Judicial Elections Rooted in Wisconsin History

By Michael Keane

Wisconsin's system of electing judges seems natural to voters who have been electing judges for more than 170 years. An elected judiciary, however, is not a given. When Wisconsin became a state, it was a novelty. The federal judicial system, which pre-dates Wisconsin's by more than fifty years, still provides for an appointed judiciary. By the time Wisconsin moved toward statehood, several states had begun experimenting with an elected judiciary. At Wisconsin's first Constitutional Convention in 1846, some advocated the idea, with proponents citing the fact that Mississippi had been electing judges for a number of years, and that other states, such as Michigan and Iowa, were moving forward with the idea. New York, the native state of many delegates, had just approved the reform in drafting its new constitution. The idea certainly seemed to match the democratic tenor of the times. However, it was not without its detractors. Among the loudest critics of an elected judiciary was Edward G. Ryan, who would years later serve as the elected Chief Justice of the Wisconsin Supreme Court. Ryan, a delegate from Racine County, fairly thundered his opposition. He asked, rhetorically, if the judiciary should be "a mere echo of the popular judgment? Sir, disguise it as man may, that is the naked question … Is the judiciary, like the legislative and the executive, representative? Must its judgments represent the will of the people? No sir! No sir! God forever forbid it!" He emphasized that the judiciary represented "no man, no majority, no people…it represents the eternal principles of truth and justice…" Ryan proposed a system whereby judges were appointed by the governor, with confirmation by a three-fourths vote of the senate. In the days before primary elections, candidates were picked in partisan nominating conventions, a practice Ryan found particularly objectionable. Unlike a governor or senator, according to Ryan's thinking, the nominating convention ceased to exist after its work was done, accountable to no posterity. Electors might then feel obligated to vote for the candidate nominated by their party, making the choice of judge not really one by the people after all.

Advocates of the new system insisted that it was a perfectly logical development of our political system: "…an elective judiciary is not only in accordance with the theory and analogy of our government; it is in harmony with its spirit and genius," argued Charles M. Baker of Walworth County. "...[T]he people will be more attached to a system…democratic in its principles, and will more cheerfully acquiesce in the decisions of a court selected by themselves."

First Constitutional Convention

The arguments in favor of an elective judiciary prevailed, and were included in the convention's final document. Perhaps as an acknowledgment that judicial elections are something distinct from the regular political process, a clause required, "That there should be no election for a judge or judges at any

general election for state or county officers, nor within thirty days before or after such election." This restriction, found at Article VII, Section 9, is still part of the Wisconsin Constitution today. It may, in fact, have been an acknowledgement of Ryan's concern about nominating conventions – the 30 day separation serving to discourage political parties from nominating judges at the same convention as legislators and other, more political actors.

Second Constitutional Convention

The first constitution was rejected by the voters, but the second constitutional convention in 1847-48 accepted the previous provisions relating to the judiciary with little debate. This second constitution was ratified by the voters, and Wisconsin joined the Union with a democratic judiciary, although providing then as now for gubernatorial appointment to fill vacancies. The new constitution provided for five judicial circuits, whose judges would meet together as a single court to hear appeals.

Early Supreme Court Elections

The Constitution gave the legislature the right to create a separate Supreme Court after five years. The first legislature, meeting in June 1848, provided for judicial elections on August 1. As Ryan predicted, the Democratic Party held nominating conventions in four of the five circuits. A Whig convention nominated candidates in two circuits. At the election, however, the people chose one Democratic judge, one Whig, and three independents. In 1850, the legislature set the last Monday in September as the annual day for judicial elections. In 1853, the legislature exercised its right to create a separate Supreme Court with three justices.

In his book, *Story of a Great Court* (1912), Justice J.B. Winslow documented in some detail how the new court in its early decades dealt with democratic pressures and electoral party politics. In anticipation of the election of all three justices to the new Supreme Court, the Democratic Party hosted a state convention in August 1853. The convention first debated whether or not a partisan convention should make a nomination for judicial office. Deciding this question in the affirmative, the convention proceeded to nominate one candidate for each seat on the court. In early September, an independent convention made up of Whigs and Democrats dissatisfied with the results of their own convention nominated a separate ticket. The Whig party, in its death throes, did not hold a nominating convention. The September election resulted in two of the three Democratic nominees being elected, with the third justice being a nominee of the independent convention. The three successful candidates then drew lots to see which would begin six, four, or two year terms, to ensure that the justices would not again have to be elected simultaneously. The following year, 1854, the legislature provided that judicial elections

should be held on the same day prescribed for town meetings, the first Tuesday in April. This has been the date for judicial elections ever since, with a few exceptions.

Samuel Crawford, the "short straw" justice, a Democratic nominee in 1853, found himself opposed in 1855 by Orasmus Cole, who was endorsed by the new Republican party. For the first time, an incumbent Supreme Court justice was turned out by the voters for no other apparent reason than party.

The practice of partisan endorsement of Supreme Court candidates continued throughout the first decades of statehood. Justice Edward Whiton's term was up in 1857; he was nominated for another term by petition and by several Republican newspapers. A Democratic convention at Madison nominated M.M. Cothren to oppose him, creating a partisan race for Supreme Court with the federal fugitive slave law as the major issue. Whiton was re-elected.

BYOB: Bring Your Own Ballot

At this time, the government did not print ballots for voters to fill out; they had the option of "making out their own ticket" by hand, but most used ballots printed by party organizations or the candidates themselves. In some cases, the parties agreed to use different color paper so the behavior of their loyalists could be monitored at the ballot box. This came into play in 1859, when the incumbent Abram Smith's term ended. A month before the election, a caucus of Republican legislators nominated Byron Payne for the seat. At the same time, a Democratic convention nominated William Pitt Lynde. This left the incumbent Smith at a great disadvantage in organization, with no party constituency to organize or print ballots. In the days before official ballots, even an individual's candidacy could be a matter of doubt. Smith enjoyed considerable support, especially among Republicans, but the nominations having been made, Smith announced through the press two weeks before the election that he was not a candidate for a second term. The Republican Payne won a comfortable victory.

Movement Away from Partisanship

The partisan character of Supreme Court races persisted through the 1860s, but receded during the 1870s, when such partisan nominations became less common. In 1878, when the Supreme Court was increased to five members and ten year terms, each party held a nominating convention for one seat; each nominee ran unopposed, ensuring that the court would add one Republican justice and one Democratic justice. After a Democratic legislative caucus nominated M.M. Cothren to run against incumbent Orasmus Cole in 1879 (Cole was re-elected), it became rare for the two parties to contest seats on the Supreme Court. In 1891, when an open seat was available following a Democratic landslide

victory in the legislative elections held in the fall of 1890, independent groups nominated two Democrats to run against each other; the Republicans did not contest the seat.

Two years later, when a Republican seat became open, independents nominated two Republicans to run against each other. The practice of maintaining a balance on the Supreme Court was institutionalized to the extent that in 1898, Republican governor Hiram Scofield appointed Democrat Joshua Dodge to the Supreme Court to succeed Democrat Silas Pinney, who had resigned.

Another development occurred during this period further advancing the idea of a non-partisan judiciary. The legislature passed a law in 1891 (Chapter 379, Laws of 1891) prohibiting the type of colored, party or campaign-printed ballots that encouraged partisan politics. The new act required municipal governments to print white ballots, with candidates identified by party nomination. The act specified that no other ballot should be used, and that "no party designation need be placed upon ballots for school or judicial officers."

The Primary System

A second major reform in 1903 (Chapter 451, Laws of 1903) took the power to nominate candidates for office away from party caucuses and conventions and created a system of primary elections for the nomination of candidates. The status of judicial office being "non-partisan" was further formalized when judicial elections were excluded from this process. Judicial candidates were nominated without limit by voter petition. A 1903 reform increased the number of justices to seven and provided that no more than one justice could be elected in any year. In 1908, incumbent justice Robert Bashford was defeated by a challenger in a three-candidate race. The winner, John Barnes, received a majority of the vote.

In 1915, a law was passed (Chapter 381, Laws of 1915) providing for primary elections for judges in populous counties when three or more candidates were nominated for the ballot; but races for the Supreme Court remained winner take all for decades afterwards. The same year another act (Chapter 383, Laws of 1915) provided that "no candidate for judicial, school, or elective city office shall be elected upon any party ticket, nor shall any designation of party or principle be printed on the ballot…" The Supreme Court saw only a few contested races between 1908 and 1930, but beginning in the 1930s, more contested races occurred. On several occasions, there were more than two candidates; once, in 1933, a race for a Supreme Court seat attracted five candidates; the winner, incumbent John Wickhem, received only 42% of the vote. This winner take all situation prevailed until 1949, when the legislature, observing that 12 candidates had qualified to run for an open seat on the Supreme Court, passed a law making the April contest a primary.

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The law (Chapter 15, Laws of 1949) required that, if none of the twelve received a majority of the vote, a second election between the top two finishers would decide the issue on the first Tuesday in May. This resulted in the first primary election in Supreme Court history, and perhaps the only run-off primary in the history of Wisconsin. The top candidate, Edward Gehl, received barely 20% of the vote in April. Also of note is that fewer than a third as many voters turned out for the decisive and novel May "run-off," which Gehl also won. Later in the year, the legislature made the Supreme Court primary an institution. Under a new law (Chapter 455, Laws of 1949) applying to all judicial offices, a primary election was to be held four weeks prior to the April election in the event three or more candidates qualified to contest the same office. A general recodification of election laws in 1965 dubbed this event the "spring primary" to be held, when needed, on the first Tuesday in March. A 1973 law moved the spring primary to the third Tuesday in February, the same as it is today.

The number of candidates for Supreme Court races has waxed and waned since the enactment of the 1949 law providing for primary election. Of the 55 races for Supreme Court since then, primaries have been required in 18 of them. Of these 18 elections, half of them involved races with no incumbent running. As many as seven candidates were on the ballot in 1996. The previous year, a five candidate field had necessitated the first primary race for Supreme Court in twenty years. Of the entire 55, 15 have involved an incumbent justice running unopposed. Only three justices during that period, Emmert Wingert in 1958, George Currie in 1967, and Louis Butler in 2008, have been defeated in an attempt at reelection.

Wisconsin's elective judiciary has endured, even as its customs and laws have moved away from the early practice of partisan nominations. The experiment no longer seems novel, as most states now have moved to a judiciary subject to the ballot box. In all, according to the *Book of the States*, 42 of the 50 states at least subject trial court judges to retention elections; while 38 states either elect members to the highest court or at least have retention elections. Yet, one may still ask: does this render justice, as Edward Ryan feared, "a mere echo of the popular judgment?" Or result in, as Charles Baker asserted, "a democratic system" in which people "cheerfully acquiesce in the decisions of a court selected by themselves"?