



Judging How Justices Are Chosen

by Lawrence W. Reed

Some legal observers are arguing that it's time to change the way Michigan Supreme Court justices are selected. Is this a wise idea? Let's look at the current process and its results.

Summary

Some legal observers argue that it's time to change the way Michigan Supreme Court justices are selected. The current process, however, far from causing problems, has instead produced what is arguably the best state Supreme Court in the nation. Policy makers therefore should be skeptical of proposals to "fix" what appears not to be broken.

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Candidates for the Court are nominated by political parties at summer conventions, after which they officially run and appear on the ballot as "nonpartisan." When a vacancy occurs because of death or resignation, the governor appoints a replacement who must face the voters in the next general election.

Surveying just a handful of states reveals no uniform number of justices or a standard method of selection that would appear to have decisive advantages over all the others. Michigan's court has seven justices, but West Virginia, Tennessee, and Indiana are among the states that have only five on their highest court; the Supreme Court of Texas, like its federal counterpart, has nine. At least one state, Tennessee, requires its high court to meet in multiple locations. Some states, but not all, require gubernatorial nominations to their Supreme Court to be confirmed by the state's Senate. In some states, justices run as partisans from the very beginning; in others, they are nonpartisan throughout the process. Michigan's partisan/nonpartisan hybrid is somewhat unusual but there is little evidence to suggest that it has produced inferior justices.

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In Maryland, members of the state's highest court are initially appointed by the governor and confirmed by the state Senate. After that, they run for office on their records, unopposed. If voters reject a judge's retention in office, the office becomes vacant and must be filled by a new appointee. The process may *look* nonpartisan because no political party officially nominates a justice, and competing Court candidates don't go head-to-head in noisy elections, but governors almost always choose men and women who share their personal and political philosophies.

While the process of partisan nomination followed by nonpartisan campaigning may appear contradictory, "problems" with it are overblown. A party endorsement does not dictate how a justice may rule in any future case; rather, it is reflective of the fact that a jurist's track record and philosophy are generally compatible with a particular party's broad perspective. Requiring candidates to run on a party line in

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November may be more consistent but it might also prompt too many voters to make their decisions based on party labels rather than the qualities and performance of the candidates. If voters have to dig a little bit to learn who's running and why, that's probably a healthy thing.

Proposals to make Michigan Supreme Court slots purely appointive—as they are at the federal level, subject to Senate confirmation for life terms—would do away with the messy electoral process altogether. But that reform would not necessarily guarantee high-quality, squeaky-clean justices immune to either cash or politics. Moreover, periodically putting incumbents and wannabes before the voters gives citizens the opportunity to rectify appointive mistakes. Even though most voters spend appallingly little time learning much about who is on the ballot, Michigan citizens don't want to give up their right to vote on who serves on their highest court.

A few observers have occasionally argued that some form of “merit selection” is missing from Michigan's Supreme Court. They usually advocate that the governor name justices only from a pre-approved list, which almost always means a list approved by the State Bar or some committee thereof. Supposedly, this would assure that we get the best and most qualified, but the legal community is not some angelic and dispassionate group of altruists. It is made up of its own elite and factions, each with its own agenda. Governors have some incentive to choose good people for spots on the Court and if they fail, at least the voters under the current system can rectify their mistakes.

If the present system unduly politicizes the Court or forces candidates to compromise their integrity by grubbing for campaign money, one small reform could ameliorate that. It would be drawn from the so-called “Missouri system” and would require that justices go before the voters in retention elections when their terms are up. By voting “yes” or “no” voters would decide whether to retain or remove a justice but wouldn't choose between competing candidates on the ballot.

Fundamentally, however, the current process has not failed Michigan citizens. Rather, it has produced what is arguably the best state Supreme Court in the nation—a body of eminently qualified, experienced, and sensible jurists, the majority of whom believe in interpreting law, not manufacturing it from the bench. Let's be careful we don't “fix” what appears not to be broken.

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