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ENGLISH REFORMS TO JUDICIAL SELECTION: COMPARATIVE LESSONS FOR AMERICAN STATES?

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ENGLISH REFORMS TO JUDICIAL SELECTION: COMPARATIVE LESSONS FOR AMERICAN STATES? *

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Abstract

This article offers a brief comparative look at American and British jurisprudential pending selection reforms, and argues that American states could improve their appointive systems by incorporating modern personnel recruitment and hiring practices. To restore public confidence in the courts, people must believe that judges exercise legitimate authority, undistorted by personal or partisan preferences. Beyond changes to the structural selection process in the Constitutional Reform Act, the extended conversations are bringing about foundational cultural shifts in the role of judges and their manner of selection. We could learn much from Britain's modernized appointive system that aims to be open, transparent, accountable, and more diverse.

KEYWORDS: Britain, Judges, appointment, reform, bench

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I. INTRODUCTION

It is often said that Britain¹ and America are two nations divided by a common language.² Although the American common law system was derived from England, many fundamental differences exist between the American and English legal systems and governmental frameworks. In contrast to the American-style legislative process, extensive formal consultations take place in Britain before government submits a bill for action to Parliament. Historically, no clear separation of powers existed in the complex relationships between Parliament and Government (the elected executive branch) headed by the Prime Minister, and the judiciary, until quite recently headed by the Lord Chancellor, a Prime Minister appointee.³ For the last 700 years, the power to appoint judges was vested in the Lord Chancellor.⁴ While the discourse continues, monumental changes are underway as part of constitutional reform. In time, these pending reforms will likely produce a greater

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1. The United Kingdom includes England, Wales, Scotland, and Northern Ireland. This Article focuses on British reforms enacted by Parliament, with limited reach to England and Wales. Scotland and Northern Ireland have been engaged in comparable, but separate, discussions relating to a wide range of pending legal reforms.

2. See Quote . . . Unquote, <http://www1c.btwebworld.com/quote-unquote/p0000149.htm> (last visited Oct. 23, 2006) (noting statements variously attributed to Oscar Wilde, George Bernard Shaw, and Winston Churchill).

3. See RON FENNEY, *ESSENTIAL CENTRAL GOVERNMENT* 2002 11-12 (6th ed. 2002).

4. See DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, *CONSTITUTIONAL REFORM: A NEW WAY OF APPOINTING JUDGES*, 2003, CP 10/03, at 11-12, available at <http://www.dca.gov.uk/consult/jacommission/judges.pdf> [hereinafter DEP'T FOR CONSTITUTIONAL AFFAIRS, *A NEW WAY OF APPOINTING JUDGES*].

symmetry between Britain, America, and other modern democracies.⁵

On June 12, 2003, without prior public consultation, Prime Minister Tony Blair shocked the legal community by announcing plans to implement sweeping reforms to the British legal system, creating a new Department for Constitutional Affairs (“DCA”), headed by Secretary of State Lord Falconer, and also naming Falconer as interim Lord Chancellor until that position could be abolished.⁶ Government introduced the Constitutional Reform Bill to the House of Lords in February 2004.⁷ Following extensive debate and revisions, the bill was adopted by both houses of Parliament and received the Royal Assent on March 24, 2005.⁸ Transfer of judicial appointments to an independent, non-governmental entity began on April 3, 2006.⁹ Effective July 4, 2006, an elected speaker of the house took office in place of the Lord Chancellor.¹⁰ The Lord Chief Justice has assumed the head of the judiciary.¹¹ In barely three years, Britain reformed its long-standing legal structure, providing for clearer separation of powers between the judiciary, Par-

5. *See id.* at 9.

6. Dep’t for Constitutional Affairs, Manifesto, <http://www.dca.gov.uk/dept/manifesto.htm> (last visited Oct. 23, 2006).

7. The English legislative process is complex, and most Parliamentary acts come from government departments or recommendations of independent advisory commissions and committees, whether ad hoc or standing. MICHAEL ZANDER, *THE LAW-MAKING PROCESS* 3 (1994). The governmental department responsible for a project determines the extent of outside consultation to occur before a bill is introduced. *Id.* at 7. After one of these bodies has considered the issues assigned for its scrutiny, it will typically issue a Green or White Paper, and sometimes both. A Green Paper is more preliminary: a tentative government proposal on an issue, put out for comment. By delaying any final commitment, the government can save face, and make adjustments in the later White Paper, which is considered a firm statement of policy. *Id.* at 8-9. After this customary gestation process, the findings and recommendations are sent to the Office of Parliamentary Counsel for drafting in cooperation with the body proposing the bill. *Id.* at 14. Thereafter, the bill gets three readings in each House of Parliament, during which amendments can be made. *Id.* at 53. To become law, a bill must be approved by both Houses and then sent on for the formality of the royal assent. *Id.* at 75.

8. Constitutional Reform Act, 2005, c. 4, pt. 1 (Eng.), available at <http://www.opsi.gov.uk/ACTS/acts2005/20050004.htm>.

9. Dep’t for Constitutional Affairs, Constitutional Reform, <http://www.dca.gov.uk/constitution/reform/reform.htm> (last visited Oct. 4, 2006) [hereinafter Dep’t for Constitutional Affairs, Constitutional Reform].

10. *See* Amanda Brown, *Decision Day for New Lord Speaker*, PRESS ASS’N LIMITED (Eng.), July 4, 2006, at 1.

11. The original plan to abolish the title of Lord Chancellor was dropped in light of fierce opposition in the House of Lords. Alison Hardie, *Blow to Blair’s Bid to Axe Lord Chancellor*, SCOTSMAN, July 15, 2004, available at <http://news.scotsman.com/topics.cfm?tid=928&id=804422004> (last visited Oct. 21, 2006).

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liament, and the elected government's executive branch¹²—truly, a remarkable achievement.

Historically, British judges were selected by the powerful Lord Chancellor, using stringent (but sometimes unstated) eligibility criteria and “secret soundings”—a process of anonymous consultation with unnamed sitting judges.¹³ Once a person was appointed a full-time judge, rules prohibited return to private practice.¹⁴ As a practical matter, these forces produced an English judiciary consisting almost exclusively of older white males drawn from the highest ranks of senior barristers—the most elite branch of the English legal profession.¹⁵ Many in the public perceived the judiciary as socially biased and out-of-touch.¹⁶ Some scholars suggest that “[t]he absence of elected judges lends a consistency to the English judiciary which does not exist in the United States, where the selection practice varies from one state to another, and even within a particular state with respect to different levels of the judiciary.”¹⁷

Judges were drawn only from the ranks of barristers, who until recently had exclusive rights of audience to participate in courts as advocates. Solicitors and other legal professionals have incrementally been granted rights of audience, starting with the lowest level of courts. Upon establishing proper qualifications, individual solicitors can serve as advocates in the highest courts. Although the most rigid distinctions between the two branches have dimin-

12. See Dep't for Constitutional Affairs, Constitutional Reform Act 2005—Legislative Process, <http://www.dca.gov.uk/legist/constreform.htm> (last visited Oct. 23, 2006).

13. CONSTITUTIONAL AFFAIRS COMMITTEE, JUDICIAL APPOINTMENTS AND A SUPREME COURT, 2003-4, H.C. 48-I, at 44, available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf>.

The British appointment system stands in sharp contrast with judicial selection of state court judges in the United States, where a strong populist tradition is resistant to abandoning elections in favor of a purely appointive system. The populist tradition maintains that state judges should, in some way, be “accountable” to voters for their conduct in office, an inherent tension with the need for an independent judiciary insulated from public outcry and retaliation for politically unpopular, but legally correct decisions. See Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1210-18, 1232-37 (2001) [hereinafter Maute, *Selecting Justice in State Courts*].

14. See COMM'N FOR JUDICIAL APPOINTMENTS, WOMEN IN THE LEGAL PROFESSION AND THE JUDICIAL APPOINTMENTS PROCESS (Oct. 2005), available at <http://www.cja.gov.uk/reports.htm> (follow “Discussion Paper – Women in the Legal Profession” hyperlink).

15. See CONSTITUTIONAL AFFAIRS COMMITTEE, *supra* note 13, at 40-41.

16. See *infra* note 74 and accompanying text.

17. MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS: TEXTS, MATERIALS AND CASES ON WESTERN LAW* 491 (3d ed. 2007).

ished, formal distinctions relating to advocacy stature and court dress remain.¹⁸ The Constitutional Reform Act 2005 (“the Act”) may be the “single most fundamental and radical change . . . in over three hundred years.”¹⁹ The Act transferred the Lord Chancellor’s judicial functions to the Lord Chief Justice, who serves as the President of the Courts of England and Wales; reaffirms the principle of judicial independence; and establishes a Supreme Court of the United Kingdom.²⁰ Most important for this Article, the Act also creates both an independent body charged with judicial selection and an ombudsman to handle complaints about the appointments process.²¹ While many of the details have yet to be determined, the process of judicial selection is undergoing massive change. Through extended consultations about the selection process, a consensus is emerging that would eliminate some of the historically rigid selection criteria and use modern personnel practices to announce and fill judicial posts.²² On April 3, 2006, responsibility for filling most judicial posts was transferred from the Lord Chancellor to an independent Judicial Appointments Commission (“the JAC”), independent of political patronage, charged with basing judicial selection “solely on merit.”²³ Because of the extended

18. GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* 238-39, 551 (7th ed. 2004) [hereinafter SLAPPER & KELLY, *THE ENGLISH LEGAL SYSTEM 7TH ED.*].

19. Peter L. Fitzgerald, *Constitutional Crisis Over the Proposed Supreme Court for the United Kingdom*, 18 *TEMP. INT’L & COMP. L.J.* 233, 267 (2004). Other commentators date the Lord Chancellor’s position back 1400 years, possibly earlier than the Norman Conquest. See Brown, *supra* note 10, at 1; *In Britain, New Era for House of Lords*, *L.A. TIMES*, July 5, 2006, at 4.

20. Selection of the new Supreme Court Judges will be handled by a separate judicial appointments commission, which is beyond the scope of this Article. An important distinction from the United States Supreme Court is that, at least initially, it will lack authority to strike legislation as unconstitutional, under the doctrine of Parliamentary sovereignty. Whether or not that subordinate status will endure is a matter of some uncertainty. See Fitzgerald, *supra* note 19, at 267.

21. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 1, §§ 66-67 (Eng.).

22. See DEP’t of Constitutional Affairs, *SUMMARY OF RESPONSES TO THE CONSULTATION PAPER, CONSTITUTIONAL REFORM: A NEW WAY OF APPOINTING JUDGES*, <http://www.dca.gov.uk/consult/jacommission/jacresp.htm> (last visited Oct. 24, 2006) (listing over 250 consultees to judicial selection, including professional bodies representing various groups of the legal professions, individual practitioners, judges, and academics); see also THE LAW SOC’Y, *CALIBRE, DIVERSITY AND INDEPENDENCE* (Nov. 2003), [hereinafter LAW SOC’Y, *CALIBRE, DIVERSITY AND INDEPENDENCE*], available at <http://www.lawsociety.org.uk/influencinglaw/policyinresponse/view=article.law?DOCUMENTID=88793> (click on “Calibre, Diversity and Independence” hyperlink) (setting forth the Law Society’s full response to the Consultation Paper).

23. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2, § 63(2); see also Dep’t for Constitutional Affairs, *Constitutional Reform*, *supra* note 9; Judicial Appointments Commission Home Page, <http://www.judicialappointments.gov.uk/>.

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discussions resulting in general consensus on the reforms, there is good reason to hope that the Commission will enhance judicial independence and public confidence in the legal system, improve the quality of selections, and diversify the English bench to better reflect the population at large.²⁴

Are the pending English changes instructive to those in America who would like to create and implement an “ideal” appointive system for selecting state court judges? In so many ways, the English and American legal systems differ vastly. Two major differences stand out with regard to judicial selection: judicial role in political disputes and demographics of the bench.

Until quite recently, English judges seldom decided cases with obvious political implications.²⁵ Parliamentary sovereignty gave ultimate authority to the legislative branch, which was largely unfettered by binding judicial review. American state and federal courts, by contrast, have consistently played a central role in deciding hotly-contested political disputes since *Marbury v. Madison*.²⁶ The power of final judicial review is firmly enshrined in the United States Supreme Court on federal issues, and in the respective state

24. See Kate Malleson, *The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 39, 51 (Kate Malleson & Peter H. Russell eds., 2006) [hereinafter Malleson, *New Wine in New Bottles?*].

25. See Sally J. Kenney, *Gender on the Agenda: How the Gender of Judges Becomes a Political Issue in England and Wales* (manuscript, at 12-13, on file with author) [hereinafter Kenney, *Gender on the Agenda*] (discussing pivotal role of Pinochet case as highlighting significance of individual attributes of jurists, as “people with political positions” and outcome of cases depending on the “luck of the draw”). For recent developments, see *R v. Bow Str. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte* (1998) 3 W.L.R 1456 (initial ruling of the House of Lords that Pinochet was not immune for alleged crimes in office set aside when it was revealed that one of the sitting judges had personal bias; same result, on narrower grounds, concluded on re-hearing); see also Fitzgerald, *supra* note 19, at 266-68 (predicting that Parliament will enact a Constitutional Reform Act, and also predicting a changing role of the courts, with greater claim of judicial review to override Parliamentary action). But see KATE MALLESON, *THE NEW JUDICIARY: THE EFFECTS OF EXPANSION AND ACTIVISM* 3-5 (1999) [hereinafter MALLESON, *THE NEW JUDICIARY*] (describing how John Griffith’s 1977 authoritative book, *The Politics of the Judiciary*, laid to rest the English myth that judges operated outside of the political realm). Although judges stress their work is apolitical, in the sense of being non-partisan, increasingly it is understood that their work is “inherently political in the sense of being the exercise of ‘human influence over inter-personal relations.’” MALLESON, *supra* at 5 (quoting J. Bell, *The Models of the Judicial Function*, in *JUDGES AND THE JUDICIAL POWER* (Rajeev Dhavan et al. eds., 1985)).

26. 5 U.S. (1 Cranch) 137 (1803).

supreme courts on non-federal issues.²⁷ The central role of American courts in the political landscape virtually ensures that partisan politics figure prominently in judicial selection. Despite many other criticisms of the English selection system, the Lord Chancellor's selection process has not been fraught with the partisanship plaguing the American system.

Demographic composition of the judiciary is the other primary distinguishing factor between the two countries. Regardless of the method used to select American state and federal judges, gender, race, and ethnicity have been at least somewhat of a factor for the last thirty years.²⁸ Despite significant variations among states, gubernatorial administrations, and presidential administrations, American courts are light years ahead of British courts in terms of demographic representativeness.²⁹ That is not to say that Ameri-

27. See MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 80; *see generally* Fitzgerald *supra* note 19. For U.S. judicial intervention on political matters, see for example *Bush v. Gore*, 531 U.S. 98 (2000), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). For state courts dealing with highly contentious political disputes see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (same sex marriage) and *Schindler v. Schiavo*, 780 So. 2d 176 (Fla. 2001) (right to refuse medical treatment); *see also* Julian N. Eule, *Crocodiles in the Bath tub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 738-39 (1994) (discussing political vulnerability of state court judges in deciding volatile cases shortly before retention election). For one example of how politically charged issues may challenge the independence of elected judges, see Terry Carter, *Loaded Questionnaires? Judicial Candidates Advised to be Wary of Answers Inviting Suits Challenging Canons*, ABA J. EREPORT, 2006, <http://www.abanet.org/journal/ereport/s8canon.html>.

28. See Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84 (2001) (describing the myriad efforts to increase the number and proportion of women and minorities on the bench over the last 25 years).

29. Compare *id.* at 89, tbl.4 (reporting that in 1985, of state court appellate judges selected either by election or an appointment process, 13.23% were women, in 1999, that figure rose to 21.14%; in 1985, 6.52% of state court appellate judges were members of ethnic minority groups, in 1999 that figure rose slightly, to 7.31%), and Herma Hill Kay & Geraldine Sparrow, *Workshop on Judging: Does Gender Make a Difference?*, 16 WIS. WOMEN'S L.J. 1, 7 (2000) (noting dramatic increase of women jurists on U.S. state high courts since 1984. By the year 2000, there were 87 women justices out of 332 justices total), with DEP'T FOR CONSTITUTIONAL AFFAIRS, JUDICIAL APPOINTMENTS 7TH ANNUAL REPORT 2004-2005 Annex A (2006), available at <http://www.dca.gov.uk/judicial/ja-arep2005/partone.htm> (last visited Oct. 24, 2006) (indicating that of the 53 highest judicial officers, 3 were women (5.7%), none were listed as self-identified members of ethnic minority groups, and 3 (11.3%) were listed as "unknown"; the composite totals, including all judicial officers in post except for the tribunals, were 16.91% women and 2.88% self-identified minorities, defined as mixed, Asian, Black, or Chinese, with 4.67% as "unknown"); *see also* Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 328 (2002) (stating need for racial diversity on the bench to ensure quality and legitimacy of judicial decision-making).

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can courts are sufficiently diverse, or that numerical nosecounts on demographics ensure representativeness of the courts. Rather, the contrast illustrates that the composition of the English bench is woefully unrepresentative of the nation's population.

Notwithstanding these differences, the advent of England's Commission heralds a new era, implementing modernized personnel appointment methods while ensuring transparency, democratic accountability, and political independence.³⁰ Kate Malleon, the leading commentator on English judicial selection, states:

If the quality of the appointments process can be made to match that of the judges appointed, the commission in England and Wales will rebuild public confidence in the judicial appointments process and may become a model for other systems looking to reform the way in which they select their judges.³¹

Besides constitutional reforms, other sweeping changes to the English legal professions are in process. While any change to hide-bound traditions takes much time and debate, momentous changes appear likely, including overhaul of the legal professions' regulatory structure and repeal of ethical rules that impede competition. Current legislative proposals would permit legal disciplinary partnerships (a variant of multidisciplinary partnerships) and law firm ownership by non-lawyers.³² Other ancient traditions might become relics of history. Lord Falconer is considering whether to do away with formal court dress—with wigs and gowns distinguishing barristers (and their most elite, Queen's Counsel) from those in the lower branch of solicitors who have gained rights of audience in court.³³ Even the Lord Chancellor's ceremonial garb may discontinue the use of lady's tights.³⁴

30. See discussion *infra* Part II.C.

31. Malleon, *New Wine in New Bottles?*, *supra* note 24, at 53.

32. See DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, DRAFT LEGAL SERVICES BILL, EXPLANATORY NOTES AND REGULATORY IMPACT ASSESSMENT, 2006, Cm. 6839, Part 5, available at <http://www.official-documents.co.uk/document/cm68/6839/6839.pdf>.

33. See Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always be an England?*, 9 CONN. J. INT'L L. 185, 235 (1994) [hereinafter Schwarzschild, *Will There Always be an England?*] (stating that the abolishment of formal court regalia would be a clear signal of the eroding status-based society, moving towards a classless meritocracy based on "society of contract"). *But see* GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM 285 (8th ed. 2006) [hereinafter SLAPPER & KELLY, THE ENGLISH LEGAL SYSTEM 8TH ED.] (reciting instances of support for wigs as a means of protection through anonymity and giving "gravitas" to less experienced barristers).

34. See Kenney, *Gender on the Agenda*, *supra* note 25 (manuscript at 29) (citation omitted); *see also* DEP'T FOR CONSTITUTIONAL AFFAIRS, COURT WORKING DRESS IN

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To the American observer, the British legal system appears complex and hard to decipher. British legislation is structured and phrased quite differently from state and federal statutes in the United States. Written in true “English,” legislation reflects British political context historically and as it is currently evolving. This Article is part of an ongoing series on major evolving changes in the British legal system; namely, to modernize, to promote democratic values, to enhance competition, and to provide access to legal services.³⁵ This Article aims to translate and explain the new reforms to British judicial selection and to identify modernization efforts being implemented there that might be adapted for use by American states seeking to reform their selection systems. Because the British legal system is immensely complicated to foreign observers, this work aims to describe, in terms comprehensible to American readers, the problems inherent in the old system and the structural framework for the new system, which went into effect in April 2006. Since the Commission is in its infancy and just beginning to take over primary authority to select judges from the Lord Chancellor’s office, there is no established track record to evaluate how it is working. Nevertheless, there is reason to be hopeful. At various times in the recent past the judicial selection practices have been the focus of sustained criticism but resulted in only minor reforms. The new process, which is a part of the Act, evolved after three years of formal consultations and legislative negotiations, with input from a large number of individuals, academics, interest

ENGLAND AND WALES (May 2003), available at <http://www.dca.gov.uk/consult/court-dress/index.htm>.

35. I began studying the English legal professions at the request of Fordham University School of Law Professor Russell Pearce, who invited my contribution to a symposium on historical and comparative issues of professional responsibility. I was teaching in Oxford that summer and agreed to focus on the English legal profession. University of Pennsylvania and Hastings Professor Geoffrey Hazard suggested I look at the evolving “drift” that was blurring the distinction between the traditionally separate branches of barristers and solicitors. In that first project, I entered the “rabbit hole,” from which I will not emerge for years to come. See Judith L. Maute, *Alice’s Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and The Fusion Debate (1000-1900 A.D.)*, 71 FORDHAM L. REV. 1357, 1357-58 (2003). The second installment, *Revolutionary Changes to the English Legal Professions or Much Ado About Nothing?*, 17 PROF. LAW. 1 (Dec. 2006) [hereinafter Maute, *Revolutionary Changes*], summarizes key events of the last thirty years, which may transform the British legal market. It, too, has a relatively modest goal: “to inform American lawyers about what has already occurred, and to provide orientation about pending proposals for regulatory reform.” *Id.* at 1, 4. This piece, on the newly created system for judicial appointments, is the third installment. After Parliament enacts the pending Legal Services Bill, this ongoing research will produce other installments, eventually culminating in a book.

groups, and professional bodies. Emerging from this discourse is increased appreciation of the need for the British judiciary to more fairly reflect the nation’s diverse population, drawing from the more diverse solicitor branch, and from other legal professionals besides barristers.

Part II of this Article addresses criticisms of the Lord Chancellor’s appointive process and the multiple forces pressing for change over the last twenty-five years—both within the nation and globally—that prompted incremental reforms. Part III describes the new selection system adopted in the Constitutional Reform Act 2005, highlighting key provisions intended to ensure political independence for merit-based appointments through a process that is transparent, publicly accountable, and committed to diversity. Finally, the Article concludes that despite important national differences, the current British reforms present valuable modern innovations that could vastly improve American state court appointive systems.

II. PRESSURES FOR REFORM

A. The Lord Chancellor’s Traditional, Primary Appointive Role

Historically, the Lord Chancellor was a central figure in all three branches of British government, serving multiple constitutional roles that are considered anomalous under modern views on separation of powers. Until radically revised as part of constitutional reform, the ancient post of Lord Chancellor “combined the duties of speaker in the Lords, chief justice and minister of justice.”³⁶ An at-will political appointee of the elected Prime Minister, the Lord Chancellor sat in the Cabinet of the executive branch, served as Speaker of the House of Lords, led the Lord Chancellor’s Department (which is roughly equivalent to the United States Department of Justice), and was head of the judiciary.³⁷ The Lord Chancellor had primary responsibility for selecting all judges in England and Wales.³⁸ As a constitutional matter, high court appointments were made by the Queen, who received the Lord

36. *In Britain, New Era for House of Lords*, *supra* note 19, at 4. As noted in Part I, *supra*, the title of Lord Chancellor has been retained, although the post has been radically reformed.

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37. See SLAPPER & KELLY, *THE ENGLISH LEGAL SYSTEM* 8TH ED., *supra* note 33, at 222; see also MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 84.

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38. See DEP’T FOR CONSTITUTIONAL AFFAIRS, *A NEW WAY OF APPOINTING JUDGES*, *supra* note 4, at 11-12.

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Chancellor's recommendations through the Prime Minister.³⁹ As a practical matter, almost exclusive appointive authority resided with the Lord Chancellor.⁴⁰

As developed in Part III, below, primary responsibility to recommend judicial candidates has been transferred to a new and independent Judicial Appointment Commission; since April 3, 2006, the Lord Chancellor's role is limited to accepting, rejecting, or seeking reconsideration of a single recommendation.⁴¹ Starting July 4, 2006, the Speaker of the House of Lords replaced the Lord Chancellor's legislative role in presiding over the upper house.⁴² A woman and former Labour government minister, Baroness Helene Hayman, has assumed the reins.⁴³

The English judiciary has expanded greatly since 1970.⁴⁴ When few appointments were made, and drawn exclusively from Queen's Counsel (the most elite group of senior barristers), the Lord Chancellor was personally involved in nearly all selections.⁴⁵ There was no need for formality in the appointment system because the Lord Chancellor, his staff, and the judges consulted were quite familiar with the small pool of eligible candidates.⁴⁶

Once it was done in smoke-filled rooms of gentlemen's clubs or in the Temple corridors. Lawyers were appointed to be judges after the right word in the ear; they were "tapped on the shoulder" and asked if they fancied promotion to the Bench. Whom you knew counted; as did your college or school.⁴⁷

Even as the judiciary expanded, both in size and its role in English society, the Lord Chancellor still took a keen personal interest in appointments.⁴⁸ The sheer volume of new appointments required a more formal, professionalized process administered by

39. See MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 82-83.

40. *Id.* at 84-85 (stating accepted view that the Lord Chancellor's "advice is not generally disregarded").

41. See Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2, §§ 73, 82 (Eng.).

42. *In Britian, New Era for House of Lords*, *supra* note 19, at 4; Brown, *supra* note 10, at 1.

43. See *In Britian, New Era for House of Lords*, *supra* note 19, at 4.

44. See MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 1 (between 1970 and 1998 the number of English judges increased from 288 to nearly 3000).

45. *Id.* at 80.

46. *Id.*

47. Frances Gibb, *Taps on the Shoulder Make Way for Job Applications*, *TIMES* (U.K.), Apr. 4, 2006, at 3 (referencing the comments of Sir Colin Campbell, the outgoing watchdog of judicial appointments for the Commission of Judicial Appointments).

48. See Roger Smith, *Constitutional Reform, the Lord Chancellor, and Human Rights: The Battle of Form and Substance*, 32 *J.L. & Soc'y* 187, 188 (2005).

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departmental staff.⁴⁹ Nevertheless, the heart of the system remained closed, with private consultations, or “secret soundings” about individual candidates conducted by the Lord Chancellor or his staff with senior members of the bench and bar.⁵⁰ These anonymous subjective reviews, described in 1973 by Sir Robert Megarry as “a mysterious system of osmosis and grapevine,”⁵¹ often determined a candidacy, with comments that one was a “good chap,” socially inept, or based on explanation of a single court performance.⁵² Many critics took aim at these private consultations, largely for

encourag[ing] self-replication on the bench by excluding good candidates who do not share the same or similar characteristics as those whose advice is sought. This in turn skews the make-up of the judiciary and inhibits efforts to increase its representativeness The emphasis on the views of the judiciary and the senior bar inevitably excludes those who do not have a strong advocacy background and so are not known in the circles of those consulted. It also disadvantages those who do not have informal contact with judges and barristers through social connections where much networking goes on. Outsiders are inevitably at a disadvantage in a system which relies on the opinions of insiders.⁵³

For the last decade, many have voiced strong criticisms on the role of automatic consultations for unduly preferencing barristers affiliated with the most elite chambers or members of Queen’s Counsel, while disadvantaging solicitors, those who did not regularly appear in court, women, and ethnic minorities.⁵⁴ Besides rais-

49. See MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 80-81 (with approximately 600 new appointments made in 1997, the role of interview panels was expanded to do initial “sifting” of applications, based both on objective criteria and consultations from the bench and bar).

50. *Id.* at 92.

51. *Id.*

52. *Id.* at 96.

53. *Id.* at 93; *see also* Kenney, *Gender on the Agenda*, *supra* note 25 (manuscript at 17) (discussing 1996 House of Commons Home Affairs Committee report; the “Peach Report,” which advocated a fairer consultation system; and the Department for Constitutional Affairs’ consultation paper on diversity).

54. Sally J. Kenney, *United Kingdom’s Judicial System Undergoes Major Reform*, 87 *JUDICATURE* 79, 82 (2003) [hereinafter Kenney, *UK Judicial System*]; DEP’T FOR CONSTITUTIONAL AFFAIRS, *INCREASING DIVERSITY IN THE JUDICIARY: RESPONSES TO DCA CONSULTATION PAPER CP 25/04 45-46*, at 43-47 (Mar. 2005) [hereinafter DEP’T FOR CONSTITUTIONAL AFFAIRS, *RESPONSES TO INCREASING DIVERSITY*], available at <http://www.dca.gov.uk/consult/judiciary/responsecp25-04.pdf> (stating strong opposition to automatic consultations from organizations including the Law Society, the Commission for Judicial Appointments, the Equal Opportunities Commission,

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ing concerns of illegal discrimination,⁵⁵ automatic consultations did not reliably further the ends of merit-based selection. The House of Commons Home Affairs Committee received many submissions urging major overhaul of the selection system in response to those concerns. In the end, however, the Committee’s 1996 report was conservative in its recommendations and suggested few changes to make the system more objective, choosing instead to “[s]tay the course of slow reform, tinkering at the margins.”⁵⁶

Because the position of Lord Chancellor vested enormous power in a single person, that individual had tremendous influence over all aspects of the English judiciary. Persistent criticisms raised concerns of cronyism, risks of partisanship or other bias, and lack of public accountability.⁵⁷ In his 1989 Green Papers, Margaret Thatcher’s Lord Chancellor, Lord Mackay of Clashfern, challenged the underlying premises that defined the English bar and legal professions.⁵⁸ Although his most radical proposals did not survive the resulting legislation (the 1990 Courts and Legal Services Act), the Green Papers shook the foundations of regulatory discourse about the professions.⁵⁹ Lord Mackay urged rights of audiences to ap-

and the Society of Black Lawyers, as being in conflict with goals of diversity and transparency).

55. See SLAPPER & KELLY, *THE ENGLISH LEGAL SYSTEM* 7TH ED., *supra* note 18, at 3 (discussing two incidents in 1998-99 where Lord Chancellor’s appointments were challenged as unlawful sex discrimination); Kenney, *Gender on the Agenda*, *supra* note 25 (manuscript at 25-28) (discussing the potential impact of the European Union’s Revised Equal Treatment Directive, first effective in 2005, which does not explicitly exempt the judiciary from its reach).

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56. Kenney, *UK Judicial System*, *supra* note 54, at 81 (summarizing the 1996 House of Commons Home Affairs Committee report on Judicial Appointment Procedures).

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57. For works describing the judicial selection process as secret, subjective, unfair, and lacking in accountability, see, e.g., MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 82; SLAPPER & KELLY, *THE ENGLISH LEGAL SYSTEM* 7TH ED., *supra* note 18, at 242; Kenney, *UK Judicial System*, *supra* note 54; Kenney, *Gender on the Agenda*, *supra* note 25

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58. See generally LORD CHANCELLOR’S DEPARTMENT, *THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION*, 1989, Cm. 570 [hereinafter *LORD CHANCELLOR’S DEP’T*, 1989 GREEN PAPER].

59. See generally *id.*; see also RICHARD L. ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* (2003); Richard L. Abel, *The Professional as Political: English Lawyers from the 1989 Green Papers Through the Access to Justice Act 1999*, in REORGANIZATION AND RESISTANCE: LEGAL PROFESSIONS CONFRONT A CHANGING WORLD, 13, 13-14 (William L. F. Felstiner ed., 2005) (discussing the 1996 House of Commons Home Affairs Committee report entitled *Judicial Appointment Procedures and the 1994 Peach Report*, both advocating a fairer consultation system); Maute, *Revolutionary Changes*, *supra* note 35; Martin Partington, *Change or No-change? Reflections on the Courts and Legal Services Act 1990*, 54 MOD. L. REV. 702, 706 (1991). Of course, no constitutional reforms could eliminate

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pear in court for solicitors (and perhaps even lay advocates). Such rights would be determined by education, training, and qualifications, eventually eliminating differences between the court activities of barristers and solicitors.⁶⁰ Critical of the fact that solicitors were categorically ineligible for senior judicial posts, Lord Mackay also recommended changes in eligibility standards, focusing judicial selection on qualifications attained whether a barrister or solicitor.⁶¹ The door was opening, diminishing differences between the branches in terms of advocacy rights, and in turn, increasing the possibility of solicitors serving on the bench. The later Access to Justice Act 1999, chapter 22 provided that all barristers and solicitors could obtain rights of audience at every level of court and in all types of proceedings, subject to compliance with the training requirements and ethical rules of the relevant professional bodies.⁶²

Lord Mackay did not take on the two-tiered system in which the Queen annually conferred lifetime special privileges to a small number of senior barristers deemed worthy of special merit. Qualification for designation as Queen's Counsel ("QC" or to "take silk" as part of their legal regalia) was limited to a select few applicants with demonstrated outstanding ability as professional leaders, with their high standing achieved from extensive, quality practice in demanding cases and over ten years of qualified service.⁶³ While not formally a prerequisite for higher-level judicial

risks of financial corruption influencing the political process. See, e.g., Alan Cowell, *Top Blair Fund-Raiser Arrested in British Labor Party Scandal*, N.Y. TIMES, July 13, 2006, at A4 (reporting arrest of political fundraiser for involvement in "peerage for pay," alleging possibility of appointment to House of Lords in exchange for contributions (or "loans") to Labour Party); cf. Janet Hook & Mary Curtius, *Capitol Lobbyist Pleads Guilty*, L.A. TIMES, Jan. 4, 2006, at 15; Stephanie Kirchgaessner & Holly Yeager, *DeLay's Former Aide Admits Guilt in Widening Corruption Investigation*, FIN. TIMES (U.K.), Nov. 22, 2005, at 7.

60. See LORD CHANCELLOR'S DEP'T, 1989 GREEN PAPER, *supra* note 58, at 21.

61. See *id.* at 34-35.

62. See SLAPPER & KELLY, THE ENGLISH LEGAL SYSTEM 8TH ED., *supra* note 33, at 607.

63. See DEP'T FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: THE FUTURE OF QUEEN'S COUNSEL 38-40 (July 2003), available at <http://www.dca.gov.uk/consult/qcfuture/qc.pdf> [hereinafter DEP'T FOR CONSTITUTIONAL AFFAIRS, FUTURE OF QUEEN'S COUNSEL]. Upon receiving this quality mark, traditional etiquette conferred the holder with additional privileges and higher fees. See *id.* at 6-10 (summarizing formal privileges and other consequences of appointment to silk); THE LAW SOC'Y, TRANSPARENT ACCREDITATION 7-9 (Nov. 2003), available at <http://www.dca.gov.uk/consult/qcfuture/responses/qc312.pdf> [hereinafter LAW SOC'Y, TRANSPARENT ACCREDITATION]; see also SLAPPER & KELLY, THE ENGLISH LEGAL SYSTEM 8TH ED., *supra* note 33, at 549.

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appointments, the designation is widely perceived to narrow the recruitment pool for such positions.⁶⁴ Charles Falconer—the last Lord Chancellor and Secretary of State—appeared ready to abolish the designation, until the Bar Council and The Law Society⁶⁵ agreed upon a new, merit-based selection scheme administered by an independent selection panel.⁶⁶ Whereas about 10% of barristers were Queen’s Counsel, fewer than .5% of solicitors achieved

64. See DEP’T FOR CONSTITUTIONAL AFFAIRS, FUTURE OF QUEEN’S COUNSEL, *supra* note 63, at 13-14; LAW SOC’Y, TRANSPARENT ACCREDITATION, *supra* note 63, at 3 (stating perception that designation is “essential prerequisite” to senior-level judicial appointments).

65. The Bar Council is the representative and regulatory body for barristers; The Law Society serves the same function for solicitors. Comparable entities represent other U.K. legal professionals, including: The Institute of Legal Executives, The Institute of Trademark Attorneys, and The Chartered Institute of Patent Agents. Analogous to bar associations in the United States, their regulatory functions have included qualification and admissions, professional standards, discipline, and complaints-handling (a system intended to provide redress to dissatisfied clients). Traditionally, each professional body regulated and represented its own section of the legal field as a trade group advancing common interests. Whereas American lawyers have been largely successful in preserving exclusive power in self-regulation, the full spectrum of British legal professionals has not. Over the years, Parliament has enacted legislation affecting the legal professions, revisited legal monopolies on specified activities including advocacy and conveyancing, mandated complaints-handling subject to oversight of an ombudsman, and imposed other regulatory standards on the discipline system and competition law as it applies to professionals. Massive regulatory reforms of the legal professions are currently underway. If, as is likely, some form of the 2006 Draft Legal Service Bill is enacted, all legal professionals will be regulated by a single regulatory agency, the Legal Services Board, which will delegate authority for the professional bodies to act as “approved regulators,” under oversight of the Legal Services Board. See DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, DRAFT LEGAL SERVICES BILL, EXPLANATORY NOTES AND REGULATORY IMPACT ASSESSMENT, 2006, Cm. 6839, available at <http://www.official-documents.co.uk/document/cm68/6839/6839.pdf> (discussed in Maute, *Revolutionary Changes*, *supra* note 35); see also DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES 10-11 (Mar. 2004), available at <http://www.legal-services-review.org.uk/content/report/report-chap.pdf>.

66. QUEEN’S COUNSEL, SUMMARY OF PROCESS FOR QC AWARD (Nov. 2004), available at <http://www.qcapplications.org.uk/external/pdf/SummaryOfProcessForQCAward.doc>; see also Joshua Rozenburg, *A Silk’s Purse After a Sour Year*, TELEGRAPH (U.K.), Nov. 25, 2004, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/11/25/nlaw25.xml&sSheet=/news/2004/11/25/ixhome.html> (reporting that bar representative praised Bill Blair, QC, for his role in the negotiations for a new way of appointing QCs and rejected the possibility that his success was influenced by his relationship with the Prime Minister, his younger brother); The Bar Council, *New QC System-Independent Selection Panel and 2005 Competition Announced* (Apr. 18, 2005), <http://www.barcouncil.org.uk/document.asp?documentid=3053&languageid=1&highlight=New%20QC%20System> (including biographies of selection panel, chaired by a layperson with background in management and as Commissioner for Judicial Appointments; only two of the nine have been designated as QCs).

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that designation by 2003.⁶⁷ More recently, only 8% of all QCs were women and just over .5% of QCs came from the larger, more diverse solicitor branch.⁶⁸ Defending retention of the designation, one commentator asserted that many ethnic minority barristers were at the point of taking silk, and hoped the new system would “encourage more women applicants and bode well for efforts to create a more representative profession and judiciary.”⁶⁹ The new process categorically rejected any element of “automatic consultation” or “secret soundings.”⁷⁰ The first appointments under the new system were announced in July 2006, and included a significant increase in the proportion of women and minority lawyers taking silk.⁷¹

B. Formal and Informal Entry Barriers

Myriad factors have combined to produce a British judiciary with distinctly elite, non-representative demographics. Born into families of wealth and privilege, most judges received their basic education from private schools, their law training from either Oxford or Cambridge (so-called ‘Oxbridge’), and thereafter obtained coveted pupilage at a prominent chambers of barristers.⁷² After long and financially rewarding careers at the highest ranks of the bar, including appointment to Queen’s Counsel, they entered the full-time judiciary at the end of their practicing career. Given formal eligibility requirements, informal entrance barriers, and other restrictions, the British bench is overwhelmingly comprised of

67. DEP’T FOR CONSTITUTIONAL AFFAIRS, *FUTURE OF QUEEN’S COUNSEL*, *supra* note 63, at 6. R

68. *Id.*; see also DEP’T FOR CONSTITUTIONAL AFFAIRS, *INCREASING DIVERSITY IN THE LEGAL PROFESSION: A REPORT ON GOVERNMENT PROPOSALS 32* (Nov. 2005), available at http://www.dca.gov.uk/legalsys/diversity_in_legal_2col.pdf; Kenney, *Gender on the Agenda*, *supra* note 25 (manuscript at 9) (citing 2004 figures for women QCs). Exact statistics for ethnic minorities are difficult to find, but in 2006, of the 175 new QCs designated, a record 10 of those were minorities. This suggests minorities are underrepresented. *Record Number of New Female QCs*, BBC NEWS (U.K.), July 19, 2006, http://news.bbc.co.uk/2/hi/uk_news/5195458.stm. R

69. Rozenburg, *supra* note 66 (quoting Courtenay Griffiths, QC). R

70. QUEEN’S COUNSEL, *supra* note 66. R

71. See generally Queen’s Counsel Home Page, <http://www.qcapplications.org.uk> (last visited Oct. 23, 2006). Of the 175 appointments under the new procedure, 33 (18.86%) were women, 10 (5.71%) were non-white, and 4 (2.29%) were solicitors. *Id.* (follow “Press Releases” hyperlink; then follow “20 July 2006: Announcement of Appointments” hyperlink).

72. See Maimon Schwarzschild, *The English Legal Professions: An Indeterminate Sentence*, 10 FED. SENT. R. 253, 253; Schwarzschild, *Will There Always be an England?*, *supra* note 33, at 195-208. R

older white males from the most privileged stratum of society.⁷³ While defenders contend the English judiciary is world renowned, critics claim it is socially biased, “out of touch with ordinary people’s lives,” and lacks public confidence that justice is fairly dispensed.⁷⁴

Significant formal entry barriers impede access, first to the bar, and later to judicial posts. Attaining qualification as a barrister, involving more extensive education and unpaid (or low-paid) pupillage in chambers, is far more expensive, time-consuming, and uncertain than becoming a licensed solicitor.⁷⁵ Due to substantially lower entry barriers, the solicitor branch is greater in both numbers and diversity. The judiciary is drawn predominantly from the barristers’ branch. Although the U.K. legal system theoretically eschews the notion of a career judiciary such as that used in continental Europe, as a practical matter appointment to the higher courts typically occurs only through such progression. Generally, applicants enter at the lower rungs of the judiciary, and after successful job performance, may seek appointment for a higher post.⁷⁶ Formal qualifications for judicial posts as set forth in the Courts and Legal Services Act 1990 require a minimum of seven to

73. See DEP’T FOR CONSTITUTIONAL AFFAIRS, A NEW WAY OF APPOINTING JUDGES, *supra* note 4, at 19 (citing the Commission for Judicial Appointments report for the proposition that “the current judiciary is overwhelmingly white, male, and from a narrow social and educational background”); MALLESON, THE NEW JUDICIARY, *supra* note 25, at 103-04.

74. Compare MALLESON, THE NEW JUDICIARY, *supra* note 25, at 95 (stating view of Commercial Bar Association and Judges’ Council that “English courts were held in high esteem internationally in the business world”), and Usha Prashar, Baroness, Chair of Judicial Appointments Commission, Speech at the Annual ILEX Luncheon (May 17, 2006), available at http://www.judicialappointments.gov.uk/docs/Baroness_Prashar_ILEX_speech_final_170506.pdf, with Clare Dyer, *Judges Aim to Dispel Fusty Image with First Move into Cyberspace*, GUARDIAN (U.K.), Apr. 3, 2006, available at <http://www.guardian.co.uk/law/story/0,,1745518,00.html> (discussing 1999 study funded by Nuffield Foundation in which only 53% of respondents believed they would receive a fair hearing in court, and 65% agreed with statement that “judges are out of touch with ordinary people’s lives”).

75. See The Law Society, *Becoming a Solicitor*, <http://www.lawsociety.org.uk/becomingasolicitor.law> (last visited Jan. 13, 2007) (describing entry to the solicitor’s profession); The General Council of the Bar’s Education and Training Home Page, <http://www.legaleducation.org.uk/Main/> (last visited Jan. 13, 2007) (describing entry to the Bar).

76. For a full description of the English court structure, see The Department for Constitutional Affairs, *The Court Structure in England and Wales*, <http://www.dca.gov.uk/legalsys/structure.htm> (last visited Jan. 13, 2007), and Judiciary of England and Wales, *Organisation Chart*, http://www.judiciary.gov.uk/keyfacts/judiciary_organisation_chart/index.htm (last visited Jan. 13, 2007) [hereinafter *Judiciary Chart*].

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ten years qualification as an advocate.⁷⁷ While that focus on rights of audience as an advocate has relaxed somewhat, a widespread perception continues that it is a prerequisite, thereby deterring applications from solicitors who lack substantial advocacy experience.⁷⁸ One could qualify for a higher judicial post by sitting as a fee-paid, part-time judge, although it appears that many solicitors cannot (or are reluctant to) obtain leave from their firms for such service because of negative career repercussions on their private practice.⁷⁹ Furthermore, rules prohibit those serving as full-time judges to return to practice.⁸⁰ Thus, the career choice to enter the judiciary has lasting consequences. Because the pay scale is lower than one’s earnings in a successful advocacy practice, movement into the judiciary typically becomes an end-stage career move.⁸¹ Other traditional limitations pertaining to mid-level appointments, such as requirements of circuit riding and full-time appointments, have deterred applicants with significant family responsibilities.⁸²

77. See Courts and Legal Services Act, 1990, c. 41, §§ 71-76 (Eng.); SLAPPER & KELLY, THE ENGLISH LEGAL SYSTEM 8TH ED., *supra* note 33, at 240; see also DEP’T FOR CONSTITUTIONAL AFFAIRS, RESPONSES TO INCREASING DIVERSITY, *supra* note 54, at 24-27 (noting that current statutory requirements prevent many qualified candidates from applying to the judiciary and possibly result in indirect discrimination).

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78. See LAW SOC’Y, TRANSPARENT ACCREDITATION, *supra* note 63, at 3; see also OPINION LEADER RESEARCH, JUDICIAL DIVERSITY: FINDINGS OF A CONSULTATION WITH BARRISTERS, SOLICITORS AND JUDGES 48 (2006), available at http://www.dca.gov.uk/publications/reports_reviews/jd_cbsj06.pdf [hereinafter OPINION LEADER RESEARCH, JUDICIAL DIVERSITY]; cf. Gibb, *supra* note 46, at 3 (discussing a widely held perception that there is a systematic bias against solicitors, women, and minorities being appointed to the bench; many eligible persons who were outside the stereotype felt there was no point in bothering to apply).

79. See DEP’T FOR CONSTITUTIONAL AFFAIRS, RESPONSES TO INCREASING DIVERSITY, *supra* note 54, at 7, 29-33.

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80. See *id.* at 62-65.

81. See MALLESON, THE NEW JUDICIARY, *supra* note 25, at 104 (judges remain on bench until retirement); Kate Malleison, *Rethinking the Merit Principle in Judicial Selection*, 33 J.L. & SOC’Y 126, 133 (2006) [hereinafter Malleison, *Rethinking the Merit Principle*] (stating that, while theoretically judges can be terminated for poor performance, they are “unsackable,” meaning this late-term second career is effectively a lifetime appointment).

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82. See DEP’T FOR CONSTITUTIONAL AFFAIRS, RESPONSES TO INCREASING DIVERSITY, *supra* note 54, at 58; see also MALLESON, THE NEW JUDICIARY, *supra* note 25, at 117 (arguing that the “trickle-up” model ignores cultural and structural reasons impeding advancement of women and ethnic minorities into the judiciary, including career breaks for parenting and difficulties of employed solicitors to sit as part-time judges for required number of days each year).

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C. Increased Pressures for Reform to Improve Transparency, Accountability, and Diversity

Sweeping law reform seldom occurs quickly. This is especially true in Britain, where the entire legal system developed incrementally, in fits and starts. Over the last twenty-five years, various forces have sought reforms aimed at shedding light on the appointment process, adopting modern personnel management techniques, and diversifying the bench to more fairly reflect the general population. Most pressures have come from within, from The Law Society and non-barrister legal professionals and governmental actors outside the Lord Chancellor's Department, as well as a broad range of social critics including the popular press and vocal academics. Mounting criticisms of insider-preferences, political cronyism, and the antiquated appointment system came both from segments of Margaret Thatcher's Conservative Party government and from Tony Blair's liberal Labour Party. Economic and political forces sought to modernize and make transparent and accountable all aspects of government, opening the way for constitutional reform and constitutional democracy. International forces also had an impact, both because the United Kingdom joined the

83. See Maute, Revolutionary Changes, supra note 35, at 4.

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84. Detailed recounting of the progressive reform efforts has been done by others, and is beyond the scope of this work. See generally DEP'T FOR CONSTITUTIONAL AFFAIRS, A NEW WAY OF APPOINTING JUDGES, supra note 4; MALLESON, THE NEW JUDICIARY, supra note 25; LEONARD PEACH, INDEPENDENT SCRUTINY OF THE APPOINTMENT PROCESSES OF JUDGES AND QUEEN'S COUNSEL (1999), available at www.dca.gov.uk/judicial/peach/indexfr.htm; SLAPPER & KELLY, THE ENGLISH LEGAL SYSTEM 8TH ED., supra note 33, at 239-51; CHERYL THOMAS & KATE MALLESON, JUDICIAL APPOINTMENTS COMMISSIONS: THE EUROPEAN AND NORTH AMERICAN EXPERIENCE AND THE POSSIBLE IMPLICATIONS FOR THE UNITED KINGDOM (1997) (on file with author); Sally J. Kenney, Britain Appoints First Woman Law Lord, 87 JUDICATURE 189 (2004) [hereinafter Kenney, Britain Appoints First Woman Law Lord]; Sally J. Kenney, Equal Employment Opportunity and Representation: Extending the Frame to Courts, 11 SOC. POL. 86 (2004); Kenney, Gender on the Agenda, supra note 25; Kenney, UK Judicial System, supra note 53, at 82.

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85. Such governmental actors include the Office of Fair Trading, a government regulatory body; Parliamentary committees or commissions; the Department for Constitutional Affairs, the government body responsible for the judiciary and legal system; and the now defunct Commission for Judicial Appointments, a quasi-governmental body responsible for auditing the judicial selection process.

86. See, e.g., Malleison, New Wine in New Bottles?, supra note 24, at 40 (stating that reforms to the appointment process were part of a larger effort to modernize the legal system).

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87. Id.

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European Union and the normative forces from globalization encouraged modern and open democracy.⁸⁸

Three principal concerns underlie the reforms now in place: transparency, accountability, and diversity. Transparency relates to whether the process and criteria are open to view, giving candidates reliable information about open positions, evaluation criteria, and individualized feedback on how to improve the candidate's credentials for possible future appointments.⁸⁹ Transparency also expects a regular, properly documented process, enabling the oversight entity to assess whether any given appointment was handled in accordance with the stated process and procedures.⁹⁰

Accountability, as used in the context of judicial selection, relates not to the conduct of sitting judges, but to the conduct of those responsible for vetting applicants and making the appointment decisions. Closely tied to both transparency and diversity, the accountability principle expects that judicial selections have legitimacy—both for individual appointments and the overall array, made with due consideration of merit-based principles and justified with appropriate documentation.⁹¹ Principles of accountability reached a new level of institutional maturity with the Commission for Judicial Appointments (“CJA”), headed by Sir Colin Campbell and comprised only of laypersons, and not judges or licensed legal professionals.⁹² Between 2001 and 2006, the CJA served as an independent watchdog entity, auditing the appointment process and investigating complaints about process and fairness issues arising in specific appointments.⁹³ The new statutory appointment process

88. See SLAPPER & KELLY, *THE ENGLISH LEGAL SYSTEM* 8TH ED., *supra* note 33, at 224-25 (stating it was unseemly for the United Kingdom to lack clear separation of powers and violate European Human Rights duties). **R**

89. MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 90. **R**

90. See, e.g., *id.* at 90-94 (discussing the normative political evolution expecting greater openness on the mechanics of the process, its adoption, public awareness of selection criteria, and feedback to candidates).

91. DEP'T FOR CONSTITUTIONAL AFFAIRS, *A NEW WAY OF APPOINTING JUDGES*, *supra* note 4, at 19; see also MALLESON, *Rethinking the Merit Principle*, *supra* note 81, at 130 (noting the 1992 speech of Lord Taylor, then Lord Chief Justice, regarding gender and ethnic imbalance on the judiciary and the expectation of substantial improvement, which was “not just a pious hope. It will be monitored.”). **R**

92. Comm'n for Judicial Appointments, About Us, <http://www.cja.gov.uk/18.htm> (last visited Oct. 13, 2006). The Commission has since been replaced by the JAC. See *infra* Part III.

93. Her Majesty's Commissioners for Judicial Appointments were first appointed in 2001, after Sir Leonard Peach's report on the appointment process. The Commission dissolved in April 2006. Under the Constitutional Reform Act 2005, the watchdog functions were assumed by a newly-created Judicial Appointments and Conduct Ombudsman. Comm'n for Judicial Appointments, Welcome, <http://www.cja.gov.uk/>

contained in the Act ends the CJA's existence as a watchdog; it confers primary appointment authority with the JAC and further advances accountability principles by requiring written reports on each appointment and annual reports to Parliament.⁹⁴

The judiciary's stunning homogeneity has become a driving force for British reform. To suggest that individual judges can, or should be expected to, best empathize and reflect the viewpoints of the demographic group from which they come is unwarranted and grossly essentialist. When one assumes judicial office, she is expected to rise above personal biases and affiliations and to decide cases impartially based on the rule of law as supported by evidence in the case and by policy considerations. Nevertheless, it is now generally accepted that judges do not decide cases in legal vacuums and that their judicial performance is influenced by a contextualized understanding about society, including issues of class, gender, society, and life experiences.⁹⁵ While most observers reject the notion of judges as "representatives" of affinity groups, Kate Malleson asserts a strong normative claim of "fair reflection." The judiciary:

should reflect through its composition the interests of the community which it serves. It moves away from the effect of the particular backgrounds of individual judges on particular decisions towards a broader approach which seeks to link the judiciary as a group to the society in which it operates. . . . Implicit in the 'fair reflection' argument is the notion that a more reflective

index.htm (last visited Jan. 13, 2007). Annual reports from 2001 to 2006 are available at <http://www.cja.gov.uk/reports.htm>. The Commission's stated functions are to review the appointment procedures to establish whether appointments are made in accordance with the principle of selection on merit and to investigate complaints from unsuccessful applicants who are concerned that their application was not treated properly and fairly. Comm'n for Judicial Appointments, Role and Remit, <http://www.cja.gov.uk/254.htm> (last visited Jan. 13, 2007). The Commissioners have contributed to debates about how the appointment procedures might be improved and how judicial diversity might be increased. *Id.*

94. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 1, § 61, sched. 12(32) (Eng.).

95. See, e.g., MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 107; Edwards, *supra*, note 28, at 327 (contending that race is not a proxy for ideology, but is part of a judge's overall perspective); Kay & Sparrow, *supra* note 28, at 11-13 (citing studies into whether gender influences the decisions of female judges); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts*, 114 *YALE L.J.* 1759, 1776 (2005) (statistical finding that gender of federal circuit judges mattered in their appellate decisions concerning Title VII sexual harassment and discrimination cases).

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judiciary will produce a better mirror of societal attitudes generally across the board.⁹⁶

Ethnic minorities comprise 8% of the United Kingdom's population, including Scotland, Wales, and Northern Ireland, which have small minority populations.⁹⁷ The vast majority of the United Kingdom's ethnic minority population live in England and are concentrated in London—the hub of the national court system.⁹⁸ Women are 51% of the U.K. population.⁹⁹ At last count, there were fewer than 1,500 barristers, including about 160 (11%) self-identified members of ethnic minorities, and fewer than 500 (33%) women.¹⁰⁰ Because women and ethnic minorities are relatively new to the legal professions, they tend to be concentrated at the lower ranks of seniority and as less prestigious “employed barristers.”¹⁰¹ By contrast, the larger and more populist branch of solicitors has a higher percentage of women and minorities. Of more than 120,000 licensed solicitors, over 40% are women and 9% ethnic minorities.¹⁰² Currently 3.8% of Britain's judges are members of ethnic minorities, and 18% are women; those numbers have nearly doubled since 1999.¹⁰³

96. MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 109 (internal quotations omitted); see also Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 *TEX. L. REV.* 1409, 1424-31 (1993) (suggesting the continuum of accountability is greatest when judges are considered representatives of the voters in the sense that they are “acting for” the populace, they are aware of the “attitudinal atmospheres of their jurisdictions” and in which the voters monitor judicial performance for conflicts with their perspectives and substantive choices); Maute, *Selecting Justice in State Courts*, *supra* note 13, at 1214.

97. HELEN CONNOLLY & AMANDA WHITE, *THE DIFFERENT EXPERIENCES OF THE UNITED KINGDOM'S ETHNIC AND RELIGIOUS POPULATIONS* 3 (Feb. 2006), available at http://www.statistics.gov.uk/articles/social_trends/ST36_Overview.pdf.

98. *Id.*

99. National Statistics Online, Population: From Age 22 Women Outnumber Men, <http://www.statistics.gov.uk/> (select “Population and Migration” from Browse by Theme drop-list; then search “From age 22”) (last visited Oct. 10, 2006).

100. THE BAR COUNCIL, *BAR STATISTICS AS AT DECEMBER 2005*, available at <http://www.barcouncil.org.uk/documents/Table5BarStatisticsDec05.doc> (last visited Nov. 30, 2006).

101. *Id.* For an explanation of employed barristers and the history of added restrictions imposed on their advocacy rights by the Bar Council, see MICHAEL ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM* 726-27 (LexisNexis 9th ed. 2003).

102. THE LAW SOC'Y, *KEY FACTS: THE SOLICITORS' PROFESSION*, available at <http://www.research.lawsociety.org.uk> (select “Fact Sheets” hyperlink) (last visited Oct. 21, 2006).

103. Judiciary of England and Wales, Annual Diversity Statistics as of Apr. 1, 2006, http://www.judiciary.gov.uk/keyfacts/statistics/diversity_stats_annual/2006.htm (last visited Nov. 30, 2006) [hereinafter *Diversity Statistics*]. For the 1999 statistics, see MALLESON, *THE NEW JUDICIARY*, *supra* note 25, at 103 (based on 1999 statistics).

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Closer examination reveals that the numbers of women and minorities are relatively static at the upper end of the superior courts¹⁰⁴ whose members are drawn almost exclusively from the barristers' branch.¹⁰⁵ No ethnic minority serves on the top three courts; only one serves on the next level, as a 'high court' (or puisne) judge.¹⁰⁶ Dame Brenda Hale was named the first woman Law Lord to the twelve-judge highest domestic court, "Lords of Appeal in Ordinary," in late 2003, over twenty years after President Reagan appointed Sandra Day O'Connor to the United States Supreme Court.¹⁰⁷ Notably, she has been a visible organizer for women judges in England.¹⁰⁸ Only three women and no ethnic minorities serve on the Lord Justices of Appeal. Until Hale's appointment, Dame Elizabeth Butler-Sloss was the highest female judge, named to the Court of Appeal in 1988; she reputedly does not believe in gender as a category, and maintains the establishment consistently did everything possible "to find qualified women to appoint to the bench."¹⁰⁹ Just over 10% of the high court judges are women; this is the highest level on which solicitors have gained a toehold. Ethnic minorities or women only serve in significant numbers as judges in the lower courts, particularly those drawn predominantly from the solicitor branch.¹¹⁰

As the national legal community engaged in intense debate about meritocracy and diversity, some traditionalists urged pa-

104. These include the Lords of Appeal, Division Heads, Lords Justices, and High Court Judges.

105. Compare Diversity Statistics, *supra* note 103, with LAW SOC'Y, TRANSPARENT ACCREDITATION, *supra* note 63. For a description of the court structure see Judiciary Chart, *supra* note 76.

106. Diversity Statistics, *supra* note 103; see also SLAPPER & KELLY, THE ENGLISH LEGAL SYSTEM 8TH ED., *supra* note 33, at 202 (stating the word is pronounced "pewnee" judge, describing junior status).

107. Kenney, *Britain Appoints First Woman Law Lord*, *supra* note 84, at 189.

108. Kenney, *Gender on the Agenda*, *supra* note 25 (manuscript at 23).

109. *Id.* (citing June 2002 interview with author); see also MALLESON, THE NEW JUDICIARY, *supra* note 25, at 119 (quoting exchange during hearings before 1996 Home Affairs Select Committee, suggesting that her prominent family background, as sister of a Lord Chancellor and daughter of a previous High Court judge, might have helped her achieve a high judiciary post that might not be available to others based on merit alone); *Former Judge Given Degree*, NORTHCLIFFE NEWSPAPERS CO. (U.K.), Mar. 6, 2006, at 3, available at 2006 WLNR 3780837 (stating Butler-Sloss was appointed Lord Justice of the Court of Appeal, sitting 1988-1999; served as President of Family Division from 1999-2005; and led a 1984 inquiry on child abuse that resulted in statutory reforms).

110. Diversity Statistics, *supra* note 103; see also LAW SOC'Y, CALIBRE, DIVERSITY AND INDEPENDENCE, *supra* note 22, at 2-3. The highest level that solicitors have reached in significant numbers is the Recorder, but the group is still only 10% solicitors. LAW SOC'Y, CALIBRE, DIVERSITY AND INDEPENDENCE, *supra* note 22, at 3.

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tience, claiming that over time, the new entrants would “trickle up” through the professional ranks and into the judiciary.¹¹¹ Parliament and other important decision-makers apparently were persuaded that this optimism was unjustified¹¹² and have incorporated into the new selection statute the dual values of merit and diversity.¹¹³ In the words of Baroness Hale,

Since the CJA started work, the senior judiciary have come to accept what others have been arguing for some time: that recruiting a more diverse judiciary matters not only to the administration of justice but also to the public perception of the justice system; that this will not happen just by waiting for talent to “trickle up” but needs more fundamental changes; and that diversity and merit are not opposed but complementary aims. A more diverse judiciary should also be a more meritorious one. The task of creating a judicial appointments system, which can attract and identify the best talents from the whole legal community has now begun . . .¹¹⁴

III. CONSTITUTIONAL REFORM ACT 2005: CREATION OF AN INDEPENDENT JUDICIAL APPOINTMENTS COMMISSION

A. Overview

The Constitutional Reform Act 2005 aimed for clear separation of powers between the three branches of government.¹¹⁵ Structural revisions to the Lord Chancellor’s post were geared to promote judicial independence from the elected government.¹¹⁶ A national Supreme Court, completely separate from the House of Lords,¹¹⁷

111. See Kenney, *Gender on the Agenda*, *supra* note 25 (manuscript at 29).

112. See *id.* (manuscript at 28) (describing Sir Colin Campbell’s “scathing first report” of the CJA as the “breakthrough” event discounting “trickle-up” claims, stating the Commission found “a picture of wider systemic bias” and “evidence of narrow and inappropriate views about who is suited”); see also COMM’N FOR JUDICIAL APPOINTMENTS, ANNUAL REPORT 2002, at 64-65, available at http://www.cja.gov.uk/files/AnnualReport_final_copy.pdf.

113. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2, §§ 63-64 (Eng.).

114. COMM’N FOR JUDICIAL APPOINTMENTS, ANNUAL REPORT 2006, at 7, available at http://www.cja.gov.uk/files/64322_Judicial_Report.pdf.

115. See Dep’t for Constitutional Affairs, *Constitution Reform Act 2005-Legislative Progress*, <http://www.dca.gov.uk/legist/constreform.htm> (last visited Nov. 30, 2006).

116. Constitutional Reform Act, 2005, c. 4, pt. 2, § 7 (transferring Lord Chancellor’s judicial functions to the President of the Courts of England and Wales).

117. The House of Lords serves as both the upper house of Parliament and as part of the judiciary. Members (“peers”) can obtain their seats through inheritance (a vestige of Britain’s landed aristocracy), or be named by the Prime Minister. See FENNEY, *supra* note 3, at 31-39.

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will take office in 2008.¹¹⁸ Authority for evaluating and recommending judicial candidates for appointment by the Lord Chancellor now resides with the newly-created JAC.¹¹⁹ The prior oversight entity, the CJA, has dissolved, with authority for handling complaints about the appointment process and for judicial discipline given to another new entity, the Judicial Appointments and Conduct Ombudsman.¹²⁰ Transfer of authority began April 3, 2006, and after a short transitional period, all appointments (except for those to the Supreme Court) will go through the JAC.¹²¹ In time, the JAC will handle selections for about nine hundred judges, including those serving full or part time, those serving on lower level tribunals, and lay magistrates.¹²² The Commission's work will be supported by a large administrative staff.¹²³

Structurally, the JAC is a recommending body. It has no authority to make any appointments on its own, instead presenting only one name to the Lord Chancellor, who retains the appointment power. By strictly limiting the Lord Chancellor's discretionary authority to reject or seek reconsideration of the single candidate put forward by the JAC panel, the Act reduces opportunities for backroom deals and strategic rankings.¹²⁴ For each selection, the JAC must submit a written report to the Lord Chancellor, who in turn must annually account to Parliament.¹²⁵

118. Constitutional Reform Act, 2005, c. 4, pt. 3, § 26, sched. 8 (selections to the twelve-member court are to be made by Supreme Court Selections Commissions).

119. *Id.* pt. 4, § 61, sched. 12.

120. *Id.* pt. 4, §§ 62, 101, sched. 13. The role of ombudsman is discussed at *id.* § 62, sched. 13. See also Judicial Appointments & Conduct Ombudsman, Home Page, <http://www.judicialombudsman.gov.uk> (last visited Nov. 30, 2006).

121. Transitional arrangements have been agreed to by the Lord Chancellor, the Lord Chief Justice, and the Chair of the JAC; transition should be complete by April 2007. Judicial Appointments Comm'n, Transitional Arrangements, <http://www.judicialappointments.gov.uk/about/transitional.htm> (last visited Nov. 30, 2006).

122. See Malleson, *New Wine in New Bottles?*, *supra* note 24, at 46.

123. See Judicial Appointments Comm'n, <http://www.judicialappointments.gov.uk/about/about.htm> (last visited Jan. 13, 2006) (stating support of 105 staff members and executive team, organized into three main staff divisions: Tribunal Appointments, Court Appointments, and Strategy and Corporate Resources).

124. In American states, judicial nominating commissions typically send forward a shortlist of recommendations, which some consider rife with backroom partisan politics, not susceptible to any public accountability. See Maute, *Selecting Justice in State Courts*, *supra* note 13, at 1235-36.

125. Constitutional Reform Act, 2005, c. 4, pt. 4, §§ 32, 72, 81, 89, sched. 12; see also Malleson, *New Wine in New Bottles?*, *supra* note 24, at 47-48 (urging Commission to provide full annual account of its activities to "safeguard against future manipulation").

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While directing that selections be based “solely on merit,” the Act further requires the Commission to “have regard to the need to encourage diversity in the range of persons available for selection for appointments.”¹²⁶ The Act does not seek to define merit, including criteria for specific judicial posts. Given the extensive debates surrounding diversity issues, Parliament declined suggestions for positive affirmative action but embraced the need for proactive measures designed to expand the pool of applicants.¹²⁷ Analogizing the words of Dean Don Burnett, Parliament firmly endorsed the need to widen the mouth of the funnel through which judicial candidates enter the system.¹²⁸ Structurally, Kate Malleson believes the JAC could “become a model for other systems looking to reform the way in which they select their judges.”¹²⁹ Only time will tell whether, in implementing that structure, the Commission members will form a collective identity transcending their individual interests and demonstrating a firm commitment to exercise their powers in ways that advance public confidence, with selections that are open, transparent, accountable, and legitimate.¹³⁰ At this point in time, looking at what went into the statutory reform and the start-up activities of the newly-named Commission, there is good reason for guarded optimism.

**B. Structure of the Judicial Appointment Commission:
“Picking the Pickers”**

Lynn Marks introduced the pithy phrase “who picks the pickers,”¹³¹ referring to the critical question of who sits on a nominating commission, and how they are selected. This concern was a theme running throughout the Symposium. Here in the United States, voters have been reluctant to approve amendments to their state constitutions needed to abandon judicial elections in favor of appointive systems. As developed more fully elsewhere, I believe

126. Constitutional Reform Act, 2005, c. 4, pt. 4, §§ 63-64.

127. *See, e.g., id.* (stating that appointment must be based on merit alone, but that the Commission must also have regard for increasing diversity).

128. *See* Donald L. Burnett Jr., *A Cancer on the Republic: The Assault upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 *FORDHAM URB. L.J.* 265, 268 (2007).

129. Malleson, *New Wine in New Bottles?*, *supra* note 24, at 53.

130. *Id.* at 51-53.

131. Lynn A. Marks, Executive Director of Pennsylvanians for Modern Courts, aptly captured the elusive question of how individuals get selected to serve on judicial nominating commissions. Shira J. Goodman & Lynn A. Marks, *A View from the Ground: A Reform Group’s Perspective on the Ongoing Effort to Achieve Merit Selection of Judges*, 34 *FORDHAM URB. L.J.* 425, 437 (2007).

that the stubborn resistance to change is grounded in a distrust that merit selection moves the politics from out in the open, to the privacy of the backroom, where decisions are made by a small number of partisan actors who have no accountability to the public at large. Appointment or election to judicial nomination commissions . . . is itself very political. About one third of lawyer and non-lawyer commissioners have had high levels of political or civic activity, having served in partisan or public offices. This evidence raises a “troubling spectre of political favoritism” that could call into question the legitimacy of merit selection systems. . . . [Such commissions] have tended to be overwhelmingly white, male and dominated by lawyers and business interests. . . . If indeed, merit selection is the superior method, it must open up the deliberative process to the light of day and involve a broader cross-section of the community as members of nominating commissions. . . . Absent explicit diversity requirements, little careful attention will be given to such matters, with the composition of the commission poorly reflecting community-wide demographics and viewpoints.¹³²

In that light, the detailed statutory requirements on the composition and selection of Britain’s new Commission is quite significant. Laypersons, including the chair, must be a voting majority. Commissioners must be selected through an open application process, in accordance with “The Nolan Principles of Public Life,” requiring selflessness, integrity, objectivity, accountability, openness, honesty, and leadership.¹³³ As the United Kingdom tries to modernize its society, in which democratic principles of good government seek to replace the aristocratic cronyism of the past, the Nolan Principles are stated often in both public and private organizational settings. Because the JAC is new, there were no established procedures in place to select the first commissioners. The personal identities of the original commissioners are relevant to whether or not the selection reforms will be effective. Accordingly, some detailed treatment is given to who they are—their professional and personal backgrounds, their past accomplishments, and their connections in government, professional organizations, society, and with one another. Honest reflection on any form of judicial selec-

132. Maute, *Selecting Justice in State Courts*, *supra* note 13, at 1235-36.

133. The Nolan Principles emerged from the independent Nolan Committee convened by former Prime Minister John Major in November 1994, in response to embarrassing public scandals involving Parliament. See Official Documents Archive, Summary of the Nolan Committee’s First Report on Standards in Public Life, <http://www.archive.official-documents.co.uk/document/parlment/nolan/nolan.htm> (last visited Nov. 30, 2006).

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tion must acknowledge that political, professional, and social connections influence both process and outcome. The concept of “the personal is political” is considered foundational to much feminist and critical race analysis.¹³⁴

Schedule 12 of the Act dictates the Commission’s composition.¹³⁵ At least seven of the fifteen-member JAC must be laypersons, defined to exclude any persons who have practiced law or held a listed judicial office.¹³⁶ It must be chaired by a layperson, and include one lay justice of the peace or magistrate, and one member of a specialized tribunal (who might, but need not be, a lawyer).¹³⁷ The five judicial members, coming from all levels of the hierarchical court system, are appointed to serve by the Judges’ Council; the most senior judge is designated vice-chairman.¹³⁸ Only two non-judicial Commissioners can be legally qualified, one appointed at the recommendation of the Bar Council and one at the recommendation of The Law Society.¹³⁹ Civil servants, who

134. See, e.g., CATHARINE A. MACKINNON, *Consciousness Raising*, in *TOWARD A FEMINIST THEORY OF THE STATE* 94 (1989).

135. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 1, § 61, sched. 12 (Eng.).

136. *Id.* sched. 12, paras. 2, 4(3). Paragraph 5 authorizes the Lord Chancellor, with agreement of the Lord Chief Justice, to temporarily adjust allocation of the Commissioners, subject to specified limitations. *Id.* para. 5. *But see* Malleon, *New Wine in New Bottles?*, *supra* note 24, at 48 (stating that the new JAC is “more heavily legally dominated” than the Scottish and Ontario commissions, with only six lay Commissioners (including the chair), five judges, one barrister, one solicitor, one tribunal member, and one magistrate). Classification of magistrate is debatable in terms of interest identification; although magistrates perform judicial functions at the lowest level of the legal system, they need not be legally trained. See Dep’t for Constitutional Affairs, Eligibility, <http://www.dca.gov.uk/magistrates/candidates/eligibility.htm> (last visited Nov. 30, 2006) (discussing magistrate qualifications).

137. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 1, § 61, sched. 12, paras. 2(1), (2)(2)(d), 2(2)(e), 4(4).

138. *Id.* paras. 2(3), 7(3), 11(1). Notably, the powerful Judges’ Council retains significant autonomy in selecting its representatives on the Commission, providing that it names judges from across the hierarchal spectrum of courts. This was probably a political compromise, given the decreased role of “consultations” with judges in the new appointment process. The Judges’ Council is a body that broadly represents the entire judiciary and advises the Lord Chief Justice upon request. See Judiciary of England and Wales, The Judges’ Council, http://www.judiciary.gov.uk/about_judiciary/representation_and_support/judges_council.htm (last visited Jan 13, 2007).

139. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 1, § 61, sched. 12, para. 10 (by its terms, 10(1) provides that the barrister and solicitor representatives are selected by “a panel appointed under paragraph 7(2)” which “must consider . . . any views expressed” by the General Council of the Bar or The Law Society). Theoretically, this panel, created to “pick the picker,” would be free to appoint a barrister or solicitor Commissioner who was not the first choice recommendation of the relevant professional body. This defies all political reality, both in Britain and the United States. While it would be a mistake to overgeneralize the significance of initial appointments,

might be at risk of political pressure from their governmental employer, are ineligible to serve on the Commission.¹⁴⁰ Each of the lay Commissioners, including the chair, are selected by application, through what is called an “open competition” by meticulously-structured selection panels.¹⁴¹ Commissioners, whose compensation is determined by the Lord Chancellor, serve initial terms up to five years, with a cumulative maximum of ten years.¹⁴²

C. The New Judicial Selection Process: Truly a Work in Progress

The statutory appointment process varies depending on the level of judicial post to be filled.¹⁴³ Regardless, there is close symmetry in the appointive process for the highest levels of judges—Lord Chief Justice, Division Heads, Lords Justices of Appeal. The remarkable detail given to panel selection and strict limits on the Lord Chancellor’s discretionary power reflect the important stature of these few posts.¹⁴⁴ Selection of the more plentiful lower court judges follows a similar format, but the Act does not dictate

it is telling that both of the initial lawyer-Commissioners could be considered political heavyweights from their professional bodies: Mr. Edward Nally (2004-05 Law Society President) and Jonathan Philip Chadwick Sumption OBE QC (described in a recent news report on an important legal malpractice defense victory as a “heavyweight”). See Ben Mitchell, *Hammonds Scores a Major Win Against Football League*, LEGAL WEEK (U.K.), June 29, 2006, <http://www.legalweek.com/ViewItem.asp?id=29555&Keyword=ben>.

140. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 1, § 61, sched. 12, para. 3; see also Sue Cameron, *Political Threats to Whitehall Have Come to a Head*, FIN. TIMES (U.K.), June 29, 2005 at 17 (noting concerns of political pressure being placed on civil servants).

141. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 1, § 61, sched. 12, paras. 8-10 (setting forth in detail the process by which non-judicial Commissioners are appointed, through four-person selection panels created by the Lord Chancellor and particularizing who is and who is not eligible to sit on such panels).

142. *Id.* paras. 13-14, 16. Initial appointments are for staggered terms. Dep’t for Constitutional Affairs, Constitutional Reform, Lord Chancellor’s Judiciary-related Functions: Proposals, at ¶ 140 (Jan. 2004), <http://www.dca.gov.uk/consult/lcoffice/judiciary.htm>.

143. See Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2, § 67 (selecting Lord Chief Justice and Heads of Division); *id.* § 76 (selecting Lords Justices of Appeal); *id.* § 85 (selecting puisne judges and other lower court judicial posts); *id.* § 98 (assistance in making all other appointments). Appointments to the Supreme Court will be handled by a smaller, completely separate body, formed only when needed to fill a vacancy. See *id.* §§ 26-31; Malleson, *New Wine in New Bottles?*, *supra* note 24, at 46.

144. In 2006, 52 judges served in these highest posts, comprising only 14% of the total British judiciary. See Diversity Statistics, *supra* note 103.

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selection by a panel, and its mechanisms appear designed to increase applications from non-traditional candidates.¹⁴⁵

1. *Highest Level Appointments*

The higher courts' selection process is initiated by the Lord Chancellor, who requests that the Commission makes a recommendation to fill a vacancy. Thereafter, the Commission appoints from its midst a four-person selection panel which must "(a) determine the selection process to be applied, (b) apply the selection process, and (c) make a selection accordingly."¹⁴⁶ The panel must select "[o]ne person only for each recommendation to which a request relates," and submit a written report to the Lord Chancellor.¹⁴⁷ Parliament tightly restricted the Lord Chancellor's discretion in acting upon a Commission recommendation. At the first stage, the Lord Chancellor can accept the recommendation; reject the recommendation only if, in his opinion, the person is "not suitable for the office"; or require that the panel reconsider a selection if, in his opinion, there is insufficient evidence that the person is "suitable" for the office, or there is evidence the person "is not the best candidate on merit."¹⁴⁸ If the Lord Chancellor rejects a panel recommendation at either of the first two stages, and following reconsideration the same name is presented and again rejected, the panel cannot further persist in selecting that candidate. If following a rejection at Stage 1, the panel then presents a new name at Stage 2, the Lord Chancellor can accept or reject the selection, or again require reconsideration.¹⁴⁹ At the final Stage 3, the Lord Chancellor must either accept the selection panel's recommendation, or accept a name put forth earlier, which he had sent back for reconsideration. During each stage of the process, the Lord Chancellor must provide written reasons for rejecting, or requiring re-

145. Sections 85-94 address the selection process for "puisne judges and other office holders." Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2, §§ 85-94, sched. 14, paras. 1-3. This process is used to select puisne judges, confusingly titled "High Court judges," as well as Circuit judges, Recorders, District judges, Deputy District judges, Magistrates, and Arbitrators to serve on a wide array of specialized tribunals. No precise number of how many positions this process includes are available. *Id.* §§ 85-94. The Annual Diversity Statistics chart only includes positions down through Deputy District judges, with a total of 3,721 positions, or 98.6% of the total positions listed. See Diversity Statistics, *supra* note 103.

146. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2 §§ 69-70, 72, 78-79, 81, 87-88, 89.

147. *Id.*

148. *Id.* §§ 73-74, 82-83, 90-91.

149. See *id.* §§ 73(3), 82(3), 90(3).

consideration of, the panel's selection.¹⁵⁰ Some doubt exists about what will serve as legitimate reasons for rejection. Of course, if the Lord Chancellor has reliable information that a panel selection is "unsuitable" because of character defects or incompetence, the Lord Chancellor's rejection power serves as an important quality check.¹⁵¹ American governors or other executives with appointive authority commonly consider partisan issues, such as whether a nominee will advance the executive's policy objectives. In striking contrast, Kate Maleson contends that a Lord Chancellor's rejection to promote the elected government's policies would be illegitimate, and "constitute improper political influence."¹⁵² Between those two extremes, there is uncertainty, which only time and contextual experience may clarify.¹⁵³ By strictly limiting the Lord Chancellor's private discretion at each stage of the process, the Act substantially furthers the principles of transparency and accountability.

For these highest-level appointments, the Act dictates composition of the selection panels, which will always include two judges from the higher courts, the one with superior rank named as chair and receiving a second vote if needed to break a tie.¹⁵⁴ The third slot goes to the Commission chair or her nominee.¹⁵⁵ Where the panel is to select a Lord Chief Justice or Division Head, the fourth slot is reserved for a layperson.¹⁵⁶ Where the appointment is for a Lord Justices of Appeal, the person named to the third slot selects who is to fill the fourth slot.¹⁵⁷ Because panel composition is somewhat fluid, allowing for designation by the initial nominee, the Commission will likely create operating norms that provide some stability ensuring the presence of at least one lay Commissioner and one representative of a professional body on each selection panel.¹⁵⁸

150. *Id.* §§ 74(3), 83(3), 91(3).

151. Maleson, *New Wine in New Bottles?*, *supra* note 24, at 47. It was negotiated through the consultations and legislative debates that the language addressing character defects would appear in the Act, likely for the purpose of limiting the Lord Chancellor's rejection power.

152. *Id.*

153. British courts have been relatively insulated from such political pressures. With the formation of the European Union, the Human Rights Act, and constitutional reform, this may change—but to what degree remains to be seen.

154. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2, §§ 71, 80.

155. *Id.*

156. *Id.* § 71.

157. *Id.* § 80.

158. See Maleson, *New Wine in New Bottles?*, *supra* note 24, at 51. For information on legal professional bodies, see *supra* note 65.

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2007] *ENGLISH REFORMS TO JUDICIAL SELECTION* 4172. *Lower Court Appointments: Puisne Judges
and Other Office Holders*

The lower court appointment process is also initiated by request of the Lord Chancellor after consultation with the Lord Chief Justice.¹⁵⁹ Here, it is the Commission that determines and applies the selection process and makes a selection accordingly.¹⁶⁰ The process requires consultation with the Lord Chief Justice and a person who has previously held the office to be filled, and the written report to the Lord Chancellor must state the recommendation made by those consulted.¹⁶¹ If the consultees' recommendations are not followed, the report must state its reasons for not doing so.¹⁶² Notably, the role of consultations remains, but the reporting requirements now remove the secrecy element, resulting in greater transparency and accountability to check against unreliable or speculative opinions that could taint the appointment process. It is unclear how extensive the consultations will be, as there is no statutory requirement for the thorough consultation process previously used.

Proactive recruitment principles are built in at several stages, which appear designed to expand and diversify applicant pools. Where the Lord Chancellor gives the Commission advance notice of anticipated positions, the Commission must actively "seek to identify persons it considers would be suitable for selection on the request" and report back to the Lord Chancellor on the results of such efforts.¹⁶³ The Commission can decline to make a selection if it decides the selection process did not identify candidates of sufficient merit (or of sufficient diversity), a decision about which the Lord Chancellor may require reconsideration.¹⁶⁴ All the consultations relating to judicial selection, Queen's Counsel, and diversifying the judiciary identified complex issues and myths that deterred applications from women, ethnic minorities, solicitors, and other professional groups which might qualify and have suitable candidates for entry into the lower judicial ranks. Various modern personnel recruitment strategies are being actively pursued to encourage more non-traditional applicants. These strategies include: newsletters and other communications about judicial oppor-

159. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2, § 87.

160. *Id.* § 88.

161. *Id.* §§ 88(3)(b), 89(2)(d).

162. *Id.* § 89(2)(e).

163. *Id.* § 94(1).

164. *Id.* §§ 88(2), 93(1).

tunities, targeted letters to eligible persons, work-shadowing so individuals can experience “a day in the life of” different judicial posts, and assessment centers where persons can demonstrate their qualifications through testing.¹⁶⁵ A new campaign encourages lawyers to seek part-time judicial appointments, extolls the benefits of such experience in becoming qualified for other posts, and encourages law firms to support part-time appointments.¹⁶⁶ There has even been suggestion of using “head-hunter” firms to recruit applicants.¹⁶⁷ The Act apparently contemplates these and other proactive recruitment techniques.¹⁶⁸

The Commission may select only one person to recommend for appointment by the Lord Chancellor.¹⁶⁹ Before exercising his limited authority to accept, reject, or seek reconsideration of a recommendation, the Lord Chancellor must consult with any person required by other law regarding that specific appointment.¹⁷⁰ The Lord Chancellor’s limited discretion to act on a Commission recommendation is set forth in three stages identical to the higher court process.¹⁷¹ For these lower levels of appointments, however, the Lord Chancellor has more latitude to avoid any appointment by withdrawing or modifying a request, if, after consultation with the Lord Chief Justice, he considers the selection process in any way unsatisfactory.¹⁷² Upon further reflection, in response to such

165. See, e.g., SLAPPER & KELLY, *THE ENGLISH LEGAL SYSTEM* 8TH ED., *supra* note 33, at 242; OPINION LEADER RESEARCH, *JUDICIAL DIVERSITY*, *supra* note 78; DEP’T FOR CONSTITUTIONAL AFFAIRS, *RESPONSE TO RECOMMENDATIONS OF OPINION LEADER RESEARCH ON JUDICIAL DIVERSITY* (May 2006), *available at* http://www.dca.gov.uk/publications/reports_reviews/jd_cbsj06dresp.pdf; DEP’T FOR CONSTITUTIONAL AFFAIRS, *RESPONSES TO INCREASING DIVERSITY*, *supra* note 54, at 22-25.

166. See *More Solicitors Should Aim to Become Judges*, GOV’T NEWS NETWORK, July 12, 2006, <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=213845&NewsAreaID=2&NavigatedFromDepartment=True> (announcing five-point plan to encourage more solicitors to apply for judicial office, launched by Department for Constitutional Affairs Minister Harriet Harmon, who is responsible for judicial diversity).

167. Examination of Rt. Hon. Lady Justice Hale, DBE, *Constitutional Affairs—First Report*, House of Commons (Feb. 3, 2004), *available at* <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/3111808.htm>.

168. See Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2, § 65 (authorizing Lord Chancellor to issue formal guidance on Commission procedures, particularly to identify persons willing to be considered for selection and to encourage diversity in the range of persons available for selection).

169. *Id.* § 88(4).

170. *Id.* § 90(6)(a).

171. *Id.* §§ 90-91. See *supra* text accompanying notes 146-151.

172. Constitutional Reform Act, 2005, c. 4, pt. 4, c. 2, § 95(2).

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action by the Lord Chancellor, the Commission may change its mind on a selection and recommend a new candidate.¹⁷³

3. *The New Commissioners: Building a Collective Identity*

Regardless of the statutory structure for judicial selection, the human actors responsible for implementing that structure are crucial to its success. The first appointments to the Commission are key to developing an institutional culture guided by a shared mission to create a modern, politically independent, open, and accountable appointment process committed to merit and diversity. Based on limited biographical information available about these individuals, there is a strong basis for guarded optimism that they can transcend their individual differences to form such an institutional culture.

Each of the Commissioners has distinguished credentials and strong social, political, or professional connections. Because of their prominence in the rarified British society, most have had prior dealings with one or more of their new colleagues. Three of the five lay representatives are women. Overall, it includes seven women and at least two ethnic minorities, both of whom are women.¹⁷⁴ Besides the chair, who is Indian, the only other obvious ethnic minority is a lay magistrate of African descent.¹⁷⁵ Four of the seven women are considered laypersons.¹⁷⁶ The chair and at least four other Commissioners have noteworthy backgrounds reflecting significant sensitivity to issues of race or gender.¹⁷⁷

173. *Id.* § 95(3).

174. Judicial Appointments Comm'n, <http://www.judicialappointments.gov.uk/about/chair.htm> (last visited Jan. 13, 2007) [hereinafter Judicial Appointments Comm'n Biographies].

175. *Id.*

176. *Id.*

177. Professor Hazel Genn, Professor of Socio-Legal Studies, has published research on issues of social justice with particular focus on race and has extensive public service on related issues, including a study of tribunal processes viewed from the perspective of white and minority ethnic users. See University College London Faculty of Laws, <http://www.ucl.ac.uk/laws/academics/profiles/index.shtml?genn> (last visited Jan. 13, 2007) [hereinafter UCL Faculty]. Ms. Harriet Greville Spicer was a founder and administrative executive of a feminist press. See Mark Bostridge, *The Apple Bites Back*, *INDEPENDENT* (U.K.), May 18, 2003, available at <http://enjoyment.independent.co.uk/books/features/article105859.ece>. Lord Justice Robin Auld, presiding with Justice John Goldring, issued a ruling that the word "Paki" was "a slang expression which is racially offensive." Helen Carter, *Man Gets Court Ban on Saying "Paki"*, *GUARDIAN* (U.K.), Aug. 13, 2003, available at <http://www.guardian.co.uk/race/story/0,11374,1017351,00.html>.

Chairperson Baroness Usha Prashar was named a cross-bencher to the House of Lords in 1999 by Prime Minister Tony Blair.¹⁷⁸ She is identified as one of Britain's most influential women and Asians.¹⁷⁹ Born in 1948 in Kenya to Punjabi parents, she received most of her education in the United Kingdom.¹⁸⁰ Prashar's long and distinguished record of public service includes work in race relations, policy studies, university administration, legal education reform, charities, and the arts.¹⁸¹ Most recently Prashar served as First Civil Service Commissioner, leading the entity charged with overseeing that public employees perform their civil service jobs independently and without improper influence by partisan forces.¹⁸² This post, in particular, would suggest she has extensive expertise in modern principles of personnel recruitment and management. Prashar has had significant involvement with the legal community, having served on the Solicitor's Complaints Bureau and the Lord Chancellor's Advisory Committee on Legal Education and Conduct, and chaired a panel charged with selecting the Crown Prosecution Service director.¹⁸³

Two of the six judicial members come from the higher ranks, as Lords Justices of Appeal. Lord Justice Auld was named vice-chair to the Commission. His route to high judicial office reflects the traditional career path: he began as barrister in a prestigious chambers, took silk and was elected bencher in due course, took the

178. See Dods, <http://www.dodonline.co.uk> (follow "Archive" hyperlink; then follow "News Archive – Lords" hyperlink; search "Usha Prashar") (last visited Jan. 13, 2007) [hereinafter Dods]. A cross-bencher is a peer in the House of Lords who is not affiliated with any political party. FENNEY, *supra* note 3, at 46.

179. See *Britain's 100 Most Influential Women*, DAILY MAIL (U.K.), Mar. 31, 2003, available at http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=174429&in_page_id=1770; *Asians Add 103 Billion Pounds to British Economy*, INDIAN NEWS, Sept. 3, 2005 (on file with author).

180. See *Woman of Indian Origin to Head UK's Judicial Appts. Commission*, INDIAN NEWS, Nov. 6, 2005 (on file with author).

181. See *id.*; see also Guy Dennis, *Nanny May Not Know Best*, TELEGRAPH (U.K.), Aug. 21, 2005, available at <http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2005/08/21/ccnanny21.xml> (last visited Jan. 13, 2007).

182. See Baroness Usha Prashar, *Letter to the Editor: The Core Values of the Civil Service Will Not Change But Clarification of Roles is Necessary*, FIN. TIMES (U.K.), Oct. 22, 2004, available at <http://www.ft.com/home/uk> (search "Usha Prashar").

183. Dods, *supra* note 178; *New Row After Barrister From Cherie's Law Firm is Named as DPP*, BIRMINGHAM POST, Aug. 6, 2003, at 7 (Usha Prashar chaired panel on which another judicial commissioner, Sir Robin Auld, also served); see also Cabinet Office, Appointment of the First Civil Service Commissioner and the Commissioner for Public Appointments, http://www.cabinetoffice.gov.uk/newsroom/news_releases/2005/051220_commissioner.asp?ID=133 (last visited Nov. 6, 2006) (announcing that Janet Paraskeva, long-time Chief Executive of The Law Society, would succeed Prashar as First Civil Service Commissioner).

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bench as Recorder, and steadily progressed up the ranks.¹⁸⁴ The other, Lady Justice Hallett, DBE, was educated at Oxford, called to the Bar at Inner Temple in 1972, and took silk in 1989, after a comparable length of practice to Sir Auld.¹⁸⁵ Her judicial career progressed at an accelerated pace, with promotion to the Court of Appeal after just six years on the bench, in contrast to the usual ten years time served.¹⁸⁶ It is likely she was an early star, one of the first women to be called to the bar, appointed to Queen's Counsel and to enter the part-time judiciary in 1985. Undoubtedly her term as Bar Council chair also gave her a boost to be named the third female judge on the Court of Appeal.¹⁸⁷ The other four judges come from lower ranks, including a Deputy High Court judge presiding over cases, a respected Technology and Construction Court judge, a County Court Registrar, and a member of the Immigration Appeal Tribunal.¹⁸⁸ It appears that only two of the judicial representatives come from the solicitor branch. Both representatives of the professional bodies are considered heavyweights. Edward Nally was immediate past President of The Law Society and is partner of a large solicitor firm.¹⁸⁹ Bar designee Jonathan Sumption, QC, serves as joint head of very prominent chambers and is considered one of the "big guns" responsible for recent major litigation victories.¹⁹⁰

After the chair, of the five lay Commissioners, law professor Hazel Genn has the highest profile.¹⁹¹ Although legally trained, she

184. See Judicial Appointments Comm'n Biographies, *supra* note 174.

185. *Id.* A DBE is a Dame Commander of the British Empire, a rank of Knighthood. *Guide to the Honours*, BBC NEWS, June 16, 2006, http://news.bbc.co.uk/2/hi/uk_news/2616057.stm.

186. *Appeal Court Promotions Snub Chancery Division*, LAW., July 25, 2005, at 1, available at 2005 WLNR 11752203.

187. *Id.*

188. Judicial Appointments Comm'n Biographies, *supra* note 174.

189. *Id.*

190. *Id.* For articles describing Sumption as a "big gun" or a "heavyweight" and crediting him with impressive court victories, see, e.g., *Lawyer Awards Preview: Litigation Team of the Year*, LAW., June 5, 2006, at 28, available at 2006 WLNR 9648947; *UK Roundup: The Year of the Negligence Expert*, LAW., Jan. 23, 2006, at 21, available at 2006 WLNR 1275815; Mitchell, *supra* note 138.

191. Hazel Genn, B.A., LL.B., LL.D. is Professor of Socio-Legal Studies in the Faculty of Laws at University College London, where she is also an Honorary Fellow. She has been a member of the Committee on Standards in Public Life since 2003, a Fellow of the British Academy since 2000, and was appointed Vice-President of the Academy for 2002-2004. Her extensive scholarship is policy-oriented, focusing on experiences of ordinary people caught up in legal problems and the responsiveness of the justice system to their needs. She is currently leading a Task Force on Public Legal Education (PLEAS). In recognition of her work on civil justice, she was

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qualified for appointment as a lay representative. She has long service on many important, law-related public commissions. The other lay representatives bring to the table an impressive array of private and public expertise and connections.¹⁹²

IV. CONCLUSION: LESSONS FOR AMERICA?

The American legal system has always drawn upon the wisdom of our British ancestors, as adapted to suit our own values and concerns. Not limited by ancient strictures that often arose by historical accident, our state and federal courts have embraced an open door policy allowing easy access for any licensed attorney or pro se litigant. We know well that open access can be messy, with voluminous records, distorted results, and questionable legal rulings—often caused by lawyers' wildly divergent advocacy skills and perceived ethical obligations. Similarly, state court judges vary greatly in quality, regardless of how they are selected. American courts have also served as traditional battlegrounds to decide politically-tinged policy disputes.¹⁹³ Public debate on the importance of having a diverse, demographically representative bench took hold in America many years before our British counterparts.

awarded a CBE in the Queen's Birthday Honours List in 2000 and appointed DBE in the Queen's Birthday Honours List in 2006. See UCL Faculty, *supra* note 177.

192. Dame Lorna May Boreland-Kelly has been Chair of Lambeth College since 1992, is a former member of the Inner London Education Authority, and chaired its Equal Opportunities Committee. She is currently Senior Social Work Manager for children and families at Mayday Hospital in South London. Lambeth College, http://www.lambethcollege.ac.uk/governors/the_governors/lorna_borland-kelly.cfm (last visited Oct. 23, 2006).

Sir Geoffrey David Inkin, OBE, was chair of the troubled Cardiff Bay Development Corporation and served as commander of the Royal Welch Fusiliars. *Curtain Drawn on Controversial Bay Development Corporation*, W. MAIL (U.K.), June 30, 2006, at 18, available at 2006 WLNR 11333346; *Battle Lost for Regiments' Names*, BBC NEWS, Feb. 25, 2005, http://news.bbc.co.uk/2/hi/uk_news/wales/4298891.stm.

Sara Catherine Nathan was a board member of the telecom regulator the Office of Communications, a member of the Regulatory Decisions Committee of the Financial Services Authority, and worked in news media as a news editor at BBC's Radio 5 Live and Channel 4 News. *Judicial Appointments Comm'n Biographies*, *supra* note 174.

Francis John Plowden was a partner at PricewaterhouseCoopers, responsible for public policy and management work. He is a former chairman of the National Council for Palliative Care. *Id.*

Harriet Greville Spicer helped found the feminist publishing house Virago Press and was one of its directors for many years. She has also served as a member of the National Lottery Commission during a period noted for scandals involving favoritism in contract bidding. Quentin Letts, *All of a Sudden She Looked Brittle as an Old Wishbone*, DAILY MAIL (U.K.), Nov. 24, 2000, at 4.

193. See *supra* note 27 and cases discussed therein.

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Are these distinctions between the two legal systems sufficiently great that American judicial selection reformers cannot glean valuable ideas from across the pond? Absolutely not. Without question, the hidebound British selection process had major systemic defects, producing a stunningly unrepresentative bench that was widely perceived to be out of touch with the lives of ordinary persons. And yet, as demonstrated by this brief comparative look at pending selection reforms, American states could improve their appointive systems by incorporating modern personnel recruitment and hiring practices. To restore public confidence in the courts, people must believe that judges exercise legitimate authority, undistorted by personal or partisan preferences. Beyond changes to the structural selection process in the Constitutional Reform Act, the extended conversations are bringing about foundational cultural shifts in the role of judges and their manner of selection. We could learn much from Britain's modernized appointive system that aims to be open, transparent, accountable, and more diverse.

