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## Why judicial elections are doomed

Within the next decade Illinois and most states will severely curtail the number of judges elected by the voters. Some kind of appointive system will probably replace popular elections.

What is killing the popular election of judges? The drastic changes in judicial campaigns, most of them brought about by the U.S. Supreme Court in three decisions concerning judicial campaigns.

The concept of electing state court judges is almost as old as the country. Thomas Jefferson thought that the voters could elect state judges. In a letter to Samuel Kercheval dated June 12, 1816, he wrote:

"It has been thought that the people are not competent electors of judges learned in the law. But I do not know that this is true, and, if doubtful, we should follow principle. In this, as in many other elections, they would be guided by reputation, which would not err oftener, perhaps, than the present mode of appointment."

Jefferson was surely aware that there were problems with allowing governors to appoint state judges. In 1812, Georgia began electing state judges after learning that its governor was appointing judges on the basis of patronage, if not outright corruption.

However, even Jefferson, great political theorist that he was, could not have foreseen big-city machine politics, the demands of ethnic and racial groups for "representation" on the bench and the influence of political parties in choosing judges. All of these occurred in the late 19th century and in the 20th century.

In the 21st century we have seen a totally new development: the extension of high-powered campaign tactics to judicial elections. That is what brought about the three Supreme Court decisions that are signaling the doom of judicial elections.

Until recently, Illinois judicial elections were, for the most part, ratifications of decisions made by the leaders of political



### Law and Public Issues

By Ann M. Lousin

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parties. Within Cook County, the slating of the Cook County Democratic Party Central Committee was tantamount to election.

When voters cast their ballots, they usually saw that nobody ran against the endorsed candidates. Those of us old enough to remember the "slating sessions" can recall judicial hopefuls who told the slating committee why it should endorse them — and the reasons had little to do with qualifications to judge cases. Devoted service to the party was often a primary consideration. In heavily Republican areas of Illinois, that party's committees often operated the same way.

With the advent of the 1970 Illinois Constitution, we began to see a few contested judicial primaries. Nonendorsed candidates for the Democratic nomination for the Illinois Supreme Court seats in the 1st District (Cook County) occasionally won. Some campaigns were hard-fought, often along the lines of "machine" candidates against "nonmachine" candidates.

The judicial candidate committees ran the campaigns. They raised the campaign funds, they decided how funds were spent and they did not tell the candidates who

had donated the funds. Candidates followed the canons of judicial ethics and never offered opinions on "subjects that might come before them on the bench."

All that began to change in 2002. In *Republican Party of Minnesota v. White*, 536 U.S. 765, the U.S. Supreme Court held that a judicial candidate's First Amendment right to speak on issues was superior to the canons of ethics preventing him from doing so.

Because most of the states had canons of ethics similar to Minnesota's, the floodgates were open. The result is that judicial candidates find it almost impossible to refuse to answer questions about their views on abortion, gay marriage, the death penalty and other hot-button issues in their jurisdictions. Interest groups from both the right and the left pepper candidates with questions and threaten to find them "unqualified" for election to the bench unless they answer the questions the way the interest groups want.

In 2009 the Supreme Court decided *Caperton v. Massey*, 129 S. Ct. 2252, which dealt with an entity not under the control of the judicial candidate or his committee. The entity spent millions of dollars on ads ostensibly concerning issues, but which really were efforts to persuade the voters of West Virginia to elect a certain candidate to the West Virginia Supreme Court.

When the chief contributor to that entity was a party to a case before that court, the justice elected refused to recuse himself. The U.S. Supreme Court held that his refusal to recuse amounted to a denial of due process to the other litigant. After Caperton, any judge who has received contributions, even indirectly, must consider recusal if the contributor is involved in litigation.

In January 2010, the Supreme Court decided *Citizens United v. FEC*, 130 S. Ct. 876. This case solidified the First Amendment rights of entities not subject to the candidate's or a party's control to

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make statements about issues relating to elections. Because Citizens United applies to judicial elections, it may be the final nail in the coffin of attempts to regulate judicial campaigns.

In 2004 one race for the Illinois Supreme Court garnered \$9 million, a record for a judicial race. Clearly, the trend is toward injecting more money into judicial campaigns. Isn't it obvious that the donors seek to place judges "friendly" to their causes on the bench?

The 2010 retention races in Illinois and Iowa evidenced this. In both states, Supreme Court justices run for "retention," that is, they do not have an opponent. Voters are expected to scrutinize the justices' records and decide whether they deserve another term. In Illinois, a pro-business group that apparently was not under any party's

control sought to unseat Justice Thomas L. Kilbride, a Democrat elected from the 3rd Judicial District. Kilbride campaigned actively to retain his seat for another 10 years. It is important that much of the money on both sides was raised from outside his district. In the end he easily obtained more than the 60 percent affirmative vote needed to keep his judgeship.

The three Iowa justices were not so lucky. A unanimous Iowa Supreme Court had ruled that the Iowa Constitution required Iowa to allow same-sex marriages. This angered some "pro-family" groups, who raised money, mostly outside of Iowa, to defeat the three justices. The three justices lost their retention races.

We are seeing a similar situation in Wisconsin, where the Supreme Court

justices are elected on a nonpartisan basis. As their terms end, someone may run to unseat them, a situation very different from Illinois and Iowa. Reports indicate that Justice David Prosser openly promised to promote conservative values from the bench. His challenger JoAnne Kloppenburg was supported by Wisconsin unions incensed by recent actions in the state legislature. Their bitter judicial race was so close that it has gone to canvass. At this point, are judicial campaigns really any different from campaigns for other offices? Jefferson surely did not have these developments in mind in 1816. I predict that within a decade, judges themselves will insist that Illinois and other states cease holding popular elections of judges. But what will take the place of elections? That is the subject of a future article.