

Michigan Supreme Court Justices Should Be Elected by the People in Partisan Elections

By Andrew Tierman

One longstanding problem in the election of justices has been the personal burden of campaigning without the support of a standing political organization. The self-advocacy and personal fund-raising required by a nonpartisan judicial campaign raises questions of propriety, especially because other members of the bar are the most likely source of support. Permitting candidates to receive the open backing of a political party would displace the burden of election campaigns from individuals to organizations dedicated to working for candidates on the basis of political philosophy, which in turn operates as the focus of appeal to the electorate.

As for airing the question how individual cases may be decided in a political campaign, any method of selecting judges entails this specter. Open party affiliation does not in itself sanction discussion of hypothetical cases. In the case of federal judicial appointments, the political inclinations of a candidate provide a fair basis for predicting general perspective and construction of reasoning on important issues. Judges and justices are regularly appointed by executive prerogative, partly on the basis of such perspective. The public ought to have similar information when electing state supreme court justices.

Political parties are voluntary associations providing opportunities for public participation in the democratic process, incorporating advances in social consciousness, and mobilizing citizens' desires to act beyond the narrow sphere of private existence for the greater society, by advancing the cause of leadership by competent individuals selected on bases of personal and political appeal. Partisan elec-

tions would resolve the problems plaguing supreme court campaigns and retain the direct representation of the will of the people in all three branches of state government. Furthermore, partisan elections would bring the supreme court into correspondence with the political reality of public awareness of issues respecting judicial selection and decision making. The myth of political nonaffiliation of justices has become dysfunctional and obsolete.

Party affiliation helps voters determine where candidates stand

In Judge Danhof's informative article in the May 2001 *Michigan Bar Journal*, he argues that the popular election of diverse and numerous public officers is gratuitous because "people have no idea what they are doing when they go to vote" on such a ballot, and continues:

Take, for example, the University of Michigan Regents and MSU Board of Trustees [and the WSU Board of Governors, it should be added]. The voters have no idea who is running. All the other university boards, such as Western, Eastern, Central, are appointed by the governor and they function very well. Why are people electing regents? Two reasons: it was historical and there was no agitation to change.

I respectfully disagree. First, it is a responsibility of the press to provide impartial information on the candidates. In past years,

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the Michigan League of Women Voters did an outstanding job publishing information on statewide candidates, including the boards for three of Michigan's major universities. Such information is necessary to preserve the integrity of the democratic process. Second, while the candidates may be unfamiliar, as in the case of the university boards, their party affiliation conveys substantive information for making a decision. Party affiliation strongly suggests which side will be taken on certain issues of policy and how a candidate's decisions are likely to articulate with policies debated in the legislature or promoted by the governor.

Election of the university boards provides an opportunity for voters to voice their agreement or disagreement with different political philosophies. The boards affect labor practices, affirmative action, academic and intellectual freedom, educational opportunity, and other policies in which universities play a substantial if not leading role. These are matters that candidates bear divergent opinions on. They are issues on which political affiliation and concomitant political philosophy can indicate distinct grounds for decision making. These are concerns properly decided by the votes of citizens who care about the society beyond their individual, daily lives.

Unfortunately, from presidential to school millage elections, over half of the electorate fails to vote. This is a more expansive issue than the one at hand. Restricting our view to the active electorate, it should be clear that party affiliation has a definitive role in state office elections for most of Michigan's voters. It is likely that party identification would secure higher levels of voting for supreme court justices, both among voters who scrupulously

refrain from marking their ballots on races about which they have insufficient information and among the electorate at large. Partisan election of Michigan's court of final appeal would provide information that voters need to make highly valued decisions, consistent with their own philosophies and perspectives—as presidents and governors do when they appoint persons to the bench.

Appointing supreme court justices would not remove “politics” from the selection process

In his article, Judge Danhof recognized that appointment does not “take politics out of the process.” “Politics” is essential for democracy to persevere: disagreements among citizens must be openly deliberated. Gubernatorial appointment of supreme court justices would not avoid politics; it would only reserve for the executive full discretion in political decisions respecting the court.

In recent history, various “litmus tests” for the U.S. Supreme Court have been issues in the appointment process. Abortion, one of the most divisive and persevering issues over the past three decades, has been an enduring issue in this process. While *Roe v Wade* inoculates the state judiciary to a substantial extent from the issue of abortion, the issue is diffused—by no small measure—because the voters of this state choose justices directly. Should the supreme court become appointed, the views and intents of the executive respecting abortion would become a chronic element of gubernatorial politics, as it is in U.S. presidential politics.

The power to appoint would make the vulnerability of *Roe v Wade* a perpetual issue. The governor could affect the state of the law, not only through appointment, but through advocacy of legislation—which would come into purview partly as a consequence of what appears feasible, given the makeup of the high court—and through enforcement. It would be naïve to assume that abortion would not become a flagrant issue in Michigan's courts, with any opening for restrictive legislation. The persistent challenges to the boundaries of the abortion issue in Congress and state legislatures nationwide and the constant vigilance of advocacy groups

suggest the alacrity with which the issue would be pursued in all branches of government, with any change in the legal environment or constitution of those branches.

That myriad other legitimate political issues would affect the appointment process was demonstrated in the 2000 election. The Michigan Supreme Court deals with the conditions of working people, regulation of business and the economy, utilities, transportation, education, welfare and social justice, civil actions and access to the courts, public health, insurance, the environment, criminal law and procedure, and other facets of the law, which, in sum, define the distribution of rights and liabilities among Michigan's citizens and institutions, public and private. While their work does not receive as much attention as does the U.S. Supreme Court, the character, wisdom, and philosophies of state supreme court justices are of great significance for the people of Michigan.

The selection of U.S. Supreme Court justices is a highly-charged political issue for the nation and one of the most poignant issues in any presidential election. The question of justices waiting until a president of their own political persuasion is in office in order to retire has become routine, with increased sophistication of American voters and increased recognition of partisanship on the court. The

visibility of aspirants to the appellate bench has increased in recent history. Some have led prominent lives in partisan politics and others' personal philosophies are evidenced by careers including state and federal appellate courts, lobbying, business leadership, and organizational administration and advocacy.

The politics of judicial appointment is highlighted by President Bush's decision to reject the advice of the nonpartisan ABA, in favor of an expressly conservative organization. The ideological steadfastness of Michigan's current governor—however viewed by the reader—could be seen as evidence that, given the power to appoint supreme court justices, the state's chief executive may likely include that process within a seamless fabric of political ideology.

In arguing for partisan election of the Michigan Supreme Court, the U.S. Supreme Court must be distinguished. Its members are appointed for life and typically serve through several administrations, during which personal growth and transformation can transcend the circumstances of appointment and the orientations of early career. Other differences include the relative ease of revising selection of the Michigan Supreme Court, compared to amending Article II of the U.S. Constitution. A preference for appointment of the U.S. Supreme Court is not transferable

to Michigan justices who have long been elected by the people. State political office is closer to the local than to the national in the quality of familiarity achievable, providing good reason for the uniqueness of the president as a national candidate.

Arguments for partisan election do not extend to lower courts

It is necessary to distinguish local courts from the state supreme court. Those who run in local, nonpartisan judicial elections typically have reputations as attorneys, officials, or community leaders. They are frequently identifiable by considerable pluralities in the districts in which they live and work, and where they aspire to serve as judges. Often, significant numbers of the public have met these candidates in person or even have been personally acquainted with them. Frequently, these candidates gain the support of local attorneys, professional associations, or citizens' groups.

Nonpartisan elections help to insulate trial judges from controversies among other political candidates on the local level, which tend to involve the very foundation of party politics, intraparty interpersonal relations, and the frailty of political careers. Partisan politics could subvert the virtues of the information that is typically available in local elections. As Justice Danhof wisely admonishes, the issue of selection of the supreme court should be dealt with by itself, without extension to lower courts, including the court of appeals, where the problems affecting supreme court campaigns have not appeared.

Partisan elections are required to maintain the integrity of the democratic process

The 2000 campaigns for Michigan Supreme Court incurred a call for re-evaluation of what Michigan law currently provides. Drawn-out exchanges were disconcerting to some of the bar and general public. The adversarial intensity of the campaign seemed to violate the flavor of a "nonpartisan" campaign. My interpretation is different. I was pleased to see issues raised, albeit in the summary form of televised ads—and more disturbed that the news media did not act upon

a duty to investigate the issues and report the facts. Imperfect as campaign ads may be, their profusion reflected an increased appeal to the electorate and thus an opportunity for enhanced participation in the democratic process. In our world, factors of deception and manipulation sowed by the conflict between self-interested factions are unavoidable. This frailty of our electoral process speaks to the importance of an informed public.

Early in the campaign, televised ads were aimed against three incumbents, asserting that they did not represent the interests of the people, but were biased in favor of business interests. The response ads did not attempt to address the alleged pro-business bias, but instead described each of the challenging candidates as deficient in some way. In contrast to the tacitly Democratic point of view of the "anti" ads, the response ads raised typical Republican issues, such as being "soft on criminals."

It was significant that the ads supporting the incumbents raised different issues than the "anti" ads, for this led to an additive rather than a dissonant effect for the ads as a whole, whatever the viewer's political orientation. Given differences in political philosophy, a preference either for the incumbents or for the challengers could have been reached on the basis of the ads. The campaigns would not have appeared unreasonable, in context of a general election, if the candidates had been accurately identified as Republicans and Democrats, respectively. The issues outlined were within the legitimate parameters of partisan campaigns and the validity of these issues affirmed the propriety of subjecting supreme court candidates to the same issue-focused scrutiny customary in partisan political contests.

Campaign ads provide useful information with varying degrees of "objective truth" and "utter mendacity." This problem is inescapable, unless we flee the entire issue by preferring autocracy to democracy. A newspaper editorial incurs the same qualification, for the amounts of bias, ideological slant, and hortatory excess remain factors to be assessed by the reader. The same may be said about reporting on candidates—of which far too little is seen. Any skilled newspaper reader can dissect a "news" article, finding

tacit assumptions behind the diction and syntax employed.

As with any other relevant messages received by the voting public, campaign ads require that information be evaluated by critical reasoning in the context of other information and knowledge. Discerning participation in democratic processes will not develop without practice. In a time when it is alleged from all quarters that education must be improved for Americans to function fully and productively in the contemporary world, narrowing the political forum bespeaks a hypocritical view of the populace as instruments in a mercenary order, an anti-democratic view which violates Kant's categorical imperative.

The 2000 campaign showed that the issues involved in the election were partisan issues of exactly the type that political parties have long debated, issues of exactly the type that distinguish the political philosophies the parties represent. The ads proved the essentially partisan nature of these campaigns. Were the incumbents openly identified as Republican and the challengers as Democrats, the debate would have been clarified for a larger number of voters.

Forbidding such identification, when the true party affiliations and legitimate partisan issues hovered so close to the surface, barely veiled by the myth of nonpartisanship, amounted to withholding information essential to the decision making of many voters.

I submit that our state's experience during the past election, while it may quicken the sense of need for reform of the selection process, is itself the strongest evidence in favor of retaining popular election of justices, with a conversion from nonpartisan to partisan. Such a change would reflect the true nature of these campaigns in the context of electoral democracy and is the only outcome that would move Michigan in the direction of a more fully democratic society. ◆

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