

REFLECTIONS ON ARIZONA'S JUDICIAL SELECTION PROCESS

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Using Arizona as a case study, this Essay examines the history of changes in state judicial-selection rationales, methods, and practices. It outlines Arizona's journey from contested elections to a hybrid merit-selection system featuring appointments and retention elections, and compares this experience to that of states that have continued with a pure election system. The Essay explores the purported tension between judicial accountability and judicial independence and argues that Arizona's experience demonstrates both the falsity of that dichotomy and the superiority of a hybrid merit-selection system in simultaneously promoting accountability, independence, competency, and fairness.

INTRODUCTION

This 50th Anniversary Issue of the *Arizona Law Review* presents a wonderful opportunity to look back at some remarkable legal developments of the latter half of the twentieth century and the issues that have impacted the work of the judicial branch during that time. One important development is a shift in the issues surrounding the judicial selection process. This trend is particularly notable at the state level because selection processes in the states are easier to change, interest has historically been much lower, and more litigation takes place at the state level than in the federal judicial system.¹ Judicial selection methods and the practices surrounding them have a great impact on the accountability and independence of judges, as well as on the public perceptions of the judiciary.

This Essay will discuss the history of changes in state judicial selection rationales, methods, and practices, using Arizona as a case study. We will discuss the historical context of Arizona's original contested elections, the rationale for changing Arizona's judicial selection system in 1974 from elections to "merit

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1. See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077 (2007).

selection,” and the changes made in Arizona after the adoption of merit selection. We will compare the experience in Arizona in the 1970s with the experience of states that have continued to use a pure election system to see how changing political realities affect considerations about judicial selection.

The basic controversy in judicial selection methods has been between election and appointment processes, with tensions between demands for judicial accountability and judicial independence. We will ultimately argue that Arizona’s experience, and the experience of other states since, show that a state is hard-pressed to achieve the right kinds of independence and accountability under a pure election system, or under a system in which the governor or the legislature has an unfettered ability to unilaterally appoint judges. We further conclude that judges are best able to perform their constitutionally prescribed role in a hybrid merit-based system like Arizona now has, featuring both appointment and retention election.

I. THE RISE OF ELECTIONS FOR STATE JUDGES

Judicial elections were rare in the United States at the beginning of its history. Of the original thirteen states, five states selected their judges with gubernatorial appointment and legislative confirmation, and eight states selected their judges with legislative appointment.² Reformers were concerned with those states that gave the legislature unfettered control over the appointment—and sometimes reappointment—of judges. The concern was that this control would make the judiciary overly responsive to political pressure from the legislature. Relations between the judiciary and the legislature were contentious in many of these states.³ As a result, the framers of the U.S. Constitution required that federal judges be appointed by the President, approved by the Senate, and given lifetime tenure. The founding fathers believed that this was the best way to ensure that judges would be insulated from political pressure.

Georgia was the first state to implement judicial elections, amending its constitution in 1812. As Jacksonian democratic reform escalated in the 1820s and 1830s, pressure mounted in other states for the election of judges. The rationale for elections during this populist period was that elected judges would be more accountable to the public than appointed judges. The rationale for judicial election changed, however, when Jacksonian populism fizzled. Calls for judicial elections continued in the mid-nineteenth Century based on the theory that “elected judges who derived their authority from the people would be more independent-minded than hand-picked friends of governors or jurists subject to the beck and call of the

2. John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 840 (1990).

3. Charles G. Geyh, *An Overview of State Judicial Selection Systems and Their Relationship to Judicial Independence*, in SANDRA DAY O’CONNOR PROJECT ON THE STATE OF THE JUDICIARY, BACKGROUND PAPERS FOR 2007 CONFERENCE: THE DEBATE OVER JUDICIAL ELECTIONS AND STATE COURT JUDICIAL SELECTION, 7 (Georgetown Law, 2007).

legislature.”⁴ Election-favoring reformers largely succeeded and “[b]y the time of the Civil War, the great majority of States elected their judges.”⁵

Before statehood, Arizona stood firmly on the side of judicial elections.⁶ Arizona elected its judges in contested elections and allowed for judicial recall by popular vote. President Taft vetoed a congressional resolution making Arizona a state in 1912 because of Arizona’s recall provision. President Taft said: “This provision is so pernicious in effect, so destructive of the independence of the judiciary, that it is likely to subject the rights of individuals to possible tyranny.”⁷ Arizona responded to President Taft’s criticism by abolishing judicial recall. After acquiring statehood, Arizona promptly reinstated recall elections.

Importantly, however, the Governor appointed interim judges to fill vacancies created between elections. In practice most judges were appointed in this manner before they were elected,⁸ which would become one of the central arguments for merit selection.

II. ELECTION IN PRACTICE AND THE RISE OF MERIT SELECTION

A new process for selecting judges, known as “merit selection,” was first developed in the early 1900s.⁹ Under a typical merit selection plan, an independent commission of citizens recommends several candidates who would be suitable for the position. From this pool, the Governor appoints a judge. After some period of time, a retention election is held in which the voters get an up-or-down vote as to whether the judge should stay on the bench. The rationale for the plan was two-fold: first, reformers were concerned that elected judges did not undergo sufficiently rigorous scrutiny regarding their legal competence; second, they were concerned that election systems gave party bosses too much power over the process, decreasing judges’ independence and accountability to the law. The second concern was driven by states like New York, for example, where the Democratic Tammany Hall organization was “able to hand-pick judicial candidates, which resulted in ousting competent judges and replacing them with incompetent but politically-responsive judges.”¹⁰

In Arizona it was largely the first concern that fueled the argument for merit selection: the election system was not doing a good enough job at ensuring the selection of competent and qualified judges.

First, Arizona reformers were worried that voters did not have enough knowledge about judicial candidates to select competent judges. There was little voter interest in judicial elections and not much public information about the candidates. The reality in Arizona was that judges campaigned only minimally,

4. *Id.*

5. Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002).

6. Roll, *supra* note 2, at 844.

7. *Id.*

8. Mark I. Harrison et. al, *On the Validity and Vitality of Arizona’s Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URBAN L.J. 239, 240 (2007).

9. Roll, *supra* note 2, at 842–43.

10. *Id.* at 841.

given their lack of resources and perhaps political skill and interest. Thus most voters had little chance to get to know the candidates. Observers of Arizona's judicial elections noted that "most voters are unaware of the candidates, the issues, or even the race."¹¹ A poll performed a month before the 1972 election showed that sixty-five percent of Arizona voters were undecided about the state supreme court races.¹² By comparison, just thirteen percent were undecided about the presidential race and between twelve and twenty-five percent were undecided about U.S. House races. Many of these under-informed and undecided voters simply did not vote for a judicial candidate. In 1972, only eighty percent of those who voted cast a ballot in the contested state supreme court races (the most high profile of the judicial races) while ninety percent voted for State Tax Commissioner and eighty-seven percent voted for State Mine Inspector.¹³

When they did vote, it was common for voters to be influenced by factors such as a familiar name. In an election for superior court judge, a little-known practitioner defeated a sitting Maricopa County judge, most likely because the challenger's name was the same as the well-known county director of elections, who had been mentioned often in the media in the days leading up to the election.¹⁴ The state bar association survey, which is the main source of information about how the judge was regarded by knowledgeable citizens, heavily favored the losing incumbent. The apparent problem was not lost on reformers. The President-elect of the State Bar of Arizona "contended that judges were elected based upon good looks and their ability to raise money from attorneys."¹⁵

Second, reformers worried that judges who were appointed before they were elected were not subject to any official screening process. The Arizona system allowed immediate interim appointment by the governor upon a judge's retirement until the next general election was held. While some governors used commissions to review the qualifications of candidates, there was no official process for ensuring an appointee's competence, and no input from the political party that did not hold the governorship. When judges were appointed, they often stayed in office because many of the subsequent elections were uncontested. In fact, less than thirty percent of the general elections for judges were contested from 1958 to 1972.¹⁶ When elections were contested, the incumbents had a major advantage in that they had the title of "judge" and uninterested voters were more likely to know their names. Thus, from 1958 to 1972, the incumbent candidate was defeated in only ten out of 215 judicial elections.¹⁷ One proponent of merit selection in the Arizona House of Representatives argued that because more than seventy-five percent of judges in Arizona were "appointed at the whim of the

11. Stephen E. Lee, *Judicial Selection and Tenure in Arizona*, 1973 L. & SOC. ORD. 51, 55 (1973).

12. *Id.* at 59.

13. *Id.*

14. *Id.* at 62.

15. Roll, *supra* note 2, at 850.

16. Lee, *supra* note 11, at 56.

17. *Id.* at 57.

Governor” the state needed a commission to help ensure competence and impartiality.¹⁸

Finally, it was argued that high-caliber candidates in Arizona were disinclined to participate in political campaigns because of the insecurity of the position of judge, especially given the disconnect between job performance and re-election. It was also argued that such candidates would not want to campaign for the bench because they would “view campaigning as undignified and . . . because there is no well-defined method for campaigning for the office.”¹⁹

The argument that electing judges made the judiciary too political was made in Arizona, but largely as a theoretical matter or in reference to the experiences of other states. The reality in Arizona was that political pressure was not high given low voter interest in the affairs of the state judiciary and no organized support from interest groups. There was some party support of candidates, especially by the Republican Party, but nothing like the “judicial appointment by party leaders”²⁰ that was going on in some other states. Some worried that an election system had “the potential for unduly influencing judicial decisions,”²¹ and there is some evidence that candidates tended to run on “‘platforms’ supporting stronger sentences and stricter treatment of criminal offenders.”²² But the politicization of judicial elections had not become a large problem in Arizona.

Nevertheless, efforts in Arizona to implement a merit selection plan began in 1959, when the Arizona State Bar Association proposed its adoption.²³ Momentum for implementing merit selection of judges grew through the 1960s and early 1970s, as support for eliminating judicial elections increased throughout the Arizona bar and among the public. In the 1970s, legislators began trying to pass the plan.

In 1971, as a member of the Arizona Senate, one of the Authors of this Essay worked with other legislators to co-sponsor a bill providing for merit selection.²⁴ The bill proposed that commissions comprised of both attorneys and laypersons screen judicial applicants. The names of at least three nominees, selected “on the basis of merit alone without regard to political affiliation,” would then be forwarded to the governor. No more than two of the nominees could be from the same party.²⁵ This seemed like a good way to ensure that the selection process was between qualified candidates, and that neither the governor nor the

18. Roll, *supra* note 2, at 849–50 (quoting ARIZ. DAILY STAR, Apr. 21, 1972, at 2B).

19. Lee, *supra* note 11, at 62.

20. Roll, *supra* note 2, at 842 (quoting JAMES. W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS, 132 (1950) (discussing political machines in Chicago)).

21. Lee, *supra* note 11, at 63.

22. *Id.* at 55.

23. Roll, *supra* note 2, at 847–48.

24. S. Con. Res. 6, 30th Leg., 1st Reg. Sess. (Ariz. 1971) (Sandra Day O’Connor, co-sponsor).

25. *Id.*

voters had unfettered power to select politically responsive judges. The bill did not make it out of committee.

In 1973, these legislators tried again, introducing another bill that would have established merit selection of judges.²⁶ This bill allowed small counties to retain judicial elections and increased the ratio of lay members to attorneys on the nominating commissions due to concerns about undue influence by the state bar. This time the bill passed in both the Senate Judiciary Committee and the Senate. In the House, however, the bill died in the Judiciary Committee.

The next year, legislative efforts having failed, supporters of the merit selection plan began the process to amend the Arizona Constitution by initiative.²⁷ The initiative closely followed the provisions of the 1973 bill. Opponents, as before, criticized the system for removing selection from the voters. Supporters pointed out that, in practice, selection already was out of the voters' hands, because governors appointed most judges to unexpired terms before they were elected.²⁸ One supporter stated: "We now have a king maker who appoints judges. [The Governor] appoints them without the advice of anyone."²⁹ Merit selection, on the other hand, used a majority layperson commission to inform the Governor's selection and prescribed periodic retention elections that would allow the voters to have a critical voice in deciding whether or not a judge, based on her record, should stay on the bench. Merit selection was thus marketed to voters as more democratic than the status quo. Ultimately, Arizona voters approved the initiative in 1974, electing to amend the Arizona Constitution to implement merit selection of judges.

III. MERIT SELECTION IN PRACTICE

The first judges appointed under the new merit selection plan were acclaimed as excellent choices.³⁰ Chief Justice Duke Cameron of the Arizona Supreme Court, two years after the plan was instituted, praised the new judges as "hard working, younger, more professional" judges.³¹ He noted that the new process encouraged high-caliber candidates to seek the bench, when under an election system many would not have campaigned. Judge Mary Schroeder, later appointed to the United States Court of Appeals for the Ninth Circuit, was among the very first judges appointed to the Arizona Court of Appeals. Sandra Day O'Connor, one of the Authors of this Essay, was appointed to the Arizona Court of Appeals just after the plan began, where she served until she was confirmed as a Justice of the Supreme Court of the United States.

26. S. Con. Res. 1001, 31st Leg., 1st Reg. Sess. (Ariz. 1973) (Sandra Day O'Connor, co-sponsor).

27. Roll, *supra* note 2, at 853.

28. *Id.* at 854; Harrison, *supra* note 8, at 240.

29. Roll, *supra* note 2, at 854 (quoting ARIZ. DAILY STAR, Oct. 30, 1974, at 2A).

30. James Duke Cameron, *Merit Selection in Arizona—The First Two Years*, 1976 ARIZ. ST. L.J. 425, 429.

31. Roll, *supra* note 2, at 855 (quoting Susan Shultz, *The Judges and the System*, ARIZ. B.J., Oct. 1978, at 26).

Over time, critics charged that the merit selection system failed to ensure accountability, pointing to the difficulty and rarity of removing an incumbent judge through the process of review and retention elections.³² In response, Arizona voters ultimately passed a constitutional amendment in 1992, Proposition 109, which implemented a comprehensive system for review of judges. Under this system, a commission appointed by the Supreme Court of the State, and comprised of lawyers, judges and other citizens, develops performance standards and thresholds for judges and conducts performance reviews.

The main sources of information for the review process are anonymous surveys. The surveys are distributed to all participants in the judicial process, from litigants and attorneys to witnesses and courtroom administrative staff.³³ After collecting information through the surveys and public hearings, the commission reviews judges and publishes its reports in preparation for the retention elections.

Proposition 109 also requires judges to go through a process of self-evaluation and meetings in which they use the results of the commission's findings to identify and document areas requiring improvement. After this evaluation process, judges work with the commission to implement a plan for improvement, which is subsequently used to assess progress. Combined, the two functions of the review process—informing voters of judicial evaluations for retention election purposes and working with individual judges to help them identify areas of their performance requiring improvement—create an effective means of ensuring judicial accountability.

IV. THE NEW WORLD OF JUDICIAL ELECTIONS

In the states that have retained partisan judicial elections of judges, the problems are different than those that Arizona addressed in the 1970s. Judicial elections have become “nastier and noisier,”³⁴ so the concern about judicial independence now exceeds the concern about judicial accountability and competence in those states with a pure election system, though both concerns are still valid.

Some of the attributes that characterized judicial elections in Arizona remain in the states that hold contested judicial elections. Voter interest in judicial elections remains low, and judicial candidates are still far less known than legislative and executive candidates. Judicial elections remain less likely to be contested than other types of elections, and incumbents win election the vast

32. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 657–58 (1998) (“The fact that no judges were ousted in [the first retention election under Arizona’s merit selection system in] 1976 was deemed ‘[a] critical fault in the new system.’” (quoting Susan Schultz, *The Judges and the System*, ARIZ. B.J., Oct. 1978, at 29)).

33. *Id.* at 673.

34. Roy A. Schotland & Bert Brandenburg, *Justice in Jeopardy: The Endangered Balance between Impartial Courts and Judicial Election Campaign*, in SANDRA DAY O’CONNOR PROJECT ON THE STATE OF THE JUDICIARY, BACKGROUND PAPERS FOR 2007 CONFERENCE: THE DEBATE OVER JUDICIAL ELECTIONS AND STATE COURT JUDICIAL SELECTION 29, 32 (Georgetown Law, 2007).

majority of the time. Finally, many judges in election states still reach the bench by appointment due to a vacancy, meaning that many “elected” judges are appointed first. All of these factors raise concerns about whether the best-caliber judges are being selected and whether they are being sufficiently evaluated.

The concern about judicial independence is much stronger, however, in today’s contested election states. There has recently been a sharp rise nationwide in the percentage of judicial races that are contested. Of high-court incumbents, only fifty-two percent faced contested elections from 1980 to 1996, while seventy-one percent faced opponents from 1996 to 2007.³⁵ One reason for this is that well-organized interest groups are now mobilized to help opposition candidates run effective campaigns against incumbents.

These groups—from plaintiff’s attorneys to corporations to cultural warriors—have strong preferences about the outcome of certain types of cases and have mobilized to finance judges who they hope will be sympathetic to their causes. The result has been an arms race in funding, making it so that campaigning for state judge can be as expensive as campaigning for U.S. Senate. The biggest increase in funding so far came in 2000, in which state supreme court candidates raised a record \$45.6 million combined, a sixty-one percent increase over the year before.³⁶ It is not unusual for a candidate for judge in a contested race to raise well over \$1 million. In Illinois in 2006, the two candidates in a race for the Supreme Court seat raised \$9.3 million—more than was raised in 18 out of 34 Senate races that year.³⁷ In comparison, a campaign for a position on the Supreme Court of Arizona in the 1970s was estimated as “at least \$25,000 and . . . as much as \$100,000.”³⁸ Even after indexing for inflation, this is nowhere near the amount of money poured into judicial campaigns in the 2000s.

Money is funneled into “informing” the voters about judicial candidates, often in the form of television advertisements. In fact, all but two of the almost twenty states with contested elections for the highest court have had network television advertisements. These advertisements, it has been noted, are to judicial selection what French Fries are to nutrition.³⁹ They are full of information, but very little of it is helpful, and some of it is downright harmful: “Fewer than 1 in 3 ads in the 2004 Supreme Court races focused on the traditional themes of qualifications, experience and integrity. Far more often, judicial campaign ads misrepresent facts and scare voters. Complicated decisions are reduced to slogans and fealty to the law is subordinated to soundbites.”⁴⁰

One result of the “noise and nastiness” is that voters in states that elect judges are more cynical about the courts, more likely to believe that judges are legislating from the bench, and less likely to believe that judges are fair and

35. *Id.*

36. *Id.*

37. *Id.* at 29.

38. Lee, *supra* note 11, at 55.

39. Schotland and Brandenburg, *supra* note 34, at 34–35.

40. *Id.* at 35.

impartial.⁴¹ This distrust likely has the perverse effect of making voters more inclined to elect their judges rather than allowing for an appointment process. If judges, like legislators, are perceived as making decisions based on policy preferences, voters want to have a voice in what they decide.

V. THE ACCOUNTABILITY V. INDEPENDENCE MYTH

Judicial independence and judicial accountability are usually perceived as diametrically opposed. Today, it is often said that if we care about judicial independence we should favor appointment of judges and if we care about judicial accountability we should favor judicial elections. Appointment, some say, ensures that the judiciary is independent from the vagaries of public opinion. Elections, others argue, ensure that judges, as government actors, are accountable to the people they serve. But as we have shown above, problems of accountability and independence can exist within the same system. The dichotomy between judicial independence and judicial accountability is ultimately a false one, because it relies on distorted portrayals of the judiciary's role.

To be sure, the judiciary must be accountable to the public. But its accountability is on a macro rather than a micro level; the judiciary should not respond to public opinion in its individual decisions. Rather, the founders called for a judiciary that is accountable to the public for its constitutional role of applying the law fairly and impartially. As long as the people believe in our three-branch system of government, judicial accountability means that judges must first and foremost be held to their public promise to fulfill their unique role. Judicial independence means that judges must resist both public bias and their own inclinations to eschew the law to achieve a policy outcome. Thus, correctly understood, accountability and independence are two sides of the same coin: accountability ensures that judges perform their constitutional role, and judicial independence protects judges from pressures that would pull them out of that role.

VI. LESSONS FROM THE ROAD TAKEN IN ARIZONA AND OTHER STATES

Arizona's experience and current trends in states with contested judicial elections demonstrate that a contested election process, especially if it is partisan, cannot maximize accountability and independence. The experience of judicial elections in Arizona shows that when voter interest in the judiciary is very low, voters will not have the necessary tools to ensure that judges are fairly and competently applying the law rather than acting according to their own whims or policy preferences. Other states' recent experience with judicial elections shows that when interest group pressure rises on particular issues, judges face political pressure that could hinder their independence. This political pressure comes both as a result of the need to attract interest group financing, and because of considerations of political responses to their actions. Whenever a judge acts in a

41. Annenberg Public Policy Center, Public Understanding of and Support for the Courts: 2007 Annenberg Public Policy Center Judicial Survey Results, http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf (last visited Jan. 7, 2008).

state with contested elections, she is tempted to consider how that action could be reduced to a soundbite in a television ad, which may have nothing to do with the law's proper application in that case.

Ugly contested elections are increasing public perceptions of judicial bias. This perception leads voters to want to elect judges who will at least be biased toward the causes that they care about. The ugliness of campaigns will only increase with greater public interest in judicial elections, as powerful issue-based interest groups are unlikely to disband as long as they see the potential to elect favorable judges. Strong grassroots organizing for fairness and impartiality alone has not yet been achieved in election states, and it is unlikely that it will any time soon.

Merit selection may not be a perfect solution, but it is clearly better than the pure election system. Almost any system designed to select individuals or evaluate human performance—particularly when that performance involves the sometimes politically charged task of doing justice—will have its flaws, and will give rise to criticisms from those who disagree with its results in isolated instances. Also, there is the possibility, even in a merit selection process, that a nominating commission will become politicized, that a governor will not act in good faith to select the best possible candidate, or that a retention election will be infected with issue-based politics. But Arizona's sharing of responsibility between a commission for appointment, a commission for evaluation, the governor of the state, and the people in retention elections provides the kinds of checks and balances that are critical to our democracy. Also, Arizona has worked hard to ensure a cross-section of participants in the process by carefully choosing an independent commission-selection process that ensures bipartisanship and diversity, with requirements that more than half of commission-members are non-lawyers.

In practice, the Arizona experience shows us that merit selection can work to promote both accountability and independence, and to select highly qualified, competent judges who will uphold the judicial promise to be fair and impartial arbiters of the law. Like democracy itself, merit selection relies on a wide-angle view of our nation's goals for its people and produces a systemic superiority that safeguards our most precious baseline values. And like democracy itself, merit selection of judges may have its faults, but it is better than any other method our states have tried.