SELECTING JUSTICE IN STATE COURTS: THE BALLOT BOX OR THE BACKROOM?
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I. INTRODUCTION

When I first agreed to participate in this Symposium, I thought I would have something original to say. After yet one more ugly season of mudslinging by judicial candidates, with each year worse than the last, it was time for major change. At first take, the answer seemed obvious--states must replace judicial elections with some form of merit-based selection. The reasons seemed compelling: low voter turnout; distortions of thirty second sound bytes; spiraling campaign costs, to name a just a few. For most of the Twentieth Century, thoughtful critics have called for reforms to selecting the state judiciary. The chorus grows louder and larger with each campaign season.

Now, upon further reflection after extensive research, I humbly acknowledge that I am “adamantly ambivalent.” Merit selection has its own problems, moving the politics to the backroom, with nomination and selection made by highly partisan actors, with the resulting appointments reflecting tradeoffs, paybacks for past support, and a myriad of considerations other than genuine merit. Empirical data yields mixed results, but it appears that merit selection, as implemented by the states, has not helped diversify the state court judiciary in terms of race, ethnicity or gender, as reflected by the local population. By contrast, there has been some successful progress at revising the electoral process through the use of subdistricts, which have increased the number of state court judges of color.

Stepping back from the minutiae of judicial selection, a more fundamental question of accountability and independence remains. Much of the debate is about judicial activism, perhaps more accurately phrased as something the “other side” is doing with which you do not agree. It is an opportune time for the nation to raise its collective sights and ask whether politicization of the courts is a necessary and permanent fixture in the American legal system. As an alternative, we might consider the process used by some other nations, which seems to have achieved greater stability, less uncertainty and a more independent judiciary that is somewhat removed from politics.

The data contrasting different types of judicial selection and retention is overwhelming, complex, and--on some issues--inconsistent or inconclusive. Borrowing a quote from Roy Schotland, “I am a bear of very little brain.” I have struggled to make theoretical, empirical and political sense of the data. It leaves me with nagging concerns about both predominant methods of judicial selections (elections and merit selection) and also about the subsequent questions of evaluation and retention. Both selection systems are highly politicized, which likely promotes the judiciary's activist role in American society.

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II. CURRENT SELECTION FORMATS

Popular election of judges was virtually unheard of until the early Nineteenth Century. On the federal level, the United States Constitution dictated both the manner of appointment and lifetime tenure without reduction of salary. Andrew Jackson's presidency triggered a new wave of populism which advocated voter control over all aspects of government. Thereafter, several states amended their constitutions, providing for selection by election, or partisan challenges to incumbent judges. Newer states tended to follow uncritically the populist electoral model based on the idea that courts should have some accountability to the electorate. This transformation was achieved “almost completely without regard for the particular considerations of policy and principle which arise out of the nature and functions of the judicial arm of the government.” The pendulum swung back towards appointment starting in the 1920s. Missouri was the first state to implement what became known as “merit selection” in 1940.

Currently, there are four basic systems of judicial selection in the United States. Judges are chosen through either partisan or nonpartisan elections in twenty-one states; eleven additional states use elections for some judgeships, usually the lower courts. What has become known as merit selection is the sole selection method in fourteen states. Seven jurisdictions use a combination of merit and election methods with the remaining states using a combination of merit and appointive systems. At present, twenty-two states use merit selection for at least their highest appeals courts. This figure can be misleading. Approximately eighty-seven percent of all state court judges are selected or retained on the basis of popular elections, although about eighty percent of all judicial offices are initially filled by appointment to compete unexpired terms.

A. Appointment

The oldest method of judicial selection in the United States is appointment. In the original thirteen states, to avoid giving exclusive power to one individual, the legislature, or the governor with legislative approval, appointed judges. Today, most states use various combinations of the appointive system. California judges, except for superior court judges, are appointed by the governor, and must then be approved by a commission on judicial appointments. New Hampshire uses an elected executive council to approve appointments by the governor. In New York, only court of appeals judges are appointed by the governor with the consent of the senate, while the remaining judges are chosen in partisan elections. Most states fill interim vacancies by gubernatorial appointment.

B. Partisan Elections

Partisan election of judges began after Andrew Jackson's populist presidency. Some authorities believe the move to elections was a response to widespread dissatisfaction with the perceived elitism of judges. Proponents maintain that judicial elections assure accountability to the people and are the only reliable method for removing judges whose decisions are unacceptable to the populace. Voters may have little information on the individual judicial candidates. Partisan elections can cue voters on a candidate's ideology through the identification of political affiliation. The political party of the judicial candidate can be used for screening purposes. “Although it has been proven otherwise in
some cases, it was thought that with the party 'footing the bill' for and controlling recruitment, special interests would be kept at arm's length from the process.”

Some voters favor judicial elections because it gives them a choice between parties and a voice in the system. There is a greater electoral turnout when voters have more information on which to make a decision, such as political party cues. One unfortunate method of increasing voter participation is the heightened negativity of judicial campaigns. Wisconsin Supreme Court Justice Shirely Abrahamson faced blistering campaign attacks by opponent Sharren Rose in the 1999 race.

Critics of partisan judicial elections claim that increased costs of campaigning and problematic funding sources create an image of justice going to the highest bidder. Special interest groups try to help elect judges favorable to their cause by pouring money into those judges' campaign coffers. Six candidates spent almost six million dollars in 1990 Texas judicial campaigns. Abrahamson and Rose spent over one million dollars on their campaigns.

Another cost of judicial elections is time spent campaigning for office instead of fulfilling the judge's duties. Successful lawyers may be reluctant to run for office, investing their reputation, time, money and effort seeking a job that is neither guaranteed nor highly paid. Additionally, having to answer to political parties and vocal contributors can deter qualified individuals from running for a judicial position.

It is debatable whether partisan elections in fact make judges accountable to the public. Most judges are initially appointed to fulfill vacant positions by the state governor, and run unopposed in the next periodic election. This scenario effectively removes the voter from the equation. Even when there is opposition in a judicial race, voter turnout is typically low. Unless the judicial election takes place during the general election and has become a hotly contested race, most voters either do not vote for the judicial offices or vote with little information, evidenced by the fact that they cannot remember who they voted for immediately afterwards.

C. Nonpartisan Elections

Thirteen states use nonpartisan elections for judicial offices, and seven additional states use it only for selected judicial offices. Ohio is unique in that it nominates judicial candidates in partisan primaries and then places them on a nonpartisan ballot for the general election. Supporters claim that nonpartisan elections remove the problem of politics entailed by partisan elections while keeping accountability to the voters. Adopted in response to the problem of judges controlled by party politics, nonpartisan elections were intended to involve voters in the process and exclude politics and special interests.

“[M]ost commentators contend that, far from being an improvement upon partisan elections, nonpartisan elections are an inferior alternative to partisan elections because they possess all of the vices of partisan elections and none of the virtues.” Voters lose their main cue for information on who to vote for and, lacking more relevant information on individual candidates, rely on other
factors such as ballot position or name recognition. Candidates who served in prior political offices as prosecutor, legislator or county commissioner, have greater name recognition which helps them in later campaigns for judicial office. Voter apathy may be greater in nonpartisan elections, with lower turn-out and voter roll-off (not voting in certain races), so that the judicial incumbents usually win. To counter this information problem, some jurisdictions print and distribute voter pamphlets, which greatly increases the election costs. Nonpartisan elections are becoming increasingly expensive and involve many of the same problems with campaign contributions as partisan elections. The most obvious example is the highly politicized, nasty and expensive battle between Ohio Supreme Court incumbent Justice Alice Robie Resnick, a Democrat, and her Republican challenger District Court of Appeals Judge Terrence O'Donnell. Business and insurance groups, with generous backing from the Chamber of Commerce, targeted Resnick for defeat because of her votes in two controversial cases. While ultimately unsuccessful, the bruising fight has prompted state leaders to reconsider selection methods.

D. Merit Selection

Albert Kales, Northwestern University law professor, first called for merit selection of judges in 1914 when the American Judicature Society was founded.

Kales' plan called for (1) the nomination of judicial candidates based solely on merit by a commission of presiding judges, (2) the selection of judges from this list of nominees by an elected chief justice, and (3) retention elections conducted on a noncompetitive... basis. In 1926, British political scientist Harold Laski suggested that the Kales plan be modified in certain respects. Laski recommended that the Governor rather than the chief justice appoint judges and that the advisory committee consist of a judge or judges from the state supreme court, the attorney general, and the president of the state bar association.  

California was the first state to adopt a type of merit plan for its supreme court and intermediate courts; it is still in use today. The governor makes nominations to fill vacant positions which must be approved by a commission including the chief justice, present justice of court of appeals and the attorney general. After confirmation, the judges must stand for retention at regular intervals. California is also noteworthy for having been the first state in which hotly contested retention elections resulted in the ouster of judges because of their unpopular decisions.

The most widely known merit selection plan, the “Missouri Plan,” was first adopted in 1940. A judicial nominating committee makes recommendations to the governor who then chooses one of the nominees to fill a vacancy. Like many other states, Missouri now uses a “modified” merit system, in which appellate and metropolitan trial courts use a merit appointment process, but elections select the trial bench in rural areas. The judge must thereafter stand for retention at regular intervals. Missouri continues to use this system for its supreme court, courts of appeals and its trial courts in

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large metropolitan areas such as Kansas City and St. Louis. Three separate nominating commissions are used in Missouri: one for the appellate courts, and one each for Jackson county and St. Louis county circuit courts. Although repeal measures have been regularly introduced, the plan has yet to be revoked. All other state judges are selected in partisan elections.

Alaska was the first state to enact a merit plan for all state judges, in 1959. Rhode Island is the latest state to change to the merit plan for its trial judges in 1994. Delaware, Hawaii, Massachusetts, and Nebraska are the only other states which use merit selection for all judicial appointments.

Judicial nomination committees are composed of lawyers and laypersons. Some jurisdictions require the nominating commission be divided between political parties. Arizona dictates that the names submitted to the governor must be balanced based on political parties. According to Sheldon and Maule, the nomination committee lessens the political pressure on the appointing authority, usually the governor, so that the most qualified persons are submitted as finalists.

Merit selection proponents maintain that it: 1) removes politics from the selection process as much as possible, especially when there are effective controls for politics in the selection of nomination committee members; 2) removes the need to campaign for office and raise contributions; 3) results in more qualified applicants and selections; 4) removes the issue of voter apathy and the problem with ethical restrictions on judicial campaign speech; 5) allows accountability to voters by using retention elections to remove bad judges; and 6) increases minority representation on the bench. They contend it is the best method to reduce the influence of politics in judicial selection.

Opponents disagree with most of these assertions. They contend merit selection is elitist and merely moves the politics outside the light of the electoral system and into the backroom, allowing for private decisionmaking by politically-appointed nomination committees. They assert that retention elections are undemocratic, misleading to voters, and allow little meaningful choice. Campaign contributions must still be addressed if a judge up for retention is targeted by a special interest group based on an unpopular decision. A courageous judge may have a difficult time defending her record against an anonymously funded soft money campaign. In contested judicial elections, at least the voters are presented with a known alternative to the incumbent, enabling them to vote in a more meaningful way.

E. Hybrid Selection

Eight states use some combination of merit selection, appointment, or elections to fill their judicial positions. In South Carolina, for instance, a merit commission nominates candidates, but the judge is elected by the legislature. The legislature also elects the judges in Virginia. In Maine, judges are confirmed by the Senate after being appointed by the governor. In New Hampshire, judges are appointed by the governor, then confirmed by an elected five member executive council. Floridians recently amended their constitution to provide for counties to vote on whether to “opt-in” to selecting trial court judges through the merit system.
III. INDEPENDENCE AND ACCOUNTABILITY: A DELICATE BALANCING ACT

A fundamental tenet of American democracy calls for a delicate balance among the three coordinate branches of government. Each operates as a check against the abuse of power by the others. Members of the legislative and executive branches are empowered to act by the people and are selected through democratic elections. Their actions are subject to review by the judicial branch. Alexander Hamilton stressed the importance of an independent judiciary in The Federalist No. 78. Before his presidency, Thomas Jefferson staunchly supported life tenure for judges, subject to their good behavior. He was, of course, less sanguine about the issue while President, when the Supreme Court declared its power of judicial review to invalidate unconstitutional federal legislation. Despite episodic and politicized challenges to an independent judiciary, most mainstream constitutional and legal scholars today would agree that independence is crucial for a just and fair society which abides by the rule of law.

On the other hand, if an independent judiciary could act arbitrarily to overcome legitimate exercises of legislative or executive power, it would then reign supreme--itself unrestrained by those branches most sensitive to popular will. Thus, it is argued, courts must be accountable to the public for the legitimacy of their decisions.

The Florida Supreme Court's crucial, and disputed role in determining the 2000 presidential election exemplifies the importance of public trust and confidence that the judiciary can rise above partisan politics. A lingering and tragic consequence of those political squabbles may be the demeaning of the judiciary. For those judges who are next up for a retention vote, they may experience first-hand the graphic metaphor of a crocodile in the bathtub.

Ignoring the political consequences of visible decisions is “like ignoring a crocodile in your bathtub.” The ability to ignore the crocodile, of course, doubtless depends on how long before one has to bathe. When there is a substantial time gap between the review of ballot measure and the next retention election, the judge is likely to feel more courageous. It is no answer to say that judges who are unwilling to serve as crocodile food for the sake of preserving republican government should not be judges in the first place. It is precisely the most principled judges . . . whose candor and integrity will compel them to question their own fortitude in the face of the crocodile. The unprincipled ones will simply step out of the tub without telling us about it.\footnote{Julian N. Eule, Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. COLO. L. REV. 733, 739 (1994) (quoting now-famous metaphor used by former California Supreme Court Justice Otto Kaus) (footnote omitted).}

Electorally accountable state court judges most need protection of their independence when they confront “measures motivated by popular passion or prejudice.” Sadly for us all, “[a] judiciary that is directly accountable to the identical political forces which shaped the judgment under review may find it difficult to provide sustained enforcement of more deliberative constitutional norms.”
Independence and accountability exist in tension with each other. To the extent court decisions are dictated by the rule of law, but conflict with popular sentiments, one of the two values is compromised.

... First, the rights of individuals and unpopular minority groups may be compromised by an elective judiciary. Second, and more mundane but no less important, the impartial administration of “day-to-day” justice may be compromised. Increasingly, judicial elections threaten the ability of state courts to decide cases fairly under the law and unimpaired by the majoritarian difficulty. ... Too often it is moneyed political forces and single issue constituencies who dominate the discourse in judicial elections. The electoral outcome, then, reflects more the will of a vocal and powerful segment of the community than that of an enlightened majority.

The inherent tension between independence and accountability may be irreconcilable. Perhaps this is a good thing--the “delicate balance” that makes our system “a government of laws and not men.” Institutional mechanisms hold state courts accountable to the rule of law. Decisions which erroneously interpret the federal law or constitution are on occasion subject to reversal by the United States Supreme Court. Deeply unpopular state court statutory interpretations and common law decisions can be legislatively overruled. State court interpretations of the local constitution require for accountability the more cumbersome method of constitutional amendment. It is only discretionary decisionmaking--that involving factual ambiguities or legal decisions at the boundaries of existing legal and constitutional principles--in which judges could arbitrarily go either way and not be subject to reversal. This, I would suggest, defines the proper category of judicial decisionmaking for which some accountability principle should operate.

Does accountability require that the selection and retention of state court judges be committed to the electoral process? I think not. ... Popular will, to the extent acted upon by voters, selects the legislative and executive representatives. ... [B]y selecting elected representatives, the people delegate the duty to make wise and informed decisions. They expect their representatives to exercise that responsibility, not to abdicate it by succumbing to those with the loudest (or best-funded) voices. They tacitly realize that self-governance is a messy process and political compromises are often required. As for the judicial branch, however, they rightly expect that cases be decided fairly under the facts and law, by impartial judges who remain above the fray of politics. Judges who are erratic in their decisionmaking, who treat participants disrespectfully, or who are dismissive of established precedent or statute, are properly held accountable to the public at large. The essential question then, is how to strike the correct balance, deterring judges from arbitrary or tyrannical impulses, while protecting the independent professional judgment of those whose conduct falls within acceptable parameters. ...

Citizens expect that judges will conduct themselves reasonably well in public and private affairs, perform their tasks competently, without bias, and decide cases based upon accepted legal authorities. Absent public outcry over egregious conduct, most people are inclined to defer to the good judgment and skill of those delegated to perform a public task. ...
Ironically, the electoral process may give a disproportionate voice to groups which are dissatisfied with the judiciary. Recent elections in several states have demonstrated that well-financed opposition campaigns may target for defeat sitting judges who have competently exercised judicial independence, and thereby incurred the wrath of special interest groups. The underlying strategy of negative attack ads may be to suppress voter turnout, by “sully[ing] the process so completely that the opponent's supporters lose interest in voting altogether.” For example, former Tennessee Supreme Court Justice Penny White was defeated in a retention election with an extremely low turnout, after an aggressive ouster campaign focused on her vote in one death penalty case.

IV. IMPERFECT SELECTION SYSTEM

A. Defects in the Electoral Process

3. Nastier & Noisier Elections

Over the last fifteen years judicial campaigns have increasingly become “high salience” events—those generating widespread public interest. Political consultants (a/k/a spin doctors) help devise campaign strategies to arouse public concerns, but may do so in a simplistic way that obscures reasoned debate. Challengers target attacks on the incumbent's conduct in office, often taking out of context the judge's vote or language in an opinion, to inflame public passion on hot political issues. A common strategy targets appellate judges who are allegedly “soft on crime,” featuring televised personal appeals by a murder victim's family member. Sensationalist attacks may trigger unreflective, visceral public reactions, but not rational discussion on the merits of the issues and their relevance to the particular judicial office. The problem is compounded in some jurisdictions, where geography or the number of potential voters requires communication over the airwaves. Opponents may launch simplistic attacks on the outcome of litigation; a judge's reasoned analysis of a complex case can seldom be reduced to a pithy reply in a thirty second sound byte.

4. Criteria for Quality Judges

Besides objective criteria such as minimum level of education and experience, what other qualifications are relevant? Although there might be consensus on some general criteria, individual assessment is not easily susceptible to objective measurement and may vary widely among those with access to first-hand information about the candidates. In the abstract, most persons would likely agree that a judge should have a competent mastery of the law, good moral character, intelligence, impartiality, maturity, emotional stability, courtesy, decisiveness, and administrative ability. They would probably also agree that it is proper to consider a candidate's judicial philosophy and approach to legal interpretation.

Who is better positioned to evaluate judicial candidates—the voting electorate or designated representatives on judicial nominating commissions? One may question whether intelligence, analytic abilities, attention to detail and other personality traits relevant to judicial qualifications would shine under the political spotlight of forums and other public campaign events. Strong political personalities do not necessarily make good judges; the converse does not hold. Superb
judges may be charismatically challenged. On the campaign trail, the political charisma of an otherwise unexceptional candidate may overshadow a better qualified candidate with a quiet and deliberative personality. Seasoned observers can recall numerous instances in which the voters elected judges who were poorly suited to the office. Sometimes aberrant personalities have been elected, and have then wrought havoc on the local legal system. Good politicians can make bad judges.

Merit selection proponents are convinced that the appointment process yields better qualified judges. By way of proof, they claim that discipline for judicial misconduct almost invariably involves elected, not appointed judges. . . .


Lurid tales of interest-driven campaign contributions cause widespread public skepticism about state court biases. For example, one study reports that “[f]orty percent of the $9.2 million in campaign contributions raised by seven justices elected to the Texas Supreme Court since 1994 came from parties and lawyers with cases before the court or contributors closely linked to these parties . . . .” Within the legal community, stories abound of judges fleecing lawyers who practice before them to support their re-election campaigns. Meanwhile, large amounts from anonymous donors are spent to fund “informational” challenges by special interest groups which seek the ouster of sitting judges.

For more than twenty years, efforts at campaign finance reform have been frustrated both by lack of political will and the Supreme Court's decision in Buckley v. Valeo, which upheld limits on contributions, but struck limits on expenditures. Relatively large sums of money are needed to fuel campaigns for state trial and appellate courts. Wealthy candidates may, without restriction, fund their own campaigns. Candidates who lack independent means must garner outside support. Among the lay public, many believe that the impartiality of state court judges is compromised by their need to curry the favor of financial contributors. Meanwhile, many lawyers complain that they only want a level playing field when litigating in state courts, and bristle at the notion that they should have to pay to insure impartiality. The judicial ethics rules purport to insulate judicial candidates from direct fund-raising activities. Nevertheless, there is no pretense that the candidates remain ignorant about who did, and who did not contribute to their campaigns. . . .

B. MERIT SELECTION: THE SOLUTION TO ALL THAT AILS JUDICIAL SELECTION?

States could avoid the uncertainty of messy judicial elections by switching to appointive systems. . . . Some form of merit selection is preferred by most bar leaders--both national and statewide, and by most legal scholars. A slim majority of states appoint their high court justices. Because more than eighty percent of all judicial offices are initially filled by appointment to complete unexpired terms, the electoral system usually operates in the shadow of interim appointments, giving the appointee the dubious benefit of incumbency. If the public and its elected representatives were convinced that appointments resulted in better judges, a formal switch to an appointive system would be the obvious cure for the pervasive defects in the electoral system.
Why is the electoral system so resilient to change?

1. The Power of Inertia

By careful design, the constitutional system of government is cumbersome to change. Administrative or executive fiat cannot upset a democratic process built into the constitutional structure. States which made the switch have overcome the power of inertia by carefully forging political compromises that assuaged deep-seated concerns. Absent compelling proof that the cure is better than the disease, established political voices have successfully countered efforts to replace elections with appointments. Uncertainty about how the appointment process might affect independence, accountability, access to and fairness of the legal system all combine to make inertia a powerful source of resistance to change.

2. Democracy & Distrust

The accountability and independence debate certainly has played an important role. Especially in states with strong populist traditions, voters have been reluctant to relinquish their role in judicial selection to an appointment process where their opportunity for input is limited or non-existent. Judges have “awesome powers in this society.” They decide issues of far-ranging importance to the parties, the state, and the nation: election disputes, intimate family matters, business disputes, criminal culpability, and the extent of state governmental powers and individual rights. While the highest appeals court, in theory, remains available to correct lower court errors, the functional reality is that state trial judges largely determine final outcome in the vast majority of litigation. Retention elections are largely symbolic events, with minimal likelihood of ousting incompetent or biased judges, and yet threaten to punish those with courage to “follow the law” despite the risk of adverse public reaction.

Merit selection reformers contend that judicial nominating commissions are better able to weed out unsuitable candidates, objectively evaluate applicant credentials, and identify the most qualified for final selection by the governor or other appointing entity. Judges who take the bench through this less political process, they contend, have greater independence to exercise their best impartial judgement, and are less concerned about partisan recriminations for their conduct in office. No state which has moved to merit selection has reverted to judicial elections.

I suggest that the stubborn resistance to change is grounded in a distrust that merit selection moves the politics from out in the open, to the privacy of the backroom, where decisions are made by a small number of partisan actors who have no accountability to the public at large. Appointment or election to judicial nomination commissions (hereinafter JNC’s) is itself very political. About one third of lawyer and non-lawyer commissioners have had high levels of political or civic activity, having served in partisan or public offices. This evidence raises a “troubling spectre of political favoritism” that could call into question the legitimacy of merit selection systems. Over the years, JNC’s have tended to be overwhelmingly white, male, and dominated by lawyers and business interests.
The fact that JNC's operate in private raises suspicion that their decisions reflect backroom politics and secret private deals. Some empirical data suggests that JNC's actively consider party politics, with the short list of qualified candidates tending to support the governor's political preferences. Critics identify at least three types of “panel-stacking” games: 1) rigging—in which the commission chooses a combination of nominees that leaves the governor no real choice; 2) loading—which is designed to force the governor to appoint someone he or she does not want, but will accept as a “lesser evil”; and 3) wiring—where the nominating commission complies with what it understands to be the governor's choices.

If indeed, merit selection is the superior method, it must open up the deliberative process to the light of day and involve a broader cross-section of the community as members of nominating commissions. The American Judicature Society Model Provisions and at least a dozen states include some requirement that appointing authorities “make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic, and racial diversity of the jurisdiction.” Precatory admonitions are not sufficient. Absent explicit diversity requirements, little careful attention will be given to such matters, with the composition of the commission poorly reflecting community-wide demographics and viewpoints. Lawyer domination may be for good reason: unique access to and understanding of the legal system, and familiarity with the past conduct of candidates for judicial office. That said, it is all the more important that there be diversity among both the non-lawyer and lawyer members of JNC's.

For the present, I make two suggestions. One, judicial nominating committees must reflect the diversity of the state's population based on gender, race, ethnicity and religion. Where there are multiple appointing authorities, there must be some requirement of consultation and coordination in order to achieve this end. This recommendation extends beyond existing “gender-balance” provisions in numerous state laws. Courts, as antimajoritarian institutions, can only do their jobs wisely if their deliberations are enhanced by the array of experiences and viewpoints of the state. Particularly in jurisdictions where political life is dominated by distinct religious, economic, class or ethnic groups, the non-dominant views need to be heard in the judicial selection process; if they are not, the resulting appointments will predictably reflect only the narrower, dominant perspectives. Second, I propose that states adopt an open meeting and public hearing component for judicial nominating commissions. To the extent that the public (either in person, or through the media) has an opportunity to attend and be heard at some time before names are submitted to the appointing authority, there will be greater confidence that the selection process was open, and considered a wide range of input. Clouds of suspicion about backroom political deals can be dissipated with the light of day. This is not to suggest that all meetings of the nominating commission should be open to the public. Closed meetings are appropriate for individual interviews with candidates. Final deliberations, may also be conducted which may require sensitive and frank discussions of candidates' qualifications and past conduct in private.
3. Is “Merit” a Misnomer?

Defining qualifications for judicial office, collecting information on candidates, and evaluating their relative standing are closely related to the process questions discussed above. Published prerequisites for the job tend to be general. Beyond the minimal formal requirements of legal education, residency and license to practice, they identify criteria which is difficult to evaluate on an objective basis. Inevitably, subjective evaluations of individual commissioners enter the equation. Political considerations are also taken into account. While merit selection clearly does better than elections at eliminating unqualified candidates, it cannot be shown to result in appointment of the “best able and most qualified” candidates. In that respect, the term “merit selection” is inaccurate, and may perpetuate a myth of meritocracy which veils biases and privileges inherent in the legal system and the society at large. Those appointed to serve likely reflect the social, economic and ideological views of those controlling the process. If proponents of merit selection truly wish to bring about reform in judicial selection, the process must undergo some structural changes to achieve a more balanced, representative and open process with greater public accountability.

Just as there is significant variance among state commissions in their demographic composition, there is also a great variance in the process used to solicit and evaluate applications. Some JNC's are proactive and have rules that encourage external recruitment of qualified applicants. If those recruited applications are seriously considered for appointment, it can only improve the caliber of the judiciary. If, however, the JNC is only “going through the motions,” then such efforts are a waste of time for all concerned. In some states, lawyers may perceive the appointment process as “wired” and do not apply unless they have friends in high places who will spend the political capital lobbying behind the scenes on their behalf. Their reticence is understandable, especially when they or those they know have invested considerable effort in applying, they appear “qualified” according to the stated criteria, but they have not been seriously considered or given the opportunity for a personal interview.

In some places, the appointment process has tended to exclude applicants of color, women, and those without influential political connections. It may be no accident that such traditional “outsiders” have lacked the political savvy or wherewithal to have the nominating commissioners lobbied on their behalf. Empirically, data on the diversity effects of merit selection is equivocal. One study found that the hybrid Missouri plan, with nomination by a commission and gubernatorial appointment, worked to the greatest advantage of white trial court judges, and possibly worked against increased opportunities for blacks on the state bench. Other studies report that the largest

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240 Comment from prominent jurist at diversity meeting held at Oklahoma Bar Association 1999 Annual Meeting (Nov. 11, 1999) (name withheld for reasons of discretion).

241 See Barbara Luck Graham, Do Judicial Selection Systems Matter? A Study of Black Representation on State Courts, 18 Am. Pol. Q. 316, 332-33 (1990) (noting gubernatorial and legislative appointment systems, without nomination commissions, increased black representation on state trial courts; judicial elections with at-large districts have been less successful); see also Robert C. Luskin et al., How Minority Judges Fare in Retention Elections, 77 Judicature 316, 321 (noting unlikelihood that greater minority representation will be achieved through merit selection; probable shortfall occurring in
proportion of African-Americans and women attained judicial office through merit plans. Yet other studies conclude that differences in selection methods do not account for underrepresentation of black and Hispanic judges on state courts, but rather the most important factor is the proportion of black and Hispanic lawyers in the state. Anecdotally, in Oklahoma, few African-American, Hispanic or women candidates make it out of the nominating commission. At the federal level, since former president Jimmy Carter's administration, merit selection has significantly expanded diversity on the bench. The priority given to diversifying the state court judiciary is a profound

nominating process).

242 See Goldschmidt, supra note 81, at 66-67 & nn.449-57; see also Brown, supra note 169, at 323 (noting that 56% of women and 59% of African-Americans on state appeals courts were appointed, with or without commission process; 29% of women were elected by popular vote, and 27% of African-Americans on state appeals courts were elected by popular vote or by state legislature).


244 See U.S. Census Bureau, ST-99-32 Population Estimates for States by Race and Hispanic Origin: July 1, 1999 <http://www.census.gov/population/estimates/state/srh/srh99.txt> (visited Sept. 1, 2000). According to the U.S. Census Bureau, minorities comprise 21% of Oklahoma's population (7.8% African-American; 7.8% American Indian & Alaska Native; 1.3% Asian & Pacific Islander and 4.1% Hispanic). See id. In the Oklahoma appellate courts, which are nominated by a JNC and appointed by the governor, of the 24 justices and judges, three women serve, one of whom is adopted into the Cheyenne-Arapaho tribe. See Letter from The Honorable Janice P. Dreiling, 1999 President of the Oklahoma Judicial Conference, to the membership (Nov. 8, 1999) (on file with author); The Supreme Court of the State of Oklahoma, Justice Yvonne Kauger, District No. 4 (visited Nov. 8, 2000) <http://www.oscn.net/oscn/schome/kauger.htm> (bio describing Oklahoma Supreme Court Justice Kauger). Governor Frank Keating appointed Tom Colbert to the Oklahoma Court of Civil Appeals in Spring 2000; Judge Colbert is the first African-American to sit on an Oklahoman appellate court. See John Greiner, Black Attorney Takes Oath as Appellate Judge, The Daily Oklahoman, Apr. 25, 2000, at A5. On the elected trial bench, of the 71 district judges, 15 are women and four are black; of the 77 associate district judges, seven are women and none are black; of the 77 special district judges (appointed by a presiding judge), 15 are women and two are black. See Dreiling letter, supra. Thus, Oklahoma appellate courts include 4.17% ethnic minorities and 12.5% women judges. See id. Among elected district court trial court judges, there are 5.63% ethnic minorities and 21.13% women; of the elected associate district judges, located in less populated areas, 9.09% are women and 0% are minorities. See id. Of the appointed special district judges, 2.6% are minorities and 19.48% are women. See id.

question which policy-makers should openly address. Delicate questions of racism, sexism and other biases are too easily ignored in debates about the manner of judicial selection. As one task force report aptly stated:

[D]iversity benefits the judiciary both by enhancing perspectives that bear on governance and by giving people of differing backgrounds a sense of assurance that persons with similar life experiences are in positions of authority . . . appointing authorities might wish to appoint women and minority judges in greater numbers; and that diversity in judicial appointments should remain a continuing goal. 246

Given the changing population trends, ethnic and gender diversity among state court judges is of paramount importance.

C. Performance Evaluations & Retention Elections: Much Ado, Minimal Accountability?

Most states which initially appoint judges for a term of years use periodic retention elections--at least in principle--as a public mechanism for judicial accountability. Other commentators have addressed how, in a few notorious instances, special interest forces have seized control of the debate, to mount serious, and sometimes successful, campaigns to oust independent judges for their legally correct, but unpopular decisions. Elsewhere, sitting judges are vulnerable to contested partisan or nonpartisan elections. Research has shown that the fact of retention elections has a pronounced effect on judicial behavior. Until recently, retention elections were “political non-events.” Since the 1986 ouster of three California Supreme Court Justices, the landscape has changed dramatically. There is now a substantial risk that judges will “receive and act upon” the message “that if they want to avoid negative votes, it is best to produce results with which the voters will agree.” Whether this is conscious or not is beside the point. In critical cases, “the potential that the pendency or threat of a judicial election is likely to have for distorting the proper exercise of the judicial function is substantial, and palpable.”

Another option would delegate judicial performance evaluations to commissions, with term renewal automatic upon a majority vote by the commission. Besides lingering questions of public accountability, evaluation commissions may also threaten independence. One critic of such commissions voiced concern about politically charged threats to judicial independence, particularly where special interests can influence the decision whether to recommend retention of an incumbent. As for selection, there is no clear solution. Any evaluation and retention process must strike a balance between accountability and independence.

Regardless of the method of judicial selection, a bona fide system of evaluating judges is essential. The office has far too much power and responsibility to be free of any public accountability. Most major employers conduct annual performance evaluations which identify areas needing improvement.

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and note strengths deserving acknowledgment. In the context of state court judges, the difficult question is how to create an evaluation process that can improve the quality of judging, include an appropriate amount of public accountability, and not impair independent professional judgment to decide cases correctly under the law. It is beyond the scope of this work to tackle such questions. Nevertheless, a few suggestions are possible. First, input should be sought from the full array of persons who interact with the judge in an official capacity, including lawyers, other judges, litigants, witnesses, jurors and court personnel. Bar polls, which gather input only from practicing lawyers, arguably are too narrow, may reflect lawyers' self-interest, and lack public credibility. Second, the evaluative criteria should be defined carefully, to exclude the risk of negative assessment for professionally competent but unpopular decisions. For example, the ABA Judicial Performance Review Guidelines identify “integrity; knowledge and understanding of the law; communication skills; preparation; attentiveness; control over proceedings; managerial skills; punctuality; service to the profession and public; and effectiveness in working with other judges.” Third, the system should be structured to distinguish between information gathered for the purpose of improving individual performance (especially anonymous comments and personal interviews) and that which is suitable for public distribution to educate the electorate.

V. CONCLUSION

I conclude where I began, with a bit of whimsy. Winnie-the-Pooh's simple wisdom can help shed light on the ordinary way of doing things. And so, I suggest that states rethink why, and whether it is a good thing that judicial selection has become so politicized. If, as I think it is, the mainstream of judging is about being fair, impartial, honest, compassionate, legally competent and administratively efficient, then why should judicial selection be relegated to the vagaries of a process deeply influenced by political considerations? If, indeed, we most highly value “equal justice under the law” could we not devise a selection process that strives to identify, from a more objective standpoint, which candidates are “best able and most qualified” to achieve the goals of wise, fair and representative judging? With some misgivings about the risk of abdicating important choices to other bureaucratic and arbitrary processes, I ask whether there are viable alternatives to the current, highly political selection systems.

Thoughtful observers probably agree on the broad qualifications: distinguished legal experience, integrity and judicial temperament, and overall an inclusive and independent judiciary. As always, the devil is in the details. The new ABA Selection Standards are on the right track, recommending that an independent and representative body evaluate the qualifications of judicial candidates before final selection by appointment or election. Might not the public be willing to delegate authority to a respected, politically independent and fairly representative entity charged with responsibility to evaluate prospective judges, according to publicly-announced, objective and inclusive criteria? This suggestion is hardly radical; it merely reinforces the importance of using sound personnel practices in making hiring decisions. Initial screening of candidates could be done through use of non-discriminatory and job-related standardized tests evaluating minimum expected competency in relevant areas of law and procedure. No veterans preference would give some categories of applicants a decisive advantage over others. Second tier screening could be done by evaluating candidates' verifiable credentials according to how well they satisfy the articulated criteria. After
identifying those candidates who are most qualified, consideration could then be given to their judicial philosophy and approach to statutory and constitutional interpretation. Whether final selection is made through appointment or election, this tiered screening process would give the public greater assurance that those who take the bench will be able, wise and compassionate.
## APPENDIX A

### JUDICIAL SELECTION METHODS

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<td>Partisan Non-Partisan</td>
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