

POLITICAL PARTY AFFILIATION IN PARTISAN AND NONPARTISAN JUDICIAL ELECTIONS

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PARTISAN JUDICIAL ELECTIONS: LESSONS FROM A BELLWETHER STATE

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I. INTRODUCTION

One of the more enduring reform debates in American politics centers on the manner by which state judges are selected. Judicial reform has existed since the founding of the United States. Prior to the American Revolution, there was such resentment against the King's power to appoint and remove judges that it was one of the grievances mentioned in the Declaration of Independence. Under the King, judges were dependent on the crown for their tenure in office and for their salaries. With the American Revolution, the concern was with developing a mechanism that would ensure the independence of judges from political pressures. The Framers were familiar only with appointment of judges, which had been their experience under the King. At the time, the election of judges was unknown.¹ Thus, federal judges were chosen with the advice and consent of the Senate. Judicial independence—which was of great concern to the Framers—was insured by providing judges life tenure.²

With the writing of state constitutions, appointment was also the method of selecting judges.³ Some states allowed the state legislature to choose judges, and some states provided that the governor appointed judges with approval by the legislature.⁴ Even today three states have gubernatorial appointment (without the nomination commission found in merit selection states), and two states have legislative selection of judges (although in one of those states a

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1. American Bar Association Standing Committee on Judicial Independence, Report of the Commission on Public Financing of Judicial Campaigns 1-2 (2001).

2. ANTHONY CHAMPAGNE & JUDITH HAYDEL, JUDICIAL REFORM IN THE STATES 2-3 (1993).

3. Larry Berkson notes that the early concern in developing state judiciaries was that the governor should not control the judiciary. He writes, "After the revolution, the states continued to select judges by appointment, but the new processes prevented the chief executive from controlling the judiciary." See LARRY C. BERKSON, AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT, at <http://www.ajs.org/selection/berkson.pdf> (accessed Jan. 29, 2003).

4. CHAMPAGNE & HAYDEL, *supra* note 2, at 3-4.

merit selection nominating committee screens the candidates for legislative selection).⁵

In the first third of the 1800s, there was a movement for a new way to select judges. One reason may have been dissatisfaction with federal judges such as John Marshall, who reflected the views of the Federalist Party at a time when the Jeffersonians dominated. With the growth of popular democracy in the era of Andrew Jackson, support developed for the election of judges.⁶ Judicial elections also expanded due to efforts by members of the legal profession to provide the judiciary with its own base of legitimacy. Electing judges was seen as a reform that would remove judges from the politics and corruption associated with political patronage.⁷ In 1832, Mississippi became the first state to elect all of its judges. New York adopted an elective system for judges in 1846. In 1850, seven states adopted election of judges; and by the beginning of the Civil War, twenty-four of thirty-four states elected judges.⁸

However, concerns soon developed over judicial elections. One concern was that political machines selected and controlled judges, which suggested that the election of judges had not achieved the goal of an independent and impartial judiciary. The failures of those early judicial elections led to reform in the way judges were elected. Generally, judges had been elected the way other candidates on the ballot were chosen in that time period—with a party label. Thus, judicial candidates, like other candidates, ran with the support of political parties. By the 1870s there was some movement toward electing judges in nonpartisan elections and by 1927 twelve states chose judges in nonpartisan elections.⁹

Like appointment of judges and partisan election of judges, the promise of nonpartisan election of judges was too great. Although twelve states elected judges on a nonpartisan basis in 1927, by that date three states had already tried and rejected nonpartisan elections. The problem was that political parties were still involved in selecting judicial candidates, and voters were even less knowledgeable of the candidates in nonpartisan elections because they did not have the guidance of party labels.¹⁰

Reformers proposed still another system of judicial selection, claiming that under the new system judges would be selected on the basis of merit, rather than partisanship or patronage. The idea behind merit selection plans was that a nonpartisan commission would recruit and evaluate candidates for judgeships and recommend several possible candidates to the governor. The recommended candidates would be chosen without regard to political considerations, but instead on the basis of their ability and qualifications. The governor would then appoint one of those recommended candidates who would serve for a period of time and then run for retention in office. That election, however, would not be a contested election such as existed with partisan or nonpartisan elective systems. Instead, it would be a retention election where the incumbent judge would run without an opponent. The question on the ballot would simply be “yes” or “no” on whether the judge should be retained in office. In 1940, Missouri became the first state to put such a commission selection plan into effect. As a result, commission or merit selection is often called the “Missouri Plan.”

5. AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES, APPELLATE AND GENERAL JURISDICTION COURTS, SUMMARY OF INITIAL JUDICIAL SELECTION METHODS (2000), at <http://www.ajs.org/selection/Jud%20Sel%20Chart-Oct%202002.pdf> (accessed Jan. 29, 2003). The three states with gubernatorial appointment and no nominating commission are California, Maine, and New Jersey. Virginia has legislative selection. South Carolina has legislative selection with a nominating screening committee.

6. CHAMPAGNE & HAYDEL, *supra* note 2, at 4-5.

7. See Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 661-62 (2002).

8. BERKSON, *supra* note 3, at 1.

9. *Id.* at 1-2.

10. *Id.* at 2.

Currently, thirty-four states use commission plans to select at least some of their judges.¹¹

In reality, most states employ hybrid systems for selecting judges where various selection systems are used. Variations in selection systems within states depend on the level of court, whether it is initial selection of judges or selection for midterm vacancies, or the region of the state.¹² Some states also have merged systems of selection in unique ways that defy more general classifications. The result is that any simple scheme that classifies judges should be interpreted cautiously. For example, in Texas almost all judges run in partisan elections, but municipal court judges often are appointed by the local governing body.¹³ In rural counties in Missouri, trial judges are still elected in partisan elections even though the state originated the Missouri Plan.¹⁴ Although Illinois uses retention elections for determining whether incumbent judges should be retained in office, judges are initially chosen in partisan elections.¹⁵ In New Mexico, judges are initially appointed to the bench and then, in their first election after appointment, run in partisan elections. If elected, these judges run in retention elections for subsequent terms.¹⁶

There are also variations in the operation of the various types of election systems. For example, although retention elections generally require a majority vote for judges to be retained in office, in Illinois a supermajority of sixty percent is required.¹⁷ And, although some states claim to have nonpartisan elections because the candidate does not appear on the ballot with a party label, some states such as Michigan, Ohio, and Idaho can be considered partisan election states because party activity is so pervasive.¹⁸

Valid criticisms exist for all the various systems of judicial selection. The problems with appointment of judges, for example, led to development of election of judges as a reform system.¹⁹ When legislatures select judges, influential legislators are likely the ones who get selected as judges.²⁰ Thus, legislative selection—though far less studied than executive appointment of judges—appears to involve a highly political process as well. The most heralded improvement in the selection of judges is, of course, merit selection of judges. However, problems exist even with this system. The commission decision-making process, for example, often results in highly partisan and political decision-making.²¹ And membership on the commission often involves intense campaigns among opposing segments of the bar.²² There are accounts of merit selection commissions stacking their nominations in ways that insure that the governor will select certain persons as judges.²³ There are also accounts of commissioners working in concert with the governor to insure selection of the governor's friends.²⁴ Additionally, research suggests that there are few differences in the background characteristics of merit-selected judges compared to elected judges.²⁵ Research

11. *Id.*

12. AMERICAN JUDICATURE SOCIETY, *supra* note 5.

13. BENJAMIN GINSBERG ET AL., *WE THE PEOPLE* 973 (3d ed., Texas Edition 2001).

14. Anthony Champagne, *Political Parties and Judicial Elections*, 34 *LOY. L.A. L. REV.* 1411, 1417-18 (2001).

15. AMERICAN JUDICATURE SOCIETY, *supra* note 5.

16. *Id.*

17. NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION, *CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION* 12 (expanded ed., with commentary 2002).

18. *Id.*

19. BERKSON, *supra* note 3, at 1.

20. LEAGUE OF WOMEN VOTERS OF MICHIGAN, *METHODS OF JUDICIAL SELECTION* 2, at <http://www.lwvofdetroit.org/docs/methods.pdf> (accessed Jan. 31, 2003).

21. See RICHARD WATSON & RONALD DOWNING, *THE POLITICS OF THE BENCH AND BAR* 98-101 (1969).

22. *Id.*

23. *Id.* at 101.

24. *Id.* at 108.

25. Henry Glick, *The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 *U. MIAMI*

also suggests little difference in the quality of merit-selected judges compared to elected judges.²⁶ Finally, although it is still rare, retention elections can be very expensive, highly partisan, political battles.²⁷ Merit selection promises more than it delivers in removing partisanship and politics from the judicial selection process and in improving the quality of judges. Some nonpartisan elections have actually proven to be partisan.²⁸ Nonpartisan elections also remove the party label from the ballot, depriving voters of a valuable cue that helps them cast a somewhat informed vote.²⁹ However, reformers have been especially concerned in recent years with the problems of elected judges, particularly the problems of partisan election of judges.³⁰

After over a century of efforts to reform partisan election of judges, sixteen states continue to select at least a portion of their judiciary with strong political party involvement.³¹ This persistence in partisanship is in spite of arguments that partisan elections contribute to the decline in the quality of state courts. Additionally, modern judicial races have become “noisier, nastier, and costlier.”³² And the most egregious offenders in this new pattern of judicial selection have been those states with overtly partisan elections or that claim nonpartisan status but actually have heavy political party involvement, such as Michigan and Ohio.³³

Partisan judicial elections are not expected to end soon. Professor Roy Schotland has pointed out that of the nation’s 1,243 state appellate court judges, forty percent of them are chosen in partisan elections at least for their initial terms; and of the states’ 8,489 general jurisdiction trial court judges, forty-three percent face partisan elections at least for initial terms.³⁴ Significantly, the National Summit on Improving Judicial Selection recognized that judicial elections were likely to remain the norm in many states. While it did recommend that those elections be nonpartisan,³⁵ most of its recommendations were incremental reforms that, if implemented, could improve partisan judicial elections.³⁶ The view that judicial elections are likely to continue to exist and that efforts to improve judicial elections—including partisan judicial elections—should be made is a sea-change in judicial reform thinking. Reformers have preferred to push for merit selection of judges as an alternative to judicial elections without regard to the likelihood that such a major systemic reform could occur.³⁷

L. REV. 509, 520-27 (1979); Henry Glick & Craig Emmert, *Selection System and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 229, 235 (1987).

26. See WATSON & DOWNING, *supra* note 21, at 282-84.

27. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431-36 (2001).

28. Champagne, *supra* note 14, at 1418-20.

29. *Id.* at 1418.

30. See NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION, *supra* note 17, at 14-15.

31. Thirteen states have at least some openly partisan judicial elections. They are: Alabama, Illinois, Indiana, Kansas, Louisiana, Missouri, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Texas, and West Virginia. Idaho, Michigan, and Ohio should be added to these states (although those three states have a nonpartisan ballot, judicial candidates run as partisan candidates). See Champagne, *supra* note 14, at 1415 n.16. That article also lists Arkansas as a partisan election state, but Arkansas decided in November 2000 to change its system to nonpartisan judicial elections. In 2004, North Carolina’s appellate courts will become nonpartisan. *Id.*

32. Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, at 74.

33. See Champagne, *supra* note 14, at 1418-19.

34. Roy A. Schotland, *Summit on Improving Judicial Selection, Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1365 (2001).

35. NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION, CALL TO ACTION, 34 LOY. L.A. L. REV. 1353, 1355 (2001).

36. See *id.* at 1355-59.

37. Roy Schotland, writing about the “enormous energy” given to eliminating judicial elections, wrote that at the speed at which systemic changes are occurring, “we’ll end contestable elections for trial judges in only another 770 years, and for appellate judges in only another 160 years.” Schotland, *supra* note 34, at 1367.

With the recognition that judicial elections, even partisan judicial elections, are expected to remain, it is important to gain further understanding of how these elections function. For example, what characteristics of partisan judicial elections explain judicial election outcomes? It has long been claimed that the existence of a party label on a ballot provides a valuable cue to voters that assists their voting.³⁸ To what extent does the party label explain judicial voting behavior? Are there also other explanations for the way voters cast their ballots in partisan judicial elections? For example, how important is incumbency in explaining voting behavior? And, since many partisan judicial elections have experienced a huge influx of money in judicial races recently,³⁹ can the amounts of money spent by candidates explain voting behavior in judicial elections? Still another factor in voting behavior has been gender and ethnicity.⁴⁰ Voters may base their candidate decisions on the gender and ethnicity of candidates that is suggested by their ballot names. This Article examines the effects of these proposed explanations of judicial voting behavior by statistically exploring voting for judges in Texas—a state that has proven to be a bellwether in forecasting events in judicial elections in other states.⁴¹

38. In his classic book on judicial elections, Philip DuBois wrote:

Since voters are not likely and probably not able to make choices in judicial races after a careful assessment of the personal qualifications and issue stands of the opposing candidates, they are forced to look for voting cues which will help them cast their votes. Party labels are the most obvious of the voting cues which voters may utilize.

PHILIP DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 245 (1980).

39. For one recent example of the amounts of money spent in judicial elections, see Roy Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 850-51 (2001).

40. *Id.*

41. For a discussion of Texas as a bellwether state in terms of judicial election politics, see Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907 (2002).