SELECTION SYSTEM, DIVERSITY AND THE MICHIGAN SUPREME COURT

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I. INTRODUCTION

As Justice Elena Kagan takes her place on the U.S. Supreme Court, she becomes the third woman on the current Court, sitting alongside Justices Ruth Bader Ginsburg and Sonia Sotomayor. Never before have three women sat on the Court at any one time. In fact, Justice Sandra Day O'Connor was the sole woman on the Court for twelve years until Justice Ginsburg joined her. Then, after Justice O'Connor retired, Justice Ginsburg was the only woman on the bench for a few years until Justice Sotomayor joined the court. Thus, with Justice Kagan joining Justices Ginsburg and Sotomayor on the Court, the first Monday in October 2010 will see the most women serving on the Court in its history.

There was great fanfare and media attention when each of these women accepted nomination to the highest court in the land. President Reagan's famous appointment of Justice O'Connor fulfilled a campaign pledge to nominate a woman to the Court, and when the Senate confirmed her by a vote of ninety to zero in 1981, she became the first woman and the 102nd justice on the Supreme Court. While President Clinton did not set out deliberately to appoint a woman in 1993,[1] his choice of Justice Ginsburg met with near-consensual approval in the

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1. *See generally* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (University of Chicago Press, 1999). Serious consideration of Justice Ginsburg's nomination by President Clinton and his advisors did not take place until relatively late in the selection process. *Id.*

Senate, which confirmed her nomination, ninety-six to three. President Obama's first two choices to the Supreme Court have been women, but neither Justice Sotomayor in 2009 nor Justice Kagan in 2010 sailed through the Senate as did their predecessors. In fact, neither of President Obama's choices received much support from the Republican side of the Senate, as the confirmation votes in favor of Justice Sotomayor and Kagan were sixty-eight to thirty-one and sixty-three to thirty-seven, respectively.[2]

While I do not plan to discuss U.S. Supreme Court nominations in this article, I raise these recent appointments for two purposes. First, judicial selection mechanisms are important. In the federal system, the president has the constitutional authority to nominate Article III judges, who reach the bench with majority consent of the Senate. The manner in which the nominations of the four female Supreme Court justices were handled, both within the White House and the Senate, provides insight into how justices reach the Supreme Court as well as the types of nominees who eventually become justices. While some of the states utilize the analogous system of gubernatorial appointment, most, however, do not.[3] Furthermore, I will exemplify how the selection system for the Michigan Supreme Court is very different from that employed in the federal courts or in any other state.

Second, the topic of judicial diversity is significant. Political participation and representation are critical to the functioning of democracies.[4] The judicial branch is no exception, even though jurists reach their positions in a variety of ways that are sometimes different from the way elected officials in the legislative and executive branches of government attain their positions.

There are many conceptions of diversity, with racial and gender diversity getting the most attention. Indeed, in many ways this focus on race and gender makes sense, in part due to the systematic discrimination

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2. A few years prior, President Bush's appointment of Justice Samuel Alito similarly received minimal approval from Democrats, as the Senate approved his nomination by a vote of fifty-eight to forty-two. David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, http://www.nytimes.com/2006/02/01/politics/politicsspecial1/01confirm.html?_r=3&ref=samuel_a_alito_jr. This lack of support from the minority party in the Senate raises the question whether any of these recent nominees would have been confirmed had the Senate majority not been in the hands of President Bush's or President Obama's respective party.

3. Mark S. Hurwitz & Drew N. Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84 (2001) [hereinafter Hurwitz & Lanier, *Women and Minorities*].

4. *See* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982).

that women and minorities historically faced in the legal profession. For example, the American Bar Association did not officially admit a minority lawyer until 1943.[5] And, it took a series of Supreme Court decisions[6] to put an official end to racial discrimination in public law schools, cases which led to a legal and ideological foundation for the *Brown v. Board of Education* decision.[7] With respect to gender discrimination in the legal profession, the Supreme Court's endorsement of Illinois' rejection of Myra Bradwell's application to practice law in *Bradwell v. State*[8] is as famous for its conclusion in that case as it is for Justice Joseph Bradley's concurrence in which he illustrated that the ancient doctrine of coverture was alive and well.[9] That stance did not change until Justice Ginsburg, prior to her appointment as a federal judge, successfully argued as a lawyer a number of cases before the Supreme Court on the invidious nature of gender discrimination. These

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5. As *The Pittsburgh Press* reported:

> Judge James S. Watson of the New York City Court, was elected to membership of the American Bar Assn. today, and became the first Negro barrister admitted to the group. Judge Watson's election followed the passage of two resolutions by the association, both aimed against race discrimination. One was a general statement against discrimination, and the other discarded a rule that two negative votes were sufficient to reject an application for membership.

First Negro Admitted by Bar Association, PITTSBURGH PRESS, Aug. 28, 1943, at 10, *available at* http://news.google.com/newspapers?id=pc8aAAAAIBAJ&sjid=jkwEAAAAIBAJ&pg=4450,6404430&hl=en.

6. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

7. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

8. Bradwell v. Illinois, 83 U.S. 130 (1873).

9. In part, Justice Bradley wrote:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . .

Id. at 141 (Bradley, J. concurring).

cases included *Reed v. Reed*,[10] the first case in which a gender-based government classification was held unconstitutional by the Court.

Accordingly, in this article I will first discuss judicial selection systems in the states. I will then explain the relationship over time between selection system and diversity in both state and federal courts. Finally, I will talk about the unique selection system employed by the Michigan Supreme Court.

II. REACHING AND REMAINING ON THE BENCH

Judicial selection and retention are critical aspects to the judicial system in the United States. At an elemental level, judges arriving on the bench through one system seem to make decisions that are different from their brethren who reach the bench through different selection methods. For instance, political scientist Melinda Gann Hall has shown how judges who are elected decide death penalty cases differently during an election year than otherwise.[11] Beyond the issue of judicial behavior, selection systems are important for the normative implications they have on what are perceived to be the best or most appropriate selection system for any particular jurisdiction.

Broadly, there are two types of judicial selection systems in the United States: 1) nomination; and 2) election.[12] Yet, the mechanism of judicial selection is much more complex than that. As stated earlier, selection in the federal courts is rather straight-forward, as the president nominates judges, with confirmation from the Senate. Alexander Hamilton made clear at the ratification of the Constitution that this type

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10. 404 U.S. 71 (1971).

11. Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 442 (1992). As Hall contended:

> There are compelling theoretical reasons to expect elected officials who wish to retain office to maximize their prospects for reelection. Consistent with that expectation . . . this research indicates that under restricted conditions, elected justices in state supreme courts adopt a representational posture . . . . Given the results of this analysis, it appears that judicial elections do have an impact on individual justices' voting behavior in state supreme courts.

Id. at 442. For other research showing how selection systems can affect judicial behavior, *see* Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54 (1990); Melinda Gann Hall, Paul Brace, & Laura Langer, *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265 (1999); LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY (Robert J. Spitzer ed., 2002).

12. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176 (1980).

of selection system along with retention that bases itself on "permanency" was indispensable to producing a highly qualified judiciary.[13]

Judicial selection is much more complicated in the states. In fact, it can be argued that as there are fifty states, so there are fifty distinct selection systems, one for each state court of last resort.[14] Notwithstanding this potential for incredible variation among the states, there are technically five types of selection systems employed in the states, each of which can be broadly aggregated into either the "appointments" or "elections" category.[15] The first two of these methods, partisan and non-partisan elections, fall in the electoral category of selection methods. In partisan elections, judicial candidates appear on ballots with party labels attached to their names; candidates usually reach the general election by winning partisan primaries. Non-partisan elections are similar, except that party labels do not appear on the ballot; candidates here often reach the general election by getting through a non-partisan primary.

There are two types of appointment systems in the states, including gubernatorial appointment and legislative appointment. Gubernatorial appointment is analogous to the federal system, whereby the governor nominates judicial candidates, usually with confirmation by the state senate. Legislative appointment, initially a popular mechanism of selection in the states in the early part of this country's history, is utilized by but two states today, Virginia and South Carolina, where state legislatures select judges.

The final selection system is a hybrid system that usually is referred to as the "merit system" or the "Missouri Plan."[16] The American Judicature Society, which has advocated for the merit system for nearly 100 years, defines this selection system as follows:

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13. THE FEDERALIST NO. 78 (Alexander Hamilton et al.).

14. From this perspective there are more than 50 distinct selection systems, as several states, including Arizona, California, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee, have varying selection systems for different levels of court within those states. LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY (6th ed. 2008).

15. *See generally* Kevin M. Esterling & Seth J. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, *in* RESEARCH ON JUDICIAL SELECTION 1 (1999); Hurwitz & Lanier, *Women and Minorities*, *supra* note 3; LYLE WARRICK, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS (2nd ed. 1993).

16. I will use the terms "merit system" and "Missouri Plan" interchangeably in this article.

> Merit selection is a system whereby the state establishes a bipartisan nominating commission, including members of the legal community as well as citizens. When a vacancy occurs on the court, applicants submit their applications to this nominating commission. The commission then reviews the applications, conducts interviews with the applicants, and assesses the qualifications of each. The commission creates a list of names of those its members feel are most qualified for the job (this list usually contains three to eight names depending upon the state). This list is given to the governor, who chooses one of the people on the list and appoints that person to a judgeship. After serving, the judge is then regularly placed on the ballot for a "retention election" and citizens get to decide whether or not they will retain their seat on the bench.[17]

This is a hybrid selection system because it integrates characteristics of both appointment systems (whereby the governor selects the judges from the list provided) and electoral systems (whereby the selected judge must face the electorate in retention elections). Advocates refer to this selection method as the merit system because they claim the bi-partisan or non-partisan commission finds the most meritorious candidates and forwards their names to the governor for selection from that list.

Utilization of selection systems was in dynamic flux in the states for much of the twentieth century. For instance, the merit system in its current iteration was first adopted by Missouri in 1940, which is the reason why this selection system is often called the Missouri Plan. Since that time, use of the merit system has increased in the states, such that it is now the most popular form of judicial selection in state appellate courts, although most of the growth in this selection system took place prior to the 1990s.[18] Interestingly, while the Missouri Plan is the most widely used selection mechanism in the states in terms of the number of courts utilizing this system, most state court judges do not attain their position on the bench via merit selection. Instead, a majority of state

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17. Commonly asked questions regarding Hunter Citizens Center for Judicial Selection, AM. JUDICATURE SOC'Y, http://www.ajs.org/selection/sel_faqs.asp (last visited Dec. 3, 2010).

18. Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Justices*, 70 JUDICATURE 228 (1987); Hurwitz & Lanier, *Women and Minorities, supra* note 3; Mark S. Hurwitz & Drew N. Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years,* 29 JUST. SYS. J. 47 (2008) [hereinafter Hurwitz & Lanier, *Diversity*].

appellate judges in the United States are elected through either partisan or non-partisan elections.[19]

These are the ways that judges in the United States attain their positions on the bench. There is great debate as to which of these systems is best or most appropriate. Some of the arguments over selection systems have focused on whether one mechanism or another produces greater or lesser amounts of diversity in the courts. I now turn to that issue.

III. SELECTION SYSTEMS AND DIVERSITY

Do judicial selection systems have any effect on the diversity of judges who attain the bench by these various selection methods? While this seems to be a simple question, the answer is more nuanced than it may at first appear. Also, those who study this question often disagree on the answer(s). Before answering the question posed, however, a better question to begin may be, should we care about diversity in the courts? There are great debates in society today, both within and outside of the legal community, concerning this question. Whether or not one supports efforts to increase (or decrease) diversity, it seems clear from both legal and moral perspectives that efforts to prevent individuals from attaining positions on the bench or elsewhere because of what they are, as opposed to who they are, are at a minimum inappropriate; indeed, those efforts are often illegal or unconstitutional.

My co-author Drew Lanier and I have studied the issue of judicial diversity in some detail. Why? As we explained in our initial published work on diversity in the courts: "The presence of political minorities in the U.S. judiciary provides enormous symbolic, and perhaps political, import to a vital branch of government."[20] Indeed, the legitimacy of judicial decisions may be tied, in part, to the symbolic nature of who sits on the bench. We provided more detail in this regard in a symposium on alternatives to judicial elections:

> In our research, [we] examine issues such as judicial selection and diversity [on] the bench . . . by tak[ing] a scientific agnostic approach to studying these issues. . . When I say we use a scientific and agnostic approach, that does not mean we do not care about these issues. To the contrary, we care quite a bit about them. That is why we are studying them . . . [b]ut by a scientific

19. Hurwitz & Lanier, *Women and Minorities*, *supra* note 3; Hurwitz & Lanier, *Diversity*, *supra* note 18.

20. Hurwitz & Lanier, *Women and Minorities, supra* note 3, at 84.

> and agnostic approach, I mean that we do not have an a priori agenda or expectations for what we do or do not want to happen. . . . Our goal is to explain the systematic influences on judicial decision making, diversity, how selection systems influence those issues, etc. We then hand those results over to the policy makers to see if they find them useful, and they use them as they see fit.[21]

Simply put, we care about judicial diversity, as we think it is an important topic of study. When we think of diversity we often think of "firsts," the trail-blazers who paved the way for others to follow. People remember the names Jackie Robinson and Sally Ride, among others, for good reason. As we know, Justice O'Connor was the first woman on the Supreme Court. Who were the women who preceded her in the federal courts? Judge Florence Allen was the first woman to serve in the federal courts, appointed to the Sixth Circuit Court of Appeals by President Franklin Roosevelt in 1934. And, when President Truman issued a recess appointment Judge Burnita Matthews became the first female federal district judge in 1949.[22]

Justice Thurgood Marshall was the first person of color to serve on the U.S. Supreme Court, attaining that position when President Lyndon Johnson nominated him in 1967. The first African American on a U.S. court of appeals was Judge William Hastie, who was issued a recess appointment by President Truman to serve on the Third Circuit.[23] Then, in 1961, President Kennedy nominated Judge James Parsons to become the first African-American U.S. district judge, where he served for the Northern District of Illinois.

Having made the argument that studying judicial diversity is important, I now return to my initial question: Is there a relationship between selection systems and diversity? This is an important issue because there is the potential that arguments on behalf of court reform may conflict with efforts to increase diversity. For instance, there is the notion that the merit system depresses minority representation, as the

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21. Mark S. Hurwitz & Drew N. Lanier, *Judicial Professionalism in a New Era of Judicial Selection: Alternatives to Electing Judges*, 56 MERCER L. REV. 885, 894 (2005) [hereinafter Hurwitz & Lanier, *Judicial Professionalism*].

22. SCOTT E. GRAVES & ROBERT M. HOWARD, JUSTICE TAKES A RECESS: JUDICIAL APPOINTMENTS FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009).

23. According to Graves and Howard, while Judge Hastie was a part of the same series of recess appointments President Truman made in 1949, his Senate hearings proved more contentious than those for Judge Matthews. *Id.* *See also* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997).

commissions that are charged with finding quality will instead focus on experienced or familiar judges. Thus, a prior *status quo* that does not include minority judges may be reinforced by reliance on the merit system. As well, some scholars have argued that judicial elections boost minority representation on the courts, especially when a local electorate votes for local judges.[24]

Thus, the research and arguments on this topic are diverse and, at times, divisive. What have we found? Our research shows that while selection mechanisms may have been associated with differing levels of diversity at a point in time in the past, there no longer appears to be a relationship between diversity and selection system. In our research we have looked at the racial and gender composition of every appellate judge in every state in the country—as well as federal appellate judges—across three cross-sections of time, 1985, 1999, and 2005. Consequently, our data include thousands of appellate judges in the United States at various points in time. In part of our research agenda we have sought to describe the potential relationship between selection system and diversity.[25] In other aspects of our research we have attempted to explain systematic, differing levels of diversity in the courts.[26]

Our findings are consistent across our various stages of research. That is, while there once may have been some correlation between selection system and diversity, there no longer is any such relationship. The fact that in 1985 minority judges were more likely to be appointed by governors than selected via merit selection provides support for those who have argued that merit commissions tamp down judicial diversity. However, by 1999 and continuing into 2005, we found that minority judges were "about as likely to reach the bench whether appointed by the governor, selected under a merit plan, or elected."[27] The conclusion from our research on descriptive representation in the courts is that state policymakers may debate the merits of the various selection systems regarding the most appropriate selection mechanism for their state. However, one issue with which they need not concern themselves is the influence of selection system on judicial diversity. In other words, levels of diversity are relatively similar across the various selection systems,

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24. *See* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 479-481 (2000).

25. Hurwitz & Lanier, *Women and Minorities*, *supra* note 3; Hurwitz & Lanier, *Judicial Professionalism*, *supra* note 21; Hurwitz & Lanier, *Diversity*, *supra* note 18.

26. Mark S. Hurwitz & Drew N. Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 ST. POL. & POL'Y Q. 329 (2003) [hereinafter Hurwitz & Lanier, *Judicial Diversity*].

27. Hurwitz & Lanier, *Diversity*, *supra* note 18, at 56.

and thus the relationship between diversity and selection system need not be a concern for policy makers or other "selectorates" when it comes to choosing an appropriate selection system.

If selection systems are no longer associated with judicial diversity, are there any specific characteristics or institutions that do affect diversity? Indeed, there are, and interestingly, the effects are somewhat different for gender and racial diversity. For female judges, the critical influence we found to increase gender diversity is the number of available seats on a bench. That is, the more positions on a state appellate court, the greater the likelihood that women will serve as judges on that bench.[28]

Racial minorities also benefit from a greater availability of seats on the bench. One variable we found that additionally aids representation of racial minorities is the available pool of judicial candidates. In other words, more African-American lawyers in a state leads to more African-American judges in that state. Interestingly, this finding did not apply to female judges, as the pool of candidates did not explain gender diversity in the courts. But, we found a strong influence between the number of racial minorities and the number of judges in a state. Thus, for those who wish to increase the presence of racial minorities on the bench, a practical starting point would be addressing the number of racial minorities who are lawyers, since being a lawyer is a necessary (but not sufficient) condition for becoming a judge, at least for most state appellate courts.

There are some institutional features that seem to aid judicial diversity in state appellate courts, particularly the number of available seats on the bench as well as the candidate pool, at least for racial minorities. But once again I must reiterate that we found no influence or correlation between judicial selection system and diversity, at least not in the more recent times. However, just because selection systems are not related to diversity does not mean that selection systems should be ignored. To the contrary, judicial selection remains a terrifically interesting topic of study, and an important one as well. As the state of Michigan has one of the most unique selection systems in the country, I now turn to a discussion of the selection system for the Michigan Supreme Court.

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28. *See also* Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504 (2002); Rorie L. Spill Soldberg & Kathleen A. Bratton, *Diversifying the Federal Bench: Presidential Patterns*, 26 JUST. SYS. J. 119 (2005).

IV. THE MICHIGAN SUPREME COURT

Based upon formal selection criteria, justices on the Michigan Supreme Court are selected in non-partisan elections, as judges on the state's court of last resort appear on the ballot with no party labels attached. However, things are not always as they appear, and this is true of the selection system for Michigan.[29] Indeed, judicial candidates on the general election ballot, while on their face appear to be non-partisan, were previously selected at political party conventions. No other state retains a system that employs both partisan and non-partisan elements in the same manner as Michigan's selection system.[30]

Michigan's unique system of selection has been in place since a constitutional amendment was passed by a voter initiative in 1939, a system that has remained substantially intact even in the face of a constitutional convention in 1962 that made numerous changes to much of the state's constitution.[31] Interestingly, the 1939 initiative that set in place the current system followed a failed effort in 1938, supported by the American Judicature Society and others, for a selection system based on nomination by commission and retention elections.[32] Had that 1938 voter initiative passed, perhaps the Missouri Plan would be referred to instead as the Michigan Plan, since this initiative in Michigan took place prior to Missouri's adoption of this selection system.[33] While reformers have continued to set their sights on Michigan's selection system, they

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29. Note that the discussion herein is based solely for the Michigan Supreme Court and not any lower levels of court in the state.

30. Ohio is another state that includes both partisan and non-partisan aspects in its judicial elections, though the details of its selection system are different from those in the Michigan system. Bert Brandenburg & Rachel P. Caufield, *Ardent Advocates*, 93 JUDICATURE 78 (2009) [hereinafter Brandenburg & Caufield, *Ardent Advocates*]. One consequence of Michigan's hybrid system is confusion and disagreement regarding how to classify its selection system. That is, should Michigan be coded as a non-partisan electoral system, or should its selection system be classified as a partisan election? Many scholars, including the author (*see* Hurwitz & Lanier, *Judicial Diversity*, *supra* note 26), have classified Michigan as a non-partisan election state, based on the format of its general election in which no party labels are observed. *See also* CHRIS W. HALL & MELINDA GANN BONNEAU, IN DEFENSE OF JUDICIAL ELECTIONS (2009). Others, particularly judicial reform advocates, assert instead that Michigan should be coded as a partisan election state, due to the partisan nature of how candidates initially reach the general election ballot. *See* Brandenburg & Caufield, *Ardent Advocates*, *supra*, at 80.

31. Elizabeth Wheat and Mark S. Hurwitz, The Politics and Influences of Judicial Selection: The Case of the Michigan Supreme Court (paper presented at the 2010 Annual Meeting of the Midwest Political Science Association) (on file with author) [hereinafter Wheat & Hurwitz, *Judicial Selection*].

32. *Id.*

33. *Id.*

have been unsuccessful in transforming Michigan's selection system, in part because the state's political parties support the current system.[34] Whether Justice O'Connor's endorsement for change to the Michigan electoral system brings about reform remains to be seen.

What are the effects of Michigan's unique electoral system? One outcome is that very few incumbents have been defeated at the polls over the years. From the inception of the current system in 1939 through the end of the Twentieth century, just eight sitting Supreme Court justices were defeated at the ballot box by a challenger. While I have not compared these electoral data to other non-partisan elections, these results do not seem out of line with studies showing relatively high incumbent reelection rates in non-partisan judicial elections.[35]

Yet, something changed in 2008. For the first time since the 1939 system has been in place a sitting chief justice, Clifford Taylor, lost to a challenger, then-Wayne County Circuit Judge Diane Hathaway. Since this electoral bombshell there has been much speculation as to why the chief justice lost. But, one thing seems clear: The 2008 election resembled a partisan election more than a non-partisan judicial election, particularly with respect to the money and tenor of the race that are becoming more prevalent in partisan elections across the country.[36] In particular, political parties and outside groups invested a good deal of money into the Taylor-Hathaway race, with Hathaway being favored by groups traditionally supportive of Democrats, and Taylor finding financial support from Republican-leaning groups.[37] In an election year that favored Democratic candidates both in Michigan and nationwide, the outcome was not close, with the challenger Hathaway besting the incumbent Taylor by about ten percentage points.[38]

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34. Michael Franck, *Coalition for the Appointment of Appellate Judges,* 56 MICH. ST. BAR J. 292, 293 (1977).

35. For a comparison of rates of failure to retain judicial seats across different selection systems, see Todd A. Curry and Mark S. Hurwitz, Does Accountability Vary? Examining the Tenure of State Supreme Court Justices, (paper presented at the 2010 Annual Meeting of the American Political Science Association), http://ssrn.com/abstract=1644718.

36. *See* Chris W. Bonneau, *The Effects of Campaign Spending in State Supreme Court Elections*, 60 POL. RES. Q. 489 (2007).

37. Pat Shellenbarger, *Stakes, Spending High in Michigan Supreme Court Race Between Taylor, Hathaway,* GRAND RAPIDS PRESS (October 30, 2008), http://www.mlive.com/news/grand-rapids/index.ssf/2008/10/stakes_spending_high_in_michig.html.

38. *Election Results: General Election: November 04, 2008*, MICHIGAN DEPARTMENT OF STATE (DEC. 30, 2008), http://miboecfr.nictusa.com/election/results/08GEN/13000000.html.

Elections matter, and Justice Hathaway's victory over the former chief justice is no exception. In particular, once Justice Hathaway reached the bench, the ideological tilt of the Michigan Supreme Court changed from one that was fairly conservative to one with a one-vote difference between those who lean left versus those who lean right. As well, from a perspective of diversity Hathaway's electoral success in 2008 also had an impact on the Michigan Supreme Court, which had a majority of four women on a seven-seat bench, all of whom were white. There was one African-American male and two white males on the Michigan Supreme Court.

Michigan's unique selection system has its critics and backers. Justice Hathaway's surprise victory in 2008 again raised the issue of the appropriateness of this selection system. As well, there was a controversy over recusal rules in Michigan that coincided with the U.S. Supreme Court's decision in *Caperton v. Massey Coal Co.*[39] And of course, the impact of the Supreme Court's opinion in *Citizens United v. Federal Election Commission*[40] on judicial elections in the country remains an open issue at this point in time. Certainly, it seems that the debate over Michigan's interesting system of selection—however it is categorized—will not end any time soon.

V. CONCLUSION

Judicial selection remains an important topic of study, as well as a critical issue for media scrutiny and attention. We know that judges behave differently on the bench, based on whether or not the selection system that placed them there fosters independence or accountability, or perhaps both. But, the influence of selection systems on the judicial process has the potential to go beyond judges' decisions. For instance, while selection systems no longer influence racial or gender diversity on the bench, they once did have some discernable effect. For now and perhaps for the future, as some selection systems engender bare-knuckled politics in terms of the types of campaigns they produce, the issue of selection system remains a critical issue of policy as well. Whether or not one takes a position that partisan elections (the type of selection system most likely to bring about bare-knuckled politics) are a good or a bad thing is not my point here. Instead, my argument is that the form of selection systems used in the states has the ability to influence many aspects of the judicial system.

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39. 129 S. Ct. 2252 (2009).
40. 130 S. Ct. 876 (2009).

With respect to diversity, both the numbers and percentages of non-traditional judges (that is, those who are female or racial minorities) have increased quite a bit in the past generation or two. While many may point to the U.S. Supreme Court in light of recent appointments, the Michigan Supreme Court also is a prime example, and has been for some time now. Nevertheless, our research has demonstrated over and again that selection systems no longer are associated in any way with increasing or decreasing levels of diversity. In other words, representation on courts today may be a function of many different issues, but diverse representation based on gender or race is no longer a function of judicial selection systems.

Finally, the Michigan Supreme Court's selection system is as unique as any in the country, combining aspects of both partisan and non-partisan elections. Should this system be changed to something else? If yes, what would be the most appropriate system? Would a fully disclosed partisan electoral system, or a non-partisan system that includes non-partisan primaries, not political party conventions, be most appropriate for Michigan? What about an appointive system? Would Michigan be best served by gubernatorial or legislative appointment? Or, would a merit-based system along the lines of the Missouri Plan be the best way to select judges in Michigan? I do not have an answer to these questions. That is not my purpose. Instead, as a scholar with both a legal and political science background my purpose is to be as objective as possible with respect to my research. That is, I remain agnostic about the findings in my research, and ensure as best I can that the scientific process I utilize in my research agenda produces valid results upon which both scholars and non-scholars alike can rely, as I continue to examine the complexities endemic within the issues of selection systems and diversity, both within Michigan and across the country.