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# Commentary on State Selection of Judges

BY BRADLEY C. CANON\*

The American people face a fundamental dilemma about what they want their judges to be. The dilemma has existed since the early years of the republic and it is likely to be with us well into the future.

We want judges to be independent, but not too independent. We expect a judge to apply the rule of law in a case regardless of the political party, the ideology, or the class which the litigants might represent, directly or indirectly. This defines a judge for us: someone who identifies with no group, advances no interest, prefers no particular policy, and has no ties to the litigants at the bar. A judge applies that specific yet amorphous concept known as "the law" to all alike, without fear or favoritism.

Yet Americans recognize that law and politics cannot be entirely separated. Law is public policy, and public policy is what politics is all about. When judges make rules of common law, construe statutes, or interpret constitutions, they are making policies, and it is natural in political systems based on democratic principles to expect that policy-makers should have some mandate from the people to do this, or in some way be accountable to voters. In short, we do not want judges who are spineless politicians following the whims of every transient majority or helping to whip up the passions of the day. But neither do we want judges whose devotion to logic or principles is so great that they are quite disdainful of the actual consequences their decisions have on society.

Since 1787 most of our efforts to resolve this dilemma satisfactorily—to have our cake and eat it too, so to speak—have

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focused on the methods by which judges are selected and retained. Americans seem to believe implicitly that it is possible to develop a selection system that will screen out judicial candidates whose future behavior or policies may be inappropriate (however we define that term). We also implicitly believe that, once in office, judges' behavior can be controlled by various retention methods. The selection system for federal judges is, of course, embedded in the Constitution and has remained constant over 200 years. There have been serious efforts to amend the Constitution in this respect but none have been successful.

At the state level, however, we have altered selection and retention methods whenever sufficient dissatisfaction arises over judges' performance in the current system. In the Jacksonian era, direct partisan election of judges was adopted to counter the perceived aristocratic dominance of the bench. By the Progressive Era, the perception that many judges were little more than party "hacks" led many states to switch to a non-partisan ballot for electing judges. During the last three decades, rising skepticism that voters could distinguish able judicial candidates from mediocre ones caused many states to adopt the so-called "merit plan" (sometimes called the "Missouri Plan").<sup>1</sup> The merit plan approach can make for some wonderful tinkering because the plan has several variations. Moreover, the variations can be combined with partisan or nonpartisan elections or with that original method, gubernatorial appointment.<sup>2</sup>

The papers presented in this section of the Symposium address three important aspects of this dilemma as it has become focused in the debates over how best to select judges. The symposium papers by Professor Baum<sup>3</sup> and by Professors Alfini

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<sup>1</sup> For a thorough history of changes in state selection systems until the merit plan began to win adoptions, see E. HAYNES, *SELECTION AND TENURE OF JUDGES* (1944). For the history of the merit plan, see Winters, *The Merit Plan for Judicial Selection and Tenure: Its Historical Development* in G. WINTERS, *SELECTED READINGS ON JUDICIAL SELECTION AND TENURE* 29 (1973). For a brief overall history, see H. STUMPF, *AMERICAN JUDICIAL POLITICS* (1987), ch. 5.

<sup>2</sup> In three of the original states, judges have been elected by the legislature for two centuries. Three others retain gubernatorial appointment. These states have largely been immune from the shifting trends of state judicial selection systems. H. STUMPF, *supra* note 1, at 160.

<sup>3</sup> Baum, 645, 77 KY. L.J. *Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court* (1988-89).

and Brooks<sup>4</sup> ask questions about how well the nature of the electoral process comports with meeting the twin, if somewhat incompatible goals, of independence and accountability. Professor Davidow<sup>5</sup> goes further and proposes a novel method of selecting judges, one which he believes will better achieve these two goals than the systems now in use.

Baum asks, in essence, whether the voters have sufficient information to cast meaningful votes in judicial elections and he approaches the answer empirically. His data are for one supreme court election in one state, and he clearly recognizes their limitations as well as the complexities of the question. Nonetheless, I infer that he leans toward a "yes" answer, especially when his findings are considered in conjunction with similar research on the same question.<sup>6</sup> He says that it may well be unrealistic to hold voters to a higher informational standard in judicial races than they have in elections for other offices with similar visibility. When judges decide cases in a partisan or ideological manner, or when major questions arise about a particular judge's behavior or character, the election process will often generate sufficient information for citizens to cast meaningful votes. When these factors are absent, voters may cast ballots almost blindly, but it doesn't matter very much—just as it doesn't matter that they cast votes almost blindly for state treasurer or county jailor.

Of course, to say that judicial elections work reasonably well insofar as voters receive minimal information is not to say that elections are the best method of obtaining judges who will be both accountable and independent. Certainly Baum makes no comparisons here. But others do make comparisons, and over the last twenty years or so a body of literature has developed that argues that judicial elections are better able to achieve this balance than are other selection systems, particularly the merit plan which has gained considerable popularity over the last three

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<sup>4</sup> Alfini & Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671 (1988-89).

<sup>5</sup> Davidow, *The Search for Competent and Representative Judges, Continued*, 77 KY. L.J. 723 (1988-89).

<sup>6</sup> See, e.g., Baum, *Explaining the Vote in Judicial Elections: The 1984 Ohio Supreme Court Election*, 40 WEST. POL. Q. 361 (1987); Dubois, *Voting Cues in Non-Partisan Trial Court Elections: A Multivariate Assessment*, 18 L. & Soc'y REV. 395 (1987); Johnson, Shaefer, & McKnight, *The Salience of Judicial Candidates and Elections*, 59 Soc. Sci. Q. 371 (1978); McKnight, Schaefer and Johnson, *Choosing Judges: Do the Voters Know What They're Doing?*, 62 JUDICATURE 94, 96 (1978-79).

decades.<sup>7</sup> One can draw from Baum's data an argument that elections do hold incumbent judges more accountable, at least when they have engaged in highly visible behavior. To test this argument, we must compare the findings of Baum and others against research into the merit plan's retention system, which centers on retention elections.<sup>8</sup> We know that very few incumbent judges are defeated in these elections, and usually voters have little information because there is no opposition candidate or campaign.<sup>9</sup> Nonetheless, the 1986 defeat of Rose Bird and two of her colleagues on the California Supreme Court tells us that retention elections can serve at times to hold judges accountable.

Professors Alfini and Brooks present an in-depth study of court decisions and judicial or bar ethics commission opinions about what candidates for elected judgeships can and cannot do in terms of raising funds, taking policy positions, and advertising in furtherance of their candidacy. The underlying question here is: To what extent, if any, can we have candidates for judicial office campaign like politicians and still retain, in both reality and appearance, the independence necessary to be a judge? Any serious degree of democratic accountability requires the use of the electoral process, but to a greater or lesser extent, judicial candidates must behave like politicians if they are to win elections; this is part of the very nature of elections. In trying to achieve both accountability and independence, we have had to draw up a series of detailed and often, complex boundary lines between the competing goals. These boundary lines vary almost bewilderingly from state to state. Alfini and Brooks do not tell

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<sup>7</sup> P. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* (1980) advances the longest and most forceful argument in favor of elections. See also Grossman, *A Political View of Judicial Ethics*, 9 *SAN DIEGO L. REV.* 803 (1971-72); Mullinax, *Judicial Revision: An Argument Against the Merit Plan for Judicial Selection and Tenure*, 5 *TEX. TECH L. REV.* 21 (1973-74).

<sup>8</sup> After completing a term, a judge runs against his own record. The ballot questions reads something like: Should Judge X be returned to another term on \_\_\_\_\_ Court? If a majority of the electorate votes no, the seat is declared vacant and the judicial nominating commission selects candidates to replace Judge X.

<sup>9</sup> On retention elections, see Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 *JUDICATURE* 211, 221 (1980-81); Hall and Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 *JUDICATURE* 340 (1986-87); Jenkins, *Retention Elections: Who Wins When No One Loses?*, 61 *JUDICATURE* 79, 80 (1977-78).

us to what extent particular states have been successful in these efforts but they do make us realize that the process is not an easy one. In this respect we are justified in at least considering alternate selection and retention systems.

Alfini and Brooks' research supports the basic assumptions that fuel the opposition to judicial elections. It is assumed, for one thing, that judges cannot accept large campaign contributions without becoming indebted to the contributors or the interests they are promoting. Why would big oil companies contribute hundreds of thousands of dollars to candidates for the Texas Supreme Court if they did not expect to keep or gain influence therefrom? If it is necessary to conduct real campaigns to win a judgeship, judges will be more accountable to and less independent from the interests that enabled them to conduct such a campaign than to the public generally. The second assumption is that judicial candidates who take campaign positions on issues or make substantive promises compromise their independence too much; that such campaign commitments seriously weaken their ability to serve the cause of justice. These are powerful arguments against putting judges in the electoral arena. They are leavened some by the reality that the majority of judicial contests feature only one candidate, and in those with more than one, the candidates usually run low-level, dignified campaigns.

But this reality could be slowly disappearing. An impression grows that both more expensive campaigns and an appeal to economic interests or ideological politics are a more frequent and public aspect of judicial campaigns of the 1970s and 1980s than they were in earlier times, particularly when incumbent judges are concerned.<sup>10</sup> If this is the case, the inevitable conclusion is that the election of judges will too often produce judges who inherently cannot satisfy the requirements of both accountability and independence—and sometimes cannot satisfy either of them. Even if judicial electoral contests are not becoming more politically visible and expensive, the occasional contests

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<sup>10</sup> There is no aggregate research bearing on this assumption. In addition to Alfini and Brooks on Texas and Baum on Ohio, see a description of California judicial politics in Cochran, *Why So Many Judges Are Going Down to Defeat*, CAL. J. 359-60 (Sept. 1980). More generally, see L. BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 98 (1986).

that are in that mode arguably render judicial elections suspect.

Professor Davidow carries us back to a system that bears some resemblance to the merit plan. But it is a distant cousin of such plans. It is concerned less with the merits of the judges than with their representativeness. The focus is not on the judges singly, but in the aggregate. He has carefully devised a system to obtain representation from broad segments of the community on the nominating commissions and independent judges at the end of the process—thus achieving both accountability and independence. The most interesting feature of Davidow's proposal comes in the pains he takes to obtain whole community representation, not simply that of the political majority.<sup>11</sup> He designs a proportional representation system to ensure that minority views are represented by membership on the nominating commission. The commission itself operates on a veto system reminiscent of John C. Calhoun's political theories about the voice of major interests in the body politic. To cap it off, judges will serve a fixed fifteen-year term and be ineligible for reappointment.

Although I find Davidow's proposed system very provocative, I believe that the system has some theoretical and practical implications that require serious consideration. One is the election of the nominating commission through a scheme of proportional representation. Proportional representation is far more analogous to legislative bodies than it is to juries. While juries are structured to represent the community as a whole, we do not believe that members of Group X or Group Y are entitled to sit on any particular jury, or even on juries as a whole in proportion to their numbers in the community. And certainly, every effort is made to discourage jurors from thinking of themselves as representing Group X or Y when deciding a case. Jurors are expected to represent the community directly; they are not expected to speak for groups to which they happen to belong.

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<sup>11</sup> The unrepresentative nature of the judicial nominating commission has long been an object of debate. Merit plan defenders argue that its whole purpose is to represent the more capable elements of the public and bar, while critics argue that it is biased against women, racial and ethnic minorities, less prestigious portions of the bar, etc. See generally H. STUMPF, *supra* note 1, at 153-72. See also A. ASHMAN AND J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* (1974).

Legislators, by contrast, are expected to represent only a portion of the community. In those elected by proportional representation, legislators act only in the interests of the slate that put them up. Such a system serves more to enhance and solidify divisions than to ameliorate them, and it often paralyzes making or enforcing decisive public policy. Because the United States lacks clear ideological or racial/ethnic divisions (except for blacks and whites), and because creating or perpetuating them is alien to our notions of community, proportional representation is not used in this country.<sup>12</sup>

Second, the benefits of electing members of the nominating commission are not very clear. Almost certainly these elections will have low public visibility; they will be accompanied by all the drama that we see in races for state utilities commissioners. If exceptions occur, they will almost always signify strong ideological or partisan divisions. The judicial selection process now becomes a two-step procedure, but it is still one where the vast majority of voters lack any information about the candidates or at best may cast their votes on the basis of simple political cues. This is what now occurs in states with judicial elections. All that we have gained is some likelihood of having more "minority" representation on the commissions.

Minority is a contextual word. Davidow uses the example of a racial minority, blacks in particular. There are, of course, other racial and ethnic minorities as well. There are also political and ideological minorities, and there are legal interpretive minorities that may be relevant to the selection of judges. We are as likely to get a ticket of candidates organized by plaintiffs' attorneys as a black slate or a Jewish slate.<sup>13</sup> Indeed, six or eight slates might end up vying for two or three positions on the commission. Could we structure the nominating commission membership into half, third, or quarter votes to make it truly

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<sup>12</sup> Of course I approve of Davidow's provision for special representation on the nominating commission for non-lawyer members of the faculty in the state universities. However, I would add one refinement. Agronomists, mechanical engineers, English professors, etc., know very little about judicial selection, so I would restrict these university seats on the commission to political scientists.

<sup>13</sup> This already occurs when the bar elects some members of judicial nominating commissions. See R. WATSON AND R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* 19-48 (1969).



reflect the philosophy of proportional representation? Put otherwise, I doubt we can obtain a very meaningful system of proportional representation on a nominating commission of six members.

I fear that there will be at least two undesirable consequences of a proportional representation, Calhounian veto system such as Davidow proposes. For one, to the extent it encourages input into the process of selecting judges, that input will be severely factionalized. If this happens frequently, the bar and the public will soon come to look upon the law as nothing more than the outcome of base and immediate political machinations, just as it is when Congress passes a Rivers & Harbors Act or fiddles around with the tax code. Every group gets its piece of the legal pie and the devil takes the hindmost. It is, I think, deleterious to the concept of universally applicable law and to the cause of the impartial administration of justice to encourage, let alone facilitate, such a view of the judicial process.

Second, if unanimity is necessary to put a nominee on the list of possible judges, the process will soon degenerate to selecting nominees of the lowest common denominator. Good candidates, who are often good because they stand for something, will be vetoed and eventually will refuse to allow their consideration. It is doubtful that the likes of Louis Brandeis, Matthew Tobriner, Richard Posner or Thurgood Marshall would have been on any nominating commission's list if a unanimous vote had been required to put them there. We will have a bench of judges chosen because they have taken very few stands and thus have no enemies. Any exceptions will attain the bench through a more or less public political trade. ("We will give you one of your folks if you give us one of ours.")

Although I disagree with some goals and consequences of Davidow's proposed selection system, it is amenable to further discussion. It is not a fixed system. He offers it in several variations, and remains open to working out the details.

Debate about what kind of selection system can best achieve a balance between judicial independence and judicial accountability will no doubt continue well into the future. A lot of tinkering and revising will accompany it. Tinkering and revising, and even wholesale innovation, is one of the purposes of the American states, our 200-year-old political and legal laborato-

ries. Of course, state experimentation with systems for selecting judges is very unlikely to affect the federal system, but experiments that seem to work well can, if history is any guide, diffuse rapidly to other states.

Indeed, my heretical thought is that there is no *best* system that will establish the elusive balance between judicial independence and accountability. I believe that the degree to which a given selection system balances these twin demands is time-bound and perhaps also limited geographically. The way a newly adopted system functions tends to change over time. For example, in an earlier era, elections probably attained the balance better than did the main alternative, gubernatorial appointment.<sup>14</sup> But as the distribution of information about candidates went from passing out handbills and door-to-door campaigning to expensive and virtually issueless thirty-second television spots, candidates for low visibility office win (especially in primaries or non-partisan elections) because they are incumbents, have memorable names, or because they raise the money for TV spots or full-page newspaper advertisements. Those elected are less accountable and, if they had to raise a campaign war chest, are perhaps less independent. As Alfini and Brooks discuss, when judges have to compete in elections, the tension between pressure to engage in "real" campaigns and the norm of complete judicial independence has produced a "twilight zone" in judicial ethics, although judicial ethics commissions and state supreme courts are slowly, if not always consistently, reducing this "zone." As discussed earlier, this tension is one reason that many states have abandoned judicial elections. Abandoning elections in this era almost automatically means choosing a variation of the merit plan.<sup>15</sup> But currently, dissatisfaction with the merit plan is on the upswing because it exacerbates divisiveness in the bar or

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<sup>14</sup> In actuality, probably over half of the judges on state elective courts first attained the bench by gubernatorial appointment to fill a vacancy. See Herndon, *Appointment as a Means of Initial Accession to Elective State Courts of Last Resort*, 38 N.D.L. REV. 60 (1962); B. HENDERSON AND T. SINCLAIR, *THE SELECTION OF JUDGES IN TEXAS* 21 (1965). Even so, the judges had to face re-election and thus may have felt more accountable to the public than if they had not been subject to re-election.

<sup>15</sup> See Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 509-10 (1977-78).

because governors can often "rig" the appointment process.<sup>16</sup> At some point in the future, it is likely that a number of states will shift away from the merit plan. Before doing so, however, states' plans will probably undergo adjustments and tinkering, especially because there are two or three versions of the merit plan.

Geography can matter. For example, Professor Davidow's system with its core value of ensuring minority representation, would be less applicable to homogeneous states such as Nebraska or Vermont than to heterogeneous ones like New York or California. Sometimes, geography may not matter. The behavior and policies of judges may reflect the political culture of a state rather than its selection system. Intuitively, I suspect that no matter what system a state such as Louisiana chooses, politics in the more banal sense of the term would be a large factor in both the process of choice and the outcome of policy. Conversely, regardless of selection system, base-level politics would play a highly reduced role in Wisconsin.<sup>17</sup>

The advocacy of a judicial selection system is only meaningful if there is reason to believe that the system is more likely to produce judges with certain policy preferences or behavior patterns than are the other systems. No selection system now used or proposed is capable of giving us more than educated guesses about how judicial candidates will behave or what policies they will prefer after donning the black robes. Selection systems, in short, are instrumental to legal and political ends, and those concerned about the matter may change positions over time as they analyze the character and decisions of the judges the system has produced, or those of judges chosen by other systems.

Although there may be no "best" system for selecting judges in any universal sense, it does not follow that we should stop pursuing the Holy Grail and choose our judges randomly. There are "wrong" systems—those that make no effort at balancing

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<sup>16</sup> See R. WATSON AND R. DOWNING, *supra* note 13; P. DUBOIS, *supra* note 7, at 258-59.

<sup>17</sup> For data pointing in this direction, see Atkins and Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427 (1974); Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 L. & Soc'y REV. 579 (1971-72).

accountability and independence or those that seem incapable of vetoing judicial candidates who are obvious risks. States have been tinkering with and occasionally making major alterations in their systems for selecting judges since they were admitted to the Union. They will likely continue this process and should be encouraged to do so. The Grail of perpetually balanced judicial accountability and independence will never be found, but we should not abandon the search.

