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## In Defense of Judicial Elections

By CHRIS W. BONNEAU & MELINDA GANN HALL

*Reviewed by Francis J. Menton, Jr.\**

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Alexander Hamilton in Federalist 78 famously called the judiciary the “least dangerous branch” of government. That, of course, was long before judges discovered the power that could be theirs by imparting some meaning to simple phrases like “due process,” “equal protection,” and similar words in the constitutions of the various states.

By the mid-twentieth century the justices of the supreme courts of the states had established their prerogatives to weigh in on, and often overturn legislative judgments as to, many of the leading political questions of the day. Generally these courts have cited broad-based constitutional provisions as the basis of their authority on such questions. Hot-button political issues on which numerous state Supreme Courts have overturned legislative enactments include: tort reforms (e.g., caps on punitive damages and on damages for pain and suffering); school funding mechanisms (such as the local property tax) that are alleged to favor wealthier over poorer school districts; and same-sex marriage. On other prominent political issues some state supreme courts have taken an approach of erecting sufficient procedural roadblocks as to completely thwart enforcement of duly enacted statutes. In a prominent example, then-Chief Justice of the California Supreme Court Rose Bird voted in sixty-four of sixty-four capital cases that came before her to overturn the death penalty on one or another procedural ground; in sixty-one of those cases enough of her colleagues went along with her to obtain a reversal. Justice Bird was ousted in a retention election in 1986, with her opponents alleging that she had broken her oath to uphold the law.

As state supreme courts have increased their role in deciding important political questions, the methods of selecting the judges of the supreme courts have come increasingly into focus. After all, if the voters want to reduce school spending, it won't do them a lot of good just to elect legislators and a governor who will cut the spending, if a state supreme court over whose membership they have no say will then order additional funding as a matter of claimed constitutional law.

As Bonneau and Hall point out in their book, the majority of the states (thirty-eight of fifty as of 2007) continue to have some form of popular election mechanism for judges of the state supreme court. Popular election of judges came in with Jacksonian democracy in the mid-nineteenth century, replacing earlier appointive systems. In most cases the original popular election system was the same partisan process used for executive and legislative offices. But by the time of the progressive era in the early twentieth century, reformers were calling for changes to rein in claimed excesses and bring better judges into the system. Many states have implemented reforms, generally taking one of two forms: either a switch from partisan to non-

partisan elections (where candidates run without political party affiliation associated with their names), or a change to a system of appointment followed by a “retention” election, in which the judge runs generally unopposed but can be ousted if she fails to receive a defined portion of the vote.

One version of the appointment/retention election system is sometimes known as the Missouri Plan, or alternatively “merit selection”—surely one of the great euphemisms of all time. In this system, a commission, often consisting substantially of bar association leaders, names a panel of potential candidates for gubernatorial appointment. The commission theoretically is charged with selecting candidates based on their merit, thus the term. The governor must appoint from the list, and so is theoretically precluded from picking unqualified cronies. The appointed candidate then is subject to a retention election after a defined period, generally one or two years.

Although thirty-eight of fifty states retain some form of election for supreme court judges, by 2007 only seven retained the original rough-and-tumble partisan version. Fifteen had moved to non-partisan elections, and sixteen had one or another form of the appointment/retention election system. But the self-described reformers continue to push to eliminate even the watered-down versions of judicial elections. In 2003 the American Bar Association House of Delegates adopted a report titled *Justice in Jeopardy* calling for the ending of all forms of contested judicial elections. Numerous state bar associations have weighed in for the same cause, often advocating for the so-called “merit selection” systems. Prominent advocacy groups like the National Center for State Courts ask at a minimum for partisan elections to be replaced with non-partisan. A large collection of law professors supports similar reforms.

A cynic—and I admit I am one—might look at the advocates for reform and the reforms they are advocating and notice that there seems to be a high degree of self-interest involved. The reform going by the sweet-sounding name of “merit selection,” and supported by all self-respecting prominent bar leaders, just happens to lead to judges selected by commissions named or consisting substantially by the self-same prominent bar leaders. And might it happen that judges coming out of this process seem to share the political views of said bar leaders on issues such as school funding, same-sex marriage, or the death penalty—issues on which the political views of bar leaders may well not match those of the voting public? And on an issue like tort reform, where elimination of large pain and suffering or punitive damages verdicts might be a key issue for the plaintiffs' contingency bar, might not a so-called “merit selection” process be subject to capture by lawyer interests seeking to block such changes?

Whether you credit the reform advocates for good advocacy or just good branding, to date there has been little intellectual pushback from forces standing up for judicial elections. And there could be good reason for that. Nobody can contend that contested judicial elections are without flaws. Contested elections require money, the more hotly contested

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the more money, and the logical contributors of substantial sums to judicial elections are inevitably going to be lawyers who appear before the courts or parties who have issues that will be decided by the courts. Also, if the issues the voters care about in an election for the state supreme court include whether the judge would vote to overturn the legislature on hot-button political issues, the candidates will have difficulty communicating their views to the public on such issues without crossing the line into prejudging actual cases that may come before them. But sometimes things that are badly flawed may still be superior to the alternatives. Take democracy, about which Winston Churchill famously said, it's "the worst form of government except for all those other forms that have been tried from time to time."

Bonneau and Hall now enter the debate as somewhat lonely voices standing up for judicial elections. They are respectively Associate Professor of Political Science at the University of Pittsburgh and distinguished Professor of Political Science at Michigan State University. They have each published previously on the issues at hand, including jointly, and cite their own prior works liberally.

The present volume is relatively slim and focused on quantitative analysis of a limited number of questions that are subject to quantitative answers. The goal of the book is to provide responses to specified criticisms of judicial elections that have been leveled by critics. The ground covered is valuable but somewhat narrow—the authors do not attempt to cover every criticism of judicial elections leveled by critics, nor to support every positive feature of judicial elections advanced by their advocates.

Bonneau and Hall have collected data as to all elections for state supreme courts in the period 1990 to 2004. (This book is limited to consideration of judicial elections in the context of state supreme courts and does not analyze data with regard to lower court judgeships, many of which are also subject to elections in the various states.) They have also created a statistical model for analyzing the data.

The authors find numerous issues on which quantitative analysis contradicts or undermines some of the principal criticisms of judicial elections by the anti-election reformers. For example, countering various criticisms of the alleged evils of money in judicial elections, the authors show that higher levels of campaign spending demonstrably enhance voter interest as measured by the percentage of voters participating in the judicial election. They further show that retention elections after appointments, where candidates typically run unopposed and are rarely defeated, attract the least interest and often have high levels of "roll-off," defined as the percentage of voters who vote on at least some contests on the ballot but do not vote in the judicial election. Further, and somewhat surprisingly, they conclude that other things equal, non-partisan judicial elections are actually more costly than partisan elections, a result the authors attribute to the valuable cues given to the voters by partisan labels attached to candidates.

Considerable effort is devoted here to the question of whether elective systems succeed in placing "quality" candidates on the state supreme court bench when compared to appointive or other hybrid systems. The authors note the seeming

contradiction between on the one hand a large body of work with respect to non-judicial elections documenting the positive association of challenger quality with defeat of the incumbent, and on the other hand the position of advocates for eliminating judicial elections who believe that the voters are incapable of distinguishing qualified from unqualified candidates in this context. No quantitative study is really capable of ending the debate on this point, because much of "quality" may not be terribly measurable. However, defining "quality" primarily in terms of prior experience in the lower courts, the authors demonstrate that a higher level of such quality is a strong predictor of success in unseating an incumbent in a judicial election. Another way of viewing this result would be that when two candidates both have a track record, the incumbency advantage is minimized and the voters are capable of picking the candidate with the track record they prefer. Whether viewed as an issue of candidate "quality" or not, this result credits voters with substantial acumen.

The U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White* falls in the midst of the data period of the authors, giving them the opportunity to evaluate quantitatively whether that opinion ushered in major changes in the nature of judicial elections. In *White*, the Supreme Court ruled unconstitutional a Minnesota rule of judicial ethics preventing candidates for the judiciary from discussing issues that might come before the court. But the authors find no statistically significant impact of *White* in the data they analyze—not on propensity of challengers to enter races, not on willingness of citizens to vote, and not on costs of campaigns.

On these and other issues the quantitative methods of Bonneau and Hall strike significant counter-blows to the narrative of the anti-election judicial reformers. Yet there are limits to how far such methods can go toward winning the debate. At its base the debate over judicial elections is a debate about the relative importance of certain fundamental values. The anti-election reformers value the purity of judicial ethics and judicial independence—including independence from the electorate—above other values. These are significant values, and in a world where the courts really are the "least dangerous branch" and spend their time tinkering with finer points of the law of contracts, they could be the most important values. But we don't live in that world. In the world where the state supreme courts claim the prerogative to restructure a school finance system that may represent close to half of a state's budget, or the prerogative to undo tort reform, or the prerogative to legalize same-sex marriage, additional and different considerations come into play. Now the courts have begun to operate as a sort of super-legislature, dealing with the most contentious political issues of the day and claiming to overrule the legislature whenever their sense of fairness is offended. The anti-election reformers fail to see that once courts have delved into such territory, the campaign for "judicial independence" has morphed into a campaign for rule by unelected and unaccountable elites, something potentially far more dangerous than the rough and tumble of contested judicial elections.

Bonneau and Hall have been prolific contributors to the debate about proper methods of judicial selection. Their current book makes a number of significant points showing at least that



contested judicial elections have a number of positive effects and that the negatives are not nearly so severe as contended by the reformers.

