



State Democracy Research Initiative

UNIVERSITY OF WISCONSIN LAW SCHOOL

Constitutional Norms and State Judicial Confirmations

Adam Sopko, Staff Attorney

Published: January 19, 2023

For the first time since New York adopted its current judicial appointment process over 40 years ago, the state senate's Judiciary Committee has rejected a governor's nominee to the Court of Appeals, the state's highest court. Beneath this striking development is a subtler but important story about how [informal norms](#), the [unwritten rules of government](#), drive state legal systems— and how those norms can change. In New York, the custom of senatorial deference accumulated over the years and functioned like a mandate, seemingly guaranteeing that a governor's selection would be confirmed as a matter of course. But it was a norm, not the law, that yielded that pattern. Grassroots organizers now seem to have convinced senators to break with the norm, if not eliminate it.

The varied landscape of state constitutional norms warrants the attention of scholars, organizers, and reporters alike. As attention shifts to state courts in response to [federal retrenchment](#), state courts will serve as the final word on a growing list of legal and social issues, ranging from [bodily autonomy](#) to [democracy reform](#). And the selection of state court judges will depend not just on the formal [mechanisms of selection](#), which vary across the states, but also the variety of state-specific norms. Any given norm may be desirable or undesirable, or its appeal may be contingent. What is consistently true is that unwritten norms can lead to divergent processes and outcomes, even among states that ostensibly have identical appointment procedures. Anyone who cares about state courts should take note of norms, not just laws.

A Tale of Two Norms

Consider how norms shape the selection method at issue in the LaSalle saga: In [ten states](#), justices are appointed by a governor and confirmed by a separate body—typically the state senate. (In a majority of states, supreme court justices are selected by the people themselves through judicial elections.) In Maine and New Jersey, for instance, the governor independently selects a nominee, who must also be confirmed by the state senate. Prospective justices in Delaware and New York submit applications to a nomination commission that compiles a list of candidates from which the governor selects a nominee, who must then be confirmed by the

senate. And in Rhode Island and Connecticut, governors follow a similar process, except nominees must be confirmed by both chambers of the legislature.

Notwithstanding the shared appointment mechanism, confirmation plays a very different role in the selection process among the states, partly due to norms. In some states, confirmation is a contested feature of the appointment process, where governors face a meaningful risk of having their nominee fail. In others, confirmation is more of a ceremonial feature.

Take New Jersey. The Garden State has several unwritten rules surrounding the appointment process: partisan balance, senatorial courtesy, and consistent reappointment. These are not the law, but they affect gubernatorial power with nearly as much bite as a constitutional mandate.

The [partisan balance](#) norm requires the seven-member court to [never have more than four justices](#) affiliated with a single political party. This has historically cashed out as three associate justices affiliated with each of the major parties, and the chief justice affiliated with the party of the nominating governor. Notably, the state's most recent constitutional convention debated—but rejected—a provision that would codify this practice. Nevertheless, members of [all three branches](#) treat the norm as if it's constitutional doctrine, functionally limiting discretion in how justices are selected and temporary assignments are filled.

Once the New Jersey governor nominates someone, their candidacy is subject to the norm of [senatorial courtesy](#). Under this practice, the state senate declines to consider a gubernatorial appointment for confirmation if a single senator from the appointee's home county objects. A single senator can thus throttle the governor's appointment power, leading one [former senator to note that](#) "if you truly want to be a power player in the Senate you are actually better off serving in the Minority with a Governor of the opposite party." A recent example: In March 2019, Democratic Governor Phil Murphy nominated Rachel Wainer Apter to the state supreme court, but she was not confirmed until October 2022 due to a single Republican senator invoking courtesy. Again, members of the legal community discuss senatorial courtesy as if it were a binding constitutional requirement; they argue that the state's 1947 constitution made the governor the strongest executive in the nation, necessitating extraconstitutional checks [on his authority](#). And when asked about abolishing the courtesy practice in light of the substantial delay during a [historic vacancy crisis](#) at the state supreme court, other legislators, and even the [governor himself](#), referred to it as the senate's "right" as part of the "balance of power."

Finally, New Jersey has followed a powerful norm regarding reappointment of sitting justices. Under the [New Jersey constitution](#), justices are confirmed initially for a seven-year term, after which they must be reappointed and reconfirmed. Since the state's current constitution was ratified in 1947, every governor (save one) has reappointed each justice as a matter of course, regardless of political affiliation or ideology. This unwritten rule is thought to serve as a shield for the court to maintain the independence necessary for a healthy and functioning judiciary. In



2010, Republican Governor Chris Christie bucked the tradition and declined to renominate Justice John Wallace, a Democrat. The move was ostensibly within the governor's reappointment power, but it nevertheless drew [bipartisan criticism](#), including a rare statement [from the Chief Justice](#). Recognizing the tradition as "a critical tenet of an independent judiciary," [Governor Phil Murphy](#), Christie's successor, resumed the practice of routine renominations.

Returning to New York reveals a very different approach to the confirmation process, one that has traditionally empowered the governor much more. The appointment process starts with judicial candidates submitting applications to the [Commission on Judicial Nomination](#), which compiles a list of up to seven finalists from which the governor must choose her nominee. Despite some [sharp criticism](#) of the Commission for placing partisan interests over legal ability, the norm that's developed is essentially one of senatorial deference.

Since this system was enacted in 1977, governors have filled [thirty-five vacancies](#)—five of which have been the Chief Judge position. No nominee has ever failed. The last several decades suggest the norm is unanimous confirmation, typically by voice vote. The norm has persisted even when the governor's mansion and senate were controlled by different parties. In the late 2000s and for most of the 2010s, Republicans controlled the senate, while a Democrat occupied the governor's office. Yet Associate Judges [Abdus-Salaam](#), [Stein](#), [Fahey](#), [Garcia](#), [Wilson](#), and [Feinman](#)—who were nominated during those periods—were all reportedly confirmed via unanimous vote. So too were the Chief Judge nominees. The votes for Chief Judges [Lippman](#) and [DiFiore](#)—who were nominated by Democratic governors and confirmed by Republican-majority senates—were also described as unanimous. In light of the senate's tradition of deference, scholars and commentators have described the advice and consent process as a "[rubber stamp](#)."

Both New York and New Jersey use a similar appointment mechanism—gubernatorial nomination subject to legislative confirmation—yet the exact contours of the confirmation process differ significantly based on the unwritten norms at play in each state. In New Jersey, the relevant norms seemingly enhance the power of the senate and narrow the governor's discretion. In New York, the relevant custom has minimized the senate's power and functionally expanded gubernatorial authority—until recently.

How Norms Erode

But norms are not forever, and rethinking outdated norms can be part of a healthy democracy. Thus, court watchers should be attentive to norms' demise as much as their existence. As Professors [David Pozen and Josh Chafetz](#) have observed, changes to norms might be expected when "the views of the relevant segments of the public raise the expected cost of adherence to a norm." The confirmation battle over LaSalle's nomination underscores that

even longstanding norms may give way when those responsible for maintaining them come to doubt their continued value, especially as the important role of state courts becomes clearer.

Arguably, the fall of New York's norm began in 2021, after Governor Cuomo nominated Madeline Singas, then the Nassau County District Attorney, to the Court of Appeals. The nomination [faced significant criticism](#) that sparked organizing efforts to "[Stop Singas](#)," led by members of the bar, academy, and civil society groups. Several members of the Democratic caucus in the senate voiced opposition, as well. Notwithstanding the historic levels of opposition that Singas faced, she was still [confirmed comfortably](#) by voice vote.

Organizers built on lessons learned during the Singas confirmation after then-Chief Judge Janet DiFiore [announced her resignation](#) in October 2022. They [called on Hochul](#) to appoint a judge who could counter what they described as a [rightward shift in the court's jurisprudence](#) and a [downward trend in the quality of its work product](#). And after Hochul announced LaSalle as her nominee, opponents quickly organized efforts to defeat his nomination. Within one week of the governor's announcement, more than one dozen Democratic senators publicly committed to voting no, while even more [privately stated](#) they would do the same. Senate Majority Leader Andrea Stewart-Cousins [noted](#) in early January that she did not see the confirmation "ending in the way the governor wished it would" and that it "would be easier" if she withdrew the nomination. The Majority Leader presaged the outcome, as LaSalle's nomination failed 9-10 in the Judiciary Committee. Hochul has [suggested](#) the state constitution requires nominees receive a vote by the full senate and that she would seek judicial enforcement of her constitutional interpretation. (At least one scholar has [disputed](#) both her reading of the state constitution and questioned whether a court would intervene in such a dispute.)

While New York may be a case of what Pozen and Chafetz classify as norm destruction, norms may also erode (or "decompose") more gradually, in ways that are harder to detect. New Jersey again provides a possible example. When Governor Murphy overcame the senatorial courtesy blocking Wainer Apter, a Democrat, he did so as part of a bipartisan deal that also put forward Justice Douglas Fasciale, a Republican. Will bipartisan deals be required, going forward, as a new norm to end invocations of courtesy? As of this writing, the vacancy created by the retirement of Justice Barry Albin, a Democrat, in July 2022 [remains](#) without a nominee. Justice Lee Solomon, a Republican, will hit mandatory retirement in 2024, thus creating the opportunity for another [bipartisan set of vacancies](#). As Pozen and Chafetz observe, minor revisions to a norm have the downside of typically going unnoticed rather than forcing dialogue about the norm's value.

Looking Ahead

If a The Judiciary Committee's rejection of LaSalle's nomination in New York, as well as the recent events in New Jersey, should be instructive to those taking new interest in state courts:



the design features codified in state constitutions are not the only factors that inform nomination and confirmation procedures.

Looking ahead, unwritten norms in Pennsylvania could affect the current vacancy on the state's supreme court, and with it, potentially the balance of power in [Harrisburg and Washington alike](#). Though justices in the Commonwealth are elected statewide, the governor can fill midterm vacancies, subject to senatorial confirmation. These midterm nominations have historically been restrained by a norm that they be temporary. Nomination is conditioned on the candidate promising not to seek reelection at the end of the partial term.

Governor Wolf, a Democrat, broke from that tradition in 2016 when he nominated Republican Sallie Mundy, without securing Mundy's promise not to seek reelection, to fill a vacancy created by the resignation of Justice Michael Eakin, a Republican. Mundy subsequently sought and won a full 10-year term the following year. The change may have been inspired by [senate Republicans](#), who reportedly "[consult\[ed\]](#)" Wolf in his selection, as they controlled the chamber and thus the confirmation process. Regardless of the motivations, the change to the unwritten norm [altered](#) the [level of influence](#) statewide elections play in the Commonwealth's judicial selection process.

The durability of this Pennsylvania norm will be a key question in 2023 given the vacancy created by the [untimely death](#) of Chief Justice Max Baer, a Democrat, in October 2022. Per the norm, Governor Shapiro could appoint a justice to serve temporarily through the November election, or he may leave the seat open until then. Alternatively, the governor may follow his predecessor and work with the senate to identify a compromise candidate and allow them to run as an incumbent in the fall. In all events, Pennsylvania's norm will be an important factor in determining how the state supreme court is structured in the near future.

State constitutional norms typically receive little attention, as much of their application is hard for the public to perceive. But as more attention shifts to state court judges and how they're selected, these norms are worth a closer look.