RETHINKING THE SELECTION OF STATE SUPREME COURT JUSTICES*

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"Judicial independence is not primarily a matter of constitutional text."[1]

I. INTRODUCTION

States currently employ five methods for selecting state supreme court justices: partisan election, nonpartisan election, election by the legislature, gubernatorial appointment, and merit selection.[2] For most of the twentieth century, judicial reformers focused on persuading various states to jettison their existing mode of selection and to adopt merit selection.[3] From the 1960s to the 1980s, these reformers enjoyed considerable success: Whereas in 1960 only three states—Alaska, Kansas, and Missouri—employed merit selection in choosing state supreme court justices, by 1980 eighteen did.[4] Yet in recent years the reform movement has lost momentum. Since 1990, legislatures in North Carolina, Texas, and elsewhere have considered merit selection, only to reject it; and in the year 2000, voters in every county in Florida voted against a referendum on merit selection for trial judges.[5] Indeed, since 1988 only Rhode Island has adopted merit selection, and it did so largely in reaction to a scandal on the state's high court.[6] Moreover, even in those states that adopted merit selection, the change of the selection process did not altogether assuage the reformers' concerns about judicial independence. Merit selection does not reduce the incidence of judicial elections; it merely changes the character of those elections.[7] Thus, even in the aftermath of reform efforts, the overwhelming majority of state appellate judges—according to a recent estimate, eighty-seven percent of appellate judges, in thirty-nine states—continue to stand for election, whether in partisan elections, nonpartisan elections, or retention elections.[8]

For a long time, reformers could dismiss the ubiquity of elections as unimportant because they believed that there were important differences among partisan elections,

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1. J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 746 (1994).

2. *See, e.g.*, G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 57-61 (3d ed. 2003).

3. *See* Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure: Its Historical Development*, *in* SELECTED READINGS ON JUDICIAL SELECTION AND TENURE (Glenn R. Winters ed., 1973). The efforts of the American Judicature Society, perhaps the most important group promoting merit selection, are detailed in MICHAEL R. BELKNAP, TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY (1992).

4. For data on the states that adopted merit selection for supreme court justices and the dates of their adoption of merit selection plans, see Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, app. A, at 79 (1994).

5. Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 852 (2002).

6. *Id*.

7. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 724-25 (1995). Luke Bierman observes that "[t]he merit selection debate sets up a false dichotomy between nominated judges and elected judges. Many of the eighty percent of judges who are elected were originally nominated in a merit-based system." *See* Bierman, *supra* note 5, at 859.

8. Roy A. Schotland, *Comment*, 61 LAW & CONTEMP. PROBS. 149, at 154-55 (1998).

nonpartisan elections, and retention elections. Recent events, however, have shaken this belief—or at least they should have. In 1986, groups opposing Chief Justice Rose Bird and two associate justices of the California Supreme Court spent roughly $5.5 million to defeat them.[9] In 1994 and 1996, the winning candidates for seats on the Texas Supreme Court spent almost $9.2 million.[10] In 2000, "businesses affiliated with the Ohio Chamber of Commerce spent millions on three soft-money ads for one supreme court race."[11] The same year in Michigan, more than $3 million was spent in races to fill three supreme court positions.[12] The sums spent in these races far outstrip the funds expended in judicial races in earlier eras.[13] Yet what is most striking about this escalation in the cost and contentiousness of elections for state supreme courts is that it has not been confined to states with partisan judicial elections. Texas selects its judges in partisan elections, but Ohio and Michigan dispense with party labels and conduct nominally nonpartisan elections, and California re-elects its judges in retention elections.[14]

These examples illustrate a crucial development. Interstate differences in the mode of judicial selection no longer prevent the development of very similar political processes in races for state high courts.[15] Or, put differently, there has been considerable convergence among systems of judicial selection, at least for state supreme courts. In saying this, one must be careful not to overstate the case. The politicization of judicial elections, especially retention elections, within individual states has tended thus far to be episodic rather than endemic. For example, although Justice David Lanphier of Nebraska was denied re-election in 1996, he remains the only justice of the Nebraska Supreme Court ever unseated in a retention election.[16] Similarly, since the removal of three justices of the California Supreme Court in a 1986 retention election, California has not experienced a high-profile, contentious retention election. Episodic or not, the events in Nebraska and California (and other states as well) make clear that the institution of retention elections or nonpartisan elections does not inoculate judicial selection from politicization. Such politicization is likely to occur whenever groups feel strongly about the judges who are seeking re-election.

One's assessment of whether this convergence in judicial selection systems is desirable or not is likely to be colored by whether one wishes to promote judicial accountability or judicial independence. Proponents of greater judicial accountability likely will view the convergence as positive because it helps to foster greater popular control over the judiciary. For proponents of judicial accountability, the escalation in the costs of judicial campaigns is a positive development because it signals that races for judicial office have become more

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9. John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81 (1986); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1986).

10. Kyle Cheek & Anthony Champagne, *Money in Texas Supreme Court Elections 1980-1998*, 84 JUDICATURE 20, 22 (2000).

11. Emily Heller & Mark Ballard, *Hard-Fought, Big-Money Judicial Races*, NAT'L L.J., Nov. 6, 2000, at A1. *See also* William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1.

12. Emily Heller, *Mixed Results for C of C*, NAT'L L.J., Nov. 20, 2000, at A11.

13. For documentation, see AMERICAN BAR ASSOCIATION, REPORT AND RECOMMEN-DATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS (1998).

14. Information on systems of state judicial selection are found in BOOK OF THE STATES 2000-01, at 137-39, tbl. 4.4 (2000).

15. The emphasis here is on races for state supreme courts because that is where the escalation of costs and acrimony has occurred. Although it is conceivable that similar political processes could develop for elections on lower state courts, this seems unlikely, given the very different types of cases that those courts typically decide.

16. Indeed, as Traciel Reid has noted, "[t]here is no evidence in Nebraska of any campaign activity either in support of or opposition to the retention of any supreme court justice before the 1996 Lanphier election." Traciel V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White*, *in* RESEARCH ON JUDICIAL SELEC-TION 1999, 48 (2000).

competitive, and greater competitiveness translates into more meaningful choices for voters. For proponents of accountability, too, the fact that fear of electoral defeat has proved a powerful incentive for judicial candidates to raise and spend campaign funds is likewise positive. If candidates spend more money on campaigns, this should make judicial elections more salient and should ensure that more information about candidates is transmitted to the electorate, thus encouraging more informed voter choice.[17] For proponents of judicial independence, in contrast, the convergence among systems of judicial selection is cause for alarm because it suggests that the mechanisms that they have traditionally relied upon to safeguard judicial independence—such as merit selection and retention elections—no longer may be effective in serving this purpose.[18]

This Article considers the factors that have contributed to this convergence in judicial selection systems and proposes a new approach to the selection and retention of state supreme court justices. Initially, the Article examines differences between nominal and actual systems of judicial selection in the states. Next, it analyzes various political and legal developments that have affected state judicial selection throughout the nation, assessing their implications for the politicization of judicial elections and for judicial independence. It then draws upon the European experience in staffing constitutional courts to offer an alternative system of selection and tenure for state supreme court justices that responds to demands for both judicial independence and judicial accountability.

17. Proponents of judicial accountability also are likely to applaud the United States Supreme Court's ruling in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), because it allows candidates for judicial office to express their views more freely, thereby promoting a better-informed electorate. For discussion of the implications of the greater freedom of expression for judicial candidates, see Stephen Gillers, *"If Elected, I Promise [___]"—What Should Judicial Candidates Be Allowed to Say?*, 35 IND. L. REV. 725 (2002); Amy M. Craig, Comment*: The Burial of an Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina*, 33 WAKE FOREST L. REV. 413 (1998). For a quite different perspective, see Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397 (1999); Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197 (2000).

18. Indeed, some proponents of merit selection expected that retention elections were a temporary expedient that would be continued only until there was support for appointment during good behavior. *See, e.g.*, Winters, *supra* note 3.