (quoting REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 645 (William G. Bishop & William H. Attree reporters, Albany, Albany Atlas 1846)).

51. Rebeca Delgado, *Acta de Reunion de 21 de Junio, 2007, Comisión Judicial de la Asamblea Constitucional Boliviana*, in ENCICLOPEDIA HISTÓRICA DOCUMENTAL DEL PROCESO CONSTITUYENTE BOLIVIANO, INFORMES POR COMISIONES—TOMO III, 771 (Biblioteca y Archivo Histórico de la Asamblea Legislativa Plurinacional, 2012).

elections. Further, several left and center-left parties, including the Socialist Party (PS) and the National Unity (UN), were explicitly against the direct election of judges. Additionally, the coalition of supporters of judicial elections represented a heterogeneous mix of constituencies including parties from the departmental autonomy movement, the student-led AYRA Movement, evangelical Christians and regionally concentrated pro-indigenous parties.

There is some evidence that parties' support for judicial elections was divided along pro- or anti-“systemic” lines. Though historically strong parties have splintered in recent years, groups with roots in the traditional party system were some of the most vocal opponents to the move to judicial elections.<sup>52</sup> Most, though not all, of the advocates of judicial elections were parties who were relative newcomers to the national political scene. Much like the advocates in the American states, these newcomers faulted the traditional parties as the root of the nation's problems, and there was broad agreement that partisan influence ought to be extricated from the judicial selection process. Indeed, there was a large consensus of parties across the ideological spectrum that the judicial system was in a state of crisis that required constitutional reforms. In this sense, disagreement did not stem from whether the system should be reformed, but rather *how* institutional changes ought to take place.

### **Normative Arguments**

A fourth commonality between the adoption of judicial elections in the United States and Bolivia is the consistency between the arguments made by both advocates and opponents of these institutions. In the United States, proponents of judicial elections emphasized a need to limit legislative influence on judicial decisions and to cut the ties between judges and their legislative political principals. By making judges dependent upon elections, delegates argued, they could increase judicial

independence from the legislature while encouraging judges to heed the will of the people. For example, Samuel Smucker, a Philadelphia lawyer, argued that “[t]he selection of the Judges, when chosen by the people, will be accomplished with less mercenary motive and influence *on the part of the electors themselves*, than is the case under the present system of appointment by the Governor.”<sup>53</sup> Likewise, one delegate to the Illinois convention said that he “would ‘rather see judges the weather-cocks of public sentiment’ than see them ‘the instruments of power, ... registering the mandates of the Legislature and the edicts of the governor.’”<sup>54</sup>

Advocates of the Bolivian elections described the direct election of judges as the only means through which the corrupt practices of the old party guard would finally be put to an end. Constitutional scholar Chivi Vargas describes the singular reason why the constituent assembly arrived at its decision: quite simply, there was “no other way. The only way to end party cronyism and patronage appointments once and for all was the direct designation of judges by direct and universal popular vote.” As the head of the MAS delegation tasked with writing the section of the constitution would later claim, judicial legitimacy and independence would hang on popular sovereignty expressed in the electoral process: “The greater the popular sovereignty in the direction of judges, the greater the independence, quality and impartiality in the administration of justice.”<sup>55</sup>

Opponents of judicial elections

52. The largest opposition party in the Constituent Assembly—the center right coalition of PODEMOS (Social and Democratic Power, though the acronym also translates to “We can”), is a recent reincarnation of the Nationalist Democratic Action (ADN) party, one of three parties that previously dominated the national party politics. PODEMOS staunchly opposed the move to judicial elections, proposing instead that judges be selected via a publicly transparent, meritocratic process conducted by the national Judicial Council. PODEMOS would, however, play a critical role in negotiation changes to the constitutional text that would stipulate stricter requirements for candidate qualifications, limited campaigning and a supermajority

in the United States suggested that elections would sacrifice judicial autonomy and expertise. Smucker, the Pennsylvania lawyer, describes the argument like this: “Able lawyers, such as would make good judges, have a lucrative practice, and would not resign it for the humbler compensation of the bench. The people will then be compelled to choose inferior lawyers, briefless and clientless hangers-on of the courts, the worthless drones of the profession.”<sup>56</sup> Moreover, opponents argued that the direct election of judges would politicize the courts and thereby decrease the legitimacy of the judiciary. For example, in an 1846 article, Joshua M. Van Cott, a New York attorney, argued that “electing [judges] would bring them into too close contact with party excitements and excesses, and tend to impair their purity and impartiality... [I]f it did not in fact make judges partial and corrupt, [it] would destroy the confidence universally reposed by the people in the courts and in the pure and impartial administration of the laws.”<sup>57</sup>

Opponents of the Bolivian elections echoed these concerns. Critics feared that the political nature of campaigns and direct elections would further politicize judicial selection processes and exacerbate tensions that were present under traditional party rule.<sup>58</sup> Even if partisanship and overt campaigning was prohibited or strictly regulated, they argued, elections would be inherently political. As one Bolivian constitutional scholar later noted: “... parties’ interests in occupying judicial posts is unavoidable because

threshold for candidate approval in the legislature, *supra* n. 44.

53. Smucker, *supra* n. 26 at 3.

54. Nelson, *supra* n. 24 at 206 (quoting CONSTITUTIONAL DEBATES OF 1947 752 (Arthur Charles Cole ed., 1919)).

55. Personal communication between Rebeca Delgado and Idón Moisés Chivi Vargas, *El Órgano Judicial*, Nuevas Miradas.

56. Smucker, *supra* n. 26 at 9.

57. Joshua M. Van Cott, STRICTURES ON THE JUDICIARY SYSTEM OF THE PROPOSED CONSTITUTION (New York, 1846).

58. Maria Teresa Zegada Claire, *Crítica y análisis de la estructura y organización funcional de Estado*; Nuevas Miradas, p144.

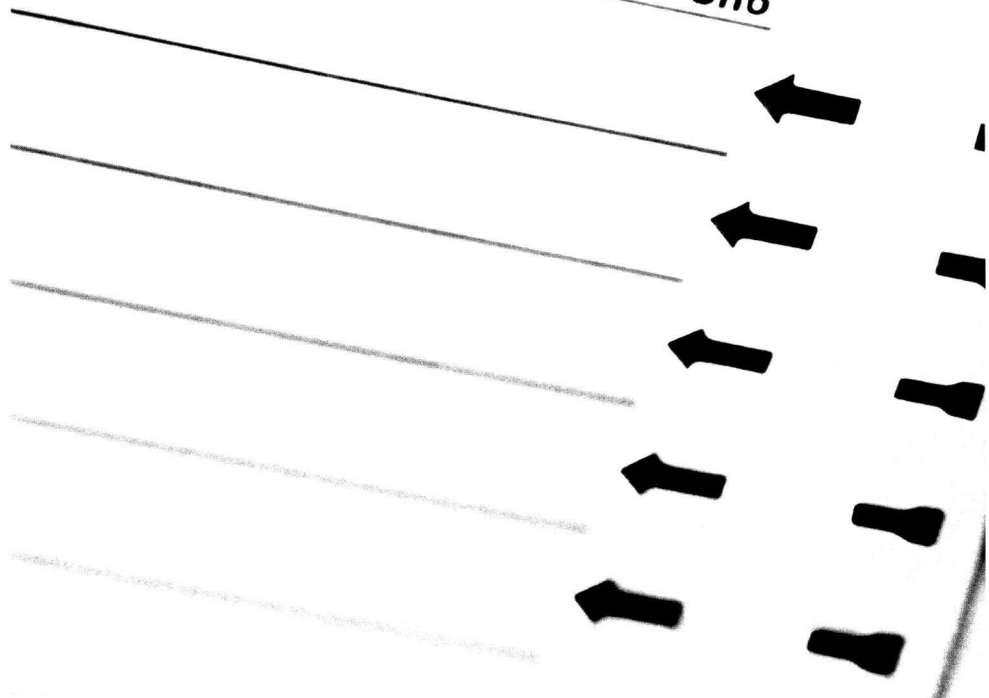


of the relevance of those positions for the administration of power... [Those in power] will surely coopt—albeit subtly—judicial candidates who will later be under their sphere of influence. For that reason, we consider that the remedy is worse than the disease.”<sup>59</sup> As former Bolivian president and former president of the Bolivian Supreme Court Eduardo Rodríguez Veltzé argues, the direct election of judges “converts judges into political representatives. In practice, judges should not represent anyone and but ought to resolve cases in accordance with law, not with reference of the opinion of those that elect her.”<sup>60</sup>

Though advocates of elections suggested the direct election of judges would imbue courts with an independent base of institutional legitimacy, opponents questioned this logic. Instead, critics would contend that courts’ institutional legitimacy is founded on procedural fairness, impartiality and judge professionalism, not judges’ “electoral connection” to the public. For example, Veltzé argues: “The legitimacy that is derived from good performance within the judicial profession is more important than the legitimacy that stems from ones’ origin of mandate and it is the legitimacy derived from good performance from which true judicial independence is derived.”<sup>61</sup> From this vantage, judges’ apoliticism and

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adherence to neutral procedures is a foundation by which the judiciary can ensure its role in the broader system of governance because of the unique role to which judges are assigned: to interpret legal doctrine and to impartially apply the law.

#### A Difference

Of course, while they are similar in many respects, the U.S. and Bolivian cases are not identical. The most notable difference between the two cases lies in the level of support that the adoption of judicial elections received from the legal community. While lawyers in the United States were, on the whole, supportive of the adoption of judicial elections, their Bolivian counterparts were vehemently and publicly opposed to the switch.

One prominent theory of the genesis of judicial elections in the United States posits that elections were adopted because of a desire to elevate the status of the legal profession and were, therefore, sup-

ported overwhelmingly by the legal profession. While historians debate the extent to which this desire is a leading cause of the U.S.’s adoption of judicial elections, they have amassed a variety of evidence that the legal profession was actively involved in the adoption of judicial elections, and the legal community typically supported the reforms.<sup>62</sup> In particular, Kermit Hall notes that lawyer-delegates played a large role in the drafting of new state constitutions, always controlled the committees that drafted the provisions for the judiciary and typically dominated discussions of the issue.<sup>63</sup>

The dynamic was much different in Bolivia, where the legal profession actively lobbied against judicial elections. The national lawyers’ and magistrates’ associations spoke out repeatedly against the direct election of jurists throughout the constitution writing process and would continue to do so in advance of the elections.<sup>64</sup> Prominent jurists and legal scholars decried the direct

59. *Id.*

60. Eduardo Rodríguez Veltzé, *El Órgano Judicial y Tribunal Constitucional Plurinacional* in Álvaro García Linera, ed. *MIRADAS: NUEVO TEXTO CONSTITUCIONAL* (Vice-Presidencia del Estado Plurinacional de Bolivia, Universidad Mayor de San Andrés and IDEA-International: Institute for Democracy and Electoral Assistance: La Paz, 2010).

61. *Id.*

62. We note, however, that Shugerman disputes Hall’s argument about the extent to which the legal profession supported the adoption of judicial elections. Shugerman and Hall agree that many convention delegates were lawyers and many of those lawyers supported the move to judicial elections. However, Shugerman notes that many legal periodicals formally opposed the move to judicial elections. Shugerman, *supra* n. 1 at 1111-1112.

63. Hall, *supra* n. 47 at 342.

64. *Bolivia: Morales takes on the Judiciary*, *LATIN AMERICAN WEEKLY REPORT*, March 29, 2009.

election of jurists as a governmental ploy to undermine the separation of powers and stack the bench with pro-MAS affiliates.<sup>65</sup> In protest, many noted legal professionals refused to advance their candidacies for the judicial positions.<sup>66</sup> Ultimately, though attempts were made to render the candidate pre-selection process more transparent and meritocratic, the nomination process was reportedly negotiated behind closed doors, and many candidates were identified for their direct affiliations with the MAS as party organizers, legislative aides or legal advisors.<sup>67</sup>

### Conclusion

We have identified several commonalities between the adoption of judicial elections in the U.S. states in the mid-1800s and the adoption of Bolivian elections in 2009. While our cases were not randomly chosen and our analysis too narrow to definitively attribute causality,<sup>68</sup> we argue that the commonalities we identify between these two cases are striking in light of the differences in time, history and political circumstances. More importantly, our comparative analysis allows the assessment of theories developed in the U.S. as they apply outside of the U.S. context. We hope future research will build on our efforts here to further identify facilitating conditions for this type of reform, or to better delineate the scope of our theory.

This comparative research design also points to larger questions regarding the political consequences of these elections for the Bolivian judicial system, the MAS leadership or Bolivian democracy more generally. Indeed, when considering the adoption of judicial elections in the American states, many reformers argued that “[e]lections mattered most not because of whom the voters chose... but because of the influences that the elections themselves created.”<sup>69</sup> A growing body of empirical scholarship has addressed these influences in the American case, which in

turn points to fruitful opportunities for future research on the Bolivian experience.

For example, opponents of judicial elections in both countries have repeatedly argued that a change in judicial selection procedures has the potential to turn judges into political representatives who are both held accountable to the public directly for their decisions but are also motivated to appeal to public sentiment to obtain or keep their positions.<sup>70</sup> In the U.S., empirical scholarship has supported this claim, suggesting that elected judges are more likely to follow public opinion in their decisions.<sup>71</sup> Paradoxically perhaps, this tendency appears to be *most* pronounced when judges face non-partisan elections like those used in Bolivia.<sup>72</sup> Future scholarship on the Bolivian judiciary should assess the tendencies the Bolivian courts to be congruent with public opinion before and after the adoption of judicial elections.

Second, future research ought to assess the consequences of judicial elections on the legitimacy of the Bolivian judiciary. As discussed above, the institutional legitimacy of courts was an object of discussion for both advocates and opponents of judicial elections, but the impact of judicial elections on public esteem for courts remains an empirical question. However, research on the U.S. states suggests that judicial elections may *enhance* the legitimacy of the judiciary, lending preliminary credence to advocates’ position.<sup>73</sup> Public opinion polls conducted several months following the

elections revealed that Bolivians remained divided on the legitimacy of the 2011 electoral contest itself: on the eve of the new Judicial Year, 47 percent of respondents reported they did not think the elected officials ought to assume their elected positions.<sup>74</sup> On the other hand, more than half of all respondents were in favor of direct judicial elections as a preferred method of selecting high court judges.<sup>75</sup> By understanding how the Bolivian experience both mirrors and diverges from the American case, we may build a better understanding of how these institutions affect law and politics both in the U.S. and abroad. ★

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65. Zegada Claire, *supra* n. 57; Rodríguez Veltzé, *supra* n. 60.

66. *Profesionales no se postularán a las elecciones judiciales*, PÁGINA SIETE, June 8, 2011; *El registro ampliado aún no tiene inscritos*, LA RAZÓN, June 23, 2011.

67. *Masistas admiten “cuoteo individual” en designación de candidatos judiciales*, EJU! TV, July 20, 2011. *30 candidatos son afines al MAS y 36 son empleados*, PÁGINA SIETE, July 15, 2011.

68. *Supra* n. 6.

69. Nelson, *supra* n. 40. At 224.

70. Veltzé, *supra* n. 61 at 423-433.

71. Paul Brace and Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360-372 (2008).

72. Caldarone, Richard P., Brandice

Canes-Wrone, and Tom S. Clark, *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J. POL. 560-573 (2009).

73. James L. Gibson, Jeffrey A. Gottfried, Michael X. Delli Carpini, and Kathleen Hall Jamieson, *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment* 64 POL. RES. Q. 545-558 (2011).

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