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Beyond the City Square: Fishing in Wider Pools Without Soundings

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Abstract

Monica Fennell begins a conversation in CITY SQUARE regarding the diversity in the judicial appointment process in the United Kingdom and the United States, a conversation sparked by Professor Judith Maute's article English Reforms to Judicial Selection: Comparative Lessons for American States?

KEYWORDS: diversity, judicial selection, United Kingdom, Maute

**BEYOND THE CITY SQUARE: FISHING IN
WIDER POOLS WITHOUT SOUNDINGS**

Monica A. Fennell^{*F}

A Response to Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 FORDHAM URB. L.J. 387 (2007).

I would like to open up a conversation in CITY SQUARE about diversity in the judicial appointment process in the United Kingdom and the United States, a conversation sparked by Professor Judith Maute's article *English Reforms to Judicial Selection: Comparative Lessons for American States?*¹ The previous process for appointment to the bench in the United Kingdom was one of what Professor Maute calls "'secret soundings'—a process of anonymous consultation with unnamed sitting judges."² Professor Maute explains:

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

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1. Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 FORDHAM URB. L.J. 387 (2007).

2. *Id.* at 389.

Bench. Whom you knew counted; as did your college or school.³

Lady Brenda Hale, the first female Law Lord and now the only woman on the Supreme Court of the United Kingdom,⁴ has affirmed that under the previous appointment process there was "no such thing as an applications process. . . . No application forms, no CVs, nothing . . . transparent like that."⁵

Professor Maute states in her article that the British judiciary was almost exclusively comprised of "older white males" and had a "stunning homogeneity."⁶ Cambridge law professor Neil Andrews labels this homogeneity as extraordinary, saying, "judges were virtually cloned."⁷ Moreover, Professor Maute notes that although the judicial selection process in the United Kingdom has not been fraught with partisanship as in the United States, the "American courts are light years ahead of British courts in terms of demographic representativeness."⁸ Professor Andrews urges that, "[a] wider pool of talent exists. Those waters should be fished."⁹

3. *Id.* at 396.

4. See Sally J. Kenney, *Britain Appoints First Woman Law Lord*, 87 JUDICATURE 189, 189-90 (2004); see also Maute, *supra* note 1, at 408.

5. Webcast—Justice Ginsburg and Baroness Hale—*The British and United States Legal Systems*, GEORGETOWN UNIV. LAW CENTER (Jan. 24, 2008), <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=473>; see also Monica A. Fennell, *Emergent Identity: A Comparative Analysis of the New Supreme Court of the United Kingdom and the Supreme Court of the United States*, 22 TEMP. INT'L & COMP. L.J. 279, 283 (2008).

6. Maute, *supra* note 1, at 389, 406; see also *Diversity*, DEP'T FOR CONSTITUTIONAL AFFAIRS, <http://www.dca.gov.uk/judges/diversity.htm> (last modified Jan. 17, 2009).

7. Neil Andrews, *The United Kingdom's Supreme Court: Three Skeptical Reflections Concerning the New Court*, 2011 UTAH L. REV. 9, 21 (2011).

8. Maute, *supra* note 1, at 392.

9. Andrews, *supra* note 7, at 24.

Maute outlines a new, more transparent and open process for the appointment of judges in the United Kingdom. Created by the Constitutional Reform Act of 2005,¹⁰ this new judicial appointment process was designed, in part, to improve diversity and representativeness on the bench.¹¹ These reforms also moved the United Kingdom's highest court out of Parliament and renamed it the Supreme Court of the United Kingdom, which may give the U.K. Supreme Court a more recognizable but still more muted identity than the U.S. Supreme Court.¹²

10. Constitutional Reform Act, 2005, c. 4, pt. 4, § 64 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2005/4/section/64>.

11. See Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 484 (2011) ("With their emphasis on merit rather than on whom a candidate knew, the appointment commissions were thought to offer potential for achieving greater diversity as well as competence, where 'merit' was no longer to be understood in narrowly constrained, tradition-bound ways."); Peter L. Fitzgerald, *Constitutional Crisis over the Proposed Supreme Court for the United Kingdom*, 18 TEMP. INT'L & COMP. L.J. 233, 233 (2004); see also *Constitutional Reform: A Supreme Court for the United Kingdom*, DEP'T. FOR CONSTITUTIONAL AFFAIRS, 4, 32 (July 2003), <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>.

12. See Fennell, *supra* note 5, at 305 ("[T]he new appointment process prioritizes diversity in the judges and thereby places more emphasis on the personal identity of individual Justices. Nonetheless, without U.S.-style legislative hearings in the appointment process, the U.K. Supreme Court Justices will not become as identifiable as the U.S. Supreme Court Justices. The reduction of the judicial responsibilities of the Lord Chancellor and the placement of the President of the U.K. Supreme Court at the head of the judiciary provides an opportunity for the President of the U.K. Supreme Court to shape a collective court identity—just as Chief Justice Roberts is shaping his Court. The U.K. Supreme Court's identity as a whole will nonetheless be more elusive than U.S. Supreme Court identity because the court will sit in panels and not en banc like the U.S. Supreme Court. . . . Although the doctrine of parliamentary supremacy has diffused the sense of identity for the United Kingdom's highest court, the doctrine of judicial review—which would tend to strengthen court identity—is gaining some ground with the new constitutional reforms.").

Professor Maute predicts that this new judicial appointment system in the United Kingdom will be successful in, among other things, increasing diversity on the bench, and she urges the United States to look to this model. It may be too early to evaluate for most of the judiciary, but so far, the new procedures for appointment to the U.K. Supreme Court have not resulted in greater diversity. Lady Hale asserted in an interview that she is "quite embarrassed to be the only Justice to tick a lot of the diversity boxes."¹³ The current composition of the U.K. Supreme Court is all white, and eleven of twelve are male.¹⁴ As for the rest of the judiciary, Professor Maute already found, even a few years ago, a "significant increase in the proportion of women and minority lawyers taking silk," a potential stepping stone to the judiciary.¹⁵

Professor Maute suggests that more can be done to gain diversity on the bench and that "diversity and merit are not opposed but complementary aims."¹⁶ Professor Maute questions "numerical nosecounts,"¹⁷ yet does not fully address how progress should be measured. The U.K. judiciary has already begun to evaluate the effectiveness of the new judicial selection processes in increasing diversity. The U.K.

13. Dan Tench & Laura Coogan, *An exclusive interview with Lady Hale*, UKSC BLOG (Sept. 16, 2010), <http://ukscblog.com/an-exclusive-interview-with-lady-hale>.

14. See *Biographies of the Justices*, THE SUPREME COURT (last visited Oct. 21, 2011), <http://www.supremecourt.gov.uk/about/biographies.html>; see also Clark, *supra* note 11, at 484 n.167.

15. Maute, *supra* note 1, at 401.

16. See *id.* at 409 (internal quotations omitted); see also Tench & Coogan, *supra* note 13 ("But given that very able women do, for a variety of reasons, become less visible than men in their legal careers, the judicial appointments system should be asking how to select the ones who have really good judicial potential, even though they haven't reached the point in their professional careers at which they would in the past have been regarded as ready for judicial office.").

17. Maute, *supra* note 1, at 393.

Supreme Court's equality and diversity strategy defines diversity as:

people who are in one or more of seven diversity groups; race, gender identity, disability, age, religion or belief or sexual orientation. For staff, we mean diversity in its widest sense, encompassing people who work part-time or other alternative working patterns; people with different skills, experiences and educational and social backgrounds; and people with caring responsibilities.¹⁸

Benchmarks have been established and progress measured against the recommendations for increasing diversity from the Advisory Panel on Judicial Diversity.¹⁹ I would like to open up for discussion whether the recent Report of the Advisory Panel on Judicial Diversity provides a meaningful way to measure progress in the United Kingdom or even in the United States. How can progress be gauged without "nosecounts?"

Maute posits that "[h]onest reflection on any form of judicial selection must acknowledge that political, professional, and social connections influence both process and outcome."²⁰ Professor Maute cites a work from 1989 as foundational, but it is not clear that this point is settled in the courts and outside of academia. For example, in looking at early announcement of the panel of judges in U.S. appellate courts, a study states that "[t]here is a strong predisposition in the American legal system toward the formalist notion that judges perform their function without

18. *The Supreme Court of the United Kingdom Equality and Diversity Strategy 2010-2012*, THE SUPREME COURT 2, http://www.supremecourt.gov.uk/docs/equality_diversity_strategy.pdf (last visited Oct. 21, 2011).

19. See MINISTRY OF JUSTICE, IMPROVING JUDICIAL DIVERSITY: PROGRESS TOWARDS DELIVERY OF THE 'REPORT OF THE ADVISORY PANEL ON JUDICIAL DIVERSITY 2010,' at 3-4 (May 9, 2011), <http://www.justice.gov.uk/downloads/publications/policy/moj/judicial-diversity-report-2010.pdf>.

20. Maute, *supra* note 1, at 412-13.

recourse to personal ideology or past experience," but also notes that this notion has come under attack and that "judicial characteristics matter to legal outcomes."²¹ Professor Maute recognizes that 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. . . . 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.²²

Professor Maute also concludes that, "[t]o restore public confidence in the courts, people must believe that judges exercise legitimate authority, undistorted by personal or partisan preferences."²³ How does this statement impact the "personal is political" argument made earlier in Professor Maute's article?

Professor Maute asserts that the U.S. judiciary can learn much from Britain's judicial selection process and from using more modern personnel practices.²⁴ This is echoed by Professor Terence Lau, who points to the new U.K. judicial selection process as "a useful template."²⁵ This

21. Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 *BYU L. REV.* 55, 63, 66 (2007); see also Fennell, *supra* note 5, at 292.

22. Maute, *supra* note 1, at 406. Cf. Jeffrey Toobin, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 338 (2007) (maintaining, *inter alia*, that the days of having a Catholic seat and a Jewish seat on the U.S. Supreme Court are over).

23. Maute, *supra* note 1, at 423.

24. See *id.*

25. Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 *NEV. L.J.* 79, 80 (2008). Professor Lau suggests creating an independent judicial appointment body and notes that many states "have adopted some variant of the so-called

leads me to my final question for discussion on CITY SQUARE. What are the U.K. judiciary's modern personnel practices that Professor Maute lauds and how can they increase diversity on the bench in the United States?