

# Merit Selection: A Review of the Social Scientific Literature

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## I. Introduction

As one judicial selection scholar noted, “It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past 50 years as the subject of judicial selection.”<sup>1</sup> Central to the judicial selection debate is the appropriate balance between judicial independence and judicial accountability. Generally, judicial independence refers to the common law tradition of a judiciary that is institutionally immune from outside political pressures in the resolution of individual cases, whereas judicial accountability comports with democratic principles and allows the judiciary to be responsive to changes in public opinion. Lifetime appointment systems are said to ensure judicial independence; popular elections at frequent intervals are favored by those who value judicial accountability.

The so-called “merit plan” for selecting judges was introduced in the 1930s as a means of promoting both independence and accountability. Merit selection calls for gubernatorial appointment of judges from a list of names submitted by an independent nominating commission. After a brief period in office, judges run in retention elections where only one question is posed to voters—should the judge be retained in office. In addition to balancing judicial independence and accountability, merit selection systems are said to produce highly qualified judges, since candidates are screened by nonpartisan commissions.

A large body of social scientific research has developed that seeks to evaluate the claims made by proponents of merit selection.

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1. Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31, 31 (1986).

Specifically, researchers have examined the extent to which nominating commissions insulate judicial selection from the political process, whether retention elections make judges accountable to the public, and whether merit-selected judges are distinguishable from judges selected through other means. I consider that research here, summarizing the qualitative and quantitative studies that have attempted to measure the actual effects of merit selection of judges.<sup>2</sup>

This review takes three parts. In the first two, I consider the key features of merit selection systems—judicial nominating commissions and retention elections. In the third part, I compare the products of merit systems—the judges themselves—to the products of other selection systems.

## II. Judicial Nominating Commissions

Allan Ashman and James Alfini describe judicial nominating commissions as “the cornerstone of the merit selection plan.”<sup>3</sup> Empirical research has focused on two aspects of judicial nominating commissions: the extent to which commission members and their nominees reflect the diversity of the larger community and the role of politics in the nominating process.

### A. *Diversity and Judicial Nominating Commissions*

Because the composition of judicial nominating commissions may affect who the nominees will ultimately be, three major studies have explored the gender and racial diversity of these commissions. In 1973, Allan Ashman and James Alfini surveyed members of nominating commissions in thirteen states.<sup>4</sup> Beth Henschen, Robert Moog, and Steven Davis conducted a similar survey of nominating commissioners in thirty-four states in 1989.<sup>5</sup> The most recent study of the racial and gender makeup of nominating commissions was conducted by Kevin Esterling and Seth Andersen, who gathered demographic information on nominating commissioners in eight states in the 1990s.<sup>6</sup>

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2. The reader will note that much of the empirical research on merit selection systems was conducted in the late 1970s and early 1980s. The reason for this is that fourteen states had adopted merit plans by the end of the 1970s, so that assessing the effects of merit selection was particularly relevant during this time. See Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1987).

3. ALLAN ASHMAN & JAMES J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 22 (1974).

4. *Id.*

5. Beth M. Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328, 334 (1990).

6. Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, in RESEARCH ON JUDICIAL SELECTION 1999 (Am. Judicature Soc’y ed., 1999).

In the first major study, Ashman and Alfini found that nominating commissioners were overwhelmingly white and male. More specifically, nominating commissioners were 97.8 percent white and 89.6 percent male.<sup>7</sup> This study also compared the characteristics of lawyer and non-lawyer commissioners. Only two of 194 lawyer members were non-white, and only one was a woman.<sup>8</sup> Of the 153 lay members, 3.3 percent were non-white, and 22.3 percent were women.<sup>9</sup>

Sixteen years later, Henschen, Moog and Davis reported notable gains in the representation of women on judicial nominating commissions.<sup>10</sup> Twenty-five percent of commissioner respondents were women, and the percentage of women among attorney commissioners had increased to 10 percent.<sup>11</sup> This study showed only slight increases in the proportion of minority commissioners, with 7 percent of commissioners being non-white.<sup>12</sup> As in the Ashman and Alfini study, there were fewer minorities among lawyer members, 5 percent, than lay members, 14 percent.<sup>13</sup> The Henschen study also reported significant variation in the racial and gender composition of nominating commissions across states.<sup>14</sup> This variation was later confirmed in the data collected by Esterling and Andersen.<sup>15</sup> States with a significant proportion of Hispanic commissioners included New Mexico, at 30.9 percent, and Arizona, at 25.8 percent, while states with substantial African-American representation were Tennessee, at 20 percent, and Florida, at 18.1 percent.<sup>16</sup> The extent of gender diversity on these commissions ranged from 22 percent in Alabama to nearly 47 percent in Tennessee.<sup>17</sup>

Esterling and Andersen examined the effects of gender and racial diversity within nominating commissions on the gender and racial diversity of applicants and nominees. In the five states for which data was available, there was some evidence that diverse commissions attracted more diverse applicants and selected more diverse nominees.<sup>18</sup>

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7. ASHMAN & ALFINI, *supra* note 3, at 38.

8. *Id.* at 38-39.

9. *Id.*

10. Henschen et al., *supra* note 5, at 330.

11. *Id.*

12. *Id.* at 329.

13. *Id.* at 330.

14. *Id.*

15. Esterling & Anderson, *supra* note 6, at 24-25.

16. *Id.* at 24.

17. *Id.* at 25.

18. *Id.* at 24-28.

## *B. Politics and Other External Influences in the Nominating Process*

### 1. Politics

Nominating commissions represent an attempt to reduce or eliminate the influence of partisan politics in the selection of judges. The Ashman and Alfini study summarized state efforts to insulate nominating commissions from political pressures.<sup>19</sup> Some states require the appointing authority to make commission appointments without regard to political affiliation.<sup>20</sup> Other states mandate partisan balance among commission members and restrict the political activities of sitting commissioners.<sup>21</sup> Many states also limit the number of consecutive terms that commissioners may serve and preclude commissioners' eligibility for judicial office for a period of time after their service.<sup>22</sup>

A substantial body of research exists on the extent to which politics plays a role in the selection of members of nominating commissions and the decisions that they make. The most comprehensive study in this regard is the Richard A. Watson and Randal C. Downing study of the Missouri Non-Partisan Court Plan.<sup>23</sup> According to this study, political influences were present in the selection of both lawyer and lay commissioners.<sup>24</sup> Lawyer commissioners were elected in a competitive "two party" system, where plaintiffs' lawyers and defendants' lawyers each sought to elect like-minded colleagues to the nominating commissions and thus to promote the selection of judges who would protect their clients' interests.<sup>25</sup> Politics also figured in the appointment of lay commissioners, who tended to be from the same political party as the governor.<sup>26</sup>

The Henschen study discovered extensive political activity among nominating commissioners prior to their selection. Two-thirds of the commissioners belonged to civic organizations, more than one-fourth served in a party office, and nearly one-third held public office.<sup>27</sup> Lay commissioners were particularly active, with 33 percent having served in a party office and 24 percent having held

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19. ASHMAN & ALFINI, *supra* note 3, at 70-79.

20. *Id.* at 72.

21. *Id.* at 72-73.

22. *Id.* at 73.

23. RICHARD A. WATSON & RANDAL G. DOWNING, THE POLITICS OF BENCH AND BAR (1969).

24. *Id.* at 19-48.

25. *Id.* at 20-43.

26. *Id.* at 43-48.

27. Henschen et al., *supra* note 5, at 331-32.

public office.<sup>28</sup> According to Henschen, the extent of political involvement among commissioners “raise[d] the somewhat troubling spectre of political favoritism.”<sup>29</sup>

Watson and Downing also presented evidence of political influences in the selection of nominees by the commissions.<sup>30</sup> Their study documented various forms of “panel stacking” and “logrolling.” “Panelstacking” occurs when a commission submits a combination of nominees to the governor that offers no real choice.<sup>31</sup> “Logrolling” describes a situation in which individual commissioners or groups of commissioners agree to support one another’s nominees.<sup>32</sup>

Studies have shown that politics not only plays a role in the selection of commissioners but also in their deliberations. Two studies have gauged the opinions of nominating commission members regarding the role of politics in their deliberations. Ashman and Alfini reported that approximately one-third of the commissioners surveyed believed that political considerations were introduced in their deliberations and that they had at least some influence on their decisions.<sup>33</sup> The commissioner responses from four states, accounting for over 75 percent of the respondents, revealed an interesting distinction. In Colorado, where commissions must be bipartisan, only 15 percent of respondents felt that politics affected their decisions.<sup>34</sup> In Iowa, Florida, and Maryland, where partisan balance is not required, between 37 percent and 41 percent of respondents believed that political considerations influenced their decisions.<sup>35</sup>

In another study, Joanne Martin questioned the chairs of nominating commissions in thirty-four states and the District of Columbia.<sup>36</sup> Slightly more than half indicated that political considerations entered into their deliberations at least “infrequently” and that they were of at least “some importance.”<sup>37</sup>

## 2. Other External Influences

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28. *Id.* at 332. These findings regarding lay commissioners contrast with those of Watson and Downing, who reported that lay commissioners participated heavily in civic and social organizations but were not involved in political activities. See WATSON & DOWNING, *supra* note 23, 44-45.

29. Henschen et al., *supra* note 5, at 334.

30. WATSON & DOWNING, *supra* note 23, at 101-11.

31. *Id.* at 107-08.

32. *Id.* at 109-11.

33. ASHMAN & ALFINI, *supra* note 3, at 75.

34. *Id.* at 76-77.

35. *Id.*

36. JOANNE MARTIN, MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY? (1993).

37. *Id.* at 20-22.

Researchers have explored other external influences on the nominating process, including bar associations. Many of the attorneys interviewed for Watson and Downing's study of the Missouri Non-partisan Court Plan indicated that the Plan "had not eliminated 'politics' but merely had substituted Bar politics and gubernatorial politics for the traditional politics of party leaders and machines."<sup>38</sup> Ashman and Alfini examined a variety of ways in which bar associations may influence the composition and deliberations of judicial nominating commissions and suggested that this was a fruitful avenue for further research.<sup>39</sup>

In 1990, Charles Sheldon surveyed leaders of state bar associations regarding their organizations' involvement in judicial selection.<sup>40</sup> In states where the bar elects lawyer members of judicial nominating commissions, the bar leadership appoints lawyer commission members, or the bar nominates or recommends lawyers to the governor to be appointed to nominating commissions, state bar leaders believed that the bar was, at a minimum, fairly effective in influencing judicial selection.<sup>41</sup> Bar leaders were less enthusiastic about bar efforts to affect judicial elections, including committee recommendations to the public and bar polls.<sup>42</sup>

### III. Retention Elections

Retention elections were introduced as a compromise between those who wanted to insulate the judiciary from political pressures and those who wanted the judiciary to remain responsive to public concerns. Empirical studies of judicial retention elections have explored determinants of voter behavior in retention elections, the effectiveness of efforts to inform voters about the performance of judges standing for retention, and the extent to which retention elections ensure judicial accountability.

#### A. *Voting Behavior in Retention Elections*

Much of the research on judicial retention elections has been conducted by Larry T. Aspin and William K. Hall, who have collected and examined data on retention elections in ten states between 1964 and 1998. Between 1964 and 1998, only fifty-two of 4,588 candidates in judicial retention elections were not retained by

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38. WATSON & DOWNING, *supra* note 23, at 258.

39. ASHMAN & ALFINI, *supra* note 3, at 79-85.

40. Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection*, 77 JUDICATURE 300 (1994).

41. *Id.* at 301-02.

42. *Id.* at 302-03. Interestingly, bar polls in partisan elections were rated as more effective than those in nonpartisan elections.

voters.<sup>43</sup> The average affirmative vote has ranged from a high of 84.7 percent in 1964 to a low of 69.4 percent in 1990.<sup>44</sup> Hall and Aspin attributed variations in affirmative vote rates over time at least in part to changes in levels of political trust.<sup>45</sup>

Researchers have also explored other influences on voter decisions in judicial retention elections. A recent study of voter behavior in judicial elections demonstrated that retention elections are not immune from partisan politics and other contextual forces.<sup>46</sup> In states characterized by competitive party politics, supreme court justices received fewer votes in favor of retention. In states where the murder rates decreased, affirmative votes declined,<sup>47</sup> suggesting that voters held accountable justices who were up for retention.

There is also some evidence that voters fail to differentiate among judges on the same ballot. For example, judges in the same district received very similar proportions of affirmative votes.<sup>48</sup> In addition, voters within a judge's home county tend to take stronger positions on the judge, either for or against, than do non-home county voters.<sup>49</sup> Voters are also slightly more likely to vote to retain a judge in presidential election years than in non-presidential election years.<sup>50</sup>

One factor that does not appear to be correlated with voter decisions in retention elections is the race of the judge. A study of retention elections between 1980 and 1990 found that there were only slight differences in the proportion of affirmative votes received by white, black, and Hispanic judges.<sup>51</sup>

Voter rolloff in judicial retention elections, or voters who cast ballots in other electoral contests but do not vote in retention elections, has declined over the years and reached an all-time low of 29.5 percent in 1998.<sup>52</sup> While rolloff is not affected by whether it is a presidential election year, there is less voter rolloff in close retention elections, defined as elections where the judge receives

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43. Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79, 79 (1999).

44. *Id.* at 80.

45. *Id.* at 79; see also William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Election Have Told Us*, 70 JUDICATURE 340 (1987) [hereinafter Hall]; Larry T. Aspin & William K. Hall, *Political Trust and Judicial Retention Elections*, 9 L. & Pol'y 451 (1987).

46. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315 (2001).

47. *Id.* at 324.

48. See Hall, *supra* note 45, at 346; Aspin, *supra* note 43, at 81.

49. See Larry T. Aspin & William K. Hall, *The Friends and Neighbors Effect in Judicial Retention Elections*, 40 W. POL. Q. 703 (1986); see also Hall, *supra* note 45, at 346.

50. Hall, *supra* note 45, at 344.

51. Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316 (1994).

52. Aspin, *supra* note 43, at 81.

less than a 60 percent affirmative vote, than in non-close elections.<sup>53</sup> Other studies have shown that voter rolloff in retention elections for judges of major trial courts is positively related to the size of judicial districts; as the size of the district increases, so does the number of voters who do not participate in retention elections.<sup>54</sup>

## *B. Bar Polls and Other Judicial Evaluation Programs*

### 1. Bar Polls

Bar associations, which are active in the initial selection of judges in many merit plan states, may also play a role in judicial retention. Many state and local bar associations have developed polls and other evaluation techniques to assess the performance of judges seeking retention. Studies of the effectiveness of bar association activities in informing voters, and of the influence of poll results on voter decisions, have reached mixed conclusions.

Some researchers have examined the extent to which voters are aware of bar evaluations of judicial candidates. Kenyon N. Griffin and Michael J. Horan reported that only 12.8 percent of voters in Wyoming's 1978 judicial retention elections had any knowledge of the state bar's poll.<sup>55</sup> Similarly, a study of bar evaluations of judicial candidates in Texas revealed that fewer than 8 percent of voters had received information from any legal source.<sup>56</sup> Contrary evidence is provided by Joel H. Goldstein, who found that voters in a 1977 Kentucky judicial primary election ranked a bar poll as second only to "personal knowledge" in terms of importance as a source of information.<sup>57</sup>

Other studies have examined the influence of bar-sponsored evaluation programs on voter decisions in judicial retention elections. John Scheb found no evidence that the Florida Bar Advisory Preference Polls conducted in 1978, 1980, and 1982 had a significant impact on voter decisions.<sup>58</sup> William Hall, however, concluded that "bar evaluations of sitting jurists do affect the outcomes of retention elections" in Illinois;<sup>59</sup> in judicial retention

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53. William K. Hall & Larry T. Aspin, *The Roll-Off Effect in Judicial Retention Elections*, 24 SOC. SCI. J. 415, 422-23 (1987) [hereinafter Hall, *Roll-Off*].

54. See Hall, *supra* note 45, at 347; Hall, *Roll-Off*, *supra* note 53, at 420-21.

55. Kenyon N. Griffin & Michael J. Horan, *Merit Retention Elections: What Influences the Voters?*, 63 JUDICATURE 78, 85 (1979).

56. Charles A. Johnson et al., *The Salience of Judicial Candidates and Elections*, 59 SOC. SCI. Q. 371, 377 (1978).

57. Joel H. Goldstein, *Bar Poll Ratings as the Leading Influence on a Non-partisan Judicial Election*, 63 JUDICATURE 377, 382 (1980).

58. John M. Scheb, II, *Is Anyone Listening? Assessing Bar Influence on Merit Retention Elections in Florida*, 67 JUDICATURE 112 (1983).

59. WILLIAM K. HALL, JUDICIAL RETENTION ELECTIONS: DO BAR ASSOCIATION POLLS INCREASE VOTER AWARENESS? 16 (1985).

elections from 1964 to 1982, nearly every negative bar evaluation resulted in a lower mean affirmative vote for the judge being evaluated.<sup>60</sup>

James H. Guterman and Errol E. Meidinger suggested that the absence of a relationship between poll results and voting behavior may be due to the way the results are disseminated.<sup>61</sup> They described two models of bar association activities with respect to communicating the results and recommendations of bar polls. Taking a “public service approach,” bar associations simply provide poll results to the media and the public.<sup>62</sup> Using a “special interest approach,” bar associations try to secure a particular result.<sup>63</sup> Guterman and Meidinger identified only four bar associations of the fifty they studied who actively campaigned on behalf of candidates they favored, providing advertising and funding.<sup>64</sup>

Studies of the influence of bar polls on the outcomes of the 1976 and 1978 retention elections in Maricopa County, Arizona, seem to bear out the Guterman and Meidinger hypothesis. William Jenkins noted that, in Maricopa County’s 1976 retention elections, the three judges with the lowest bar ratings were retained by voters by substantial margins, suggesting that voters were either unaware of or unconcerned about bar poll results.<sup>65</sup> John A. Stookey and George Watson, however, reported that the Maricopa County Bar Association’s 1978 poll increased voter awareness of judges on the ballot and even “influenced some voters to oppose the retention of some judges.”<sup>66</sup> Stookey and Watson noted that the Maricopa County Bar released its 1976 poll results without recommendations or follow-up activity, while, in 1978, the Bar actively campaigned against the three judges who had received low ratings, using paid newspaper advertisements, printed material that was distributed to the public, and a speakers’ bureau discussing the poll and its recommendations.<sup>67</sup>

## 2. Other Judicial Evaluation

Six states that utilize merit selection to fill both initial and interim vacancies have established official, state-sponsored, judicial

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60. *Id.* In Illinois, judges are initially selected in competitive, partisan elections; they run in retention elections for subsequent terms.

61. JAMES H. GUTERMAN & ERROL E. MEIDINGER, *IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES* (1977).

62. *Id.* at 8-10.

63. *Id.*

64. *Id.* at 45-48.

65. William Jenkins, Jr., *Retention Elections: Who Wins When No One Loses?*, 61 *JUDICATURE* 79, 83-84 (1977).

66. John A. Stookey & George Watson, *Merit Retention Elections: Can the Bar Influence Voters?*, 64 *JUDICATURE* 234, 241 (1980).

67. *Id.* at 240-41.

performance evaluation programs to provide voters with objective information on the performance of judges standing for retention.<sup>68</sup> Kevin M. Esterling and Kathleen M. Sampson evaluated the effectiveness of these programs in four states, Alaska, Arizona, Colorado, and Utah, in making information available to voters and the extent to which the evaluations influenced voter decisions.<sup>69</sup> The percentage of exit survey respondents who were aware of judicial evaluation commission reports ranged from 15.2 percent in Phoenix to 40.2 percent in Salt Lake City.<sup>70</sup> Among respondents who were aware of the reports, between 13.8 percent in Denver and 26.8 percent in Phoenix based their decisions solely on the evaluations, and between 39.3 percent in Phoenix and 62.5 percent in Denver indicated that their voting decisions were helped by this information.<sup>71</sup> In addition, an analysis of the relationship between judicial ratings and election outcomes in Alaska from 1976 to 1996 showed a positive relationship between ratings and affirmative votes.

While state-sponsored evaluation programs are viewed as a valuable means of enabling voters to make informed choices, some have questioned the methods, accuracy, and fairness of these programs.<sup>72</sup> Esterling and Sampson reported that nearly half of the Utah judges whom they interviewed felt that the evaluation commission did not accurately measure their on-the-bench performance.<sup>73</sup> In addition, they discovered that judges' assessments of the fairness of these programs seemed to depend on the opportunity that they were given to respond to the commissions' findings.<sup>74</sup> Perhaps most significantly, more than one-fourth of evaluated judges believed that the evaluation process undermined their independence as judges.<sup>75</sup>

### C. Retention Elections and Accountability

Judicial retention elections were intended to introduce an

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68. These states are Alaska, Arizona, Colorado, New Mexico, Tennessee, and Utah. For a description of these programs, see Seth S. Andersen, *Judicial Retention Evaluation Program*, 34 LOY. L.A. L. REV. 1375 (2001).

69. KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS (1998).

70. *Id.* at 36.

71. *Id.* at 39.

72. For a discussion of similar concerns with respect to bar evaluation polls, see Errol E. Meidinger, *Bar Polls: What They Measure, What They Miss*, 60 JUDICATURE 469 (1977); Steven Flanders, *Evaluating Judges: How Should the Bar Do It?*, 61 JUDICATURE 304 (1978); Theodore C. Koebel, *The Problem of Bias in Judicial Evaluation Surveys*, 67 JUDICATURE 224 (1983).

73. ESTERLING & SAMPSON, *supra* note 69, at 44.

74. *Id.* at 43.

75. *Id.* at 44.

element of accountability to judicial appointment systems, but some observers have charged that retention elections insulate judges from popular control. A study of retention elections from 1942 to 1978 revealed that only thirty-three judges were not retained.<sup>76</sup> Of the thirty-three unsuccessful judges, approximately 75 percent were opposed for significant reasons, with the most common reason being that they lacked professional competence.<sup>77</sup> In two-thirds of the cases in which judges were not retained, they were opposed for more than one reason.<sup>78</sup> The organized bar, the public, and the press also played a role in these judges' failed bids for retention.<sup>79</sup> Of the thirty-three judges who were not retained between 1942 and 1978, nineteen (58 percent) were the subjects of public campaigns to remove them from office.<sup>80</sup> In addition, sixteen of the thirty-three received negative bar evaluations,<sup>81</sup> and fifteen received exclusively unfavorable editorial comment in the newspapers.<sup>82</sup>

Susan B. Carbon used these findings to assert that "retention elections are a useful tool for holding judges accountable, especially in urban areas, where the bar, the press and citizen groups can make the public aware of those judges they believe to be unqualified for office."<sup>83</sup> Jenkins, however, disagreed. Examining retention elections held in 1976, he found that only three of 353 judges were rejected by the voters, in many cases in spite of unfavorable bar ratings.<sup>84</sup> Jenkins described judicial retention elections as "merely a rubber-stamp approval of incumbent judges."<sup>85</sup>

In a 1991 survey of judges who had recently stood for retention, Aspin and Hall addressed the issue of retention elections as a means of accountability.<sup>86</sup> Three-fifths of the judges who participated in the survey indicated that retention elections have a pronounced effect on their behavior on the bench.<sup>87</sup> While a small minority, almost 14 percent, believed that retention elections give judges independence from voters, the remaining judges perceived themselves as responding to their environment.<sup>88</sup> Nearly 28 percent

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76. Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 221 (1980).

77. *Id.*

78. *Id.* at 221-23.

79. *Id.* at 229-32.

80. *Id.* at 230.

81. *Id.* at 229. Interestingly, six of those thirty-three judges received positive evaluations. *Id.*

82. *Id.* at 232.

83. *Id.* at 233.

84. Jenkins, *supra* note 65, at 80.

85. *Id.*

86. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306 (1994).

87. *Id.* at 312.

88. *Id.*

of responding judges reported that retention elections made them more sensitive to their environment, almost 12 percent felt that they motivated them to do a good job, and nearly 6 percent believed that they improved their judicial performance.<sup>89</sup> When asked about the most effective thing judges can do to win a retention election, more than half of the respondents mentioned competent judicial performance.<sup>90</sup>

#### IV. Comparisons of Merit Selection with Other Selection Systems

A number of scholars have addressed the question of whether merit-selected judges differ in significant ways from judges selected through other means. Comparisons of the products of judicial selection systems have focused on three dimensions: gender and racial diversity, background characteristics, and behavior on the bench.<sup>91</sup>

##### A. *Gender and Racial Diversity*

What influence, if any, the method of judicial selection has on the success of women and minorities attaining judgeships is a point of contention between those seeking to diversify the bench and those who advocate merit selection. Proponents of a diverse bench argue that merit selection prevents women and minorities from reaching the bench by entrenching a system dominated “by state and local bar associations whose members overwhelmingly are white, male, Protestant, conservative ‘establishment’ attorneys.”<sup>92</sup> Some empirical studies of the relationship between judicial diversity on state courts and judicial selection methods validate this assertion.<sup>93</sup> At the same time, several studies find no correlation between selection method and diversity,<sup>94</sup> and others show a

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89. *Id.* at 312-13.

90. *Id.* at 314.

91. While many judges initially reach the bench via appointment, even in elective states, most studies of variations across selection systems focus on formal methods of judicial selection. One noteworthy exception is a study by Barbara Graham, who examines the relationship between judicial selection methods and the degree of black representation on state trial courts. Barbara Luck Graham, *Do Judicial Selection Systems Matter? A Study of Black Representation on State Courts*, 18 AM. POL. Q. 316 (1990). While there is no correlation between formal methods of selection and racial distribution on the bench, blacks are more likely to be selected through appointment, whether formal or informal, than through election. *Id.* at 331. Unless otherwise noted, the results discussed in this section are based on formal methods of selection.

92. Glick & Emmert, *supra* note 2, at 230.

93. *See, e.g.*, GARY S. BROWN, CHARACTERISTICS OF ELECTED VERSUS MERIT-SELECTED NEW YORK CITY JUDGES, 1992-1997 (1998) (examining women and minority judges in New York City from 1992 to 1997).

94. *See, e.g.*, Nicholas O. Alozie, *Black Representation on State Judiciaries*, 69 SOC. SCI. Q. 979 (1988) (examining the number of blacks on all state courts); Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effect of*

positive correlation between merit selection and the diversity of the bench.<sup>95</sup>

The most recent study of selection systems and judicial diversity finds no evidence that women and minorities are more likely to become state appellate judges under merit systems than they are under non-merit systems.<sup>96</sup> Their findings indicate that the proportion of minorities selected under merit systems was slightly less than the proportion of minorities on state courts nationwide.

### *B. Other Background Characteristics*

In addition to comparing the race and gender of judges chosen through various selection systems, researchers have also examined other judicial characteristics such as political and legal experience, education, religious affiliation, and localism.<sup>97</sup> The most recent and comprehensive study of the relationship between judicial backgrounds and selection systems was conducted by Henry R. Glick and Craig F. Emmert.<sup>98</sup> Analyzing all sitting high court

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*Judicial Selection Methods*, 71 SOC. SCI. Q. 315 (1990) (examining the numbers of women, blacks, and Hispanics on all state courts); Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 SOC. SCI. Q. 110 (1996) (examining the number of women on state courts of last resort).

95. See, e.g., M.L. HENRY, *THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE* (1985) (examining the numbers of women and minorities on all state courts); Karen L. Tokarz, *Women Judges and Merit Selection Under the Missouri Plan*, 64 WASH. U. L.Q. 903 (1986) (examining the number of women on Missouri courts); M.L. HENRY, *CHARACTERISTICS OF ELECTED VERSUS MERIT-SELECTED NEW YORK CITY JUDGES, 1977-1992* (1992) (examining the numbers of women and minority judges on New York City's Civil, Family, and Criminal Courts from 1977 through 1992).

96. Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches: A Cross-Time Comparison, 1985 to 1999*, 85 JUDICATURE 84 (2001).

97. Several scholars have cautioned that regional forces may also contribute to variations in judicial characteristics, so that regional factors should be taken into account when comparing the effects of judicial selection systems. See, e.g., 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); Glick & Emmert, *supra* note 2.

98. Early studies of variations in judicial background characteristics across selection systems were conducted by Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104 (1964) (examining characteristics of supreme court and major trial court judges in twelve states in 1955); WATSON & DOWNING, *supra* note 23 (comparing characteristics of trial court judges selected before and after Missouri adopted a merit plan in 1940); Canon, *supra* note 97 (examining characteristics of state high court justices sitting between 1961 and 1968); STUART S. NAGEL, *COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS* (1973) (comparing backgrounds of elected and interim-appointed judges on state supreme courts in 1955); and Larry L. Berg et al., *The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Systems*, 28 W. POL. Q. 263 (1975) (comparing characteristics of appellate judges in Iowa and California at six different points in

judges in 1980 and 1981, Glick and Emmert found few differences in terms of qualifications between judges identified through merit plans and judges chosen through other systems. Merit-selected judges did not have more legal or judicial experience than judges chosen by other means, and they were just as likely as other judges to have had partisan political careers.<sup>99</sup>

In terms of education, more judges chosen through merit plans went to prestigious law schools than did judges who were elected, although the authors caution that the numbers are small.<sup>100</sup> In addition, merit plans were less likely than other systems to place religious minorities, defined as low-status Protestants, Catholics, and Jews, on the bench.<sup>101</sup> Finally, local ties, in terms of whether judges were born in-state or educated in-state, were less important for merit-selected judges than for elected judges.<sup>102</sup>

### C. *Judicial Behavior and Performance*

One of the earliest studies of behavioral differences between merit-selected and elected judges was conducted by Watson and Downing for trial court judges before and after Missouri adopted a merit selection system in 1940. They found no evidence that merit plan judges were more or less likely than elected judges to favor the plaintiff in personal injury litigation, and they extended this finding to conclude that these judges did not differ in their general ideological stances.<sup>103</sup>

More recent analyses of the decision-making of merit judges versus elected judges have revealed no important differences between the two groups, whether regarding supreme court support for various categories of litigants,<sup>104</sup> trial court sentencing in driving-while-intoxicated cases,<sup>105</sup> or supreme court rulings in racial discrimination cases.<sup>106</sup>

A number of studies have failed to distinguish between merit systems and other appointive processes and have simply made comparisons between appointed and elected judges. Some of these studies have discovered marked discrepancies in the

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time).

99. Glick & Emmert, *supra* note 2, at 232-33.

100. *Id.* at 231-32.

101. *Id.* at 233-35.

102. *Id.* at 231-32.

103. WATSON & DOWNING, *supra* note 23, at 324-26.

104. Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427 (1974).

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

106. Francine Sanders Romero, David W. Romero & Victoria Ford, *The Influence of Selection Method on Racial Discrimination Cases: A Longitudinal State Supreme Court Analysis*, in 2 RESEARCH ON JUDICIAL SELECTION 17 (Am. Judicature Soc'y ed., 2002).

decisionmaking of appointed and elected judges,<sup>107</sup> while others have revealed no significant differences in their behavioral tendencies.<sup>108</sup>

In addition to assessing the decisional tendencies of merit-selected and elected trial court judges, Watson and Downing also compared the performance of these judges. Based on attorney evaluations of these judges' overall performance, the authors concluded that a merit plan "tend[ed] to eliminate the selection of very poor judges."<sup>109</sup> While large proportions of both merit and elected judges were ranked in the highest quartile, fewer merit judges were ranked in the lowest quartile.

## V. Conclusion

This review of social scientific research on merit selection systems does not lend much credence to proponents' claims that merit selection insulates judicial selection from political forces, makes judges accountable to the public, and identifies judges who are substantially different from judges chosen through other systems. Evidence shows that many nominating commissioners have held political and public offices and that political considerations figure into at least some of their deliberations. Bar associations are able to influence the process through identifying commission members and evaluating judges.

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107. See, e.g., Gerald S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143 (1986) (showing that state supreme court decisions upholding sex discrimination claims were more likely to occur in appointive states than in elective states); Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5 (1995) (concluding that the influence of judicial selection system on decisions in death penalty cases depended on the extent of partisan competition in the state—in states where partisan competition was high, elected justices were more likely to vote in favor of the death penalty, while appointed justices were more likely to oppose it); DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY* (1995) (reporting that appointed judges tended to favor the individual over the state in criminal procedure cases, and were more likely than elected or legislatively selected judges to introduce new policies in business law cases); Andrew F. Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205 (1999) (finding higher litigation rates in appointed state high courts than in elected high courts).

108. See, e.g., NAGEL, *supra* note 98 (examining the judicial behavior of elected and interim-appointed judges serving on the same state high courts); Ronald Schneider & Ralph Maughan, *Does the Appointment of Judges Lead to a More Conservative Bench? The Case of California*, 5 JUST. SYS. J. 45 (1979) (comparing the liberalism of the California Supreme Court before and after gubernatorial appointment replaced partisan elections in 1935); John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999) (comparing the propensities of partisan-elected appellate judges with other appellate judges to uphold death sentences).

109. WATSON & DOWNING, *supra* note 23, at 283.

In addition, support for the effectiveness of retention elections in holding judges accountable to the public is limited. Judges rarely fail in their bids for retention, and approximately one-third of those who cast votes in other races do not vote in retention elections. There is some evidence, however, that judicial evaluation programs are effective in informing and influencing voters.

Finally, there are no significant, systematic differences between merit-selected judges and other judges. Some evidence suggests that merit plans may place fewer racial and religious minorities on the bench. The finding that merit plans may prevent the selection of bad judges is noteworthy, but this appears to be an isolated result.

Lest this review be interpreted as a call to abandon merit selection, I would suggest an additional criterion on which judicial selection systems should be judged—their impact upon the public's trust and confidence in the courts. By this standard, merit selection is preferable to judicial elections. As we saw in the 2000 judicial elections in states such as Alabama, Michigan, and Ohio, campaigning for office can transform judicial candidates into ordinary politicians, giving sound bites and raising campaign funds. Judicial elections tend to politicize the judiciary in the eyes of the public.<sup>110</sup> To foster the appearance of an independent and impartial judiciary, we need a system that emphasizes judicial qualifications, opens the process to all who meet the legal requirements, and in most instances, eliminates the need for political campaigning. Merit selection is such a system.

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110. The results of two recent national surveys support the assertion that judicial elections jeopardize public trust and confidence in the courts. In a 1999 survey commissioned by the National Center for State Courts, 75 percent of the respondents agreed that having to raise campaign funds influences elected judges. NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS, <http://www.ncsc.dni.us/PTC/results/results.pdf> (May 14, 1999). According to a national poll conducted in 2001 in association with the Justice at Stake Campaign, 76 percent of voters believed that campaign contributions made to judges have at least some influence on their decisions, and more than two-thirds felt that "individuals or groups who give money to judicial candidates often get favorable treatment." Letter from Stan Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research, and Linda A. DiVall, President, American Viewpoint, to Geri Palast, Executive Director, Justice at Stake Campaign (Feb. 14, 2002), at [http://www.justiceatstake.org/content/Viewer.asp?bread\\_crumb=5,268](http://www.justiceatstake.org/content/Viewer.asp?bread_crumb=5,268).