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Electing Justice

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IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE. By *Joseph R. Grodin.* Berkeley: University of California Press. 1989. Pp. xxi, 208. $20.

This small volume makes one of the best arguments I have yet seen against the encroachment of electoral politics into the process of selecting judges. The argument is made by one with first-hand knowledge; Joseph Grodin's[1] four-year tenure on the California Supreme Court ended as a result of a 1986 retention election in which, as he puts it, "a majority of California voters decided that I, along with my colleagues Chief Justice Rose Bird and Associate Justice Cruz Reynoso, should do something else" (p. xvii). His book, *In Pursuit of Justice: Reflections of a State Supreme Court Justice,* describes that experience and the years on the bench that preceded it.

To the author's credit, however, the overriding tone is not bitterness for having been removed but gratitude for having been permitted to serve. Only one chapter, the last, is devoted specifically to the subject of judicial elections and, although in that context the author is openly critical of the process, that is hardly the explicit theme of the book.

The scope of the work is much broader, ambitiously so. Justice Grodin includes several topics — for example, a history and analysis of the common law and a discussion of the emergence of state constitutional law — that could themselves fill volumes. One may wonder whether it is possible to do justice (so to speak) to any one of these topics in only 188 pages, but Grodin does surprisingly well. He recognizes that there are already works that treat these subjects in depth and detail and he does not try to replicate or outdo them. Instead, he draws upon their scholarship to provide a pithy synthesis accessible to a broad audience. It is a legal education for the layperson.

No, Grodin does not explain the Rule in Shelley's Case or the distinction between *res judicata* and issue preclusion. What he offers is far more important for a public with a role in the selection of judges: an understanding of how appellate judges in the state systems go about their business and the kind of constraints under which they operate.

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1. Justice Grodin is currently a law professor at the University of California at Hastings. B.A. 1951, University of California, Berkeley; J.D. 1954, Yale; Ph.D. 1960, University of London.

Part I describes the structure of the appellate court system and the mechanics of appellate judging. It is, in part, autobiographical. Justice Grodin uses the story of his own ascent through the California courts, which he attributes in part to a longstanding friendship with Justice Matthew Tobriner, to describe the levels and standards of appellate review. He provides a rare inside look at the workings of an appellate court — the assignment of opinions, the use of law clerks, the conduct of conferences, and how judges view oral argument, among other things. He endorses the tradition of generalist courts and diversity among judges, both of which foster the development of the law through a kind of cross-pollination, as concepts developed in one area are applied by analogy in other areas (pp. 22-25).

In Part II, entitled "Function," Justice Grodin describes some of the variety of issues that state appellate courts face —with separate chapters devoted to common law, criminal, and constitutional cases. In the criminal area, he laments the tremendous drain on judicial resources attending death penalty cases, arguing that the disproportionate amount of time that must be spent on such cases is reason enough to abolish capital punishment (pp. 100-01).

The chapter on constitutional adjudication focuses on the recent emergence of state constitutions as an independent source of individual rights. As a New Yorker, I read with interest that New York's state constitution was an influential model for the drafters of California's first constitution; half of California's Declaration of Rights was adopted from guarantees of individual liberties contained in the New York constitution.

The book's final section is something of an overview. The first of the two chapters in this section concerns one of the eternal questions in legal scholarship: Do judges make law? Most modern scholars — former Attorney General Meese notwithstanding — agree that the judiciary has a legitimate lawmaking function. Justice Grodin aptly notes, however, that the judicial role varies with the source of the law that frames the legal issues in a given case. The court's role in a case involving statutory interpretation, for example, is not the same as its role in a common law case and it is different still in a constitutional case (p. 134). Legal philosophers do not always acknowledge these differences in their discussions of judicial lawmaking.

The book ends, appropriately enough, with Justice Grodin's reflections on his experience as the subject of a retention election. He brings home the dilemma of a judge who is criticized for his voting record but who is constrained in his efforts to defend that record by ethical restrictions against talking publicly about the court's decisions. There is also the unseemliness of seeking campaign contributions, when the contributors — or those who fail to contribute — may appear before the court in the future. Even if the judge is able to detach himself

from those considerations when deciding cases, the public perception of the judiciary cannot be enhanced by such a process. Even worse is the danger that the impending election may influence the judge's vote on a case decided during the campaign. Most judges would make every effort to avoid deciding a case based on how it would effect the campaign but, as Justice Grodin notes, one would have to be superhuman not to at least think about it from time to time. One of his colleagues compared it to brushing your teeth in the bathroom and trying not to notice the crocodile in the bathtub (p. 177).

I began with the observation that Justice Grodin's book makes a powerful argument against judicial elections. From this survey of the book's contents, this may appear to be an overstatement of the importance of that topic — much more of the book is, in fact, devoted to other themes. But all of this other information is a foundation for an important (and true) premise of the argument. It demonstrates that the bare results of a court's decision — the reversal of a conviction, the reinstatement of a jury verdict, and the like — say less about the decisionmakers than the public may think. Most cases present a narrow range of options for the appellate judge. As Justice Grodin explains, appellate courts have, at best, limited power to review the facts, and the legal issues are framed by existing statutes and precedents. The particular case before the court cannot be viewed in isolation; it must be examined with an eye toward similar cases that have been decided in the past and those that may arise in the future.

Judges, of course, must take these things into account. The public, on the other hand, is free to judge a case based on its own impression of the facts and according to what it thinks the law ought to be. This approach gives the public a substantial advantage in justifying a popular result, but it is inconsistent with our commitment to the rule of law.

This book thus illustrates the kind of insights that are minimally necessary to make an informed evaluation of judicial decisions, and demonstrates why the public is not well served by a judicial selection process that is little more than a referendum on the results of individual cases. It is surprising that Justice Grodin is able to convey so many of these concepts so well in a relatively short written work. It would be astonishing if anyone could do the same in the context of a political campaign. These are concepts that demand elaboration and reflection, not slogans and sound bites.

There are, of course, other reasons why the judiciary should not be vulnerable to the vicissitudes of popular opinion, especially where individual liberties are at stake. An institution charged with safeguarding individuals from the potential tyranny of the majority cannot do its job as well if it must answer to the majority. I wish it were possible to eliminate partisan politics from the process of selecting judges, but

political realities do not bode well for this prospect, at least not in the near future. In the meantime, however, it may be possible to temper the effects. Justice Grodin suggests that, at the very least, we should make an effort to raise the level of discourse in judicial campaigns — to shift the focus away from a judge's "voting record." In his words,

> It is vital to insulate incumbent judges from gross political pressures in the performance of their duties. In order to do that we need to establish a consensus of constraint. . . . [W]e should vote to oust an incumbent judge in favor of a challenger not simply because we like the challenger better, nor because we are unhappy with some of the incumbent's decisions, nor because the governor who appointed the judge offends us, but only when it is demonstrated to our satisfaction that the incumbent is deficient as a judge in some important respect. That we may regard a judge as being too "liberal" or "conservative" is not sufficient unless we are convinced that the judge's view of the law and its relationship to society is so extreme that it lies outside the mainstream of legal thought and community values. And we must be very careful in making that judgment, so as to avoid creating an atmosphere in which politics becomes the dominant criterion. If we are unsure, I think we owe the incumbent the benefit of the doubt. [pp. 185-86]

Of course, developing such a consensus will require an educational effort. The public is not likely to change its habits without knowing why the criteria applied to other offices are inappropriate for judicial elections. This book, which illuminates the role of the judiciary for a lay audience, is a fine beginning.

Justice Grodin's reflections on his years on the bench reveal him to be thoughtful, intelligent, dedicated, and compassionate. In the end, perhaps the book's most compelling argument against judicial elections is the unstated one: a selection process that deprives the system of judges like Justice Grodin must be flawed.