

Should judges be elected by the people?

The advent of social media has intensified popular politicisation by dramatically expanding public engagement. Platforms facilitate the broadcasting of manifestos, ideologies and criticisms, and thus, the layperson understands the democratic process better than ever before. However, as politicisation evolves into polarisation, social media contributes to the growing prevalence of political conspiracy theories. These theories often revolve around legal matters (e.g. allegations that the US Supreme Court case *Dobbs v Jackson*, which overruled *Roe v Wade*, was politically motivated).¹ Confidence in the judiciary has sharply declined in recent years, now around 57% in the UK.² Hence, it is hardly surprising that the impartiality of the judiciary is frequently questioned. This renewed debate over whether judges should be elected by the people is one of the foremost questions for legal systems to contend with, especially given the lack of consensus on the matter. This essay will contend that an elected judiciary is far inferior to an appointed one, by establishing that an elected judiciary risks political bias – a crucial and multifaceted disincentive. An appointed judiciary is more stable than an elected one, while retaining accountability. Accordingly, although elected judiciaries may enjoy greater public engagement, appointed judiciaries are a superior alternative as they better uphold legal integrity.

Montesquieu was the first legal scholar to articulate the tripartite system of executive, legislative and judiciary in his seminal *Spirit of Laws*.³ On them, he wrote ‘Of the three powers above mentioned, the judiciary is next to nothing’. Hamilton echoed this sentiment in *Federalist 78*, using it to justify judicial stability, writing that not having life-appointed judges would be ‘fatal to their necessary independence’.⁴ Alexander Bickel’s *The Least Dangerous Branch* proves the seminal modern work on the matter, pushing back on

¹ Murray, Melissa Shaw, Katherine. “Dobbs and Democracy.” *Harvard Law Review* 137, no.3 (2024): 730-807.

² Vigers, Benedict. 2025. “Britons’ Trust in Courts and Police Declines.” Gallup.Com. Gallup. December 18, 2025. <https://news.gallup.com/poll/699710/britons-trust-courts-police-declines.aspx>

³ Patterson, Shawn, Matt Levendusky, Ken Winneg, and Kathleen Jamieson. n.d. “The Withering of Public Confidence in the Courts” 108 (1). https://judicature.duke.edu/wp-content/uploads/sites/3/2024/07/ANNENBERG_Vol108No1_9.11.pdf.

⁴ Hamilton, Alexander *The Federalist Papers*, no.78. New York: Signet Classics, an Imprint of New American Library, a Division of Penguin Group (USA), 2005.

Hamilton's undervaluing of the judiciary whilst also introducing the notion of the 'countermajoritarian difficulty' of appointed judges.⁵ However, this essay turns to the more directly relevant new analysis by Steven Croley regarding the 'majoritarian difficulty'. Here Croley asks 'how elected judges can be justified in a regime committed to constitutionalism'.⁶ He asserts that elected judges are politicised to such a degree that it undermines judicial impartiality and independence, threatening the very rule of law itself. Politicisation of the judiciary is to some extent inevitable under an elective system, as judges have to campaign and appeal to voters on either implicitly or explicitly political issues.

This essay reasserts Croley's conclusion that elected judges are unjustifiable, since the process of judicial review requires the courts to independently judge wrongdoing, regardless of political bias. Hence, an institutionally independent judiciary is indispensable. Despite the disagreement between Dworkin and Waldron on the legitimacy of judicial review, it remains a crucial legal mechanism because it represents the one area in which Hamilton's assessment that 'the judiciary...has no influence over either the sword or the purse' appears most contestable.⁷ On a more basic level, politicising judges would politicise justice – which should never be partisan (corroborating with Cicero's legal theory).⁸ Lower public confidence in the judiciary may cause broader societal polarisation, which has empirically proven consequences of rising extremism, social fragmentation and lower confidence in democracy. Regardless of political leanings, it is undeniable that the US is feeling these effects today, largely due the extreme polarisation between Democrats and Republicans. Overall, politicisation is seriously detrimental to the stability of judicial system.

The significance of having an appointed judiciary is even more apparent in Common Law jurisdictions, such as the UK. In these jurisdictions, judges are relied upon to make influential decisions that establish and develop precedent as social mores shift. The clear advantage of

⁵ Bickel, Alexander M. *The Least Dangerous Branch*. Yale University Press, 1986.

⁶ Croley, Steven P. "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law." *The University of Chicago Law Review* 62, no. 2 (1995): 689–794. <https://doi.org/10.2307/1600148>.

⁷ Dimitrios Kyritsis. "Representation and Waldron's Objection to Judicial Review." *Oxford Journal of Legal Studies* 26, no. 4 (2006): 733–51. <http://www.jstor.org/stable/4494565>.

Hamilton, *The Federalist Papers*, no. 78

⁸ Plessis, Paul J. du, ed. *Cicero's Law: Rethinking Roman Law of the Late Republic*. Edinburgh University Press, 2016.

such a legal system is that judges can adapt the law slightly with the times, rather than relying on the arduous process of statutory revision. Also, UK judges are not required to rely on statute in their judgements to the same extent as in Civil Law jurisdictions, with slightly greater ability to adapt statutory interpretation for the specific case. Although the Common Law is widely celebrated as a substantial and indispensable legal tradition, it can be considered unstable if paired with an elected judiciary – a scenario unique to the US. It is therefore unsurprising that confidence in the judiciary is at a record-low of 35% in the US.⁹ This slump does not appear to be coincidental, as Annenberg Public Policy Centre research suggests sudden dips in confidence after controversial decisions such as *Dobbs v Jackson* – a sentiment which is reaffirmed by commentators.¹⁰

In the US, Supreme Court cases are decided by unelected Justices, who are appointed after a presidential nomination. Supreme Court cases are typically highly consequential and are thus broadcasted widely. In general, these are the most likely cases to provoke outrage. Although not elected, the point remains that a judiciary with a political design is unlikely to be trusted by the public. This is especially true since there are no professional requirements for presidential nominees to the Supreme Court, exacerbating the sentiment of injustice. Trust and popularity are important tools to maintain the legitimacy of the judiciary. If people perceive a breakdown in the rule of law, where courts are making biased decisions, they will be disincentivised to respect the law. Courts are only authoritative when respected, and if they are not authoritative, compliance with the law will decrease.

It is also important to recognise that fixation on popularity (as is the case for elected judges) may lead courts to discriminate against minority groups, creating a tyranny of the majority. David Pozen asserts that ‘elective judiciaries are theoretically more free, but practically less free, to seek justice in the face of popular opposition’.¹¹ Hence, although popularity is by no means the central aim of the judiciary, it is significant and should be preserved where possible while adhering to the rule of law.

⁹ Vigers, Benedict. 2024. “Americans Pass Judgment on Their Courts.” Gallup.Com. Gallup. December 17, 2024. <https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx>

¹⁰ Gibson, James L. “Losing Legitimacy: The Challenges of the *Dobbs* Ruling to Conventional Legitimacy Theory.” *American Journal of Political Science* 68, no. 3 (2024): 1041–56. <https://www.jstor.org/stable/48785563>.

¹¹ Pozen, David E. “The Irony of Judicial Elections.” *Columbia Law Review* 108, no. 2 (2008): 265–330. <http://www.jstor.org/stable/40041759>.

Elected judiciaries are not without advantage, else they would not exist at all. In *Law and Disagreement*, Jeremy Waldron argues that since people disagree over rights, legal decisions on rights are political, and should therefore be democratically decided rather than by unelected judges.¹² Even supporters of judicial independence often concede the truth in Waldron's prose: Judith Resnik notably said "given democratic preferences for empowerment of leaders through the popular will, judicial election...nests easily inside democratic principles".¹³ Elections have greater democratic legitimacy, and can be seen as an important representation of popular sovereignty. However, it is important to recall that the sentiment of democracy should not outweigh the rule of law.

Furthermore, judges who are elected are theoretically more accountable, because their occupational security rests in the hands of the public. It can be assumed that judges wish to keep their jobs. All judges are therefore significantly more pressured into exemplary performance in elective systems, as a perceived laziness or bias will likely result in removal from office. However, this argument has two practical flaws. First, that the public are generally not savvy enough to the judicial candidates in elections to make a decision based on performance, and second, that appointed judges are by no means immune from disciplinary action if they are deemed to underperform in their duties. The relative rarity of disciplinary action may reflect both the rigorous selection of judges and the exacting professionalism within the judiciary. In many countries, becoming a judge is an extraordinarily process that requires very hard work, and rightly so. Perhaps the system of judicial appointment is strong enough that only the top candidates are allowed to practice, and thus already take accountability and pride in their own work. Instead of increasing accountability, elections might incentivise judges to make popular, yet incorrect decisions – violating the rule of law.

¹² Waldron, Jeremy, *Law and Disagreement* (Oxford, 1999; online edn, Oxford Academic, 22 Mar. 2012), <https://doi.org/10.1093/acprof:oso/9780198262138.001.0001>

¹³ Resnik, Judith. *Judicial Selection and Democratic Theory: Demand, Supply and Life Tenure*, 26 *Cardozo L.Rev.* pp.579-594. 2005

It is also necessary to analyse the practical limitations of an elected judiciary. While theoretically attractive, staging judicial elections is a complex and expensive process. Moreover, US evidence shows that judicial elections suffer from poor voter turnout.¹⁴ This is partly down to the barriers on partisan funding in many US states, without which candidates are unable to properly advertise their campaigns. This demonstrates that judicial elections are only worthwhile when politicised – a proposition that raises myriad problems, as previously discussed.

Furthermore, even those who do vote are often incognizant of the candidates, forced to make superficial judgements, sometimes based on only a name. At best, this means that incumbent judges routinely regain office. At worst, voters rely on their prejudices to pick a candidate. Roy Schotland picks on one particularly glaring example of this: a Democratic candidate won his primary in a 2000 Texan election despite clear inexperience, simply because he was called Gene Kelly.¹⁵ This example illustrates how incognizant voters pose a danger to the rule of law, since unqualified candidates can easily be elected. Overall, seeing as judicial elections are not necessary to preserve the rule of law, they should be avoided because of the practical concerns of cost, dispassion and superficiality.

Thus far, this essay has demonstrated that an elected judiciary is inferior to an appointed one. This principle is not only evident in lower courts but applies with even greater force to Justices of the Supreme Court. For a case to warrant referral to the Supreme Court, the highest civil court in the UK, it must be sufficiently complex that subordinate courts were unable to come to a consensus over the ruling. Hence, Supreme Court Justices are frequently working on highly consequential and technical cases, that play a particularly important role in establishing precedent. Supreme Court cases are usually judged by five Justices, where a majority of three votes is required. Considering the finely balanced nature of cases and low vote threshold, it is clearly of utmost importance that the Justices are the best candidates for the role, to avoid unruly judges swinging majorities in such influential cases. Thus, it can be

¹⁴ “Election Briefing Series: American Judicial Elections - United States Department of State.” 2024. United States Department of State. July 3, 2024. <https://2021-2025.state.gov/briefings-foreign-press-centers/2024-elections-fpc/judicial-elections>.

¹⁵ Schotland, Roy A. *Financing Judicial Elections, 2000: Change and Challenge*, 2001 Mich. St. L. Rev. pp.849-856.

assumed that a system of appointment is far superior to one of election when it comes to the Supreme Court, due to the same principles of guaranteeing stability and preventing political bias. Supreme Court appointments are a more pronounced example of the importance of judicial appointment, with significantly “higher stakes”, as it were.

The counterarguments here seem initially convincing. judges plainly do not represent the diversity of the UK, seeing as all twelve are aged over sixty, and all but one are Oxbridge graduates. In this light, it is unsurprising that the work of the Supreme Court can feel rather disconnected from the public. While they may be the best qualified candidates, the sentiment that they are privileged and unrepresentative lingers, sullyng their public perception somewhat. Elections to the Supreme Court would increase general confidence in the judiciary, at least in theory. But how would this work in practice?

It seems likely that one of the two following scenarios would occur. First, that an unrepresentative, yet majority-backed, set of judges is elected, with their own interests in mind rather than those of vulnerable minorities. Second, that a battleground of underqualified and overtly politicised judges is created, incapable of working together at the helm of the English legal system. While this sense of competition could potentially increase accountability and provoke important debate, it is more likely that it would have a politicising effect, complicating and polarising Supreme Court cases. Therefore, an appointed Supreme Court is the clear choice, and the same principles apply across the judiciary – even if unpopular.

It is apt to conclude with Pozen’s observation that, despite extensive debate on this question, a persistent theme is “disdain for the elective judiciary.”¹⁶ This essay has demonstrated why that scepticism is justified. While elections appear to enhance accountability and democratic legitimacy, their practical effects are limited and often counterproductive. Elections risk politicising judicial decision-making, undermining impartiality and public confidence in the rule of law. These effects are conspicuous upon analysis of empirical evidence from the US.

¹⁶ Pozen, David E. “The Irony of Judicial Elections.” *Columbia Law Review* 108, no. 2 (2008): 265–330. <http://www.jstor.org/stable/40041759>.

A meritocratically appointed judiciary is the clear and best alternative, in order to better preserve stability, professionalism and independence, without losing accountability. This is particularly true in common law jurisdictions. In short, the clear conclusion is that judges should not be elected by the people.