

## **Judicial Selection: A Simulation**

Like many concepts, when students learn about the different approaches to judicial selection, it is hard for them to understand how different approaches can produce very different outcomes. They usually have not explored whether representation matters or how certain types of information about candidates impact them personally in the voting booth. This simulation seeks to increase understanding of these important considerations by simulating and discussing a judicial selection process using a merit-based approach, a non-partisan election, and a partisan election. Results from several years and 23 classes reveal that these types of simulations are important for helping students understand why judicial selection approaches vary across and within states, how different approaches impact outcomes, and why there is continued debate about judicial selection approaches.

Keywords: judicial selection, merit, partisan election, non-partisan election

## Introduction

In the United States, there are over 30,000 state judges (Institute for the Advancement of the American Legal System, n.d.) and over 7,500 criminal municipal courts (Natapoff, 2021). The approach to selecting these individuals varies from state, and there are even differences within states based on the level of court. According to the Brennan Center for Justice (2022), there are six different approaches to selecting judges and justices. These include the Missouri Plan, nonpartisan elections, gubernatorial appointment, partisan elections, a hybrid approach, and the least common, legislative appointment.

Would there be a different outcome in any specific judicial seat if the approach to selection was different? Are some approaches better than others at promoting an emphasis on judicial expertise? Are some approaches better at promoting a more diverse judiciary? These are questions that one must consider when faced with the patchwork of judicial selection approaches presented in the United States.

One of the motivating factors in the development of this simulation was a question in a reading quiz for the judicial branch chapter that at least one student per semester would assert was incorrect. This was a fill-in-the-blank question with multiple choice options. The question was, “Merit-based selection approaches tend to result in a higher representation among \_\_\_\_ and \_\_\_\_.” The correct answer is the option that includes “women and minorities.” Students were allowed to take this quiz multiple times until they received full points. However, again, at least one student a semester insisted the answer was incorrect, even though this is information included in the text that was used.

To help students better understand this answer and to help them explore the several questions above, the following simulation was developed.

### *Materials and Methods*

The following materials are needed:

- Information sheets for a set of candidates (copy of each set for each student)  
These should be candidates from a previous judicial race that your students did not vote in, preferably one that has at least 3 candidates and at least one female. The information sheet should include:
  - Education
  - Legal experience
  - Awards and honors in the legal field
  - Community recognitions
  - Any other information that you might typically find in a judicial application or in a candidate’s campaign website

The information should NOT include:

- Name
- Political Party
- Candidate Picture
- Any other information that identifies someone as a man, woman, or member of a minority group (e.g., pronouns)
- Information that makes it easy to determine the candidate’s age

- PowerPoint that includes the following information
  - Slide 1-candidates listed as Candidate 1, Candidate 2, Candidate 3
  - Slide 2-the names of the candidates
  - Slide 3-the names of the candidates with their party identification
  - Slide 4-pictures of three people that are not the candidates (in a different order than the previous slides)
  - Slide 5-the actual pictures of the candidates (in a different order than the names and previous slide)
- Polling software or polling devices (optional but recommended)—or paper ballots (if you use these, create a separate ballot per slide per student)

### *Methods*

- In the class period before the simulation takes place, introduce the class to the various judicial selection methods used across the country. The following resources are helpful:
  - Brennan Center for Justice’s “Judicial Selection: An Interactive Map” at <https://www.brennancenter.org/judicial-selection-map>
  - Ballotpedia’s “Judicial election methods by state” at [https://ballotpedia.org/Judicial\\_election\\_methods\\_by\\_state](https://ballotpedia.org/Judicial_election_methods_by_state)
- Given the inclusion of the question about diverse representation, it would additionally be helpful if the students have learned about and discussed the microcosm theory of representation. Use the following questions to guide discussion around that theory and the judicial branch.
  - What type of qualities should judges and justices have?
  - Which approach best supports those qualities?
  - What information should be used to select a judge?
  - Is diverse representation in the judicial branch important?
  - Which approach best supports that?
  - What are the pros and cons of each approach (in their opinion)?
- On the day of the simulation, explain to the students that they will be going through a simulation of several of the judicial selection approaches discussed in the previous class meeting.
- Pass out the candidate information sheets. Ask the students to read them carefully and to decide which candidate they would support for an open judicial seat. Once they have had sufficient time to read, pull up the first PowerPoint slide. Ask them to indicate their selection on their polling device, polling app, paper ballot, or by show of hands.
- Before moving to the next slide of the PowerPoint, tell students that you are about to show the students the names of the candidates, but that the candidates are NOT in the same order as the information sheets presented candidates. Have them indicate their selections.
- Proceed to each of the three remaining slides, asking the students to indicate their selection each time.

- Calculate and/or display the results of each selection.
- Have a discussion using the following questions, revealing the results, including the prevailing candidate for each one:

Selection Approach 1 (Slide 1-Information Sheets)

- Which type of selection approach did this simulate?
- How did you make your decision?
- Which information was most important to you?
- Was there any information provided that you think could potentially bias someone against any of the candidates based on factors that are unrelated to their credentials and ability to neutrally apply the law?

Selection Approach 2 (Slide 2-Names)

- Which type of selection approach did this simulate?
- How did you make your decision?
- Was there any information provided that you think could potentially bias someone against any of the candidates based on factors that are unrelated to their credentials and ability to neutrally apply the law?

Selection Approach 3 (Slide 3-Names and Party Identification)

- Which type of selection approach did this simulate?
- How did you make your decision?
- Which information was most important to you?
- Was there any information provided that you think could potentially bias someone against any of the candidates based on factors that are unrelated to their credentials and ability to neutrally apply the law?

Selection Approach 4 (Slide 4-Fake Pictures)

- How did you make your decision?
- Was there any information provided that you think could potentially bias someone against any of the candidates based on factors that are unrelated to their credentials and ability to neutrally apply the law?
- Why was this included in the simulation?

Selection Approach 5 (Slide 5-Actual Pictures)

- How did you make your decision?
- Did your choice change based on the pictures?
- Was there any information provided that you think could potentially bias someone against any of the candidates based on factors that are unrelated to their credentials and ability to neutrally apply the law?
- Why was this included in the simulation?

- Some additional questions to consider after you have discussed each slide:
  - Why do you think I have included this simulation in this class?
  - What did you learn from this simulation overall?
  - How could the information from this simulation be used to promote better outcomes in our state?

- What impact does this simulation have on your approach to preparing to vote for judicial candidates?
- Which judicial selection approach is most in line with your expectations of judges (discussed in previous class)?
- Optional: Provide students with the links to following videos that discuss judicial elections: <https://vimeo.com/33285123>  
<https://www.youtube.com/watch?v=poL7l-Uk3I8&t=1s>

### *Online Classes*

This simulation can be done with online classes as well. For synchronous, online classes, the simulation is the same. However, the information sheets need to be provided to the students before the session where the simulation takes place.

For asynchronous, online classes, provide the information sheets, instructions, and a recording of the activity. Have the students report their results in written or recorded form.

### ***Results***

Would there be a different outcome in any specific judicial seat if the approach to selection was different? Are some approaches better than others at promoting an emphasis on judicial expertise? Are some approaches better at promoting a more diverse and representative judiciary? These are the questions that the simulation was designed to answer. When it is facilitated as described, students should have answers to all of these questions.

This simulation has been conducted with 23 sections of the state government course using the same candidate information and set of pictures since Fall 2018. In this candidate set, there are three candidates. There are two female candidates and one male candidate. There is a Democrat, Republican, and Libertarian candidate. Although there has been some variation in the results depending on the course, there is one result that is always the same, the selection based on the candidate information that has information related to age, sex, and party identification removed. The result in this case is overwhelmingly in the favor of the candidate that is both a woman and a person of color. However, as the simulation progresses, the winning candidate changes, depending on the students in the class and how they respond to the names, parties, and pictures.

The discussion that results after each winner is critical in helping students analyze their approach to making decisions and whether those decisions are in line with what they have previously argued to be the important criteria when selecting judges.

### ***Discussion***

By simulating the main judicial selection approaches, students are better able to understand the approaches, the way they impact outcomes, and their own decision-making processes. Although students cannot personally or directly change the selection approach in any given state, knowing the pros and cons helps them to be more

intentional about making decisions in a way that minimizes the cons, at least in areas where there are partisan and/or nonpartisan elections.

An added bonus during the simulation is the potential for students to become more aware of factors that were biasing them in favor or against certain candidates that had not been clear to them before. For those firmly set in their party identification, the preference for candidates from their party is understandable. However, the exercise may at least give them pause before using party as the sole criterion for or against a candidate.

A merit-based approach to judicial selection is not a blind review of applicants, and some states even require a picture to be submitted with the application. The point of removing name, age, and sex information from the candidate information sheets in the simulation is to make the differences between the selection approaches more pronounced and to also help students more easily identify the factors that drive their decisions.

In states that use partisan elections or nonpartisan elections for some, many, or all of their judicial seats, this activity in a great way to help students become more aware of the importance of educating themselves about candidates and offices that are further down on the ballot.

### ***Acknowledgements***

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### ***Declaration of Interest***

I declare that this simulation has been designed entirely by me. It has not been submitted to any other journal, and I am not receiving any compensation for this submission. I have no conflicts of interests to declare.

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