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What Makes Merit Selection Different?

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INTRODUCTION

The framers of the American Constitution were clear in their intent that the judicial branch should be free from political influence. As Alexander Hamilton noted in Federalist No. 78, good judges are few, and every care should to be taken to guarantee that those who are best qualified will be appointed.[1] Once appointed, they must be independent from politics, insulated from both partisan influence and the public mood, free from the damaging effects of political retribution.[2] Although the federal judiciary continues to exemplify many of these fundamental ideals,[3] states continue to debate these principles. At the core of the debate is the fundamental notion of the importance of the judge within a democratic system of justice.

Writing in 1922, Benjamin Cardozo noted that "there is no guarantee of justice . . . except the personality of the judge."[4] The heart and soul of any justice system is the judge, the impartial arbiter who weighs competing arguments in the quest to

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1. THE FEDERALIST NO. 78 (Alexander Hamilton).

2. *Id.*

3. The federal judicial selection process has, throughout U.S. history, been inherently and unabashedly political. For an excellent discussion, see JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES (The Johns Hopkins University Press 1998). While the process of selection may be political, however, Article III judges in the federal system still retain tenure for good behavior, as well as protection from declining salaries. This ensures that, once seated, individual judges maintain decisional independence.

4. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 16-17 (Yale University Press 1922).

determine how legal principles apply to specific case facts. Maurice Rosenberg wrote that:

> Justice is an alloy of men and mechanisms in which, as Roscoe Pound remarked, "men count more than machinery." Assume the clearest rules, the most enlightened procedures, the most sophisticated court techniques; the key factor is still the judge. . . . The reason the judge makes or breaks the system of justice is that rules are not self-declaring or self-applying. Even in a government of laws, men make decisions.[5]

The acknowledgement that people matter as much as (if not more than) the law implies that an assessment of any system of judicial selection will ultimately rely on an assessment of the people chosen within that system.

As the name implies, merit selection was designed to ensure that judges would be selected on the basis of professional merit, including professional qualifications, experience, legal expertise, impartiality, and temperament. Before evaluating whether merit selection systems populate the bench with individuals who are qualitatively different than those judges chosen in popular elections, the historical and political roots of the movement are relevant and informative as they clarify expectations. Although today's merit selection advocates may put forward any number of claims regarding the benefits of adoption, returning to the foundational claims will provide a more authentic means of comparison.

I. A BRIEF HISTORY OF THE MOVEMENT TO MERIT SELECTION

Merit selection, as a conceptual theme, makes a claim about the type of individuals who will be chosen to serve as judges.[6] But the historical movement to merit selection is less about the types of judges chosen than about the manipulation of political

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5. Maurice Rosenberg, *The Qualities of Justice – Are They Strainable?, in* JUDICIAL SELECTION AND TENURE: SELECTED READINGS 1 (Glenn R. Winters, Ed., Am. Judicature Society 1973).

6. As just one example, see The American Judicature Society's guide explaining the merit selection system. AMERICAN JUDICATURE SOCIETY, MERIT SELECTION: THE BEST WAY TO CHOOSE THE BEST JUDGES, *available at* http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf.

processes prior to the adoption of commission-based merit selection processes.[7] As the cases outlined below indicate, the movement to adopt merit selection was more frequently a practical effort to minimize the effect of overt political considerations in judicial appointment processes and thereby, to better guarantee the effective and fair application of law for state citizens.A. The Case of Missouri

Missouri was the first state to adopt merit selection in 1940.[8] Like most states, Missouri had a system of gubernatorial

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7. "Commission-based appointment" is not necessarily synonymous with "merit selection," as it is possible to create a commission that would eschew the values of "merit selection." For example, a party committee may nominate an individual for the bench, or a group of state legislators may assess individuals without regard to traditional "merit" considerations (such as experience, temperament, knowledge of the law, productivity, dignity, integrity, impartiality, etc). Though many have used the terms interchangeably, I use "merit selection" to mean a system whereby (1) a bipartisan commission of non-lawyers and lawyers is established by statute or constitutional provision; (2) the members of the commission serve fixed terms; (3) the commission engages in formalized procedures to advertise judicial vacancies, gather applications, assess individual applicants, and vote on recommendations; (4) the commission determines which applicants are best qualified for the position and submits a list of recommendations to the governor; (5) the governor is bound by the recommendations of the commission and makes an appointment (with or without legislative consent); and (6) after serving a fixed term on the bench, the judge is subject to a retention election. *See* AMERICAN JUDICATURE SOCIETY, MODEL JUDICIAL SELECTION PROVISIONS (Revised 2008), *available at* http://www.judicialselection.us/uploads/documents/MJSP_ptr_3962CC5301809.pdf.

8. Hence, "merit selection" is often referred to as "the Missouri Plan." Although Missouri's Nonpartisan Court Plan remains the longest merit selection system in operation, two important caveats should be noted. First, it is a misnomer, as there are many variants of "merit selection," some of which differ dramatically from Missouri's system. For a comparison of state systems see AMERICAN JUDICATURE SOCIETY, JUDICIAL MERIT SELECTION: CURRENT STATUS (2010), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf. Second, not all judges in Missouri are appointed through the Missouri Nonpartisan Court Plan. Under the state's Constitution, circuit court judges in St. Louis, Jackson County (Kansas City) are also appointed through merit selection. The Constitution also permits other counties to adopt merit selection through a majority vote of citizens living in the circuit, and the plan has been adopted by Clay, Platte, St. Louis, and Greene Counties in this manner. *See* American Judicature Society, Judicial Selection in the States, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=MO (last visited May 25, 2010).

appointment and Senate confirmation modeled on the federal system[9] when it first joined the union in 1821, and, like most states, Missouri switched to popular election of judges in the mid-nineteenth century.[10] In the 1930s, the Missouri courts fell victim to machine politics and control by notorious Democratic Party boss Tom Pendergast.[11] After a particularly brutal battle within the Democratic Party in the 1936 judicial elections, the two factions joined forces to punish a popular incumbent Supreme Court justice who had failed to follow Pendergast's political agenda. Specifically, this justice was ousted from the bench, sending a message to other judges (and all elected officials) that there were real repercussions for failing to follow party boss Pendergast.[12] Machine politics were so rampant that between 1918 and 1941 only two Supreme Court justices successfully ran for reelection.[13]

Meanwhile, Judge Eugene Padberg was elected to the Circuit Court in the City of St. Louis with significant support from local party leaders who had put him on the ballot in 1934.[14] Although technically eligible for the bench,[15] Padberg had made his living as a pharmacist before his election.[16] His lack of experience was used to highlight the excess of party politics.[17] His professional behavior continually favored party elites, most notably when he chaired a grand jury charged with investigating brazen election fraud.[18] A fellow judge took the unprecedented step of summarily discharging the grand jury when it became clear that no real effort

9. Judges also had lifetime appointments at the time.

10. Mississippi was the first state to adopt popular elections in 1832. Missouri amended its Constitution to allow for popular election of judges in 1850. *See generally* Charles B. Blackmar, *Missouri's Nonpartisan Court Plan from 1942 to 2005*, 72 MO. L. REV. 199 (2007).

11. *See* LAWRENCE H. LARSEN & NANCY J. HULSTON, PENDERGAST! (1997).

12. Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 722 (2009).

13. American Judicature Society, Judicial Selection in the States: Missouri, http://www.judicialselection.us/judicial_selection/index.cfm?state=MO (last visited Apr. 23, 2010) [hereinafter Judicial Selection in Missouri].

14. The Missouri Bar, http://www.mobar.org/courts/commission_report.pdf [hereinafter Missouri Bar Commission Report] (last visited Aug. 9, 2010).

15. Padberg was admitted to the Bar in 1927. *See id.*

16. Blackmar, *supra* note 10, at 199. *See also* Missouri Bar Commission Report, *supra* note 14, at 22.

17. Missouri Bar Commission Report, *supra* note 14, at 22-24.

18. *Id.* at 23.

was being made to investigate anything – largely because of party control.[19] The *St. Louis Dispatch* called his service "a humiliation to the law and to the city."[20]

The movement to adopt "the Missouri Plan" was a widespread public effort to limit party control over the Missouri courts and stop widespread politicization of judicial decisions.[21] The well-coordinated campaign of citizens, citizen groups, judges, and lawyers achieved merit selection by way of popular initiative in 1940.[22] Within months, opponents in the state legislature argued that citizens did not understand the language of the initiative and demanded a new vote.[23] Thus, in 1942, voters again approved the initiative, with more than double the support of just two years earlier.[24] In 1945, the Missouri voters adopted a new Constitution that included the Nonpartisan Court Plan.[25]

B. The Case of Kansas

In many ways, the experience of Kansas mirrors that of Missouri. When it joined the union in 1861,[26] Kansas (consistent with the trend of the day) chose judges through popular election, allowing the Governor to appoint judges to vacancies.[27] A series of events led to popular dissatisfaction with this system, culminating in what is referred to as the "triple play" in 1956.[28]

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19. *See generally* Blackmar, *supra* note 10.

20. Judicial Selection in Missouri, *supra* note 13. *See also* Missouri Bar Commission Report, *supra* note 14, at 23.

21. Stith & Root, *supra* note 12, at 723-24.

22. Missouri Bar Commission Report, *supra* note 14, at 24.

23. *Id.*

24. Stith & Root, *supra* note 12, at 723. *See also* Judicial Selection in Missouri, *supra* note 13.

25. Judicial Selection in Missouri, *supra* note 13.

26. *See generally* Kansas Office of the Secretary of State, Kansas History, http://www.kssos.org/forms/communication/history.pdf (last visited Aug. 14, 2010).

27. COMMITTEE FOR THE NON-POLITICAL SELECTION OF JUDGES, CONSTITUTIONAL AMENDMENT NO. 1: HERE ARE THE FACTS (on file with author).

28. American Judicature Society, Judicial Selection in the States: Kansas, http://www.judicialselection.us/judicial_selection/index.cfm?state=KS (last visited Apr. 23, 2010). *See also* Patricia E. Riley, *Merit Selection: The Workings of the Kansas Supreme Court Nominating Commission,* 17 K. J. L. & PUB. POL'Y 429, 436 (2008); Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems,* J. KANSAS BAR ASS'N 33-35 (Jan. 2000);

Just before the 1956 election cycle, the dominant political party in the state, the Republicans, faced deep divisions.[29] Republican Governor Fred Hall lost the party nomination to Warren Shaw, who lost the general election to Democratic candidate George Docking.[30] Chief Justice Bill Smith, a supporter of Hall, was ill and wished to retire from the bench, but was uncertain that his successor, through an election, would be ideologically like-minded.[31] Knowing that he would no longer be Governor, Hall negotiated a plan to allow the Chief Justice to retire.[32] Chief Justice Smith retired on December 31, Governor Hall resigned on January 3, and Lieutenant Governor John McCuish took office for eleven days prior to Docking's inauguration.[33] During his eleven-day tenure as Governor, McCuish performed only one official act: the appointment of former Governor Hall as Chief Justice of the Kansas Supreme Court.[34]

The state legislature responded to the "triple play" by proposing a constitutional amendment that would eliminate popular elections and limit gubernatorial influence over judicial appointments by instituting merit selection of Supreme Court justices through a bipartisan nominating commission.[36] The voters supported the constitutional amendment in the 1958 elections by a sizeable margin. [37]

Chief Justice Richard W. Holmes, *Merit Selection of Judges,* J. KANSAS BAR. ASS'N (Aug. 1995).

29. Stacie L. Sanders, *Kissing Babies, Shaking Hands, and Campaign Contributions: Is this the Proper Role for the Kansas Judiciary?,* 34 WASHBURN L. J. 573, 578 (1995).

30. Jackson, *supra* note 28, at 34.

31. Sanders, *supra* note 29, at 578.

32. American Judicature Society, Judicial Selection in the States: Kansas, http://www.judicialselection.us/judicial_selection/index.cfm?state=KS (last visited Apr. 23, 2010).

33. Sanders, *supra* note 29, at 578.

34. *Id.*; Jackson, *supra* note 28, at 34.

[36] Significantly, merit selection was proposed as an alternative to judicial elections in 1953 and 1955, but was not successful until the "triple play" made manipulation of the provision allowing interim appointments to be filled, unchecked, by the sitting governor, publicly apparent. *See* Jackson, *supra* note 28, at 34.

[37] Glenn R. Winters, *Selection of Judges: An Historical Introduction,* 44 TEX. L. REV. 1081, 1085 (1965).

C. The Lessons of Missouri and Kansas

Missouri and Kansas were the first two states to adopt what is currently known as "merit selection" to choose their state judges,[38] and therefore the stories behind the choice in these two states are informative. The historical context is clear in both cases – the impetus for reform was not a concern about the quality of judges, but a concern with the ability of political and party elites to control judicial selection and, in doing so, to manipulate judicial decision-making based on overtly political goals. The central lesson, then, is that the origins of merit selection rest on public dissatisfaction with politics in the judicial process and overt politicization of judicial selection processes. Although a few examples of unqualified or political individuals who came to the bench through these processes came to represent the larger problems inherent in the system, the *system* was the problem, and voters wanted to protect the integrity of the judiciary by improving the system. Put another way, the historical origins of merit selection rest on concerns about the external political environment – those outside of the system were to blame for public distrust of judicial institutions. In explaining the adoption of merit selection in Missouri, Laurance M. Hyde explains:

> [The] most important [impetus for the adoption of the Missouri Plan] was the situation in our two large cities, St. Louis, and Kansas City, where selection and tenure of judges was mainly controlled by politicians, and political machines, very apparently not working in the public interest. Conditions were continuously getting worse so that it was rather generally felt that something had to be done about it . . . selection and tenure of judges depended upon issues wholly irrelevant to any judge's ability, record, or qualifications.[39]

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[38] For a full description of current merit selection states, including the year that the system was adopted in each state, see AMERICAN JUDICATURE SOCIETY, JUDICIAL MERIT SELECTION: CURRENT STATUS (2010), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf.

[39] *See generally* Laurance M. Hyde, *The Missouri Non-Partisan Court Plan, in* JUDICIAL SELECTION AND TENURE: SELECTED READINGS (Glenn R. Winters, ed. 1973).

Similarly, a brochure from the 1958 Kansas campaign for merit selection included the following:

> What's Wrong with Electing Judges? First, the partisan elective process puts the judiciary into politics. Candidates for legislative or executive offices may run on the basis of advocacy of certain policies; a judge should have no policy other than to administer the law honestly and competently. Judges should not be influenced by political alliances or political debts.[40]

The clear intent of reform in both of these states was to create a system where judges would be free from political pressure or influence.

Nonetheless, widespread acceptance of merit selection in other states came to rest on the notion that the individuals chosen through merit selection would be different – and, on the whole, "better" – than those who were chosen through electoral processes. The transition in argument is not as clear as one would expect, however. Arguments supporting judicial selection reform, and advocating for merit selection in particular, are remarkably consistent over time. Even the early writings of Albert Kales, as he embarked on the project to outline some form of judicial selection that would free a judge from the whims of public opinion and partisan control, considered both the quality of the individual judge produced within a given system and the propensity for the system itself to suffer from external influence.[41] In Bulletin VI of The American Judicature Society, Kales writes the following, referring to elective systems at the time:

> The supposition is that if the influence of the party leaders can be eliminated the electorate will necessarily make a real choice. But the electorate does not fail to choose simply because the party leaders have taken that choice from it. On the contrary, the party leaders rule because the electorate regularly goes to the polls too ignorant politically to make a choice of judges. That

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[40] KANSAS STATE CHAMBER OF COMMERCE, THE BASIC ISSUE IS NON-PARTISAN VS. POLITICAL SELECTION OF SUPREME COURT JUSTICES (1958) (on file with author).

[41] JACK RABIN ET AL., HANDBOOK OF PUBLIC ADMINISTRATION 993-94 (3d ed. 2007).

> ignorance is due to the fact that the office of judge is inconspicuous and the determination of who are qualified for the office is unusually difficult, even when an expert in possession of all the facts makes the choice . . . The elimination of extra-legal government by party leaders does not give to the electorate at large the knowledge required to vote intelligently . . . The basis of choice would, therefore, be utterly chaotic. There could be neither responsibility nor intelligence in the selection of judges. The results reached would depend upon chance or upon irresponsible and temporary combinations. With every lawyer allowed to put up his name by petition and chance largely governing the result, the prospect is hardly encouraging.[42]

Following on the heels of Missouri and Kansas, states like Nebraska (1962),[43] Iowa (1962), Wyoming (1972), and Hawaii (1978)[44] appealed less to citizens' concerns about specific individuals within the judicial branch than to the general sense that an independent judiciary, untainted by political control, was better able to deliver impartial justice. Hawaii is typical of this argument, where merit selection proponents argued that the new system would promote individuals who were selected "solely based on their qualifications rather than on political patronage."[45] Similarly, in Iowa, the Voters Committee for Judges and Courts, leading the 1962 reform effort, wrote the proposed plan would (1)

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[42] ALBERT M. KALES, METHODS OF SELECTING AND RETIRING JUDGES, BULLETIN VI, AMERICAN JUDICATURE SOCIETY, 36-37 (on file with author).

[43] The term merit selection was first used in Nebraska. *See* Winters, *supra* note 37, at 1085.

[44] *See* American Judicature Society, Judicial Selection in the States: Hawaii, http://www.judicialselection.us/judicial_selection/index.cfm?state=HI (last visited Apr. 23, 2010). It is important to note that Hawaii's method varies from the typical model of merit selection. *Id.* For all appellate and circuit court judgeships, the judicial selection commission solicits nominations and makes recommendations to the governor. *Id.* The governor appoints one person from the commission's list. *Id.* Then, at the end of a judge's term, they must re-apply to the judicial selection commission and be retained by a majority vote of the commission rather than by a vote of the people. *Id.* For district courts and family courts, the chief justice makes an appointment from a commission list; the commission also must retain district and family court judges by majority vote. *Id.*

[45] *See id.*

remove the selection of Iowa Supreme and District Court Judges from politics; (2) guarantee the right to vote on each District and Supreme Court Judge on his personal record of performance after each term of office; and (3) assure the availability and continuance of qualified judges, freed from the uncertainties and pressures of party politics.[46] Although these arguments referenced individual qualifications, they did not *explicitly* propose that merit selected judges would be different from, or better than, elected judges on a wide array of characteristics. Instead, proponents proposed only one critical difference in the types of judges selected under these different systems: merit selection would prioritize an individual's qualifications regardless of political or partisan affiliations while elections prioritize an individual's political or partisan affiliations regardless of their qualifications. In this argument, we see continued emphasis on ridding the judiciary of *external* political forces.

As a statement of goals, however, it is easy to see how this proposition would be interpreted as a claim that merit selected judges would be *better* than elected judges. There is an implied assumption that selecting judges based upon political affiliations will necessarily diminish the quality of the bench, while choosing based on professional qualifications alone would necessarily increase the quality of the bench.

D. The Case of Rhode Island

As the most recent state to adopt merit selection,[47] Rhode Island's adoption of merit selection is illustrative of this more modern conception of merit selection. Rhode Island's decision to adopt merit selection was prompted by a series of judicial scandals in the late 1980s and early 1990s. Prior to reform, Rhode Island chose its Supreme Court justices through the General Assembly,

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[46] VOTERS COMMITTEE FOR JUDGES AND COURTS, AN OPPORTUNITY FOR YOU TO VOTE TO ASSURE IOWANS ONE OF AMERICA'S FINEST COURT SYSTEMS (1962) (on file with author).

[47] Since 1994, when Rhode Island adopted a statewide merit selection system, other jurisdictions have moved to merit selection, most notably Greene County, Missouri in 2008. But no other state has adopted a statewide system since 1994. AMERICAN JUDICATURE SOCIETY, JUDICIAL MERIT SELECTION: CURRENT STATUS (2010), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf.

with both chambers operating together (called the "Grand Committee") to select judges. Lower court judges were selected by the Governor with Senate confirmation.[48] In 1986, Chief Justice Bevilacqua resigned from the bench in order to avoid impeachment for misuse of public funds and employees, as well as alleged links to organized crime.[49] In 1988, Bevilacqua's successor as Chief Justice, Thomas Fay, hired the House speaker, who had negotiated his appointment, as clerk of the high court and administrator of the court system.[50] Also in 1988, Chief Justice Fay worked with leaders in the General Assembly to create a new magistrate position, with Fay appointing a state Representative who had been the floor manager for his effort to become Chief Justice to that position.[51] In 1993-1994, Fay and the high court's clerk (appointed by Fay), were tried and convicted on an array of charges that they had abused the office.[52] Meanwhile, Superior Court Judge Antonio Almeida was convicted of accepting bribes from a practicing attorney who appeared in his courtroom.[53]

Amid the turbulence of these scandals, a coalition called RIght NOW! initiated a campaign to adopt merit selection.[54] The coalition brought together public interest groups like Common Cause Rhode Island and the League of Women Voters with the state Bar Association, business groups, and religious organizations. In 1994, by a margin of 2-1, the voters of the state adopted a constitutional amendment that created a merit selection

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[48] There is a general consensus that the Governor, the President of the Senate, and the Speaker of the House alternated control over selection of judges through an informal cooperative agreement. *See* American Judicature Society, Judicial Selection in the States, http://www.judicialselection.us/judicial_selection/index.cfm?state=RI (last visited Aug. 14, 2010).

[49] Michael J. Yelnosky, *Rhode Island's Judicial Nominating Commission: Can "Reform" Become Reality?*, 1 ROGER WILLIAMS U. L. REV. 87, 89 (1998). *See also* Rhode Island History, http://www.rilin.state.ri.us/studteaguide/RhodeIslandHistory/chapt9.html (last visited Aug. 14, 2010).

[50] *See also* Rhode Island History, http://www.rilin.state.ri.us/studteaguide/RhodeIslandHistory/chapt9.html (last visited Aug. 14, 2010).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] American Judicature Society, Judicial Selection in the States, http://www.judicialselection.us/judicial_selection/indix.cfm?state=RI (last visited Aug. 14, 2010).

system to choose judges.[55]

The context for reform in Rhode Island, then, combines a *systemic* concern about the *external* influence of political elites who manipulated the judicial branch to advance their personal interests with a *personnel* concern about the integrity and dignity of the individuals who populated the bench. Unlike Missouri and Kansas, where reform was driven by concern about *outside* actors who were attempting to subvert the judiciary for political purposes, reform in Rhode Island was driven by concerns about those who served *inside* the judiciary.[56]

Rhode Island is hardly alone, however. Consider the case of Oklahoma, where the impetus for selection reform – and adoption of merit selection – came in the mid-1960s, when a Supreme Court justice was convicted on charges of bribery, and another was impeached and removed from office.[57] Even as these two justices were immersed in scandal, a former justice had been convicted for tax evasion and was serving time in federal detention.[58] One journalist at the time went so far as to say that the scandals were "one of the blackest marks ever on state government."[59] Like Rhode Island, the reform was initiated with an intention to improve the quality of the individuals selected to serve on the bench. A pamphlet advocating reform read:

> Our practice of electing judges who must 'run' on a party ticket defeats our concept of the impartial administration

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[55]Rhode Island History, http://www.rilin.state.ri.us/studteaguide/RhodeIsland History/chapt9.html (last visited Aug. 14, 2010).

[56] Even prior to the move to merit selection, the concern for personnel was at the center of judicial selection in Rhode Island. In an executive order dated August 10, 1984, Governor J. Joseph Garrahy established an advisory commission on judicial appointments, continuing a process in existence since 1977. The executive order begins: "Whereas the quality and integrity of Rhode Island's judicial system is determined largely by the character and ability of judges serving in such capacities . . . ." Exec. Order No. 84-8 (Aug. 10, 1984) (on file with author).

[57]American Judicature Society, http://www.judicialselection.us/judicial_selection/indix.cfm?state=ok (last visited Aug. 15, 2010). It is important to recognize that Oklahoma was among the first states to consider merit selection in 1962. *Balanced Bench in Oklahoma,* OK. CITY TIMES, Sept. 3, 1962. Merit selection, however, was not adopted until the personnel concerns arose from scandal.

[58] American Judicature Society, http://www.judicialselection.us/judicial_selection/indix.cfm?state=ok (last visited Aug. 15, 2010).

[59] *Id.*

> of justice – for these reasons: Because political influence may outweigh judicial qualifications in a man's getting on a party ticket. An excellent politician may be also a good judge, but all good judges are not necessarily good politicians . . . Because a judge may be tempted to be partial in a case if his political future or renomination is at stake.[60]

The campaign was successful, and Oklahoma voters adopted constitutional amendments that switched district court elections from partisan to nonpartisan contests, and adopted merit selection for all of the state's appellate judges and all interim appointments to the district courts.[61]

Likewise, a failed attempt to adopt merit selection through the "local option" for Florida district courts[62] in 2000 was advocated primarily as a way to improve judicial personnel. Advocates of commission-based appointment relied heavily on the rates of disciplinary actions against sitting judges, arguing that merit selection would promote more qualified judges who would be less prone to these lapses in judgment, thereby promoting a better judiciary.[63] The initiative failed in every county.[64]

E. Combining the Systemic with Personnel

Every judicial selection system is, at its core, a process of determining how outside non-judicial actors (citizens, governors, legislatures) will choose those who work inside the judicial system, those who will give shape and meaning to the abstract

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[60] *See* LEAGUE OF WOMEN VOTERS OF OKLAHOMA, THE ADMINISTRATION OF JUSTICE IS YOUR BUSINESS (1964) (on file with author).

[61] American Judicature Society, http://www.judicalselection.us/judicial_selection/indix.cfm?state=ok (last visited Aug. 15, 2010).

[62] The so-called "local option" permits individual counties to adopt merit selection without any statewide merit selection system. Witness the adoption of merit selection in Greene County, Missouri, and an unsuccessful campaign to nix merit selection in Johnson County, Kansas in 2008. Similarly, two counties in Alabama adopted merit selection for interim vacancies in 2008.

[63] A second argument focused on the increase in campaign contributions and the possibility that the conflicts of interest arising from campaign contributions would only exacerbate the problems with ethical behavior on the bench. American Judicature Society, http://www.judicialselection/us/judicial_selection/indix.cfm?state=fl (last visited Aug. 15, 2010).

[64] *Id.*

notion of judicial authority. Judicial selection, then, is by its very nature an effort to determine the systemic process that will determine personnel. While the immediate environment that gives rise to judicial selection reform in any state may focus attention on one or the other, the design of a judicial selection system necessarily implicates both simultaneously. Nonetheless, the historical record of reform coming from concerns about the system rather than the individuals can help us untangle the ways that merit selection is "different." The difference comes both in the role of extra-judicial actors and the characteristics of those individuals who are chosen to serve. Any effort to examine how merit-selected judges differ from elected or appointed[65] judges requires that we ignore the equally important examination of how non-judicial actors influence the judiciary, as it focuses exclusively on those who are chosen, rather than the question of how extra-judicial actors have influenced the process.

Yet generations of scholars have turned their attention to this question, with mixed success. Given the generalized claim that merit selection will not only lessen the influence of political forces within the justice system, but will also elevate highly qualified individuals to the bench, the claim that those jurists chosen through merit selection will be fundamentally different than those elected to the bench deserves considerable attention. This attention has come at the expense of the equally compelling question of whether merit selection fundamentally alters the ability of non-judicial actors to manipulate the choice of judges or judicial decisions and the extent to which this manipulation occurs.[66] In an effort to meld these two questions as much as is

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[65] Judges are appointed by the governor without the aid of a nominating commission in a number of states. See Appendix for a breakdown of states that use each method of selection.

[66] There have been a number of claims that merit selection permits the bar to have extraordinary influence in the choice of judges. The scholars who make these claims argue that providing the bar with a role in the process privileges a set of elite political goals at the expense of average Americans' input. See for example, a lawsuit in Alaska challenging the state's merit selection system on exactly these grounds. *See generally* Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court,* 18 KAN. J.L. & PUB. POL'Y 392, 392-427 (2010). *See also* Stephen J. Ware, *The Missouri Plan in National Perspective,* 74 MO. L. REV. 751, 755-64 (2009). There is little empirical evidence, however, to support these claims. Although some have attempted to test the role of the bar, the data has significant

practical, the discussion offered here attempts to expand traditional considerations of how merit-selected judges might differ by including some new lines of research regarding the influence of outside actors.

II. HOW DIFFERENT ARE JUDGES CHOSEN THROUGH MERIT SELECTION?

To assess how merit-selected judges may differ from judges chosen in elective or appointive systems, I examine a number of ways that we might expect judges to differ based on the system under which they were selected. The debate over merit selection has focused on a few key assumptions about how each system of selection will function, and these arguments form the basis for the discussion.

The most prominent point of debate references the "quality" of judges selected in elective, appointive, and merit selection systems. This debate has inevitably stalled because of the difficulty in determining what we mean by "quality." Judges are asked to perform many tasks, and the job of judging is notoriously difficult to reduce to easily measured qualities.[67] Judges are expected to exhibit personal, professional, and judicial characteristics, which are sometimes contradictory. We expect "good judges," for example, to be firm and decisive, yet we also hope that they will be deliberative, respectful, and patient. We expect judges to be well-trained in the law and impartial in their decisions (implying that all "good" judges should reach the same conclusion) at the same time that we recognize the value of having

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flaws. Most notably, Professor Brian Fitzpatrick examined the list of individuals who were recommended by the nominating commission in Tennessee and attributed a party affiliation to each of them based upon uneven, inconsistent data on their participation in party primary elections. Brian T. Fitzpatrick, *The Politics of Merit Selection,* 74 MO. L. REV. 675, 693 (2009). For example, if a recommended individual had participated in ten primary elections, six as a republican and four as a democrat, he would be labeled a republican for Fitzpatrick's purposes. *Id.* Like Rhode Island, Tennessee is dominated by one political party, and the choice to vote in a party primary may just as likely be a strategic calculation as an expression of political preferences.

[67] Rosenberg, *supra* note 5. Brian Z. Tamanaha, *The Distorting Slant of Quantitative Studies of Judges,* Legal Studies Research Paper Series, Paper #08-0159 78-79 (St. John's Univ., Nov. 2008) (on file with author).

diversity on the bench (implying that race, gender, religion, and other characteristics will necessarily influence a judge's interpretations of the law).[68] Those who prioritize accountability to the public claim that a "good" judge will be responsive to public opinion on prominent legal, political, and social issues, but public opinion polls widely report that voters want the judicial branch to remain free from political influence.[69] To say that we can easily compare judges selected through different systems requires us to directly address the contradictions inherent in doing so.

Here, I select some possible characteristics that might help us define "quality" judges, recognizing that the list is necessarily incomplete. What we find, however, is that there are predictable ways in which merit-selected judges differ from their elected and appointed colleagues.

A. Legal Experience & Professional Background

The earliest studies of how merit selection matters focused attention on the professional and legal background of judges.[70] In examining these patterns, research indicated little difference between merit-selected judges and those who reached the bench through other methods.[71] Most notably, Henry R. Glick and Craig

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[68] The most recent example of this contradictory set of expectations is, clearly, the Senate hearings on the confirmation of Justice Sotomayor related to her comments about a "wise latina" who would be better qualified to reach fair decisions. Despite widespread acceptance of Justice Alito's explanation that his background and family experiences would make him more aware of and more sensitive to the claims of immigrants, Justice Sotomayor's comments were widely used to discredit the idea that she would be impartial in her decisions. *See* American Bar Ass'n, *Is the "Wise Latina" a Myth?, available at* www.abanow.org/?s=wuse+latine+myth.

[69] For example, a poll of Pennsylvania voters found that seventy percent believed it was "very important" that judges be "independent of politics;" at the same time, seventy percent reported that they thought it "very important" that judges be "representative of the values of their community." *See* BELDEN, RUSSONELLO & STEWART, QUALITY COUNTS: MAKING THE CASE OF MERIT SELECTION (Mar. 2002) (on file with author).

[70] As comparison is always a tricky business, prior scholars have repeatedly cautioned against drawing too many conclusions without adequately controlling for regional differences. *See generally* Philip L. Dubois, *The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California*, JUST. SYS. J. (1983); Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges – Reconsidered*, L. AND SOC'Y REV. (1972).

[71] *See* Larry L. Berg et al., *The Consequences of Judicial Reform: A*

F. Emmert's exhaustive examination of all state high court judges in 1980 and 1981 found few differences in the qualifications or educational backgrounds of merit-selected or elected judges.[72] Among those differences they did find, appointed judges (both chosen through merit selection systems as well as those chosen through gubernatorial appointment without the use of a nominating commission) were significantly less likely to be born in the state in which they serve, less likely to have completed their undergraduate education in the state, and more likely to have attended a prestigious law school.[73] Merit-selected judges, moreover, were more likely to have governmental experience (including partisan positions) than judges selected in other systems.[74] Most importantly, Glick and Emmert's findings, like those of scholars before them, indicated that judges selected in partisan elections were more likely to have more years of legal experience, while appointed judges are more likely to have practiced law in large firms.[75]

The difficulty with this line of inquiry is that it is unclear exactly why one should expect significant differences in background characteristics – like years of experience, size of law firm, and in-state or out-of-state law school – as these are unlikely to capture those qualities that are most important to the enterprise of judging, nor is it clear why these particular qualities are measured. It is perhaps unsurprising, then, that little recent work has been done on this question. It is undoubtedly more significant to focus on the work that judges do.

B. Diversity

Because of the judge's unique role within the American justice

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Comparative Analysis of the California and Iowa Appellate Systems, 28 W. POLITICAL Q. 263 (1975); RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF BENCH AND BAR (1969). The notable exception to this general conclusion that the selection system does not alter the characteristics of judges is Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104 (1964).

[72] *See generally* Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1987).

[73] *Id.* at 231-32.

[74] *Id.* at 232-33.

[75] *Id.* at 231-33.

system, scholars have recently directed attention to the diversity of the bench, and the degree to which the judicial system adequately represents minorities and women. Although race or gender are not typically among the most significant characteristics directly related to job performance, there have been notable claims that these traits have a large effect not only in how an individual judge approaches the task of rendering decisions but also in establishing greater public confidence in the decisions rendered. Existing studies have produced vastly different results about the effects of judicial selection systems on gender and racial diversity on the state bench, however.[76] Some scholars have found that merit selection is less likely to advance the goal of a diverse bench.[77] Other studies have found that appointive selection systems advance judicial diversity. For example, in a study of women and minorities on courts in all fifty states, M.L. Henry concluded that "the success of women and minorities in achieving judicial office depends in large measure upon the method of selection," finding that appointive systems were much more effective in creating a diverse bench than electoral systems.[78] Similarly, a more recent study found that some types of appointive systems tend to favor African American candidates of both genders.[79] Other scholars have noticed a

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[76] It is important to note that some scholars have found no relationship between method of selection and diversity on the bench. *See, e.g.*, Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches: A Cross-Time Comparison*, 1985-1999, 85 JUDICATURE 84 (2001); Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 SOC. SCIENCE Q. 110 (1996); Nicholas O. Alozie, *Black Representation on State Judiciaries*, 69 SOC. SCIENCE Q. 979 (1988).

[77] *See, e.g.*, Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats of State Supreme and Appellate Courts*, 3 STATE POLITICS AND POL'Y Q. 329, 338-39 (2003) (finding that merit selection produced a lower proportion of minority judges in 1985, but that this effect had diminished by 1999); GARY S. BROWN, CHARACTERISTICS OF ELECTED VERSUS MERIT-SELECTED NEW YORK CITY JUDGES, 1992-1997 (1998) (finding that elective systems produced more minority and women jurists in New York City from 1992-1997).

[78] *See* Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, *in* RESEARCH ON JUDICIAL SELECTION (Am. Judicature Society 1999); M.L. HENRY, THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE 65 (1985).

[79] *See generally* ELAINE MARTIN & BARRY PAYLE, GENDER AND THE RACIAL DIVERSIFICATION OF STATE SUPREME COURTS, WOMEN AND POLITICS (2002).

"threshold effect," whereby appointive systems provide gender diversity to formerly all-male courts, but the effect may not hold once the court is initially diversified.[80]

While there has been considerable disagreement about the nature of the relationship, some methodological deficiencies have hindered prior research. Most studies of diversity have relied upon the states' formal methods of selection, ignoring the fact that individual judges often reach the bench through informal mechanisms such as vacancy appointments.[81] In addition, existing research typically limits the scope of inquiry to a single set of states or a single set of courts, most often state supreme courts. Recent research has attempted to resolve these problems by collecting information on each individual judge and the method by which they first attained their seat on the bench.[82] The data represents all appellate state court judges who were sitting in 2008 and a random sample of ten percent of all state court judges sitting on state trial courts of general jurisdiction. The results, depicted in Table I, indicate that more women and minorities reach the bench through merit selection than through any other selection process. For minority jurists, substantially higher proportions of appellate judges are merit-selected, although this pattern does not hold for trial courts of general jurisdiction. Women on state supreme courts are more likely to be appointed through merit selection, although partisan elections are more effective at promoting women to the intermediate appellate courts,

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[80] *See, e.g.*, Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 JUST. SYS. J. 1-13 (2006) (finding that interim appointments are also effective at diversifying all-white or all-male courts); Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCIENCE Q. 504-18 (2002).

[81] A number of states use merit selection only for interim vacancies, so the "formal" selection system may be elections, but an individual judge may be chosen through the "informal" process where they are initially appointed to the bench. *See* AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS, *available at* http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

[82] *See generally* Malia Reddick, Michael J. Nelson, and Rachel Paine Caufield, *Racial and Gender Diversity on State Courts: An AJS Study*, 48 JUDGE'S J. 28 (2009).

and gubernatorial appointment without a nominating commission is the most prominent path to the bench for women serving on trial courts. Multivariate analysis indicates that democratic governors are most likely to appoint women and minorities, and the best predictor of judicial diversity is the proportion of minority and women attorneys in the state.[83]

C. Judicial Decisions and Ideology

Judicial selection reform has generally been fostered by the idea that changes in selection system will limit the ideological or political influence on individual judicial performance. The degree to which elected, appointed, or merit-selected judges exhibit decisional independence, then, is key to understanding the ability of the system to insulate judicial decisions from popular or political retaliation. Furthermore, the extent to which judicial decisions are ideologically different can tell us whether merit selection produces ideological implications for the bench.[84]

Some research on this question indicated little if any difference in judges' propensity to support plaintiffs in personal injury litigation,[85] sentencing behavior in DWI cases,[86] or supreme court decisions on racial discrimination claims.[87] Nonetheless, a number of other scholars have found significant differences between elected and appointed judges. Appointive state supreme courts, for example, were found to be significantly more likely to uphold sex discrimination claims.[88] Particularly on those cases that are most salient – capital cases – research has demonstrated that appointed judges are more likely to oppose the death penalty while elected judges' decisions reflect the level of partisan

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[83] *Id.* at 30.

[84] Some have argued that the merit selection process institutionalizes the role of the bar and therefore produces more judges who are sympathetic to trial lawyers. *See generally* Fitzpatrick, *supra* note 66.

[85] *See* WATSON & DOWNING, *supra* note 71, at 324-26.

[86] Jerome O'Callaghan, *Another Test for the Merit Plan*, 14 JUST. SYS. J., 477, 482 (1991).

[87] Francine Sanders Romero, David W. Romero and Victoria Ford, *The Influence of Selection Method on Racial Discrimination Cases: A Longitudinal State Supreme Court Analysis*, 2 RESEARCH ON JUDICIAL SELECTION, 17, 27 (Am. Judicature Society 2002).

[88] *See* Gerard S. Gryski, Eleanor C. Main & William J. Dixon, *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143 (1986).

competition in the state, with highly competitive states leading to more judicial decisions to impose the death penalty.[89] Likewise, in a study of criminal cases, with a focus on criminal procedure, appointed judges were more likely to rule in favor of the defendant over the state.[90] For those that wish to see courts be faithful to public opinion (an external force, surely), a substantial body of work has clearly indicated that elected judges give harsher punishments and more often sentence people to death than merit selected judges. For those that value the independence of the judiciary and value independent decisions that reflect respect for political minorities and the dispossessed based on legal protections, this body of research would confirm that merit-selected judges are freer to diverge from popular opinion. While this may not reflect any clear ideological distinction based on the method of selection, there are systematic differences in judicial decisions.

Most recently, some scholars assert that merit selection systems favor "the lawyer class," which is assumed to be liberal.[91] It is therefore worth examining the general propensity of merit selection systems to be "captured" by liberal lawyers and, as a result, make decisions that are unfavorable to business. The Chamber of Commerce Institute for Legal Reform (ILR) rankings are illustrative, as they convey some information about whether merit selection is detrimental to the business community. In fact, the 2008 rankings are particularly telling. Assessing the treatment of tort and contract litigation, the five states rated the highest all use merit selection of judges, while the five states rated the lowest all use contested elections. Similarly, all five of the top rated states for punitive damages appoint their appellate judges,[92] while three of the five worst elect their appellate judges. In rating the impartiality of a state's judges, three of the top five states have adopted merit selection, one state uses legislative appointment, and another state, Minnesota, uses nonpartisan

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[89] *See* Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5 (1995).

[90] DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY 73-104 (1995).

[91] Fitzpatrick, *supra* note 66, at 690-91.

[92] One of the top five, Maine, uses a gubernatorial appointment system without a nominating commission.

elections. However, a large percentages of Minnesota judges (as high as 96%) are appointed under a merit selection plan for interim vacancies; the same is true for the Chamber's assessment of judges' competence. Overall, even the most cursory look at the ILR's rankings tells the story clearly: all of the top five states use appointment methods, whereas all of the lowest five states use contested elections. This evidence clearly refutes any claim that trial lawyers are dominating merit selection procedures and fostering judicial institutions that are hostile to business.

D. Work Product

A prominent line of research by Choi, Gulati and Posner[93] assesses the work product of state courts, in order to develop an alternative ranking to the Chamber of Commerce ILR ranking system.[94] Their specific concern is that the Chamber of Commerce studies are based on a survey of attorneys at large national firms who may favor big business interests.[95] As such, the ILR rankings do not provide an unbiased assessment of state judiciaries, whereas other more objective measures may yield different results. Choi, Gulati, and Posner have, therefore, based their rankings on judicial decisions to determine (1) which courts are most likely to produce high quality opinions (as measured by the number of citations by other out-of-state courts); (2) which courts produce the most opinions; and (3) which judges are most independent (as measured by whether a judge votes along party lines).[96]

In terms of productivity, the study demonstrates that elected

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[93] Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Which States Have the Best (and Worst) High Courts?*, John M. Olin Law and Economics Working Paper No. 405, *available at* HTTP://PAPERS.SSRN.COM/SOL3/PAPERS.CFM?ABSTRACT_ID=1130358; Public Law and Legal Theory Working Paper No. 2172 (2008), *available at* http://www.law.uchicago.edu/files/files/405.pdf.

[94] A few political scientists have developed similar measures in the past, including GREGORY A. CALDIERA, ON THE REPUTATION OF STATE SUPREME COURTS, POLITICAL BEHAVIOR (1983) (state supreme court "reputation" scores measuring citations), and SCOTT A. CAMPARATO, ON THE REPUTATION OF STATE SUPREME COURTS REVISITED, REMARKS PRESENTED AT THE ANNUAL MEETING OF THE MIDWEST POLITICAL SCIENCE ASSOCIATION (2002) (updating Caldiera's measures).

[95] This is precisely why the ILR survey is so valuable in assessing whether state judiciaries are hostile to business.

[96] *See* Choi, Gulati, & Posner, *supra* note 93.

judges, especially those selected in partisan elections, write the most opinions.[97] California, which uses appointment to select Supreme Court justices, with consent of the Commission on Judicial Appointments, and Delaware, which has an appointed judiciary through a merit selection process instituted through executive order, rank as the states that are most influential and most cited by other high-courts.[98] However, Montana and Washington, which select their high-courts through nonpartisan elections, follow close behind Delaware in regard to how frequently their high-courts are cited by out-of-state high-courts.[99] Massachusetts, which uses merit selection and lifetime appointment, completes the top five.[100] Accordingly, in regard to reputation, there are no significant differences between judges in states that use merit selection and those in states using other methods of judicial selection.[101] Lastly, the study finds that Rhode Island, New York, Oregon, Utah, and Oklahoma's civil courts rank at the top in terms of independence.[102] Of these five, only Oregon's high court is elected in nonpartisan elections.[103] The other four have all implemented a merit selection system for their high courts.[104]

These measures offer a mixed review of which methods of selection yield the "best" judges. It is clear from the independence rankings that there are fewer ideological forces at work among merit-selected judges, and accordingly, less partisan influence. While elected judges may produce more opinions, if those opinions are driven by ideological factors, then that productivity may not make up for the partisanship ensconced within the judiciary.

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[97] The study also illustrates that there is a correlation between the salary and the productivity of elected judges. *See* Choi, Gulati & Posner, *supra* note 93.
[98] *Id.* at 16.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 17.
[103] *Id.*
[104] *Id.* The authors characterize Rhode Island and New York as appointment systems, but both states have adopted a merit selection system for their high courts. *See* Judicial Selection in the States: Appellate and General Jurisdiction Courts (2010), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charters_1196376173077.pdf.

E. Ethics

Most pertinent to states that implemented merit selection in the wake of judicial scandals, such as Rhode Island, a "good" judge is one who recognizes the power of the position and respects the dignity of the office. Studies of judicial discipline indicate that merit selection promotes individuals who are less likely to be disciplined for judicial indiscretions. For example, an examination of New York City judges found that elected judges serving on the City's Civil Court were substantially more likely to face disciplinary action than appointed judges serving on the City's Supreme Courts and Family Courts.[105] Similarly, in California, elected judges have higher disciplinary rates than appointed judges.[106] Moreover, the Florida Bar reports that since 1970, ten of the thirteen judges who have been removed from the bench pursuant to disciplinary proceedings were elected rather than merit-selected; since 1998, seventy-three percent of judges who were disciplined were initially elected to the bench.[107]

Comparing disciplinary rates is a difficult task, as state provisions and enforcement regimes vary considerably.[108] A recent study examining judges in nine states, all of which have mixed systems where a judge may be initially appointed through merit selection or initially elected, indicates that disciplinary rates are significantly lower for appointed judges.[109] Using a quasi-

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[105] Steven Zeidman, *To Elect or Not To Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 810 (2004).

[106] *See* State of California Commission on Judicial Performance, Summary of Discipline Statistics 1990-1999, *available at* http://www.cjp.ca.gov/usefiles/file/miscellaneous/report_sum_stats_90T099.pdf.

[107] *Id.*

[108] Research by Goldschmidt, et al. examines the relationship between discipline and selection systems, but suffers from two problems. First, it analyzes aggregate data, thereby minimizing the very significant differences between states. Second, the research classifies judges based upon the "formal" selection system within the state, which fails to recognize the large number of judges who initially come to the bench through "informal" procedures to fill vacancies. *See generally* Iona Goldschmidt, David Olson & Margarget Eikman, *The Relationship Between Method of Judicial Selection and Judicial Misconduct,* 18 WIDENER L.J. 455, 455-90 (2009).

[109] Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline* (2010), *available at* http://www.ajs.org/selection/docs/JudgingQualityJudSelectMethods.pdf.

experimental design to control for the state's rules as well as its enforcement, Reddick (2010) finds that the proportion of merit selected judges who are disciplined is significantly lower than the proportion of all merit selected judges in the state in six of the nine states studied.[110] These findings suggest that concerns about the people serving on the bench can be alleviated by merit selection. In other words, merit selection does, indeed, result in more ethical judges than elections.

III. WHAT MAKES MERIT SELECTION DIFFERENT?

Over the past seven decades, states have opted for merit selection to address two distinct concerns about their state judiciaries: external political influences on the judiciary and the individuals who serve inside the judiciary. An evaluation of the types of judges who are selected reflects these arguments. Early studies examining differences in judges' personal background found little evidence to support a shift to merit selection, but these early studies, focusing on educational or geographic background, have little relation to the real concerns that gave rise to reform. From a practical perspective, states that suffered significant systemic or personnel problems found merit selection to be a way of removing either outside political forces (systemic) or unfit individuals (personnel) from the bench. From a systemic perspective, merit selected judges (1) appear to be more independent from partisan influences, and (2) may be less likely to reflect popular sentiment in their decisions, especially with regard to the rights of the accused and defendants in capital cases. From a personnel perspective, merit selection has helped to bring more diverse individuals to the bench and has resulted in more ethical judges.

The debate that continues to frame decisions about which method of selection is preferable reflects deep division about these forces, as some believe that judges *should* reflect the same political forces that motivate other elected officials or that elections are the most effective way to eliminate unfit judges. Merit selection proponents have long argued that merit selection is preferable because it provides a bipartisan screening process

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[110] *Id.*

that can avoid populating the bench with unqualified individuals. At the same time, merit selection promotes a bipartisan decision about which individuals are most likely to serve with distinction. Finally, proponents argue that merit selection removes overt political influence from the courts, allowing judges to remain faithful to the law. Merit selection is not a panacea and care must be taken to ensure that these systems use policies and procedures that foster meaningful and thoughtful deliberation. Looking at the broad array of measures that we can use to evaluate the differences that may be attributable to selection systems, it is clear that differences do emerge. More importantly, those differences reflect real improvements to the situations and circumstances that originally gave rise to the movement to initiate merit selection.

Appendix: Summary of Initial Selection Methods for Appellate and General Jurisdiction Courts[111]

Merit Selection	Gubernatorial (G) or Legislative (L) Appointment	Partisan Election	Nonpartisan Election	Combined Merit Selection and Other Methods
Alaska	California (G)	Alabama	Arkansas	Arizona
Colorado	Maine (G)	Illinois	Georgia	Florida
Connecticut	New Jersey (G)	Louisiana	Idaho	Indiana
Delaware	Virginia (L)	Ohio	Kentucky	Kansas
District of Columbia	South Carolina (L)	Pennsylvania	Michigan	Missouri
Hawaii		Texas	Minnesota	New York
Iowa		West Virginia	Mississippi	Oklahoma
Maryland			Montana	South Dakota
Massachusetts			Nevada	Tennessee
Nebraska			North Carolina	
New Hampshire			North Dakota	
New Mexico			Oregon	
Rhode Island			Washington	
Utah			Wisconsin	
Vermont				
Wyoming				

[111] For details on each state and the methods of judicial selection used, see Judicial Selection in the States: Appellate and General Jurisdiction Courts (2010), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

TABLE I: Selection Methods and Diversity on State Courts [112]

	Courts of Last Resort	Intermediate Appellate Courts	General Jurisdiction Trial Courts	Total
Racial/Ethnic Minorities				
Merit Selection	54.3% (19)	40.8% (49)	25.5% (26)	36.6% (94)
Gubernatorial Appointment	31.4% (11)	22.5% (27)	35.3% (36)	28.8% (74)
Partisan Election	11.4% (4)	25.0% (30)	27.5% (28)	24.1% (62)
Nonpartisan Election	2.9% (1)	3.3% (4)	8.8% (9)	5.4% (14)
Legislative Election	---	0.8% (1)	2.9% (2)	1.2% (3)
Court Appointment	---	7.5% (9)	1.0% (1)	3.9% (10)
	(35)	(120)	(102)	(257)
Women				
Merit Selection	48.5% (50)	27.5% (77)	30.2% (60)	32.1% (187)
Gubernatorial Appointment	17.5% (18)	28.6% (80)	28.1% (56)	26.5% (154)
Partisan Election	19.4% (20)	29.3% (82)	24.1% (48)	25.8% (150)
Nonpartisan Election	10.7% (11)	6.1% (17)	12.1% (24)	8.9% (52)
Legislative Election	1.9% (2)	1.4% (4)	2.0% (4)	1.7% (10)
Court Appointment	1.9% (2)	7.2% (20)	3.5% (7)	5.0% (29)
	(103)	(280)	(199)	(582)

[112] Figures represent percentages and numbers of minority and women judges by selection method. Data includes all state appellate judges and a random sample of ten percent of all states trial court judges. Each judge is characterized according to the actual method. Malia Reddick, Michael J. Nelson, and Rachel Paine Caufield, Racial and Gender Diversity on State Courts: An AJS Study, The Judges Journal, v. 48 (28-32) at 31.