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Parties, Interest Groups, and Systemic Change

Anthony Champagne*

I. INTRODUCTION

It is a pleasure to be here and to be on this panel. A number of years ago, there was a panel on judicial selection at Willamette University Law School, and one of the panelists had a perfect solution to the issue of judicial selection in the states. He argued that judicial elections violated the Guaranty Clause of the Constitution. That is, judicial elections were contrary to the requirement of a republican form of government and should be swept away as unconstitutional.¹ It is commendable that we have not heard such proposals as that during this session.

All the paper presenters have touched on interest groups and the judiciary – with some of the discussion quite broadly examining interest groups. This comment will narrow things a bit and just discuss one part of this issue: the role of political parties and interest groups in maintaining or changing state judicial selection systems.

Traditionally, we think of judicial elections as promoting accountability of judges, and we think of appointive or merit-selection systems as representing independence. The overwhelming tendency since the implementation of merit selection in Missouri has been that states have moved from elections to some form of merit selection. However, Professor Schotland's comment about Tennessee is most appropriate here because only a last-minute political compromise kept Tennessee from being the first state to move from a merit-selection plan back to a judicial election system.²

For a moment at least, let us pass over the debate about whether judicial selection systems should be changed. I realize there is a body of thought that maintains that judicial election systems should not be changed – either because they are achieving a valued goal of accountability or because the alternative does not produce better judges or a less politicized system of selec-

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1. Luke Bierman, *Comment on Paper by Cheek and Champagne: The Judiciary as a "Republican" Institution*, 39 WILLAMETTE L. REV. 1385, 1392 (2003). Bierman writes, "So, let me further suggest that judicial elections don't just stink, but that they are unconstitutional as incompatible with Article IV, Section 4 of the United States Constitution, which guarantees to every state a 'Republican Form of Government.'" *Id.*

2. Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507, 511 (2009). See *Tennessee Bar Fight: Busting the Monopoly on Judicial Selection*, WALL ST. J., June 16, 2009, available at <http://online.wsj.com/article/SB124501939681813547.html>.

tion.³ Indeed, a conclusion that one might draw from Professor Dimino's paper is that all systems of selection are highly politicized, so why change?⁴

But let us go to our main point. If we are going to get from point A to B – if we are going to change a state system of judicial selection – what must be done? How does one get from a judicial election system to a merit-selection system? Generally it is going to take a state constitutional amendment to make the change. That is usually going to mean that a constitutional amendment must be approved by the legislature in order to be submitted to the people for a vote. To do this, key interest groups must be considered. The story of changing to merit selection is the story of interest group politics, and, as Professor Schotland points out, it is a story of an increasingly difficult process.⁵

II. KEY INTEREST GROUPS

As Professors Solimine and Gely mention, perhaps the most important group in changing the state system of judicial selection is the bar.⁶ As they point out, the bar is not a monolithic institution. There are nearly 1.2 million active lawyers in the United States today⁷ compared to 349,000 in 1970.⁸ The interests of such a huge number of lawyers cannot be uniform; this is especially the case given the increasing specialization of the law. In battles over state judiciaries, the segments of the bar that are most involved (because they have the most at stake) include lawyers who handle civil cases. These two competing segments of the bar – with the defense bar aligned with busi-

3. *Caperton v. A.T. Massey Coal Co.*, of course, raises questions about whether costly judicial elections affect the fairness of judicial decisions. 129 S. Ct. 2252 (2009). The case spotlights the huge increase in judicial campaign spending where, from 2000-2007, \$168 million was spent in judicial election contests compared to \$87 million from 1990-1999. See Joan Biskupic, *At the Supreme Court, A Case with the Feel of a Best Seller*, USA TODAY, Feb. 17, 2009, at 1A, available at www.usatoday.com/printedition/news/20090217/1agrishamcourt17_cv.art.htm. Judicial elections have also produced dramatic partisan shifts where all or most judges are defeated because of a sudden shift in party voting – such events occurred in Dallas County, Texas, in 2006 and 2008 and in Harris County, Texas (Houston), in 2008. But partisan elections are defended in Michael DeBow, Diane Brey, Erick Kaardal, John Soroko, Frank Strickland & Michael B. Wallace, *The Case for Partisan Judicial Elections*, Jan. 1, 2003, www.fed-soc.org/publications/pubID.90/pub_detail.asp.

4. Michael R. Dimino, Sr., *We Have Met the Special Interests, and We Are They*, 74 MO. L. REV. 495 (2009).

5. See Schotland, *supra* note 2, at 509 n.6.

6. Michael E. Solimine & Rafael Gely, *Federal and State Judicial Selection in an Interest Group Perspective*, 74 MO. L. REV. 531, 537 (2009).

7. AM. BAR ASS'N, NATIONAL LAWYER POPULATION BY STATE, (2008) http://www.abanet.org/marketresearch/2009_NATL_LAWYER_by_State.pdf.

8. David Scott Clark & Tugrul Ansay, *INTRODUCTION TO THE LAW OF THE UNITED STATES* 30 (2d ed., rev. 2002).

ness and professional groups and the plaintiffs' bar aligned with labor – have been at the core of these election battles. These interests within the bar have proven mortal enemies in backing opposing candidates in judicial elections throughout much of the country. While Solimine and Gely are correct when they mention that the death penalty has been an issue in judicial races,⁹ and Professor Dimino mentions crime as an important issue,¹⁰ the driving force in almost all high-profile judicial elections over the past quarter century has been tort law.¹¹ To a considerable degree, issues such as the death penalty or crime have merely been tools used by interest groups interested in tort law to mobilize the voters for or against particular judicial candidates.¹²

Often, where there have been judicial election battles, there has also been conflict over judicial selection. In these conflicts, the interests of the competing segments of the bar have sometimes changed over time. In the 1980s, for example, due to predominantly pro-plaintiff decisions, the plaintiffs' bar was as opposed to changing the partisan system of electing judges in Texas as the defense bar was in supporting change to a merit-selection system.¹³ But, like a number of other southern states, Texas moved into the Republican column, and conservative, pro-business Republican judges began to be elected to office.¹⁴ As a result, the interests of these segments of the bar have begun to change sides.¹⁵

Interestingly, since the bar has a significant stake in the selection of judges, it is one of the few interest groups in a state with reserved seats on judicial selection commissions. But as Watson and Downing's classic book on the Missouri Plan points out, the diverse character of the bar means that there are pitched battles within the plaintiff and defense segments of the bar to get a seat on the selection committee.¹⁶

With lawyers getting a guaranteed voice in the selection of a state's judges, as Solimine and Gely suggest, the issue of which type of lawyer is

9. Solimine & Gely, *supra* note 6, at 551.

10. Dimino, *supra* note 4, at 555.

11. Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE 79* (Matthew J. Streb ed., 2007). Also, Shepherd writes, "In most states, the majority of the contributions to state judicial campaigns comes from groups hoping to shape tort law." See Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 *DUKE L.J.* 623, 644 (2009).

12. For example, Deborah Goldberg notes that there was "speculation" that the Chamber of Commerce funneled money through the Law Enforcement Alliance of America (LEAA), which in the 2002 judicial elections in Mississippi ran 650 television ads in the state's major media markets that focused on the death penalty and criminal justice. See Goldberg, *supra* note 11, at 79.

13. Anthony Champagne, *Judicial Reform in Texas: A Look Back After Two Decades*, 43 *CT. REV.* 68, 78 (2006) [hereinafter Champagne, *COURT REVIEW*].

14. *Id.*

15. *Id.*

16. RICHARD A. WATSON & RONALD G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* (1969).

getting that voice is a big one among lawyers and is a key factor in determining whether the bar – or at least which segments of the bar – will back merit selection.¹⁷

No doubt other interest groups would like to have guaranteed seats on merit-selection commissions and might be encouraged to support change to merit selection if they did have such guarantees. A few years ago, the Louisiana Committee on Judicial Excellence, that state's major judicial reform group, considered legislation that would guarantee the state's Farm Bureau, AFL-CIO, and Chamber of Commerce a place on the state's proposed merit-selection commission.¹⁸ That legislation never passed, but it is indicative of the notion that, in order to build a winning coalition for changing a system for selecting judges, key interest groups in a state must have their interests promoted, or at least protected, by the new system.

Another interest group that usually has a reserved place on merit-selection commissions is the judiciary. We usually do not think of judges as a separate interest group, but they certainly are in the area of state judicial selection. Judges who have been elected tend to be quite pleased with the current system of selection – it must be good since it elected them.¹⁹ That changes, of course, if partisan sweeps begin to occur and those judges' positions are threatened.²⁰ However, judges are often quite influential with state legislatures on judicial selection issues and have political heft in their communities. To gain judges' support, the judges must be convinced that merit selection is in their best interest. This might be done by grandfathering the judges into office so they have no concern about whether they will be chosen by a merit-selection commission. This system might also have its best chance of being implemented when judges are faced with increased electoral opposition and the corresponding need for fundraising and campaign activity. One of the problems in designing a merit-selection system that is satisfactory to judges is that judges' interests vary: a system of selection that benefits urban judges may not be useful to rural judges, or a system that benefits appellate judges may not gain the support of trial judges. The result is that hybrid systems may be designed where, for example, judicial elections remain in rural areas but not in urban areas, or merit selection exists at the appellate level but not at the trial level.

In recent years, minority groups – Latino groups in the Southwest and African-American groups in the South and Midwest – have been interested in

17. Solimine & Gely, *supra* note 6, at 538 (“The bar represents a diverse set of interests.”).

18. Frank Simoneaux, Remarks at the Midyear Meeting of the American Judicature Society, Roundtable Discussion: The Challenge of Judicial Selection Reform – Case Studies from the States, (Feb. 24, 2006) (regarding “The Louisiana Experience”).

19. Champagne, *COURT REVIEW*, *supra* note 13, at 73.

20. Posting of Paul Burka to Burkablog, <http://www.texasmonthly.com/blogs/burkablog/?p=2840>, (Feb. 12, 2009, 06:49 CST).

increasing the number of minority judges. As a result, these groups have initially used litigation (or its threat) in which they have argued that judicial election districts should be drawn to benefit minorities. They have been successful in getting judicial subdistricting in states such as Illinois, Louisiana, and Mississippi.²¹ Not always successful, minority groups and their lawyers remain distrustful of merit selection, which some fear will not result in as many minority judges as would judicial subdistricting.²² As Professor Dimino notes, various states have proposed legislation that either attempts to bring the composition of selection commissions in line with the racial, ethnic composition of a state or encourages the commissions to make recommendations consistent with a state's demographic composition.²³ This helps to gain the support of minority groups for changes in a state's selection system.²⁴ Women's groups are exerting a similar influence in the appointment process.²⁵ These groups need to be assured that any change in the selection system will benefit, and definitely not harm, their interests.

Business and professional groups are often aligned against labor unions in judicial election campaigns. Business and professional groups typically

21. See generally Jonathan C. Augustine & Hon. Ulysses Gene Thibodeaux, *Forty Years Later: Chronicling the Voting Rights Act of 1965 and Its Impact on Louisiana's Judiciary*, 66 LA. L. REV. 453 (2006).

22. Champagne, COURT REVIEW, *supra* note 13, at 72-76. Geri Palast, former Executive Director of Justice at Stake, stated, "There has been an historic pro-election view among many in communities of color, because of a suspicion of the appointment and merit selection process. The concern is that insiders will be less likely to select diverse candidates." See Lawyers' Committee for Civil Rights Under Law, ANSWERING THE CALL FOR A MORE DIVERSE JUDICIARY 40 (2005).

23. Dimino, *supra* note 4, at 503.

24. These admonitions can be ignored, although there may be political consequences from minority groups in ignoring them. For example, "after a brief but occasionally noisy session during which several senators expressed dismay that the [New York State] judicial-selection process did not produce a more diverse set of candidates," Jonathan Lippman was confirmed as the Chief Judge of the state's Court of Appeals. The "nomination was clouded by questions about how fair the nomination process was to minority candidates and women. All seven of the nominees [of] the State Commission on Judicial Nomination . . . were men, and most were white." See Jeremy Peters, *Senate Confirms Top Judge on State Court of Appeals*, N.Y. TIMES, Feb. 11, 2009, at A32, available at <http://www.nytimes.com/2009/02/12/Nyregion/12lippman.html>. Professor Dimino notes some proposals go beyond mere admonitions. Dimino, *supra* note 4, at 504. One example that Dimino cites is a proposal requiring one third of a merit selection commission to be minorities or women. *Id.* at 504 n.43 (citing Peter D. Webster, *Selection and Retention of Judges: Is there One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 40 (1995)).

25. In fact, this influence is likely leading to results. Missouri has seen an increase in women on its courts, and it is likely due, in part, to the use of a merit-selection system. See Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 747 (2009).

back judicial candidates with a tort reform agenda, while labor unions support judicial candidates who are often backed by the plaintiffs' bar in supporting an anti-tort reform agenda.²⁶ These same groups are seen in the battles over state judicial selection reforms.

Along with key interest-group actors, as Solimine and Gely point out, one cannot ignore the importance of the political parties.²⁷ In general, the political parties benefit from judicial elections. Judicial elections provide the parties with a stable of offices that will be held largely because of party affiliation. Further, judicial candidates are a source of party activists and campaign workers. Parties may well be expected to oppose a change to an appointive system that will deprive the party of offices as well as important party activists, since judicial candidates usually must have involvement in a political party to gain the party's nomination. Of course, if the party is not competitive in a state or appears to be losing competitiveness, the party may support moving to an appointive system where – at least with control of the appointing officer – the party can expect that its members will receive judge-ships.²⁸ However, if the party is dominant in a state, it loses much in terms of prestige, support, and leadership by moving away from judicial elections.

Thus, to change a system of selection in a given state, it is necessary to construct a political coalition that is sufficiently strong to win legislative approval for a constitutional amendment that then must be submitted to the voters – where, of course, the losers in the legislative struggle over the constitutional amendment have a second chance to defeat the proposal. A constitutional amendment election offers an ideal opportunity for opponents to defeat a merit-selection proposal through thirty-second sound bites. Professor Schotland mentions what is probably the classic illustration of defeating a merit-selection amendment: the 1987 Ohio election. There, rejection of the merit-selection system was a result of a massive television campaign where voters were told, “Don’t let them take away your vote!”²⁹ And, it should be noted, that second chance to defeat merit selection is an important one. As former Texas Supreme Court Chief Justice Tom Phillips has stressed, “[V]oters cherish their franchise and in elected states they generally prefer to retain it by a two to one margin.”³⁰

26. Deborah Goldberg has written, “What is driving the intensifying interest group involvement in judicial elections over the past three cycles? The principal motivating force is the battle over what is sometimes known as ‘tort reform.’” Goldberg, *supra* note 11, at 80.

27. Solimine & Gely, *supra* note 6, at 546.

28. Champagne, COURT REVIEW, *supra* note 13, at 77.

29. Schotland, *supra* note 2, at 508 n.5.

30. Thomas R. Phillips, *Keynote Address: Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 145 (2003).

III. THE ADVANTAGES OF INCREMENTAL REFORM

With key players in this battle being the political parties, business and professional groups, minority groups, labor unions, the plaintiffs' bar, the defense bar, judges, and other groups that may see their interests affected, changing the system of selection is a massive undertaking. Several years ago, Lieutenant Governor Bob Bullock of Texas created a committee to recommend changing the state's system of judicial selection. Members of the committee included judges, state senators (some who were clearly representing key interest groups), a representative of the Texas Trial Lawyers Association, and a business group, the Texas Civil Justice League. As one of the state senators started talking about merit selection, one of the others spoke up, "What's in it for me?" He, of course, was asking what merit selection would do for the interest group he was representing. That is basically the job in every state that is considering judicial selection reform: satisfactorily answering that question – "What's in it for me?" – to a coalition large enough to adopt a proposed amendment.

It is not an impossible task, of course. The politics of judicial selection are dynamic, and political interests can and do change. This is an important point that can often be overlooked. There can be opportune moments that allow new political coalitions to form – in Oklahoma, a judicial scandal created that opportunity for change,³¹ and in Mississippi and Louisiana, civil rights litigation by African American groups created a systemic change toward judicial subdistricts.³² Perhaps the declining power of the Republican Party in Texas creates an opportunity for change there as well.³³ However, as Professor Schotland has suggested in his paper, such opportunities for major transformations in the system of judicial selection are rare.³⁴ Schotland

31. Phillip Simpson, *The Modernization and Reform of the Oklahoma Judiciary*, 3 OKLA. POL. 1 (1994).

32. Kyle Cheek & Anthony Champagne, *JUDICIAL POLITICS IN TEXAS* 146-151 (2005).

33. Paul Burka, editor of *TEXAS MONTHLY*, wrote in his blog,

The reason why merit selection has never come to pass is that whichever party is in power has no interest in changing the rules of a game that they are winning. These days, Republicans win all the statewide races, and Democrats win the urban courthouses and gain seats on regional courts of appeals. Justice Jefferson lamented the sweeps of urban courthouses (in Dallas in 2006 and Houston in 2008) and Republicans, who have been the party that has killed merit selection in the past, applauded. I read the bill that Robert Duncan has filed, and it applies only to appellate judges, but it could be amended to apply to district judges. I agree with the Chief Justice that the urban sweeps, driven by straight-ticket voting, are a problem, but Republicans lived happily by that sword for many years and have only considered it a problem when they are dying by it.

Burkablog, *supra* note 20.

34. Schotland, *supra* note 2, at 510 & n.7.

writes that, at the pace we have moved away from contestable elections since Roscoe Pound began his efforts to have judges appointed in 1906, it will take another 160 years to end contested appellate races and 770 years to do so for trial judges!³⁵ Given the difficulties of putting together a new political coalition of the political parties and interest groups, Professor Schotland's argument – that resources are best spent on incremental changes within a system of judicial selection rather than dramatic and systemic changes in the system³⁶ – has much to commend it.

35. *Id.* And it should be stressed that the pace of change toward appointive systems has been slowing in recent years.

36. *See generally id.* at 517.