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Commission-Based Judicial Appointment: The American Experience[1]

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1. As Justice Louis Brandeis famously observed in *New State Ice Co.* v. *Liebermann* (1932), "it is one of the happy incidents of the federal system that a courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[2] Brandeis's metaphor highlights the opportunities for learning from political practices in other jurisdictions, and it applies to learning across national, as well as state, borders.[3] That, at least, is the assumption of this paper, which explores the experience of the American states with the appointment of judges in order to elucidate for a Canadian audience the issues associated with commission-based systems of judicial selection.

1. An earlier version of portions of this paper was published as "Designing an Appointive System : The Key Issues", 34 *Ford. Urb. L. Rev.* 291 (2007). Research on this article was supported by a fellowship from the National Endowment for the Humanities, and the author gratefully acknowledges that support. The analysis and conclusions are the author's alone and do not represent the views of the National Endowment for the Humanities.

2. *New State Ice Co.* v. *Liebermann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Although one may endorse Brandeis' emphasis on learning across borders, his laboratory metaphor has unfortunate implications. *See* G. Alan TARR, "Laboratories of Democracy? Brandeis, Federalism, and Scientific Management", 31 *Publius* 37 (2001).

3. *See* Mary L. VOLCANSEK, "Exporting the Missouri Plan : Judicial Appointment Commissions", 74 *Mo. L. Rev.* 783 (2009). Obviously, the flow of information can proceed in both directions. Judith L. MAUTE, "English Reforms to Judicial Selection : Comparative Lessons for American States?" 34 *Fordham Urb. L. Rev.* 387 (2007).

JUDICIAL APPOINTMENT IN THE UNITED STATES

2. The United States Constitution prescribes that federal judges be appointed by the President with the advice and consent of the Senate, and once appointed, they serve during "good behavior", which usually means until retirement, death, or disability.[4] Some early state constitutions also provided for judicial appointment by the chief executive, with confirmation of gubernatorial appointments by an executive council or by the legislature, while others opted for legislative selection of judges. With only 2 exceptions (Indiana and Mississippi), all the states that joined the Union from 1791 to 1847 followed the lead of the original 13 states, adopting legislative or gubernatorial selection for judges.[5]

3. Although the American states are famous — or infamous — for electing judges, today appointment is the predominant mode of judicial selection in the United States. Currently, 21 states initially appoint the judges of their general jurisdiction courts, while another 4 states appoint at least some of their trial judges.[6] Twenty-two of the states that have intermediate appellate courts appoint their members, and 30 states appoint the justices of their supreme courts.[7] Moreover, even in states where selection is nominally by election, 44 states fill unexpired judicial terms by gubernatorial appointment.[8] And in a study of accession to state supreme courts from 1964 to 2004, Lisa Holmes and Jolly Emrey found that 52 percent of justices in states that elect judges were initially appointed to their positions.[9]

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4. U.S. Constitution, Art. III, sec. 1.

5. *See* F. Andrew HANSSEN, "Learning about Judicial Independence: Institutional Change in the State Courts", 33 *J. Legal Stud.* 431 (2004), and more generally G. Alan TARR, *Without Fear or Favor: Judicial Independence and Judicial Accountability in the American States* (forthcoming 2011).

6. These data on judicial selection are found in AMERICAN JUDICATURE SOCIETY, *Judicial Selection in the States: Appellate and General Jurisdiction Courts*, [On line]. http://www.ajs.org/js/JudicialSelectionCharts.pdf.

7. *Ibid.*

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

9. Lisa M. HOLMES & Jolly A. EMREY, "Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments", 27 *Just. Sys. J.* 1, 6 tbl. 1 (2006).

4. The systems of judicial appointment now in place in the American states differ markedly from the federal model — currently, only 4 states (California, Maine, New Hampshire, and New Jersey) authorize the governor to appoint supreme court justices without a nominating commission.[10] Most appointive systems in the states trace their roots to the early twentieth century, when judicial reformers were seeking alternatives to partisan election of state judges, which was then the predominant mode of selection. In 1914 Albert Kales, a co-founder of the reformist American Judicature Society, proposed a commission-based appointive system that became the basis for the "merit selection" system that has come to dominate in the states.[11] Under Kales' original proposal, an independent, nonpartisan commission would nominate candidates to fill judicial vacancies, the chief justice of the state supreme court would choose judges from the lists of nominees, and the populace in non-competitive ("retention") elections would periodically assess the performance of the judges thus selected. Later versions of commission-based appointive systems replaced the chief justice with the governor, thereby substituting a political official for a judicial one, but otherwise followed Kales' plan. In 1920 the American Judicature Society endorsed merit selection, and in 1937 the American Bar Association followed suit, providing powerful institutional support for reform efforts. In 1940 Missouri became the first State to institute merit selection.[12]

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10. *Supra,* note 6, p. 4–5. Maine, New Hampshire, and New Jersey use gubernatorial appointment to trial courts of general jurisdiction, and only California and New Jersey use it for appointment to their intermediate appellate courts, as Maine and New Hampshire do not have intermediate appellate courts. In New Hampshire recent governors have established their own commissions by executive order to assist in the screening of potential judges, although all members of these commissions are appointed by the governor.

11. Albert A. KALES, *Unpopular Government in the United States*, p. 107–118 (1914).

12. We employ the term "merit selection" because it has become the standard denomination for commission-based selection systems in the United States. However, one need not necessarily endorse its "propagandistic" overtones. *See* Michael R. DIMINO, "The Futile Quest for a System of Judicial 'Merit' Section", 67 *Alb. L. Rev.* 803 (2004). On the development of merit selection and its endorsement, *see* Glenn R. WINTERS, "The Merit Plan for Judicial Selection and Tenure: Its Historical Development", *in Selected Readings: Judicial Selection and Tenure*, p. 29, 37 (Glenn R. Winters ed., rev. ed. 1973). Both the American Judicature Society and the American

5. Only 2 other states — Alaska and Kansas — adopted merit selection over the next 2 decades, but from 1960 to 1980, 18 more switched to merit selection for state supreme court justices.[13] In recent years the reform movement has lost momentum — since 1988 only Rhode Island has adopted merit selection, and it did so largely in reaction to a scandal on the State's high court. Over the past two decades, legislatures in North Carolina, Texas, and elsewhere have considered merit selection, only to reject it; and in 2000, voters in every county in Florida voted against a referendum on merit selection for trial judges.[14] Nonetheless, commission-based appointment of judges remains the most widely used system of judicial selection. Let us examine what questions arise in constructing and operating a commission-based appointment system and how the American states have answered those questions.

HOW DO WE GET THE SORT OF JUDGES WE WANT?

6. Every system of judicial selection is a means to an end, namely, the elevation of highly qualified persons to the bench and their retention in office. Thus, the fundamental criterion for judging a system of judicial selection is the results it produces : the best appointive system is the one that over time produces the best judges. If judges are to serve more than a single term in office, the best system of reselection or de-selection is the one that over time retains

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Bar Association have drafted Model Judicial Articles that elaborate elements of the merit selection plan and provide a guide for constitution-makers. *See, e.g.*, AMERICAN JUDICATURE SOCIETY, *Model Judicial Selection Provision* (1994), [On line]. http://www.ajs.org/js/provisions.pdf.

13. *See* Jona GOLDSCHMIDT, "Merit Selection : Current Status, Procedures, and Issues", 49 U. *Miami L. Rev.* 1, 79 (1994).

14. Luke BIERMAN, "Beyond Merit Selection", 29 *Fordham Urb. L.J.* 851, 851–852 (2002); G. Alan TARR, "Rethinking the Selection of State Supreme Court Justices", 39 *Willamette L. Rev.* 1445, 1446 (2003). For a consideration of the reasons for the declining adoption of merit selection, *see* Seth ANDERSEN, "Examining the Decline in Support for Merit Selection in the States", 67 *Alb. L. Rev.* 793 (2004). It should be noted that in 2008 Missouri's Greene County moved to merit selection and Kansas voters in Johnson County rejected a proposal to return to contested judicial elections. *See* Roy A. SCHOTLAND, "A Plea for Reality", 74 *Mo. L. Rev.* 507, 511–512, n. 10 (2009).

judges who have performed well and removes those who have not. Yet figuring out how to accomplish this is no easy task.

7. One problem is clarifying exactly what sorts of judges one wants. Although there is a vast literature on the qualities desired in a judge, the list is so broad — a catalogue of nearly every virtue known to humankind, plus the advantage of experience — that it offers little guidance for structuring a system of judicial selection.[15] In addition, lists of desirable judicial traits seldom rank-order them or justify what was selected or omitted. Ideally, those designing a system of judicial appointment should begin by identifying what qualities should be sought in a judge, how those qualities can be detected in candidates for judgeships, how strengths in some areas should be balanced against weaknesses in others, and whether different sets of qualities should guide the selection of trial judges as opposed to appellate judges.[16] But no State has systematically undertaken such an inquiry. Even those organizations that have led the fight for reform have avoided confronting these issues. The American Judicature Society has merely endorsed the nomination of "highly qualified persons", and the American Bar Association's Standards on State Judicial Selection has focused on ensuring a commission qualified to assess candidates rather than on elaborating the grounds for assessment.[17] Yet clarity as to the qualities desired in judges is essential if one is to provide guidance to those charged with nominating or appointing them.

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15. *Standards on State Judicial Selection* (ABA 2000), [On line]. http://www.abanet.org/judind/downloads/reformat.pdf.

16. This last consideration is a serious but underemphasized concern because the tasks that trial and appellate judges are called upon to perform vary significantly. *See* G. Alan TARR, *Judicial Process and Judicial Policymaking* 79–82 (5th ed., 2010) For example,

> a genuinely qualified trial judge has the capacity to translate legal jargon into English intelligible to lay jurymen and can, without endangering the legal soundness of his instructions, give the jury a useful analysis of the task it has ahead of it. Sensitivity to jury relations and skills at communication are among the qualities that are most imperative for effective service as a trial judge.

Harry W. JONES, "The Trial Judge — Role Analysis and Profile", *in The Courts, the Public, and the Law Explosion*, 124, 134–35 (Harry W. Jones ed., 1965). This skill in oral communication with the public is much less important for appellate judges.

17. *Model Judicial Selection Provisions* (Am. Judicature Soc'y 1994), [On line]. http://www.ajs.org/js/provisions.pdf.

8. This does not end the difficulties. Even if there were an implicit consensus on the qualities desired in a judge, it is difficult to devise measures for determining whether prospective judges possess those qualities or possess them to a greater degree than do other candidates for the bench. As Maurice Rosenberg has noted, "[T]he qualities [authors] found the most important are nebulous and do not lend themselves well to comparative application."[18] Perhaps the most thoroughgoing attempt to resolve this difficulty and provide guidance is Allan Ashman and James Alfini's catalogue of qualities that judges should possess, with weighting.[19] But even their heroic effort fails to justify the relative weight assigned to the various factors. This underscores that it is far easier to assess judicial performance than it is to predict it.

9. The difficulty — perhaps even impossibility — of specifying what qualities are to be sought in a judge and of furnishing objective measures for determining whether prospective judges have those qualities means that those appointing judges will have to exercise judgment. This shifts the question from the qualities that are desirable in a judge to the qualities that are desirable in those engaged in judicial selection. In the United States, the debate has typically pitted defenders of judicial elections against advocates of commission-based appointment selection, with reformers arguing that commission-based appointment is superior to judicial election because it removes politics from the selection process. This claim, however, raises two questions : has merit selection in fact removed politics from the process of selecting judges, and is it desirable that politics be removed from the process?

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18. Maurice ROSENBERG, *The Qualities of Justices — Are They Strainable?*, *in* Selected Readings, *supra*, note 15, p. 1, 9. For an enterprising, if ultimately unsuccessful, effort to identify objective criteria to be used in judicial selection, *see* Stephen CHOI, Mitu GALATI, "A Tournament of Judges?" 92 *Cal L. Rev.* 299 (2004).

19. Allan ASHMAN, James J. ALFINI, *The Key to Judicial Merit Selection : The Nominating Process*, p. 60–69 (1974).

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

10. In most civil law countries in Europe, the judiciary is a career service. Prospective judges receive specialized training designed to prepare them for their professional responsibilities, and upon graduation they immediately begin their lifetime judicial careers.[20] Competitive examinations are used to banish political considerations and personal favoritism from the selection process, and seniority and performance evaluations by senior judges and supervisors provide the basis for career advancement.[21] Although the civil law system of judicial selection is obviously incompatible with long-standing American and Canadian approaches to legal education and legal practice, the European idea of apolitical selection has continued to attract reformers in the United States.[22]

11. Historically, the desire to eliminate politics as a factor in judicial selection has provided the impetus for reform in the states. The shift from appointment of judges to election in the mid-nineteenth century was designed to rescue judges from an unduly partisan appointment process dominated by party bosses. The shift from partisan to non-partisan elections in the late nineteenth and early twentieth centuries was meant to reduce political influences on judicial selection, and the reformers' shift to merit selection later in the twentieth century was designed to serve the same purpose.[23] As the American Judicature Society put it on the eve of the first adoption of a merit system: "[T]he most important single step in

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20. For an overview of systems of judicial selection in various countries, *see Appointing Judges in an Age of Judicial Power : Critical Perspectives from Around the World* (Kate Malleson & Peter H. Russell, eds., 2006).

21. Carlo GUARNIERI, Patricia PEDEROZOLI, *The Power of Judges : A Comparative Study of Courts and Democracy*, p. 35–45 (2002).

22. For an attempt to incorporate credentializing of prospective judges into the reform mix, *see* for example, L. BIERMAN, *supra*, note 14.

23. A.A. KALES, *supra*, note 11, p. 112; *see* also Kermit HALL, "The Judiciary on Trial : State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860", 45 *Historian* 337, 346 (1983); Caleb NELSON, "A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America", 37 *Am. J. Legal Hist.* 190, 205 (1993).

improving judicial administration in a majority of the states is that of making judges independent of politics."[24]

12. Yet one might view this history as a record of repeated unsuccessful efforts to banish politics. This raises the question as to whether the effort to eliminate political influences on judicial selection is ultimately a quixotic quest. So too do studies of selection under current merit systems. The classic study of judicial appointment in Missouri, the State that pioneered the merit system, concluded that commission-based appointment transformed the politics of judicial selection but did not eliminate politics.[25] More recent accounts have documented either partisan conflict or competition between elements of the bar — for example, between plaintiffs' attorneys and defense attorneys — in several merit selection systems.[26] The seven justices of the Florida Supreme Court who decided *Bush* v. *Gore* were all Democrats, even though there was a merit selection system in place in Florida, because they were all appointed by a Democratic governor.[27] Today there are Republicans on the Florida Supreme Court, because Republican Governors Jeb Bush and Charlie Crist have had the opportunity to make appointments.[28]

13. Recent research confirms the continued influence of partisan politics on judicial selection even under merit selection — governors overwhelmingly appoint fellow partisans to seats on the supreme court bench.[29] Thus, merit selection appears to be no less partisan, at least in its results, than appointment without a commission, as occurs

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24. AMERICAN JUDICATURE SOCIETY, "Judges Relieved of Political Stress", 23 *J. Am. Judicature Soc'y* 51, 51 (1939).

25. Richard A. WATSON, Rondal G. DOWNING, *The Politics of the Bench and the Bar: Judicial Selection*, p. 348–350 (1969).

26. *See* Beth M. HENSCHEN *et al.*, "Judicial Nominating Commissioners: A National Profile", 73 *Judicature* 328, 331–332 (1990); and Rebecca Mae SALOKAR, Kimberly A. SHAW, "The Impact of National Politics on State Courts: Florida after the Election of 2000", 23 *Just. Sys. J.* 57, 62–63 (2002).

27. 531 U.S. 98 (2000); *see* also R. SALOKAR, S. SHAW, *supra*, note 26, p. 57–58.

28. Rebecca Mae SALOKAR, D. Jason BERGGREN, "The New Politics of Judicial Selection in Florida: Merit", 27 *Just. Sys. J.* 123, 126 (2006).

29. Aman MCLEOD, "The Party on the Bench: Party Politics and State High Court Appointments", *Just. Sys. J.* (forthcoming).

in the appointment of federal judges.[30] As a political scientist, I do not find this political dimension surprising: when positions of status and power are distributed, politics is likely to play a role.[31] Nor do I find it distressing: in a democracy, it is appropriate that citizens have a role, directly or indirectly, in selecting those who wield power, and undeniably judges wield power. What would be surprising would be if elected officials who participate in judicial selection failed to take account of political considerations in their choices. Unless one wishes to adopt Kales' model and substitute a purportedly nonpartisan judge for the chief executive, politics will play a role. But just as the presence of political considerations in policymaking does not preclude good policy, the presence of politics in an appointive process does not preclude the selection of good judges. Politics certainly plays a central role in the selection of American federal judges, yet many observers rate highly the quality of the federal bench. So the aim of insulating judicial selection from politics may be not only futile but misguided. To repeat: the goal is good judges, not an apolitical process.

How Should Members of the Nominating Commission Be Chosen?

14. If one opts for a commission-based appointment system, then how should one choose the commissioners? Most American states with commission-based appointment have multiple commissions, with separate commissions for trial and appellate courts and/or for districts or regions. The size of these commissions varies intrastate, with larger commissions typically for the nomination of appellate court judges. They also vary interstate, with commissions for appellate court

30. On the role of politics in federal judicial selection throughout American history, *see* generally Henry J. ABRAHAM, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (1999); Sheldon GOLDMAN, *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan* (1997); Nancy SHERER, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process*, (2005).

31. The title of a classic text in political science summarizes the point nicely: Harold L. LASSWELL, *Politics: Who Gets What, When, How* (1936).

judges ranging from 7 members in 5 states (Alaska, Idaho, Indiana, Missouri, and Wyoming) to 21 members in Massachusetts and 17 in Maryland and Tennessee. Term length varies as well, with 6 years widely used, and terms tend to be staggered in order to ensure continuity on the commission and to prevent a single appointing authority from exerting too much influence over the composition of the commission. Some states allow commissioners to serve multiple terms, while others limit them to a single term.[32]

15. Most commissions are composed of both members of the legal profession (attorneys and sitting judges) and laypersons, with those with legal training constituting a majority on most commissions. For example, all 5 states with seven-member commissions include three attorneys, three laypersons, and the State's Chief Justice. In most states attorney members of the commission are selected by the legal profession, either by appointment by the leadership of the state bar or by election by its members. Lay commissioners in contrast are typically appointed by the governor. However, there is some interstate variation. In Connecticut, for example, the 6 lawyer members of the judicial nominating commission are appointed by the governor; while the 6 non-lawyer members are appointed by the president *pro tempore* of the senate, the speaker of the House of Representatives, the majority leaders of the house and senate, and the minority leaders of the house and senate.[33] Some states mandate partisan balance on the nominating commissions — for example, Idaho's seven-member commission includes the Chief Justice, 3 attorney members, and 3 non-attorney members, with no more than 3 of the appointed members being members of a single political party.[34]

16. Perhaps the most contentious issue in the selection of commissioners involves the guaranteed representation of the

32. For information on the particularities of the selection process for commissioners in each State, *see* AMERICAN JUDICATURE SOCIETY, *Judicial Nominating Commissions*, [On line]. www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissionscfm?state=.

33. *Ibid.*

34. *Ibid.*

legal profession, including judges, on nominating commissions. According to one scholar, 14 of the 24 states with commissions for the selection of state supreme court justices mandate that a majority of the commissioners be members of the legal profession (either judges or attorneys).[35] Moreover, "nearly all merit-selection states delegate to the state bar association the authority to fill some or all the seats on the commissions, either by directly selecting members for the commission or by controlling the list of names from which elected officials must select members."[36]

17. Those who favor guaranteed seats for the legal profession argue that lawyers have valuable professional knowledge as to the role that judges play and as to the temperament and attributes necessary to fulfill that role successfully. In addition, attorneys may have information about the background and reputation of their colleagues in the legal profession who are seeking to become judges, and this knowledge is typically unavailable to laypersons. Finally, because they share a personal and professional interest in the administration of justice, attorneys would likely nominate the most qualified persons.[37] So whereas lay commissioners bring a "consumer perspective" of the legal system, together with insight to issues of character and integrity, lawyer commissioners bring a specialized expertise.

18. Those who oppose the mandated representation of attorneys on nominating commissions maintain that it is undemocratic, even elitist, giving a particular interest group (the legal profession) disproportionate influence over the selection of judges and hence over the development of judicial policy.[38] These critics insist that the views and values of attorneys do

35. *See* Brian T. FITZPATRICK, "The Politics of Judicial Selection", 74 *Mo. L. Rev.* 675, 680, tab. 1.

36. *Id.*, p. 679. *See* also Stephen J. WARE, "Selection to the Kansas Supreme Court", 17 *Kan. J. L. & Pub. Pol'y* 386, 387–388 (2008), and Stephen J. WARE, "The Missouri Plan in National Perspective", 74 *Mo.L. Rev.* 751 (2009).

37. Jeffrey D. JACKSON, "Beyond Quality : First Principles in Judicial Selection and Their Application to a Commission-Based Selection System", 34 *Fordham Urb. L. Rev.* 125,150–552 (2007).

38. Michael J. DIMINO, "We Have Met the Special Interests, and We Are They", 74 *Mo. L. Rev.* 495, 502–504 (2009). *See* also Bradley A. SMITH, "Selecting Judges in the 21st Century", 30 *Cap. U. L. Rev.* 437 (2002).

not mirror those of the general populace, so this imparts an ideological element to mandated attorney representation.[39] They also warn that attorneys are unlikely to be motivated primarily by a concern for the impartial administration of justice. Rather, the divisions within the bar are likely to be reflected on nominating commissions, as (for example) plaintiffs' and defense attorneys seek to populate the bench with judges sympathetic to their interests and those of their clients. In fact, there is some evidence of this.[40]

19. Some proponents of commission-based appointment deny that the guaranteed representation of lawyers renders it undemocratic. For example, Justice Laura Denvir Stith of the Missouri Supreme Court has noted that the lawyer members "are popularly elected by their peers, and Missouri's constitution ensures that they are chosen from each geographic region of Missouri and so reflect the broad range of its people's political views."[41] Others maintain that concerns about democracy and elitism are sufficiently allayed as long as an official answerable to the people has the appointing authority.[42] Some commentators have defended the bar's role as ensuring the independence of the commission, insisting that those who appoint judges should play no role in the selection of the commissioners who appoint them.[43] Still others acknowledge lawyers need not make up a majority of commissioners, noting that some states — for example, Arizona — have reconfigured their commissions to ensure that a majority of commissioners are laypersons.[44] Nonetheless, there is no consensus as to what sort of institutionalized role the legal profession should play, if any, in a commission-based appointment system.

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39. B.T. FITZPATRICK, *supra*, note 35, p. 690–703; M. J. DIMINO, *supra*, note 38, p. 505–506.

40. *See* Malia REDDICK, "Merit Selection : A Review of the Social Science Literature", 106 *Dick. L. Rev.* 729, 732–733 (2002).

41. Laura Denvir STITH, Jeremy ROOT, "The Missouri Nonpartisan Court Plan : The Least Political Method of Selecting High Quality Judges", 74 *Mo. L. Rev.* 711, 715. (2009).

42. *See, e.g.*, J.D. JACKSON, *supra*, note 37, p. 137.

43. *See, e.g.*, A. ASHMAN, J.J. ALFINI, *supra*, note 19, p. 25.

44. Sandra Day O'CONNOR, "The Essentials and Expendables of the Missouri Plan", 74 *Mo. L. Rev.* 479, 492 (2009).

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

20. The reform consensus that emerged in the United States during the twentieth century favored an appointive system for state judges, with the appointing authority, the governor, choosing among a set of candidates — usually three to five — proposed by a nominating commission.[45] If one provisionally accepts this model of an appointive system, rather than one based on the federal model of chief executive and senate, what then should the relationship be between the nominating commission and the appointing authority?

21. The reform literature implies that the role of the nominating commission is at least equal to that of the appointing authority.[46] Indeed, reformers tend to spend far more time discussing the formation and membership of the commission than they do discussing the appointing authority or the qualities of those chosen under merit selection. Thus, Ashman and Alfini's classic text describes "the nominating process" as "the key to merit selection. . . [b]ecause the nominating commission has ultimate authority to determine which candidates are qualified to hold judicial office."[47] In actuality, however, it is more accurate to view the nominating commission's role as subsidiary. The commission does not select judges but merely nominates slates of candidates from which the governor chooses. To describe the commission's role as subsidiary is not to demean it, because its responsibility for quality control is an important one. The commission's job is to ensure that the appointing authority chooses from only qualified candidates.

22. In making their selections, the appointing authority — in the United States, state governors — are likely to consider

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45. According to the American Judicature Society, "[F]ive names appear to be the optimum because it gives the governor a real choice while limiting the governor's appointing power." *Model Judicial Selection Provisions§ 1 cmt. 1* (Am. Judicature Soc'y 1994), [On line]. http://www.ajs.org/js/provisions.pdf.

46. *See, e.g.*, A. ASHMAN, J.J. ALFINI, *supra*, note 19.

47. *Id.*, p. 22. In doing so, the authors shift the focus from the substantive questions of what system produces the best judges to the process question of how the commissioners, those involved in nominating potential judges, are selected. *Id. See* also Rachel Paine CAULFIELD, "How the Pickers Pick : Finding a Set of Best Practices for Judicial Nominating Commissions", 34 *Ford. Urb. L. Rev.* 163 (2007).

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

23. The commission's role is subsidiary in another important respect. Its job is to assist the appointing authority, and so it should take into account her needs and predilections. For example, unless precluded from doing so by legal requirements, governors in the United States tend to choose members of their own party as judges, so commissions should not send to them slates of potential candidates that include no members of the governor's party.[48] Most states with commissions recognize that the governor's perspective should be taken into account in the commission's deliberations by giving the governor authority to appoint some or all members of the commission. In 17 states, the governor appoints the non-lawyer members, and in Idaho the governor does so with the advice and consent of the senate.[49] In another 10 states the governor shares in the appointment of commission members with other officials, and in only two states does the governor play no role in their appointment.[50] Furthermore, unless it is required by law that membership on the commission be bipartisan, governors tend to appoint members of their own party to commission slots. Many of those selected

48. Obviously, the longer the list of candidates sent to the appointing authority, the more discretion that authority has, so in designing an appointive system one must consider whether one wishes to enhance or limit the discretion of the appointing authority.

49. *See* AMERCAN JUDICATURE SOCIETY, *Judicial Merit Selection: Current Status*, [On line] http://www.ajs.org/js/JudicialMeritCharts.pdf, p. 18–19, tbl. 5.

50. *Ibid.*

have been politically active prior to their appointment — according to one study, one third of non-lawyer commissioners had served in a party office, and almost one-quarter had held public office.[51] Thus at least in the United States, it is hard to view those serving on judicial selection commissions as a politically disinterested group of experts. Yet this need not be seen as detrimental. The political experience of the commissioners should equip them to recognize the political dimension of the appointment process and ensure that candidates are put forward who are both highly qualified and politically acceptable.

WHO SHOULD EXERCISE THE APPOINTING AUTHORITY?

24. If the commission plays only a subsidiary role, then the primary focus in designing an appointive system should be on the appointing authority. There are two considerations here. First, who should exercise the authority to appoint judges? Second, what constraints, if any, should be placed on the discretion exercised by the appointing authority? My focus here will be on the alternatives as they have played out in the United States. Although this experience may not be immediately transferable to a country with a parliamentary system, it should nonetheless be instructive. I begin with the identity of the appointing authority.

SHOULD THERE BE CONFIRMATION OF APPOINTEES?

25. Most commission-based appointive systems in the American states lodge the appointing authority in the governor. Twenty-two states give the appointment power to the governor acting alone, 8 require the confirmation of gubernatorial choices by the state senate or state legislature, and

51. B.M. HENSCHEN *et al.*, *supra*, note 26, p. 333. *See also*, AMERICAN JUDICATURE SOCIETY, *supra*, note 49, p.13–15, tbl. 3. This of course has implications for the Sisyphean effort to eliminate politics from the selection process. Kansas in 2005 considered requiring senatorial confirmation of gubernatorial appointments, in response to a Kansas Supreme Court ruling that allowed several convicted murderers to escape a death sentence. Tim CARPENTER, "Senators Want to Have Say Under Plan, Justices Would Require Senate Confirmation", *Topeka Capital-Journal*, (Feb. 10, 2005), C1.

Massachusetts requires ratification of the governor's choices by the governor's council.[52] Those appointive systems that dispense with a commission typically lodge the appointing authority in the governor with the advice and consent of the senate, drawing on the federal model.[53] Both models thus divide power between the governor and a numerous body. They thereby attempt to avoid, insofar as possible, the dangers associated with one-person appointment that Alexander Hamilton identified in *The Federalist Papers*, No. 76.[54] Even if there is a commission, serious consideration should be given to requiring some sort of confirmation of judicial nominees, as in federal judicial selection.[55] Checks and balances are a desirable feature of any selection system, and the commission is unlikely to provide as adequate a check on gubernatorial discretion as the senate would in a presidential-style system of government. (Obviously, some other confirming authority would be necessary in a parliamentary system.)

26. The argument for a confirmation process is based on the recognition that the commission is not a coequal partner in the appointment process. The commission is required to submit several names to the governor for consideration, usually three or more, and in Maryland and Utah 5 to 7, thus giving considerable leeway to the governor.[56] No State allows commissions to rank-order candidates, and only 2 — Indiana and New York

52. AMERICAN JUDICATURE SOCIETY, *supra*, note 49.

53. *Ibid.* This is possible, of course, because 49 of the American states have bicameral state legislatures.

54. Alexander HAMILTON, *The Federalist papers, No. 76*, p. 425–426 (Clinton Rossiter ed., 1961).

55. Some reformers believe that participation by the senate would not advance the selection of good judges. Thus, Glenn Winters has contended that the senate "has already proved itself to offer no significant assistance in the selection process and what significance it has is ninety-five percent political. As an element of the judicial selection process it has degenerated in almost all instances to a meaningless rubber stamp." *See, e.g.*, G.R. WINTERS, *supra*, note 12, p. 41. This argument persuades only if one assumes that political input from the senate is either unnecessary or undesirable. In arguing for senatorial confirmation, we confine our attention to commission systems in which the governor or other state-wide officials exercise appointive authority. In some states, local executive officials appoint members of some trial courts, and this argument does not apply in that context.

56. AMERICAN JUDICATURE SOCIETY, *supra*, note 49, p.13–15 tbl. 3.

— permit commissions to submit their evaluations along with their list of nominees.[57] In addition, the commissioners are also likely to take the views of the governor into account in drawing up their list of candidates in the first place. Furthermore, whereas the commission is expected to focus on professional qualifications, the senate can bring additional considerations to bear as well.

27. The senate will likely represent the diversity of perspectives in the State better than the commission. Historically, the membership of commissions substantially overrepresented white males.[58] Model provisions currently call for greater demographic representation on commissions, and some states have done a better job of achieving that goal.[59] Yet even if commission members today better reflect the diversity of the state population, the commission is not strictly speaking a representative body. The commissioners have no constituencies, so they are not representative in the sense of reflecting or responding to the views of a public. Moreover, because the commissioners are appointed or in some cases elected by the state bar, they do not reflect a popular mandate. Finally, because they are reappointed in systems that permit multiple terms, they cannot be held accountable by the public for their actions.[60]

28. It should be added that one measure of a good state judiciary might be that it includes judges from more than one political party, so that qualified persons are not disqualified merely because of party affiliation. If so, then senatorial confirmation may be desirable, because it may help to ensure partisan diversity, particularly when the party controlling the governorship does not control the senate.

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57. *Ibid.*

58. M. REDDICK, *supra*, note 40, p. 730–731.

59. *Ibid.*

60. AMERICAN JUDICATURE SOCIETY, *supra*, note 49, p. 13–15, tbl. 3. While not accountable to the public, the commissioners may be answerable to an oversight board for misbehavior such as conflicts of interest and taking bribes. But the oversight board would not inquire into the quality of judgment exercised by the commissioners.

WHAT CONSTRAINTS SHOULD THERE BE ON THE APPOINTMENT PROCESS?

29. Whatever the identity of the appointing authority, questions remain as to whether any constitutional or other constraints should be placed on its discretion in selecting judges. Many American state constitutions do limit that discretion by prescribing qualifications to serve as a judge, including residence, age, and legal experience.[61] In some states the qualifications vary depending on the court on which the judge serves — that is, the constitution imposes more stringent qualifications for those serving on appellate courts than on trial courts and for those on trial courts of general jurisdiction than on trial courts of limited jurisdiction.[62] One would assume that a properly operating appointment commission would consider age and legal experience in deciding whom to nominate, but redundancy on this point may be worthwhile. One would expect, however, that commissions by rule would establish far more detailed criteria to structure their deliberations and guide their choices. Indeed, the *Handbook for Judicial Nominating Commissioners* published by the American Judicature Society provides just such a list, as well as a discussion of procedural issues facing commissions.[63]

30. Beyond the standard qualifications prescribed by state constitutions, Delaware (by constitutional provision) and New Jersey (by long-standing practice) require that governors appoint an equal number of Democrats and Republicans to the bench.[64] European countries likewise seek partisan balance in staffing their constitutional courts, either by requiring super-majorities in the legislature for appointment or by ensuring that certain judicial positions are in effect

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61. For a summary of these qualifications, *see* THE COUNCIL OF STATE GOVERNMENTS, "Book of the States", p. 313–314, tbl. 5.3.

62. *Ibid.*

63. *See* www.judicialselection.us/judicial_selection_materials/records.cfm?categoryID=7.

64. Del. Const. art IV, § 3. For discussion of the Delaware provision and its origins, *see* Randy J. HOLLAND, *The Delaware State Constitution : A Reference Guide*, p. 128–129 (2002). For discussion of the New Jersey tradition, which began in the mid-nineteenth century, *see* Arthur T. VANDERBILT, *Judges and Jurors : Their Function, Qualifications, and Selection*, p. 40 (1956).

controlled by particular political parties.[65] There is good reason to seek a politically diverse bench, just as there is to seek other sorts of judicial diversity. Moreover, one must recognize that the political perspectives of judges have an important effect on their behavior on the bench. A large body of social science literature has documented connections between judges' political ideologies and their decisional tendencies.[66] Therefore, one may well wish to stock the bench with a variety of different approaches to and understandings of the law.

31. If a bipartisan bench is valuable, that can be mandated, and perhaps it should be. Imposing such a requirement in a commission-based appointive system may create difficulties, however. For example, if a commission puts forth a slate on which only a single Republican is listed, and the governor is obliged to pick a Republican, then the commission is in effect usurping the appointment power. New Jersey avoids this problem by opting for a non-commission-based appointment system.[67] Delaware employs a commission-based system, but its commission is chosen in such a way that it is unlikely to intrude on the governor's prerogatives. The Delaware commission was established by executive order rather than by the state constitution, and the governor appoints 8 of the 9 commissioners, so they are likely to be mindful of gubernatorial concerns.[68]

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

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65. Alec Stone SWEET, *Governing with Judges: Constitutional Politics in Europe*, p. 46–49 (2000).

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

67. AMERICAN JUDICATURE SOCIETY, *New Jersey: Current Methods of Judicial Selection*, http://www.ajs.org/js/NJ_methods.htm.

68. AMERICAN JUDICATURE SOCIETY, *Judicial Selection in Delaware: An Introduction*, [On line]. http://www.ajs.org/js/DE.htm.

that a sufficient number of candidates from both parties are submitted, so that the governor can exercise meaningful choice. One way to ensure this is to increase the minimum number of candidates that must be submitted to the governor. Another approach, which Delaware has adopted, is to authorize the commission to submit as few as 3 candidates, but to allow the governor to request another list of candidates if she finds the initial list unsatisfactory.

HOW SHOULD ONE DEAL WITH RESELECTION?

ELIMINATING RESELECTION

33. Thus far, this paper has only addressed initial appointment. Many of the same issues arise with reselection, but so do additional issues. The first question to be resolved is whether there should be a reselection process at all. Many of the most acute problems associated with judicial selection occur not at the point of initial selection but at the point at which a judge seeks to continue serving on the bench, because judges may be tempted to decide in ways likely to please whoever controls whether they will receive another term.[69] One possibility for avoiding the issues associated with reselection is to appoint judges to serve during "good behavior," or at least until a mandatory retirement age. In the United States, federal judges serve during good behavior, but only 3 states have eliminated reselection. Judges in Massachusetts and New Hampshire serve until age 70, and those in Rhode Island serve for life.[70] No State has instituted such an extended tenure for over a century, and indeed, if there is a trend in the United States, it has been to question lifetime tenure, not to grant it.[71] For example, in recent years there

69. For details of the argument, *see* generally G.A. TARR, *supra*, note 14.

70. JUDICIAL SELECTION CHARTS, *supra*, note 3, p. 7–14; *see also* New Jersey Selection, *supra*, note 67.

71. *See, e.g.*, David J. GARROW, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment", 67 *U. Chi. L. Rev.* 995 (2000). For a collection that presents both sides of the debate in great detail, *see* Roger C. CRAMTON, Paul D. CARRINGTON (eds.), *Reforming the Court: Term Limits for Supreme Court Justices* (2006).

have been several serious proposals to eliminate lifetime tenure for members of the U.S. Supreme Court.[72]

34. Another way to avoid reselection is to limit judges to a single, non-renewable term of office. Such a term limitation serves the aim of judicial independence, because judges will not be pressured or tempted to decide cases in a particular way in order to curry favour with those who control their continuation in office. Most European countries employ such a system for the members of their constitutional courts, and the American Bar Association endorsed the concept in a recent report.[73] There are costs associated with judicial turnover, however, particularly if judicial terms are short. In addition, it may be difficult to attract qualified candidates if one's judicial career ends after a single term. An alternative worth considering is to term limit only members of the highest appellate court, because these are the judges whose rulings have the broadest policy consequences. This would be analogous to the policy of single, non-renewable terms for members of constitutional courts (but not other courts) in Europe.[74] Also, if the European experience with constitutional courts is transferable, there should be no difficulty attracting qualified candidates, although they may seek a seat on the court when they are older, as a capstone to their careers.[75]

TERM LENGTH

35. If one decides to institute a process of judicial reselection, however, one must address how frequently judges should come up for reselection and what the process for reselection should involve. In most states that have commission-based appointment systems, judges come up for review

72. *See, e.g.*, Judith RESNICK, "Reconsidering the Federal Judicial Appointments Process. Judicial Selection and Democratic Theory : Demand, Supply, and Life Tenure", 26 *Cardozo L. Rev.* 579 (2005).

73. On the terms of members of constitutional courts, *see* A.S. SWEET, *supra*, note 65, p. 46–49, and Lee EPSTEIN, Jack C. KNIGHT, Olga SHVETSOVA, "Comparing Judicial Selection Systems", 10 *Wm. & Mary Bill Rts. J.* 7, 23 (2001). On the American Bar Association's endorsement of this idea, *see* ABA, "Justice in Jeopardy", p. 70–73 (2003).

74. *See* G.A. TARR, *supra*, note 14, p.1466–1469.

75. *Ibid.*

initially after a short probationary period, and if they are retained, they are subject to review periodically, usually after a longer term of office.[76] Six states have a one-year probationary period, 3 a two-year period, 3 a three-year period, and 3 a period that lasts until the next regularly scheduled election.[77] After this initial probationary period, judicial terms tend to be much longer. Two states have instituted twelve-year terms for their state supreme court justices; 3, ten-year terms; 4, eight-year terms; and 5, six-year terms.[78] For states that do not have an initial probationary period, terms for justices range from 6 years (Vermont) to 14 years (New York).[79] Many states prescribe shorter terms for trial judges than for appellate judges, with 8 states — Arizona, Georgia, Idaho, Kansas, Mississippi, Oklahoma, Texas, and Washington — having the shortest for judges of general jurisdiction (4 years) and Maryland the longest (15 years).[80]

36. Obviously, the longer judicial terms are, the less frequent will the opportunities be for assessment of judicial performance. The American Bar Association has endorsed lengthening judicial terms to at least 15 years, and many American court reformers seem to agree.[81] To ensure accountability despite these longer terms of office, the ABA has proposed that the judicial branch enhance its internal review of judicial performance through such mechanisms as periodic performance evaluations, court monitoring, and an effective judicial conduct commission.[82] The underlying assumption appears to be that intra-branch assessment provides an equally effective check on poor judicial performance as do formal decisions on judicial retention or non-retention and that it poses less of a threat to judicial independence and judicial quality. There are to my knowledge no systematic assessments of the relative effectiveness of external and internal controls on judicial performance. Indeed, it is difficult to imagine how such an assessment might be conducted,

76. *See* JUDICIAL SELECTION CHARTS, *supra*, note 6.
77. *Ibid.*
78. *Ibid.*
79. *Ibid.*
80. *See* COUNCIL OF STATE GOVERNMENTS, *supra*, note 61, p. 10.
81. *See* ABA, *supra*, note 73, p. 70–73.
82. *Ibid.*

although one might wish to examine how frequently and how aggressively judicial conduct commissions pursue complaints about judicial misbehavior.

MODE OF RESELECTION

37. Most states that employ commission-based appointment systems use retention elections to decide whether incumbents should or should not remain in office. There are serious problems with such elections — incumbents are almost always retained, so judicial accountability is largely illusory, and retention elections can become as politicized as contested elections are.[83] The reformers who introduced commission-based selection included retention elections as a concession to those who believed that the populace should retain a direct role in judicial selection, but at least some reform leaders hoped that over time the retention elections would be eliminated.[84] There is little reason for Canadians to adopt retention elections.

38. The alternative is a system of reappointment. Six merit selection states use such a system, as do those states that appoint without a commission, usually employing the same mechanism of gubernatorial appointment and senate confirmation that was used for reselection.[85] In New Jersey, for example, judges are appointed for an initial seven-year term, and if reappointed by the governor with the consent of the senate, serve to the mandatory retirement age of 70.[86] As the

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83. G. Alan TARR, "Do Retention Elections Work?" 74 *Mo. L. Rev.* 605 (2009); G. A. TARR, *supra*, note 14; Traciel V. REID, "The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White", *in Research on Judicial Selection 1999* (American Judicature Society, 2000); and Deborah GOLDBERG, Craig HOLMAN, Samantha SANCHEZ, *The New Politics of Judicial Elections 2000*, (2002). [On line]. www.justiceatstake.org.

84. As Michael Dimino notes, "[T]he push for merit selection... rests... on the determination that public input is bad for the judicial system and must be tolerated only as a political compromise. This is clear once one sees the degree to which success under the merit selection system is equated with the retention of incumbents." M.R. DIMINO, *supra*, note 12, p. 813. A leading proponent of merit selection, Glenn Winters, has confirmed this: "The device of tenure by non-competitive election also will pass out of the picture... [I]t was originally offered only to quiet the fears of... devotees of the elective method." G.R. WINTERS, *supra*, note 12, p. 41.

85. *See* JUDICIAL SELECTION CHARTS, *supra*, note 6.

86. *See* NEW JERSEY SELECTION, *supra*, note 67.

conflicts over reappointing Chief Justice Robert Wilentz in New Jersey in the 1980s and over not reappointing Justice John Wallace in 2010 reveal, reappointment can likewise be contentious.[87] Whichever system of reselection is employed, it would be advantageous to have a commission evaluate the performance of incumbents while in office and to recommend for or against retention. This commission should be as independent as possible, and its verdict on judges should be widely publicized. Some states — most notably, Hawaii and Colorado — have already instituted such commissions.[88]

AN AMERICAN POSTSCRIPT

39. As a noted legal scholar once observed, "The quality of our judges is the quality of our justice."[89] A well-designed system of judicial selection can affect who seeks to become a judge and who is selected, and the quality of those who are chosen and retained is the key criterion by which to assess systems of judicial selection. This study has identified the fundamental questions that constitutional reformers in the American states have addressed in assessing their existing systems of judicial selection and in crafting commission-based alternatives. It may be that the efforts of these states may furnish guidance, both positive and negative, to those undertaking the task of appointment reform in Canada.

40. Yet in candor one cannot leave it at that. Merit selection remains highly controversial in both political and scholarly circles in the United States, with social scientists and some legal scholars disputing many of the claims of its proponents. Indeed, according to a former U.S. Supreme Court Justice, "we are at a new and critical point in history" because "[t]he question of how we choose our judges, whom we entrust to

87. *See* Peter BUCHSBAUM, "The Courts", N.J. Rep., Sept. 1986, p. 34.

88. *See* JUDICIAL SELECTION CHARTS, *supra*, note 6, p. 8.

89. Robert A. LEFLAR, "The Quality of Judges", 35 *Ind. L. J.* 289, p. 305 (1960). Chief Justice John Marshall was even more emphatic: "The greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary." A.T. VANDERBILT, *supra*, note 64, p. 24 (quoting *Proceedings and Debates of the Virginia Convention of 1829-1830*, p. 619 (1830)).

uphold and interpret our laws, speaks to foundational principles of our judiciary and, indeed, our nation."[90] Even though Canadians are unlikely to embrace a system of judicial elections, it may be useful to review the critics' case against commission-based appointment of judges.

41. Critics of merit selection challenge the idea that merit selection elevates more qualified persons to the bench than do judicial elections, noting that this is simply an assertion without supporting evidence. Looking at the backgrounds of judges as possible objective measures of judicial merit, the critics have demonstrated that there are no significant difference in the quality of law school or in the career paths of justices selected by appointment and those selected by election.[91] Proponents of merit selection have quarreled with the crudity of the empirical measures devised to measure judicial quality and noted that all of the debunkers' studies are at least two decades old. However, the advocates of merit selection have not offered any empirical research documenting their claims about the superiority of appointed judges, aside from a recent study by the American Judicature Society which found that in states where some localities elected their trial judges and others appointed them, merit-selected judges were disciplined by judicial disciplinary commissions less often than were elected judges.[92] Some recent studies attempting to measure judicial quality in the states have produced rather equivocal results : judicial opinions authored by jurists selected via merit selection were more often cited in other jurisdictions, but judges in other systems were more productive than were merit-selection judges.[93]

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90. S.D. O'CONNOR, *supra*, note 44, p. 480.

91. Henry R. GLICK, Craig F. EMMERT, "Selection Systems and Judicial Characteristics : The Recruitment of State Supreme Court Judges", 70 *Judicature* 228 (1987); Bradley C. CANON, "The Impact of Formal Selection Processes on the Characteristics of Judges — Reconsidered", 6 *Law & Soc'y Rev.* 579 (1972); Philip L. DUBOIS, "The Influence of Selection System and Region on the Characteristics of a Trial Court Bench : The Case of California", 8 *Just. Sys. J.* 59 (1983); Herbert JACOB, "The Effect of Institutional Differences in the Recruitment Process : The Case of State Judges", 13 *J. Pub. L.* 104 (1964).

92. Malia REDICK, *Judging the Quality of Judicial Selection Methods : Merit Selection, Elections, and Judicial Discipline*, [On line]. http://www.ajs.org/elections/docs/JudgingQualityJudSelectMethods.pdf.

93. *See* the studies cited in B.T. FITZPATRICK, *supra*, note 35, p. 685.

42. Critics of merit selection further contend that commission-based appointment merely substitutes a politics dominated by the legal profession and/or political insiders for a more democratic politics. They note the absence of popular input into the selection of nominating commissions and the unaccountability of commissioners. Insofar as the legal profession dominates commissions, they argue that this empowers an interest group because the organized bar and legal professionals have distinct interests, not shared with the public at large, which they seek to advance in their selection of candidates for the bench.[94] They also argue that lawyers tend to have an ideological perspective that differs from that of the public at large.[95] They further stress the advantage of judicial interaction with the public via political campaigns and note that the public overwhelmingly favors the election of judges.[96]

43. Finally, critics of merit selection insist that the retention elections are ineffective in promoting judicial accountability and in practice tend to retain unqualified incumbents.[97] Yet accountability is essential, because in democratic political systems, it is expected that the citizenry should be able to choose those who wield power and hold them accountable for its exercise. Certainly state supreme courts' increasing involvement with legal issues that have far-reaching policy consequences, such as school finance, tort law, abortion, capital punishment, and same-sex marriage argues for some form of accountability.[98] Such accountability can serve to

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94. *See* F. Andrew HANNSEN, "On the Politics of Judicial Selection : Lawyers and State Campaigns for the Merit Plan", 110 *Pub. Choice* 79 (2002); S.J. WARE, *supra*, note 35.

95. Michael E. DEBOW, "The Bench, the Bar, and Everyone Else : Some Questions About State Judicial Selection", 74 *Mo. L. Rev.* 777 (2009); Russell G. PEARCE, "The Legal Profession as a Blue State : Reflections on Public Philosophy, Jurisprudence, and Legal Ethics", 75 *Ford. L. Rev.* 1339 (2006); William C. DUNCAN, "'A Lawyer Class' : Views on Marriage and "Sexual Orientation" in the Legal Profession", 15 *BYU J. Pub. L.* 137 (2001).

96. M. R. DIMINO, *supra*, note 12; Harold SEE, "An Essay on Judicial Selection : A Brief History", *in* Keith J. BYBEE (ed.), *Bench Press : The Collision of Courts, Politics, and the Media*, (2007).

97. G.A. TARR, *supra*, note 83; Chris W. BONNEAU, Melinda Gann HALL, *In Defense of Judicial Elections*, (2009).

98. G. Alan TARR, "Politicizing the Process : The New Politics of State Judicial Elections", *in* K.J. BYBEE (ed.), *supra*, note 96.

prevent corruption, favoritism, and other abuses of power. It can also ensure that governmental policy, including policy enunciated by judges in the course of resolving disputes, reflects the values and interests of the populace.

44. One might well respond that such accountability would politicize courts, that it would encourage judges to respond to the external pressures upon them, and that it would undermine judicial impartiality and the rule of law. Yet the critics of merit selection disagree, arguing that the main threat to the rule of law is not external pressures on judges but rather judicial willfulness, which is encouraged by the absence of mechanisms for calling errant judges to account. Or some argue in more radical fashion that on many controversial legal issues the law is unclear, so judges have the leeway to decide either way, and therefore popular views rather than the ideologies of judges should be determinative. Whether or not one accepts this argument, what is clear is that merit selection emphasizes judicial independence at the expense of judicial accountability, and that this choice remains controversial. Many critics of commission-based judicial selection tend to argue for popular participation in the initial selection of judges and urge that state supreme court justices serve only a single term of office, so that the public can render a verdict on the overall direction of the state supreme court without unduly influencing the decisions of individual justices, who do not have to run for reelection.[99] Although this debate is unlikely to be replicated in Canada, it does suggest the need for some caution before adopting a commission-based appointment system.

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99. G.A. TARR, *supra*, note 14; M.J. DIMINO, *supra*, note 38; L. EPSTEIN, J.C. KNIGHT, O. SHEVTSOVA, *supra*, note 73.