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# BEYOND MERIT SELECTION

Luke Bierman\*

The foundation for an independent federal judiciary is embodied in the U.S. Constitution. The Constitution vests the judicial power of the United States in the Supreme and inferior courts.<sup>1</sup> Federal judges are appointed by the executive subject to Senate confirmation.<sup>2</sup> They serve terms limited only by “good behavior”<sup>3</sup> and receive salaries that cannot be “diminished during their continuance in office.”<sup>4</sup> Authority, selection, tenure and compensation are thus the bellwethers for assessing judicial independence.

State judiciaries are varied in terms of judicial authority, selection, tenure, and compensation.<sup>5</sup> These broad differences among the states influence the independence of a particular judicial system. Some judges are elected while others are appointed, and in both cases, there is much variation in how selections are made.<sup>6</sup> Judicial terms range from just a few years to life tenure.<sup>7</sup> Salaries approximate those of the federal judiciary in some states, but are much smaller in others.<sup>8</sup>

Of the factors comprising judicial independence, judicial selection receives the most attention. A number of organizations focus on studying judicial selection and offering suggestions for its improvement.<sup>9</sup> The popular press gives significant attention to state

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1. U.S. CONST., art. III, sec. 1.

2. *Id.*, at art. II, sec. 2.

3. *Id.*, at art. III, sec. 1.

4. *Id.*

5. See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (discussing the judicial selection procedure and the impact of different judicial selection methods on judicial review).

6. Larry Berkson, *Judicial Selection in the United States*, 64 JUDICATURE 176, 178-93 (1980).

7. *Id.*

8. Cheryl Frank, *Judges Wanted: Who Can Afford the Honor?*, 71 A.B.A. J. 25 (1985).

9. See, e.g., ABA, STANDARDS ON STATE JUDICIAL SELECTION, REPORT OF THE COMMISSION ON STATE JUDICIAL SELECTION STANDARDS (2000); THE CONSTITUTION PROJECT, UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS (2000).

judicial selection issues.<sup>10</sup> Much scholarship focuses on issues affecting judicial selection.<sup>11</sup> Indeed, no topic considered by judicial process scholars receives as much attention as judicial selection.<sup>12</sup>

Much of this attention results from the ongoing debate regarding the appointment or election of judges. The controversy over appointment or election goes back to the early years of the Republic, and became more heated in the early twentieth century when merit selection was proposed as an alternative to straightforward executive appointment and popular election. Merit selection became the goal of reformers seeking to diminish the prevalence of popular elections for judges, while making appointment palatable to advocates of election. Missouri adopted merit selection in 1940. Soon thereafter, merit selection was used in thirty-four states and the District of Columbia for selecting at least some judges, especially appellate judges.<sup>13</sup>

Yet, in the last thirteen years, only one state, Rhode Island, has established merit selection, and only after a series of public scandals involving its high court.<sup>14</sup> Last November, Florida voters in every county rejected a referendum to implement merit selection for trial judges.<sup>15</sup> Legislatures in Texas, North Carolina, and elsewhere have considered merit selection for appellate judges, but have chosen not to implement it.<sup>16</sup> Pennsylvania, with Governor

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10. A series of *New York Times* articles, for example, ran during the November 2000 election cycle detailing controversial elections in states like Illinois, Michigan, and Ohio. William Glaberson, *A Bipartisan Effort to Remove Politics From Judicial Races*, N.Y. TIMES, Oct. 23, 2000, at 18; William Glaberson, *A Spirited Campaign for Ohio Court Puts Judges on New Terrain*, N.Y. TIMES, July 7, 2000, at 15; William Glaberson, *Court Rulings Curb Efforts to Rein in Judicial Races*, N.Y. TIMES, Oct. 7, 2000, §A, at 9; William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at 1; William Glaberson, *States Taking Steps to Rein in Excesses of Judicial Politicking*, N.Y. TIMES, June 15, 2001, at 1; William Glaberson, *U.S. Chamber Will Promote Business Views In Court Races*, N.Y. TIMES, Oct. 22, 2000, at 24.

11. See, e.g., Larry Berkson, *Judicial Selection in the States*, 64 JUDICATURE 176 (1980); Elliot E. Slotnick, *Review Essay on Judicial Recruitment and Selection*, 13 JUST. SYS. J. 109 (1988).

12. Philip L. DuBois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 S.W. L.J. 31 (1986).

13. See THE CONSTITUTION PROJECT, *supra* note 9, at 89. It should be noted that ten of these states use a form of merit selection for interim vacancies, *id.*, thereby diminishing the prevalence of merit selection. Some eighty percent of all judges stand for some type of election. *Id.*

14. See *infra* note 70 and accompanying text.

15. Editorial, *Judicial Elections*, MIAMI HERALD, Nov. 14, 2000.

16. See, e.g., Rob Christensen, *Who Killed the Merit Plan for Judges?*, NEWS & OBSERVER (RALEIGH N.C.), July 9, 1999; Bruce Davidson, Editorial, *Judicial Politics See Some Reform*, SAN ANTONIO EXPRESS-NEWS, June 24, 2001, at 2G.

Tom Ridge's support, is making a serious effort to enact merit selection for appellate judges. The outcome, however, is far from certain.<sup>17</sup>

The lack of momentum for merit selection at the beginning of the twenty-first century seems ironic. The increasing presence of money in judicial elections, with concomitant concerns about justice for sale, would seem to pose an excellent opportunity for advocates of merit selection. Reform, however, remains elusive. What then remains for those who wish to improve judicial selection? Where does the merit selection constituency go if merit selection is not a viable alternative?

This Article will review some of the factors that have diminished merit selection's appeal. It will examine why merit selection has never been an entirely successful answer for reformers seeking to diminish partisanship in judicial selection. It will suggest addressing other aspects of the judicial office to promote judicial independence. It will conclude by suggesting an educational credential for becoming a judge. This credential would accomplish the objectives advanced by merit selection advocates. It would offer legitimacy to judicial aspirants and would provide independent, accountable, impartial, and well-trained judges regardless of the selection method used by any given state.

## I. THE APPEAL OF MERIT SELECTION

One of the colonists' indictments against King George was that "He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."<sup>18</sup> The adoption of executive or legislative appointment of judges by the colonies in their state constitutions was a direct reaction to the concern raised in the Declaration of Independence. During the first years of the Republic, and with the advent of Jacksonian democracy in the middle 1800s,<sup>19</sup> fears over executive prerogative

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17. See generally James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 JUDICATURE 10 (2000); News Release, Office of Governor, Commonwealth of Pennsylvania, Gov. Ridge Begins Historic Effort to Create Appointive System for Selecting Appellate Judges (Apr. 10, 2001). While this article was being written, Governor Ridge resigned to serve as director of homeland security, placing the fate of merit selection in Pennsylvania in further doubt. Ann Gerhart, *Tom Ridge, on High Alert; The Nation's New Chief of Homeland Security Takes On an Impossible Job With a Can-Do Attitude*, WASHINGTON POST, Nov. 12, 2001, at C01.

18. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

19. Timothy Kelley, *The Presidency Powers Up*, N.Y. TIMES UPFRONT, Sept. 17, 2001, at 26.

arose. Concerns about abuse of the appointment power and the resulting concentration of power in the executive produced a trend toward popular election of judges in the states. Many agreed with Andrew Jackson who argued that "judges should be made responsible to the party by periodical elections."<sup>20</sup> Mississippi adopted judicial elections in 1832<sup>21</sup> and was followed by every state to enter the union after 1845.<sup>22</sup> Several other states also abandoned their appointive system in favor of election.<sup>23</sup>

This preference for elections was designed to support judicial independence.<sup>24</sup> As popularly elected officials, judges, and thus their decisions, would be subject to greater public trust and confidence. In addition, judges surviving an election battle would have the savvy to decide cases in ways that other branches of government would find respectful and appropriate. Bad judges would be subject to removal at election time.

As time went on, however, the weaknesses of judicial elections became apparent. During the Progressive Era, concerns arose that elected judges were too dependent on political parties for their office. Among the objections raised to judicial elections were low voter interest in judicial elections, excessive campaign fundraising, and unseemly campaign conduct.<sup>25</sup> Still, non-partisan elections were not an ideal solution. Without party affiliation as a cue, voters in non-partisan elections would have to rely on other cues such as name recognition, hardly better than party affiliation as an indicator of a judge's qualifications for office.

The American Judicature Society, organized in 1913, adopted judicial selection reform as one of its founding objectives.<sup>26</sup> The Society offered a series of proposals for ensuring that experts, rather than voters, would be responsible for selecting judges. The Society's initial proposals called for the appointment of judges by an elected chief justice.<sup>27</sup> Over time, however, the Society's preference became merit selection. In the merit selection system, a bi-

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20. MARY L. VOLCANSEK & JACQUELINE L. LAFON, *JUDICIAL SELECTION: THE CROSS-REVOLUTION OF FRENCH AND AMERICAN PRACTICES* 90 (1988).

21. *Id.*

22. *Id.*

23. *Id.*

24. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345 (1984).

25. See, e.g., Croley, *supra* note 5.

26. MICHAEL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* 33-34 (1992).

27. *Id.* at 40-41, 51.

partisan commission nominates judicial candidates for appointment by the governor. After nomination, the judges are subject to a retention election or some other means of confirmation by legislative or popular endorsement. Merit selection was endorsed by the American Bar Association in 1937, prompting several bar associations to investigate merit selection as a possibility in their own jurisdictions.<sup>28</sup>

The advantages of merit selection are many. First and foremost, the objective of merit selection is to remove partisan politics from the selection of judges.<sup>29</sup> By eliminating the party influence inherent in an election, merit selection frees judges from any corrupting influence of partisanship. With merit selection, party bosses cannot use judgeships as rewards. The judiciary can render impartial decisions without any appearance of impropriety from corrupt bargains with parties. The result is enhanced public trust and confidence.

Eliminating judicial elections in favor of merit selection would also remove a fiction from the judicial process—that judicial elections are democratic in nature and provide direct accountability to the electorate.<sup>30</sup> One powerful argument against merit selection is that it deprives the public of the right to vote for public officials. Judges already enjoy many powers generally perceived as undemocratic, including the power to declare public laws unconstitutional.<sup>31</sup> Dispensing with popular election arguably removes a powerful element of accountability. Yet, judicial elections are often not competitive because powerful party leaders line up judicial candidates and remove any real public say in the outcome.<sup>32</sup> Merit selection, in contrast, is a more honest selection system, with legitimate representatives of the public involved in the screening processes.

With the elimination of elections, the need for campaign funding is also eliminated. Campaign funding for judges has created many problems.<sup>33</sup> The Model Code of Judicial Conduct includes a num-

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28. BELKNAP, *supra* note 26, at 104-05.

29. Scott William Faulkner, *Still on the Backburner: Reforming the Judicial Selection Process in Alabama*, 52 ALA. L. REV. 1269, 1275 (2001).

30. *Id.*

31. See, e.g., 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) (discussing the undemocratic power of justices in making decisions).

32. See generally Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339 (1996).

33. See, e.g., Lawrence H. Averill, Jr., *The Arkansas Courts: Observations on the Wyoming Experience With Merit Selection of Judges*, 17 U. ARK. LITTLE ROCK L.J. 281, 302-06 (1995).

ber of restrictions on campaign conduct by judges.<sup>34</sup> For example, judicial candidates are not supposed to announce positions on issues likely to come before them as judges.<sup>35</sup> Likewise, they are not supposed to solicit or accept campaign funds. Campaign fundraising should be done by campaign committees that operate under numerous restrictions.<sup>36</sup> These regulations are designed to insulate the judge from political pressures resulting from political involvement. In addition, these prohibitions are designed to limit perceptions of impropriety that result from campaign contributions.<sup>37</sup> Merit selection eliminates both the political pressure and the perceptions of impropriety.

Implementation of a merit selection system also acknowledges the fact that judges generally attain the bench by appointment regardless of formal selection systems. Even in states that use judicial elections, many judges reach the bench through a system of initial appointment after an interim vacancy.<sup>38</sup> Under these circumstances, the electorate is not presented with a choice but rather a *fait accompli* accomplished without public input through a secretive appointment process. Merit selection would shed light on the selection process and add some public input through the nominating commission.

Merit selection may also increase diversity on the bench. Faced with historical barriers to voting participation and the large districts from which appellate judges typically run, candidates of color for elected judgeships have to overcome significant obstacles.<sup>39</sup> Merit selection, focusing more on qualifications than on political alliances, would permit nontraditional candidates for the bench to stand on their own achievements.

Another advantage of merit selection is its capacity to improve the quality of judges. Judging requires both expertise and sensitiv-

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34. It should be noted that these restrictions face increasing constitutional scrutiny under freedom of expression provisions. *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.) (upholding the constitutionality of ethical canons proscribing a judicial candidate from announcing certain positions on certain issues), *cert. granted*, 122 S.Ct 643 (2001); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J.L. ETHICS 1059 (1996); William Glaberson, *Court Rulings Curb Efforts to Rein in Judicial Races*, N.Y. TIMES, Oct. 7, 2000, §A at 9.

35. *Kelly*, 247 F.3d at 854; MODEL CODE OF JUDICIAL CONDUCT CANON 5 (2000).

36. *Id.*

37. See generally ABA, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS (1998).

38. THE CONSTITUTION PROJECT, *supra* note 9, at 92-93.

39. See generally Barbara L. Graham, *Judicial Recruitment and Racial Diversity on State Courts: An Overview*, 74 JUDICATURE 28 (1990); Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316 (1994).

ity to the judicial role, not only in dispute resolution, but also in the American system of government.<sup>40</sup> These special demands, during an era of increasing specialization, have placed particular emphasis on the role of the judge as expert.<sup>41</sup> Indeed, it was precisely this role that motivated the American Judicature Society's interest in judicial selection reform almost 100 years ago.<sup>42</sup>

The advantages of merit selection appealed to reformers seeking to improve older judicial selection systems. Reports of inappropriate political influence, questionable campaign conduct, and improper fundraising offered merit selection advocates opportunities for success in a number of states. Missouri and other states considered and adopted merit selection.<sup>43</sup> By the time of the fiftieth anniversary of Missouri's adoption of merit selection, thirty-three states and the District of Columbia were using merit selection for at least some judges.<sup>44</sup>

## II. MERIT SELECTION IN RETROSPECT

As merit selection grew in popularity throughout the twentieth century, some three quarters of the states adopted the use of a nominating commission for choosing at least some of their judges. With the increased use of nominating commissions came the inevitable assessments of merit selection's effectiveness.<sup>45</sup> These studies, analyses, and experiences have exposed a number of weaknesses in merit selection. Perhaps foremost among merit selection's flaws is the uncertainty over what the word "merit" means with respect to judicial selection. The public appreciates that judges require expertise to be effective.<sup>46</sup> There are some generally accepted requirements, therefore, about who is professionally qualified to be a judge.<sup>47</sup> These requirements usually call for ad-

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40. See generally William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993 (1994).

41. Leslie Morsek, *Get on Board for the Ride of Your Life!: The Ups, the Downs, the Twists, and the Turns of the Applicability of the "Gatekeeper" Function to Scientific and Non-Scientific Expert Evidence: Kumho's Expansion of Daubert*, 34 AKRON L. REV. 689, 726 (2001).

42. BELKNAP, *supra* note 26, at 33-34.

43. Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?: Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 20 (1994).

44. Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990).

45. Goldschmidt, *supra* note 43, at 20.

46. See BELKNAP, *supra* note 26, at 33-34.

47. See generally ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, STANDARDS ON STATE JUDICIAL SELECTION: REPORT OF THE COMMISSION ON STATE JUDI-

mission to the bar or the attainment of a specific amount of legal experience before one can become a judge.<sup>48</sup> People expect that judges will be trained as lawyers with experience doing what lawyers typically do, whether as practitioners, judges, or academics.<sup>49</sup>

This perception begs the question of what "merit" encompasses. Do we prefer judges to pursue justice at the expense of efficient administration? Which qualities of judging do we promote—compassion, intellectualism, fairness? Which qualities are appropriate? Are the characteristics different for trial judges than for appellate judges?

The ambiguity of merit selection becomes obvious when examining its adoption by the states. No two states have adopted merit selection in quite the same way.<sup>50</sup> Although the American Judicature Society has developed model merit selection provisions,<sup>51</sup> merit selection exists in the eyes of the beholder.<sup>52</sup> Some merit-based states use senate confirmation after gubernatorial appointment based on commission nominations. Other states use retention elections,<sup>53</sup> and still others do not require post appointment validation.<sup>54</sup> Some nominating commissions are oriented towards bar associations, while others focus on public representation. The

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CIAL SELECTION STANDARDS (2000); Roger J. Miner, *Remarks: Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075 (discussing the qualifications used in judicial selection generally).

48. See ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, *supra* note 47; Miner, *supra* note 47.

49. It is interesting to note that unlike state constitutions, the U.S. Constitution poses no formal prerequisites to serving as a federal judge. Expectations that a federal judge will be a lawyer, however, have become so ingrained in the fabric of our legal culture that disputes arise not over whether a nominee is an attorney, but over a nominee's legal training. Indeed, it is unthinkable that a nonlawyer might be nominated and confirmed to the federal bench. The guidelines followed by the American Bar Association Standing Committee on Federal Judiciary are as close to formal requirements as might be found. See AM. BAR ASS'N, STANDING COMMITTEE ON FEDERAL JUDICIARY, *WHAT IT IS AND HOW IT WORKS* (1999); see also STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 98-110 (4th ed. 1993).

50. Martha W. Barnett, *The 1997-1998 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 412 (2000).

51. MODEL JUDICIAL SELECTION PROVISIONS (American Judicature Society, 1994).

52. Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 30 (1995).

53. Erwin Chemerinsky, *Presenting an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI. KENT. L. REV. 133, 133 (1998); Webster, *supra* note 52, at 34.

54. Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104, 105 (1964) (explaining the different processes used in judicial selection).

methods of selection of nominating commission members also vary greatly.<sup>55</sup> General similarities include a commission, appointing authority, and some method of confirmation. Still, the great variation adds uncertainty to the precise meaning of merit selection.

It must also be noted that eighty percent of judges must, at some point in their careers, participate in an election.<sup>56</sup> The merit selection debate sets up a false dichotomy between nominated judges and elected judges. Many of the eighty percent of judges who are elected were originally nominated in a merit-based system. The implication that elected judges are not "merit-based" also discounts the fact that some of the most respected jurists in our nation's legal history came to the bench in elective systems.<sup>57</sup> During the early and mid twentieth century, when it was generally recognized as the nation's preeminent common law court, the New York Court of Appeals was made up of elected judges.<sup>58</sup> Local elected judges would undoubtedly take umbrage at the notion that they are not of a sufficient quality to be characterized as merit based.

The difficulty of defining the meaning of merit in the judicial selection context has attracted the attention of judicial scholars. As judges selected through merit-based processes developed records in the jurisdictions, these records could be compared to the records of non-merit selected judges. These analyses tested the claims that a merit-based system would result in better and more qualified judges.<sup>59</sup>

Although an early study reported that different selection procedures correspond to judges with specific characteristics,<sup>60</sup> recent examinations do not substantiate this conclusion. For example, a comparison of Iowa's selection system with that of California provided little support for the proposition that merit selection pro-

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55. See Victor E. Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selections Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 27 (1979).

56. Chemerinsky, *supra* note 53, at 133.

57. *Id.* Examples include Benjamin Cardozo of the New York Court of Appeals, Howell Heflin of the Alabama Supreme Court, and Hans Linde of the Oregon Supreme Court.

58. See, e.g., Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); John H. Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613 (1954); John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970*, 50 S. CAL. L. REV. 381 (1977).

59. See *infra* notes 60-63 and accompanying text.

60. Jacob, *supra* note 54, at 113.

duces more highly qualified judges.<sup>61</sup> A broader analysis of studies of state high court judges also concluded that few differences could be attributed to the use of a particular selection scheme.<sup>62</sup> “[T]he identity of the actor who exercises the dominant role in designating nominees is at least as important and may be more important than the nature of the name-generation process.”<sup>63</sup> Merit selection in and of itself does not generate judges with significantly different characteristics than those judges selected by other means.

Analysis likewise indicates that the merit selection process does not remove the effects of politics. Rather it alters the dynamics of how political considerations are manifested. In an examination of the Missouri system compiled some twenty years after its adoption, the researchers concluded that partisan considerations were not eliminated from the selection process but instead were redirected to membership on the nominating commission.<sup>64</sup> More recently, an examination of the New York Court of Appeals’ selection process before and after the implementation of merit selection suggested that not much had changed in the prevailing political forces leading to judicial selection.<sup>65</sup> Indeed, at least some evidence suggests that the adoption of the particular scheme for merit selection process was designed to preserve the authority and role of certain political actors in the selection system.<sup>66</sup> From this perspective, merit selection has undergone a metamorphosis from a tool for reform to a tool of the status quo.

The lack of movement toward merit selection in the last decade has also been manifested by the increasing attention given to the

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61. Larry L. Berg et al., *The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Court Systems*, 28 W. POL. Q. 263 (1975).

62. Flango & Ducat, *supra* note 55. *But see* Webster, *supra* note 52, at 33 (Although the empirical data generally indicates that judicial quality is not related to selection methods, some evidence suggests that judges chosen under a merit-based system may perform their core responsibilities better than judges chosen in other ways.).

63. Elliot E. Slotnick, *Judicial Selection Systems and Nomination Outcomes: Does the Process Make a Difference?*, 12 AM. POL. Q. 225 (1984).

64. RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NON-PARTISAN COURT PLAN* (1969); *see also* Webster, *supra* note 52, at 32.

65. *See* Bierman, *supra* note 32, at 353.

66. *Id.* at 341-42. In New York, for examples, the political leadership that historically had selected candidates to run for election to the New York Court of Appeals lost control of this authority in the early 1970s but regained control of the process through its appointments to the judicial nominating commission when merit selection was adopted in 1977.

improvement of the electoral processes for judges. A variety of organizations have suggested ways of improving the election processes for judges to address the negative aspects of judicial elections in a more positive way, or at least in a way that does not have severe negative implications for public trust and confidence. The appointment of a Task Force on Lawyer's Political Contributions by the American Bar Association (ABA) is a recognition that judicial elections will continue in at least some jurisdictions.<sup>67</sup> The ABA's work on the public financing of judicial campaigns explicitly acknowledges the impediments to merit selection's adoption in some states and the fact that judicial elections will likely remain in place.<sup>68</sup> Even the American Judicature Society, historically identified with merit selection, has questioned whether it should involve itself in reforming judicial elections.<sup>69</sup>

Some jurisdictions will never adopt merit selection, so a consideration of alternative reform approaches is appropriate. The last state to adopt merit selection was Rhode Island in 1994. Prior to 1994, the last state to adopt merit selection was New Mexico in 1988. Thus, in the last fourteen years only one state has been able to muster the political force necessary to amend its constitution despite egregious partisan election systems in states like Illinois, Texas, Pennsylvania, and Louisiana.<sup>70</sup> The fate of merit selection for trial judges in Florida further emphasizes the ongoing decline of merit selection.<sup>71</sup> In 1998, Florida's constitution was amended to permit counties to adopt merit selection for trial judges by referen-

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67. THE CONSTITUTION PROJECT, *supra* note 9.

68. AM. BAR ASS'N STANDING COMM. ON JUDICIAL INDEPENDENCE, COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 5 n.3 (2001).

69. At its annual meeting in 2001, the focus of the Society's program was "What Role for AJS in Reforming Judicial Elections?" Not all organizations that advocate merit selection's adoption are trying to incorporate judicial election reform into their program. Pennsylvanians for Modern Courts, the preeminent advocate for merit selection in Pennsylvania, has not withdrawn from its mission of amending the state constitution in favor of merit selection for Pennsylvania appellate judges. The organization appears to have some hope for success. *See supra* note 17.

70. *See, e.g.*, ELLEN MATTLEMAN KAPLAN, BLUEPRINT FOR THE FUTURE OF JUDICIAL SELECTION REFORM (1999); SUPREME COURT OF TEX., STATE BAR OF TEX. & TEX. OFFICE OF COURT ADMIN, THE COURTS AND THE LEGAL PROFESSION IN TEXAS—THE INSIDER'S PERSPECTIVE (1999); James Gill, *Influencing Louisiana's Judiciary*, NEW ORLEANS TIMES-PICAYUNE, Dec. 3, 1999; Daniel C. Vock, *Business Leaders See Supreme Court Race as Good Investment*, CHI. DAILY L. BULL., Sept. 13, 2001, at 1.

71. *See Webster, supra* note 52, at 27-28.

dum.<sup>72</sup> Florida voters in every country rejected the proposal in 2000.<sup>73</sup>

### III. BEYOND MERIT SELECTION: ALTERNATIVE APPROACHES TO JUDICIAL INDEPENDENCE

Some alternatives to merit selection will improve judicial independence in general and state judicial selection in particular. Efforts to improve judicial campaigns and elections are appropriate and helpful.<sup>74</sup> Other mechanisms, some derived from the U.S. Constitution, can also protect the role of state judges. Authority, tenure, and compensation can insulate judges from the influences of partisans and special interests. In addition, by reconceptualizing the purposes of merit selection, other ways to promote judicial independence become evident.

#### A. Authority

Over the past few years, the legislative and executive branches have, on occasion, removed the judiciary's authority over issues in order to accomplish particular policy goals. At the federal level, Congress has restricted federal court jurisdiction in areas such as habeas corpus and the death penalty,<sup>75</sup> immigration,<sup>76</sup> and religious freedom.<sup>77</sup> State governments have similarly restricted state judges. Constitutional and statutory revisions proposed in a number of states limit state court authority over particular issues.<sup>78</sup>

In Ohio, for example, a constitutional amendment has been proposed to require a five vote supermajority by the state supreme court in order for it to invalidate state legislation.<sup>79</sup> This proposal

72. Barnett, *supra* note 50.

73. Indeed, the votes were so one-sided against merit selection that the difficulties encountered with counting the Florida presidential ballots were not encountered in this constitutional referendum anywhere in the state. *See* Editorial, *supra* note 15, at B6.

74. *See* ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, *supra* note 47.

75. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217 (codified in scattered titles of the U.S.C.); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 104 Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 7, 8, 21, 25 and 42 U.S.C.).

76. *See, e.g.*, Omnibus Consolidated Appropriations Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1997).

77. *See, e.g.*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. 2000 bb) (1994).

78. *See, e.g.*, Carrington, *supra* note 31 (supporting the need to restrict judicial independence in light of the excessive activism of courts).

79. Catherine Candisky, *Proposal Would Limit Power to Undo Laws*, COLUMBUS DISPATCH, Aug. 24, 2001, at 1A.

followed a series of four-three supreme court decisions invalidating state laws on contentious issues like education funding and civil justice reform. The representative proposing the revision indicated that the supermajority requirement would impose "a little more accountability, a little more stability and a little more confidence with respect to the courts."<sup>80</sup>

In New Hampshire, a pending constitutional amendment would eliminate the state high court's authority over its rule making.<sup>81</sup> This proposal followed several years of heated litigation over how to fund the state's educational system.<sup>82</sup> The court had repeatedly ordered New Hampshire to find new sources of revenue to compensate for disparities in the real estate taxes funding education.<sup>83</sup> In addition, the court had been embroiled in controversies over some of its members' conduct, leading to one justice's resignation and the chief justice's unsuccessful impeachment.<sup>84</sup> Questionable recusal procedures and concerns about the administration of internal court policies exacerbated tensions between the court and the legislature, leading to proposals to restrict the supreme court's authority.<sup>85</sup> There also have been proposals to remove the supreme court's jurisdiction over school funding cases.

In Florida, the first bill filed in the state House of Representatives for the 2002 session would limit the availability of habeas corpus writs and increase legislative authority over court rulemaking.<sup>86</sup> This proposal follows not only the controversial role of the Florida courts in the 2000 presidential election, but also long standing disputes between the Florida Supreme Court and the state legislature.<sup>87</sup> These disputes originated with controversial state

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80. *Id.* (quoting Ohio Representative Rex Damschroder).

81. See 2001 N.H.C.A.C.R. 4 (providing that Article 73-a of the Second Part of the New Hampshire Constitution, relative to the chief justice as the administrative head of all the courts, be repealed); 2001 N.H.C.A.C.R. 5 (providing that the New Hampshire Supreme Court's rules are effective only when not inconsistent with statute).

82. Attorney General McLaughlin 'Misspoke' Before State Supreme Court, UNION LEADER, Jan. 10, 2002, § A at 2.

83. See, e.g., *Claremont Sch. Dist. v. Governor*, 142 N.H. 462 (1997) (holding that varying property tax rates violated the constitutional requirements for providing adequate funding for public education).

84. Carey Goldberg, *New Hampshire Supreme Court Justice Is Acquitted in His Impeachment Trial*, N.Y. TIMES, §A, Oct. 11, 2000, at 4.

85. Shirley Elder, *Supreme Court Controversies Have Staying Power*, BOSTON GLOBE, June 24, 2001, at 1 (New Hampshire Weekly).

86. Gary Blankenship, *First House Bill Filed Would Rewrite Article V*, FLA. BAR NEWS, Aug. 15, 2001, at 1.

87. See, e.g., Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 100 n. 13 (1994) (describing the disagreement between the Florida legislature and the Florida

supreme court decisions on abortion rights and the imposition of capital punishment.<sup>88</sup>

At the turn of the twentieth century, numerous proposals were made to rein in courts, largely in reaction to unpopular rulings. Colorado amended its constitution to provide for popular review of judicial decisions. Other states imposed recall provisions for judges or required supermajority votes of high court judges to invalidate state legislation.<sup>89</sup> Theodore Roosevelt, embarking on a highly publicized political comeback, proposed supermajority legislation in New York following a 1911 high court decision striking down New York's workmen's compensation law.<sup>90</sup> While this trend towards limiting courts faded in light of World War I, the intrusions into judicial independence today are increasing in scope and number. Thus, a century ago these intrusions led to the development of merit selection, whereas today they occur at a time when merit selection efforts clearly have stalled.

### B. Tenure

The life tenure granted to federal judges is a powerful aspect of judicial independence. Life tenure may be the most important ingredient in assuring federal judicial independence.<sup>91</sup> Certainly, the Framers firmly supported life tenure for federal judges.<sup>92</sup> Over the past 200 years, the rarity of federal judicial impeachment reflects the commitment to life tenure shared by American legal and political culture.<sup>93</sup>

Life tenure and long terms promote judicial independence. Long terms for elected judges diminish the number of times that judges need to raise campaign funds, thus minimizing the appear-

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Supreme Court with regard to the affirmative duties of therapists to warn of their patients' dangerous tendencies).

88. See, e.g., Carrington, *supra* note 31 (supporting the need to restrict judicial independence in light of the excessive activism of courts).

89. THE CONSTITUTION PROJECT, *supra* note 9, at 108-09.

90. *Id.*; see also PETER GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 205-06 (1996).

91. See Associate Justice Stephen G. Breyer, Remarks Delivered at the Conference of the Supreme Courts of the Americas (October, 1995), in 40 ST. LOUIS L.J. 989 (1996).

92. See THE FEDERALIST NO. 78 (Alexander Hamilton).

93. Indeed, there never has been a conviction of an impeached federal judge solely on the basis of an unpopular judicial decision. See ABA, AN INDEPENDENT JUDICIARY, REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 48-49 (1997). See also HENRY J. ABRAHAM, THE JUDICIAL PROCESS 42 (6th ed. 1993).

ance of partiality<sup>94</sup> and increasing public trust and confidence. Long terms permit judges to concentrate on their judicial duties rather than retaining their positions. Likewise, long terms diminish the opportunity for political forces to infiltrate the judicial selection process. In addition, long terms provide the public with a greater opportunity to assess the record of a particular judge when the time for redesignation arises. These rationales explain the generally accepted value of life tenure for the federal judiciary.

State judiciaries are different. Summaries of state judicial terms are provided elsewhere and need not be restated here.<sup>95</sup> More than seventy-five percent of state judges have terms for less than ten years.<sup>96</sup> State judges who must therefore devote themselves to redesignation several times during their judicial careers are providing several opportunities for the intrusion of political influences.

The appropriate length for judicial terms is subject to interpretation. Although life tenure, or tenure to age seventy, on good behavior mirrors the federal model, some jurisdictions are not likely to switch from relatively short terms to life tenure. In the current political climate, some states have even suggested further limiting judicial terms.<sup>97</sup> Lengthy terms, however, promote judicial independence.

The judges of New York's high court, appointed through a merit selection appointment process, and those of New York's general jurisdiction trial courts elected in judicial districts, both serve fourteen-year terms, subject to mandatory retirement when the judge reaches age seventy.<sup>98</sup> Under this scenario, a person who attains the bench at age forty-two will face selection only twice—the initial selection and a single reappointment or reelection. This length neatly balances independence with accountability. The intrusion of political interests is minimized with as few selection processes as necessary for each individual judge. Still, the public, directly or through representatives, has the opportunity to review a judge's record at the end of a term so a reasonable assessment can be made about retention. This method seems an appropriate way to support independence and accountability if the federal model is not to be followed.

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94. David Barnhizer, "On the Make": Campaign Funding and the Corrupting of the American Judiciary, 50 CATH. U. L. REV. 361, 366 (2001).

95. See generally THE CONSTITUTION PROJECT, *supra* note 9, at 90-92 app. II.

96. See *id.*

97. See, e.g., Elder, *supra* note 85.

98. See N.Y. COURT OF APPEALS, available at <http://www.courts.state.ny.us/ctapps>.

### C. Compensation

The constitutional ban on reducing federal judicial salaries provides an essential safeguard for judicial independence. Federal judges know that Congress will not reduce their pay.<sup>99</sup> This constitutional proscription protects federal judges who make unpopular decisions.<sup>100</sup> This constitutional protection alone, however, has not eliminated many concerns about federal judicial compensation.<sup>101</sup> In the absence of regular pay increases, inflation has eroded the value of compensation.<sup>102</sup> Linkage of federal judicial pay with congressional salaries generates substantial concern about maintaining adequate levels of pay for federal judges, who do not have the ancillary resources that members of Congress can tap.<sup>103</sup> The increasing spiral of lawyer salaries creates concerns about parity for federal judges, the elite of the legal profession.

Despite these concerns, federal judicial compensation establishes a benchmark for state judicial compensation. According to published reports about state judge salaries, no state pays its trial judges more than a U.S. district judge or its appellate judges more than a U.S. Supreme Court Justice.<sup>104</sup> Twenty states use judicial compensation commissions to establish salary levels, although the effectiveness of these bodies ranges from inactive to advisory to mandatory.<sup>105</sup> In at least one state, judicial salaries correspond to the consumer price index.<sup>106</sup> The compensation of most state judges, then, is left to the vagaries of the legislature's erratic attention.

The commission approach may be an appropriate method for periodic review and modification of judicial salaries. Other possibili-

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99. At the time this is written, the salary of United States district judges is \$150,000; that of U.S. circuit judges is \$159,100; that of Associate Justices of the Supreme Court of the United States is \$184,400; and that of the Chief Justice of the United States is \$192,600. Linda Greenhouse, *Rehnquist Sees a Loss of Prospective Judges*, N.Y. TIMES, Jan. 1, 2002, at A16.

100. AM. BAR ASS'N & FED. BAR ASS'N, FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM ii (2000).

101. *Id.* at ii.

102. *Id.* at i.

103. *Id.* at i.

104. See NAT'L CTR. FOR STATE COURTS, 26 SURVEY OF JUDICIAL SALARIES (2001), available at <http://www.ncsc.dni.us/is/summer2001.pdf>. Recent reports indicate that some Alabama judges may receive salaries higher than those received by Justices of the Supreme Court of the United States. Stan Bailey, *Some State Judges' Pay Tops U.S. Justices*, Birmingham News, Oct. 1, 2001.

105. See NAT'L CTR. FOR STATE COURTS, 26 SURVEY OF JUDICIAL SALARIES (2001)

106. *Id.*

ties include a mechanism tying state judicial salary increases to the cost of living so that an objective periodic adjustment can be made. Such a mechanism would diminish subjective partisan bickering over a topic so closely associated with judicial independence. Of course, state judicial salaries must reflect the legal, political and social cultures of a specific jurisdiction. But the value of judicial independence should be constant throughout the country. Therefore, consistency in the approach to judicial compensation seems warranted and appropriate.

Factors associated with authority, tenure, and compensation offer some modest assessments and proposals that will enhance judicial independence in the states. These aspects of judicial independence connect to judicial selection, since both are constitutionally recognized as essential components of protecting the third branch. Still, they do not precisely address judicial selection in general or the weaknesses of merit selection in particular. Accordingly, merit selection needs to be rethought to better promote quality judicial candidates in a politically feasible manner, while remaining true to judicial independence. This article suggests that educational credentials be encouraged for those seeking a judicial post.

#### IV. CREDENTIALING – THE REAL MERIT SELECTION

Judging is an imprecise science. The question of what makes a good judge will never be resolved to everyone's satisfaction. Nevertheless, judges are professionals with some standard elements in their job descriptions, albeit elements that may vary depending on their jurisdiction and position. Regardless of whether they are assigned to family court or a court of appeals, judges must resolve disputes within the parameters of a judicial process that is part of a larger legal system.<sup>107</sup>

Judges come from the legal profession and have legal training.<sup>108</sup> They hold the credentials of a law degree, an undergraduate degree, and a license, usually attained after passing a bar examination. Some jurisdictions impose other requirements such as a certain number of years work experience, but no uniform standard

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107. See LAWRENCE BAUM, *AMERICAN COURTS* 148 (3d. ed. 1994).

108. Although there are some judges who can serve without legal training or experience, for example in New York town and village courts, these judges are relatively few in number and generally are being phased out. Focusing on what typically are characterized as courts of record, it is fair to say that judges are drawn from the ranks of those with legal training.

of further qualification exists. Indeed, even these limited prerequisites are not officially specified for service on the federal bench.

This lack of formality seems odd when so many activities, from brain surgery to taxidermy, require credentials. The increasing professionalization of our society serves many purposes, including training, regulation, and socialization.<sup>109</sup> As public officials, judges are treated like other government officers whose service is dependent on public approval and accountability through the electoral process. The adoption of an earned credential system would distinguish judges from legislators and executives. This credential system makes sense because judges serve a role that requires impartiality and independence distinct from those serving in the other branches of government, whose authority derives from their representational role. This distinction serves as the basis for the need for an educational credential.

Lawyers are advocates, representing a client zealously to the exclusion of almost any other consideration.<sup>110</sup> Lawyers must keep confidences<sup>111</sup> to attain goals often at odds with the objectives of other lawyers and their clients<sup>112</sup> and protect their legal positions with impunity.<sup>113</sup> Balancing the interests of competing parties is not part of a lawyer's job description. Indeed, lawyers are expected not to act impartially.

Judges, however, are a societal model of impartiality. Judges resolve the disputes that lawyers bring to their attention. The attributes one must have to perform the judicial role (knowledge of legal rules, judicial temperament, administrative acumen) may come from legal practice, but their application is very different from the advocacy role that lawyers play. New judges may have little appreciation for how the judicial process proceeds from a judge's perspective as an official obligated to move cases through the justice system.<sup>114</sup>

The lack of training for judges has been improved during the past thirty years with the development of a number of programs. The Federal Judicial Center and the National Judicial College provide significant offerings to help judges maintain their currency in

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109. See, e.g., Blechner et al., *The Jay Healey Technique: Teaching Law and Ethics to Medical and Dental Students*, 20 AM. J.L. & MED. 439 (1994) (discussing the training, regulation, and monitoring of the professions).

110. See MODEL RULES OF PROF'L CONDUCT pmbl. (1995).

111. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (1995).

112. *Id.*

113. See *id.*

114. See BAUM, *supra* note 107, at 150-51.

many fields. These organizations also help new judges acclimate to the demands of their new positions. Likewise, state court systems have increased their continuing legal education for judges. The creation of the National Association of State Judicial Educators to provide training, support, and assistance to judicial educators indicates the professionalization of this trend. Indeed, the State Justice Institute has made improving judicial education one of its highest priorities.<sup>115</sup> A recent collaboration between Pace Law School and the New York State Office of Court Administration to develop a training facility for state judges demonstrates a substantial commitment to judicial education.<sup>116</sup>

These resources and efforts, however, are only available after a judge assumes the bench.<sup>117</sup> Little is done to prepare judicial aspirants before taking the bench. As one commentator has concluded, "the task of learning how to be a judge remains difficult and largely unsystematic."<sup>118</sup>

This state of affairs is in marked contrast to other nations with a career judiciary.<sup>119</sup> Prospective judges in many other countries are trained for the demands and responsibilities of judging at an early point in their careers, so that a judicial temperament comes naturally. Early training for judicial aspirants is just as appropriate as law school for prospective lawyers.

Indeed, early and specialized judicial training may be even more appropriate at a time when an informal career judiciary is developing in this country.<sup>120</sup> In marked contrast to the past, the trend for selecting Justices of the Supreme Court of the United States is to avoid nominees with broad experience.<sup>121</sup> All current Associate Justices of the Supreme Court served on appellate courts before their appointment.<sup>122</sup> Chief Justice Rehnquist served for many

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115. State Justice Institute, 66 Fed. Reg. 51746 (Oct. 10, 2001). See Generally Sarah Famar, *Striving for a Judicial Balance on the Bench*, CHRISTIAN SCI. MONITOR, Feb. 7, 2002, at 16.

116. Victoria Rivkin, *Pace University Is Site for Judicial Institute*, N.Y. L.J., July 22, 1999, at 1.

117. See generally Judith Resnik, *Teaching Judges* (2001) (unpublished paper presented at the 2001 American Bar Association Annual Meeting, Chicago, Illinois on August 7, 2001).

118. Baum, *supra* note 107, at 151.

119. *Id.* at 150.

120. This phenomenon was recognized by Chief Justice Rehnquist in his Annual Report on the Judiciary at the end of 2001.

121. See generally LUCAS A. POWE JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

122. See [www.uscplus.com/info/justices.htm](http://www.uscplus.com/info/justices.htm).

years as an Associate Justice before his elevation.<sup>123</sup> Several of the current Justices were law faculty and none were broadly experienced public figures.<sup>124</sup> Without minimizing the distinction these Justices earned in prior positions, their career paths diverge from those of the likes of John Marshall,<sup>125</sup> Roger Taney,<sup>126</sup> Charles Evans Hughes,<sup>127</sup> Earl Warren,<sup>128</sup> and Lewis Powell.<sup>129</sup> These Justices, like almost half of all Supreme Court justices, had no judicial experience when they first came to the Supreme Court.<sup>130</sup>

The same trend toward a career judiciary exists at the state court level. All six current Associate Judges of the New York Court of Appeals served as elected judges before their appointment, and all but one served on New York's intermediate appellate court. Chief Judge Judith Kaye served almost a decade as an associate judge before becoming chief judge. This trend toward a career judiciary also finds support in the trend toward younger federal judges, at least among those appointed to the federal bench in recent presidential administrations.<sup>131</sup>

Although the phenomenon of a career American judiciary may not yet be substantiated by definitive study, the anecdotal evidence is certainly apparent. If this trend is real, the need for career training before assuming a judicial post may be comparable to that in countries where a career judiciary is well established. Even if the trend proves illusory, the need for earlier and more thorough training for those contemplating a judicial career is not. Rather, the need fits neatly with the predominant values of expertise through education and training for those exercising important democratic

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123. *See id.*

124. *See id.*

125. *See* GEOFFREY R. STONE ET. AL., CONSTITUTIONAL LAW xvi (2d ed. 1991). John Marshall served in the Continental Army before practicing law. He served in the House of Representatives and as secretary of state during the Adams administration. *See Generally* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1998).

126. Roger Taney served as attorney general and secretary of the treasury under the Jackson administration. *See* STONE ET. AL., *supra* note 125, at xxii.

127. Charles Evans Hughes served as governor of New York, secretary of state and Associate Justice of the Supreme Court of the United States, as well as being an unsuccessful presidential candidate before serving as Chief Justice. *See id.* at xiv.

128. Earl Warren served as governor of California. In 1948, he ran for vice president and was defeated. *See id.* at xxiii.

129. Lewis Powell was a prominent Virginia attorney who served as president of the American Bar Association and who was the head of the Richmond Board of Education during the desegregation era. *See id.* at xvii.

130. *See generally* HENRY J. ABRAHAM, JUSTICE AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (3d. ed. 1992).

131. *See, e.g.,* Frank, *supra* note 8.

responsibilities without representational legitimacy like legislators and executives.

The credential need not be a prerequisite for being a judge. More than 200 years of history animate our judicial selection processes and a wholesale abandonment of these processes is unlikely. Rather, the training can create a pool of candidates for judicial office who are well attuned to the judicial role before beginning judicial service. Thereby, they can provide an element of expertise regardless of the precise selection method, whether elected or appointed. Providing the opportunity to acquire the educational credential would assure an otherwise skeptical public that those selected to serve as judges have sophisticated credentials beyond mere legal training and experience. An educational conclusion would answer the complaints raised by the individuals who question the relative advantages of merit selection or popular election in their many guises. The credential would be a forceful declaration that a particular judicial aspirant is specially qualified to serve in the most important role in our judicial process.

To grant the credential, the educational program should be administered by an institute designed to train those considering a judicial office. This institute would be distinguished from the Federal Judicial Center and National Judicial College by its focus on training those who aspire to judicial office rather than those already in judicial office. While the precise organization of such an institute is well beyond the scope of this article, if the advocates of merit selection and judicial election reform marshaled their collective resources to reconceptualize the judicial selection issue, these details could certainly be developed and implemented in a fashion that accomplishes many of the objectives sought by these advocates.

### CONCLUSION

Many different factors affect judicial independence. Judicial authority, selection, tenure, and compensation are among the most important elements that define judicial independence. Even modest changes to some of these attributes can impact the status of judicial independence. Selection, perhaps the most visible of these factors, offers some relatively clear choices as the debate over judicial election reform and adoption of merit selection intensifies, at least in some jurisdictions. The goal of a quality judiciary selected by processes that appropriately balance independence and accountability to enhance public trust and confidence in our justice

system requires that creativity and sensitivity be applied to develop fresh approaches to old problems.

The failure of merit selection to advance raises a concern about its continued viability as a realistic policy alternative in the judicial selection debate. By reconceptualizing the values and attributes sought by merit selection, new methodologies can accomplish similar goals. The establishment of an educational credential to legitimize judicial aspirants as worthy of judicial office can serve the purposes sought through merit selection. An educational requirement will move the positive developing trends in judicial education to a point where they can do even more good.

An educational credential will not solve all the problems associated with judicial selection. It will, however, offer an opportunity to improve the judicial process, while remaining true to the foundations of the American system of justice—independence, accountability, and impartiality.