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State Constitutional Politics

John Dinan

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Chris W. Bonneau & Melinda Gann Hall, *In Defense of Judicial Elections* (Routledge 2009). Pp. 184. $30.95.

Kenneth P. Miller, *Direct Democracy and the Courts* (Cambridge U. Press 2009). Pp. 278. $24.99.

Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform* (Stanford L. Books 2010). Pp. 322. $27.95.

Scholars have increasingly been drawn in recent years to the study of state courts and constitutions, partly on account of state court decisions providing more protection for rights than is afforded by U.S. Supreme Court decisions but also because of state constitutional amendments enacted in response to these rulings. From the 1970s onward, state courts have relied on state constitutional provisions to restructure school-finance systems, ban capital punishment, protect rights of criminal defendants, and legalize same-sex marriage. These decisions have in turn led to constitutional amendments reinstating capital punishment, preventing state courts from exceeding federal search-and-seizure guarantees, and barring legalization of same-sex marriage.

These developments have focused scholarly attention on several distinctive aspects of state constitutional politics, including the prevalence of elected judges, availability of direct democracy, and presence of constitutional provisions with no federal counterpart. The authors of the books reviewed in this essay are concerned in various ways with analyzing these distinctive features. In their book, *In Defense of Judicial Elections*, Chris W. Bonneau and Melinda Gann Hall contend that many critiques of judicial elections cannot withstand empirical scrutiny. Kenneth P. Miller, in *Direct Democracy and the Courts*, analyzes the use of the initiative process and the way that courts have handled challenges to initiatives. In *Framing Equal Opportunity: Law and the Politics of School Finance Reform*, Michael Paris assesses the different approaches taken by legal reformers who relied on state education clauses to secure state court rulings requiring restructuring of school finance systems.

Bonneau and Hall write in response to "an increasingly loud clamor in the United States to end the election of judges altogether," which has persuaded a number of states to eliminate partisan elections and adopt non-partisan elections or some variant of the Missouri Plan of merit selection/retention elections.[1] As Bonneau and Hall note,

* Associate Professor, Department of Political Science, Wake Forest University.

1. Chris W. Bonneau & Melinda Gann Hall, *In Defense of Judicial Elections* 1, 3 (Routledge 2009).

opponents challenge both the concept and conduct of judicial elections.[2] Conceptually, critics value judicial independence and fear that judges who stand for election will behave in ways detrimental to the cause of justice.[3] In their campaigns, judges may make promises or take policy positions that constrain them from approaching cases on their merits and lead to an unhealthy politicization of the judicial process. Forced to raise funds to run their campaign, judges may accept and perhaps even solicit donations from lawyers and groups who will later appear before them in court.[4] And because they must be conscious of maintaining public support in order to retain their position, judges may be led to take account of public opinion in issuing rulings where such considerations may be inappropriate, such as regarding particular death penalty appeals. Moreover, and aside from these conceptual concerns, critics of judicial elections are dissatisfied with the way such elections are currently conducted.[5] Voters may lack the requisite information to evaluate competing judicial candidates and may be influenced by negative advertisements run by single-issue interest groups.[6]

Bonneau and Hall are, to put it mildly (which is not the tone they adopt at various points), unconvinced. As they argue, "we find that many of the claims made by opponents of judicial elections are at best overstated and are at worst demonstrably false."[7] Making use of sophisticated statistical analyses of data from state supreme court elections from 1990-2004, they aim to "show that many of the most pressing concerns about the ills of judicial elections are not grounded in empirical reality."[8] As they put it, "[o]n just about every empirical point of contention, the evidence strongly suggests that critics of judicial elections simply are wrong"[9] and "are not just assaulting a method for choosing judges but also are waging war on the democratic process."[10] For their part, Bonneau and Hall conclude that, "rather than being eradicated, judicial elections should be retained if not restored to their original form of partisan, competitive races, the situation that existed before modern reform advocates convinced the states to remove partisan labels and challengers from these contests."[11]

In Defense of Judicial Elections subjects to empirical testing several important claims in the judicial elections debate. Based on a detailed analysis of factors that correlate with ballot roll-off rates, they make a convincing case that "partisan elections draw more citizens into state supreme court races than any other system";[12] therefore, if we are primarily concerned with increasing voter participation, then partisan elections are preferable to non-partisan or retention elections. Additionally, whereas critics are concerned about high levels of campaign spending in judicial elections, in part because this may reduce voter participation, it turns out that "campaign spending exerts a

2. *Id.* at 2-3.
3. *See id.* at 1.
4. *See id.* at 75-76.
5. *Id.* at 1-2.
6. Bonneau, *supra* n. 1, at 1-2.
7. *Id.* at 2-3.
8. *Id.* at 4.
9. *Id.* at 17.
10. *Id.* at 18.
11. Bonneau, *supra* n. 1, at 2.
12. *Id.* at 26.

statistically significant impact on the willingness of voters to participate in supreme court elections once these voters are already at the polls."[13] Moreover, to the extent that higher rates of campaign spending might be seen as a concern, the data indicate that "[o]ther things being equal, partisan elections are significantly cheaper than nonpartisan elections," because candidates in nonpartisan judicial elections must spend more money to educate voters and distinguish themselves than would be necessary if voters had access to party labels as cues.[14] Additionally, Bonneau and Hall report that challengers "with experience on the bench perform almost 5 percent better than their inexperienced counterparts,"[15] indicating that "the electorate takes into account judicial experience when selecting among candidates,"[16] thereby striking what they deem "a considerable blow to the negative characterizations dominating the judicial reform literature."[17] The preceding conclusions are based on statistical analyses of all states with judicial elections; a penultimate chapter examines data from several specific states that recently changed their judicial selection system.

In Defense of Judicial Elections is persuasive in demonstrating that many of the behavioral patterns found in representative elections also characterize judicial elections. Voters participate at higher rates when they benefit from partisan cues and when campaigns are well-financed.[18] Moreover, to the extent that judicial elections fall short in various respects, Bonneau and Hall are convincing when they claim that these shortcomings are largely attributable to the removal of party labels and adoption of retention elections in place of partisan election.[19] In these respects, there is little with which critics of judicial elections can take issue and much from which scholars can benefit. In fact, the book would be a good candidate for use in graduate-level courses in state politics, or even courses in research design and methods, given the rigorous and sophisticated way that the authors proceed to address a question of pressing interest.

In two other important respects, however, judicial election opponents are likely to remain unconvinced or at least press for additional evidence. First, although Bonneau and Hall have done a fine job of examining the conduct of judicial elections, they do little to examine the ways judicial selection systems affect the behavior of judges on the bench. The one effort they make along these lines is to report the findings of several other scholars to the effect that elected judges write more opinions and garner more citations than appointed judges,[20] which leads them to conclude that "the best supreme court justices in America are the product of democratic politics, especially partisan elections."[21] Even if one were to accept these indices as good measures of judicial quality, there remain all sorts of other questions about the effects of elections on judicial behavior that are unexamined in this book but have been the subject of previous

13. *Id.* at 44.
14. *Id.* at 66.
15. *Id.* at 98.
16. Bonneau, *supra* n. 1, at 101.
17. *Id.* at 101-102.
18. *Id.* at 44-45.
19. *Id.* at 45.
20. *Id.* at 137.
21. Bonneau, *supra* n. 1, at 17.

empirical testing and ongoing scholarly debate. For instance, when issuing decisions, are elected judges more likely to favor groups from which they have received large campaign donations or to take account of public opinion in cases where doing so is inappropriate? After all, it is not just the conduct of judicial elections themselves that pose concerns for critics who are at least as troubled, if not more so, by the possibility that judicial elections might affect the way that judges act on the bench.

Critics of judicial elections are also likely to remain unpersuaded because much of their concerns stem from a theoretical preference for independence over accountability that is not susceptible to empirical testing. Bonneau and Hall are aware of this and make clear that they "speak only to those aspects of judicial elections that can be addressed scientifically" and realize their evidence is unlikely to convince anyone who "opposes them on normative grounds."[22] The question, at the end of the day, is how much of the current scholarly disagreement revolves around empirical questions of the sort that Bonneau and Hall examine and how much is attributable, on the other hand, to contrasting normative visions? One suspects that the critics' normative preference for judicial independence accounts for at least as much, and likely more, of their opposition to judicial elections as do their concerns about levels of voter participation, campaign spending, and voter capacity. Critics are therefore likely to respond to evidence that judicial elections increasingly resemble other representative elections in just the way Bonneau and Hall predict: not by disagreeing with this empirical claim but by viewing this as all the more reason to move away from judicial elections and toward an appointment system, because judges should not be equated with legislators.[23] To the extent that judges might be asked to rule on controversial policy issues such the legality of same-sex marriage or the death penalty, the positions of judges and legislators might indeed be equated. But to the extent that judges are asked to rule on a particular criminal defendant's appeal or a specific land-use dispute, to take just several examples, one might want judges to assume a role different from a legislator. These types of normative questions, although taken up in passing,[24] are largely outside the scope of the inquiry of this book. In this sense, the debate over judicial elections is likely to continue, although the evidence presented here is a very welcome addition to the discussion.

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Whereas Bonneau and Hall are concerned with defending state judicial elections, Kenneth Miller is intent on analyzing and evaluating the increasing reliance on direct democracy and the courts for policy-making on controversial issues. Particularly since the introduction of direct democracy in the Progressive Era, constitutional politics at the state level has been characterized by a different dynamic than at the federal level. Citizens in twenty-four states can exercise the initiative power, whereas there are no opportunities for direct citizen participation in lawmaking at the federal level.[25] Moreover, state constitutional amendment processes are invariably more flexible than the federal amendment process, to the point that eighteen states permit citizens to initiate

22. *Id.* at 18.
23. *Id.* at 51.
24. *Id.* at 11, 14-15, 51.
25. Kenneth P. Miller, *Direct Democracy and the Courts* 35 (Cambridge U. Press 2009).

constitutional amendments.[26] As a result, and contrary to Justice Robert Jackson's proclamation in the 1943 flag-salute case that individual rights are intended to be placed beyond the reach of current majorities and defended by courts,[27] Miller notes that at the state level, where "the people can amend their constitution by petition and simple majority vote, constitutional rights are up for grabs," and court decisions "are always subject to popular override," such that "state constitutional rights *may* be submitted to a vote and *do* depend on the outcome of elections."[28]

Miller aims to "provide a comprehensive account of this conflict" between "direct democracy and the courts,"[29] by examining the origin and century-long use of the initiative process, the way that courts have countered direct democracy, and the way the people have in turn sought to check the courts. He compiles data from all twenty-four initiative states (all but five of which adopted the initiative in the Progressive Era); but he is particularly interested in learning from a handful of western states Arizona, California, Colorado, Oregon, and Washington - that make the heaviest use of initiatives.

Just as a principal virtue of Bonneau and Hall's book is that it subjects various claims in the judicial elections debate to empirical testing, Miller's book is particularly helpful in compiling data in response to several longstanding questions about the use of direct democracy and the way courts have treated challenged initiatives. However, whereas Bonneau and Hall seek to rebut what they view as a flawed prevailing wisdom, Miller is not primarily concerned with advancing an overarching argument about the interaction between direct democracy and the courts. Rather, he brings a range of data to bear on important questions that scholars have posed about these institutional devices.

Regarding the history and frequency of initiative usage, he shows that initiatives were used with some regularity in the 1910s and 1930s and then declined in popularity, until "in the 1970s, the initiative process staged a dramatic revival," before peaking in the 1990s.[30] Although many scholars view the passage of Proposition 13 in California in 1978 as being responsible for the modern resurgence of initiatives, he argues that this is only partly correct and that initiative use increased in the early 1970s for reasons broader than the tax revolt that boosted and was in turn boosted by Proposition 13.[31] As to the subject matter of initiatives over the last century, he finds that "[m]easures to reform politics and government have been the most common . . ., accounting for more than 40 percent of all citizen lawmaking nationally,"[32] with "public health, welfare and morals" initiatives the second most common.[33]

As to the heavily debated question of whether the initiative process poses a threat to individual rights, Miller undertakes a careful analysis and concludes that rather than undermining minority rights, "direct democracy's most consequential impact on rights has been to limit the *expansion* of rights in a number of areas, including affirmative

26. *Id.* at 35.
27. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
28. Miller, *supra* n. 25, at 10.
29. *Id.* at 15.
30. *Id.* at 46.
31. *Id.* at 48-49.
32. *Id.* at 55.
33. Miller, *supra* n. 25, at 58.

action, bilingual education, marriage, and certain areas of criminal law."[34] Miller is particularly helpful, and offers a useful corrective to other studies of this topic, in pointing out that many of the examples cited in the literature "have involved competing rights claims," making it difficult to reach a definitive judgment about which of several competing interests and values should prevail in any given instance and, therefore, how to identify when rights have in fact been violated.[35]

Miller also makes a fine contribution in examining the way that courts have responded to the initiative process. Scholars have taken a range of positions on the question of how courts *should* treat challenged initiatives, with some arguing that initiatives should be entitled to less deference than legislative statutes, others arguing that initiatives and statutes should be treated equally, and a few arguing that initiatives are entitled to special deference because they embody the direct expression of the popular will. In this context, Miller performs the valuable service of compiling data on the way that courts have actually ruled on challenges to ballot measures over the last century. For instance, he finds that "[i]n the leading states, courts struck down, in whole or in part, 44 percent of the initiatives that faced post-election challenges," meaning that nearly one-fifth of all initiatives approved by voters in these states were invalidated in whole or in part.[36] Moreover, this pace accelerated in the period from the 1960s to the 1990s, to the point that almost one-third of the initiatives adopted in these states in the 1990s were invalidated by state or federal courts.[37]

Regarding the way that the initiative process has been used to respond to court decisions, one of Miller's purposes is to identify the principal state court rulings that have generated court-overturning constitutional amendments. Same-sex marriage rulings are the most recent example and have led to the passage of 30 state constitutional amendments (some enacted through the initiative process) that were intended to prohibit judicial imposition of same-sex marriage. As Miller shows, however, this is far from the only example, in that court-constraining amendments have also been enacted in response to decisions banning the death penalty and protecting the rights of criminal defendants, among other rulings. Miller's principal contribution here is to show that the design of direct democratic institutions goes a long way toward explaining why some court decisions are overturned whereas others are sustained. As he notes, efforts have been made to overturn same-sex marriage rulings in Massachusetts, California, Connecticut, and Iowa, but have only been successful in California, primarily because that is the only one of these states that has a direct initiative procedure whereby constitutional amendments can be adopted without any participation by the legislature.

After answering a number of empirical questions about the interaction between direct democracy and the courts, Miller closes by considering the consequences of permitting contentious policy questions to be resolved in these institutions. Among other concerns, he argues that bypassing the legislature has "polarized the debate" and that confrontations between the citizenry and judges can lead to a perceived "[p]oliticization

34. *Id.* at 154-55.
35. *Id.* at 155.
36. *Id.* at 105.
37. *Id.*

of the [c]ourts."[38] At the same time, he acknowledges that these state-level "hybrid constitutional systems," as he refers to them, can be viewed at bottom as conforming to "the basic Madisonian principle that power should never be concentrated in the hands of any individual or group."[39]

Although Miller is therefore not unconcerned with the consequences of the increased reliance on direct democracy and the courts, and he identifies several adjustments that could reduce their prominence in policy-making, his principal contribution to the literature is collecting and organizing an impressive amount of data in response to longstanding questions about the use of initiatives and their treatment by state and federal courts. *Direct Democracy and the Courts* will be the authoritative source on these topics.

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Whereas Bonneau/Hall and Miller are concerned with assessing institutional features of state political systems that permit a more direct popular influence on judging, lawmaking, and constitution-making than at the federal level, Michael Paris is intent on analyzing the strategies employed by legal reformers who have relied on distinctive state constitutional provisions to bring about restructuring of school finance systems. The U.S. Supreme Court in 1973 in *San Antonio Independent School District v. Rodriguez* rejected a federal constitutional challenge to the way that Texas schools were financed.[40] However, from the 1970s to the present, all but a handful of state courts have heard state constitutional challenges to the adequacy or equity of school finance systems, and a significant number have sided with plaintiffs and ordered major changes in the way schools are financed.

Framing Equal Opportunity aims to make a particular contribution to our understanding of this school-finance litigation, and it is important to be clear about what Paris is and is not concerned with examining. He is not primarily concerned with assessing the legitimacy of these school-finance suits, although he does take the opportunity in the conclusion to rebut what he refers to as, "recent neoconservative attacks,"[41] rooted in separation of powers concerns and based on what he deems a "theoretically naïve and empirically undefended" view of law, politics, and courts.[42] Nor is he primarily intent on assessing whether education outcomes have improved through the policy changes achieved through these lawsuits. As he makes clear, "This is a study of legal mobilization and relatively elite processes of policy change," meaning that "questions about educational policy implementation and impact will be given somewhat short shrift."[43] Nor, as he also makes clear, does he intend to bring to bear the sort of extensive data compiled by Miller or the sophisticated statistical tests performed by Bonneau and Hall. Rather, because his central claims are "not amenable to precise

38. Miller, *supra* n. 25, at 221.

39. *Id.* at 223, 224.

40. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

41. Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform* 229 (Stanford L. Books 2010).

42. *Id.* at 231.

43. *Id.* at 33.

measurement,"[44] he quite reasonably relies on "narrative case studies making use of relevant sources, such as interviews, newspaper coverage, and documents."[45]

Paris aims to contribute to the ongoing scholarly debate about the capacity of law and courts to bring about social change (to which Gerald Rosenberg and Michael McCann, among others, have contributed), by showing that approaches taken by school-finance reformers in New Jersey and Kentucky "played a central role in shaping the language of public debate, the organization of educational politics, and policy processes and outcomes."[46] In both states, reformers secured important legal victories leading to legislation changing the way schools are financed. But there are notable differences in the time it took for these legal victories to translate into legislative change and in the character of the resulting reforms. Paris argues that the approaches taken by these legal reformers can go a long way toward accounting for these different outcomes. In short, whereas other scholars in the school-finance area, as well as other areas, focus on state court decisions when seeking to explain different outcomes, Paris argues that we must go further back and concentrate on legal reformers and analyze the ways they framed their arguments and built supportive political coalitions.

Paris's first conclusion - that "legal strategies work best when used in conjunction with broader political mobilization and coalition building"[47] is his strongest and clearest argument. Others have made this point, as he acknowledges, but his densely packed narrative of the New Jersey and Kentucky cases illustrates the argument in a particularly helpful fashion. As he shows, legal reformers in New Jersey were able to secure important state supreme court victories in *Robinson v. Cahill* in 1973 and then in a series of *Abbot v. Burke* cases from 1990 onward.[48] But the legislation enacted after the 1973 ruling did little to achieve reformers' goals, and it took some time before the 1990 ruling translated into legislation that brought sustained change in the way that schools were financed, mostly by boosting state spending on poor urban districts.[49] In Kentucky, meanwhile, a 1989 state supreme court victory in *Rose v. Council for Better Education*[50] led to passage the next year of a sweeping legislative reform that increased spending throughout the state and brought significant changes in the way education is delivered.[51]

Paris's contribution is to explain these different outcomes in part by reference to the divergent strategies taken by New Jersey and Kentucky legal reformers. In New Jersey, he notes that "[u]ntil the early 1990s, the lawyers at the center of this effort distrusted community involvement in their case; they made no effort to use litigation to mobilize constituents for action in politics."[52] It was not until 1991-1992, after "[t]heir avoidance of political engagement . . . left their judicial victory in *Abbott* vulnerable to a

44. *Id.* at 32.
45. *Id.* at 32.
46. Paris, *supra* n. 41, at 31.
47. *Id.* at 4.
48. These two cases generated 27 separate opinions by the New Jersey Supreme Court. Accordingly, citations are omitted. *Id.* at 5-7.
49. *Id.* at 6-7.
50. *Rose v. Council for Better Educ.*, 790 S.W.2d (Ky. 1989).
51. Paris, *supra* n. 41, at 7-9.
52. *Id.* at 60.

political backlash," that "they adopted a more realistic political approach that helped to rescue their project."[53] By contrast, "the Kentucky reformers took a realistic, pragmatic approach to litigation and change. Throughout, they coordinated their lawsuit with broader political strategies."[54]

Paris also aims to move beyond this "axiomatic proposition" about the inefficacy of a "legalistic overreliance on courts to bring about change"[55] by advancing a second argument: that "ideological coherence (or fit) across the legal and political prongs of reform projects has an important and overlooked connection to overall success."[56] He argues that New Jersey legal reformers advanced a claim about "compensatory justice"[57] but evaded certain questions about the application of this principle and encountered difficulties in building support with teachers' unions who might have been expected to be natural allies.[58] In Kentucky, by contrast, legal reformers adopted a "common school vision," and it was "of vital importance that, in both law and in politics, the Kentucky reformers acted in ways consistent with the vision they espoused," including by going to great lengths to reject any emphasis on redistribution of resources.[59]

In assessing Paris's contribution, there is no denying that legal reformers benefit from a supportive political coalition and encounter difficulty in the absence of political support. As to the importance of maintaining an ideologically coherent vision, this would also seem beneficial; however, one wonders whether certain types of lawsuits naturally lend themselves to more ideological coherence than others. After all, Kentucky was a classic "adequacy" case where reformers wanted to increase school spending across-the-board in a way that naturally facilitated building a broad supportive political coalition. New Jersey, on the other hand, turned into a classic "equity" case, where reformers did not aim for overall spending increases but rather sought targeted spending on a small number of poor urban districts, a goal inherently less likely to attract a broad supportive political coalition. In short, any explanation for the greater difficulty encountered in achieving school-finance reform in New Jersey as compared with Kentucky would have to give at least as much consideration to the content of the divergent reform goals in these states as to the way that legal reformers framed and articulated these goals. These are the sorts of questions that scholars may want to pursue as they continue to examine the role of law and courts in achieving social reform, whether at the federal level or in the rich array of state-level cases to which Paris and others are increasingly turning.

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The publication of these three books attests on one level to the vitality of the state constitutional politics literature, but it is also indicative of a shift in the focus of this literature. For some time now, legal scholars have been drawn to the study of state constitutional politics primarily because of independent state court interpretations of individual rights provisions and with an eye toward analyzing and informing such

53. *Id.*
54. *Id.* at 8.
55. *Id.* at 153.
56. Paris, *supra* n. 41, at 4.
57. *Id.* at 108.
58. *Id.* at 106-108.
59. *Id.* at 188.

judicial decision-making. But in recent years, scholars have turned to examine other aspects of state constitutional politics such as various distinctive state institutions and with an eye toward assessing their performance.

Of these three books, *Framing Equal Opportunity* comes the closest to undertaking a study in line with the traditional focus. However, even this book is concerned not so much with analyzing state court interpretations of state constitutions as contributing to our understanding of the conditions under which law and courts can bring about social change. In this sense, it serves to highlight the ways that public law scholars who are intent on studying a broad range of questions about the relationship between law and politics can benefit from turning their attention to state-level developments.

The other two books - *In Defense of Judicial Elections* and *Direct Democracy and the Courts* are particularly illustrative of the recent turn toward analyzing distinctive state institutions. It is noteworthy, and in keeping with recent work in this area, that neither book views the federal constitution as a model by which state institutions must be measured. Rather, the authors are open to the possibility that state constitution-makers have been motivated by a different logic than their federal counterparts and have been prepared to deviate from the federal model in adopting institutional devices such as judicial elections and direct democratic institutions, and in a way that may be appropriate for the states. Rather than starting from the premise that these state institutions should approximate the federal model, the principal question that motivates these authors and is likely to attract continued scholarly attention in future years, is whether these distinctive state institutions are contributing to good governance and if not how they might be reformed to achieve this end.