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## DESIGNING AN APPOINTIVE SYSTEM: THE KEY ISSUES

### **Cover Page Footnote**

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## DESIGNING AN APPOINTIVE SYSTEM: THE KEY ISSUES

*G. Alan Tarr\**

A leading scholar of state judicial elections has estimated that more than eighty-seven percent of state judges go before the voters at some point in their careers.<sup>1</sup> This figure, endlessly repeated in the literature, has fostered a perception of the ubiquity of judicial elections.<sup>2</sup> Yet one might as readily argue that it is appointment, not election, that dominates judicial selection in the states. Twenty-one states initially appoint the judges of their general jurisdiction courts, while another four states appoint at least some of their trial judges.<sup>3</sup> Twenty-two of the states that have intermediate appellate courts appoint their members, and thirty states appoint the justices of their supreme courts.<sup>4</sup> Moreover, even in states where selection is nominally by election, judges are often appointed to the bench to fill unexpired terms.<sup>5</sup> For example, in a study of accession to state supreme courts from 1964-2004, Lisa Holmes and Jolly Emrey found that more than half the justices (fifty-two percent) in states that elect judges were initially appointed to their positions.<sup>6</sup> This is significant because once appointed, these justices often face minimal or no electoral

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1. Roy A. Schotland, Comment, 71 *LAW & CONTEMP. PROBS.* 149, 154-55 (1998).

2. *See id.* at 152-53.

3. These data on judicial selection are found in AM. JUDICATURE SOC'Y, *JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS*, <http://www.ajs.org/js/JudicialSelectionCharts.pdf> (last visited Oct. 25, 2006) [hereinafter *JUDICIAL SELECTION CHARTS*].

4. *See id.*

5. According to Daniel Deja, forty-four states fill unexpired terms by gubernatorial appointment. *See* Daniel R. Deja, *How Judges Are Selected—A Survey of the Judicial Selection Process in the United States*, 75 *MICH. B.J.* 904, 906 (1996).

6. Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 *JUST. SYS. J.* 1, 6 tbl.1 (2006).

challenges to remaining in office,<sup>7</sup> thus transforming a nominally elective process into an essentially appointive one. In a study of state supreme court elections from 1980-1994, Melinda Gann Hall discovered that barely half of incumbents (52.1 percent) faced a challenger, regardless of whether they were initially elected to the court or appointed mid-term; furthermore, in only 15.5 percent of the races did they fail to garner more than fifty-five percent of the vote.<sup>8</sup> Appointed incumbents on lower courts are even less likely to face serious opposition.<sup>9</sup> The obvious conclusion is that, although judicial elections may seem ubiquitous, the vast majority of state judges never participate in a competitive election.

In states that combine appointment with retention elections, initial appointment is likewise the determinative decision. Despite some heralded cases in which interest groups targeted and defeated supreme court justices, incumbent judges are rarely unseated in retention elections.<sup>10</sup> In the most comprehensive study of judicial retention elections, involving ten states from 1964-1998, Larry Aspin found that only fifty-two of 4,588 judges (1.1 percent) were defeated when they sought retention.<sup>11</sup> Close elections were likewise rare: the same study noted that the average affirmative vote in retention elections never dipped lower than 69.4 percent during that period.<sup>12</sup>

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7. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 317 tbl.1 (2001).

8. See *id.* at 318 tbl.3.

9. Although there has been no nationwide empirical research documenting this, it follows from the fact that races for trial judgeships are generally uncompetitive. See, e.g., LAWRENCE BAUM, *AMERICAN COURTS* 102 (2001); L. Douglas Kiel, Carole Funk & Anthony Champagne, *Two-Party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290 (1994).

10. For discussion of these instances, see generally DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000* (2002), available at <http://faircourts.org/files/JASMoneyReport.pdf>; Traci V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White*, in RESEARCH ON JUDICIAL SELECTION 1999, at 48 (2000); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).

11. Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79, 79 (1999); see also Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 221 (1980); William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 347 (1987); Malia Reddick, *Merit Selection: A Review of the Social Science Literature*, 106 DICK. L. REV. 729, 739-40 (2002).

12. Aspin, *supra* note 11, at 80. Thus, as one observer during the 1970s put it, “[O]f the total number of judicial elections held in the 50 states, closely contested, partisan ‘unjudicial’ judicial elections probably constitute no more than 5 to 7 percent

The frequency of appointment as a means of reaching the bench, combined with the unlikelihood that incumbent judges will be defeated, underscores the importance of establishing a good system of judicial appointment. Judicial reformers have been at the task since 1906, when Roscoe Pound called for the replacement of judicial elections in his famous address on “The Causes of Popular Dissatisfaction with the Administration of Justice.”<sup>13</sup> In 1914 Albert Kales, a co-founder of the American Judicature Society, proposed an appointive system that became the basis for the “merit selection” system that has dominated reform efforts ever since. Under Kales’s proposal, an independent, nonpartisan commission would nominate candidates to fill judicial vacancies, an elected official—the chief justice—would appoint judges from among the lists of nominees, and the populace in noncompetitive elections would periodically assess the performance of the judges thus selected.<sup>14</sup> Later commission-based appointive systems replaced the chief justice with the governor but otherwise followed Kales’s lead. Over time a consensus emerged among reformers in favor of such commission-based appointive systems, which were christened “merit selection” systems. In 1920 the American Judicature Society endorsed “merit selection,” and in 1937 the American Bar Association followed suit, providing powerful institutional support for reform efforts.<sup>15</sup>

From the 1960s to the 1980s, the proponents of “merit selection” enjoyed considerable success—the number of states employing “merit selection” plans for choosing supreme court justices, for example, rose from three to eighteen.<sup>16</sup> More recently, however, the reform movement has lost momentum. Since 1990, legislatures in North Carolina, Texas, and elsewhere have considered “merit se-

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of the total.” Henry R. Glick, *The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 519 (1978).

13. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906), reprinted in 46 J. AM. JUDICATURE SOC’Y 55 (1962).

14. ALBERT A. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES 107-18 (1914).

15. On the development of merit selection and its endorsement, see Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 29, 37 (Glenn R. Winters ed., rev. ed. 1973). Both the American Judicature Society and the American Bar Association have drafted Model Judicial Articles that elaborate elements of the merit selection plan and provide a guide for constitution-makers. See, e.g., AM. JUDICATURE SOC’Y, MODEL JUDICIAL SELECTION PROVISION (1994), available at <http://www.ajs.org/js/provisions.pdf>.

16. See Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1 app. at 79 (1994).

lection” plans, only to reject them.<sup>17</sup> In 2000, voters in every county in Florida voted against a referendum on “merit selection” for trial judges.<sup>18</sup> Since 1988 only Rhode Island has adopted “merit selection,” and it was forced to change its selection system because of a scandal on the state’s high court.<sup>19</sup>

A variety of factors may have contributed to this loss in momentum for the reform movement, ranging from deficiencies in the particular plans that were proposed to popular opposition against relinquishing a direct vote on who should serve on the bench. Regardless of the reasons, the record of the last two decades suggests the importance of reconsidering the reform consensus and addressing anew the design of state judicial selection systems. Moreover, the Supreme Court’s 2002 decision in *Republican Party of Minnesota v. White*, which upheld the right of judicial candidates to take public stands on controversial issues, seems to promise a greater politicization of judicial elections.<sup>20</sup> This shift may encourage a reconsideration of the advantages of alternatives to election. Thus, regardless of one’s ultimate views on the merits of appointment versus election, Fordham University School of Law’s Rethinking Judicial Selection Symposium is certainly timely.

Any reconsideration of judicial appointive systems must include both the broadly theoretical and the intensely practical. It should identify the key questions that must be addressed in creating a system of judicial appointment, elaborate and defend the principles that should guide choices among alternative appointive systems, and clarify how those principles can be translated into institutional arrangements that will advance the goal of a quality judiciary. This reconsideration should also take seriously the arguments and claims of those who oppose the appointment of judges. Insofar as the concerns of opponents are valid, efforts should be made to design an appointive system that is responsive to those concerns. Even if those concerns lack merit, it is important not to dismiss them out of hand. Reformers need to engage their opponents and present reasoned arguments in support of appointment. As its con-

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17. Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 851-52 (2002).

18. See AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN FLORIDA: AN INTRODUCTION, <http://www.ajs.org/js/FL.htm> (last visited Oct. 25, 2006).

19. G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILAMETTE L. REV. 1445, 1446 (2003). For a consideration of the reasons for the declining adoption of “merit selection,” see Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793 (2004).

20. 536 U.S. 765 (2002).

tribution to this effort, this Article highlights some of the basic choices that reformers must make in creating such a system and elucidates arguments for and against alternative institutional designs.

### WHAT SHOULD AN APPOINTIVE SYSTEM SEEK TO ACCOMPLISH?

The most basic question in designing a system of judicial appointment is: what is one seeking to accomplish? I would argue that a system of judicial appointment—like systems of judicial selection more generally—is a means to an end, namely, the elevation to the bench of good judges and their retention in office. Thus, the fundamental criterion for judging a selection system is the results it produces. The best system of judicial selection is the one that over time produces the best judges. If judges are to serve more than a single term in office, the best system of reselection or deselection is the one that over time retains judges who have performed well and removes those who have not.

This may seem non-controversial, or even obvious, but the literature on judicial selection suggests otherwise. Most arguments for the appointment of judges focus on deficiencies associated with the election of judges rather than on the qualities of the judges who are appointed.<sup>21</sup> Advocates of appointment note that judicial elections in the states have become “noisier, nastier, and costlier,” characterized by “pernicious rhetoric directed at courts and individual judges,” by “relentless negativity,” and by “dirty politics, even gutter politics.”<sup>22</sup> They insist that voters are uninformed about and uninterested in judicial races.<sup>23</sup> Moreover, because voters lack ad-

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21. For a particularly clear illustration of this, see Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 277-95 (2002).

22. GOLDBERG ET AL., *supra* note 10, at 8; see also Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 111 (1998); Paul J. De Muniz, *Eroding the Public's Confidence in Judicial Impartiality: First Amendment Jurisprudence and Special Interest Financing of Judicial Campaigns*, 67 ALB. L. REV. 764, 764 (2004); Clive S. Thomas, Michael L. Boyer & Ronald J. Hrebennar, *Interest Groups and State Court Elections: A New Era and Its Challenges*, 87 JUDICATURE 138 (2003).

23. For a study that tends to support this claim, see Kenyon N. Griffin & Michael J. Horan, *Patterns of Voter Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 72 (1983). Yet in fact the evidence is more complicated than many reformers admit. See, e.g., Nicholas P. Lovich, *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 32 (1989); Melinda Hall & Chris Bonneau, *On the Nature of Ballot Rolloff in Contemporary State Supreme Court Elections* (Sept. 1, 2005) (unpublished paper presented at the 2005 annual meeting of the American Political Science Association), available at <http://www.apsanet.org/sec->

equate information about judicial candidates, they are easy prey for misleading claims and appeals during electoral campaigns, and voters often make their choices based on factors other than a reasoned consideration of the strengths and weaknesses of judicial candidates.<sup>24</sup> Finally, proponents of judicial appointment contend that the escalating cost of judicial campaigns has created suspicions that judges are beholden to campaign contributors, and this has fueled public cynicism about the administration of justice.<sup>25</sup> Indeed, because voters often do not differentiate sufficiently, charges against individual judges have the effect of undermining respect for the judiciary as a whole.<sup>26</sup> As Charles Gardner Geyh succinctly summarized it, “judicial elections stink.”<sup>27</sup>

Whatever the validity of these charges—and they are contested<sup>28</sup>—they do not address directly the quality of judges who are appointed or their superiority to those who are elected. There are at least three reasons for this. First, although voluminous literature on the topic has yielded a rough consensus as to qualities desired in a judge, the list is so broad—a catalogue of nearly every virtue known to humankind, plus the advantage of experience—that it offers little guidance for judicial selection. Given this difficulty, the American Judicature Society’s Model Judicial Selection Provisions

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24. See Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Fate*, 18 J.L. & POL. 643, 643-44 (2002).

25. On the increasing cost of judicial campaigns, see Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21 (2004). A 2002 poll by the American Bar Association found that seventy-two percent of respondents were concerned that judges’ fundraising might affect their impartiality, and a poll the same year by the Justice at Stake Campaign showed that seventy-six percent of respondents believed that judicial decisions were influenced at least in part by campaign contributions. For discussion of these poll results, see Aman McLeod, *If at First You Don’t Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 509 (2005).

26. Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 640 (1999).

27. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003).

28. For defenses of judicial elections, see PHILLIP L. DUBOIS, *FROM BALLOT TO BENCH* (1980); Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397 (1999); Michael R. Dimino, *The Futile Quest for a System of Judicial ‘Merit’ Selection*, 67 ALB. L. REV. 803 (2004) [hereinafter Dimino, *Futile Quest*]; Michael R. Dimino, *The Worst Way of Selecting Judges—Except for All the Others That Have Been Tried*, 32 N. KY. L. REV. 267 (2005); Judith L. Maute, *Selecting Justices in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197 (2000).

opted merely to provide for the nomination of “highly qualified persons.”<sup>29</sup> The American Bar Association’s Standards on State Judicial Selection focus on ensuring a commission qualified to assess candidates rather than on elaborating the grounds for assessment.<sup>30</sup> Insofar as they do list desirable qualities for judges, they fail to rank order them or justify what was selected or omitted.<sup>31</sup> The consensus seems to be, recalling a comment by Justice Potter Stewart in another context, that one knows good judges when one sees them.<sup>32</sup> But obviously this offers little guidance for judicial selection.

Second, even if agreement can be reached about the qualities desired in a judge, it is difficult to devise measures for determining whether prospective judges possess those qualities or possess them to a greater degree than do other candidates for the bench. As Maurice Rosenberg has noted, “[T]he qualities [authors] found the most important are nebulous and do not lend themselves well to comparative application.”<sup>33</sup> Perhaps the most thoroughgoing attempt to resolve this difficulty and provide guidance is Allan Ashman and James Alfini’s catalogue of qualities that judges should have, with weighting.<sup>34</sup> But even their heroic effort fails to justify the relative weight assigned to the various factors. In sum, it is far easier to assess judicial performance than it is to predict it.

Third, when researchers have sought to identify objective criteria of judicial quality, they have found no evidence that appointed judges rank higher on those criteria than do elected judges.<sup>35</sup> One may well quarrel with the crudity of the empirical measures that

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29. MODEL JUDICIAL SELECTION PROVISIONS (Am. Judicature Soc’y 1994), available at <http://www.ajs.org/js/provisions.pdf>.

30. STANDARDS ON STATE JUDICIAL SELECTION (ABA 2000), available at <http://www.abanet.org/judind/downloads/reformat.pdf>.

31. See *id.*

32. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

33. Maurice Rosenberg, *The Qualities of Justices—Are They Strainable?*, in SELECTED READINGS, *supra* note 15, at 1, 9. For an enterprising, if ultimately unsuccessful, effort to identify objective criteria to be used in judicial selection, see Stephen Choi & Mitu Galati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004).

34. ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 60-69 (1974).

35. See, e.g., Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC’Y REV. 579 (1972); Phillip L. Dubois, *The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California*, 8 JUST. SYS. J. 59 (1983); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Justices*, 70 JUDICATURE 228 (1987); Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104 (1964).

social scientists have employed in measuring judicial quality, and all of the studies are now at least two decades old. Nevertheless, proponents of appointment have altogether failed to produce any rigorous studies demonstrating the superiority of judges selected via appointment.

Given these difficulties, the debate about judicial selection in the states has focused more on process than on outcomes. The assumption appears to be that if those who choose the judges are knowledgeable and insulated from politics, and if they are guided by proper rules and procedures, they will choose good judges.<sup>36</sup> Standing alone this is ultimately unsatisfactory. Proponents of judicial election have not been persuaded by criticisms of the electoral process to abandon judicial elections,<sup>37</sup> nor has the general public.<sup>38</sup> Despite their concerns about the effects of campaign fund-raising on judicial independence, respondents in a 2002 ABA poll were nonetheless more likely to trust elected than non-elected judges,<sup>39</sup> and a 2005 Maxwell School Poll found that over seventy-five percent of respondents rejected the idea of reducing the number of judges subject to election.<sup>40</sup>

More importantly, clarity as to the qualities desired in judges is essential if one is to provide guidance to those charged with the task of nominating or appointing them. Those designing a system of judicial appointment must begin with a serious inquiry into what qualities should be sought in a judge, how strengths in some areas should be balanced against weaknesses in others, and whether different sets of qualities should guide the selection of trial judges as opposed to appellate judges.<sup>41</sup>

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36. See, e.g., Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597 (2005).

37. See *supra* notes 21-27 and accompanying text.

38. See *infra* note 76 and accompanying text.

39. See McLeod, *supra* note 25, at 509 for more on the ABA poll results.

40. See Maxwell Poll Results, Judges and the American Public's View of Them (Oct. 2005), available at <http://www.maxwell.syr.edu/news/MaxwellPoll.pdf> [hereinafter Maxwell School Poll].

41. This last consideration is a serious but underemphasized concern because the tasks that trial and appellate judges are called upon to perform vary significantly. See G. ALAN TARR, *JUDICIAL PROCESS AND JUDICIAL POLICYMAKING* 86-92 (2d ed., Wadsworth Publishing Co. 1999) (1977). For example,

a genuinely qualified trial judge has the capacity to translate legal jargon into English intelligible to lay jurymen and can, without endangering the legal soundness of his instructions, give the jury a useful analysis of the task it has ahead of it. Sensitivity to jury relations and skills at communication

**SHOULD AN APPOINTIVE SYSTEM SEEK TO BANISH POLITICS  
FROM JUDICIAL SELECTION?**

In most civil law countries in Europe, the judiciary is a career service, akin to the American civil service system. Prospective judges receive specialized training designed to prepare them for their professional responsibilities, and upon graduation they immediately begin their lifetime judicial careers.<sup>42</sup> Competitive examinations are used to banish political considerations and personal favoritism from the selection process, and seniority and performance evaluations by senior judges and supervisors provide the basis for career advancement.<sup>43</sup>

Although the civil law system of judicial selection is obviously incompatible with long-standing American approaches to legal education and legal practice, the European idea of apolitical selection remains attractive to reformers.<sup>44</sup> Historically, the desire to eliminate politics as a factor in judicial selection has provided an impetus for reform in the states. The shift from appointment of judges to election in the mid-nineteenth century was designed to rescue judges from an unduly partisan appointment process, and the shift from partisan to non-partisan elections (and ultimately to “merit selection”) was meant to reduce political influences on judicial selection.<sup>45</sup> As the American Judicature Society put it on the eve of the first adoption of a “merit” system: “[T]he most important sin-

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are among the qualities that are most imperative for effective service as a trial judge.

Harry W. Jones, *The Trial Judge—Role Analysis and Profile*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 124, 134-35 (Harry W. Jones ed., 1965).

This skill in oral communication with the public is much less important for appellate judges.

42. Descriptions of particular civil law systems include D. S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795 (1988); Jacqueline Lucienne Lafon, *The Judicial Career in France: Theory and Practice under the Fifth Republic*, 75 JUDICATURE 97 (1991). Yet even these countries use an overtly political process in selecting the members of their constitutional courts. See CARLO GUARNIERI & PATRICIA PEDEROZOLI, *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* 35-45 (2002).

43. See GUARNIERI & PEDEROZOLI, *supra* note 42, at 35-45.

44. For an attempt to incorporate credentializing of prospective judges into the reform mix, see for example, Bierman, *supra* note 17.

45. KALES, *supra* note 14, at 112; see also Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 346 (1983); Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 205 (1993).

gle step in improving judicial administration in a majority of the states is that of making judges independent of politics.”<sup>46</sup>

Yet the repetition of unsuccessful efforts to banish politics makes one wonder whether this is ultimately a quixotic quest. So too do studies of selection under current “merit” systems. The classic study of the first “merit selection” system in Missouri concluded that appointment transformed the politics of judicial selection but did not eliminate politics.<sup>47</sup> More recent accounts have documented either partisan conflict or competition between elements of the bar (e.g., plaintiffs’ attorneys vs. defense attorneys) in several “merit selection” systems.<sup>48</sup> The Florida Supreme Court illustrates this partisan dimension. The seven justices of the Florida Supreme Court who decided *Bush v. Gore* were all Democrats, even though there was a “merit selection” system in place in Florida, because they were all appointed by a Democratic governor.<sup>49</sup> Today there are Republicans on the Florida Supreme Court, because a Republican Governor, Jeb Bush, has had the opportunity to make appointments.<sup>50</sup>

As a political scientist, I do not find this political dimension surprising: when positions of status and power are distributed, politics is likely to play a role.<sup>51</sup> Nor do I find it distressing—in a democratic system, it is appropriate that citizens have a role, directly or indirectly, in selecting those who wield power, and judges unquestionably do wield power. Moreover, elected officials who participate in judicial selection are bound to take account of political considerations in their decisions. Unless one wishes to adopt Kales’s model and substitute the state’s chief justice for the governor, politics will play a role.<sup>52</sup> But just as the presence of political considerations in policymaking does not preclude good policy, the

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46. Am. Judicature Soc’y, *Judges Relieved of Political Stress*, 23 J. AM. JUDICATURE SOC’Y 51, 51 (1939).

47. RICHARD A. WATSON & RONALD G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* 348-50 (1969).

48. See Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328, 331-32 (1990); Reddick, *supra* note 11, at 732-35; Rebecca Mae Salokar & Kimberly A. Shaw, *The Impact of National Politics on State Courts: Florida after Election 2000*, 23 JUST. SYS. J. 57, 62-63 (2002) [hereinafter Salokar & Shaw, *Impact*].

49. 531 U.S. 98 (2000); see also Salokar & Shaw, *Impact*, *supra* note 48, at 57-58.

50. Rebecca Mae Salokar & D. Jason Berggren, *The New Politics of Judicial Selection in Florida: Merit*, 27 JUST. SYS. J. 123, 126 (2006).

51. The title of a classic text in political science summarizes the point nicely: HAROLD L. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936).

52. Even this may not be sufficient, particularly when the chief justice has election prospects of her own to consider.

presence of politics in an appointive process does not preclude the selection of good judges. Politics certainly plays a central role in the selection of federal judges, yet many observers rate highly the quality of the federal bench.<sup>53</sup> So the aim of insulating judicial selection from politics may be not only futile but misguided. To repeat: the goal is good judges, not an apolitical process of appointment.

**WHAT SHOULD THE RELATIONSHIP BE BETWEEN THE  
NOMINATING COMMISSION AND THE  
APPOINTING AUTHORITY?**

The reform consensus that emerged during the twentieth century favored an appointive system for judges, with the appointing authority, the governor, choosing among a set of candidates—usually three to five—proposed by a nominating commission.<sup>54</sup> If one provisionally accepts this model of an appointive system, rather than one based on the federal model of chief executive and senate, a crucial issue arises: the relationship between the nominating commission and the appointing authority. Do these participants in the selection process have equal roles? And what particular role should each play in the selection process?

The reform literature implies that the role of the nominating commission is at least equal to that of the appointing authority.<sup>55</sup> Indeed, reformers tend to spend far more time discussing the formation and membership of the commission than they do discussing the appointing authority or the qualities of those chosen under “merit selection.” Thus, Ashman and Alfini’s classic text describes “the nominating process” as “the key to merit selection,” “[b]ecause the nominating commission has ultimate authority to

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53. On the role of politics in federal judicial selection throughout American history, see generally HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* (1999); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); NANCY SHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (2005).

54. According to the American Judicature Society, “[F]ive names appear to be the optimum because it gives the governor a real choice while limiting the governor’s appointing power.” MODEL JUDICIAL SELECTION PROVISIONS § 1 cmt. 1 (Am. Judicature Soc’y 1994), available at <http://www.ajs.org/js/provisions.pdf>.

55. See, e.g., ASHMAN & ALFINI, *supra* note 34.

determine which candidates are qualified to hold judicial office.”<sup>56</sup> In actuality, however, it is more accurate to view the nominating commission’s role as subsidiary. The commission does not select judges but merely nominates slates of candidates from which the governor chooses. To describe the commission’s role as subsidiary is not to demean it, because it remains important. The commission’s job is quality control. It should ensure that the selecting authority chooses from only qualified candidates.

In making their selections, governors are likely to consider factors beyond which candidate on the commission’s slate has the greatest legal expertise. This is only reasonable. For one thing, the governor is unlikely to have either the time or expertise to engage in a detailed comparison of the legal qualifications of the various candidates. At best, the governor’s staff may brief her, although they are just as likely to inform the governor about political considerations as about judicial qualifications. For another thing, if the commission has done its job well, the differences in competency among the candidates will probably not be substantial, and may not provide the governor with much guidance. Most importantly, there are a variety of valid additional considerations—political, demographic, regional, ideological, etc.—that will (and should) inform the governor’s choice.

The commission’s role is subsidiary in another important respect. Its job is to assist the governor, and so it should take into account her needs and predilections. For example, unless precluded from doing so by legal requirements, governors tend to choose members of their own party as judges, so commissions should not send to them slates of potential candidates that include no members of the governor’s party.<sup>57</sup> Most states with commissions recognize that the governor’s perspective should be taken into account in the commission’s deliberations, ensuring that the governor’s perspective will be accounted for by giving the governor authority to appoint non-lawyer members of the commission. In seventeen states, the governor appoints the non-lawyer members, and in Idaho the

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56. *Id.* at 22. In doing so, the authors shift the focus from the substantive question of what system produces the best judges to the process question of how the commissioners, those involved in nominating potential judges, are selected. *Id.*

57. *See supra* notes 47-50 and accompanying text. This view is not shared by all proponents of commission systems. Many would undoubtedly argue that the commission should select the best set of candidates regardless of party affiliation.

governor does so with the advice and consent of the senate.<sup>58</sup> In another ten states the governor shares in the appointment of commission members with other officials, and in only two states does the governor play no role in their appointment.<sup>59</sup> Furthermore, unless it is required by law that membership on the commission be bipartisan, governors tend to appoint members of their own party to commission slots. Many of those selected have been politically active prior to their appointment—according to one study, one-third of non-lawyer commissioners had served in a party office, and almost one-quarter had held public office.<sup>60</sup> This background destroys the illusion of the commission as a politically disinterested group of experts. But more importantly, this experience should equip the commissioners to recognize the political dimension of the appointment process and to ensure that candidates are put forward who are both highly qualified and politically acceptable.

#### WHO SHOULD EXERCISE THE APPOINTING AUTHORITY?

If the commission plays only a subsidiary role, then the primary focus in designing an appointive system should be on the appointing authority. There are two considerations here. First, who should exercise the authority to appoint judges? Second, what constraints—if any—should be placed on the discretion exercised by the appointing authority? I begin with the identity of the appointing authority.

#### Commission-Based Appointive Systems

Most commission-based appointive systems in the American states lodge the appointing authority in the governor.<sup>61</sup> Twenty-two states give the appointment power to the governor acting alone, eight require the confirmation of gubernatorial choices by the state senate or state legislature, and Massachusetts requires rat-

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58. See AM. JUDICATURE SOC'Y, JUDICIAL MERIT SELECTION: CURRENT STATUS, <http://www.ajs.org/js/JudicialMeritCharts.pdf>, 18-19 tbl.5 (last visited Nov. 16, 2006) [hereinafter JUDICIAL MERIT CHARTS].

59. See *id. passim*.

60. Henschen et al., *supra* note 48, at 333; see also JUDICIAL MERIT CHARTS, *supra* note 58, at 13-15 tbl.3; see generally Reddick, *supra* note 11, at 732-33. This of course has implications for the Sisyphean effort to eliminate politics from the selection process. Kansas in 2005 considered requiring senatorial confirmation of gubernatorial appointments, in response to a Kansas Supreme Court ruling that allowed several convicted murderers to escape a death sentence. Tim Carpenter, *Senators Want to Have Say Under Plan, Justices Would Require Senate Confirmation*, TOPEKA CAPITAL-JOURNAL, Feb. 10, 2005, at C1.

61. See JUDICIAL MERIT CHARTS, *supra* note 58, at 8-12 tbl.2.

ification of the governor's choices by the governor's council.<sup>62</sup> Those appointive systems that dispense with a commission typically lodge the appointing authority in the governor with the advice and consent of the senate, drawing on the federal model.<sup>63</sup> Both models thus divide power between the governor and a numerous body. They thereby attempt to avoid, insofar as possible, the dangers associated with one-person appointment that Alexander Hamilton identified in FEDERALIST NO. 76.<sup>64</sup>

Even if there is a commission, serious consideration should be given to requiring senatorial confirmation of judicial nominees, as in federal judicial selection.<sup>65</sup> Checks and balances are a desirable feature of any selection system, and the commission is unlikely to provide as adequate a check on gubernatorial discretion as the senate would. First, the commission is not a coequal partner in the process. The commission is required to submit several names to the governor for consideration, usually three or more, and in Maryland and Utah five to seven, thus giving considerable leeway to the governor.<sup>66</sup> No state allows commissions to rank-order candidates, and only two—Indiana and New York—permit commissions to submit their evaluations along with their list of nominees.<sup>67</sup> The commissioners are also likely to take the views of the governor into account in drawing up their list of candidates in the first place.

Furthermore, whereas the commission is expected to focus on professional qualifications, the senate can bring additional considerations to bear as well. The senate will also represent the diversity of perspectives in the state better than the commission. Historically, the membership of commissions substantially over-repre-

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62. *Id.*

63. *See id.*

64. THE FEDERALIST NO. 76, at 425-26 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

65. Some reformers believe that participation by the senate would not advance the selection of good judges. *See, e.g.,* Winters, *supra* note 15, at 41. Thus, Glenn Winters has contended that the senate "has already proved itself to offer no significant assistance in the selection process and what significance it has is ninety-five percent political. As an element of the judicial selection process it has degenerated in almost all instances to a meaningless rubber stamp." *Id.* This argument persuades only if one assumes that political input from the senate is either unnecessary or undesirable.

In arguing for senatorial confirmation, I confine my attention to commission systems in which the governor or other statewide officials exercise appointive authority. In some states, local executive officials appoint members of some trial courts, and this argument does not apply in that context.

66. *See* JUDICIAL MERIT CHARTS, *supra* note 58, at 13-15 tbl.3.

67. *See id.*

sented white males.<sup>68</sup> Model provisions, however, currently call for greater demographic representation on commissions, and some states have done a better job of achieving that goal.<sup>69</sup> Yet even if commission members today better reflect the diversity of the state population, the commission is not strictly speaking a representative body. The commissioners have no constituencies, so they are not representative in the sense of reflecting or responding to the views of a public. Moreover, because the commissioners are appointed, they do not reflect a popular mandate, and because they are reappointed, they cannot be held accountable by the public for their actions.<sup>70</sup> Finally, one measure of a good state judiciary might be that it includes judges from more than one political party, so that qualified persons are not disqualified merely because of party affiliation. If so, then senatorial confirmation is desirable, because it may help to ensure partisan diversity, particularly when the party controlling the governorship does not control the senate.

### Alternatives

Those considering the institution of an appointive system may also wish to consider other possibilities seldom addressed by advocates of state judicial reform. First, states might adopt a system analogous to the federal model of judicial selection, in which the chief executive appoints without the participation of a constitutionally prescribed commission, and the senate confirms or refuses to confirm the governor's choice.<sup>71</sup> Second, states might devise an alternative mode of nomination or ratification for gubernatorial appointments or a system of commission-based election. In the interest of expanding the range of choices available to constitutional reformers, let me briefly outline these alternatives.

Under the initial state constitutions, judges were appointed either by the governor or by the legislature without the participation of a commission.<sup>72</sup> Of the four states in which the governor chose

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68. Reddick, *supra* note 11, at 730-31.

69. *Id.*

70. JUDICIAL MERIT CHARTS, *supra* note 58, at 13-15 tbl.3. While not accountable to the public, the commissioners may be answerable to an oversight board for misbehavior (e.g., conflict of interest, taking bribes). But the oversight board would not inquire into the quality of judgment exercised by the commissioners.

71. A governor might establish a commission to provide assistance in identifying and screening potential judges, but the composition and mandate of the commission would remain in the hands of the chief executive.

72. MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 16-17 (2000); *see also* Gerhard Casper, *An Es-*

judges, in three she shared this appointment power with a council.<sup>73</sup> The Constitutional Convention of 1787, which was committed to guaranteeing sufficient “energy” in the executive, dispensed with an executive council.<sup>74</sup> But it did follow the example of several states in creating a general appointment power in the executive, governing the appointment of judges and executive-branch officials, with the advice and consent of the Senate.<sup>75</sup> Most states that had appointment systems abandoned them in the nineteenth century, when states opted for popular election of judges, and every state entering the Union since the 1840s has provided for the election of at least some of their judges.<sup>76</sup> Today only four states—California, Maine, New Hampshire, and New Jersey—authorize the governor to appoint supreme court justices without a nominating commission.<sup>77</sup> Yet it is hard to see why only a few states have embraced the federal model. The sterling reputation of judges selected for the federal courts, taken as a whole, and the national reputations of the California and New Jersey judiciaries indicate that it is certainly possible to recruit highly qualified jurists using the federal model.<sup>78</sup> The model of a governor-senate appointment process, with or without the participation of a nominating commission, deserves serious consideration.

Popular resistance to appointive systems in large part reflects voters’ concern about losing their input in the selection process.<sup>79</sup> This raises the question of whether popular participation can be included in a good selection system. Three possibilities suggest

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say in *Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 223 (1989).

73. See GERHARDT, *supra* note 72, at 17.

74. *Id.* at 16-17 (citing to Gerhardt).

75. *Id.*

76. *Id.* at 16.

77. See JUDICIAL SELECTION CHARTS, *supra* note 3, at 4-5. Maine, New Hampshire, and New Jersey use gubernatorial appointment to trial courts of general jurisdiction, and only California and New Jersey use it for appointment to their intermediate appellate courts, as Maine and New Hampshire do not have intermediate appellate courts. *Id.*

78. Whether reputation and actuality coincide is, of course, a difficult question to answer, and the same difficulties that attend identifying quality judges affect efforts to identify outstanding courts. For efforts to avoid such difficulties by focusing on state courts’ reliance on the rulings of other state courts, see Peter Harris, *Structural Change in the Communication of Precedents Among State Supreme Courts, 1870-1970*, 4 SOC. NETWORKS 201 (1982) and Gregory A. Caldeira, *The Transmission of Legal Precedents: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178 (1985).

79. Poll results were reported in 2002 by Justice at Stake. See Justice at Stake Poll, Frequency Questionnaire 4, available at <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf>; see also Maxwell School Poll, *supra* note 40, at 2-3.

themselves, which reformers might wish to consider. First, voters could play a role in electing some or all of the non-lawyer members of the nominating commission. This would combine popular input with the thorough screening of prospective judges and deliberation associated with commission consideration of candidates. The success of the jury system testifies to the fact that members of the public can understand complex legal matters and do take seriously their responsibilities for the impartial administration of justice. It is not clear to me that popular selection of some commissioners would undermine “merit selection”—indeed, it might encourage greater consideration of popular concerns—and it might add legitimacy to the selection process. The advantage might be largely symbolic, however, because voter turnout for elections for commissioners would likely be very low and information about the candidates minimal.

Second, voters could play the role now played by the governor in the selection process, thereby transforming the system into a guided election system. That is, the list of candidates prepared by the commission could be placed on the ballot for popular vote with the candidate winning a plurality filling the judicial vacancy. This would have certain advantages, in that the people would not be giving up their right to participate in judicial selection, and assuming that the commission did its job well, whoever was chosen would be well qualified to sit on the bench. The usual arguments against judicial elections might apply to this mode of selection as well—judicial candidates would have to raise funds for their campaigns, interest groups would seek to influence the outcome of the election, and judges might be tempted to announce their views in an effort to attract support. Nevertheless, these concerns would not interfere with the aim of seating highly qualified persons on the bench.

Third, voters could play the role now played by the senate in the selection process, voting to confirm or reject the nominee selected by the governor. Under this alternative, voters again would not give up their vote, but if the commission and governor did their jobs well, the candidate for the bench would likely be well qualified. This alternative resembles the system of retention elections currently employed in many “merit selection” systems, except that voters would be assessing not only the performance of incumbent judges but also the likely performance of prospective judges. Certainly prospective assessment is more difficult than retrospective assessment, but it is probably no more difficult for an electorate

than it is for a governor and/or a senate. In most cases, one suspects, these accession elections would resemble retention elections, in that absent strong reasons to reject a nominee, voters would endorse a governor's choice. Should a governor be unpopular, however, that might make voters less willing to ratify the governor's selection, just as the unpopularity of a President may encourage the Senate to reject his nominees.<sup>80</sup> Once again, it should be emphasized that popular rejection of a nominee under this alternative would not result in an unqualified person ascending the bench. The failure of one nomination would merely require the commission to submit a new slate of candidates for gubernatorial appointment and popular consideration.

#### WHAT CONSTRAINTS SHOULD THERE BE ON THE APPOINTMENT PROCESS?

Whoever the appointing authority might be, questions remain as to whether any constitutional or other constraints should be placed on its discretion in selecting judges. Many state constitutions do limit that discretion by prescribing qualifications to serve as a judge, including residence, age, and legal experience.<sup>81</sup> In some states the qualifications vary depending on the court on which the judge serves—that is, the constitution imposes more stringent qualifications for those serving on appellate courts than on trial courts and for those on trial courts of general jurisdiction than on trial courts of limited jurisdiction.<sup>82</sup> One would assume that a properly operating commission would consider age and legal experience in deciding whom to nominate, but redundancy on this point may be worthwhile. One would expect, however, that commissions by rule would establish far more detailed criteria to structure their deliberations and guide their choices.

Beyond the standard qualifications prescribed by state constitutions, Delaware (by constitutional provision) and New Jersey (by long-standing practice) require that governors appoint an equal number of Democrats and Republicans to the bench.<sup>83</sup> European

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80. On the reduced success of lame-duck or politically damaged presidents in gaining approval of their Supreme Court nominees, see LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS*, ch. 4 (2005).

81. For a summary of these qualifications, see THE COUNCIL OF STATE GOVERNMENTS, *BOOK OF THE STATES* 313-14 tbl.5.3 (2005).

82. *Id.*

83. DEL. CONST. art. IV, § 3. For discussion of the Delaware provision and its origins, see RANDY J. HOLLAND, *THE DELAWARE STATE CONSTITUTION: A REFER-*

countries likewise seek partisan balance in staffing their constitutional courts, either by requiring super-majorities in the legislature for appointment or by ensuring that certain judicial positions are controlled by particular political parties.<sup>84</sup> There is good reason to seek a politically diverse bench, just as there is to seek other sorts of judicial diversity.

Moreover, one must recognize that the political perspectives of judges have an important effect on their behavior on the bench. A large body of social science literature has documented connections between judges' political affiliations and their decisional tendencies.<sup>85</sup> Therefore, one may well wish to stock the bench with a variety of different approaches to and understandings of the law.

If a bipartisan bench is valuable, that can be mandated, and perhaps it should be in a good appointive system. Imposing such a requirement in a commission-based appointive system may create difficulties, however. For example, if a commission puts forth a slate on which only a single Republican is listed, and the governor is obliged to pick a Republican, then the commission is in effect usurping the appointment power. New Jersey avoids this problem by opting for a non-commission-based appointment system.<sup>86</sup> Delaware employs a commission-based system, but its commission is chosen in such a way that it is unlikely to intrude on the governor's prerogatives. The Delaware commission was established by executive order rather than by the state constitution, and the governor appoints eight of the nine commissioners.<sup>87</sup>

If one wishes to constitutionalize a commission-based appointment system and mandate partisan balance on the bench, then steps must be taken to ensure that only candidates from the party

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ENCE GUIDE 128-29 (2002). For discussion of the New Jersey tradition, which began in the mid-nineteenth century, see ARTHUR T. VANDERBILT, *JUDGES AND JURORS: THEIR FUNCTION, QUALIFICATIONS, AND SELECTION* 40 (1956).

84. ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 46-49 (2000).

85. This vast literature is summarized and analyzed in Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 *JUST. SYS. J.* 219 (1999). In most cases, this correlation does not indicate a lack of good faith on the part of judges. Rather, it suggests that Republicans and Democrats often bring different perspectives to the bench and that those perspectives affect the way they read and interpret the law. In this context, party affiliation can be understood as serving as an (inexact) indicator of political ideology.

86. AM. JUDICATURE SOC'Y, *NEW JERSEY: CURRENT METHODS OF JUDICIAL SELECTION*, [http://www.ajs.org/js/NJ\\_methods.htm](http://www.ajs.org/js/NJ_methods.htm) (last visited Sept. 13, 2006) [hereinafter *NEW JERSEY SELECTION*].

87. AM. JUDICATURE SOC'Y, *JUDICIAL SELECTION IN DELAWARE: AN INTRODUCTION*, <http://www.ajs.org/js/DE.htm> (last visited Sept. 13, 2006).

controlling the position are submitted or that a sufficient number of candidates from both parties are submitted, so that the governor can exercise meaningful choice. One way to ensure this is to increase the minimum number of candidates that must be submitted to the governor. Another approach, which Delaware has adopted, is to authorize the commission to submit as few as three candidates, but to allow the governor to request another list of three candidates if she finds the initial list unsatisfactory.<sup>88</sup>

## HOW SHOULD ONE DEAL WITH RESELECTION?

### Eliminating Reselection

Thus far, I have only addressed initial appointment. Many of the same issues arise with reselection, but so do additional issues. The first question to be resolved is whether there should be a reselection process at all. I have argued elsewhere that many of the most acute problems associated with judicial selection occur not at the point of initial selection but at the point at which a judge seeks retention on the bench.<sup>89</sup> One way to avoid the issues associated with reselection is to appoint state judges, like federal judges, to serve during “good behavior,” or at least until a mandatory retirement age specified in the state constitution. Currently only three states grant such tenure: judges in Massachusetts and New Hampshire serve until age seventy, and those in Rhode Island serve for life.<sup>90</sup> No state has instituted such an extended tenure for over a century, and indeed, if there is a trend, it has been to question lifetime tenure, not to grant it.<sup>91</sup> For example, in recent years there have been several serious proposals to eliminate lifetime tenure for federal judges.<sup>92</sup>

The other way to avoid reselection is to limit judges to a single, non-renewable term of office. Such a term limitation serves the aim of judicial independence, because judges will not be pressured

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88. *Id.*

89. For details of the argument, see generally Tarr, *supra* note 19.

90. JUDICIAL SELECTION CHARTS, *supra* note 3, at 7-14; see also NEW JERSEY SELECTION, *supra* note 86.

91. See, e.g., David J. Garrow, *Mental Decrepitude on the U. S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000). For a collection that presents both sides of the debate in great detail, see REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006).

92. See, e.g., Judith Resnick, *Reconsidering the Federal Judicial Appointments Process: Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579 (2005).

or tempted to decide cases in a particular way in order to curry favor with those who control their continuation in office. European countries employ such a system for the members of their constitutional courts, and the American Bar Association endorsed the concept recently in *JUSTICE IN JEOPARDY*.<sup>93</sup> There are costs associated with judicial turnover, however, particularly if judicial terms are short. In addition, it may be difficult to attract qualified candidates from law firms if one's judicial career ends after a single term. An alternative worth considering is to term limit only members of the state supreme court, because these are the judges whose rulings have the broadest policy consequences. This would be analogous to the policy of single, non-renewable terms for members of constitutional courts (but not other courts) in Europe.<sup>94</sup> Also, if the European experience with constitutional courts is transferable to the United States, there should be no difficulty attracting qualified candidates, although they may seek a seat on the court when they are older, as a capstone to their careers.<sup>95</sup>

### Term Length

If one decides to institute a process of judicial reselection, however, one must address two issues: (i) how frequently should a judge come up for reselection; and (ii) what is the process by which reselection should occur? In fifteen of the twenty-one states that have commission-based appointment systems, judges come up for review initially after a short probationary period, and if they are retained, they are subject to review periodically, usually after a longer term of office.<sup>96</sup> Six states have a one-year probationary period, three a two-year period, three a three-year period, and three a period that lasts until the next election.<sup>97</sup> Once retained, judicial terms in those states tend to be much longer. Two states have instituted twelve-year terms for their state supreme court justices; three, ten-year terms; four, eight-year terms; and five, six-year terms.<sup>98</sup> For states that do not have an initial probationary

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93. On the terms of members of constitutional courts, see SWEET, *supra* note 81, at 46-49, and Lee Epstein, Jack C. Knight, Jr. & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 23 (2001). On the American Bar Association's endorsement of this idea, see ABA, *JUSTICE IN JEOPARDY* 70-73 (2003) [hereinafter *JUSTICE IN JEOPARDY*].

94. See TAIT, *supra* note 19, at 1466-69.

95. See *id.*

96. See JUDICIAL SELECTION CHARTS, *supra* note 3, *passim*.

97. *Id.*

98. *Id.*

period, terms for justices range from six years (Vermont) to fourteen years (New York).<sup>99</sup> Many states prescribe shorter terms for trial judges than for appellate judges.<sup>100</sup>

Obviously, the longer judicial terms are the less frequent will be retention elections or other structured opportunities for judicial accountability. The American Bar Association has endorsed lengthening judicial terms to at least fifteen years, and many court reformers seem to agree.<sup>101</sup> To ensure accountability, it has proposed that the judicial branch enhance its internal review of judicial performance through such mechanisms as periodic performance evaluations, court monitoring, and an effective judicial conduct commission.<sup>102</sup> The underlying assumption appears to be that intra-branch assessment provides an equally effective check on poor judicial performance as do retention elections and that it poses less of a threat to judicial independence and judicial quality. There are to my knowledge no systematic assessments of the relative effectiveness of external and internal controls on judicial performance. Indeed, it is difficult to imagine how such an assessment might be constructed, although one might wish to examine how aggressively judicial conduct commissions in fact pursue complaints about judicial misbehavior.

### Mode of Reselection

Fifteen of the twenty-one states that employ commission-based appointment systems use retention elections to decide whether incumbents should or should not remain in office, while the other six states use a system of reappointment.<sup>103</sup> The reformers who introduced commission-based selection included retention elections as a concession to those who believed that the populace should retain a direct role in judicial selection, but at least some reform leaders hoped that over time the retention elections would be eliminated.<sup>104</sup> In states that appoint without a commission, often the

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99. *Id.*

100. *See, e.g., id.* at 10 (showing that Mississippi's state court system features four-year trial court terms and eight-year appellate court terms).

101. *See* JUSTICE IN JEOPARDY, *supra* note 93, at 70-73.

102. *Id.*

103. *See* JUDICIAL SELECTION CHARTS, *supra* note 3, *passim*.

104. As Michael Dimino notes, "[T]he push for merit selection . . . rests . . . on the determination that public input is bad for the judicial system and must be tolerated only as a political compromise. This is clear once one sees the degree to which success under the merit selection system is equated with the retention of incumbents." Dimino, *Futile Quest*, *supra* note 28, at 813; *see also* Winters, *supra* note 15, at 41. As Winters writes, "The device of tenure by non-competitive election also will pass out of

same mechanism of gubernatorial appointment and senate confirmation is used for reselection.<sup>105</sup> In New Jersey, for example, judges are appointed for an initial seven-year term, and if reappointed by the governor with the consent of the senate, serve to the mandatory retirement age of seventy.<sup>106</sup>

There is no doubt that retention elections can be politicized and can exhibit the worst features of partisan elections. Nonetheless, as noted earlier, the experience of the states is that the vast majority of incumbents are retained and that even at the state supreme court level, defeat of incumbent justices is infrequent, and politicization is episodic. Moreover, as the conflict over reappointing Chief Justice Wilentz in New Jersey in the 1980s showed, reappointment can likewise be contentious.<sup>107</sup> Whichever system of reselection is employed, it would be advantageous to have a commission evaluate the performance of incumbents while in office and to recommend for or against retention. This commission should be as independent as possible, and its verdict on judges should be widely publicized. Some states—for example, Hawaii and Colorado—have already instituted this.<sup>108</sup>

### CONCLUSION

As Robert Leflar once observed, “The quality of our judges is the quality of our justice.”<sup>109</sup> A well-designed system of judicial selection can affect who seeks to become a judge and who is selected, and the quality of those who are chosen and retained is the key criterion by which to assess systems of judicial selection. This Article has identified the fundamental questions that constitutional reformers must answer in assessing their own states’ systems of judicial selection and in crafting alternatives to current systems.<sup>110</sup>

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the picture . . . [I]t was originally offered only to quiet the fears of . . . devotees of the elective method.” Winters, *supra* note 15, at 41.

105. See JUDICIAL SELECTION CHARTS, *supra* note 3.

106. See NEW JERSEY SELECTION, *supra* note 86.

107. See Peter Buchsbaum, *The Courts*, N.J. REP., Sept. 1986, at 34.

108. See JUDICIAL SELECTION CHARTS, *supra* note 3, at 8.

109. Robert A. Leflar, *The Quality of Judges*, 35 IND. L.J. 289, 305 (1960). Chief Justice John Marshall was even more emphatic: “The greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary.” VANDERBILT, *supra* note 83, at 24 (quoting PROCEEDINGS AND DEBATES OF THE VIRGINIA CONVENTION OF 1829-1830, at 619 (1830)).

110. For a more general consideration of the agenda for reform of state judicial systems, see G. Alan Tarr, *The Judicial Branch*, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 85 (G. Alan Tarr & Robert F. Williams eds., 2006).

Yet one must also recognize that a selection system that works well in one state may not work well in another, and that the culture and politics of a state may fundamentally alter its operation.<sup>111</sup> This suggests that the campaign to improve state judiciaries must pursue a two-pronged approach. One prong, discussed here, is to improve the process by which judges are selected and retained. The other prong is to educate the public as to what judges do and what is necessary for judges to do their jobs effectively. This, obviously, is not the task of a day, but together with institutional reform it can contribute to improving the quality of judges and thereby the quality of justice in the states.

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111. For an insightful analysis of the crucial importance of political and legal culture, see generally CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2006).