2005

A Call for Change: Improving Judicial Selection Methods

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Abstract

Empirical data show that, despite the significant electoral success of state court judges, elections still impact judicial decision making. Using the State of Wisconsin as an example, this Essay suggests that Wisconsin and other state legislatures, with the support of bar associations and academics, should revisit the historical underpinnings of judicial elections and consider both whether electing judges conforms with the historical goals of having an elected judiciary and whether the available empirical data support the belief that elected judges can be systematically consistent and independent in the decision making process.

In evaluating state judicial selection methods, scholars, judges, legislators, and lawyers must consider empirical evidence, normative arguments, and democratic concerns. However, we must also consider the historical context of state judicial selection methods. In other words, why did a state choose an elective system, and does recent empirical data support that historical choice? The State of Wisconsin serves as an excellent example. In 2005, nearly forty Wisconsin judges stood for re-election, over eighty percent unopposed,[1] but do these non-partisan elections promote judicial independence? Historically, two reasons for electing judges in Wisconsin were that elected judges would be *less* politically motivated than appointed judges and that such elections would help further participatory democracy. However, the data suggest that these 150-year-old empirical assumptions have proven incorrect, and perhaps Wisconsin, and other states, should open up a dialogue to

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1. WISCONSIN STATE ELECTIONS BOARD, CANDIDATES REGISTERED BY OFFICE, SPRING GENERAL ELECTION – 04/05/2005, http://elections.state.wi.us/docview.asp?docid=13-47&locid=47.

re-evaluate their systems of judicial selection.[2]

At the time Wisconsin became a state, scholars, citizens, and the popular press debated whether electing judges would affect judicial decisions. While the question was first raised in 1846 by delegates of the First Constitutional Convention,[3] and again by the popular press from 1847 to 1848 during the Second Constitutional Convention,[4] it has been left unresolved for over 150 years. Competing prose in the nineteenth century debated the pros and cons of judicial elections, but relying only on political theory and assumptions, not empirical evidence. In these circumstances, Wisconsin and other state legislatures, with the support of bar associations and academics, should revisit the historical underpinnings of judicial elections, and consider both whether electing judges conforms with the historical goals of having an elected judiciary and whether the available empirical data support the belief that elected judges can be systematically consistent and independent in the decision making process. Such an analysis will support the conclusion that court systems should be based on a system of appointments, not elections. As a more modest alternative, further safeguards should be instituted to insure greater judicial independence.

An elected judiciary is certainly consistent with Wisconsin's Jacksonian tradition of promoting public participation in government.[5] Wisconsin Supreme Court Justices are elected to ten-year terms in statewide, non-partisan, April elections, and vacancies are filled by gubernatorial appointment with the appointee expected to stand for election to a full ten-year term the following spring (unless another

2. I am certainly not the first to suggest that states should consider changing or modifying their judicial selection procedures. Yet, despite much literature and groups seeking reform, *see, e.g.*, American Judicature Society, Merit Selection: The Best Way to Choose a Judge, http://www.ajs.org/js/ms_descrip.pdf (last visited July 15, 2005), most attempts to adopt alternative appointed systems have been unsuccessful. Perhaps combining historical perspectives with empirical claims will prove beneficial.

3. *See* JOSEPH A. RANNEY, TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN'S LEGAL SYSTEM 52-53 (1999).

4. *See, e.g.*, *Constitutional Principles: V The Judiciary,* WIS. ARGUS (Madison, Wis.), June 27, 1847 [hereinafter *Constitutional Principles*], *reprinted in* THE ATTAINMENT OF STATEHOOD 34 (Milo M. Quaife ed., 1928); *Virtues on the Constitution*, PATRIOT (Prairie Du Chien, Wis.), June 22, 1847 [hereinafter *Virtues on the Constitution*], *reprinted in* THE ATTAINMENT OF STATEHOOD, at 114.

5. *See* Nathan S. Heffernan (Chief Justice, Wisconsin Supreme Court (1983-1995); Justice, Wisconsin Supreme Court (1964-1983)), *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031, 1036 (1997) ("Wisconsin, admitted in 1848, became a state at the high tide of Jacksonian democracy.").

supreme court seat will be contested).[6] Judges on the courts of appeals and the circuit courts are also elected to shorter six-year terms of service.[7]

The constitutional drafters of Wisconsin felt such elections would not hamper judicial independence because judges would be elected by diverse citizens from large geographic areas with little political stake in the results.[8] This is a key point. These drafters did not want an appointment system because they worried that, unlike citizens (who presumably would pick the most qualified jurists), the governor or legislature would be biased in making appointments leading to a judiciary with a lack of independence.[9] In addition, gubernatorial or legislative appointment was inconsistent with the Jacksonian ideal of popular sovereignty, and, thus, Wisconsin became the second state to require that all judges be elected by the people.[10]

Offering arguments steeped in political rhetoric, supporters and detractors split over whether this elective system would foster or impede judicial independence and objectivity. Those few constitutional delegates opposed to an elected judiciary thought that judges would be chosen based on political party affiliation rather than legal ability and would craft their opinions to fit with public opinion.[11] The many supporters of the elective system, however, dismissed concerns of judicial politicization and a loss of independence because of their faith in the electorate.[12]

Like a small minority at the Constitutional Convention, Wisconsin's popular press and the framers of the United States Constitution were not optimistic that judicial elections could insure judicial independence. The framers of the Federal Constitution thought elections created too great a desire or pressure to consult public opinion, especially in light of the fact that many citizens are not trained in law.[13] If popular elections were used, "there would be too great a disposition to consult

6. WIS. CONST. art. VII, §§ 4, 9.

7. *Id.* §§ 5, 7.

8. *Journal and Debates of the Wisconsin State Constitutional Convention 1847-1848*, Jan. 20, 1848, *reprinted in* THE ATTAINMENT OF STATEHOOD, *supra* note 4, at 652.

9. *See id.* at 214.

10. RANNEY, *supra* note 3, at 52.

11. *Id.* at 52-53.

12. *Virtues on the Constitution*, *supra* note 4, at 114 (describing elections as "a decided improvement upon the formation of the judiciary and an increased confidence in the acts of the people").

13. THE FEDERALIST NOS. 78, 81 (Alexander Hamilton).

popularity," and "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence."[14] The press in Wisconsin was more practical in describing its concern, simply wondering how, if one elects judges, one can expect anything other than that the popular vote will influence the decisions of a judge, and if not, the reasoning went, there is nothing to be gained by the electoral system.[15] While few have claimed that the electorate has failed by electing obvious partisans or unqualified candidates, where Wisconsin's constitutional drafters truly erred in their analysis and in preferring an electoral system was in failing to understand the practical effects of election itself on judges.

Thus, two major claims can be made. First, in light of Wisconsin's history and tradition as just briefly described, the early founders would not have wanted judges to exhibit changes in voting behavior in light of past or upcoming elections. Second, modern empirical studies of elected judiciaries strongly suggest that facing election does influence voting behavior—an effect that would have been a concern to the founders and should be a concern of modern-day lawyers, judges, politicians, and citizens.

Appointed judges, who are more independent from the electoral process, demonstrate a type of consistency in decision making not exhibited by elected judges.[16] Elected judges, on the other hand, are far more sporadic in their voting patterns as a result of both pending and past electoral experience.[17] Elected judges fail to exhibit judicial consistency as their arguably irrational fear of losing grows. While judges may fear losing re-election, this rarely happens, and it is especially rare for a sitting state supreme court justice to lose.[18] The last

14. THE FEDERALIST NO. 78, at 105 (Alexander Hamilton) (1970).

15 *Constitutional Principles*, *supra* note 4, at 34-35.

16. Even if one is not convinced that appointed judges are more consistent and independent, appointment systems at least foster an appearance of independence and impartial judging. *See* Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744-45 (2002), *available at* http://www.ajs.org/js/LitReview-.pdf.

17 *See infra* notes 24-29 and accompanying text.

18. *See* Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U. L. REV. 559, 561, 567 (2002) ("When incumbents [on the Ohio Supreme Court] are challenged, they have a high success rate of 80% or more."); Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 81 (2001) (citing Pamela Karlen, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 543 (1990)) ("[M]ost judicial incumbents are re-elected without opposition."). *See also infra* notes 19-20 and accompanying text.

incumbent Wisconsin justice to lose an election (and the only chief justice to be unsuccessful in an election bid) was Chief Justice George R. Currie in 1967.[19] Wisconsin's lower court judges also are likely to be re-elected. For example, in the judicial elections of spring 1999, nearly ninety percent of sitting circuit court judges ran unopposed (twenty-five of twenty-eight), and the three incumbents who had to defend their seats all prevailed.[20] This year, none of the fourteen Milwaukee County circuit judge elections, including an open seat, were competitive races.[21] Paradoxically, despite the high likelihood of electoral success, judges nevertheless succumb to electoral pressures due to unfounded concerns of losing re-election. Similar pressures are felt by other elected officials. For example, members of Congress also exhibit irrational fears of losing re-election. Despite the fact that incumbents typically win by comfortable margins, they focus disproportionately on the occasions of an incumbent losing a supposedly "safe" congressional seat.[22]

Judges seem likely to exhibit their most true voting preferences when few adverse consequences will arise as a result of their votes. For judges, this usually occurs when they are not up for re-election in the near future or are not required to be elected at all. (This is not to say that there are not other concerns such as legislative reversal or possible impeachment for serious ethical violations.) If judges are experts in the law and if one can reasonably assume that their true voting preferences (or what they believe to be the best legal outcomes) reveal themselves when judges are not facing election, perhaps judicial selection systems should strive to limit the electoral effects on judicial voting patterns. The alternative will result in undesirable consequences—adverse effects on unpopular litigants and inconsistencies in judicial voting patterns.

For example, judges in some other states hand out death penalty sentences far more often when they are up for re-election.[23] A strong relationship has been observed between election years for judges and the likelihood that a defendant will get the death sentence.[24] It is

19. *See* George R. Currie, http://www.wicourts.gov/about/judges/supreme/retired/currie.htm (last visited July 15, 2005).

20. Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies From Wisconsin*, 85 MARQ. L. REV. 593, 731-46 (2002).

21. Derrick Nunnally, *Races for Circuit Judge Draw No Competition*, MILWAUKEE J. SENTINEL, Jan. 11, 2005, at, 2B.

22. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 61 (1990).

23. *See infra* note 24 and accompanying text.

24. *See* Richard R.W. Brooks & Stephen Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. &

sometimes true that judges are "soft" on criminals when not worrying about re-election and then ramp up sentences to the "optimal" level of punishment when elections are near. But it is more common that judges, like members of Congress, are influenced by an exaggerated concern about re-election prospects. While Wisconsin does not have the death penalty, it should be of concern if criminals, even those who have committed terrible crimes such as murder and rape, receive disproportionately higher sentences simply because the trial judges are worried about upcoming elections.[25]

While little research has been done on Wisconsin's trial courts, analysis of the Wisconsin Supreme Court suggests that justices are less likely to protect defendant and prisoner rights once justices have experienced elective politics compared to the time period following a gubernatorial appointment.[26] In looking at Wisconsin Supreme Court criminal cases from 1986-2001, justices appointed by the governor were fifty percent more likely to vote *for* a criminal defendant's claim than they would be in later elected terms, or if they had been elected to their first term.[27] On the other hand, those justices who immediately faced electoral pressures and were elected in the first term are sixty percent more likely to vote *against* a defendant's claim in the first term.[28] These findings complement research done on other state courts suggesting that judges vote strategically by conforming with public opinion and refraining from dissent if they have to run for election or if they have won election by a narrow vote margin in the past.[29]

The concern of a judge is not necessarily that he or she may violate public opinion, but more precisely, that someone will draw attention to a specific violation during an election. In other words, judicial

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CRIMINOLOGY 609, 638 (2003). *See also* Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206 (1997); Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5 (1995).

25. Judges may become more punitive as election nears. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When it Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004) (documenting a thirty percent increase in expected sentence length from the first to the last day of a judge's term in Pennsylvania where judges serve ten-year terms and stand in non-competitive retention elections).

26. *See* Jason J. Czarnezki, *Voting and Electoral Politics in the Wisconsin Supreme Court*, 87 MARQ. L. REV. 323 (2003).

27. *Id.* at 346.

28. *Id.*

29. *See, e.g.*, Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992). If a judge is up for re-election, there is little incentive to dissent in the face of a strong majority block.

independence is sacrificed because the cost of a controversial decision may be to stir up a contestable and provocative issue for a future opponent. Hence, changes in voting behavior are more likely in high profile cases. In addition to facing difficulties in voting independently, elected judges encounter additional pressures from political parties, interest groups, and the media that make it more difficult to conform with notions of judicial ethics. Judges, when facing election, find themselves more likely to be influenced by partisan interests or the public, more likely to make extra-judicial statements, and certainly find it more difficult to avoid the appearance of impropriety even if none has taken place.[30]

The evidence of judicial election effects centers mainly on criminal cases because the public presumably pays little attention to the more complex and less frequent cases such as copyright, antitrust, and administrative law. Instead, the assumption is that the public generally pays attention to only a few high profile criminal cases or criminal issues. The limited evidence available seems to support this conclusion. California Supreme Court Chief Justice Rose Bird's 1986 electoral defeat can be attributed to her resolute opposition to the death penalty and overturning a series of death sentences.[31] In 1999, Wisconsin's Chief Justice Shirley Abrahamson's sole dissent in a sexual predator case was used against her in the election campaign, and the advertisement implied that the chief justice's presence on the court would allow sexual predators to prey on children.[32] Thus, even in the absence of evidence about other types of cases, the election effects on criminal cases is sufficient to switch to a different selection method.

It is true that electing judges provides for more direct accountability and that any appointment process is certainly not devoid of political maneuvering. However, for an institution dependent on precedent and evenhandedness, it is of great concern if there is any inconsistency in deciding cases on the basis of opinion polls. Even if appointed judges base their decisions on ideological and policy preferences much of the

30. *See* John D. Fabian, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155 (2001).

31. *See generally* 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 (1987).

32. Chief Justice Shirley Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 986 (2001). *See also* Kearney & Eisenberg, *supra* note 20, at 650 (revealing the considerable extent to which news articles reported about campaign events in which issues related to crime were raised).

time, as many scholars suggest,[33] at least these outcomes provide for some measure of consistency and predictability. In other words, even if there are also disadvantages to any appointment system, it is still the stronger method.

Depending on personal politics and the case at hand, one might prefer an appointed judge or an elected judge. But only appointed judges have an institutional safety net to prevent flip-flopping in the face of electoral pressures. Life tenure or a lack of electoral accountability for a substantial period of time no doubt permits appointed judges to deal with some issues better left to legislatures (*e.g.*, those areas where various state experimentation might lead to valuable evidence of success and failure). This is a necessary evil as there is little evidence to support any contention that elected judges will better protect minority viewpoints or promote the general enrichment of the less fortunate if doing so will adversely affect their chances—or perceived chances—of re-election (though some judges may not do so whether they are appointed or elected). In this manner, the empirical evidence (including the judges' own voting records) stands in stark contrast to the views of elected judges and justices, including the views of Wisconsin's chief justice, that judicial elections are beneficial to democracy, that elected judges do not consider public opinion, and that even if judges wanted to consider public opinion, they would be unsuccessful in correctly determining the notorious cases.[34] While judicial elections promote participatory democracy, the data show that elections *do* impact judicial voting patterns. At no point in Wisconsin's history has it been suggested that it is beneficial to democracy for judges to take into consideration public opinion in deciding a case. If this is in fact a perceived advantage of the elective system, then no changes to it need to be made.

Based on the traditional view that judges should be independent decision makers and the available empirical evidence suggesting that elected judges change their voting patterns in the face of election, judges at all levels of state court systems, like the federal system, should be

33 *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). However, the appropriate conditions must exist for policy preferences to trump. Judges are able to further their policy goals when they "lack electoral or political accountability, have no ambition for higher office, and comprise a court of last resort that controls its own caseload." *Id.* at 92.

34. *See, e.g.*, Abrahamson, *supra* note 32, at 973; Judge Peter Olszewski, Sr. (Pennsylvania Superior Court), *Who's Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems*, 109 PENN ST. L. REV. 1 (2004). *See also* Heffernan, *supra* note 5, at 1033 (arguing that the elective system should not be discarded, and instead a reasonable system of public financing should be established).

appointed. Because any judicial selection method can affect the decision process, any change from the electoral system would require careful consideration of whether to adopt a plan of gubernatorial appointment, legislative appointment, or a "merit plan" where the governor would appoint judges from a list of nominees submitted by an independent judicial-nominating commission.[35]

In the alternative, there may be tools to be explored by individual states to offset the negatives of an elected judiciary. For example, does Wisconsin effectively limit the electoral influence in individual cases of its highest court by electing no more than one justice per year and having long terms of service? Even if individual justices would, consciously or subconsciously, consider the views (perceived or otherwise) of the electorate, the judicial election provisions in Wisconsin may not allow electoral influences to have a significant impact on the voting outcomes of the court as a whole. These safeguards minimize the effect of any one given justice who faces re-election in the next year on the voting outcome in any given year. What remains unclear is whether these safeguards alone are sufficient to minimize the shifting of the majority voting block in election years. In any case, the elections of the lower court judges lack these safeguards—elections may take place more frequently and judges have shorter term lengths. Other safeguards might include further campaign finance reform for judicial elections,[36] still longer terms, and mandatory recusal in certain cases. In fact, the early opposition to judicial elections in Wisconsin received a slight increase in the length of judicial terms as its only concession.[37]

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35. For a discussion of the various approaches, see Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1 (1995); DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE SUPREME COURT POLICY (1995). Which of these appointment systems is preferable is not the subject or aim of this short piece.

36. Many states have considered tempering the effects of the judicial selection process on judicial decision making by implementing campaign finance reform for judicial elections. *See, e.g.*, North Carolina's Judicial Campaign Reform Act, N.C. GEN. STAT. ANN. §§ 163.278.61-.70, 163.278.13, 105-41, 105-19.2, 163-321 - 323 (West 2003), *available at* http://www.ncjudges.org/citizens/education/about_jcra/full_text.php (last visited July 15, 2005) (setting up fundraising and spending limits, and intending to create full public funding for appellate court elections in North Carolina). For information on other state initiatives, see American Bar Association, Commission on Public Financing of Judicial Campaigns, *available at* http://www.abanet.org/judind/jud_campaign.html (last visited July 15, 2005). In Wisconsin, public financing legislation known as the "Impartial Justice Bill" passed the State Senate in 2000, but stalled in the State Assembly. *See* American Judicature Society, Judicial Selection in Wisconsin: An Introduction, *available at* http://www.ajs.org/js/WI.htm (last visited July 15, 2005).

37. RANNEY, *supra* note 3, at 53.

At present, no independent branch of government exists in Wisconsin. Empirical data show that, despite significant electoral success, elections still impact judicial decision making, and elected judges are less consistent in their voting patterns than appointed judges. In addition, if interest in judicial elections continues to wane and these contests are not robust,[38] Wisconsin no longer even benefits from the participatory advantages of an elective system. Historically, judges were elected in Wisconsin because the thought was that they would not be politically motivated, and that elections would promote Jacksonian democracy. The experience and evidence of 150 years have proven this assumption incorrect, and, thus, Wisconsin should renew debates about its judicial selection method. Perhaps others states should as well.

38. There is some historical disagreement among scholars as to whether interest in state judicial elections has waned. *Compare* William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 347 (1987) (finding that judicial retention elections are generally characterized by low voter turnout) *and* Kenyon N. Griffin & Michael J. Horan, *Merit Retention Elections: What Influences the Voters?*, 63 JUDICATURE 78, 80 (1983) (noting that "[a] prominent characteristic of the 1978 judicial retention elections was the rate of voter abstention or non-participation") *with* PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980) (noting that low levels of citizen participation in judicial elections are uncharacteristic in the United States). Increased scholarly attention and citizen activism has been seen concerning financing of judicial election campaigns, but, at this point, I remained unconvinced that the attention to campaign finance reform has resulted in increased voter turnout in recent years. *See, e.g.*, Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. L. & PUB. POL'Y 273, 290 (2002) (citing Lynn A. Marks & Ellen Mattleman Kaplan, *Guest Commentary: Appellate Judges Should Be Appointed, Not Elected*, PA. L. WEEKLY, Dec. 8, 1997, at 4; Abrahamson, *supra* note 32, at 992) (noting that only three of ten registered voters voted in Pennsylvania's 1997 judicial election and less than one in four Wisconsin voters participate in judicial elections). *See also* Brian F. Schaffner et al., *Terms Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RES. Q. 7 (2001) (finding that nonpartisan races decrease turnout); David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709, 720 (2001) (finding that party information would reduce abstention rates).