

between the liberalism of the public and the probability of pro-equality votes. One interesting implication is that the structure of accountability that a state implements for its state judges will have a more profound impact on judicial behavior than previously understood.

In chapter 8, the authors move from individual judge votes to an aggregation and assessment of circumstances under which pro-equality litigants prevail in the litigation. That is, in this chapter they take us beyond the judges and assess when courts as a collective advance equality. This chapter will surprise no one who has read the previous chapters. The ideological propensity of the state high court is a fairly reliable predictor of whether the rulings promote or inhibit equality. Courts of conservatives make anti-equality-promoting policy, whereas courts of liberals make policy that pushes equality. In the concluding chapter, the authors pull together the themes of the book and demonstrate how state courts are often instruments of the political and policy elites in their states. If there are popular elections, the courts may be responsive to public opinion, but that only promotes equality to the extent that the public in a given state supports equality as a policy, not just a concept. The state courts serve the privileged minorities, but even in the space that exists for the courts to move toward more equality at the expense of that privileged minority, the courts are unlikely to do so unless there is broad and salient public support.

One concern pertains to the authors' argument that judicial elections may help ameliorate the issues they raise. Specifically, they will help hold the state judges more accountable. It seems, however, that elections may be a double-edged sword. Well-organized and wealthy elites and the interest groups they support—particularly those opposed to equality on issues like women's reproductive rights and LGBTQ rights—in at least some cases can easily dominate these judicial elections because of the low salience of judicial elections for most voters. Even in high-salience elections, judges advocating equality for unpopular groups, like Muslims, or the rights of prisoners and criminal defendants might be defeated by appealing to the popular will of mobilized subconstituencies. Consequently, this wisp of optimism—that accountability mechanisms grounded in voting may help ensure equality—may not be warranted. We are reminded, for example, of the 2010 Iowa judicial retention elections after the marriage equality rulings where a handful of elites manipulated the outcome to defeat the pro-equality justices. Once the elites abandoned the issue and their effort to change the makeup of the court, the remaining pro-equality justices were retained. In Alaska, in 2010, Justice Dana Fabe was narrowly retained despite a half-hearted challenge by conservative religious elites over her support for abortion rights (Bishin et al., "Elite Mobilization Theory: A Theory Explaining Opposition to Gay Rights,"

*Law & Society Review*, 2020). And perhaps most famously, California Chief Justice Rose Bird was defeated because of her rulings on the death penalty. In short, these examples lead us to wonder about the extent to which judicial elections are equality enhancing is contextual rather than absolute.

This book should be required reading for any undergraduate or graduate student interested in public law, public policy, institutions, or how equality manifests in our political system. Exposure to this outstanding work should not however, be limited to those who find the subject matter interesting. This book is also an impressive example of how to construct a dataset, how to use data to understand a problem, and—perhaps most importantly—how to present data in a compelling, complex, yet consumable way.

**Response to Benjamin G. Bishin, Thomas J. Hayes, Matthew B. Incantalupo, and Charles Anthony Smith's Review of *Judging Inequality: State Supreme Courts and the Inequality Crisis***

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— Michael J. Nelson   
— James L. Gibson

We are so thankful to Benjamin G. Bishin, Thomas J. Hayes, Matthew B. Incantalupo, and Charles Anthony Smith for their generous review of *Judging Inequality*. We tried to write a book that covers a lot of ground both empirically (the backgrounds of judges, the composition of courts, and the position of the judiciary in state politics) and theoretically (judicial behavior, democratic theory, the role of partisanship in policy making). Their exceedingly kind review of our book does a deft and efficient job of summarizing our arguments and conclusions while also giving us—and we hope others!—something to think about moving forward.

The biggest point for consideration relates to the role of judicial elections in democratic policy making. We share Bishin and coauthors' skepticism that judicial elections uniformly enhance accountability (just as no elections for any offices uniformly enhance accountability). On the one hand, we find in *Judging Inequality* that there is a tighter connection between public opinion and the votes of judges when those judges face both the electorate and the specter of a challenger to keep their seat on the bench. When judges run in uncompetitive retention elections or merely face reappointment, we find no statistically significant relationship between public opinion and judges' decisions to cast a vote in favor of equality. In this way, our results provide some glimmer of hope that judicial elections might help translate the public's preferences into enacted legal policy concerning

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equality. On the other hand, the relationship between public opinion and the outcomes of cases—whether equality actually gets enhanced—is tenuous, even in places with judicial elections.

We think the larger lesson of the book is that “the judges are not going to save us.” State high courts are part of the governing coalition and, owing to selection mechanisms, are unlikely to block the pernicious schemes of the majority. Even though most judges face the electorate in some way to stay on the bench, most state high court judges (and even a near-majority of formally “elected” judges) are initially chosen by political elites. These elites are savvy and know that judicial appointments matter. So, they select “good” judges, those judges make decisions that largely align with their ideologies, and the output of state high courts reflects those of the governing coalition appointing the judges. In short, the dream of liberals that judges may save the day is likely a hollow hope.

What is somewhat ironic about our findings is the fact that our conclusions directly contradict the original rationale for judicial elections: to remove courts from the

thumb of the legislative and executive branches of government. Reformers thought that freeing judges from the need to please elites would enable the judiciary to make countermajoritarian decisions. What they seemingly did not foresee, and what we emphasize in *Judging Inequality*, is that the de facto operation of these institutions gives elites substantial sway over initial judicial selection. And, coupled with the broad formal grants of independence that judges have once on the bench, that level of control may be sufficient to align courts with the governing coalition over the long term.

Still, as the US Supreme Court seems likely to “return” the “final say” over rights (like abortion) back to state supreme courts, understanding exactly what sort of role judicial elections play for the substantive protection of rights, the promotion of equality or inequality, and the position of state high courts in a democratic, separation-of-powers system is imperative. *Judging Inequality*, in this regard, leaves more questions than answers; we hope others will continue to investigate these vital questions.