

POLITICAL ECONOMY

IN THE CAROLINAS

PROVIDING PARTISAN AFFILIATION IN JUDICIAL ELECTIONS

Notes & Commentary by:
Bryan C. McCannon
*West Virginia University, Center for
Free Enterprise*

In 2017 North Carolina changed its policies regarding the election of judges. Since the legislature overrode a gubernatorial veto in March 2017, the partisan affiliation of superior court and district court judges has been on the election ballot. North Carolina joins the twelve other states that have partisan elections. Interestingly, this policy change reverses the state's 2001 and 1996 changes that respectively eliminated partisan affiliation for these two positions. Given the variation in selection and retention mechanisms used across the country, it is possible to investigate what effects this policy change might have. This note's objective is to discuss the impact partisan affiliation may have so as to shed light on the properness of North Carolina's policy.

In free societies, the legal system is of primary importance. We all want ourselves and our possessions to be protected from violence and harm. We want those who cause harm to be punished and those who are law-abiding to not be wrongfully sanctioned. Importantly, we want crime deterred. Regarding civil law, there are economic benefits to clear, unambiguous contract enforcement. Property rights should be defended and fraud reduced. In short, we all benefit when legal systems are functioning properly.

At the center of the legal system is judges. Judges are asked to uphold the rule of law. They are meant to properly apply the rules of evidence, statutes passed by the legislative branch, and judicial precedents. As Friedrich von Hayek (1944) argued, the value of the rule of law is that we can plan our lives easier. Arbitrarily applied law frustrates the planning of our lives. Additionally, arbitrary law favors one person or group at the expense of others and hence is

discriminatory. We rely on judges to consistently apply the law in clear, predictable ways.

Across the US, states differ in how judges are held accountable for their decisions. Many jurisdictions, including North Carolina, use the election mechanism. Citizens are asked to cast a vote between competing candidates for judge positions. Judges serve fixed terms in office, and to remain in office they must run for re-election. For example, superior court judges in North Carolina serve eight-year terms. This provides voters the opportunity to express their support for the judges' job performance. Also, it allows other legal insiders to challenge the incumbent judge for the position, which expresses to the citizens the incumbent's shortcomings. The United States is unique in the world in its use of the election mechanism, which empowers citizens to hold their judges accountable.

Going hand-in-hand with the use of the election mechanism is partisanship. Most political officeholders have partisan affiliation. In elections for legislative or executive offices, because legislative and executive policy is often distributional (benefitting one group at the expense of another), partisanship is to be expected. In fact, the phenomenon of plurality voting leading naturally to a two-party system is known as Duverger's law (Duverger 1972). For the judicial branch, on the other hand, it is not clear what benefit partisan affiliation has.

Ultimately, the decision of whether to list partisan affiliation on the ballot is a regulatory decision made by a state government. Is it in society's best interest to provide the information to voters, or is it welfare enhancing to suppress it? My objective in this note is to use economic theory and empirical analysis to discuss partisan affiliation as a regulatory action.

At the core of welfare economics is the fundamental welfare theorem. It states that competitive markets achieve Pareto-efficient

outcomes. Stated plainly, if a market is competitive then it will naturally lead to a "good" outcome in the sense that some individuals cannot be made better off without hurting others. If this occurs, then regulation does not have societal value.

What is the value of including partisan affiliation on ballot? The question is one of providing information. Obviously, a motivated voter can put the time and effort into learning about a candidate's partisanship. Given that the probability a particular individual will swing the election's outcome is very small, it is not necessarily in the individual's best interest to exert this effort (Tullock 1971). This phenomenon has been referred to as rational ignorance (Caplan 2007). Thus, providing partisan affiliation on the ballot provides information to voters cheaply.

While direct evidence of voters' preferences is not observable, actors in the legal system behave as if voters care about partisan affiliation in judicial elections. One way to observe judges' responses to elections is to evaluate changes in their decision-making over time. A common presumption is that voters are myopic. That is, they pay attention to the choices of their elected representative when it is close to election time. Incumbents, anticipating this, behave differently closer to the election than farther away from it. If the pattern of their choices over time correlates with the political cycle, then the influence of voters' information can be identified.

One important work studying such a pattern is by Berdejó and Yuchtman (2013). They consider judges in Washington State, who are chosen in partisan elections. Evaluating sentencing data, they find that as the time until election shrinks the harshness of the judges' sentences increases.

Relatedly, Lim (2013) studies judicial sentencing in Kansas. Kansas is unique in that the state is divided between jurisdictions that elect their trial court judges and those in which such judges are appointed. She compares the two and

finds that sentencing varies with the election cycle in areas that elect their judge, but in areas with appointments, judicial sentencing is flat over time.¹

Along with sentencing, the quality of judges' decisions correlates with the election cycle. Building off the earlier work of McCannon (2013) on election of prosecutors, DeAngelo and McCannon (2018a) use data on appealed felony convictions in New York to evaluate judicial elections. They use reversed or modified convictions as a measurement of lower-court error and ask whether the errors are correlated with re-election pressures on judges. They find an important difference between judges who are former prosecutors and those that are not. Prosecutors-turned-judges are more likely to have the appellate court affirm their convictions, and they see an improvement in the election season. Judges who were not prosecutors are worse and get even more worse close to re-election.

The results of these papers strongly suggest that voters care about judicial performance. But do they care about the information partisan affiliation provides? The role of information in judicial elections is explored in depth by Lim, Snyder, and Strömberg (2015). They argue that the media has an important role in providing information. The media's informational value is largest when voters have the weakest prior knowledge. They argue that voters' prior knowledge is weakest when they are denied information on the judge's party affiliation. Hence newspaper coverage of judges should be most impactful when judges face nonpartisan election. This is precisely what they find. Evaluating sentencing harshness of judges across the country, who differ in the use of partisan elections and differ in newspaper coverage of their district, they find that newspaper coverage leads, overall, to harsher

sentences and that this effect is concentrated for judges who face nonpartisan elections. Thus, stripping away information about partisan affiliation takes away important information that voters care about, which must be supplemented via media coverage of the courtroom.

If voters value party affiliation, then why regulate it? A common argument in economics is that regulation is a potential solution when there are externalities. An externality is an unintended spillover of one person's or organization's action onto others. To justify restricting information availability, then, one must identify negative spillovers and these spillovers must create harm exceeding the benefits.

So where is the harm? One important concern is that partisanship provides bad information. The argument usually goes that judges should not be political. They should make their decisions based solely on the laws of the nation or state. The law should be applied the same regardless of which political party the judge prefers. Therefore, if voters are making their decisions based on partisan affiliation, then they must be selecting candidates on dimensions other than those they should be acting on.

This argument has merit. If there is a law supported by the party currently in power and opposed by the other party, then it should concern us that democratic processes are being subverted when a judge affiliated with the latter refuses to uphold the law.

There is suggestive evidence that partisanship influences judges. For one example, Shepherd (2009) considers the relationship between state high court judges' decisions and partisan ideology. She finds that judges elected by Republican majorities or appointed by Republican

¹ Similar work confirming the electoral cycle's influence on the legal system can be found in elections of prosecutors. See Bandyopadhyay and McCannon (2014) for empirical evidence on the relationship between such elections and the increased use of jury trials, rather than plea bargaining, and Bandyopadhyay and McCannon (2015) for a theoretical investigation.

governors, for example, are more likely to decide on typical Republican sides, such as siding with management in labor-management disputes or with businesses in environmental-damage cases. Interestingly, she finds that when the ideology of the retention agent changes, as happens when the voting majority switches from supporting Republicans to supporting Democrats, judges adjust their opinions in cases to coincide with the ideology of the retention agent. Finally, Shepherd (2009) documents that these effects are strongest for judges selected in partisan elections.

On the other hand, US judges have a substantial amount of discretion. For example, the separation of powers has curtailed legislative efforts to dictate sentencing decisions. Though given suggestive bounds via sentencing guidelines, judges have discretion to vary sentencing as they see fit. It seems reasonable in such a circumstance for citizens motivated by concerns of crime to be interested in harsher sentencing, which reduces crime through both an incarceration effect and a deterrence effect. It would also be reasonable for other citizens, motivated by data on sentencing disparity by race (Rehavi and Starr 2015) or mass incarceration, to prefer milder sentences. As another example, one citizen may prefer retribution through incarceration, while another citizen may prefer liberal use of alternatives to incarceration. If these different views on appropriate punishment coincide with differences in political party platforms, then partisan affiliation can provide useful shorthand information to voters, thus saving them the time and effort necessary to learn candidates' specific views on these issues.

Another potential harm is the deadweight loss associated with campaign spending. A substantial amount of money is spent on elections. The relationship between partisan versus nonpartisan elections and spending on these elections is, then, an important question. If having

nonpartisan elections corresponds with less wasteful campaign spending, then social welfare may be higher with the regulation.

Little research has been done evaluating campaign spending in judicial elections. Experiments conducted by DeAngelo and McCannon (2018b) stand alone. In the laboratory, the authors create elections. An election is operationalized as a contest in which each party in the race chooses how much to spend, and the probability of winning the election is proportional to one's spending. That is, holding fixed the campaign spending by the other participants, the more a candidate spends the greater is the likelihood that the candidate wins the election. The authors compare a treatment intended to capture partisan affiliation with one meant to capture nonpartisan affiliation. Their insight is that in a particular district, one party dominates the electorate. Spending by that party's candidate is more effective than spending by the nondominant parties' candidates. This disparate effect is not as strong in nonpartisan elections.

DeAngelo and McCannon have laboratory subjects compete repeatedly in both treatments. The group's well-being is improved when they reduce the amount of money spent on the contest. Equilibrium, on the other hand, involves a modest (and thus excessive) amount of spending by each candidate. The authors find that their laboratory subjects, overall, spend too much on the election. The average amount put into the contest is approximately double what equilibrium predicts. Thus, not only does theory predict that there is excessive spending in such contests, but the amount real humans spend in a competitive environment exceeds these levels.

Importantly, the authors find that the spending is highest on candidates who have the dominant-party advantage. Spending is approximately 10 percent higher on those who have

the dominant-party advantage than spending on those in the nonpartisan election treatment. There is a slight reduction in spending by those who do not have the partisan advantage, but the net effect of partisanship is to increase the deadweight loss of the campaign. They conclude that dropping partisan affiliation may have the benefit of reducing the wasteful spending of political campaigns for judges.

These are two spillovers of concern, and there may very well be others. Regulation can only be justified when these negative spillovers outweigh the benefits voters receive. How to balance these benefits and costs is a difficult value judgment. If the value voters place on the information is greater than the costs of potentially increased spending on the elections and of the partisan shift in judicial decisions, then the policy change in North Carolina can be justified. If not, then nonpartisan elections may have been better.

REFERENCES

- Bandyopadhyay, Siddhartha, and Bryan C. McCannon. 2014. "The Effect of the Election of Prosecutors on Criminal Trials." *Public Choice* 161 (1–2): 141–56.
- Bandyopadhyay, Siddhartha, and Bryan C. McCannon. 2014. "Prosecutorial Retention: Signaling by Trial." *Journal of Public Economic Theory* 17(2): 219–56.
- Berdej6, Carlos, and Noam Yuchtman. 2013. "Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing." *Review of Economics and Statistics* 95 (3): 741–56.
- Caplan, Bryan. 2007. *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*. Princeton University Press.
- DeAngelo, Gregory, and Bryan C. McCannon. 2018a. "Using Appellate Decisions to Evaluate the Impact of Judicial Elections." Working Paper.
- DeAngelo, Gregory, and Bryan C. McCannon. 2018b. "Political Competition in Judge and Prosecutor Elections." Working Paper.
- Duverger, Maurice. 1972. *Party, Politics, and Pressure Groups*. New York: Thomas Y. Cowell.
- Hayek, Friedrich A. von. 1944. *The Road to Serfdom*. University of Chicago Press.
- Lim, Claire S. H. 2013. "Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges." *American Economic Review* 103 (4): 1360–97.
- Lim, Claire S. H., James M. Snyder Jr., and David Stromberg. 2015. "The Judge, the Politician, and the Press: Newspaper Coverage and Criminal Sentencing across Electoral Systems." *American Economic Journal: Applied Economics* 7 (4): 103–35.
- McCannon, Bryan C. 2013. "Prosecutor Elections, Mistakes, and Appeals." *Journal of Empirical Legal Studies* 10 (4): 697–715.
- Rehavi, M. Marit, and Sonya B. Starr. 2015. "Racial Disparity in Federal Criminal Sentencing." *Journal of Political Economy* 122 (6): 1320–54.
- Shepherd, Joanna. 2009. "The Influence of Retention Politics on Judges' Voting." *Journal of Legal Studies* 38: 169–202.
- Tullock, Gordon. 1971. "Public Decisions as Public Goods." *Journal of Political Economy* 79 (4): 913–18.