

## The Politics of Judicial Selection: The Case of the Michigan Supreme Court

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*"If there's a reform I would make, it would be that."*

Justice Ruth Bader Ginsburg, in response to a question whether states should replace judicial elections.<sup>1</sup>

*"Judicial elections are democracy-enhancing institutions that operate efficaciously and serve to create a valuable nexus between citizens and the bench."<sup>2</sup>*

As the debate rages between those who argue that judicial elections are bad for legal justice *vis-a-vis* those who argue that they are good for democracy, there remains the singularly unique system of judicial selection in Michigan. For its Supreme Court justices, Michigan employs a hybrid electoral system, where candidates are first nominated at political party conventions, after which those candidates run in non-partisan general elections. Moreover, vacancies are filled by interim appointments made by the governor with no outside input or oversight. How did Michigan come to utilize this system which is different from all other states in the country? In this study we discuss the history behind Michigan's judicial selection system. We show how Michigan transformed from an appointive system to one that employed partisan elections, and finally to the current hybrid system. The accounts behind the manner in

which Michigan selects its Supreme Court justices provide a glimpse into the political forces among political and legal elites, interest groups, and the electorate that have shaped judicial politics within the state. We thus illustrate how the form of judicial selection that is unique to Michigan evolved and has been sustained over time.

When then Michigan Circuit Court Judge Diane Hathaway defeated Supreme Court Chief Justice Clifford Taylor in the November 2008 election, it was the first time ever that an incumbent Chief Justice had been defeated at the polls in Michigan. In fact, it was only one of a few times that an incumbent had lost an election in Michigan Supreme Court history. How did this happen, particularly in a state with non-partisan general elections for its Supreme Court? Did Michigan's unique system for selecting its Supreme Court justices, where political party conventions nominate the candidates for the non-partisan general election ballot, play a role?

The manner by which judges are selected in the United States has fascinated scholars, lawyers, interest groups, and many others, and for good reason. As the clamor over the recent retirements of U.S. Supreme Court Justices David Souter and John Paul Stevens shows, judicial selection is a critical part of the judicial and political processes. Whether discuss-

ing judicial selection in the federal or state courts, many actors within the political and judicial systems are involved; and, the method of selecting judges has the potential to influence decision making on the bench.

As the quotations above suggest, strong opinions abound with particular respect to judicial elections, and much has been written recently on judicial elections both within and outside the scholarly community.<sup>3</sup> Moreover, the Supreme Court's decisions in *Republican Party of Minnesota v. White*<sup>4</sup> and *Citizens United v. Federal Election Comm'n*<sup>5</sup> have provided additional fuel to this fire.

Despite the contentious arguments over the appropriateness and efficacy of judicial elections, there are more alternatives confronting a state than a dichotomous decision whether or not to hold judicial elections. In this regard, Glick and Vines<sup>6</sup> discussed five formal systems of judicial selection in the states: 1) non-partisan elections; 2) partisan elections; 3) gubernatorial appointment; 4) legislative selection; and 5) nomination by commission, otherwise known as the Missouri Plan or "merit" selection.<sup>7</sup> Some submit there are but two formal methods of selection, appointments and elections, and all others are simply variants of these major categories.<sup>8</sup> However, since there are significant distinctions between and among the five categories listed above, we agree with Glick and Vines and many others who consider these to be separate and distinct methods of selection.<sup>9</sup> Nevertheless, as we will show using the unique example of the Michigan Supreme Court, there are numerous permutations arising from these

basic forms of selection, resulting in a cacophonous assortment of judicial selection methods in the fifty states.

The decision concerning which process of selecting judges is best or most appropriate is one we do not consider here, in part because numerous others have expounded upon this issue in some detail.<sup>10</sup> Thus, we leave to state policy makers and disparate advocates to debate that issue. What we analyze instead are the specifics of the judicial selection system in the Michigan Supreme Court, including how this unique system came to be and how it continues to shape judicial politics in the state.

### **The Michigan System for Selecting Supreme Court Justices**

From a formal selection perspective Michigan employs non-partisan elections for its Supreme Court, as the justices and challengers on the general election ballot do not have party labels attached.<sup>11</sup> While most non-partisan election states choose their judicial candidates for the general election via open, non-partisan primaries,<sup>12</sup> Michigan does not follow this norm. Instead, partisan politics is involved in the selection process in Michigan, as the candidates on the non-partisan general election ballot are initially nominated at political party conventions.<sup>13</sup> Michigan's hybrid approach to selecting its Supreme Court justices, using partisan nominating procedures within a non-partisan electoral system, is entirely idiosyncratic among the states. Indeed, only Ohio, with a system of non-partisan general elections and partisan primary elections, has a system somewhat similar to Michigan.<sup>14</sup>

This unique judicial selection system has existed in some form in Michigan since an initiative passed in 1939 that amended the State Constitution. Prior to that time, judicial reformers attempted to bring to Michigan either non-partisan elections or a variation of the Missouri Plan. These efforts were defeated at the polls in 1934 and 1938, respectively. Interestingly, had the 1938 initiative succeeded, perhaps the

Missouri Plan instead would be referred to as the Michigan Plan.<sup>15</sup> With both efforts in the 1930s to change the selection system having failed, Michigan turned to a novel system whereby candidates for its court of last resort are initially nominated at political party conventions, who then face off against each other in a non-partisan general election.

While the struggles in the 1930s over judicial selection in Michigan were fierce, this time period was not the only one in which Michigan altered, or attempted to alter, its system of selecting Supreme Court justices. In many ways Michigan has served as a battleground for forces that have favored disparate judicial selection methods as well as political agendas. And, these efforts continue through the present. In the succeeding sections we illustrate the historical changes, whether or not successful, to the selection system for the Michigan Supreme Court.

### **The Early History of Judicial Selection in Michigan Statehood Through the Nineteenth Century**

When Michigan attained statehood in 1837 and became the 26th state in the union, its inaugural Constitution called for gubernatorial appointment of Supreme Court justices, with advice and consent of the state Senate. While selecting justices at the top of the judicial hierarchy initially followed the design for U.S. Supreme Court justices, state circuit and probate judges reached the bench via election.<sup>16</sup> This appointive system for Supreme Court justices did not last for long, however, as the Michigan Constitution of 1850 provided that all judicial officers would attain their seats through partisan elections, with the governor filling interim vacancies.<sup>17</sup> It appears Michigan moved away from an appointive system as part of "the wave of Jacksonian democracy then sweeping the country" that preached majoritarian rule via electoral processes, including judicial offices.<sup>18</sup> Indeed, the maiden period of Michigan's history proves to be the only time in which

elections did not guide formal judicial selection. Moreover, the arrangement of partisan judicial elections that commenced in 1850 continued into the twentieth century.

### ***The Early Twentieth Century: Notable Change in Judicial Selection***

Michigan modified its selection system with the Constitution of 1908, the third Constitution in the state, but only slightly.<sup>19</sup> One constant was that it continued the practice of judicial elections for Supreme Court justices. As well, the governor would continue to fill vacancies with interim appointments.<sup>20</sup> The changes in the 1908 Constitution specified that judicial elections would take place every other spring, and that the number of justices would increase from five to eight.<sup>21</sup> This same constitutional provision provided that the term of office would be set by law. As was the case under the 1850 Constitution, this meant that the state legislature had a critical voice in judicial selection.<sup>22</sup> And, since the legislature had always provided by statute for partisan nominations at state party conventions,<sup>23</sup> that practice continued under the 1908 Constitution. Thus, we observe the tradition of party politics in both the electoral and nomination processes as determined by the legislature and the Constitution.

Soon thereafter, Michigan's judicial election system was subject to various attacks and proposed changes. These were not isolated events; instead, these criticisms were taking place during a time of wholesale change across the country, as the politics of, and potential changes to, Michigan's judicial selection system did not take place in a vacuum. In this regard, during this time period the judicial system in the United States was the subject of many changes (and attempted changes), often prompted by criticism of courts during the Progressive Era by various advocates of court reform.

One of the most important events during this period occurred when Roscoe Pound, then Dean of the University of Nebraska Law School, gave

his famous speech before the 1906 annual meeting of the ABA.<sup>24</sup> Pound did not discuss the issue of judicial elections *per se*; however, he did speak to a growing disenchantment with the judicial system that he contended stemmed from a variety of sources, particularly the inappropriate mingling of courts and politics. While imminent shifts in the landscape did not occur, Pound's speech eventually led to many transformations within the judicial system in the U.S.<sup>25</sup>

The Pound speech influenced the emergence of the AJS in 1913.<sup>26</sup> While the initial mission of the AJS was "to make the administration of justice in American courts more effective and economical", the organization soon focused more particularly on methods of judicial selection, specifically advocating what it termed a "merit" system.<sup>27</sup>

Consequently, the ABA and AJS fit within this time period in which assorted interests advocated judicial selection methods that did not overtly entail partisan politics. For instance, after New York instituted partisan primaries into its judicial electoral system in 1911, it soon became concerned with the "bare-knuckled" politics of partisan primaries, and within a decade the state altered its selection system.<sup>28</sup> Moreover, in 1913 former President William Howard Taft gave a speech before the ABA in which he criticized judicial elections, instead strongly supporting an appointive method of selection similar to that employed in the federal courts.<sup>29</sup> Similarly, University of Chicago Law School Dean James Parker Hall addressed the Ohio Bar Association in 1915, contending that the benefits of appointive systems far outweigh electoral methods.<sup>30</sup> Of course, by the 1930s President Franklin Delano Roosevelt was locked in heated constitutional and political battles with the U.S. Supreme Court, culminating in the proposed (and ultimately doomed) Court-packing plan and the switch in time that saved nine,<sup>31</sup> events that were very much on the mind of the American electorate,<sup>32</sup> and those

attempting to transform judicial selection.

Thus, by the 1930s the ABA and AJS were fiercely lobbying for an appointive selection system based on candidates nominated by a commission. In this regard, for the first time the AJS devoted a session exclusively to the subject of judicial selection and tenure at its May 6, 1931 meeting.<sup>33</sup> While several versions of appointive selection plans were considered and supported by the AJS, eventually the group settled on the notion of a selection system based upon gubernatorial appointment subsequent to the work of a nominating commission.<sup>34</sup>

A few years later, the ABA conducted a survey of 105 bar association committees in thirty-five states. Sixty of the surveyed committees favored a change in their present electoral methods of selection. In contrast, states with gubernatorial appointment or legislative selection strongly opposed any changes to their respective systems.<sup>35</sup> Several proposals were included in the ABA survey. One potential change included a modification of the system then existing in California, where appointed judges would be required to run in a retention election. A more drastic proposal provided that the bar nominate several candidates followed by a gubernatorial appointment from this list. Several bar associations suggested that the Senate, Governor's Council, or Judicial Council then confirm these gubernatorial appointments. One of the main obstacles was the challenge of amending their state constitutions, but the bar associations believed that educating the public and politicians would make the amendment procedure possible. The ABA survey was one of the first confirmations of the attitudinal differences between lawyers and the general electorate in states with varying judicial selection methods.<sup>36</sup>

Eventually in 1937, the ABA's House of Delegates approved a plan for judicial selection which included gubernatorial appointment from a list as well as retention elections.<sup>37</sup> With these national advocacy groups

supporting this new appointive form of selection, numerous states, including Michigan, began to consider changing their own selection systems.<sup>38</sup>

### **The Battle over Judicial Selection in the 1930s**

Perhaps the best chance for reformers to bring about an appointive system in Michigan was the 1930s. Yet, their efforts failed. We now turn to a discussion of those efforts, as well as the manner in which the current hybrid system came to be.

In the early 1930s several local bar associations joined the national debate over judicial selection. In particular, they expressed concern over the political pressures experienced by judges facing election, and thus they suggested that appointment by the governor or a judicial council be considered. At the time, a vacancy on the bench due to death or retirement was filled by gubernatorial appointment and followed by a retention election.<sup>39</sup> Accordingly, the State Bar Association formed a special committee on judicial selection and tenure in 1932 for the purpose of organizing the association's reform goals.<sup>40</sup>

This committee made two suggestions in their initial report. In one plan, it proposed that for all courts except probate the governor would appoint judges with advice and consent of a nine-member judicial commission. Three of the commission members would be chosen by the governor and the remaining six would be chosen by the Bar Association's board of directors. Alternatively, the judicial commission could file lists of competent lawyers for each court of record with the governor, who would then select from the approved lists.<sup>41</sup> The critical commonality in both plans concerns the involvement of a judicial commission. The State Bar Association strongly believed that the governor's power of appointment should be subject to a check in addition to the electorate, and that the judicial commission was best equipped to furnish this check.

In 1933, the Grand Rapids Bar

Association presented a report in which they suggested lower court judges be appointed by a majority of justices on the Supreme Court and remain in office for life or good behavior. The rationale was that Supreme Court justices were knowledgeable about experienced judges in the state and would be less influenced by politics. Following this report from the Grand Rapids Bar Association, the State Bar recommended that a special committee be appointed to further investigate the issue and the constitutional amendment necessary to change selection methods.<sup>42</sup>

In the State Bar Association's 1933 report, the Committee on Criminal Jurisprudence offered several recommendations. First, it contended that Supreme Court justices and Circuit Court judges be provided with life tenure, giving them complete independence from political pressures. Second, the Committee advocated appointment of Supreme Court justices by the governor, though they disagreed with the Grand Rapids Association's suggestion to have the justices appoint lower court judges. The Committee also disagreed with the process of local bar associations providing candidates to the governor for appointment, believing this would interject bias and special allegiance to the associations which supported the judicial nominee. Finally, the Committee advocated gubernatorial appointment of circuit judges. Conceding that political influence may still exist at this stage, the Committee contended that lifetime appointments would minimize political allegiance.<sup>43</sup>

The Detroit Bar Association's Executive Committee echoed similar sentiments regarding election of judges at its February 7, 1933 meeting. In this regard, prosecuting attorney Matthew Bishop stated, "I've come to my senses at last. The present system of electing justices of the Supreme Court, or any judicial officer for that matter, as a partisan is indefensible. I admit I had to have a brick wall fall on me before I reached that decision. The brick wall was the

recent elections when lawyers of whom I had never heard were elected to the bench."<sup>44</sup> Bishop then added, "The party system in the selection of judges is all wrong . . . What have the tariff or prohibition or the sales tax or war debts to do with the administration of justice by the highest court in your state? Absolutely nothing . . . I've been wrong for years and years but thank heaven I'm right now and I'm going to do my best to correct the system."<sup>45</sup>

To further the Detroit Bar Association's commitment to reforming the selection system, the Executive Committee authorized the president of the association to appoint a committee that would "map out a program to place before the electorate a proposed constitutional amendment to remove all members of the judiciary from the party ballot and make their election non-partisan, and make any other recommendations relating to methods for the selection of judges and their tenure of office the special committee may deem advisable."<sup>46</sup> With so much of the state bar supporting a switch from the existing electoral system, the question then became how to bring such a change about.

### ***1934 Proposal for Non-Partisan Elections***

There were discussions in 1934 in Michigan over adopting various changes to its selection system, a process that was now occurring in many states. After some debate, Michigan's Bar Committee voted to send out ballots to all members in support of a constitutional amendment in favor of non-partisan elections of all state court judges, save for probate court. The Judicial Commission supported the amendment 606-166.<sup>47</sup> Thus, it would be up to the electorate in the November 1934 election to decide the fate of this proposed constitutional amendment.

Though the proposed constitutional amendment for non-partisan general elections was not the kind of selection system advocated by reform groups, the AJS in particular was hopeful since it would have rid

the state of partisan elections: "[I]t seems safe to predict that Michigan may be the first state to accomplish a thoroughgoing, unqualified reform in selecting judges."<sup>48</sup> Interestingly, the Michigan Bar Association neither sponsored nor opposed the proposed amendment.<sup>49</sup> Reform groups were disappointed, however, when the proposal was defeated at the ballot, with about 47 percent of the electorate voting in favor of the amendment.

The proposal for non-partisan judicial elections was one of six proposed constitutional amendments on the November 1934 ballot. Several, but not all, of these other proposals directly affected farm interests in the state. The Michigan Farm Bureau joined with a number of organizations and interests in the state to encourage voters simply to vote against all of the proposed amendments.<sup>50</sup> Indeed, in the November 3, 1934 edition of the *Michigan Farm News*, the front page headline exclaimed, "Vote 'NO' on All Proposed Constitutional Amendments to be Voted on November 6."<sup>51</sup>

The "vote no on all amendments" campaign was successful. Though the proposal for non-partisan elections carried Wayne County (which includes Detroit) by a 2-1 margin, rural voters opposed the measure by nearly the same margin. With more than twice as many voters in the state outside of Wayne County, the proposal failed.<sup>52</sup> The *Detroit Bar Quarterly* contended that if rural voters knew about the problems of large cities and the extra sway partisan labels carried, then they would have understood the need of non-partisan elections. However, consensus among the rural populace was that since they knew the local judges, they were effectively elected on a non-partisan basis and thus there was no need to change the system. Notwithstanding, judicial reform advocates believed that defeat of the proposal for non-partisan judicial elections had little to do with the substance of judicial selection.<sup>53</sup>

***1938 Proposal for an AJS/ABA Plan***  
In 1935, the Farm Bureau asked the

Michigan State Bar and Detroit Bar Associations to draft another amendment to set up a system of judicial appointment by a governor with the advice of a non-partisan commission similar to those supported by the AJS and ABA.<sup>54</sup> The proposed amendment would have provided for gubernatorial appointment from a list supplied by a non-partisan judicial commission. However, the Michigan Senate defeated this amendment by a vote of 18-10.<sup>55</sup> Nevertheless, there still remained opportunities for judicial selection reform in the state during the 1938 election cycle.

Following the 1934 electoral defeat of a non-partisan electoral system, the Michigan State Bar integrated. Consequently, the new bar's membership was three times larger than the voluntary associations that previously existed, which meant that a large number of members were unaware of the bar's previous attempts at reforming judicial selection in the state.<sup>56</sup> The Michigan State Bar Judicial Selection Committee thus announced its intent to present an amendment for a judicial selection plan of the kind supported by the AJS and ABA.<sup>57</sup> The Detroit Bar Association announced a similar intent at their December 8, 1937 meeting.<sup>58</sup>

At the State Bar's annual meeting in 1936, members adopted a resolution to refer the judicial selection issue to the board of commissioners. The commissioners adopted two proposals, each of which involved gubernatorial appointment after nomination by a non-partisan judiciary commission. One proposal targeted supreme court justices, while the other focused on circuit courts. The Judicial Selection and Tenure Committee favored the resolution limited to the Supreme Court because it felt these were the jurists with whom the public was least familiar, in contrast to the territorial circuit judges that made them more well-known at the local level. The thinking was that once voters gained confidence in this selection method, the committee believed it could then be extended to lower courts.<sup>59</sup>

The proposal for an AJS/ABA plan

of selection for the Supreme Court went before the electorate in November 1938. While it initially received support in the press, opposition grew as the election drew near. In particular, it was opposed by sponsors of the prior non-partisan plan which included influential Wayne County judges, as well as the Detroit Chapter of the National Lawyers Guild, unions, a coalition of teachers and educators, one of the major Detroit newspapers and a local radio station with state broadcasting capacity. Neither of the major political parties were involved in the campaign.<sup>60</sup>

When the 1938 general election arrived, the electorate soundly defeated the measure, with about 60 percent of the voters opposing the initiative. As with the 1934 initiative, there was greater opposition outside of the Detroit area; however, Wayne County also voted against the measure. With such a clear vote against the proposal, an ABA/AJS style of judicial selection in Michigan appeared dead.

### ***The Current Hybrid System Becomes Law in 1939***

With two attempts in just four years to end the partisan electoral system in the state having failed, including the broad attempt to bring about the AJS/ABA plan in 1938, judicial reformers were at a loss but were determined to carry on. "No doubt this is merely the first engagement of the campaign." Yet, in many ways national reformers were in a bit of denial: "When the electorate understands this it will pass the judicial amendment, which should be resubmitted whenever there is a prospect for its success."<sup>61</sup>

But, local officials realized that the battle for an appointive system in Michigan likely would be futile. They understood that "using direct democracy in order to abandon direct democracy"<sup>62</sup> was a non-starter, especially in the wake of the landslide electoral defeat of the 1938 proposal. As the Detroit Chapter of the National Lawyers Guild stated in opposition to the 1938 proposal: "Thus, in reality, the proposal does

not take the selection of supreme court judges out of politics. What it does is to put their selection beyond the reach of the people."<sup>63</sup> The question then became, what to do next?

With these edicts in mind, both the legislature and Michigan Bar Association acted, and did so shortly after the defeat of the 1938 AJS/ABA proposal. And the result would eventually become the current hybrid system of selecting judges in the state. In late 1938, the legislature directed removal of party designations from judicial ballots. Since the method of judicial selection in Michigan was largely a function of legislative fiat,<sup>64</sup> this was a critical change in the selection process, as it kept elections in the mix but made them non-partisan in nature.

Then in 1939, the Michigan Bar Association hoped to go one step further than the legislature. In this regard, the Bar Association voted in favor of putting a proposed constitutional amendment on the spring 1939 ballot. That initiative, known as Constitutional Amendment No. 1, would require non-partisan elections of judges in the state.<sup>65</sup> That is, while the legislature had voted to rid the state of partisan judicial elections, this proposal, if passed by the electorate, would amend the Constitution by instituting a system of non-partisan judicial elections.

An interesting note behind the proposed change from partisan to non-partisan elections had everything to do with politics. The 1930s were a time of critical transformation of electoral patterns in the country,<sup>66</sup> and Michigan was no exception. As President Roosevelt was leading Democrats to large electoral victories in the 1930s, urban areas in particular were swinging to support FDR and his fellow Democrats. This meant that incumbent Republican judges in the Detroit area who had been elected under a partisan system were now vulnerable. "The change to nonpartisan election basically happened because Wayne County swung from being Republican to being Democrat. Judges went to a nonpartisan ballot because they were afraid they

were going to lose.”<sup>67</sup>

Contrary to the prior failed initiatives, proposed Constitutional Amendment No. 1 passed on April 3, 1939. Consistent with the history of spring elections in the state, turnout was light but sufficient to amend the Constitution of 1908. As amended by this proposal the Constitution now mandated that election of all judges in the state be non-partisan.<sup>68</sup> While this constitutional provision applied to general and primary elections,<sup>69</sup> it did not apply to the nomination of justices of the Supreme Court. As the Michigan Supreme Court stated in a case interpreting this language:

The provision required that all judicial officers except justices ‘shall be [nominated] at non-partisan primary elections.’ However, ‘[n]ominations for justices of the supreme court shall be made as now or hereafter provided by law.’<sup>70</sup>

In accordance with this constitutional provision: “This language allowed the Legislature to continue the practice of nominating candidates for the office of justice at state political conventions.”<sup>71</sup> The result was the unique system that entails a partisan nomination process with a non-partisan general election. As Hannah explained: “As now [or hereafter provided by law]’ meant at state party conventions. Because the state legislature has never provided otherwise, Michigan now operates under a bizarre system whereby candidates for state supreme court justice are initially nominated by party conventions, but elected on a nonpartisan ballot.”<sup>72</sup> In addition to bringing about a system of non-partisan general elections, the 1939 constitutional amendment provided sitting justices with perceived, and perhaps actual, advantage by designating their incumbency status when facing reelection.<sup>73</sup>

The process leading to this hybrid system almost seemed anti-climatic, after the steam from the prior efforts at reform had escaped.<sup>74</sup> In fact, the initiative to bring about the hybrid system passed rather easily, as it seems the electorate favored some

form of election, even if non-partisan, though some remnants of the old partisan system persisted. Moreover, while criticism of Michigan’s selection system has continued and efforts have been made to alter it, the method that voters and the legislature put in place as of 1939 largely exists today.

### **The Latter Half of the Twentieth Century: Minimal Modification in Judicial Selection**

While some changes came to pass with respect to Michigan’s selection system after the 1939 amendment established the hybrid system, these moves were nominal, particularly when compared to the seismic shifts that occurred (or nearly occurred) during the first half of the century. As we show, judicial reformers have continually advocated a move away from elections toward some appointive system, preferably the Missouri Plan; but, their efforts always have fallen short of tangible success in Michigan. Thus, the peculiar selection system Michigan uses, incorporating both partisan and non-partisan elements, remains the core of its selection process through the present time. That system, however, has not remained etched in stone, as the ensuing discussion illustrates.

### **The Post-War Period of the 1940s and 1950s**

Two amendments to the 1908 Constitution were successful during the period following World War II, both of which were relatively minor. First, in 1947 a proposed amendment rendered unnecessary a primary election if a candidate had no opposition. This proposal was accepted by the electorate during the spring election cycle. Second, in the spring election of 1955 voters ratified another amendment, as this one simply streamlined the wording of the constitutional provision relating to judicial elections. Both of these successful ballot proposals amended §23 of Article VII of the 1908 Constitution, and they remained in effect until the 1963 Constitution supplanted them. Yet, both amendments furthered the system

of non-partisan elections while continuing “the key requirement that candidates for justice of the Supreme Court shall be nominated ‘as now or hereinafter [sic] provided by law’ while ‘nominations for all other said judicial offices shall be made at non-partisan primary elections.’”<sup>75</sup>

A change to Michigan’s statutory law solidified the current selection method. The legislature in 1954 clarified that party conventions would be used for nomination of Supreme Court justices: “At its fall state convention, each political party may nominate the number of candidates for the office of justice of the supreme court as are to be elected at the next ensuing general election.”<sup>76</sup>

While reformers were not successful in bringing about an appointive system, that does not signify they were entirely quiet during this time. To the contrary, in 1944 the Michigan Bar’s Committee on Judicial Selection and Tenure revisited the failed 1938 ballot initiative, recommending once again that a Missouri Plan be adopted in Michigan. The proposal did not succeed any further than this Committee.<sup>77</sup> Then in 1950, the State Bar Association approved another recommendation by this Committee to bring about a Missouri Plan for appellate courts in the state.<sup>78</sup> The state legislature did not accept the Bar Association’s recommendation.<sup>79</sup>

The State Bar continued its advocacy of a Missouri Plan for Michigan throughout the 1950s, despite its failure to gain traction beyond the Bar Association. In 1952 the Bar Association approved a proposal for a Missouri Plan, but once again this proposal did not go beyond approval among the State Bar, largely because of the perceived threat to voters’ franchise.<sup>80</sup> The next chance for reformers would be the State Constitutional Convention in the early 1960s; yet again, they would be disappointed.

### **The Constitutional Convention of 1961-62 and the 1963 Constitution**

Michigan’s fourth and current Constitution came about after the Constitutional Convention of 1961-62,

colloquially referred to as “Con Con” by locals. There were three primary reasons for the Constitutional Convention: 1) to clear up the state’s finances so it could meet its obligations; 2) to reform the executive branch; and 3) to deal with re-apportionment of the state legislature.<sup>81</sup> The judiciary was not regarded as a contentious issue prior to the Constitutional Convention. In fact, one of the delegates to the Constitutional Convention, Judge Robert J. Danhof who chaired the Judicial Branch Committee at the Constitutional Convention, stated in retrospect: “[B]efore the Constitutional Convention there was no agitation for change with the judiciary.”<sup>82</sup> Nevertheless, since the Constitutional Convention was revisiting the 1908 Constitution, the procedures and operations of the state’s judiciary were considered. The result was a new judicial article in the 1963 Constitution.

To nobody’s surprise, judicial selection was a key issue for the delegates on the Judicial Branch Committee. Consequently, during the Constitutional Convention the State Bar took a poll of members of the bar at the request of Judge Danhof’s Committee. The questions included preferences on judicial selection in general, as well as selection with respect to specific levels of court within the state.<sup>83</sup> The poll results showed that members of the state bar supported a Missouri Plan over the current hybrid system, as well as the current system over gubernatorial appointment akin to the federal system.<sup>84</sup> Moreover, the AJS and others testified before the Committee advocating for a Missouri Plan.

Accordingly, a proposal was introduced during the Constitutional Convention to institute a Missouri Plan (or the ABA Plan as referred to by the Michigan Supreme Court).<sup>85</sup> Notwithstanding, the delegates did not support a change in Michigan’s selection system; thus, no major change was included in the 1963 Constitution. Consequently, the hybrid system, with a partisan nomination process and non-partisan general elections, remained largely in place

despite the ratification of a new Constitution.<sup>86</sup>

In particular, the relevant constitutional provision in the 1963 Constitution provides:

**§ 2 Justices of the supreme court; number, term, nomination, election.**

The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. The term of office shall be eight years and not more than two terms of office shall expire at the same time. Nominations for justices of the supreme court shall be in the manner prescribed by law. Any incumbent justice whose term is to expire may become a candidate for re-election by filing an affidavit of candidacy, in the form and manner prescribed by law, not less than 180 days prior to the expiration of his term.<sup>87</sup>

The clear message was that non-partisan general elections would continue, while nominations would ensue “in the manner prescribed by law.” Thus, political party conventions continued to guide the nomination process per statute.<sup>88</sup> In interpreting this provision, the Michigan Supreme Court ruled:

We conclude that the debates [from the Constitutional Convention] amply demonstrate the intent of the convention that the Legislature have the option to continue providing for nominations of candidates for supreme court justice at political party conventions. It was also the intent that the Legislature might provide for other methods of nomination, such as nonpartisan nomination, if it felt such methods might offer better results.<sup>89</sup>

In other words, the nominating process remains within the command of the legislature, which it may continue or amend at any time.

While judicial selection remained the same, some changes from the 1908 Constitution to the 1963 Constitution were accomplished. As §2 provides, the Supreme Court would decrease to seven members, a more manageable number if for no other reason than to have an odd number of justices on the bench. Since a new level of court, an intermediate court of appeals, was added in Article VI, §8, it was believed the smaller

Supreme Court would not be subject to an increased workload.<sup>90</sup> Also, §2 allows incumbents to bypass the nomination process.<sup>91</sup> One significant change was that the 1963 Constitution took the away from the governor the power to fill interim vacancies. Instead, vacancies would be filled by an electoral process. In practice this proved unworkable, and in 1968 an amendment passed that restored interim appointment power to the executive.<sup>92</sup>

Finally, the 1963 Constitution mandated that all jurists be lawyers, and that no judge or justice can begin a new term (whether by interim appointment or election) after turning 70 years old.<sup>93</sup> And, judicial elections were moved to the fall general election. So, while the 1963 Constitution had the potential to make drastic changes, and indeed some important changes are observed, the Constitution Convention continued the practice of non-partisan general elections with a partisan nomination process. Michigan’s idiosyncratic selection process would continue for the foreseeable future.

***Status Quo (For the Most Part) During the Late Twentieth Century***

When discussing judicial selection during 1970s through 1990s, in many ways what follows is a broken record. That is, in the final decades of the last century, numerous proposals were advanced in favor of an appointive selection system, particularly the Missouri Plan. And, in each instance these proposals did not make it far enough to change the selection system in the state.

For instance, in 1972 the legislature created a Special Commission to Study the Judicial Article of the Michigan Constitution, with the direction to propose a constitutional amendment to replace Article VI of the 1963 Constitution. Among other things the Special Commission proposed a form of the Missouri Plan. In 1974 the State Bar Assembly adopted these recommendations. Concurrently, the ABA passed a new standard that called for abolishing all judicial elections

and replacing them with a Missouri Plan. Then in 1976 the President of the State Bar urged an end to Michigan's electoral system, to be replaced with a Missouri Plan. In conjunction with these efforts, the Commission directed a survey of voters regarding the Missouri Plan. Results found that the majority of voters in Michigan preferred appointment systems such as a Missouri Plan, but only after it was explained, while differences remained between Detroit and the rest of the primarily rural voters in the state. Again in 1977 the State Bar adopted a proposal to bring about a Missouri Plan.<sup>94</sup> All of these efforts failed to alter Michigan's selection system in any substantive way. Additional efforts in the 1980s and 1990s similarly brought no change to Michigan's judicial electoral system,<sup>95</sup> though endeavors by reform advocates would continue.

An interesting event occurred in 1972 when state Court of Appeals Judge Charles Levin formed his own political party, was nominated at its only state convention, ran in the non-partisan general election, and won a seat on the Supreme Court. The law in Michigan provided that a candidate for the Supreme Court must be nominated by a political party. Levin, a Democrat, was passed over by his party. Consequently, Levin formed his own party: "The Nonpartisan Judicial Party, or NJP, was conceived by Judge Levin for one purpose and only one purpose: to permit Charles Levin to run for a seat on the Michigan supreme court."<sup>96</sup> Another Court of Appeals Judge with aspirations for the Supreme Court, Vincent Brennan, was similarly scorned by the Democratic party; consequently, he formed his own Independent Judiciary Party and ran in the 1972 election for Supreme Court. As both Levin and Brennan followed all constitutional and statutory rules, their candidacies were proper.

Neither Levin nor Brennan were content with Michigan's hybrid selection system. For instance, in his acceptance speech at his Independent Judiciary Party's nominating convention, Brennan stated: "Maybe

this maverick, rebel approach or ours will influence the legislators to adopt some other means of electing Justices."<sup>97</sup> Moreover, before forming his own party Levin filed a suit in federal court, claiming the partisan nomination requirement in Michigan was unconstitutional; but, his case was dismissed as moot since it was still pending after he won the 1972 election.<sup>98</sup> Justice Levin served on the Michigan Supreme Court until he retired in 1997.

One substantive change was made to the election law in Michigan. In 1988, the state passed a law permitting candidates to bypass the partisan affiliation requirement by filing a qualifying petition. While this provision pertained to nearly every elective office in the state, it specifically applied to the Supreme Court.<sup>99</sup> Accordingly, a candidate for Supreme Court no longer needed to garner a nomination from a political party, as she or he could qualify as a candidate without the affiliation of a political party by acquiring a requisite number of signatures. Nomination by petition has proven a significant means of achieving a place on the ballot, though electoral success has proven more difficult. In fact, since the law became effective at least one candidate in every general election has attained the ballot by petition; yet, only Justice Levin won a seat on the Supreme Court via this procedure.

### **Twenty-First Century Justice: Time for a Change in Michigan?**

In 2003 the ABA published *Justice in Jeopardy*<sup>100</sup> which, among other things, advocated for a Missouri Plan. And, the AJS recently issued its own study once again urging adoption of this form of selection and retention.<sup>101</sup> Moreover, since her retirement from the U.S. Supreme Court Justice Sandra Day O'Connor has fought tirelessly to eliminate judicial elections in favor of the Missouri Plan.<sup>102</sup>

These efforts and ideas have found their way into Michigan, at least in part. In particular, in 2010 the Michigan Judicial Task Force set out with

a mission to study the state's selection system and submit recommendations for appropriate changes. Funded by the Michigan State Bar Foundation with no public funds, the Task Force was designed to be independent and bi-partisan in nature. The co-chairs of the Task Force were Michigan Supreme Court Justice Marilyn Kelly and federal appeals court Judge James L. Ryan. Justice O'Connor served as the Task Force's Honorary Chair.

In April 2012 the Task Force released its report.<sup>103</sup> While it may have been presumed that with Justice O'Connor on board the Task Force would be stacked in favor of a Missouri Plan in Michigan, that did not occur. In fact, the Task Force's first recommendation concerned disclosure of financial sources behind campaign ads. "If corporations, unions, trade groups, political parties, or private persons wish to fund advertisements, they are free to do so. But they should inform the public of their true identity so that voters can weigh the message in context."<sup>104</sup>

As for judicial selection, the Task Force recommended that Michigan end its hybrid system that includes both partisan and non-partisan aspects. Specifically, it proposed voiding the role of political party conventions in the nomination process and instead replacing it with an open, non-partisan primary election. Since the nomination process is dictated by statute, this change could be brought about simply by legislative action, not constitutional amendment. Moreover, under the Task Force's recommendations the process of non-partisan general elections would continue.<sup>105</sup>

While the Task Force did not recommend adopting a Missouri Plan, it did suggest that the governor name a screening committee to advise on the merits of potential interim appointees. As the governor has ultimate authority to make interim appointments, the process of an advisory screening committee would be entirely voluntary. Still, the Task Force stated that it believed the "best method of selecting supreme court

justices is by bipartisan judicial nominating commission."<sup>106</sup> While it hoped Michigan would adopt such a system, it acknowledged the difficulty of amending the Constitution. Thus, the non-partisan open primary would be a short-term solution easily remedied by legislative action, while the Task Force considered a Missouri Plan to be a long-term solution it hoped for the future.

Finally, the Task Force recommended ending the mandatory retirement age of 70 while suggesting that the Secretary of State's office enable circulation of educational guides for voters. In summing up the work of the Task Force, one of its members stated after release of the study:

Judge Ryan and Justice Kelly occupy entirely different places on the ideological spectrum. They worked to populate the panel they co-chaired with a passel of community leaders defined by their partisan and professional diversity. The eclectic task force has spoken in a single voice, one reflecting a shared belief that Michigan's system of electing justices must be reformed. . . . In the end the task force issued a report from which no member dissented. The report is a blueprint for better judicial elections.<sup>107</sup>

The Task Force's Report has garnered much publicity, certainly more than the boilerplate proposals continually recommended by the State Bar Association or reform groups. Perhaps this is because there are quite a few heavy hitters on the Task Force. Whatever the reason, the Task Force issued an ambitious report. Yet, as it did not recommend scrapping the electoral system, the Report did not go as far as those favored in the past by reformers. Will the legislature address the recommendations made by the Task Force, particularly with respect to an open, non-partisan primary and disclosure of campaign spending? Will the current governor (or any governor in the future) voluntarily create and use a panel to screen interim appointments? As this study illustrates, much inertia has hindered wholesale change of Michigan's judicial

selection system. Time will tell if the recommendations made by the Task Force will fail in a manner that has plagued prior recommendations such as those made by the State Bar, the ABA or AJS, or whether this time change is in the air.

### Conclusion: Implications of Michigan's Hybrid Selection System

No other state selects judges in the way Michigan does for its Supreme Court, and it seems unlikely the state will change its approach in the near future, the recommendations of the Task Force notwithstanding. In this regard, reformers such as the ABA and AJS continue to push for a Missouri Plan. Yet Michigan seems not at all interested in adopting an appointive system of any kind, as judicial elections are deep-rooted in the state. And, it should be no surprise that the major political parties support the current elective system which includes partisan elements at the nomination stage.<sup>108</sup>

While Michigan's system for selecting its Supreme Court judges is unique, by no means does that make its selection system irrelevant. To the contrary, the Michigan selection system fits within the debate over judicial elections in the states. An initial question concerns whether Michigan is a non-partisan or partisan electoral system. Some empirical studies, including those by one of the authors of this study, code Michigan as a non-partisan selection system.<sup>109</sup> Yet, others deem Michigan to be a partisan system. In this regard, in their book review of *In Defense of Judicial Elections*,<sup>110</sup> Bert Brandenburg (of Justice at Stake) and Rachel Paine Caufield (of the AJS) were clear to point out what they considered to be a fatal flaw in the coding of Michigan as a non-partisan system.<sup>111</sup> That Michigan is difficult to code because of its hybrid nature makes it a particularly important state to consider with respect to its judicial elections, whether the study includes empirical or normative implications.

Moreover, that Michigan was among the first states to attempt a nomination by commission system

early on in the 1930s, yet failed in its attempt to do so, also makes its selection system important within the debate on appointments versus elections. In this regard, as the keynote speaker at Wayne State University Law School in February 2010, Justice O'Connor labeled Michigan a state that would do well to change its electoral system to an appointive system with nomination by commission, in order to bring about a more independent judiciary not encumbered by the effects of campaign spending.<sup>112</sup> While Justice O'Connor has waged a campaign to rid the states of their electoral systems, she seems particularly critical of the hybrid system employed in selecting justices to the Michigan Supreme Court. We can speculate that these issues were her motivation to serve as honorary chair of the Task Force.

We make no normative or subjective judgments concerning which judicial selection system is best or even relatively better than any other. As stated, there are numerous voices, both scholarly and otherwise, that fill such a role. What we do instead is focus on the specific and unique case of Michigan's electoral system over the course of the state's history. The accounts behind the manner in which Michigan selects its Supreme Court justices provide a glimpse into the political forces among political and legal elites, interest groups, and the electorate that have shaped judicial politics within the state. We believe that when scholars, lawyers, and others discuss the various merits and debates over the disparate judicial selection methods, it is imperative to include Michigan's unique hybrid system in the mix. ★

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1. Barnes, *Ruth Bader Ginsburg Says She Would Forbid State Judicial Elections*, The Washington Post, March 12, 2010.

2. Bonneau and Hall, *IN DEFENSE OF JUDICIAL ELECTIONS* (New York: Routledge, 2009).

3. See American Bar Association Commission on the 21st Century Judiciary. JUSTICE IN JEOPARDY (Chicago: American Bar Association, 2003); Bonneau and Hall, *supra* n. 2; Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making*, STATE POL. & POLICY Q., 7: 281-97 (2007); Geyh, *Why Judicial Elections Stink*, OHIO STATE L. J. 64: 43-79 (2003); Gibson, *'New-Style' Judicial Campaigns and the Legitimacy of State High Courts*, J. OF POL., 71: 1285-1304 (2009); Sample, Jones, and Weiss. THE NEW POLITICS OF JUDICIAL ELECTIONS (Washington, DC: Justice at Stake, 2007). Of course, much has been written on the efficacy and influence of judicial elections and alternative forms of judicial selection for some time now, see Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges -- Reconsidered*, L. & SOCIETY REV. 6: 579-93 (1972); Cavanagh, *The Judiciary Re-Examined: How Do They Get There?*, U. OF DETROIT L. J. 16: 180-85 (1952-53); Dubois, *The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California*, JUSTICE SYS. J. 8: 59-87 (1983); Elliott, *Judicial Selection and Tenure*, WAYNE L. REV. 3: 175-86 (1957); Glick and Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, JUDICATURE 70: 228-35 (1987); Hannah, *Competition in Michigan's Judicial Elections: Democratic Ideals vs. Judicial Realities*, WAYNE L. REV. 24: 1267-1306 (1978); Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, J. OF PUBLIC L., 13: 104-19 (1964); Kaminsky, *Judicial Selection: Alternatives to the Status Quo in the Selection of State Court Judges*, ST. JOHN'S L. REV. 48: 496-524 (1974); Wierzbicki, *Selecting Michigan's Supreme Court Justices: Enough of Partisan and Non-Partisan Elections?* DETROIT COLLEGE OF L. REV. 3: 731-56 (1984).
4. 536 U.S. 765 (2002).
5. 558 U.S. 310 (2010).
6. Glick and Vines, STATE COURT SYSTEMS (Englewood Cliffs, NJ: Prentice-Hall, 1973).
7. Nomenclature is not a trivial issue when it comes to characterizing judicial selection systems. For instance, judicial advocacy groups such as the American Bar Association (ABA) and American Judicature Society (AJS) refer to the "merit" system as the selection method with nomination by commission at its core (ABA, *supra* n. 3; Caufield, *Inside Merit Selection: A National Survey of Judicial Nominating Commissioners*, AMERICAN JUDICATURE SOCIETY (2012)). Though these two groups differ on minor details, they each claim this selection method chooses the best judges while taking politics out of the process to the extent possible; in other words, judges are selected based on merit. Others, whether or not they support this method of selection, refer to this system as the "Missouri Plan," the state credited with being the first to adopt this selection method. Still yet, in *Committee for Constitutional Reform v. Sec'y of State of Michigan*, 389 N.W.2d 430 (MI 1986), the Michigan Supreme Court called this system the "ABA Plan" due to its advocacy of this method, while the "AJS Plan" also is employed to describe this system (see Cavanagh *supra* n. 3). We will generally refer to this system as the Missouri Plan, the term often used by scholars, though we also make reference to "merit" or the AJS/ABA plan.
8. Berkson, *Judicial Selection in the United States: A Special Report*, JUDICATURE 64: 176-93 (1980); Hannah, *supra* n. 3.
9. Glick and Vines, *supra* n. 6; see also Esterling and Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, in RESEARCH ON JUDICIAL SELECTION (Chicago: American Judicature Society, 1-32, 1999); Hurwitz, *Selection System, Diversity and the Michigan Supreme Court*, 56: 691-704 (2010).
10. See, e.g., ABA, *supra* n. 3; Bonneau and Hall, *supra* n. 2; Caufield, *supra* n. 7; Hannah, *supra* n. 3; Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, FLORIDA ST. UNIV. L. REV. 23: 1-40 (1995); Wierzbicki, *supra* n. 3.
11. Mich. Const. Art. VI, § 2 (1963).
12. Baum, AMERICAN COURTS: PROCESS AND POLICY (6TH ED), (Boston: Houghton Mifflin Company, 2008).
13. Mich. Comp. Laws § 168.392.
14. Easter, *Tipping the Scales: Organizations in State Supreme Court Elections*, MIDWEST POL. SCI. ASSOC. (Chicago, 2011); Hurwitz, *supra* n. 9.
15. According to the AJS, in 1940 Missouri became the first state to enact this selection system utilizing nomination by commission when its voters approved "The Nonpartisan Selection of Judges Court Plan" (Caufield, *supra* n. 7; see also DETROIT BAR Q. 1941, 16). Missouri's adoption followed rejection of this system at the polls in Michigan and Ohio in 1938. Moreover, while California's Proposition No. 3, which passed in 1934, instituted a selection system with nomination by commission, it "would not be the precise 'merit' model for other states in the twentieth century, because the California governor was the first mover in the nomination process, not the professional panel" (Shugerman THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (Cambridge: Harvard University Press, 2012, at 192).
16. Mich. Const. Art. VI, § 2 (1835).
17. Mich. Const. Art. VI, § 2 (1850).
18. Hannah, *supra* n. 3, at 1271; see also Aldrich, WHY PARTIES? A SECOND LOOK (Chicago: University of Chicago Press, 2011).
19. Noto, *A Brief History of the Michigan Supreme Court*, MICHIGAN SUPREME COURT HISTORICAL SOCIETY (2001).
20. Mich. Const. Art. VII, § 20 (1908).
21. Mich. Const. Art. VII, § 2 (1908). Various statutory enactments throughout the late 1800s and early 1900s also provided for the number of justices on the Supreme Court (Howe, *The Selection of a Chief Justice*, MICHIGAN STATE BAR J., 32: 20-27, 1953).
22. Howe, *supra* n. 21.
23. Hannah, *supra* n. 3.
24. Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, THE AM. LAWYER, 14(10): 445-51 (1906).
25. Pound was not alone among his contemporaries in discussing reasons for public discontent with courts, see, Kent, *Dissatisfaction with our Judges*, MICHIGAN L. REV. 11: 452-59 (1912-13). But, Pound was the most prominent and influential, see Geyh, *supra* n. 3; Joiner, *The Michigan Constitution and the Judiciary*, MICHIGAN CONSTITUTIONAL CONVENTION STUDIES (1961).
26. Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, JUDICATURE 74: 128-32 (1990); Shugerman, *supra* n. 15.
27. Krivosha, *supra* n. 26, at 129.
28. Hurwitz, *Judge Lopez Torres and New York's Trial Judge Nominating Process*, JUSTICE SYS. J. 28: 243-46, at 243 (2007).
29. Krivosha, *supra* n. 26. Taft would soon be the beneficiary of an appointive system when he was nominated by President Warren G. Harding as Chief Justice. After the Senate confirmed his nomination on the same day he was appointed in 1921, Taft, who also had previously served in the federal government as Solicitor General and federal appeals court judge, became the only person ever to serve as president and on the U.S. Supreme Court, see Hurwitz and Lanier, *Judicial Diversity in Federal Courts: An Historical and Empirical Exploration*, JUDICATURE, 96: 76-83, 2012).
30. Hall, *The Selection, Tenure, and Retirement of Judges*, J. OF THE AMERICAN JUDICATURE SOC. 3: 37-51 (1919).
31. Carson and Kleinerman. *A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan*, PUBLIC CHOICE 113: 301-24 (2002).
32. Caldeira, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan*, AM. POL. SCI. REV. 81: 1139-53 (1987).
33. AM. BAR ASSOC. J. (1931, at 400).
34. Krivosha, *supra* n. 26.
35. AM. BAR ASSOC. J. (1934, at 529).
36. *Id.*; see also McNutt, *The Elective Method of Judicial Selection and Proposed Remedies*, AM. BAR ASSOC. J., 20: 636-39 (1934).
37. The term "merit" was not initially used to depict this system. "Civil service reform had been called the 'merit system' since the 1910s, but the movement for professional judicial selection did not adopt the label 'the merit plan' until 1958 . . . [when] the Nebraska Bar Association introduced the name 'merit plan' interchangeably with 'the Missouri plan' and 'the ABA plan'" (Shugerman, *supra* n. 15, at 216-17; see Martin, *A Message from the President*, NEBRASKA STATE BAR J., 7: 5-6 (1958).
38. There are many varieties of merit systems. While the AJS currently advocates for nomination by commission followed by retention elections (Caufield, *supra* n. 7), the ABA presently supports nomination by commission and term limits (ABA., *supra* n. 3). Thus, while some features of the AJS and ABA plans differ, the critical component to this selection system is gubernatorial appointment based on nomination by commission (Hurwitz and Lanier, *Women and Minorities on State and Federal Benches, 1985 and 1999*, JUDICATURE 85: 84-92 (2001); Tendler, *The Missouri Plan . . . How It Works!*, MICHIGAN STATE BAR J. 30: 28-33 (1951)), a point about which these groups clearly agree.
39. MICHIGAN STATE BAR J. (1932-33, at 39).
40. Brand, *Michigan State Bar's Work for Judicial Appointment*, J. OF THE AM. JUDICATURE SOCIETY 22: 199-202 (1938).
41. MICHIGAN STATE BAR J. (1933, at 19).
42. MICHIGAN STATE BAR J., *supra* n. 39.
43. MICHIGAN STATE BAR J., *supra* n. 39 (at 54).
44. Detroit News, February 7, 1933.
45. *Id.*
46. DETROIT BAR Q. (March 1933).
47. MICHIGAN BAR ASSOC. MINUTES (September 26, 1934, at 57).
48. J. OF THE AM. JUDICATURE SOCIETY (1934, at 168).
49. Brand, *supra* n. 40.
50. DETROIT BAR Q. (July 1935, at 19).
51. Michigan Farm News, November 3, 1934. Opposition was not universal among farm groups in the state, as *The Michigan Farmer* encouraged its subscribers to vote in favor of the judicial amendment, believing it would begin to remove politics from the courts (Michigan Farmer, October 27, 1934).
52. Brand, *supra* n. 40.
53. *Id.*
54. *Id.*
55. NAT. LAWYERS GUILD Q. (1937-1938, at 321).
56. J. OF THE AM. JUDICATURE SOCIETY (1937-38, at 33).
57. Brand, *supra* n. 40.
58. DETROIT BAR ASSOC., *Minutes of the Board of Directors* (December 8, 1937).
59. Brand, *supra* n. 40.
60. *Id.*
61. AM. BAR ASSOC. J., (1938, at 960, 961).
62. Shugerman, *supra* n. 15, at 187).
63. NAT. LAWYERS GUILD Q., *supra* n. 55 (at 323). Similar observations have been made about Michigan's selection system over time: "The one clear theme that runs through the record of the debate on [the constitutional

provision for electing judges] is the idea that justices should be chosen by the electors, rather than appointed.” (MICHIGAN STATE BAR J., 2001, at 15).

64. Hannah, *supra* n. 3; MICHIGAN STATE BAR J. (2001).

65. MICHIGAN STATE BAR J. (1939, at 137).

66. Abramson, Aldrich, and Rohde, *CHANGE AND CONTINUITY IN THE 2008 AND 2010 ELECTIONS* (Washington, DC: CQ Press, 2011).

67. Danhof, *Shaping the Judiciary: A Framer Traces the Constitutional Origins of Selecting Michigan’s Supreme Court Justices*, MICHIGAN BAR J., 80: 15-19 (2001).

68. Mich. Const. Art. VII, § 23 (1908).

69. *Soutar v. St. Clair County Election Comm’n*, 54 N.W.2d 425 (MI 1952).

70. *Committee for Constitutional Reform v. Sec’y of State of Michigan*, *supra* n. 7 (at 433-34), quoting Mich. Const. Art. VII, § 23 (1908).

71. *Committee for Constitutional Reform*, *supra* n. 7, at 434.

72. Hannah, *supra* n. 3, at 1271.

73. Kelman, *Ballot Designations: Their Nature, Function and Constitutionality*, WAYNE L. REV., 12: 756-79 (1966); see also *Burdick v. Hare*, 130 N.W.2d 380 (MI 1964).

74. In this regard, neither the ABA nor AJS officially reported on Michigan’s 1939 electoral reform.

75. *Committee for Constitutional Reform*, *supra* n. 7, at 434-35.

76. Mich. Comp. Laws §168.392 (1963); note that this is the wording and codification of the current statute which was amended in 1963 to coincide with the move of judicial elections from the spring to fall election cycle in the 1963 Constitution.

77. MICHIGAN STATE BAR J. (1944).

78. MICHIGAN STATE BAR J. (1950).

79. MICHIGAN STATE BAR J. (1951); see also Memorandum On The Selection of Judges (1973; Typescript on file with Author).

80. Quinn, *A New Method of Judicial Selection: The Positive Argument*, MICHIGAN STATE BAR J., 32: 30-41 (1953); Beattie, *A New Method of Judicial Selection: The Negative Argument*, MICHIGAN STATE BAR J., 32: 31-44 (1953).

81. The state’s initiative on re-apportioning the legislature at the Constitutional Convention was made prior to the U.S. Supreme Court’s seminal *Baker v. Carr* (369 U.S. 186, 1962) decision, which was issued after the Constitutional Convention had completed its business (Danhof, *supra* n. 67).

82. Danhof, *supra* n. 67.

83. MICHIGAN STATE BAR J. (1962).

84. Donnelly, *An Analysis of Proposed Article VI and the State Bar Poll*, MICHIGAN STATE BAR J. 41: 41-47 (1962).

85. *Committee for Constitutional Reform*, *supra* n. 7.

86. Danhof, *supra* n. 67; Donnelly, *supra* n. 84; Sedler, *The Selection of Judges in Michigan: The Constitutional Perspective*, WAYNE L. REV. 56: 667-73 (2010).

87. Mich. Const. Art. VI, § 2 (1963).

88. See Mich. Comp. Laws §168.392 (1963).

89. *Committee for Constitutional Reform*, *supra* n. 7 (at 441).

90. Donnelly, *supra* n. 84.

91. In this regard, the statutory counterpart to §2 codifies this provision: “Any incumbent justice of the supreme court may become a candidate for re-election as a justice of the supreme court by filing with the secretary of state an affidavit of candidacy not less than 180 days prior to the expiration of his term of office.” Mich. Comp. Laws §168.392a (1963).

92. Mich. Const. Art. VI, § 23 (1963); see Hannah, *supra* n. 3.

93. Mich. Const. Art. VI, § 19 (1963).

94. MICHIGAN STATE BAR J. (1972; 1974; 1976; 1977).

95. See Nichols, *Election vs Appointment: Time for a Change*, MICHIGAN STATE BAR J., 60: 761-62 (1981); Reed, *Judicial Selection in Michigan: Time for a Change?*, MICHIGAN STATE BAR J., 75: 900-03 (1996).

96. Kelman, *A Tale of Two Parties*, WAYNE L. REV., 12: 253-59, at 259 (1973).

97. *Id.*

98. *Levin v. Apol*, Civil No. 38592 (E.D.M.I 1972).

99. Mich. Comp. Laws §168.590(2) (1988); see generally Mich. Comp. Laws §168.590a-h.

100. ABA, *supra* n. 3.

101. Caufield, *supra* n. 7.

102. O’Connor, *Options For An Independent Judiciary In Michigan*, WAYNE L. REV., 56: 579-81 (2010).

103. Michigan Judicial Task Force, *Report and Recommendations* (2012), available at: <http://sbmblog.typepad.com/files/jstfreport.pdf>

104. *Id.* at 1.

105. *Id.* at 9.

106. *Id.* at 11.

107. Doctoroff, *A Blueprint to Better Judicial Elections*, The Detroit News, May 8, 2012.

108. MICHIGAN STATE BAR J. (1977).

109. See, e.g., Bonneau and Hall, *supra* n. 2; Hurwitz and Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, STATE POL. AND POLICY Q. 3: 329-52 (2003).

110. Bonneau and Hall, *supra* n. 2

111. Brandenburg and Caufield, *Ardent Advocates*, JUDICATURE 93: 79-81 (2009); Shugerman (2012, 253) seems to agree: “Michigan [has] formally ‘nonpartisan’ judicial elections, but the campaigns are in fact as partisan, expensive, and aggressive as the partisan elections, if not more so.”

112. O’Connor, *supra* n. 102.

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