An Historical Vignette on Michigan's Judicial Election System
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Introduction

Thank you for the warm and charitable introduction. I want to thank President Wallace Riley and the Michigan Supreme Court Historical Society for treating me so graciously. You have made my trip from Kalamazoo well worth it. It is truly a privilege and an honor to speak here today, particularly considering all the esteemed speakers who have preceded me.

My topic today concerns the history of the judicial selection system for the Michigan Supreme Court. I have come to know and understand the judicial selection system in Michigan quite well in the past few years, in large part due to a generous grant I received from the Society to research our State's judicial selection system. Based on this grant I was able to research numerous and varied archival files. For instance, among the many items we have uncovered and examined during this research project include Michigan State Bar Journals from the 1930s, old newspaper clippings from major outlets such as the Detroit Free Press and Detroit News to more niche journalistic outlets such as the Michigan Farm News, and electoral results from years past. Frankly, without the grant from the Society for this research, it is likely that these materials never would have seen the light of day. Research grants from groups like the Society are invaluable and essential to the pursuit of knowledge, not just for the sake of academics but for practical purposes as well. In this regard, research for my article in the current issue of the *Wayne Law Review* was made possible in part by the grant I received from the Society (Hurwitz 2011). For all of these reasons I thank the Society for its generosity and foresight with respect to this grant.

Before I talk about some of the research we uncovered, I want to make a comparison. Prior to my current position as a university professor, I practiced law in New York City. Anyone familiar with the New York judicial system knows that it is among the most complicated and archaic in the country. For starters, New York's court of last resort is known as the Court of Appeals, while its trial court of general jurisdiction is known as the Supreme Court. Those of you who have seen the classic movie "Miracle on 34th Street" (the original version from 1947) already know that the Supreme Court is New York's trial court, when the judge unequivocally declares, with some relief: "Since the United States government declares this man to be Santa Claus, the Supreme Court of New York will not dispute it." For those who have never seen this movie, my apologies for giving away the ending.

Beyond the odd manner of the names of the various courts in New York, there also are different selection systems for disparate levels of court, while there are seemingly dissimilar judicial systems within the State, depending upon whether the court is located in urban, suburban, or rural areas. To say that New York's judicial system is quirky is an understatement.

After practicing law, I received my PhD in political science from Michigan State University – yes, I bleed Spartan green and white. Upon arriving in East Lansing, at first blush it seemed to me that the judicial system here was much more logical than the convoluted system in New York. For starters, at least the court of last resort in Michigan was referred to as the Supreme Court. Upon closer inspection, however, I came to learn that the selection system by which Michigan Supreme Court justices reach the bench is quirky in its own right.

As you know, Michigan utilizes non-partisan elections as the formal selection system for its Supreme Court. In this selection system judicial candidates' names appear on the general

election ballot with no partisan identifiers. However, prior to the general election, judicial candidates initially reach the general election ballot after being nominated at political party conventions, as partisan an institution as can exist. Michigan's selection system for the Supreme Court is a hybrid, one that combines both partisan and non-partisan elements. As a result, Michigan is entirely unique, as no other state in the country has a selection system precisely like that which exists in Michigan.

The question I have been interested in and have been researching based on the grant I received from the Society is, how did Michigan come to embrace its entirely unique system of non-partisan judicial elections with a partisan twist? That is the subject to which I now turn.

Michigan's Judicial Selection System Over Time

When political scientists study judicial selection systems, we code the various systems into five general categories. First, there is gubernatorial appointment, usually with confirmation by the state senate. This is the state analogy to the system by which federal Article III judges reach the bench. Next, a few states employ legislative selection, whereby the state legislature votes for the members of its judiciary. Third, there are partisan elections, and fourth, non-partisan elections. The difference between these electoral systems concerns whether candidates are identified by party labels on the general election ballot. And finally, there is the selection system that advocates call the merit system, also referred to as the Missouri Plan, whereby a commission nominates a few potential jurists to the governor, from which he or she appoints one for that particular judicial post; then, after a period of time the judge runs in a retention election, whereby the electorate simply decides whether or not to retain the judge on the bench.

As you can imagine, there is a myriad of variation to these general categories of judicial selection. For instance, in a typical non-partisan electoral system, judicial candidates reach the general election ballot by getting through a non-partisan primary election. In this regard, Michigan is not typical. In its non-partisan selection system, Michigan does not utilize a non-partisan primary but instead chooses its candidates in party conventions. As laboratories of experimentation, it is the choice of each state's policy makers to determine the selection system for its judges. Clearly, Michigan appears more experimental than any other state when it comes to its non-partisan judicial selection system. But, from an historical perspective it was not always this way.

When Michigan became the 26th State in 1837, the official selection method for Supreme Court justices in the newly minted state Constitution was gubernatorial appointment, with consent of the state senate. "While selecting justices at the top of the hierarchy . . . followed the U.S. Constitution . . . lower court circuit and probate judges initially reached the bench by election. Yet, by 1850 the Constitution had changed to provide that all judicial officers reached the bench by partisan election" (Wheat and Hurwitz 2010).

"This arrangement of partisan judicial elections, with the Governor filling interim vacancies, continued into the twentieth century, though attacks on this system, often prompted by the Progressive Movement and court reformers, began to take hold" (Wheat and Hurwitz). By the 1930s, groups such as the American Judicature Society were lobbying Michigan and other states to abandon the "bare-knuckled" politics inherent in partisan elections (Hurwitz 2007). As a consequence, at the behest of the Michigan Bar Association two ballot initiatives to amend the state Constitution were presented to Michigan voters. The first in 1934 would have changed

Michigan's partisan elections to traditional non-partisan elections, and where the governor would fill vacancies with interim appointments subject to approval by a commission. The second in 1938 would have implemented the classic merit system in Michigan as advocated by the American Judicature Society. Both ballot initiatives failed.

Interestingly, "had that 1938 voter initiative passed, perhaps the Missouri Plan would be referred to instead as the Michigan Plan, since this initiative in Michigan took place prior to Missouri's adoption of this selection system" (Hurwitz 2011). Moreover, how long we will be able to refer to the merit system as the Missouri Plan is unclear. For those following news on judicial selection, bills have been introduced into the Missouri legislature that seek to modify the selection system that goes by its own name.

Back to Michigan. After the second loss at the ballot in 1938, where the proposed merit system was opposed by about 60 percent of the voters, advocates of ending Michigan's partisan elections realized that various versions of judicial nomination by commission would not become a constitutional reality any time soon. It was then that "the current hybrid system of selecting judges came into play. First in late 1938, the Michigan Legislature directed removal of party designations from judicial ballots. Then in 1939, a successful initiative petition amended the Michigan Constitution and established a non-partisan election system, though the partisan institution of nominating candidates for the Supreme Court remained in effect. The changes leading to this hybrid system almost seemed anti-climactic, after the steam from the prior efforts at reform had escaped. In fact, the initiative to bring about the partisan/non-partisan system passed rather easily, as it seems the state favored some form of election, even if non-partisan, though some remnants of the old partisan system remained" (Wheat and Hurwitz).

The judicial selection system enacted in 1939 remains largely intact through the present day. In fact, Michigan's hybrid system of selecting justices survived the Constitutional Convention of the early 1960s, where tremendous changes were made to numerous aspects of the Michigan Constitution. But, save for a few relatively minor changes to the Supreme Court during the Constitutional Convention, Michigan's hybrid selection system has not been significantly altered for over 70 years.

The Battle over Judicial Selection in Michigan

As this historical perspective of Michigan's judicial selection system implies, battles over what may be the best or most appropriate selection system are nothing new. During the 1930s, numerous groups aligned both in favor of and against the ballot initiatives that sought to change Michigan's electoral system. In addition to national groups such as the American Judicature Society and the American Bar Association, local bar associations throughout the state, as well as many newspapers in the state, began to support judicial nomination by commission. But, opposition was fierce. For instance, the Michigan Farm Bureau opposed the 1934 proposal to change Michigan's judicial selection system, in part because other proposed changes to the Constitution affecting farm interests also were on the ballot. The Farm Bureau joined with other non-farm organizations in the state to form a coalition of minorities, all of which encouraged their supporters to vote "no" on all the proposed amendments. Similarly, in 1938 various unions and a coalition of teachers and educators opposed that proposed constitutional amendment. In each case these voter initiatives were defeated at the ballot box.

Another issue apparent in these electoral battles concerned the divide between Detroit and the rest of the state. In both ballot initiatives in the 1930s, support for the proposed constitutional

amendments was far greater in the Detroit area than in the rest of the state. In fact, the 1934 referendum carried in Wayne County but was strongly opposed, and ultimately defeated, by rural voters far from Detroit.

Do the battles from the 1930s have any application to the present? In many ways, yes. Efforts to change Michigan's hybrid selection system continue to be made. In fact, nearly every decade since the current system was implemented has seen proposals to bring about some version of the Missouri Plan or otherwise to change Michigan's selection system. The past decade in particular has been active, as judicial reformers have gained traction in their determination to end judicial elections in the United States. Perhaps this renewed interest is traceable to the public campaign of U.S. Supreme Court Justice Sandra Day O'Connor in favor of the Missouri Plan. In fact, at her appearance before the Wayne State University Law School a year ago, Justice O'Connor made a strong plea that Michigan end its hybrid judicial election system (O'Connor 2011). Whatever the reason for the recent emphasis on the Missouri Plan, while no official legislative proposals to change Michigan's judicial selection system have yet been made or succeeded, there currently is a great deal of action in other states on potential changes to their respective judicial selective systems. In this regard, we eagerly await any proposed changes to be recommended by the panel currently revisiting judicial selection in Michigan. It will be interesting to follow what happens in Michigan and the rest of the country, as numerous changes in judicial selection are potentially on the horizon.

Conclusion

"While Michigan's system for selecting its Supreme Court justices is unique in the country, by no means does that make the state's selection system irrelevant. . . Michigan's hybrid

system makes it a particularly important state to consider with respect to its judicial elections. . . In [my research] I make no normative or subjective judgments concerning which selection system is best or even relatively better than any other. What I do instead is focus on the specific and unique case of Michigan's electoral system. The history behind the manner in which Michigan selects its Supreme Court justices provides a glimpse into the political forces among political elites, interest groups, and the general electorate that have helped to shape judicial politics within the state. I believe that when scholars [particularly political scientists who are currently much more active in studying judicial selection systems than law school scholars] and others discuss the various merits and debates over judicial selection methods, it is imperative to include Michigan's hybrid system in the mix" (Wheat and Hurwitz). By doing so we all will learn more about Michigan's history and its future when it comes to judicial selection.

Once again, I thank you for the opportunity to speak with you today.

References

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Biography

Mark S. Hurwitz is an Associate Professor of Political Science at Western Michigan University. He also is the Associate Editor and Legal Notes Editor of *Justice System Journal*. He received a grant from the Michigan Supreme Court Historical Society to study the history of the Michigan Supreme Court selection system, research which led in part to his article that was published in *Wayne Law Review*. He also has published his research in *American Political Science Review, Law & Policy, Mercer Law Review, Political Research Quarterly,* and *State Politics & Policy Quarterly*, among others. He received his PhD and MA degrees in political science from Michigan State University, and his JD degree from Brooklyn Law School. He resides in Portage with his wife Sheralee, who practices law at Foster Swift Collins & Smith PC in Grand Rapids, and their three children. The author thanks the Michigan Supreme Court Historical Society for the grant to research the Michigan Supreme Court selection system and Elizabeth Wheat for her able research assistance on the grant.