The Court Archive:
Election of Judges

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During the last two years, Illinois voters have had a lot to say about their Supreme Court. In 2020, the 5th and 1st districts had an election, and the 3rd district had a retention election. Last month, the 2nd and 3rd districts had elections, and the 1st district had a retention election. Just less than half of the states in the country have judicial elections—some are partisan, some are nonpartisan. Other states utilize merit selection, gubernatorial appointments, or legislative appointments.

Illinois has had an elective judiciary since 1848, when the second Illinois Constitution took effect. Why did the framers of that constitution decide on popular elections for judges and justices? Jacksonian Democracy in the 1830s and 40s featured a growing trend nationally toward popular election for judges, calling for citizens by popular vote to control who served in various positions. The intent was based on the idea that the people, in democratic elections, have greater control over the administration of government and that those popularly elected would be more responsive to the public.

In addition to this national trend, there were two men in Illinois whose actions cemented the decision for an elective third branch: William Foster and Stephen Douglas.

The first Illinois Constitution in 1818 gave broad powers to the Illinois legislature, including the responsibility of appointing Illinois Supreme Court justices. William Foster was one of the first 4 justices the legislature named to the Supreme Court in October 1818. The Court was scheduled to meet for its first term in Kaskaskia in July 1819. Foster resigned in June 1819, but not before picking up his paycheck and leaving Illinois permanently. Nineteenth-century historians wrote that Foster was paid for no work, was a scoundrel, and even prostituted his daughters. More modern research has shown that Foster actually did some work as a circuit judge, which was required of Supreme Court justices. Nonetheless, the memory of Foster loomed large when the second Illinois constitutional convention met in 1847.

Stephen Douglas was involved as an attorney in two politically charged cases (*People ex rel. McClernand v. Field* and *Spragins v. Houghton*) in 1839. The Supreme Court consisted of 4 members: 3 Whigs and 1 Democrat. The *McClernand* case concerned the governor's ability to

replace a sitting secretary of state. The Whig majority Court ruled in favor of the Whig secretary of state, angering the Democrats. The *Spragins* case concerned voting rights for new Irish immigrants, who typically voted Democrat, but had not yet been argued before the Supreme Court. Stephen Douglas feared the Whig majority would rule against his client and party. Even though he was not a member of legislature, Douglas pushed the legislature's Democratic majority in 1840 to pass a bill to reorganize the Supreme Court increasing its membership from 4 to 9. Since the Democrats controlled the legislature, the Democrats then appointed the 5 new Supreme Court justices—all of whom were Democrats, giving them a 6-3 majority on the Court. Stephen Douglas was the last appointed of the 5 new Democratic justices.

Fearing more William Fosters and Stephen Douglases, the 1847 constitutional convention agreed to an elective judiciary to give the people of Illinois the right to choose the judges who served them. With a popularly elected judiciary, the Supreme Court became less politicized in the 1850s and more concerned with the important cases of the day to help create and maintain a growing body of law in Illinois. The constitution of 1870, judicial article of 1964, and constitution of 1970 maintained judicial elections.