

***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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**ANTHONY**

merit selection nominating committee screens the candidates for legislative selection).<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

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.”

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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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> In rural counties in Missouri, trial judges are still elected in partisan elections even though the state originated the Missouri Plan.<sup>14</sup> Although Illinois uses retention elections for determining whether incumbent judges should be retained in office, judges are initially chosen in partisan elections.<sup>15</sup> 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.<sup>16</sup>

There are also variations in the operation of the various types of election systems. For

also suggests little difference in the quality of merit-selected judges compared to elected judges.<sup>26</sup> Finally, although it is still rare, retention elections can be very expensive, highly partisan, political battles.<sup>27</sup> 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.<sup>28</sup> Nonpartisan elections also remove the party label from the ballot, depriving voters of a valuable cue that helps them cast a somewhat informed vote.<sup>29</sup> However, reformers have been especially concerned in recent years with the problems of elected judges, particularly the problems of partisan election of judges.<sup>30</sup>

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.<sup>31</sup> 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.”<sup>32</sup>

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.<sup>38</sup> 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,<sup>39</sup> 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.<sup>40</sup> Voters ma