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BEYOND QUALITY: FIRST PRINCIPLES IN JUDICIAL SELECTION AND THEIR APPLICATION TO A COMMISSION-BASED SELECTION SYSTEM

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Cover Page Footnote

* Associate Professor of Law, Washburn University School of Law. I would like to thank Norman Greene, Donald Burnett, Rachel Paine Caufield, Joe Colquitt, Jean Dubofsky, John Feerick, Judge John Irwin, Lynn Marks, Shira Goodman, Judith Maute, Aman McLeod, Leo Romero, Michael Sweeney, Robert Tembeckjian, Mary Volcansek, Steve Zeidman, Mark Harrison, Justice Marilyn Kite, and Luke Bierman for their comments and food for thought that were helpful in the preparation of this Article. I would like to thank the Fordham Urban Law Journal, The Louis Stein Center for Law and Ethics at Fordham Law School, The American Judicature Society, The Constitution Project, The League of Women Voters of New York State Education Foundation, The Fund for Modern Courts, and Carnegie Corporation of New York, and the Open Society Institute for providing a forum for discussion of these ideas and financial support for this project. I would also like to thank Mary K. Hanisch, Washburn Law 2006, and Karl L. Wenger, Washburn Law 2008, for their research, editorial, and drafting assistance on this project.

BEYOND QUALITY: FIRST PRINCIPLES IN JUDICIAL SELECTION AND THEIR APPLICATION TO A COMMISSION-BASED SELECTION SYSTEM

*Jeffrey D. Jackson**

INTRODUCTION

Scholars of judicial selection have written a large volume of work regarding the concept of judicial quality and how to achieve it through the selection process.¹ The idea seems to be that if we can find some way to measure judicial quality, we could then design a system that would select for it, thus assuring that the most qualified judges will be selected. The selection of qualified judges is the primary goal of the commission selection system; indeed, it is implicit in the name commonly applied to such systems: “merit” selection systems.² In a perfect world, the optimal selection system would be

* Associate Professor of Law, Washburn University School of Law. I would like to thank Norman Greene, Donald Burnett, Rachel Paine Caufield, Joe Colquitt, Jean Dubofsky, John Feerick, Judge John Irwin, Lynn Marks, Shira Goodman, Judith Maute, Aman McLeod, Leo Romero, Michael Sweeney, Robert Tembeckjian, Mary Volcansek, Steve Zeidman, Mark Harrison, Justice Marilyn Kite, and Luke Bierman for their comments and food for thought that were helpful in the preparation of this Article. I would like to thank the Fordham Urban Law Journal, The Louis Stein Center for Law and Ethics at Fordham Law School, The American Judicature Society, The Constitution Project, The League of Women Voters of New York State Education Foundation, The Fund for Modern Courts, and Carnegie Corporation of New York, and the Open Society Institute for providing a forum for discussion of these ideas and financial support for this project. I would also like to thank Mary K. Hanisch, Washburn Law 2006, and Karl L. Wenger, Washburn Law 2008, for their research, editorial, and drafting assistance on this project.

1. See, e.g., Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409 (1981); Maurice Rosenberg, *The Qualities of Justice: Are They Strainable?*, 44 TEX. L. REV. 1063 (1966); Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365 (2005); Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988).

2. Of course, this name is somewhat of a misnomer, in that there is little empirical evidence to suggest that judges selected through the commission system have any more “merit” or are any more qualified than those selected through other systems. See Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 65-67 (1986); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 235 (1987); Malia Reddick, *Merit Selection: A Review of the Social Science Literature*, 106 DICK. L. REV. 729, 742-44 (2002). This may be due, in part, to the problems inherent in trying to define judicial quality in the first place.

designed with only one objective in mind: to select the most qualified judges.

The reality is that this perfect world does not exist. Initially, there is the problem of reaching agreement on what attributes make someone a qualified judge. While it might be possible to agree on some general attributes,³ it is difficult to quantify them in any one individual, and just as difficult to determine ways to design an imperfect tool such as a judicial selection system to promote these attributes.

Further, even assuming that these difficulties can be overcome, there is the problem of garnering public support for such a system. Unfortunately, judicial candidates, unlike eggs, do not come with a generally-recognized quality grade stamped on their forehead, visible to all. In fact, in general, the quality of a judge is not readily apparent, and indeed should not be if that judge is doing her job correctly. Very few people in the general population have the time or opportunity to grade the work of judges on the bench or to determine when a judge's decision is good or bad. In such an environment, there is only one universal truth: bad judging is almost always more certain to get a judge noticed than is good judging. As such, a judicial selection system designed with the sole aim of selecting the most qualified judges may not be a system that the public will adopt.

I believe that the commission system of judicial selection provides a better opportunity for the consistent selection of qualified judges than does either judicial election or the federal system of appointment and confirmation.⁴ That does not mean, however, that the system cannot be refined to better enhance both quality and public acceptance. The question that must be asked is: what principles, beyond the ability to select qualified judges, should judicial selection systems advance? I assert that, in addition to judicial quality, there are five other "first principles" that should be advanced in an optimal selection system: independence, accountability, representativeness, legitimacy, and transparency. Consider-

3. For one such list, see Leo A. Romero, *Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election*, 30 N.M. L. REV. 177, 189-90 (2000) [hereinafter Romero, *Judicial Selection*] (detailing evaluative criteria used by the New Mexico nominating commission, including physical and mental ability, moral courage, courtesy, impartiality, industry, integrity, diligence, and writing ability).

4. See Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. KAN. B. ASS'N 32, 39-41 (2000) (comparing the commission system and judicial election on the subject of opportunity to ensure judicial quality).

ation of each of these principles is necessary to ensure that a judicial selection system is both effective in selecting qualified judges and supported by the public.

This Article examines these principles and how their consideration affects choices in the configuration of a commission-based judicial selection system. Part I examines and defines the principles and discusses each one's application to different aspects of the commission system. Part II discusses the implications that consideration of these principles as a whole has on the commission system. While these principles do not dictate one perfect system, they do set up parameters within which experimentation can occur to further refine the commission system.

I. BEYOND QUALITY: THE OTHER FIRST PRINCIPLES

As noted above, there are five qualities that an optimal judicial selection system should be designed to advance: independence, accountability, representativeness, legitimacy, and transparency. Some of these principles, such as independence and accountability, have been addressed at great length in judicial selection literature.⁵ Others, such as transparency and representativeness, have been treated much less comprehensively. Each of these principles, however, plays a vital role in developing a judicial selection system. By examining each principle in detail and looking at the ways in which a judicial selection system might be configured to advance them, it is possible to design a system that not only selects judges who possess a high degree of judicial quality, but a system that will also be recognized by the general public as valid in accomplishing this purpose.

In advocating the advancement of these principles, I realize that two of them, independence and accountability, are diametrically opposed. The ideal approach in addressing these principles, therefore, is to find the proper balance between them. Further, some of the other principles, although not directly opposed, still have an inherent tension when applied to the mechanics of a selection process, in that if part of the selection process is configured to advance one, it may not be as effective at advancing another. The key with regard to those principles is finding the proper mix that will advance each attribute to the maximum extent possible. Because of

5. See generally Amy B. Atchison, Lawrence T. Liebert & Denise K. Russell, *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. CAL. L. REV. 723 (1999) (compiling books, articles, papers, and reports on judicial independence and accountability from 1958-1998).

this tension, and because these principles are not fully quantifiable, it is improper to speak of an “optimal” selection system. Instead, it is more proper to speak of an “optimal range” of selection systems that balance these principles to different degrees.

A. Independence and Accountability

The concept discussed most often in the field of judicial selection is judicial independence.⁶ The discussion frequently emphasizes the importance of this concept, using lofty rhetoric referring to judicial independence as “‘the backbone of the American democracy,’ the ‘bulwark of the Constitution,’ and ‘an indispensable element of our constitutional framework and its commitment to freedom.’”⁷ These labels unqualifiedly embrace judicial independence not only as *a* critical attribute of a selection system, but indeed as *the* critical attribute, without which a selection system is ineffective.⁸

More recently, however, other scholars have cast a skeptical eye toward the concept of judicial independence on several grounds.⁹ Many of these scholars argue that judicial independence is difficult to define in a useful manner,¹⁰ “does not further the development of normative theories of adjudication,”¹¹ “does not advance under-

6. See *id.* (demonstrating the large quantity of research conducted with regard to judicial independence).

7. See Jackson, *supra* note 4, at 35. The phrase “the backbone of the American democracy” comes from an article written by former Tennessee Supreme Court Justice Penny White. Penny J. White, *It's a Wonderful Life, or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 3 (1996). The phrase “bulwark of the American democracy” derives from the late Chief Justice William Rehnquist's article. See William H. Rehnquist, *An Independent Judiciary: Bulwark of the Constitution*, 9 N. ILL. U. L. REV. 1, 1 (1988). The final phrase, referring to judicial independence as “an indispensable element of our constitutional framework and its commitment to freedom,” comes from an article written by Dan Nolan. Dan L. Nolan, Jr., *We Must Maintain an Independent Judiciary*, TENN. B.J., Sept.-Oct. 1997, at 3.

8. See, e.g., Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 339 (1997) (stating that “[t]he focus of judicial selection must be independence”).

9. See *infra* notes 10-14 and accompanying text.

10. Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9, 10 (Stephen B. Burbank & Barry Friedman eds., 2002).

11. Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 10, at 45, 53. According to Kornhauser, judicial independence has no clear meaning outside of the different theories of adjudication to which it applies; that is, each judge defines his or her judicial independence differently, depending on which theory of adjudication he or she applies. *Id.* at 48-49.

standing of the functioning of extant judicial systems,”¹² and “does not aid in the design (or improvement) of judicial institutions.”¹³ Others question whether judicial independence actually exists at all, because evidence suggests that judges are heavily influenced by political factors, including personal preferences, interbranch pressure, and public opinion.¹⁴

While the skeptics make several good points regarding the difficulties in defining and achieving judicial independence, the concept is still useful, both in legal theory and in the design of a selection system, but first it must be defined in a meaningful manner.

In the past, I have defined judicial independence as the concept that “a judge, in deciding a case, should not be forced to consider whether his or her decision, if contrary to public opinion or the will of the executive or legislative branch, will result in the loss of his or her job.”¹⁵ Others defined judicial independence as an absolute: “a judiciary free from partisanship, political pressure, special interests, popular will, and, most importantly, a judiciary guided by the sovereign will of the people embodied in the United States Constitution and its Amendments,”¹⁶ or as a measure: “the extent to which a court may adjudicate free from institutional controls, incentives, and impediments imposed or intimidated by force, money, or other extralegal, corrupt methods by individuals or institutions outside the judiciary, whether within or outside of government.”¹⁷

Each of these definitions captures at least part of what we think judicial independence should mean—that no extraneous influences, such as public opinion or fear of reprisal from other

12. *Id.* at 53. Kornhauser contends that because judicial independence is not “directly observable,” it is not helpful in explaining how judicial institutions function either in isolation or in relation to other institutions. *Id.*

13. *Id.* at 53-54. Kornhauser argues that “judicial independence is neither necessary nor sufficient for the achievement of a variety of social goals that it is thought to promote.” *Id.* at 54. In reaching this conclusion, he contends that judicial independence is unnecessary for the creation of a stable government, as evidenced by the fact that countries such as Japan enjoy a stable government even though their judiciary is subject to partisan influences. *Id.* at 52-53. He also argues that judicial independence is not sufficient to achieve either stability or development because a variety of court systems with very different structures manage to achieve the same goals. *Id.* at 53.

14. See Terri J. Peretti, *Does Judicial Independence Exist?*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 10, at 103, 109-16.

15. Jackson, *supra* note 4, at 35.

16. James A. Wynn, Jr., *Judging the Judges*, 86 MARQ. L. REV. 753, 757 (2003).

17. Robert M. Howard & Henry F. Carey, *Is an Independent Judiciary Necessary for Democracy?*, 87 JUDICATURE 284, 286 (2004).

branches of government, should influence a judge's decision.¹⁸ Further, each of these definitions is valuable in describing the general ideals of our judiciary, and in making large-scale comparisons of different systems. If we are to have a working definition that can be used in designing a selection system, however, we need to go deeper.

As some skeptics of the topic have pointed out, there is a need to distinguish between those influences on a judge's decision that are proper, and those that are improper.¹⁹ Despite the lofty rhetoric associated with the idea of judicial independence, no one would argue that judges should be completely free from all influence from other branches of government. For example, we expect judges to be bound by statutory language, which is promulgated as the result of political action by the legislative and executive branches.²⁰ Further, we expect judges to be influenced, at least to some extent, by precedent, persuasive authority, and *stare decisis*, which are the products of other courts and other judges.

There are other forms of influence, however, which we recognize as improper, or at least "inappropriate."²¹ Most of these affect what has been characterized as "decisional independence," that is, the power to decide a specific case in a specific way.²² Among these influences are worries of reprisal from either the executive or legislative branch should the judge fail to decide something in their favor. These reprisals may be personal, as in threats that a judge will lose his or her job through executive or legislative action such as impeachment, or they may be systemic, such as threats to cut the judiciary's budget or change the method by which judges are selected. Judges may also be influenced by fear of public reprisal, in the form of concern that he or she will be voted out of office at the next opportunity.

Even in defining those types of influences that are improper, however, we must be cautious. Actions that are improper in response to a specific decision may in fact be, at the very least, less

18. This concept is often referred to as "decisional independence," to distinguish it from "institutional independence," which concerns the structure of the judiciary, and "separation of powers." See Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 532 (2006) (summarizing the general types of judicial independence).

19. See Kornhauser, *supra* note 11, at 48.

20. See Burbank & Friedman, *supra* note 10, at 11-12.

21. See Kornhauser, *supra* note 11, at 48.

22. See Souders, *supra* note 18, at 532; see also *supra* note 18 (distinguishing decisional independence as distinguished from other thought-of notions of judicial independence).

improper when applied to a string of judicial decisions or a course of conduct. It may be proper, and indeed desirable, for a legislature to suggest modification of a judicial selection process that results in the selection of judges whose decisions are not well-reasoned or thoughtful, or for the public to turn out a judge whose decisions reflect arbitrariness, bias, partiality, or prejudice. While these actions reduce judicial independence, we tend to think of them as not altogether improper, because they promote a counter-vailing value—judicial accountability.²³

Moreover, there are some influences which, even though we think of them as improper, are beyond the scope of influences that a judicial selection system can effectively regulate. For example, there is no way a judicial system can attempt to account for the legislature attempting to change the selection system in response to a particular decision. Similarly, a selection system can do very little to respond to an attempt by the judiciary to cut financial resources in response to such a decision. These threats to judicial independence must be addressed through other means.

Finally, there are some influences that, although they are what we generally think of as improper, are hard to remedy because they are not readily apparent. Social science research has identified several influences on judicial decision-making that fall into this category: personal preference, interbranch pressure, and public opinion.²⁴ The research suggests that, even absent overt influences such as political threats or worries, judges are often influenced by their own political attitudes, the expected strategic consequences of decisions regarding the courts' relationship with other branches, and their perception of how the decision will play to the public.²⁵ There is also some evidence that judges may be influenced by what so-called societal "elites" will think of their decisions.²⁶

These influences are difficult for a judicial selection system to address, at least completely. Because these influences are subtle, rather than overt, the selection system is a crude tool to remedy them. At best, the system can try to reduce their impact.

23. See *infra* notes 27-29 and accompanying text.

24. Peretti, *supra* note 14, at 109-16.

25. *Id.* See also Burbank & Friedman, *supra* note 10, at 32-33 (supporting the suggestion that judges are influenced by how their actions will be perceived and enforced by the other branches).

26. See Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 271 (2005) (noting that "elites" influence judges).

The inability of a judicial selection system to remedy all improper influences does not mean, however, that the system should not be geared to advance judicial independence where it can. Judicial selection systems can advance judicial independence in at least two significant ways. First, they can reduce the likelihood that selected judges will be subject to outside influences by making sure that the selection process is sufficiently diversified so that no one group or political actor has an excessive amount of power in making an appointment. Second, they can reduce the pressure of outside influence on sitting judges by providing sufficient job security.

In deciding how to accomplish this, the second of my suggested principles, judicial accountability, should be considered. Judicial accountability is the idea that in a democratic society judges should, at least to some degree, be popularly accountable for their decisions and conduct.²⁷ Judicial accountability is important in the field of judicial selection because it works to enhance the public's respect for and confidence in the judicial system.²⁸ In this regard it is closely tied to the idea of legitimacy, but rather than providing public confidence in the selection of judges, accountability is concerned with public confidence in the retention of judges.

Judicial accountability is the "opposite side" of the coin from judicial independence.²⁹ As noted above, accountability and independence do not coexist as absolute values; instead they are in opposition to each other. Any measure of accountability necessarily limits judicial independence. Therefore, in designing a judicial selection system the question is not how to maximize both, but rather how to strike the balance between them.

All judicial selection systems are to some extent an attempt to strike this proper balance. At one end of the spectrum there is the federal system, which is heavy on judicial independence, but light on accountability.³⁰ At the other end of the spectrum there are partisan and non-partisan election systems, which have chosen to

27. See Phillip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31, 37 (1986); Jackson, *supra* note 4, at 36.

28. See Jackson, *supra* note 4, at 37.

29. See Burbank & Friedman, *supra* note 10, at 14-15.

30. The only formal accountability built into the federal system is that a judge, once selected, may be impeached for treason, bribery, or other high crimes and misdemeanors. See U.S. CONST. art. II, § 4; U.S. CONST. art. III, § 1. There is theoretically another measure of accountability, however, in that a judge who hopes to move up to a different judicial appointment has an incentive to decide doubtful cases in a manner pleasing to the appointing authority, the President.

strike a balance that is heavily weighted toward accountability at the expense of independence.

The “Missouri Plan” version of the commission system attempts to promote independence through the use of a non-partisan committee that selects three candidates to send to the appointing officer, while acknowledging the importance of accountability by providing for retention elections.³¹ Other versions of the commission system provide for slightly different balances between independence and accountability. Some systems, such as the one used in Rhode Island, are arguably more weighted toward independence than even the federal system in that the commission advances the candidates and, once they are selected, judges with good behavior serve for life.³² Others, such as the system in place for New York’s Court of Appeals, arguably provide less independence and greater accountability. In that system, judges must be reappointed by the commission and the governor, with the advice and consent of the senate, in order to be retained.³³

The question for developing a selection system, then, is where to draw the line between independence and accountability. In striking this balance an optimal version of the commission system should be weighted heavily in favor of “decisional independence.”³⁴ A judge should not worry about losing her position because of the way she rules on a particular case. Instead, the judge should be free to follow the law, even when the decision transgresses the interests of other political branches or is contrary to public opinion.

On the other hand, there must also be room for accountability. What if the judge has a long history of ruling in favor of one particular party, or in favor of criminal defendants in all situations regardless of the facts of the case? At some point, shouldn’t there be a mechanism for allowing the public to remove that judge from the bench?

To illustrate the difference between these two situations, consider two examples often referenced in judicial selection literature:

31. See Laurence M. Hyde, *The Missouri Non-Partisan Court Plan*, in JUDICIAL SELECTION AND TENURE 91 (Glenn R. Winters ed., rev. ed. 1973).

32. See R.I. CONST. art. X, §§ 4-5.

33. See N.Y. CONST. art. VI, §§ 2, 4. New York’s system is not as lacking in independence or as heavily weighted toward accountability as these procedures would seem, however, as judges on the New York Court of Appeals serve fourteen year terms. See *id.* § 2.

34. See *supra* note 18 and accompanying text (distinguishing decisional independence from other notions of judicial independence).

former Tennessee Supreme Court Justice Penny White and former California Supreme Court Justice Rose Bird.³⁵ Justice White's situation shows the importance of protecting decisional independence. Justice White lost a retention election because, shortly before the election, she joined an opinion reversing and remanding the conviction of a defendant in a brutal murder case.³⁶ Because of the opinion, special interest groups including the Tennessee Conservative Union sent out misleading information vilifying Justice White.³⁷ Due to this campaign Justice White lost her bid for retention, receiving only a forty-five percent favorable vote.³⁸ Interestingly, the case in which Justice White joined in the opinion was her first death penalty case.³⁹

Justice White's experience shows a danger of the commission system that should be addressed: the possibility that one decision, because of unfortunate timing or a highly coordinated special interest attack, could cause a judge to lose her position. On the other hand, the non-retention of Justice Bird presents what I would consider the other end of the spectrum. In 1986, Justice Bird became the subject of a highly coordinated opposition campaign led by Governor George Deukmejian and a group of district attorneys.⁴⁰ The campaign focused on the voting records of Justice Bird and two other justices in death penalty cases. Justice Bird had voted to reverse in every one of the sixty-one death penalty cases on which she had sat.⁴¹ Justice Bird secured only thirty-four percent of the vote at the retention election, and was ousted along with the other two justices.⁴²

While most would agree that the Justice White case shows a need for judicial independence, it is harder to argue that, at least to

35. For a small sample of articles referencing White and Bird, see Anthony Champagne, *Coming to a Judicial Election Near You: A New Era in Texas Judicial Elections*, 43 S. TEX. L. REV. 9 (2001); John Copeland Nagle, *Choosing the Judges Who Choose the President*, 30 CAP. U. L. REV. 499 (2002); G. Allan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445 (2003); Joanna Cohn Weis, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101 (2006).

36. See Patrick Emery Longan, *Judicial Professionalism in a New Era of Judicial Selection*, 56 MERCER L. REV. 913, 916-17 (2005).

37. *Id.* at 917.

38. See B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1434 (2001).

39. See John D. Fabian, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155, 156 (2001).

40. See Dann & Hansen, *supra* note 38, at 1432.

41. *Id.*

42. *Id.*

some extent, the failure to retain Justice Bird violates that concept. Instead, the Justice Bird situation begins to look like the kind of accountability that many believe judicial selection systems should foster: the ability of the public to remove judges from office who, although they may not have violated a judicial canon or engaged in conduct that would result in impeachment, have displayed a continuous course of conduct that shows a disregard for precedence and law.⁴³

In other words, it is clearly wrong to dismiss a judge for reversing a death penalty case because we want judges to decide cases on their best idea of what the law requires. A reversal vote in every case, however, seems to be an abuse of this power because it looks as if the judge is not assessing each individual case. It appears that the judge is instead applying a bias that is unconnected with the law.⁴⁴

A bias against the death penalty is certainly not the only bias that a judge may harbor. An easier question is presented by judges who are biased against a particular race or religion, or even for or against certain classes of plaintiffs or defendants. While it might be argued that, in these situations, disciplinary action could be taken against these judges, it is by no means clear that this is an adequate solution. As several commentators have noted, judicial misconduct may go unreported by lawyers who are fearful of alienating judges

43. See John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 353-55 (1987). Wold and Culver provide an analysis of the data taken from a voter poll that reflects that the overwhelming reason California voters asserted their “no” votes on Justice Bird had to do with her death penalty decisions and her perceived leniency toward criminals in general. *Id.* at 353-54. At least one commentator also argues that the Bird court’s attitude toward legislation made it seem as though the court was weighing in on the side of the Democratic party in California. See Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2028-32 (1995).

44. As one commentator has noted, the judicial philosophy of the Rose Bird court in reviewing death penalty cases reflected a norm of reversal, in which the court paid little heed to principles such as abstention, the substantial evidence rule, and the principle of harmless error. Doubts, particularly those involving choice of sentence, were resolved in favor of reversal because of the severity and finality of the judgment being reviewed.

Gerald F. Uleman, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 239 (1989). While such a philosophy may be valid, it is one which even supporters acknowledge is an “extreme example.” See *id.* Of course, the same might be said of a judge or a court that always votes to affirm the death penalty, despite the evidence. Unfortunately, the public doesn’t seem to be so upset with those types of judges.

and even reported misconduct may not reach the disciplinary level.⁴⁵ As a result, it is imperative that a selection system contain enough accountability to allow for the removal of biased judges.

Further, accountability should also allow for the removal of judges who simply are not good judges, whether because their rulings are arbitrary or because they lack the requisite qualities a judge should possess, such as diligence, competence, or even civility.⁴⁶ As Norman Greene noted, “judicial incivility is merely another form of verbal abuse and bullying, especially egregious since the recipient cannot respond in kind.”⁴⁷ Judicial selection systems should be designed to make it difficult for such individuals to reach the bench in the first place, but because it is hard to predict such incivility, there must also be enough accountability in a selection system to allow such justices to be removed once selected.⁴⁸

To sum up, a judicial selection system should be configured to promote decisional independence, such that a judge need not worry that his or her decision in a single case, or even in a number of cases, will result in the loss of a job. It should also reduce the possibility that a judge who reaches the bench will be beholden to any person or group that could influence the judge’s decision while on the bench. At the same time, the system should contain enough accountability that judges may be removed if their behavior in office demonstrates bias, a conscious disregard of the requirements of the law, a lack of diligence, or a lack of civility.

The next question that must be answered is how these values can be advanced through the configuration of a commission-based judicial selection system. Certainly it would be impossible to design a system to perfectly advance these values. It is possible, however, to make some large scale conclusions about what features of the system are more likely than others to advance these values. In particular, the parts of the commission system that have the most to do with these values are: 1) the makeup and procedure of the selection commission and its relationship to the appointing authority, 2)

45. See Norman L. Greene, *Perspectives on Judicial Selection*, 56 *MERCER L. REV.* 949, 955 (2005) [hereinafter Greene, *Judicial Selection*]; Longan, *supra* note 36, at 945.

46. See Norman L. Greene, *A Perspective on Temper in the Court: A Forum on Judicial Incivility*, 23 *FORDHAM URB. L.J.* 709 (1996) [hereinafter Greene, *Temper in the Court*].

47. Greene, *Judicial Selection*, *supra* note 45, at 955 n.31 (citing Greene, *Temper in the Court*, *supra* note 46, at 715).

48. For an example of judicial behavior that would subject a judge to being turned out of office, see Longan, *supra* note 36, at 918-20 (describing the judicial attitude of Judge John McBryde).

the length of term judges serve, and 3) the retention mechanism involved.

1. *The Selection Commission*

As noted above, recent studies suggest that judges, even those in systems such as the federal system that place a large emphasis on independence, are subject to a variety of subtle influences, including their own political preferences and sense of indebtedness to those who are responsible for their appointment.⁴⁹ Also, it is difficult for a selection process to deal with these subtle influences.⁵⁰ Nevertheless, there are some things that can be done at the outset to reduce the impact of these influences.

To reduce such influences, judicial independence would suggest that the membership of the nominating commission be as diverse as possible. This would help to prevent the formation of groups on the commission that would seek to nominate candidates who would be more likely to advance their agendas. Instead, the candidates that pass through the commission would have to be palatable to a wider group. In so doing, these candidates would feel less of a sense of indebtedness to any one particular group, and thus would be less likely to allow themselves to be subtly influenced in that sense.

The need for independence also suggests that the nominating authority not be allowed to select members of the commission.⁵¹ Because judicial independence is concerned with reducing outside influence, allowing the appointing authority to also appoint members of the commission increases the possibility that power blocks within the nominating committee will influence the selection process.⁵² It also increases the possibility that

49. See *supra* notes 24-26 and accompanying text.

50. See *supra* notes 24-26 and accompanying text.

51. See Norman Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 605 (2005) [hereinafter Greene, *Reform*].

52. *Id.* Greene notes the American Judicature Society's comment that [s]ince merit selection is intended to deprive the executive of the opportunity to make judicial appointments solely on the basis of his political motivations (and to remove political pressures on him to do so), it is thought to be self-defeating to permit the executive to have a direct say in the appointment of nominating commissioners.

Id. (quoting ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 25 (1974)).

the candidate will feel influenced by the wishes of the appointing authority.⁵³

Finally, judicial independence appears to require that the decision of the committee regarding candidates binds the appointing authority, and requires the authority to pick one of the suggested candidates. If the appointing authority is free to disregard the candidates put forth by the commission, the authority has a much greater influence over the candidate.

2. Term Length

Another component of the selection system that has implications for the balance between independence and accountability is the length of the term the judges serve. If we accept that accountability demands that judges not be given life terms, then the question of term length is of great importance. Shorter term lengths advance accountability while longer term lengths further independence. In those states using some form of the commission system, there is a large variety of lengths of service. Terms range from a high of fourteen years⁵⁴ to a low of six⁵⁵ for the highest appellate court, with six and ten years being tied in frequency.⁵⁶ Other terms include twelve years⁵⁷ and eight years.⁵⁸

In looking at the term length with regard to independence and accountability, it seems that accountability demands that the public not have to wait an unduly long period of time before being given

53. Unfortunately, my home state of Kansas does not do a very good job of this. The Kansas commission plan provides for the governor to select the non-lawyer member of each of the four congressional districts represented on the commission. See KAN. STAT. ANN. §§ 20-120, -124 (2006). This effectively gives the governor, in addition to ultimate appointing authority, the ability to appoint four out of the nine members of the commission. While this is better than allowing the governor to appoint a majority of the commission, it still results in the formation of a considerable power block.

54. The term for New York for Court of Appeals judges is fourteen years. See N.Y. CONST. art. VI, § 2(a).

55. Arizona, Florida, Kansas, Nebraska, Oklahoma, and Vermont. See ARIZ. CONST. art. VI, § 4; FLA. CONST. art. V, § 10(a); KAN. CONST. art. III, § 5(c); NEB. CONST. art. V, § 21(3); OKLA. CONST. art. VII-B, § 5; VT. CONST. ch. II, § 34.

56. Six states have six-year terms and six states have ten-year terms. See Sandra Schultz Newman & Daniel Mark Isaacs, *Historical Overview of the Judicial Selection System in the United States: Is the Electoral System in Pennsylvania Unjustified?*, 49 VILL. L. REV. 1, 18-53 (describing judicial selection processes in the United States).

57. Missouri uses twelve-year terms. See MO. CONST. art. V, § 19.

58. Five states use eight-year terms. See Newman & Isaacs, *supra* note 56, at 18-53 (describing judicial selection processes in the United States).

the opportunity to remove a judge.⁵⁹ This argument favors relatively short periods. On the other hand, the periods should not be so short that they affect decisional independence.⁶⁰

While it is not possible to say that the principles of independence and accountability “require” a specific term length, the principles do aid in the establishment of a general range that might be considered optimal. Four years may make it difficult for a judge to amass enough of a record to enable a fair evaluation of her performance,⁶¹ while terms of ten years or more seem to unduly limit accountability. Terms in the six- to eight-year range seem to strike a balance between allowing judges enough time so that their performance on the bench can be evaluated, and allowing the public an opportunity to exercise its right to evaluate its judges.

3. *The Retention Mechanism*

If we accept the premise that accountability requires the public to evaluate a judge after a specified length of time, then the next part of the system that has implications for the balance between independence and accountability is the retention mechanism that should be used. Commission systems generally use two different types of retention mechanisms: non-partisan retention elections and reappointment by the same or similar method as selection.⁶² The most popular system by far is the non-partisan retention election; only four states use some form of reappointment.⁶³

Both systems have their advantages and disadvantages. The major critique of retention elections is that they pose a threat to independence by subjecting judges to the political process, and perhaps even make it easier for interest groups to target a judge for re-

59. Of course, judges in many states are required to stand for retention after only a brief initial period. This is usually more of a referendum on the choice, however, than on the performance in office. See *infra* note 137 and accompanying text.

60. See Roy A. Schotland, *Judicial Independence and Accountability*, 61 *LAW & CONTEMP. PROBS.* 149, 152-54 (Summer 1998) (arguing that terms under six years in length are incompatible with judicial independence).

61. See *id.* at 153.

62. See Newman & Isaacs, *supra* note 56, at 18-53 (describing judicial selection processes in the United States).

63. *Id.* The four states using reappointment do so in slightly different ways. In Connecticut, the commission makes recommendation to the governor as to which judges to retain. See *CONN. GEN. STAT. ANN.* § 51-44a(e) (West 2006). In Hawaii, the commission itself makes the call. See *HAW. CONST.* art. VI, § 3. In New York, the governor redesignates. See *N.Y. CONST.* art. VI, § 4(c). In Vermont, the General Assembly makes the reappointment. See *VT. CONST.* ch. II, § 34.

moval, because they require only an up or down vote.⁶⁴ Even where such targeting is uneventful it results in expensive retention races that are distracting for judges.⁶⁵ Paradoxically, retention elections have also drawn criticism for not doing enough to ensure accountability, primarily because incumbent judges almost never lose.⁶⁶

While reappointment is seen as a way to avoid such problems,⁶⁷ it brings other problems to the table. The reappointment process simply changes the accountability equation. Rather than making the judge accountable to the public in general, the reappointment process has the potential to make judges more accountable to certain elected officials. In a system such as the one used in Vermont, the judge becomes accountable to the General Assembly which can pose problems if the judge's decisions are unpopular there. In systems such as the ones used in New York and Connecticut, the judge's retention is ultimately dependent upon the governor's reappointment, which can also have an effect on the judge's perceived independence.

I tend to favor the retention election system because it provides accountability directly, rather than through representative government. Any of these retention systems, however, has the potential to provide the necessary accountability, so long as the manner in which they shift the locus of the accountability is recognized.

No matter what system is used to provide accountability, it will be unsuccessful in the absence of a way to get information about judicial performance to the persons who will be responsible for the retention decision. This is especially important in a commission-based system where the ability of a judge to respond to partisan attacks is often limited. Thus, every commission system should include a provision for some type of judicial performance evaluation commission that can provide independent and impartial information regarding the performance of judges who will be up for retention.⁶⁸

64. See Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence and Competence*, 14 GEO. J. LEGAL ETHICS 667, 673 (2001); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 833 (2004).

65. See Zeidman, *supra* note 64, at 833.

66. See Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 34 (1995) (detailing criticisms of retention elections).

67. See Zeidman, *supra* note 64, at 833 (advocating a reappointment process).

68. There have been a large number of editorials and articles in various publications for many years calling for such commissions. See, e.g., Richard F. Hayse, *The*

Judicial independence is an important value. Judges must be able to make decisions according to the law without worrying whether they will be considered unpopular. As noted above, independence is not the only value. A judicial selection system must also allow the public a mechanism to replace those judges who are incompetent, biased, or who do not follow the law. The task of a judicial selection system is to balance accountability and judicial independence so that good judges are retained, and bad judges are removed.

B. Representativeness

Representativeness is the concept that judges should, in general, be “representative” of the community in which they serve.⁶⁹ Judges should reflect the diversity of the community, rather than as historically has been the case, being drawn solely from a pool of wealthy Caucasian males. Representativeness is important not only because it helps to promote another principle, legitimacy, but also because it helps to promote justice.⁷⁰ Differences in background, culture, life experience, and even work experience impact how persons perceive the law, and promote a more thorough examination of the law from different viewpoints.⁷¹ Judges with different life experiences are able to contribute different insights regarding the law.⁷² As Justice Ruth Bader Ginsburg has noted, “[a] system of justice is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of its judgments, if its members—its lawyers, jurors, and judges—are all cast from the same mold.”⁷³ As one person who testified before New York’s Commis-

Need for Judicial Performance Evaluation, 75 J. KAN. B. ASS’N 5 (2006); Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053 (2002).

69. See Davidow, *supra* note 1, at 423.

70. See Michael Sweeney, Panel 3 Remarks at the Fordham Law School Symposium: Rethinking Judicial Selection 57-58 (Apr. 7, 2006) (transcript on file with author) (referencing the importance of diversity).

71. See Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252, 1258-65 (2006).

72. *Id.* at 1264.

73. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 190 (2003); see also Onwuachi-Willig, *supra* note 71, at 1258 (highlighting Justice Ginsburg’s comments).

sion to Promote Public Confidence in Judicial Elections put it, “[d]iversity allows justice to see.”⁷⁴

This diversity should go beyond what is usually meant by the term, to include not only diversity with regard to race and gender, but also diversity in religion, background, geography, and type of practice.⁷⁵ Each of these diverse factors can affect perspectives on justice and can contribute to the impartiality of judging.⁷⁶

The desirability of representativeness in a judicial selection system does not necessarily mean, however, that a rigid quota should be enacted mandating that judges be selected in proportions of gender, ethnicity, or some other representative factor to match the community. Part of the problem, as Norman Greene identifies, is that only lawyers are eligible to be judges.⁷⁷ Therefore, in talking about representativeness with regard to judicial candidates and their chances of appointment, there is a question as to whether this representativeness should be directed toward reflecting the diversity of the community or the diversity of the pool.⁷⁸

The inherent problem in attempting to tie representativeness of the judiciary to the diversity in the community is that, fairly or unfairly, it breeds charges of a quota system and all of the negative connotations of that word. Thus, there may be charges that the system discriminates against white males and does not allow the perceived “best” candidates to become judges. Such charges can undermine the public perception of the judicial system and thereby harm the principle of legitimacy.

Therefore, the best definition for representativeness of the judiciary would be tied to diversity of the applicant pool. We should define representativeness as the ability of all persons in the available pool of applicants to compete on merit without regard to race, creed, or color. This definition does not require a numerical quota. Instead, it requires an equality of opportunity.

The rub is how to advance representativeness in a judicial selection system without imposing a quota on judges. How can we use the mechanics of the selection system to promote this “equality of

74. Sweeney, *supra* note 70, at 58.

75. See Onwuachi-Willig, *supra* note 71, at 1263-64 (noting that “even diversity in work experience matters”); Leo M. Romero, *Enhancing Diversity in an Appointive System of Selecting Judges*, 34 FORDHAM URB. L.J. 485, 487-90 (2007) [hereinafter Romero, *Enhancing Diversity*].

76. See Onwuachi-Willig, *supra* note 71, at 1263-65.

77. See Greene, *Reform*, *supra* note 51, at 607.

78. *Id.*

opportunity”? Historically, the traditional “Missouri Plan” commission system has not done a very effective job in this regard.⁷⁹

One possibility for a state seeking a representative judiciary is to build representativeness into the makeup of the commission based on the notion that a more representative commission will result in a more representative judiciary.⁸⁰ In Tennessee, the judicial commission is selected by the speaker of the senate and the speaker of the house from lists provided by the Tennessee bar association, the Tennessee trial lawyers association, defense lawyers association, district attorneys conference, and criminal defense lawyers, along with three non-lawyer members.⁸¹ If a group’s nominees do not reflect the diversity of the state’s population, however, the speakers must reject that group’s list and a new list must be submitted.⁸² Similarly, the New Mexico judicial selection system established by that state’s constitution requires that the two major political parties be equally represented on the Appellate Judges Nominating Commission. The president of the state bar and the judges on the commission are empowered to make additional appointments to achieve parity.⁸³ These additional appointments are to be made “such that the diverse interests of the state bar are represented,” with the dean of the University of New Mexico School of Law the

79. See Davidow, *supra* note 1, at 430. It should be noted, however, that despite claims to the contrary, it appears that the commission system does a better job than partisan election at bringing women and minorities to the bench. Because judicial districts tend to be drawn largely there is a greater chance that, especially with regard to minorities, voter dilution will occur. *Id.* See also Reddick, *supra* note 2, at 741 (noting that some studies show a positive correlation between merit selection and diversity).

80. See, e.g., Daugherty, *supra* note 8, at 341-42 (advocating a nominating commission wherein at least one of the four attorneys appointed to the commission must be a member of the state’s largest minority group and at least one must be a woman).

81. The judicial commission in Tennessee is composed of seventeen members, eight of which are appointed by the speaker of the senate, eight by the speaker of the house, and one jointly, as follows: two lawyer members from a list provided by the Tennessee bar association (but they cannot be either personal injury or criminal defense lawyers), one lawyer member from a list provided by the Tennessee defense lawyers association, three lawyer members from a list provided by the Tennessee trial lawyers association, three lawyer members appointed by the Tennessee district attorneys conference, three lawyer members appointed by the Tennessee association of criminal defense lawyers, three non-lawyer members, and two lawyer members who are not nominated by a group. TENN. CODE ANN. § 17-4-102 (2006).

82. *Id.* § 17-4-102(b)(2). Further, each group and the speakers are directed to make their choices “with a conscious intention of selecting a body which reflects a diverse mixture with respect to race, including the dominant ethnic minority population, and gender.” *Id.* § 17-4-102(d).

83. N.M. CONST. art. VI, § 35. See Romero, *Judicial Selection*, *supra* note 3, at 185-86 (describing New Mexico’s system).

final arbiter.⁸⁴ Some other states also have included language favoring diversity, generally of political party, in the makeup of their nominating commissions.⁸⁵

While it might be possible to mandate diversity in a judicial nominating commission through the use of a quota system, I do not believe this is desirable. Although a quota at the nominating commission level is less a threat to legitimacy than a quota for judges would be, it brings its own problems. Because a commission is generally a small body of persons there is a question as to which groups would be included in the diversity quota, and which would not.

Even in the absence of rigid quotas, however, there is value from a representativeness standpoint in directing that the makeup of the commission, to the extent possible, consider diversity. Similarly, there is value in directing that diversity be one of the factors that the committee considers when making its selection of candidates to be presented to the appointing authority. There is also value in the appointing authority taking diversity into account in making its final selection. One way to do this, as suggested by Professor Leo Romero, is to mandate such consideration in the legislation establishing the judicial selection system.⁸⁶

Representativeness also can be advanced by adopting formal procedures and informal customs and practices for the nominating commission that emphasize diversity.⁸⁷ Such procedures can help to create an institutional mindset in both the commission and the appointing authority, encouraging representativeness.⁸⁸

Finally, as Professor Romero suggests, there is value in requiring the nominating commission to keep a record of its efforts to en-

84. N.M. CONST. art. VI, § 35. See Romero, *Judicial Selection*, *supra* note 3, at 185-86.

85. See ARIZ. CONST. art. VI, §§ 36, 37 (providing that not more than three of the five attorney members, and not more than five of the ten non-attorney members of the commission shall be members of the same political party); COLO. CONST. art. VI, § 24 (providing that no more than one-half of the commission members plus one, exclusive of the chief justice, shall be members of the same political party); CONN. GEN. STAT. § 51-44(a) (2006) (providing that no more than six members shall belong to the same political party); NEB. CONST. art. V, § 21(4) (providing that no more than four of the eight voting members of the commission shall be from the same party); S.D. CODIFIED LAWS § 16-1A-2 (2006) (providing that of the three members of the state bar no more than two shall be from the same political party, and that the two non-lawyer members appointed by the governor shall not be from the same party).

86. See Romero, *Enhancing Diversity*, *supra* note 75, at 487.

87. *Id.* at 492.

88. See *id.*

courage diversity and in providing that data to the public.⁸⁹ The simple act of record-keeping can help to keep the necessity for representativeness in the minds of the commission members, the appointing authority, and the public.

Judges are not the exclusive province of any one section of society. Rather, they must provide justice for all. In order for a judicial selection to be considered fair and impartial, it must be seen as representative of the community. It is important for a selection system, insofar as it is possible, to advance methods that provide for a judicial bench that reflects the diversity of its qualified applicants.

C. Legitimacy

The concept of legitimacy is the justifiability of a selection process in a democratic society. Although legitimacy is related to the principle of accountability, and the two are sometimes conflated,⁹⁰ the two concepts really are distinct. Accountability concerns the ability of the public to review the performance of judges and remove bad judges.⁹¹ Legitimacy, on the other hand, refers to the confidence of the public that the initial selection system itself comports with democratic principles.

Legitimacy is especially important with regard to the selection of judges. Judges occupy a peculiar place within a democratic society, because they are not expected to rule according to either the views of the particular officials that appoint them or the popular will. Thus, their decisions are often unpopular and countermajoritarian.⁹² This role is essential in a democratic society, and bears a special responsibility: “Democracies need adjudication to be legitimate, which in turn requires that mechanisms for selecting judges be understood to be legitimate.”⁹³

89. *Id.* at 496-97.

90. *See, e.g.*, Jackson, *supra* note 4, at 35-37 (conflating both accountability and legitimacy under the “judicial accountability” heading).

91. *See supra* notes 27-28 and accompanying text.

92. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *CARDOZO L. REV.* 579, 592-93 (2005); *see* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 *S. CAL. L. REV.* 1969, 1979 (1988) (“A peculiar and delicate relationship exists between the judicial function and the democratic process.”).

93. Resnik, *supra* note 92, at 593.

Legitimacy in this country generally turns on how a process fits within the concept of a democratic system.⁹⁴ The underlying theory of democracy is that government officials are selected through a process that takes into account the will of the people and that relies on periodic elections for expression of the public will.⁹⁵ Even where members of the government are appointed, they derive their power from elected officials and are constrained by the mandate of the elected official.⁹⁶

A commission system carries an even greater burden to demonstrate legitimacy than other systems, such as elections or appointments. Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public.⁹⁷ Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.⁹⁸

Commission systems, on the other hand, do not fit so neatly within this democratic framework. While judges in a commission system are appointed by a popularly-elected official, the official's choice is not unfettered. Rather, the choice is made from a pool selected by an unelected commission. Further, although some members of the commission are generally appointed by an elected official, others are not. In particular, many commissions have lawyer members that gain their seats, either through election by a minority of the persons, i.e. lawyers in their area, or through nomination by special interest groups.⁹⁹ The composition of nominating commissions thus raises some serious concerns with regard to legitimacy.

94. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 5-8 (Harvard Univ. Press 1980) (discussing the foundation of American government).

95. See Resnik, *supra* note 92, at 591.

96. *Id.*

97. See *id.* at 594.

98. See *id.* at 593-94. It should be noted, however, that this fit is not exact, because usually the judge's mandate does not end when the appointing authority's does. Rather, appointed judges' terms are usually longer than those of the persons who have appointed them. *Id.* at 592.

99. See, e.g., ARIZ. CONST. art. VI, § 36 (providing that the five attorney members of the Arizona judicial nominating commission be nominated by the board of governors of the state bar of Arizona); KAN. CONST. art. III, § 5(e) (providing that attorney members of the Kansas nominating commission be selected by the vote of the members of the Kansas bar in each judicial district).

This is not to say that the commission system as a whole is devoid of legitimacy just because its judges are not the product of an elective system or direct appointment and ratification by elected officials. There is much to be said for the legitimacy-enhancing aspect of removing direct partisan politics from the judicial selection process. As noted above, the position of judges in the democratic process is somewhat unusual, because they play a role vastly different from those officials in both the executive and legislative branches of government.¹⁰⁰ Part of the expected role of judges in a democratic society is to make hard choices in the protection of individual rights and liberties that may thwart the will of the majority and its elected representatives.¹⁰¹ While this role may not be a popular one, both in the sense of public opinion and in the sense of flowing from a majority decision, it is generally recognized as a legitimate one. The legitimacy of the adjudication process is strengthened when judges are viewed by the public as having been selected on merit; it is compromised when the public views judges as having been selected as the result of a political decision by a government official.

Just as important to the legitimacy of a selection system is the perception that the judge's role in each individual case is a fair one. One of the constant criticisms of an elected judiciary is that judges are compromised by campaign contributions from special interests, especially lawyers who will be appearing before them because they will be beholden to these interests in making their rulings.¹⁰² Legitimacy is threatened if the public believes that a judicial selection system operates to put judges on the bench who will be biased in favor of those special interests that contributed to their campaigns.

The concerns regarding the legitimacy problems in the commission system are real and should be addressed. Even if the commission system can be justified as legitimate for the role it plays in helping to select an unbiased judiciary that will protect individual rights, we look at ways in which the system can be changed to further its legitimacy in the eyes of the public while still retaining its positive qualities. This requires an examination of some of the features of the commission system that are particularly difficult to jus-

100. See *supra* notes 92-93 and accompanying text.

101. See Resnik, *supra* note 92, at 592-93.

102. See Greene, *Judicial Selection*, *supra* note 45, at 951; Jackson, *supra* note 4, at 40; see also Joel Achenbach, *Why Reporters Love Judicial Elections*, 49 U. MIAMI L. REV. 155, 155 (1994) (discussing the irony of judges accepting campaign contributions from lawyers arguing before them).

tify to the public, such as the mandated participation of lawyers and judges on the selection committee, the prevailing influence of the organized bar, and the lack of public input in the initial selection process.

1. *Mandated Participation of Lawyers and Judges*

A particularly troublesome aspect of many commission systems is their reliance on, and provision for the selection of, their lawyer members.¹⁰³ The idea of mandating lawyer participation in the selection of judges is unique to the commission system and also unique in the democratic system. As a result, it requires special justification if it is to be considered legitimate. This question, why lawyers are so particularly suited to serve as nominators that their participation is mandated, must be addressed.

In order to evaluate the reasons for and legitimacy of the commission system's reliance on lawyer members, it is necessary to first understand how such reliance developed. The traditional commission-based system was born out of the attempt by Professor Albert Kales to combine the advantages of, and eliminate the problems with, both the appointment-based and election-based modes of judicial selection.¹⁰⁴ Kales first proposed that judges be appointed by a popularly-elected chief justice from a list drawn up by the presiding justices of all divisions of the court.¹⁰⁵ This judge-centered se-

103. In Kansas, I have heard a small but vocal segment of the public referring to the judicial nominating committee as a "lawyers' cabal" because of its reliance on lawyer members. The state judicial nominating commission in Kansas is composed of one lawyer member from each of the four congressional districts, who is selected by a vote of the members of the bar in that district, and four non-lawyer members selected by the Governor. KAN. STAT. ANN. §§ 20-119, -120, -124 (2005). The commission is chaired by a lawyer who is selected through a statewide vote of the Kansas Bar. *Id.* § 20-119. The participation of the organized bar in selecting the lawyer members has also led to the suggestion: "You can't get to be a judge if you don't take the plaintiffs' lawyers' point of view." This is a fairly common problem. See Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 305 (2002) (noting that in several states the bar association is dominated by personal injury lawyers who pick candidates favoring their philosophy).

104. Glenn R. Winters, *Judicial Selection and Tenure*, in JUDICIAL SELECTION AND TENURE, *supra* note 31, at 19, 24.

105. Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure: Its Historical Development*, in JUDICIAL SELECTION AND TENURE, *supra* note 31, at 29, 33-34 [hereinafter Winters, *Merit Plan*]. Kales's proposal was that the chief justice be required to select from the list "on the occasion of every other appointment at least." *Id.* at 34 (quoting ALBERT M. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES 250 (1914)). The founder of the American Judicature society, Herbert Hartley, later proposed that every appointment be made from the list. *Id.*

lection idea was based on a set of expectations regarding the fitness of judges. Kales felt that judges, especially appellate judges, were the logical persons to select judicial candidates, because they had “stronger motives to appoint those who will carry out the interests of justice” and “a better opportunity for determining the character and ability of lawyers, since they examine the work of lawyers continually and with the most minute care.”¹⁰⁶ Kales also believed that the “only proper appointing power” was an official that was “conspicuous, legal, subject directly to the electorate, and interested in and responsible for the due administration of justice.”¹⁰⁷ The chief justice was the most logical choice as the appointive official because of his or her responsibility for the administration of justice. Kales thought that “such a man cannot carry on the work of the courts without the most efficient judges that he can possibly secure” and would thus be motivated to select judges based on their qualifications rather than on partisan motives.¹⁰⁸

The idea of the organized bar, as well as judges, forming a part of the nominating commission came later with Herbert Harley’s proposal, which included a governor as the appointing officer and a bar plebiscite as the nominating instrument.¹⁰⁹ Harley believed that a bar plebiscite would “winnow out the deserving from the merely self-seeking” and create “a goodly list of lawyers willing to become judges and bearing the approval of their colleagues.”¹¹⁰

These early attempts to take politics out of judicial selection are reflected in the way states using the commission system set up their selection commission. Today, the vast majority of the states using a commission system require the presence of lawyer members.¹¹¹ A

106. ALBERT M. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES 238-39 (1914). Kales thought that popular election of judges was not a good method, because the public was effectively ignorant of the merits of the candidate. *Id.* at 232.

107. *Id.* at 237. See also Albert M. Kales, *Methods of Selecting and Retiring Judges*, 11 J. AM. JUDICATURE SOC’Y 133, 139 (1928).

108. See KALES, *supra* note 106, at 240-41.

109. Winters, *Merit Plan*, *supra* note 105, at 35. Winters notes that the first suggestion of attorneys other than judges taking part in a nominating commission was probably the plan put forth by Harold J. Laski, which would have used an advisory committee of a supreme court judge, the attorney general, and the president of the state bar association to guide the governor in making an appointment. *Id.*

110. Herbert Harley, Editorial, *The Eligible List of Judicial Candidates*, 11 J. AM. JUDICATURE SOC’Y 131, 132 (1928).

111. See Newman & Isaacs, *supra* note 56, at 18-53 (summarizing the state judicial selection laws of the United States). Of the states that do not require lawyers or judges to be members, Hawaii is particularly interesting. Hawaii allows for the appointment of one member by the chief justice of the supreme court and two members elected by the members of the state bar. HAW. CONST. art. VI, § 4. Although it is

large portion of those states also require a judge on the commission, usually as the chair, although that judge may not always be entitled to cast a vote in the selection process.¹¹²

A review of the history thus discloses a two-fold reasoning for the required presence of lawyers, including judges, on the nominating commission. First, lawyers were thought to have better knowledge of the judicial skills of the candidates than would ordinary citizens.¹¹³ Second, lawyers, and especially judges, would be more concerned with the administration of justice and would thus seek to put only the most deserving on the bench.¹¹⁴ While each of these considerations, if true, would provide a justification for the legitimacy of the required presence of lawyers on the judicial nominating commission, there is a question as to whether this reasoning reflects reality.

The first reason is susceptible to inquiry regarding whether the lawyer members of a nominating commission actually have a far greater base of knowledge about the quality of individual attorneys than the general public. Kales's original idea that appellate judges would have a base of knowledge regarding quality may be correct, at least regarding their base of knowledge of appellate attorneys. Nevertheless, the legitimacy in a democratic system of a nominating commission consisting only of unelected appellate judges, and of having the applicant pool be limited to only those persons who tended to appear before appellate courts, is limited. While allowing one unelected group of individuals to choose their own successors with minimal input from a political authority may actually be a good idea from the standpoint of ensuring that qualified judges ascend to the bench, it is not a system that the public is likely to regard as legitimate.

Expanding the pool of nominating commissioners beyond Kales's initial vision to include practicing lawyers instead of only judges does not provide much help from the standpoint of ensuring knowledgeable candidates. While this expansion would open up the possible nominees beyond the field of those attorneys practicing before the appellate courts, there is a real question whether, in this day of increasing specialization in the practice of law, lawyers actu-

highly probable that these persons will be lawyers, there is also a restriction that no more than four members of the nine member commission may be lawyers. *Id.*

112. See Newman & Isaacs, *supra* note 56, at 18-53. Usually, the judge involved is the chief justice of the state supreme court and acts as a chair of the committee. *Id.* Sometimes, this person is a non-voting member. *Id.*

113. See KALES, *supra* note 106, at 232, 238-39; Harley, *supra* note 110, at 132.

114. See KALES, *supra* note 106, at 237-39; Harley, *supra* note 110, at 132.

ally know very much about the quality of other lawyers who do not practice in their same specialized areas.

The second reason for requiring lawyers and judges on the nominating commission, that they will be motivated by their concern for the administration of justice to put only the best candidates on the bench, has also met with some skepticism.¹¹⁵ Studies of actual nominating commissions have shown that the selection of lawyer members and their selection in turn of judicial candidates is often itself a political process.¹¹⁶ These studies revealed that, rather than being motivated by the administration of justice, attorneys picking representatives tended to favor the “socioeconomic interests” of their clients, with plaintiff and defense attorneys attempting to elect their representatives to the nominating commission in the hopes that these representatives would select judges that favored their interests.¹¹⁷ Further, attorney representatives on the commissions tended to be subject to the sentiment that “political considerations” affected their deliberations.¹¹⁸

If there is evidence that judges and lawyer members of the nominating commission tend to have little specialized knowledge of the individual candidates, and that they tend to be influenced by politics in their deliberations, is there a reason to have them on the commission as opposed to representatives that would be more politically legitimate, such as commissioners who are popularly elected? Do judges and attorneys add value to the commission such that their mandated participation can be construed to be legitimate within the ideals of our democratic society?

I believe there are good reasons, beyond those advocated by early proponents of the system, for mandated inclusion of lawyers and judges on the committee. First, although lawyers and judges in general may not have the ideal personal knowledge of the individual candidates that has been attributed to them by proponents of the commission system, they do have specialized knowledge that is important: an understanding of the role that judges play and of the attributes necessary for a judge to fulfill that role. While they may

115. See, e.g., HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 141-43 (2d ed. 1998) (criticizing the idea that lawyer members seek the most-qualified candidates); RICHARD A. WATSON & RONALD G. DOWNING, THE POLITICS OF THE BENCH AND BAR 331-32 (1969).

116. See Reddick, *supra* note 2, at 732-33 (recounting studies showing political influences on the nominating process).

117. STUMPF, *supra* note 115, at 142 (commenting on the Watson and Downing survey).

118. See Reddick, *supra* note 2, at 733.

not know the individual candidates, even those lawyers who do not generally practice before courts have an understanding of what they would like to see in a judge and an appreciation for the damage that a biased judge can do to a political system.

Further, lawyers and judges often have better access to a network of information regarding individual candidates than would lay persons and a better understanding of how to interpret that information. Although they may not themselves know the qualifications of individual candidates, they are often connected, either through law school, practice, or bar association ties, to colleagues who do. They also have a “frame of reference” about how these various qualifications play out in the real world. For these reasons, their mandated presence on the committee is justified.

Nevertheless, the commission system’s reliance on lawyer members also emphasizes the importance, from a legitimacy standpoint, of including lay members on the commission. The participation of non-lawyers is vital to rebut the perception that the commission system is simply one wherein the lawyerly elite anoint their own as judges, without public participation.¹¹⁹ Nor is the presence of non-lawyer members on the committee simply ceremonial. Rather, throughout the commission system’s history, lawyers and judges who have served on nominating commissions with lay members speak highly of the contributions those members make.¹²⁰ They note that lay members provide a valuable perspective on important issues, such as the integrity and human character of the applicants, that may be lost if the commission focuses entirely on lawyerly skills. Further, the presence of non-lawyer members can “help remind the other commission members that the courts are not just to serve lawyers and their interests, but truly and ultimately belong to the people.”¹²¹

2. *The Influence of the Organized Bar*

Another criticism directed at the commission system from a legitimacy standpoint is its reliance on the state bar in selecting law-

119. As one commentator noted, “the mere presence of such individuals will blunt any claim that elitist attorneys control judicial appointments.” James E. Lozier, *The Missouri Plan A/K/A Merit Selection Is the Best Solution for Selecting Michigan’s Judges?*, 75 MICH. B. J. 918, 922 (1996).

120. See, e.g., Elmo B. Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, in JUDICIAL SELECTION AND TENURE, *supra* note 31, at 109, 114; Winters, *Merit Plan*, *supra* note 105, at 40-41 (detailing the benefits of having non-lawyer committee members).

121. Hunter, *supra* note 120, at 114.

yer members of the nominating commission. Critics argue that some systems allow the state bar to dominate the proceedings and reduce the input of the public and its elected officials.¹²²

States use various formulations in obtaining their lawyer members.¹²³ On one extreme, Kansas uses direct election by the members of the bar of each congressional district.¹²⁴ Arizona takes what might be called a “middle-ground” approach, where the lawyer members are nominated by the board of governors of the state bar and appointed by the Governor with the “advice and consent” of the state senate.¹²⁵ In Colorado, on the other extreme, the lawyer members are appointed by majority action of the governor, attorney general, and chief justice.¹²⁶

Most of the commission systems in the United States use the state bar, either through its board of governors or through direct election of its members, to select the lawyer members.¹²⁷ From a legitimacy standpoint, this is a questionable system. Membership in the state bar does not have a connection to the democratic function, and judges selected through the use of this system are open to charges that they are simply tools of the lawyers running the state bar.¹²⁸

Moreover, this problem is not entirely solved by placing the final selection in the hands of the governor, an elected official, or by juxtaposing the non-lawyer members with lay members who are appointed through some other process. Rather, because the governor’s choices are generally limited to the slate given to her by the

122. See, e.g., Kelly Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 656 (2002) (stating that “[h]istory has shown that trial lawyers and their acolytes have controlled merit selection committees”); Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 211 (1987) (arguing that “[a]ppointing judges to office under a Missouri Plan scheme significantly increases the ability of the organized bar to influence the selection of judges and severely reduces the participation of the voting public in the judicial selection process”).

123. See Newman & Isaacs, *supra* note 56, at 18-53.

124. See KAN. STAT. ANN. § 20-120 (2006).

125. See ARIZ. CONST. art. VI, § 36.

126. See COLO. CONST. art. VI, § 24(3).

127. See Newman & Isaacs, *supra* note 56, at 18-53. Fourteen states use the bar association in various ways to determine their lawyer members. In Alaska and Florida, the lawyer members are directly appointed by the governing body of the state bar. See ALASKA CONST. art. IV, § 8; FLA. CONST. art. V, § 20(5). Other states have the state bar members elect the lawyer members of the commission. See, e.g., KAN. CONST. art. III, § 5(e); WYO. CONST. art. V, § 4(c).

128. See Reddick, *supra* note 2, at 733 (describing perceptions of the influence of the state bar on the nominating commission).

commission, the system can be perceived as vulnerable to “panel stacking,” wherein the commission submits a combination of nominees that offers the governor little real choice.¹²⁹ Even if lay members are added to the process, there is the problem that a large part of the selection system is being delegated to persons who are not subject to the democratic process.

Legitimacy, then, would appear to favor a reduction in the influence of the state bar and its members over the nominating commission because they do not fit within the democratic process. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission’s members selected through means more consistent with the concept of representative government.

This does not mean, however, that the selection of members of the nominating commission must be left to partisan politics. Indeed, such a system would actually tend to compromise perceptions of fairness and impartiality. Legitimacy does not require that the makeup of the nominating commission actually reflect the political makeup of the state; rather, the key is that a majority of the commissioners be a product of a connection to the democratic system. For instance, the best possible system from a legitimacy standpoint might be one where a number of both the lawyer and non-lawyer members are selected by the majority and minority leaders of the various legislative houses, whose choices could be expected to balance out politically, while remaining the product of the democratic process.¹³⁰ There is wide room for experimentation in this regard, so long as the result can be characterized as legitimately fitting within the democratic process.

This also does not mean that there is no room for the organized bar in judicial selection activities. The point is that the organized bar should not control the system. Some members of the commission could still be selected by the bar as “neutral” participants. Further, state bar associations could legitimately continue to play a

129. *See id.* (describing Watson and Downings’ report as it relates to panel stacking).

130. New York’s judicial nominating commission includes elements of this idea, in that the speaker of the assembly, president of the senate, minority leader of the senate, and minority leader of the assembly each get to appoint one commissioner to the twelve-person commission. *See* N.Y. CONST. art. VI, § 2(d)(1).

vital role in vetting the qualifications of candidates and in making those qualifications available to the commission.¹³¹

3. *The Lack of Public Input on the Initial Selection*

The commission-based system has been criticized, especially by those favoring judicial elections, for its lack of public input in the initial selection process.¹³² They claim that “the people are that much more disenfranchised, and power is proportionately concentrated in the hands of a select few.”¹³³ They argue that, instead of taking politics out of the system, the commission system “takes the voter out of the system.”¹³⁴

While it is true that the initial input from the public with regard to the selection of judges is minimal in a commission system, from a legitimacy standpoint this does not pose a real concern. As noted above, our conception of a representative democratic system would accommodate the appointment of judges through the participation of duly elected government officials.¹³⁵ As long as the system provides for selection through politically accountable officials, its legitimacy is not compromised by the absence of direct election.

The reliance of the commission system on this indirect democracy underscores the importance of allowing the public some input in judicial selection. In many commission systems, the selected judge is required to run for retention at the next available statewide election.¹³⁶ Because the judge has been in office for only a short time when this election occurs, it is less of a referendum on the judge’s conduct while in office than it is a referendum on the selection of the judge in the first place. The initial retention election thus serves as an opportunity for the public to put its “stamp of approval” on the selection made by its representatives.

131. See Blake Tartt, *The Participation of the Organized Bar in Judicial Selection: What Is Proper, and What Is Improper*, 43 S. TEX. L. REV. 125, 137-140 (2001) (advocating the use of such a system in Texas).

132. See Jack W. Peltason, *Merits and Demerits of the Missouri Court Plan*, in JUDICIAL SELECTION AND TENURE, *supra* note 31, at 95, 99-100 (discussing the classic objections to the commission system).

133. See John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 863 (1990) (addressing criticisms of the merit selection system).

134. Franklin S. Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 501, 509 (1988).

135. See *supra* notes 96-98 and accompanying text; see also Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 36-39 (2004) (arguing that appointments fit within democratic theory).

136. See, e.g., KAN. CONST. art. III, §5(e) (providing that each Kansas Supreme Court justice must run for initial retention at the first statewide election following twelve months of service).

Some commentators have argued that in order to ensure judicial independence retention elections, including the initial one, should be abolished.¹³⁷ Apart from accountability concerns for subsequent retention elections, there is a very large legitimacy problem with abolishing the initial retention election. It is important to give the public some input in the selection of judges in order for the procedure to be deemed legitimate. As one commentator has noted, while “[o]ther cultures can accept a justice system administered by their elders, hereditary Levites, or monarchical appointee,” community confidence requires that the public have access and participation in the selection of its judges.¹³⁸ Giving the public an initial opportunity to cast an up or down vote on the choice of a judge at the earliest possible opportunity adds legitimacy to the system.¹³⁹

Because the commission system does not fit neatly within the normal concepts of democracy, it bears a particular burden of convincing the public that it is legitimate. In order to convince the public that it is valid, a system must be able to answer questions regarding how it fits within the democratic system of government. The greater the extent to which a commission system can answer this question and advance legitimacy, the better the chance it has to be accepted by the public.

D. Transparency

The final principle vital for a judicial selection system is transparency. By transparency I mean the extent to which the selection proceedings are open to public view so that the public can see how the decision as to which judge is eventually chosen is made. The transparency of a system is important in garnering public trust for the eventual result. Along with legitimacy, transparency is vital in inspiring public confidence in the system.

Transparency is especially important in a commission-based system. Unlike for example judicial elections, where the process itself

137. See Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988); Grodin, *supra* note 92, at 1981.

138. Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 Sw. L.J. 23, 24 (1986).

139. New Mexico takes the idea of public validation of the choice one step further than most commission systems. In New Mexico, the judicial candidate that is nominated by the commission and appointed by the governor must stand in a contested partisan election at the next general election. Romero, *Judicial Selection*, *supra* note 3, at 195-96. While this method of retention is open to criticism on many grounds, it does comport with notions of legitimacy.

is uncomplicated and easily understandable by the public because of its similarity to the selection of political officers, the commission system is a complicated, multi-step procedure that is not necessarily intuitive for the public. The commission system bears only a passing resemblance to the elections of other government officials that the public knows and to the appointment with ratification process that it sees for United States Supreme Court Justices. Concepts such as nominating commissions and even retention elections can be very confusing to the public.¹⁴⁰ Much of the work of selecting the judges is done in secret by a nominating commission whose members are not well known.

A lack of transparency is highly damaging to the public's perception of the commission system. In the absence of information regarding proceedings, the public tends to think that the system is "closed," and that judges are selected through "the old-boy system" or some other process that has little to do with the qualifications of the candidate.¹⁴¹ Such perceptions undermine the confidence in the quality of judges and ultimately in the quality of the legal system.¹⁴²

There are a number of ways in which a commission system can enhance transparency. Transparency can be advanced at the outset by ensuring that notice of a judicial position is widely disseminated through the public, along with a detailed account of the selection criteria and process.¹⁴³ Once the applications for the position are in, applicants' names should be made public so that the citizens of

140. See, e.g., Ronald T.Y. Moon, *Together, Courts and Media Can Improve Public Knowledge of the Justice System*, 87 JUDICATURE 205, 261 (2004) (reporting on a 2003 poll commissioned by the Hawaii state judiciary that the general public is not well-informed about the judicial selection process); Webster, *supra* note 66, at 35 (noting polls indicating "an appalling amount of confusion and general lack of understanding among voters regarding the purpose of retention elections"); see also John F. Irwin & Daniel L. Real, *Enriching Judicial Independence: Seeking to Improve the Retention Vote Phase of an Appointive Selection System*, 34 FORDHAM URB. L.J. 453, 463-64 (2007) (reporting that the public does not understand the retention election process because it is not taught).

141. See Moon, *supra* note 140, at 206. In Kansas, I have also heard complaints that the "trial lawyers control" the system, or "the governor controls the system," sometimes from the same people.

142. See Marilyn S. Kite, *Wyoming's Judicial Selection Process—Is It Getting the Job Done?*, 34 FORDHAM URB. L.J. 203, 227 (2007).

143. See Sweeney, *supra* note 70, at 63-64.

the state have an opportunity to look at them.¹⁴⁴ Also at this point, the process should be explained again.

There should also be transparency in the interview process, with the caveat that there may be some tension at this stage between advancing the public's knowledge of the candidates and attracting quality candidates. While transparency would appear to suggest that interviews with the candidates be made publicly available, doing so may inhibit the effectiveness of the interviews. A commission should have the ability to ask hard questions, which might cause problems for the commissioners or the candidates if made public.

Regardless of whether the interviews themselves are made public, the ultimate decision of the commission should certainly be made public. While the discussions of the nominating commission should probably remain in confidence, the names of the finalists should be publicized, along with their qualifications.¹⁴⁵

Finally, the commission's work should not stop with the publication of the final names. As Professor Leo Romero argues, the commission should also be required to provide data to the public regarding how minorities fare under the system, including the number of minority and women commissioners, the number of minority and women candidates, and the fate of those candidates.¹⁴⁶ Such data will go a long way towards informing the public about how well the system is promoting representativeness, and will increase the public perception that the system is "open" rather than "closed."¹⁴⁷

The commission system is complex. While this is good in terms of many of the principles that judicial systems should be designed to advance, the complexity may also work against the system in terms of its transparency. It is incumbent, therefore, that commission systems take steps to advance transparency by informing the public and conducting as much of their business as possible in public. Such transparency will reduce the all-too-common perception that the system is a closed one in which only those on the inside

144. There has historically been some resistance in publicizing the names of applicants, for fear that those who are not selected as part of the short list submitted to the governor will be thought to be less qualified. I believe, however, that the benefits of openness outweigh such concerns.

145. See Romero, *Enhancing Diversity*, *supra* note 75, at 496.

146. *Id.*

147. See *id.* at 497.

will prosper, and will advance the public's willingness to accept the system.

II. WHAT DO THE PRINCIPLES TELL US?

As noted above, the principles that I advocate do not and cannot by themselves dictate one perfect commission system for judicial selection. The application of these principles can suggest, however, some parameters for an optimal selection system.

Regarding the makeup of the nominating commission, judicial independence would suggest that the selection of its members be spread out among several groups, so that no one political party or interest group has the ability to influence the selection process.¹⁴⁸ To enhance representativeness, the selection of the commission should also emphasize racial and gender diversity, so that the commission reflects the diversity of the community.¹⁴⁹ Legitimacy would suggest that both lawyer members and lay persons are needed on the commission.¹⁵⁰

With regard to who picks the commission, legitimacy would suggest that the majority of members be appointed by persons with ties to the democratic process, rather than unelected special interests.¹⁵¹ Independence would suggest that the ultimate appointing authority not be allowed to select any members of the commission.¹⁵²

Transparency would suggest that the work of the nominating commission, insofar as possible, be open to the public.¹⁵³ Certainly, the notice of the judicial opening along with a detailed account of the selection process should be widely disseminated, and the list of applicants should be made public.¹⁵⁴ In deliberating and making its picks, the commission should be directed to consider diversity as a factor.¹⁵⁵ The nominating commission should also be directed to keep records regarding the diversity of its applicants, not only on the basis of race or gender, but also on the basis of

148. *See supra* note 51 and accompanying text.

149. *See supra* notes 86-88 and accompanying text.

150. *See supra* notes 118-21 and accompanying text.

151. *See supra* notes 122-31 and accompanying text. This does not mean, however, that the majority political party should be allowed to pick a majority of the commissioners. *See supra* notes 122-31 and accompanying text.

152. *See supra* notes 51-53 and accompanying text.

153. *See supra* notes 143-45 and accompanying text.

154. *See supra* note 143 and accompanying text.

155. *See supra* notes 86-88 and accompanying text.

religion, background, geography, and type of practice.¹⁵⁶ Once the commission had made its decision on the names to send to the appointing authority, those names should be made public.¹⁵⁷ The appointing authority should then be required to select one of those persons nominated by the commission.

Once selected, the need for legitimacy would suggest that the judge be required to stand for initial retention soon after selection, so that the public can ratify the choice in some manner.¹⁵⁸ Thereafter, the judge should be subject to some sort of retention mechanism, either a retention election or reappointment at fairly frequent intervals, perhaps every six to eight years.¹⁵⁹ To enhance accountability, the system should have a mechanism for independent evaluation of the judge's performance, and the public should be informed of the evaluation in advance of the retention decision.¹⁶⁰

Clearly, these parameters are wide, and there is room inside them for experimentation in the quest for finding an optimal selection system. They do provide, however, a starting point for a system design that can be refined further in light of study and experience to make a better commission system.

CONCLUSION

The ultimate goal of any judicial selection system should be to bring qualified judges to the bench. This is not as easy as it sounds. Judicial quality is an elusive concept, and not one that is easily demonstrable to the public. While it seems that, of all the judicial selection systems in use, the commission system has the best chance of selecting qualified judges, this is more a matter of faith than empirical evidence.

In addition to quality, however, there are five other principles that a judicial system should advance in order to be effective and supported by the public. When considering the design of an optimal commission-based system, the principles of independence, accountability, representativeness, legitimacy, and transparency should be taken into account. Although they do not dictate one

156. *See supra* notes 89, 146 and accompanying text.

157. *See supra* note 144 and accompanying text.

158. *See supra* notes 136-39 and accompanying text.

159. *See supra* notes 54-61 and accompanying text.

160. *See supra* note 68 and accompanying text.

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specific system, they do create some parameters within which experimentation can take place to further refine the commission system.

