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JUDICIAL SELECTION: THE SEARCH FOR QUALITY AND REPRESENTATIVENESS

Robert P. Davidow*

In this Article, Professor Davidow examines the selection of judges in the United States, both historically and currently. After identifying the twin goals of selection as quality and representativeness, Professor Davidow offers a critique of the ability of the current selection systems to effectuate these policy goals. Merit selection, both of state and federal judges, receives particular attention. Finally, Professor Davidow offers four proposals to improve judicial selection which suggest differing degrees of public participation in the selection process. Professor Davidow then concludes that the present methods of judicial selection are inadequate and that the adoption of new selection techniques would ensure the appointment of higher quality judges who would be representative of the wider community.

INTRODUCTION

ALTHOUGH THE literature concerning judicial selection in the United States is voluminous,¹ most commentators assume

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that the principal methods of selection used today—partisan election, nonpartisan election, executive appointment, legislative appointment (election), and merit selection—constitute an exhaustive list of possibilities. Discussion, therefore, is confined to the arguments in favor of or against one or more of these methods of selection. This Article demonstrates, however, that these selection techniques do not lead to the selection of judges of the highest quality who possess beliefs, attitudes, and values that are broadly

representative of the community.\(^2\) The Article also contains several proposals for judicial selection designed to achieve these twin goals of quality and representativeness.\(^3\)

Three of the four proposals resemble the present system of merit selection in that they entrust a commission with the duty of nominating persons for a judicial vacancy.\(^4\) The three proposals differ from that system of merit selection, however, in that they provide both for selection of at least some commissioners on the judicial nominating commissions through a system of proportional representation and for final selection of judges by lot from among the nominees.\(^5\) A fourth proposal, which also provides for final selection by lot, allows the electorate even more direct participation by permitting it to choose the nominees under a system of proportional representation.\(^6\)

First, however, it is necessary to consider three preliminary matters: the methods by which judges have been and are being selected,\(^7\) whether quality and representativeness are appropriate goals of a system of judicial selection,\(^8\) and whether the current methods of judicial selection adequately achieve these goals.\(^9\)

I. JUDICIAL SELECTION IN THE UNITED STATES—THE BROAD PICTURE\(^10\)

In colonial America, judges were appointed and could be re-
moved by the Crown. The lack of judicial independence resulting from this Royal power of removal was one of the grievances cited in the Declaration of Independence. Following the Revolution, the colonies established systems of judicial selection based on executive appointment, subject to confirmation or approval by some other body, or legislative selection. In eight of the original thirteen colonies, however, judges were given life tenure. In fact, Article III of the Constitution effectively mandated life tenure for federal judges following executive appointment.

A feature of the era of Jacksonian democracy in the nineteenth century was a trend, especially among the newly admitted states, toward the popular election of judges, with limited terms. Some of the eastern states, however, retained judicial selection based on gubernatorial or legislative life appointments.

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12. "He [The King] has made judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Declaration of Independence, art. II, § ix.


14. Id.


17. Presently, three states provide for life tenure. In Massachusetts and New Hampshire, the governor appoints judges for life, subject to mandatory retirement at age seventy, and must obtain the approval of the council. MASS. CONST. pt. 2, ch. 2, § 1, art. 9; and pt. 2, ch. 3, art. 1 (Presently, a voluntary merit selection plan is being implemented. See Note 16, infra); N.H. CONST. pt. 2, arts. 46, 47, 73. In Rhode Island, Supreme Court justices are "elected by the two houses in grand committee" R.I. CONST. art. 10, § 4; trial court judges
In 1914, a proposal was made to combine the supposedly best elements of appointment and popular election: appointment from a list of candidates proposed by a nominating commission, followed by periodic retention elections. In 1940, Missouri adopted a refinement of this "merit selection" plan. Originally, this plan called for the gubernatorial appointment of one of the three nominees submitted by a judicial nominating commission composed of three lawyers, elected by members of the State Bar Association; three lay persons, appointed by the governor; and the chief justice of the Missouri Supreme Court. After a specified period in office, each judge had to run in a retention election in which voters could vote only for or against the judge and not for another candidate; if the judge failed to receive a majority of the vote, a new judicial selection process was commenced.

Today, the picture of state judicial selection is confused, in part because of a trend toward experimentation with the use of some form of merit selection for only some courts in a particular state, and sometimes for only interim vacancies. Furthermore, this experimentation has been undertaken sometimes constitutionally, sometimes statutorily, and sometimes informally (as in the case of a governor's decision voluntarily to select from among

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18. Albert M. Kales, one of the founders of the American Judicature Society, made the original proposal. Kales proposed that a judicial council prepare a list of eligible lawyers from which an elected chief justice would choose. Judges thus selected would be required periodically to run against their record; that is, the question whether they should be retained would be placed on the ballot. The original plan is found in A. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES, 239, 245-47, 249-50 (1914). Later, Harold Laski suggested that the governor be substituted for the elected chief justice as the appointer. A. ASHMAN & J. ALFINI, supra note 1, at 11 (citing Laski, The Technique of Judicial Appointment, 24 Mich. L. Rev. 529, 539 (1926)). In 1937, the American Bar Association adopted, in principle, the Kales proposal, as modified. 23 A.B.A. J. 105, 108 (1937).


20. The present Missouri plan differs only in that the judicial member is now a member of the Supreme Court elected by the other members of the Supreme Court. Mo. Const. art. 5, § 25(a)-(d).


22. Ala. Const. amend. 83; Alas. Const. art. 4, §§ 5, 8; Ariz. Const. art. 6, § 36; Colo. Const. art. 6, §§ 20, 24; Fla. Const. art. 5, § 11; Hawaii Const. art. 6, §§ 3, 4; Ind. Const. art. 7, §§ 9, 10; Iowa Const. art. 5, §§ 15, 16; Kan. Const. art. 3, § 2; Ky. Const. §§ 117, 118; Mo. Const. art. 5, § 25(a)-(d); Mont. Const. art. 7, § 8; Neb. Const. art. 5, § 21; Nev. Const. art. 6, § 20; N.Y. Const. art. 6, § 2; N.D. Const. art. 4, § 13; Okla. Const. art. 7-B, §§ 3, 4; Vt. Const. ch. 2, § 32; Wyo. Const. art. 5, § 4.

a list of nominees prepared by a nominating commission).24

The following methods of judicial selection are now being utilized in the several states (with some states using more than one method of selection): partisan election;25 nonpartisan election;26 gubernatorial appointment or nomination,27 with confirmation or consent required by the state senate,28 legislature,29 or a council30

24. An unpublished state-by-state compilation prepared by the American Judicature Society, July 1, 1979, shows the following voluntary plans: Delaware (by executive order issued in 1977); Georgia (interim vacancies); Maryland (interim vacancies on court of appeals, court of special appeals, circuit courts, district courts, and supreme bench of Baltimore City, based on executive order of 1979); Massachusetts (ad hoc judicial selection committee); Minnesota (for vacancies in county and district courts by executive order of 1979); New York (voluntary merit selection for interim vacancies by executive order of 1975); North Carolina (superior court interim vacancies or new judgeships by executive order of 1977); Oklahoma (trial judge interim vacancies by executive order of 1967); Pennsylvania (interim vacancies and newly created offices by executive order of 1973, as modified in 1975); South Dakota (interim vacancies by executive order of 1977).

In addition, the Mayor of New York has used a voluntary scheme of merit selection for criminal and family court judges in New York City since 1962. A. Ashman & J. Alfini, supra note 1, at 130–50. Voluntary plans as of 1976 are outlined in Note, Judicial Selection in the States: A Critical Study With Proposals for Reform, 4 Hofstra L. Rev. 267, 330 (Georgia), 333 (Maryland), 334 (Massachusetts), 337 (New York), 338 (Oklahoma trial courts and Pennsylvania), 339 (South Carolina). For a report on the operation of President Carter's voluntary method of merit selection of judges for the United States Courts of Appeals, see L. Berkson & S. Carbon, supra note 1.


26. Ariz. Const. art. 6, § 12; Cal. Const. art. 6, § 16(b); Fla. Stat. Ann. § 105.011 (West Supp. 1974–1978); Idaho Const. art. 5, §§ 6, 11; Ky. Const. § 117; Mich. Const. art. 6, §§ 2, 8, 12; Minn. Const. art. 6, § 7; Mont. Const. art. 7, § 8; Nev. Const. art. 6, §§ 3, 5; N.D. Const. art. 4, §§ 7, 9; Ohio Const. art. 4, § 6; Okla. Const. art. 7, § 9; Or. Const. art. 7, § 1; S.D. Const. art. 5, § 7; Utah Code Ann. § 20-1-7.7 (Supp. 1979); Wash. Const. art. 4, §§ 3, 5; Wis. Const. art. 7, §§ 4, 5, 6.

27. The reference here is to gubernatorial appointment in the first instance. Cal. Const. art. 6, § 16; Del. Const. art. 4, § 3; Me. Const. art. 5, pt. 1, § 8; Md. Const. art. 4, § 5A; Mass. Const. pt. 2, ch. 2, § 1, art. 9; N.H. Const. pt. 2, arts. 46, 47; N.J. Const. art. 6, § 6, § 1. Such appointments by the governor are to be distinguished from interim appointments, which are very common in the case of nonpartisan or partisan election. E.g., Mich. Const. art. 6, § 23 (nonpartisan election with interim gubernatorial appointment); Miss. Const. art. 7, § 177 (gubernatorial appointment for interim vacancies with partisan election).

28. Md. Const. art. 4, § 5A; N.J. Const. art. 6, § 6, § 1.

29. Conn. Const. art. 5, §§ 2, 3 (in form, the legislature "appoints" following the governor's nomination; in substance, it would seem that the governor appoints, and the legislature approves by concurrent resolution of each house); Me. Const. art. 5, pt. 1, § 8 (following gubernatorial appointment, a committee of both houses of the legislature makes a recommendation; this recommendation can be overridden only by a two-thirds vote in the Senate).

or commission; \textsuperscript{31} legislative election or appointment; \textsuperscript{32} appointment of inferior court judges by a superior court judge or judges; \textsuperscript{33} and some form of merit selection. \textsuperscript{34}

The picture, however, is even more complicated than this list might suggest. In some instances of gubernatorial appointment, for example, the governor voluntarily has used a screening committee, which evaluates candidates whose names are submitted by the governor, \textsuperscript{35} as opposed to a nominating committee or commission, which recruits \textit{and} evaluates candidates. \textsuperscript{36} The forms of merit selection also have differed markedly in regard to the composition of the nominating commission. The number of commissioners, for example, has varied from five \textsuperscript{37} to twenty-four. \textsuperscript{38} The proportion of lawyers has varied from a majority \textsuperscript{39} to a minority

\begin{footnotes}
  \textsuperscript{31} Cal. Const. art. 6, \textsection 16(d).
  \textsuperscript{32} R.I. Const. art. 10, \textsection 4 ("elected by the two houses in grand committee"); S.C. Const. art. 5, \textsection 3 ("elected by joint public vote of the General Assembly"); Va. Const. art. 6, \textsection 7 ("chosen by the vote of a majority of the members elected to each house").
  \textsuperscript{33} Ill. Const. art. 6, \textsection 8; N.C. Gen. Stat. \textsection 7A-171 (Supp. 1979). United States magistrates also are chosen by the district courts in which they serve. 28 U.S.C. \textsection 631 (1976).
  \textsuperscript{35} The governors of the following states voluntarily use a screening procedure for initial or interim appointments: Arkansas, Connecticut, Michigan, New Jersey, and New Mexico. Unpublished state-by-state compilation prepared by American Judicature Society, July 1, 1979. In addition, North Carolina provides that the Governor is to fill interim vacancies by appointing from among those candidates nominated by the bar of the pertinent judicial district. N.C. Gen. Stat. \textsection 7A-142 (Supp. 1979).
  \textsuperscript{36} Ashman and Alfini distinguish a screening committee from a nominating commission that is part of a merit selection plan:

  Given the primary concern of this study with the structure, procedures and duties of the judicial nominating commissions, the nonpartisan merit selection plan is defined for our purposes as a judicial selection system which employs:

  \textit{A permanent nonpartisan commission of lawyers and non-lawyers that initially and independently generates, screens and submits a list of judicial nominees to an official who is legally or voluntarily bound to make a final selection from the list.}

  This definition immediately distinguishes the nonpartisan merit selection plan from those jurisdictions which continue to use the strict appointive or elective systems. The definition also excludes: "Commissions which confirm or review candidates submitted to it by another governmental unit or individual." A. Ashman & J. Alfini, supra note 1, at 12 (emphasis supplied).
  \textsuperscript{37} E.g., Ala. Const. amend. 83.
  \textsuperscript{38} A. Ashman & J. Alfini, supra note 1, at 35 (New York City).
  \textsuperscript{39} Ala. Const. amend. 328, \textsection 6.13; Ala. Const. art. 4, \textsection 8; D.C. Code app. \textsection 434 (1973 & Supp. V 1978); Ind. Const. art. 7, \textsection 9; Kan. Const. art. 3, \textsection 2; Mo. Const. art. 5, \textsection 25; Neb. Const. art. 5, \textsection 21; Nev. Const. art. 6, \textsection 20; Wyo. Const. art. 5, \textsection 4; Pa., A. Ashman & J. Alfini, supra note 1, at 36.
\end{footnotes}
(with lay persons in the majority)\textsuperscript{40} to an equality of lawyers and lay persons.\textsuperscript{41} Sometimes the exact proportion of lawyers to non-lawyers has not been fixed.\textsuperscript{42} Lawyer members have sometimes been elected by the bar membership,\textsuperscript{43} been appointed by the bar leadership,\textsuperscript{44} or coincided with the bar leadership.\textsuperscript{45} Judges have been members,\textsuperscript{46} but not always.\textsuperscript{47} Legislators have sometimes been members\textsuperscript{48} or have selected members.\textsuperscript{49} Sometimes there has been a limitation on the number of commissioners from any one political party,\textsuperscript{50} but not always.\textsuperscript{51}

\textsuperscript{40.} ARIZ. CONST. art. 6, § 36; FLA. STAT. ANN. § 43.29 (West 1974); KY. CONST. § 118; OKLA. CONST. art. 7-B, § 3; VT. STAT. ANN. tit. 4, § 601 (Supp. 1979).
\textsuperscript{41.} COLO. CONST. art. 6, § 24 (including a nonvoting judge); Ga., A. ASHMAN & J. ALFINI, \textit{supra} note 1, at 29.
\textsuperscript{42.} IOWA CONST. art. 5, § 16; N.Y. CONST. art. 6, § 2; TENN. CODE ANN. § 17-4-102 (1980); Utah Code Ann. § 20-1-7.3 (Supp. 1979); Md., A. ASHMAN & J. ALFINI, \textit{supra} note 1, at 32.
\textsuperscript{43.} ALA. CONST. art. 4, § 8; ARIZ. CONST. art. 6, § 36 (the bar leadership actually nominates, and the governor appoints by and with the advice and consent of the Senate); D.C. CODE app. § 434 (1973 & Supp. V 1978); FLA. STAT. ANN. § 43.29 (West 1974); IDAHO CODE § 1-2101 (1979); KAN. CONST. art. 3, § 2; K.Y. CONST. § 118; MO. CONST. art. 5, § 25; NEB. CONST. art. 5, § 21; OKLA. CONST. art. 7-B, § 3; TENN. CODE ANN. § 17-4-102 (1980); Utah Code Ann. § 20-1-7.3 (Supp. 1979); VT. STAT. ANN. tit. 4, § 601 (Supp. 1979); WYO. CONST. art. 5, § 4; Md., A. ASHMAN & J. ALFINI, \textit{supra} note 1, at 32.
\textsuperscript{44.} ALAS. CONST. art. 4, § 8; ARIZ. CONST. art. 6, § 36 (the bar leadership actually nominates, and the governor appoints by and with the advice and consent of the Senate); D.C. CODE app. § 434 (1973 & Supp. V 1978); FLA. STAT. ANN. § 43.29 (West 1974); IDAHO CODE § 1-2101 (1979); KAN. CONST. art. 3, § 2; NEV. CONST. art. 6, § 20.
\textsuperscript{45.} Ga., A. ASHMAN & J. ALFINI, \textit{supra} note 1, at 29. Lawyers are selected in several other ways. In Colorado, for example, lawyers are selected by the majority vote of the governor, attorney general, and the chief justice of the State Supreme Court. COLO. CONST. art. 6, § 24. In Montana, the lawyer members are appointed by the State Supreme Court. MONT. CODE ANN. § 3-1-1001 (1978). In New York, the governor appoints two of the lawyer members; two additional lawyer members are appointed by the chief judge of the Court of Appeals. N.Y. CONST. art. 6, § 2.
\textsuperscript{46.} ALA. CONST. amend. 83; ALAS. CONST. art. 4, § 8; ARIZ. CONST. art. 6, § 36; COLO. CONST. art. 6, § 24 (nonvoting); D.C. CODE app. § 434 (1973 & Supp. V 1978); IDAHO CODE § 1-2101 (1979); IND. CONST. art. 7, § 9; IOWA CONST. art. 5, § 16; KY. CONST. § 118; MO. CONST. art. 5, § 25; MONT. CODE ANN. § 3-1-1001 (1978); NEB. CONST. art. 6, § 20; UTAH CODE ANN. § 20-1-7.3 (Supp. 1979); WYO. CONST. art. 5, § 4; Pa., A. ASHMAN & J. ALFINI, \textit{supra} note 1, at 36.
\textsuperscript{47.} FLA. STAT. ANN. § 43.29 (West 1974); OKLA. CONST. art. 7-B, § 3; TENN. CODE ANN. § 17-4-102 (1980); VT. STAT. ANN. tit. 4, § 601 (Supp. 1979); Ga., A. ASHMAN & J. ALFINI, \textit{supra} note 1, at 29; KAN. CONST. art. 3, § 2; Md., A. ASHMAN & J. ALFINI, \textit{supra} note 1, at 32.
\textsuperscript{48.} VT. STAT. ANN. tit. 4, § 601 (Supp. 1979).
\textsuperscript{49.} ALA. CONST. amend. 83; N.Y. CONST. art. 6, § 2 (each of the following legislators selects one commissioner: speaker of the assembly, temporary president of the senate, minority leader of the senate, and minority leader of the assembly); UTAH CODE ANN. § 20-1-7.3 (Supp. 1979).
\textsuperscript{50.} \textit{E.g.}, COLO. CONST. art. 6, § 24.
\textsuperscript{51.} \textit{E.g.}, ALA. CONST. amend. 83.

In light of the varied composition of the judicial nominating commission, it is a mistake to assume that all "merit" selection plans are alike or will operate identically. Neverthe-
II. GOALS OF SELECTION

A. Quality

The lay person might assume a goal of judicial selection is to select "the best" people for judgeships. This assumption, however, is not universally accepted; no consensus exists as to which qualities make an individual "the best" candidate for a judgeship. The conventional wisdom deems important the personal attributes of honesty, moral courage, diligence, courtesy, patience, decisiveness, independence, impartiality, open-mindedness, knowledge of the law, and experience. Even if the conventional wisdom is accepted, however, problems remain.

One unresolved problem is how much "knowledge of the law" a candidate should possess. Although some knowledge is desirable, a person who has specialized in one particular area—for example, corporate law—may be considered for a trial court judgeship which requires knowledge outside of that specialty. The solution to this problem may be found, not in any automatic disqualification of persons with a narrow specialty, but in a required course of instruction for newly appointed judges.

Another question is whether candidates should be required to have trial experience. Although this problem raises issues which...
may be more pertinent to a discussion of judicial careers,55 two observations should be made as to judicial selection. First, it has been recognized generally that trial experience is less pertinent to the work of appellate courts than to the work of trial courts and that, therefore, the absence of such experience should not preclude consideration of a person for the appellate bench.56 Second, extensive trial experience may not be as essential for trial judges if a school for judges can provide appropriate training, either prior to selection or prior to a judge's assumption of his or her duties.57

Surprisingly enough, great competence, presumably the result of high intelligence and fine training, is not invariably mentioned as an essential judicial attribute, as is illustrated by the nomination of G. Harrold Carswell for the position of associate justice of the Supreme Court. While considering the nomination in 1970, the U.S. Senate heard testimony that Carswell was not the most competent person for the job.58 Senator Hruska remarked in an interview, however, that "[e]ven if he [Carswell] were mediocre, there are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation, aren't they?"59 There is implicit support for Hruska's view in the writings of some social scientists who suggest that there is an inconsistency between the ideal of democracy and the desire to have the most intelligent people in governmental positions.60


56. In one study, for example, the first 96 justices of the United States Supreme Court were rated by 65 persons (law school deans and professors of law, history, and political science). These ratings were correlated with occupational experience before selection to the high court. The highest rating was given to academic lawyers; the next highest rating was given to corporate lawyers, with lawyer/politicians ranking third. Walker & Hulbary, Selection of Capable Justices, in A. Blaustein & R. Mersky, The First One Hundred Justices 52, 65 (1978).

57. See note 54, supra.

58. Dean Louis H. Pollak of the Yale Law School, for example, testified that "I am impelled to conclude that the nominee [Carswell] presents more slender credentials than any nominee for the Supreme Court put forth in this century." George Harrold Carswell: Hearings on the Nomination of George Harrold Carswell of Florida to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 242 (1970). The ABA Committee evaluating federal judges rated Carswell as merely "qualified," rather than "well qualified" or "exceptionally well qualified." See S. Rep. No. 91–14, 91st Cong., 2d Sess. 2 (1970).


60. Milton Rokeach, for example, devised a questionnaire to measure dogmatism; one indication of dogmatism was the "coexistence of contradictions within the belief system." M. Rokeach, The Open and Closed Mind 74 (1960). Agreement with the following statements was said to indicate the coexistence of contradictions within the belief system:
The Hruska thesis, however, should be rejected. Other things being equal, the most intelligent people should be in government. No inconsistency need exist between a theory of democracy—at least a theory of representative democracy, as contrasted with a theory of pure democracy, such as that illustrated by the Greek city-state or the New England town meeting—and a preference for the most intelligent representative. This author has personally observed judges who were apparently unable to comprehend the arguments of counsel. Many other lawyers and even non-lawyers seemingly have had the same experience. Neither the actuality nor appearance of justice is served by such incompetence.

B. Representativeness

Acceptance of quality as a legitimate goal of judicial selection, leaves unanswered the question whether judges should be representative of the community in which they serve or accountable to that community. Here, a distinction should be drawn between “accountability” and “representativeness.” Some people have assumed that because judges make policy decisions in deciding cases—e.g., the abortion and reapportionment decisions of

“...the highest form of government is a democracy and the highest form of democracy is a government run by those who are most intelligent.” Id.

61. If there were a return to a pure democracy, as represented, for example, by the Athenian city-state of the fourth and fifth centuries B.C. (see, e.g., 4 G. GROTE, supra note 10), or the New England town meeting, the conclusion might be reached that it would be inconsistent with the notion of democracy to seek only intelligent rulers, since by definition democracy involved rule by everyone. Since it seems likely, however, that a representative democracy will continue, some individuals must be chosen to represent the rest. There is certainly nothing in logic to prevent the conclusion that the most intelligent should be selected as the representatives.

62. One nonlawyer who interviewed and observed judges across the country, albeit in an unsystematic fashion, concluded:

My impression is that between 30 and 40 percent of state trial court judges are unfit to sit. On the federal trial bench, I would estimate the figure to be about 10 percent. At the magistrate's level, perhaps two thirds are unqualified for the responsibilities they hold. Their failures include intellectual inadequacy, corruption, bigotry, tyranny, temperament instability, and physical or mental disabilities.

D. JACKSON, JUDGES 379 (1974). At least partially consistent with this view is that of Harold Chase, who has estimated that about ten percent of federal judges are “incapable of doing a first-rate job”; Chase, however, attributes this inability to old age and illness rather than to the selection process. H. CHASE, supra note 1, at 189.

63. If law is the “enterprise of subjecting human conduct to the governance of rules,” L. FULLER, THE MORALITY OF LAW 96 (rev. ed. 1969), then it seems unlikely that the enterprise will be furthered by the lack of respect for the courts that must inevitably flow from a general perception that judges are not intellectually competent to perform their duties.
Supreme Court—judges should be accountable, in apparently the same way that legislators are thought to be accountable.64 This legislative analogy should be rejected, however, because it assumes that the task of the judge is no different from that of the legislator.65 As more fully developed below, the jury analogy, suggesting that the second major goal of judicial selection is representativeness and not accountability, is more appropriate than the legislative analogy.66

1. Differences Between Judges and Legislators

There are at least two respects in which the role of the judge in the United States differs from that of the legislator. First, although legislators theoretically are bound to uphold the Constitution,67 as a practical matter, the courts have assumed the task of assuring compliance with the fundamental law.68 Thus, the role of the court is not to ascertain the will of the majority; instead, it often involves enforcing the provisions of the Bill of Rights and other constitutional limitations in the face of majoritarian opposition.69

Although constitutional issues may arise more frequently in federal courts than in state courts, almost any mundane state court adjudication can involve federal constitutional issues. In particular:

64. "Since judges make policy, it follows that, like other policymakers, they should be accountable to the people in a representative political system. No-persuasive reason has been advanced for insulating state judges from accountability." Adamany & Dubois, Electing State Judges, 1976 Wis. L. Rev. 731, 772.
66. See notes 78–86 infra and accompanying text.
67. "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution..." U.S. Const. art. VI, cl. 3.
68. See, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (Supreme Court has constitutional authority to review state criminal judgments); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Supreme Court has the constitutional authority to review laws enacted by Congress).
69. A classic statement of this principle is found in Mr. Justice Jackson's opinion for the court in West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624 (1943), in which the Supreme Court invalidated a compulsory flag salute on the basis of the first and fourteenth amendments:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the court. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638.
lar, state criminal trials are subject to a myriad of federal constitutional limitations developed through recent decisions of the Supreme Court.70 Also, civil matters adjudicated in state courts—for example, a suit to enforce a restrictive covenant in a deed,71 a suit for the wrongful death of a mother brought by her illegitimate children,72 and garnishment proceedings—often raise federal constitutional issues.73

In fact, almost any state cause of action is potentially subject to a due process or equal protection challenge. Thus, although many cases tried in state courts do not raise constitutional issues, the potential for constitutional assault is sufficiently great to justify the assumption that such issues will arise regularly. Even if no other factors were involved, this need to enforce limits on majority rule would be sufficient to justify a system of judicial selection different from that used to select legislators. The value judgment implicit in this conclusion, should be made explicit: Our Constitution strikes a balance between majority rule and the protection of individual rights; the latter is as important as the former, and the courts are the preeminent guarantors of the latter.74

Second, the role of judges in a complex society is inherently different from that of legislators. In general, the legislature adopts general principles to be applied prospectively, but the courts apply general principles, previously determined, to existing disputes. The significance of this distinction as to accountability is readily apparent. When legislators, acting prospectively, attempt to deter-

70. E.g., Duncan v. Louisiana, 391 U.S. 145 (1968) (application of sixth amendment right to jury trial to states); Miranda v. Arizona, 384 U.S. 436 (1966) (requirement that a suspect be informed of his or her privilege against self-incrimination before any of that suspect’s statements may be used against him or her in a judicial proceeding); Gideon v. Wainwright, 372 U.S. 335 (1963) (requirement that states provide indigents free counsel in serious criminal cases); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of evidence seized in violation of fourth and fourteenth amendments).
74. Thus, there are grounds for disagreeing with the proposition articulated by Justice Rehnquist in his dissent in Furman v. Georgia, 408 U.S. 238 (1972):

But an error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual’s constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

Id. at 468.
mine present popular attitudes or anticipate future ones to ensure their re-election, no threat is posed to the reasonable expectations of private persons. There can be no detrimental reliance, therefore, when the statute has completely prospective effect. If judges, however, decide cases in accordance with their best estimate of present or future popular attitudes, private parties' reasonable reliance on past precedents may not be protected.  

The preceding discussion of the inherent differences between the role of judge and legislator is, of course, oversimplified. Sometimes retroactive curative laws are necessary; sometimes it is difficult to characterize a statute as prospective or retrospective, as illustrated by changes in tax laws which only require future action by the taxpayer but which are based on past events. Furthermore, the courts occasionally rely on "legislative facts" to announce general principles designed to have largely prospective effects. Nevertheless, an infrequent overlapping of function should not obscure the reality that in most instances judges and legislators perform different tasks. Thus, application of the notion of accountability to judges—to the extent that such notion implies popular election of judges—carries with it a potential for injustice to private litigants.

75. See L. FULLER, supra note 63.

It is also commonly assumed that legislators make more policy than judges. This assumption restates the second point—that judges are supposed to apply pre-existing principles, rather than create the principles themselves. As suggested below, however, this difference is one of degree. See note 78 infra and accompanying text.

76. Fuller gives the following example:
Suppose a statute declares that after its effective date no marriage shall be valid unless a special stamp, provided by the state, is affixed to the marriage certificate by the person performing the ceremony. A breakdown of the state printing office results in the stamps not being available when the statute goes into effect. Though the statute is duly promulgated, it is little publicized, and the method by which it would ordinarily become known, by word of mouth among those who perform marriages, fails because the stamps are not distributed. Many marriages take place between persons who know nothing of the law, and often before a minister who also knows nothing of it. This occurs after the legislature has adjourned. When it is called back into session, the legislature enacts a statute conferring validity on marriages which by the terms of the previous statute were declared void. Though taken by itself, the retrospective effect of the second statute impairs the principle of legality, it alleviates the effect of a previous failure to realize two other desiderata of legality: that the laws should be made known to those affected by them and that they should be capable of being obeyed.

L. FULLER, supra note 63, at 53–54.

77. Id. at 59.

78. Miranda v. Arizona, 384 U.S. 436 (1966), is a prime example of a judicial decision applied prospectively.
2. The Nature of Representativeness and the Jury Analogy

The notion of representativeness is consistent with the proper role of the judiciary. Individual judges fulfill this representative function if their policy views, presumably influenced by their backgrounds, broadly represent the policy views of the population or a pertinent subgroup of the population, such as all lawyers eligible for judgeships. An analogy to the jury system in criminal cases can best illustrate the pertinence of such representativeness; juries in these cases must reflect a cross-section of the community. Jurors are not expected to conduct a public opinion poll before deciding a case; instead the expectation is that their beliefs, attitudes, and values—which are assumed to influence their decisions—will reflect the beliefs, attitudes, and values of adults in the wider community.

The justification for requiring representativeness resembles the justification for democracy: society may not always approve of the results, but no better alternative exists. There is no consensus on many fundamental legal and institutional issues, such as

79. See, e.g., S. Nagel, THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE (1969), who states: "In addition, if one finds that as background characteristics, like party affiliation, religion, and regionalism, have a significant relation to certain judicial propensities, then one can better demonstrate the need for making judges more representative of the people over whom they judge with regard to these characteristics." Id. at 177; Crockett, Judicial Selection and the Black Experience, 58 JUDICATURE 438 (1975):

Among the criteria generally (and properly) applied to judicial candidates—in addition to the hope for at least a modicum of understanding of the law, a breath of compassion, a spark of originality—is the need for judges to represent a true cross-section of the population over which they are to preside. Id. at 438.

80. See notes 204–05 infra and accompanying text.

81. See notes 158–59 infra and accompanying text.


83. The argument might be made that this proposal for representativeness is inconsistent with the criticism of Senator Hruska's view that mediocrities ought to be represented on the Supreme Court. See note 61 supra and accompanying text. The distinction between representativeness as to views and representativeness as to abilities is a legitimate one with regard to judges, although it may not be a legitimate one with regard to jurors. If one has a true cross section of the community on a jury, the jury, it is hoped, will include some people who are intelligent, as well as some who are not; the more intelligent members will be able to help those who are less intelligent. Since under our system of jurisprudence, however, a judge very often sits alone, it is important that the judge be sufficiently intelligent to understand, among other things, the arguments of counsel.

84. Consider Churchill's view of democracy: "It has been said that Democracy is the worst form of government except all those other forms that have been tried from time to time." Speech of Winston Churchill, House of Commons, November 1947, reprinted in INTERNATIONAL THESAURUS OF QUOTATIONS (1970).
the appropriate balance between order and liberty and the extent to which judges should be activists or champions of self-restraint. Thus, a system of judicial selection that would permit selection of judges having only the viewpoint of the majority of society would result in courts composed of judges having views which are an anathema to some members of the minority. The minority undoubtedly would prefer a process assuring selection of at least some judges embracing the minority's viewpoint, to a system making it highly unlikely that such judges would ever be selected.

C. Nonpartisanship

It is often assumed that nonpartisanship is also a goal of judicial selection. Nonpartisanship, however, is not a primary goal,

85. Many of the specific issues involving the proper balance between order and liberty have both substantive and procedural aspects. The question, for example, whether it is constitutional for the state to place on a defendant in a criminal case the burden of proving provocation to reduce a charge of murder to manslaughter, is substantive in the sense that the state which places such a burden on the defendant is placed in a position of greater power vis-a-vis individuals in society; but, the issue is procedural in the sense that it affects the conduct of the trial and the extent to which certain evidence must be produced by the defendant. See Patterson v. New York, 432 U.S. 197 (1977). Similarly, the question whether it is unconstitutional for a police officer to interrogate a formally charged defendant in the absence of previously retained private counsel, has both substantive and procedural aspects. The issue is substantive in the sense that it directly affects the relationship of the individual to the government; it is procedural in the sense that if the action of the police is unconstitutional, the statement taken during the interrogation may be included at trial. See Brewer v. Williams, 430 U.S. 387 (1977).

86. Even acknowledged champions of self-restraint, such as Justices Holmes and Frankfurter, did not always vote to sustain state action in the face of constitutional challenge. E.g., Rochin v. California, 342 U.S. 165 (1952) (Frankfurter, J.); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). In light of these opinions, it is not so surprising that more recent self-styled champions of self-restraint, such as the four Nixon appointees—Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist—have voted to invalidate state action on constitutional grounds. See, e.g., Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977); Roe v. Wade, 410 U.S. 113 (1973). Although a certain amount of activism seems inevitable, there is still a lively debate regarding the appropriate extent of such activity. See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY (1977). Moreover, "activism" is not necessarily a single entity. For a discussion of the complexity of the concept of activism in the context of trial courts, see Galanter, Palen & Thomas, The Crusading Judge: Judicial Activism in Trial Courts, 52 S. CAL. L. REV. 699 (1979).

87. Cf. J. RAULS, A THEORY OF JUSTICE 18-19 (1971) (determination of those principles that will be acceptable to people in advance of their knowing the particular circumstances in which they may find themselves).

88. The resolution, for example, presented to the American Bar Association in 1937, advocating what has now become known as the system of merit selection, included a statement of the desirability of adopting a method of selection that "will take the state judges out of politics as nearly as may be." 23 A.B.A. J. 105 (1937).
but one that is pursued, if at all, only because its achievement is necessary to the accomplishment of another goal, such as quality. Quality cannot be achieved if the only or primary criterion of selection is party service or loyalty.99 Similarly, if one party is in the majority, but there are other parties or factions, selection on the basis of party affiliation is not likely to lead to appropriate representativeness.90

III. CRITIQUE OF PRESENT METHODS OF JUDICIAL SELECTION IN THE UNITED STATES IN LIGHT OF THE GOALS OF QUALITY AND REPRESENTATIVENESS

A. Election

A system of election, either partisan or nonpartisan, could provide the electorate with information concerning competence and other pertinent attributes of judicial candidates. A screening committee, for example, designed to evaluate judicial candidates, might publicize information about such candidates.91 An amendment to the American Bar Association Code of Judicial Conduct probably would be required, however, if the screening committee wanted to publicize the political views of such candidates.92 To date, evaluations of judicial candidates, apart from self-serving

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90. On the basis of past experience, it seems unrealistic to expect that an appointing authority from one party will, to any great extent, appoint judges from other parties or factions. From 1933 to 1962, for example, the percentage of federal judges (including justices of the United States Supreme Court) chosen from the same party as that of the president ranged from 75% (in the case of Truman in regard to Supreme Court justices) to 100% (in the case of Kennedy in regard to Supreme Court justices and judges of the courts of appeals). J. Grossman, supra note 1, at 33. Similarly, in a recent preliminary study of candidates selected by merit selection commissions under President Jimmy Carter’s voluntary merit selection system for judges of the United States Court of Appeals, it was found that during the first round of selection 85% of the candidates were Democrats; in the second round 75% were Democrats. Berkson, Carbon & Neff, supra note 1, at 113.


92. The pertinent provisions of the Code of Judicial Conduct provide:

A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election: . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identify, qualifications, present position, or other fact.

Id. § 7B(1)(c).
statements emanating from the candidates themselves, have come largely from bar polls in some jurisdictions. The publication of the results of such polls, however, occasionally has failed to assist, or even has harmed, those judges highly rated in the polls. In some instances, the electorate has known little or nothing about the candidates—sometimes not even their names. Thus, a major restructuring of the present systems of partisan and nonpartisan election would be required before the electorate could be given meaningful information on which to judge the relative quality of the judicial candidates.

Even if the electorate could be given pertinent information concerning the competence and attitudes of judicial candidates, it is unlikely that a system of election could provide adequate representativeness. If, for example, impecunious lawyers could obtain public funds to support their election campaigns, wealthy candidates still would have a marked advantage in light of Buckley v. Valeo, since it is doubtful that candidates could be prevented

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94. Watson and Downing report that a judge who was rated at the bottom of a bar poll in 1934 nevertheless was elected with the help of ward leaders in St. Louis. R. Watson & R. Downing, supra note 1, at 10. A judge from the State of Washington has said: "The publication of the results of polls of the bar as to the merits of judicial candidates generally has not been a determinative factor in judicial elections in this state." Utter, Selection and Retention—A Judge's Perspective, 48 WASH. L. REV. 839, 844 (1973).

95. Even though Democratic candidate Donald Yarbrough did poorly in the Texas State bar poll in 1976, for example, he nevertheless won the election. A subsequent survey in one medium size Texas city demonstrated substantial ignorance on the part of voters regarding judicial candidates. See McKnight, Schaefer & Johnson, Choosing Judges: Do the Voters Know What They're Doing?, 62 JUDICATURE 94 (1978). An earlier survey revealed similar ignorance on the part of voters in several areas in New York State. How Much Do Voters Know or Care About Judicial Candidates?, 38 J. AM. JUD. SOC'Y 141 (1955).


constitutionally from spending their own money in a campaign.98

A more fundamental problem of representativeness is the potential for a dilution of minority voting strength. This problem arises because the traditional form of election in the United States requires a majority vote for victory. When voting is polarized along racial lines—a common phenomenon today99—a Black minority constituting fifteen percent of the population, for example, could never hope to elect a Black candidate to judicial office.100

Better representativeness can be achieved, however, by filling several judicial positions simultaneously.101 In some jurisdictions—particularly rural ones—it is not feasible to use such a device unless several judges from a large area are elected simultaneously. Such an increase in the size of the area, however, may remove an advantage often claimed for elections in small communities, i.e., that voters in rural areas "really know" the can-

98. In Buckley v. Valeo, the Court, inter alia, struck down spending limitations as applied to candidates for public office. In so doing the Court stated in part:

The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provides the sole relevant rationale for [Federal Election Campaign act § 203, 18 U.S.C.] § 608(a)'s expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights. First, the limitation may fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts. Indeed, a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign. Second, and more fundamentally, the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limits on behalf of his own candidacy. We therefore hold that § 608(a)'s restriction on the candidate's personal expenditures is unconstitutional.

424 U.S. at 54. Although it can be argued that judicial elections are, in a number of respects, different from other elections, the rather strong language concerning the restrictive impact of the first amendment suggests that the same rule might well apply to judicial elections.

99. In Bolden v. City of Mobile, Alabama, 571 F.2d 238 (5th Cir. 1978), rev'd on other grounds, 446 U.S. 55 (1980), a suit challenging a system of at-large elections for members of the City Commission in Mobile. Alabama, the Court of Appeals noted the trial court finding that "[n]o black had achieved election to the City Commission, due, in part, to racially polarized voting of an acute nature." 571 F.2d at 243.

100. In Lubbock, Texas, for example, although Blacks and Chicanos make up almost twenty-five percent of the population, no Black or Chicano has ever been elected a member of the Lubbock City Council. Jones v. City of Lubbock, No. CA-5-76-34 (N.D. Tex. 1979), rev'd and rem'd, No. 79-2744 (5th Cir. March 25, 1981), reversal withdrawn (Apr. 29, 1981).

101. In an election with ten candidates for five positions, for example, the five candidates with the most votes would fill the judicial positions. See, e.g., Mich. Stat. Ann. § 6.1417 (1972).
candidates because of close personal association. Furthermore, it is not clear that it is beneficial to fill vacancies simultaneously since increasing the number of candidates increases the difficulties for the electorate in choosing intelligently. In addition, the concern for stability should counsel against the creation of the possibility of a sudden, large-scale change in court personnel.

B. Executive Appointment

The problems associated with executive appointment, with or without confirmation by a special or legislative body, have been extensively treated in other commentaries. For the purposes of this Article, however, it is sufficient to note that since political considerations are likely to be the sole or dominant consideration in the appointment of judges, that executive appointment is unlikely to ensure either quality or representativeness. Although a requirement of confirmation by a legislative or independent body may give some protection against the appointment of grossly incompetent judges, the history of senatorial confirmation, for example, is not reassuring. Even if such confirmation by an independent


104. Fuller has referred to the principle that "laws should not be changed too frequently," as one of the "principles that make up the internal morality of the law." L. FULLER, supra note 63, at 79.

There are also other difficulties with a system of election of judges. For an incumbent judge, there is the problem of time lost from the bench during re-election. See, e.g., Van Osdol, Politics and Judicial Selection, 28 Ala. Law. 167, 169 (1967). Moreover, in view of the restraints presently imposed on subject matter in a judicial campaign, many lawyers find the prospect of running for judicial office demeaning. See, e.g., Lindsay, The Selection of Judges, 21 Rec. N.Y.C.B.A. 514, 517 (1966). In fact, it has been asserted that the present costs of judicial election and its demeaning nature cause many able lawyers not to run for judicial office. Kaminsky, Judicial Selection: Alternatives to the Status Quo in the Selection of State Court Judges, 48 St. John's L. Rev. 496, 513 (1974). For an excellent account of the practical reality of judicial campaigning by one who is eminently qualified for the office, see Waltz, supra note 1.

105. In regard to federal appointments by the United States President, see, e.g., J. Grossman, supra note 1.

106. Grossman reported in 1965 that from 1893 to that date only one Supreme Court nominee had been rejected by the Senate. Id. at 168. Since then, three nominees have failed to be confirmed: Fortas, Haynsworth, and Carswell. More precisely, Associate Justice Fortas withdrew his name from consideration (for the position of Chief Justice) under pressure, N.Y. Times, Oct. 3, 1968, at 1, col. 8, but it would seem that he was bowing to the inevitable. The Senate officially rejected the other two candidates. N.Y. Times, Nov. 22, 1969, at 1, col. 6 (Haynsworth); N.Y. Times, April 9, 1970, at 1, col. 8 (Carswell). The question remains whether the Senate has been a very effective check on the exercise of
body provides a check on the appointment of incompetent judges, the screening function performed by the senate or a similar body provides no assurance of representativeness.\textsuperscript{107}

\section*{C. Merit Selection}

Some form of merit selection offers the best opportunity to achieve the goals of quality and representativeness.\textsuperscript{108} Surveys of lawyers in Missouri\textsuperscript{109} and Colorado,\textsuperscript{110} for instance, indicate a belief that the merit plan has increased the quality of judges in these states. Although some political scientists have observed, for

\begin{itemize}
  \item \textsuperscript{107} One admittedly very rough guide to representativeness is the appointment of persons from a party other than that of the appointing authority. In the case of Supreme Court Justices from 1933 to 1962, the percentage of appointments of those from the President's own party ranged from a low of 75\% in the case of Truman to a high of 100\% in the case of Kennedy. Grossman, supra note 1, at 28.
  \item \textsuperscript{108} See A. Ashman & J. Alfini, supra note 1.
  \item \textsuperscript{109} Seventy-three percent of the Missouri lawyers responding to the survey indicated their opinion that "the plan has recruited better judges." R. Watson & R. Downing, supra note 1, at 259.
  \item \textsuperscript{110} Seventy-seven percent of all lawyers responding to the questionnaire in Colorado indicated that the merit selection plan had "improved the quality of judges selected to the bench" since implementation of the plan. A. Ashman & J. Alfini, supra note 1, at Table XVIII at 200.
\end{itemize}

One author has questioned these kinds of statistics, noting that Watson and Downing admitted that there was a correlation between originally favoring the nonpartisan court plan and finding judges selected under that plan to be of higher quality than those selected by election. Glick, supra note 1, at 529-30. This criticism by Glick must be placed in proper perspective by recalling that Watson and Downing also concluded that supporters of the elective system do not evaluate its judges higher than those chosen under the Plan: their ratings of Plan and holdover judges in Jackson County are virtually identical, as are their ratings of St. Louis City Plan and St. Louis County elective judges, and they actually rate the St. Louis City Plan judges as being considerably better than their holdover colleagues.

R. Watson, & R. Downing, supra note 1, at 288.

Moreover, Glick totally ignores the findings of the Colorado survey, which show that elected judges as well as judges appointed under the merit selection plan thought that the plan had "improved the quality of judges selected to the bench" since implementation of the plan. A. Ashman & J. Alfini, supra note 1, at 198. Although a greater percentage of appointed judges agreed with the proposition regarding improvement in the quality of judges selected—95\% for appointed judges as opposed to 77\% for elected judges is still a very substantial majority of the elected judges who agreed that the quality of judges had been improved by the plan. Id.

In M. Levin, Urban Politics and the Criminal Courts (1977), the author also raises questions about whether merit selection leads to the selection of "better" judges. Whatever else can be said about Levin's study, it offers no data with respect to this issue, since the study involves a comparison of judges selected by popular election in Pittsburgh with judges selected by nonpartisan election in Minneapolis-St. Paul; the study, therefore, does not involve a merit selection plan. Id. at 48-59.
example, that the judges selected under merit plans and elected judges have attended law schools of comparable quality,\footnote{111} this observation does not prove that merit selection judges are inferior to elected judges. Such an "objective" criterion as the quality of the law school attended by the judge is not necessarily related to present competence.\footnote{112}

The main problem with present merit selection plans is their failure to assure sufficient representativeness. Under the original version of the merit selection plan, which was adopted in Missouri, for example, three of the seven members of the judicial nominating commission are appointed by the governor\footnote{113}—the chief politician in the state. Since the governor is usually elected by majority vote and is likely to be committed to the views of his or her constituency, virtually all of his or her appointments to the commission will reflect such a majoritarian bias.\footnote{114} Even where

\begin{footnotes}
\footnote{111} Glick, supra note 1, at 525.

\footnote{112} Although certain prestigious national law schools usually get students who have done better in undergraduate school and have demonstrated greater capacity for legal work (as demonstrated on the Law School Admissions Test), these factors do not mean that all graduates of less prestigious schools are inferior to all graduates of the prestigious schools. Since, as indicated below at note 190, infra, there has been no demonstration of a correlation between performance in law school and performance as a lawyer, it cannot be assumed that performance in law school, which at least can be quantified, is an indication of the quality of persons placed on the bench. It may be true that with recent graduates, there is no clue to potential performance as a judge other than actual performance in law school; however, some people develop more gradually than others, and certainly some very fine judges have not had exemplary law school records.

For a discussion of the evaluation of judicial candidates, see notes 160–69, 213, 226, 232–35, & 239 infra & accompanying text.

\footnote{113} MO. CONST. art. 5, § 25.

\footnote{114} Watson and Downing note:

Table 6.2 further shows that our general expectation regarding the lessening of partisan factors in the selection of Plan judges, compared to elective judges, is not borne out by the data. Since 1940, the minority Republican party has been less well-represented on the Jackson County and St. Louis City circuit benches than it was during the period when such judges were popularly elected. However, the table fails to take into account important political developments that have occurred in both these communities since the Plan was adopted in 1940. These two cities have become overwhelmingly Democratic since that time, and if voting for judges had paralleled voting for other offices, it is doubtful that few, if any, Republican judges would have been elected to these benches under a system of partisan ballots. Moreover, the St. Louis County situation indicates what has happened in an elective jurisdiction that is not as clearly Democratic as the two cities: Democratic representation on the County circuit bench rose rapidly in the period since 1940 as a result of the growing strength of the party in that area, as well as the practice of Democratic governors of appointing fellow partisans to new judgeships and vacancies on the court. Thus it is erroneous to assume that the Plan has actually disadvantaged the minority Republican Party as far as representation in the Jackson County and St. Louis circuit courts is concerned. At the same time, it has not produced the party balance on the bench that some
bipartisanship is required, as in Colorado, only the two major parties are guaranteed representation on the commission. The various groups, however, that are particularly interested in, and are likely to be affected by, the work of the courts do not necessarily arrange themselves along traditional party lines. Sympathy or antipathy towards persons accused of crime, for example, is not necessarily a function of party affiliation. Thus, bipartisanship on the commission provides no assurance of representativeness. Furthermore, there is no guarantee that representativeness of the commission as a whole will be improved by the presence of members not appointed by the governor. Although Watson and Downing concluded that the commissioners, especially lawyer commissioners, in Missouri did represent the various interest groups fairly well, there is no structural guarantee that non-appointed commissioners will represent the community at large or groups especially interested in the courts.

Most other methods of commissioner selection offer no greater assurance of representativeness. Legislative selection of the commissioners, whether the persons selected are themselves legislators, is no guarantee of broad representation; once again, while the majority party may be represented well, other groups may not.

The method of judicial selection following nomination by the persons, perhaps mistakenly, associated with the nonpartisan emphasis of the Plan.

R. Watson & R. Downing, supra note 1, at 211–12 (footnotes omitted).


116. Watson and Downing list, for example, a number of such interest groups: casualty insurance companies, public utilities, railroads, social service organizations active in the welfare field, and newspapers. R. Watson & R. Downing, supra note 1, at 77–79. Watson and Downing report that labor unions are not particularly interested in state judgeships; they are presumably more interested in federal judgeships, since federal courts do review decisions of administrative agencies in the labor law field. Certainly, minority groups, members of which form the majority of persons processed through the criminal justice system, presumably have an interest in the workings of a court as well. Id. at 78, 173.

117. See note 205 infra.

118. R. Watson & R. Downing, supra note 1, at 350–51.

119. In Utah, one commissioner is chosen by the state senate, and one commissioner is chosen by the state house of representatives; apparently neither person selected need be a member of the state legislature. In addition, the governor appoints two commissioners, and the Utah State Bar Association appoints two commissioners. The Chief Justice of the State Supreme Court is a commissioner ex officio. Utah Code Ann. § 20–1–7.3 (Supp. 1979). In Vermont, the state senate and the state house each elect three of its members as commissioners. Vt. Stat. Ann. tit. 4, § 601 (Supp. 1980).

120. Some awareness of the need for greater representativeness is shown in Montana, where four nonlawyer members are appointed by the governor, “each of whom is represen-
commission reveals a similar problem of representativeness. Even if the commission always succeeds, despite its somewhat unrepresentative composition, in nominating three or more persons who represent a range of beliefs, attitudes, and values, the chief executive may select the person with views most similar to his or her own views.

IV. PROPOSALS FOR MODIFIED MERIT SELECTION

A. The Potential for Increased Representativeness Through Merit Selection

The negative aspects of the assessment of the current merit selection plans contained in the prior section should be placed in proper perspective. Previous discussion mentioned surveys of lawyers in Missouri and Colorado indicating the belief of many of those lawyers that the quality of judges in those states has been improved by merit selection. Moreover, the Colorado survey evidenced a belief that merit selection encourages competent lawyers to seek judgeships. This latter point is especially relevant to the potential for representativeness since persons with varying backgrounds apparently are willing to submit their names to a judicial nominating commission.

This potential for representativeness is further illustrated by this author's own survey of law student attitudes towards judicial careers. Advanced law students in a nationwide sample were asked, among other things, to indicate on a seven-point scale, the likelihood that they would seek a judgeship under six separate
methods or conditions of judicial selection: (1) selection by popular, partisan election; (2) selection by popular, nonpartisan election; (3) selection by appointment by the chief executive, with or without confirmation by the upper house of the legislature; (4) selection by legislative appointment; (5) selection by appointment based on “merit”; and (6) selection by appointment to an inferior court judgeship, with the selected judge having “a reasonable assurance that he or she will be promoted to the court of general jurisdiction and eventually to the appellate court if, without engaging in political activity, he or she exhibits desirable judicial attributes.”

The law students surveyed were remarkably consistent in stating that they would be more likely to seek a judgeship with merit selection than with any other method listed. Students grouped, for example, according to party, region, gender, and demonstrated success in law school all indicated this preference. Only non-Caucasians departed from this pattern, although they also would be more likely to seek a judgeship with merit selection than with any of the traditional methods, such as executive appointment, nonpartisan election, or partisan election. In addition, there is reason to believe that young lawyers share the preference.

127. The following definition of merit selection was set forth in the questionnaire: Judges are appointed by the chief executive from a list of three nominees compiled by a bi-partisan nominating commission, with the appointee remaining a judge thereafter unless the voters at a subsequent election vote to remove him or her from office. At such subsequent elections, held at regular intervals, the voters can choose to retain or remove the judge, but they cannot vote for an opponent. If the judge is voted out of office, a successor is chosen by the chief justice in the manner prescribed for initial selection.

128. Id. at 3 (Appendix).
129. Id. at 9–10.
130. Id. at 20–25.
131. Id. at 23. The result in regard to non-Caucasians must be treated cautiously because of the small number (63) of non-Caucasians responding. Id. at 24.
132. Id. at 23.
for merit selection expressed by law students. The challenge, therefore, is to capitalize on this potential for representativeness through appropriate modifications of the Missouri plan that will enhance representativeness, while continuing to assure the selection of competent judges.

B. Possible Modifications of Merit Selection: The Usefulness of Proportional Representation and Selection by Lot

Proportional representation and selection by lot are two components of a system of judicial selection that are unfamiliar to most Americans. These two procedures should be considered as potential modifications of a system of merit selection, however, because of the possible contribution they can make toward achieving the goals of quality and representativeness.

1. Proportional Representation in the Selection of at Least Some Members of the Nominating Commission

Proportional representation is a device, used primarily in certain European elections, to ensure more accurate representation. Such a device is a response to the problem, noted above, that minorities in any given electorate are likely to remain unrep-

133. Because of a similarity in patterns between responses from law students at the University of Houston and responses from young lawyers in Houston, the conclusion can be reached cautiously that there is a good chance that the pattern for students would also hold true for young lawyers. Id. at 28-30.

Other surveys of various populations regarding general attitudes toward merit selection plans have yielded mixed results. Two state surveys of the general population have shown negative attitudes toward merit selection plans. Note, Judicial Selection in the States: A Critical Study With Proposal For Reform, 4 Hofstra L. Rev. 267, 317 n.154 (1976) (Minn.); Gordon, Judicial Reform, A Legislative Viewpoint, 48 N.Y. St. B. J. 284, 285 (1976) (New York State). A Survey of Pennsylvania legislators in the late 1950's also yielded negative results. Keefe, Judges and Politics: The Pennsylvania Plan of Judge Selection, 20 U. PITT. L. REV. 621, 624-25 (1959). Other surveys, however, have shown a positive attitude toward merit selection. Atkins, Judges' Perspective on Judicial Selection, 49 St. Gov't. 180, 185 (1976) (Florida judges); Niles, supra note 1, at 248-49 (survey of nominating commissioners in Missouri, Iowa, Kansas, and Nebraska); Sheldon, Perceptions of the Judicial Roles in Nevada, 1968 Utah L. Rev. 355, 367 (survey of judges). In a survey of lawyers and judges in Texas, a majority of both groups favored the Missouri plan over other methods considered individually. Lawyers, however, tended to favor some method of election; that is, more Texas lawyers favored the present method of election and election for longer terms than favored the "Missouri plan." Henderson & Sinclair, supra note 1, at 497.

134. For general discussions of proportional representation, see, e.g., G. Hallett & C. Hoag, PROPORTIONAL REPRESENTATION (2d ed. 1940); E. Lakeman, How Democracies Vote (4th ed. 1974).

Although proportional representation has been used more extensively in Europe, it has been used in approximately 20 municipalities in the United States at one time or another.
resented in a system of strict majority rule. Although different types of proportional representation exist, the list system is the simplest. Under that system, individuals vote for one of several lists of candidates, each proposed by a particular party or faction. Each party or faction is then entitled to the selection of the percentage of the total number of candidates to be elected that corresponds to the percentage of votes cast for its list. If X party receives ten percent of the popular vote, for example, and the number of candidates to be selected is one hundred, then X party is entitled to ten representatives, who are the first ten candidates on the list originally proposed by X party. Thus, through a system of proportional representation, even a small faction can be certain of receiving some representation in a popularly elected body.

Another type of proportional representation is the single transferable vote. This system does not require party organization; instead, each voter lists the candidates in order of preference with his or her second, third, and even lower choices often being used to permit candidates to achieve the minimum number of votes needed for selection. Greater flexibility is thereby achieved with this system than with the list system.

The primary difficulty with proportional representation in the legislative context is that, arguably, it can lead to undue factionalism since many parties may be represented. Even if it is assumed that this objection is valid, however, it is of less concern in regard to the judiciary, where each judge is expected to act indi-

E. LAKEMAN, supra at 245. A general discussion of the early Cincinnati experience with proportional representation is found in C. TAFT, CITY MANAGEMENT 94-105 (1933).

135. Although the United States Supreme Court has held that the equal protection clause of the fourteenth amendment incorporates the 1980 principle of "one person, one vote" in regard to systems of election, it recently rejected the notion that such provision incorporates a principle of proportional representation. The Court established its position in a suit in which Black plaintiffs argued that a system of at-large municipal elections prevented them from electing a candidate of their own choosing. City of Mobile, Alabama v. Bolden, 446 U.S. 55, 75-76.

136. See E. LAKEMAN, supra note 134, at 92-110.

137. Id. at 111-50.


It should not be assumed that under proportional representation, ballots are necessarily long and confusing. But see text accompanying note 102 supra. The ballot need not be an unintelligible one under the list system; the total number of names on the ballot may be great, but the number of parties will be considerably smaller, and the positions of the various parties are more important than the specific names on the ballot. Second, even under the single transferable vote, although the number of candidates may be relatively large, voter apathy, particularly among minorities, is likely to be less because of the greater likelihood of selection of minority candidates. Less apathetic voters are likely to be better informed about candidates attractive to them.
vidually and not as a member of a party. If pertinent at all in the judicial context, party affiliation is only one possible indicator of attitudes that may influence a judge's decisionmaking process.

If proportional representation were used to select at least some members of a judicial nominating commission, "politics" would not be eliminated; in fact, the whole purpose of using proportional representation would be to ensure the presence of politics—but a more broadly representative politics than is possible under a system of strict majoritarianism.

The quality of judicial nominees would not suffer merely because of the presence of politics in the selection of members of the nominating commission. As developed more fully below, the more broadly representative nature of the commission would prevent any one faction from selecting its own "party hack" because other factions could oppose any such effort.

2. Selection of Judges by Lot From Among Those Nominated by the Commission

Another suggestion for achieving greater representativeness is selection of judges by lot after nomination by the commission. Reference has already been made to the lack of consensus on some fundamental public policy issues. Attitudes toward these issues, such as abortion and legislative apportionment, are likely to affect judicial fact-finding and choice of an appropriate legal standard. It is precisely in situations in which there is such disagreement that selection by lot is appropriate because it allows society to avoid making choices. As one commentator has stated:

[W]hen the policies to be furthered are in conflict or the good cannot be allocated rationally, the luck of the draw avoids the difficult choice between people. The premise is that people are better able to accept and reconcile themselves to certain kinds of decisions when made by fate, rather than through the application of principles they dislike or of limited human reason.

If the argument in favor of assuring representativeness with regard to beliefs, attitudes, and values is accepted, then it is not

139. See text following note 156 infra.
140. See notes 85–86 supra and accompanying text.
difficult to accept selection by lot, which in this context is merely a mechanism that achieves more accurate representation. If nominees are relatively numerous and appropriately representative on every occasion, the law of averages will assure representative selection over time. This process may be illustrated as follows: If the number of nominees is twelve on each occasion, the chance that any one nominee will be chosen by lot on any occasion is one-twelfth or approximately 8.3%. If the same nominee (or one possessing similar beliefs, attitudes, and values) is involved in ten consecutive selections, the probability of selection increases to 58%.144

The question arises, however, whether selection by lot is consistent with affirmative action policies designed to overcome the effects of historic discrimination against minorities and women in the legal profession.145 It may be argued that, other things being equal, selection by lot is appropriate to secure representativeness, but not where other things have not been equal.

The affirmative action problem requires a two-part response. First, even if the proposals in this Article are favorably received, they are not likely to be implemented immediately. Thus, the affirmative action programs which exist under present methods of judicial selection can continue. Second, it is within the power of the commission to increase the number of minorities among the nominees under a system of selection by lot. If the commission, for example, chooses two minority nominees on each occasion, instead of one, the chance that a minority member will be selected by lot is increased from one-twelfth to one-sixth on each of those occasions; there is now a 59.9% chance that a minority nominee will be selected in the course of five consecutive selections by

143. The use of the lot in judicial selection was first suggested to the author by James Renfrew, Esquire, of Royal Oak, Michigan in the fall of 1974. Renfrew viewed selection by lot as selecting from among all attorneys in a particular jurisdiction for a nonrenewable term of four years. Two recent proposals, though differing in crucial respects from the proposal set forth infra, have included a recommendation that the lottery be used in some fashion in the selection of judges. T. Becker, American Government: Past, Present, Future 486 (1976); Mullen & Clancy, The McCourt Bill: A Practical Merit Selection Plan, 66 Ill. B.J. 12 (1977).

144. The formula for computing the probability is 1−(11/12)x where x equals the number of selections.

145. Arguably, President Carter did a good job in increasing the number of minority persons on the United States Courts of Appeals. It recently has been reported, for example, that twenty-nine percent of his appointments have been from among minorities. L. Berkson & S. Carbon, supra note 1, at 181.
Moreover, in large cities, such as Detroit, in which Blacks are in the majority, proportional representation presumably will result in the selection of a large number of Black commissioners, who may be expected to select a large number of Black nominees. Use of the lot in such circumstances is thus likely to result in the selection of a large number of Black judges.

Similarly, if a vacancy on a court is created by the death or retirement of a judge with a particular expertise, selection by lot will not preclude the selection of a new judge with a similar expertise if the commissioners agree that there is a continued need for such expertise on the court. Even if there is disagreement about this need or if fewer than twelve sufficiently qualified candidates with this expertise can be found, the chance that a person with such expertise will be selected will still exist. Selection by lot will thus be no worse in this regard than systems of appointment and election. Under a system of appointment, a chief executive may select someone with a particular expertise, but no guarantees exist. Other factors, such as the perceived need to reward a political supporter, may outweigh the need for someone with such an expertise. Furthermore, under an elective system, the selection of a judge with a particular expertise to replace a judge with the same expertise can be no more than fortuitous.

History reinforces the arguments for the use of random selection; selection by lot was used in the fourth and fifth centuries.

146. The formula for computing the probability is now \(1-\left(\frac{5}{6}\right)^x\) where \(x\) equals the number of selections; the chance that at least one minority member will be selected in the course of ten selections is now 83.9%.

147. At least one prominent Black has opposed merit selection on the ground that in Detroit, election has been responsible for the selection of many Blacks and that adoption of a system of merit selection is likely to decrease the number of Blacks thus chosen. See Crockett, supra note 79, at 438.

148. For a general discussion of the theory of selection by lot, see Note, supra note 142. Two modern examples of use of the lot are the military lottery (50 U.S.C. § 455 (1976) (not presently being utilized, but still on the statute books)) and, perhaps more pertinently, jury selection (e.g., 28 U.S.C. § 1863 (1976)). In addition to selection of judicial and other officers by lot in ancient Greece, see note 146 infra, historical examples of the lot or lottery include the use of random selection to determine which of a number of passengers on a boat or ship are to survive in an emergency situation in which it is evident that not everyone can survive. United States v. Holmes, 26 F. Cas. 360, 367 (C.C.E.D. Pa. (1842) (No. 15,383) (charge to jury). The religious origins of selection by lot are illustrated by the case of Jonah, who was thrown overboard by a storm when it was determined by lot that he was the source of God's wrath. Jonah 1:7-15.

For proposals for additional use of the lottery, see DeFunis v. Odegaard, 416 U.S. 312, 344 (1974) (Douglas, J., dissenting) (selection of candidates for admission to law schools); Divine, Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion, 5 J.L. & EDUC. 429, 434-44 (1976) (use of lot in hiring and promotion in university
B.C. in Athens for the selection of most governmental officials, including dikasts—numerous persons who served for a year in a judicial capacity.\textsuperscript{149} Interestingly enough, selection by lot was not considered inconsistent with democracy; rather, it was regarded as the very essence of democracy.\textsuperscript{150} Selection by a lot was the one method that assured that the judicial process would not be influenced by wealth or privilege.\textsuperscript{151}

Admittedly, selection by lot in the unrestricted Athenian sense would not be appropriate in any system in which quality or competence was a goal.\textsuperscript{152} As noted in the previous discussion of proportional representation,\textsuperscript{153} however, additional structural devices can be employed to adapt this concept to the search for quality.

\textbf{C. Specific Proposals}

This Article first considers the problem of merit selection in the states. After this problem is addressed, the Article asks whether there are any special problems with merit selection pertinent to the federal judiciary in addition to those which arise from the express limitations of Article III of the Constitution.

\textsuperscript{149} In regard to selection by lot of dikasts, who determined both the law and the facts, see, e.g., 1 R. Bonner & G. Smith, The Administration of Justice From Homer to Aristotle 187–250 (1930); 4 G. Grote, supra note 10 at 438-86; J. Headlam, supra note 2; J. Moore, Aristotle & Zenophon on Democracy and Oligarchy 303–10 (1975).

\textsuperscript{150} For whatever may be our difficulties the Greeks themselves seem to have had no doubt why the lot was used at Athens, nor what its effect was. On this they are explicit. Election by lot was a democratic institution; more, it was necessary to a democracy. In this they are almost unanimous; friends and enemies of democracy all agree on this point that in a perfectly democratic state magistrates will be elected by lot.

\textsuperscript{151} I do not mean to deny that the lot was often used in states which were not democratic, and that in the period before the Persian wars it was introduced in many oligarchies. As will be seen below, I believe that it was. All I wish to make clear is that, as used at Athens from the time of the Persian wars, it was of the very essence of the democracy. The importance of the experiment at Athens caused the older use in oligarchy states to be forgotten just as it destroyed the religious significance.

\textsuperscript{152} \textcolor{red}{"[M]ediocrity in office was its object, because this was the only means of ensuring that not only the name but also the reality of power should be with the Assembly."

\textsuperscript{153} See notes 134–39 supra and accompanying text.
1. **State Judges**

Below are four alternative proposals, each followed by commentary.

**Alternative A**

§ 1 The Judicial Nominating Commission shall consist of the following: two lawyers, elected by the State Bar Association; six persons popularly elected by proportional representation, of whom one must be a lawyer and five must be nonlawyers; two judges, elected by all judges of courts of record in the state; one full-time member of a faculty of a law school in the state accredited by the American Bar Association, elected by all full-time members of the law school faculties of accredited law schools in the state; and one full-time member of a nonlawyer faculty of an accredited university within the state, elected by all nonlawyer full-time professors in accredited universities in the state.

§ 2 Whenever a vacancy occurs in a court of record within the state, the Judicial Nominating Commission shall prepare a list of twelve well-qualified candidates for the position. A unanimous vote of the twelve commissioners shall be required for inclusion of a candidate on the list. Once the list has been prepared, the person to fill the vacancy shall be selected by lot from among those persons on the list.

**Commentary**

A number of groups, thus, are represented on the commission: lawyers, judges, groups drawn from the general population, law teachers, and nonlaw university teachers. Ideally, those selected from among the general population will include groups or factions in the general population that have a special interest in court decisions. In particular, minority groups that are now disproportionately affected by the application of the criminal law\(^{154}\) might well organize and achieve representation on the commission through the list method of proportional representation.

Lawyers and judges, who have an obvious interest in the administration of justice in the courts, also are represented. Since these individuals are elected by a majority of their respective

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154. It has been reported, for example, that in 1972, forty-one percent of the overall population of jails in the United States consisted of Blacks, although the percentage of Blacks in the general population ranged from twelve to fourteen percent. Goldkamp, *American Jails: Characteristics and Legal Predicaments of Inmates*, 15 *Crim. L. Bull.* 223, 227 (1979).
groups, dissident factions among them may not be represented directly;\textsuperscript{155} it is hoped, however, that the beliefs, attitudes, and values of such dissidents will be expressed by the members chosen from the general population. This hope is realistic because there is nothing to prevent lawyers who disagree with the views of the majority of the legal profession from working toward the election of members selected by proportional representation from the general population.

University teachers of law and other disciplines are represented because the commission can be improved by including in its membership those who have pertinent interests and expertise but whose livelihoods cannot be affected adversely by their refusal to place a high priority on maintaining the goodwill of judges and influential members of the bar. In this regard, the nonlaw teachers may be expected to be even more independent of the bar and judiciary than the law teacher-commissioner.\textsuperscript{156} Once again, dissident law teachers and other university instructors can work toward the appointment of like-minded persons by selecting members of the general population through a system of proportional representation.

The requirement of unanimity is designed to give each member of the commission a veto power over the selection of nominees by other members of the commission. Only this requirement can assure a minority member, for example, that at least one person satisfactory from the minority perspective will be included among the group of nominees. This principle applies equally, however, to all reasonably large groups with a particular point of view. A member of the commission may say to his or her colleagues: "If you want me to refrain from vetoing those whom you prefer, you had better not veto my choice." At the same time, other commissioners may say to the first member: "If you do not want us to veto your choice, you had better make sure that your choice is well-qualified."

A question arises, however, concerning the wisdom of giving each commissioner a power of total disruption through noncoop-

\textsuperscript{155} For a discussion of various groups within the bar associations in Kansas City and St. Louis, see R. WATSON & R. DOWNING, supra note 1, at 20-32. For a more recent study of various groupings within the bar from the perspective of the relative prestige of various activities, see Laumann & Heinz, Specialization and Prestige in the Legal Profession: The Structure of Deference, 1977 AM. B. FOUNDATION RESEARCH J. 155.

eration. It is true that such a system of anonymity permits any one of the commissioners, presumably acting in bad faith, to frustrate the efforts of all the others by vetoing every candidate; however, any system will fail if those charged with the responsibility of making it work want it to fail. Perhaps it is not unrealistic to assume that persons who actively seek the position of nominating commissioner and who have sufficient popular support to get themselves elected will act in good faith. When commissioners are shown the importance of representativeness, in light of a lack of consensus regarding some fundamental values, and when they see that no one nominee has any greater chance than any other nominee of finally being selected by lot, they are likely to act responsibly.

An issue, which was alluded to earlier and deserves further attention, is whether it is appropriate to use selection by lot when the result may be the appointment of judges who are representative of the legal profession and not the community at large. Even if it is assumed that lawyers have beliefs, attitudes, and values that differ from those of the general population, it is only partly true

157. Even jurors, who perform as such only for a brief period of time, and who therefore presumably do not develop the kind of role perception that is developed by judges or commissioners who serve for longer periods of time, apparently are able to reach agreement unanimously in the majority of cases. Kalven and Zeisel, for example, reported that a hung jury resulted in only 5.5 percent of the cases considered in their much-quoted study. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 56 (1966).

158. It seems there is no survey that has attempted to compare the attitudes of lawyers with those of the general population on particular issues. It does appear that the attitudes of "professional and business" persons toward capital punishment do not differ substantially from a nationwide sample of the general population. According to a recent Gallup poll, 62% of the nationwide sample responded affirmatively to the question, "Are you in favor of the death penalty for persons convicted of murder?"; 27% answered negatively; 11% said that they did not know. Among "professional and business" persons, 63% answered affirmatively; 29% answered negatively; 8% said that they did not know. GALLUP OPINION INDEX 22 (Sept. 1978). Given the margin of error for such polls—three percentage points—it would seem that the differences between the sample of "professional and business" persons and the nationwide sample are not statistically significant. It must be remembered, however, that the category of "professional and business" persons is considerably broader than the category of lawyers; lawyers themselves may differ significantly from other persons within that broader category.

That there may indeed be differences between lawyers and the general population is suggested by the results of the author's survey of law students and judges concerning capital punishment, as reported in part in an article co-authored with George Lowe. Davidow & Lowe, Attitudes of Potential and Present Members of the Legal Profession Toward Capital Punishment—A Survey and Analysis, 30 MERCER L. REV. 585 (1979). An unpublished portion of that study consisted of a comparison of law students at the University of Minnesota and judges in Minneapolis-St. Paul, St. Louis University students and St. Louis judges (city and county), and University of Houston law students and Houston judges. No significant differences were found between the attitudes of University of Minnesota law students and
that selection by lot will result in the selection of judges who are representative of the legal profession rather than the wider community. It must be remembered that six of the twelve commissioners are not members of the legal profession, and they may select nominees who are representative of community beliefs, attitudes, and values. Moreover, it must be remembered that jurors, who may be the closest analogue of judges, do not reflect the values of the total community. Jurors, for example, are not necessarily representative of minors, patients in mental hospitals, convicts, or those who have not registered to vote. Even jurors, therefore, are only roughly representative of the community, and there is no reason that the nominees selected by the Judicial Nominating Commission should be less representative.

Since one objective of judicial selection is not the exclusion of broad political considerations, but rather the inclusion of persons representing a broad political spectrum, the Judicial Nominating Commissioners should ask questions of potential nominees which are designed to probe basic values. Although it might still be improper to ask a candidate how he or she would decide a specific case, wide latitude should be accorded commissioners during interviews. Thus, commissioners might inquire, for example, as do the commissioners in Colorado, "Do you think the rules of evidence recently decided by the U.S. Supreme Court are primarily to protect the innocent or the guilty? . . . Do you feel that there are times when the technical rules of law should yield to common sense and natural justice? If so, when?" Similarly, candidates might be asked, "Would you say the several States are sovereign? . . . Do you think that the concepts of liberty and equality are more likely to be harmonious, disharmonious, or something in between?" Additionally, it would be appropriate to administer questionnaires to candidates, such as the Capital Punishment Atti-

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159. In Texas, for example, a person is not qualified to serve on a jury if he or she is not a registered voter, has been convicted of or is under indictment for a theft or any felony, is insane, or is legally blind. Tex. Code Crim. Proc. art. 35.16 (Vernon Supp. 1980).
160. See Fish, supra note 156.
161. See note 92 supra.
162. A. Ashman & J. Alfini, supra note 1, at 306, 308.
163. Fish, supra note 156 at 15.
tude Questionnaire, which has been found to indicate relative "prosecution-proneness" or "defense-proneness" in criminal cases.

The ability to determine personal characteristics accurately is equally important in the final selection of judges by the commission. To test for open-mindedness, one of the desirable personal attributes, commissioners might consider the use of the "dogmatism scale" developed by Milton Rokeach. There is some question, however, whether this scale can be used effectively with lawyers since it requires responses to general questions removed from any specific context and since lawyers are trained to emphasize the factual context in their case analyses. Another possibility is a requirement that candidates submit to psychiatric or polygraph examination. Furthermore, the commission can explore other personal characteristics, such as honesty, courtesy, decisiveness, and independence, through inquiries directed to those who have had extensive professional dealings with the candidates.

In the design of successful merit selection systems, the standards for measuring the quality of candidates and the number of candidates to be nominated also must be determined. Although measuring legal competence is a subjective task, the greatest difficulty is encountered in the evaluation of persons in the middle range of competence since, as any law teacher knows, it is relatively easy to identify those persons in the extreme categories, the very good and the very bad. Because merit selection attempts to identify excellence, however, the task is not impossible. This conclusion is confirmed by the experience of judicial nominating commissions in jurisdictions utilizing some form of merit selection. Apparently, there are no complaints by commissioners that they have been unable to distinguish the very competent from the competent. Peter Fish, a political scientist who served on President Carter's merit selection commission for the Fourth Circuit, has said, for example, that his group had no difficulty in evaluating the competence of the candidates reviewed by that commission. The commission reviewed briefs, articles, and speeches written by lawyers, the written opinions of judges, and the pub-

164. See notes 232-33 infra.
165. See notes 234-35 infra and accompanying text.
166. M. ROKEACH, supra note 60, at 71. For a discussion of Rokeach's work, see notes 213-26 infra and accompanying text.
167. See note 226 infra.
168. See note 239 infra.
lished articles of academicians. In all cases, personal interviews permitted the commission to estimate the amount of outside assistance received by candidates in the preparation of briefs, articles, or opinions.169

The establishment of standards of competence raises the question, however, whether the minimum qualification should be labeled "qualified," "well qualified," or possibly "exceptionally well qualified."170 Here, the level of court and the size of the jurisdiction become important. For the highest appellate courts in various populous states, such as California and New York, commissioners should aim for at least "well qualified" candidates because the pool of potential candidates will be large, and there is every reason to believe that competent candidates representing a broad spectrum of values can be found.171 Perhaps the same standard should apply to most state supreme courts and intermediate appellate courts. Possibly the same standard can be applied to trial courts of general jurisdiction in large metropolitan areas, such as New York, Chicago, and Los Angeles. Commissioners nominating persons for trial courts in less populous areas or trial courts of limited or special jurisdiction may have to settle for persons who are merely "qualified."172 It is a mistake, however, to abandon the search for quality merely because the selection is for "inferior" court positions. After all, most people who come in contact with the judicial system in operation do so in such courts, and these individuals will lose vital respect for the legal system if inferior courts are staffed by incompetents or people who are tem-

169. Phone conversations between Peter Fish and R. P. Davidow (December 10, 1980). Similar views have been expressed by Larry Berkson, co-author of a recent study of President Carter's voluntary merit selection scheme. Phone conversation between Larry Berkson and R. P. Davidow (December 17, 1980).

170. The application of these labels is a subjective task. This subjectivity is graphically illustrated by the action of the ABA Committee when it was confronted with the question whether to report that Byron White was well qualified or exceptionally well qualified. See J. Grossman, supra note 1, at 102-03.

171. It may be true that some nominating commissions under existing merit selection schemes have had difficulty in getting many competent persons, or at least many very competent attorneys in private practice, see Fish, supra note 1, at 641, to agree to be considered for judgships; this difficulty may be the result of many factors, including inadequate recruitment and a perception that it is futile for some candidates to apply because experience has shown that the appointing authority is likely to select only members of his or her own party. See L. Berkson & S. Carbon, supra note 1, at 82; Fish, supra note 1, at 641. Thorough recruitment would eliminate the first factor; selection by lot would eliminate the second factor.

172. The size of the pool of qualified or well qualified applicants might depend upon other considerations, including salary and career opportunities. See Davidow, supra note 55.
peramently unfit for the job.\textsuperscript{173}

As mentioned above, another issue with which the commission must be concerned is the appropriate number of candidates who should be nominated for judgeships. Like the minimum standards of competence, the number of nominees will be a function of the size of the candidate pool. No difficulty should be encountered, therefore, in populous states or districts in choosing at least twelve candidates.

The problem encountered by the smaller state or district can be mitigated by adapting a procedure of French judicial selection. In France—a unitary as opposed to a federal state—judges are not recruited locally. Instead, these judges are recruited centrally and assigned wherever needed.\textsuperscript{174} Similarly, in less populated states, a single, central nominating commission might consider candidates from anywhere in the state for a trial court with limited geographic jurisdiction.\textsuperscript{175} Although local residents might not know the judge personally before he or she assumed office, this lack of knowledge might be an advantage. If the judge were well known locally before assuming the bench, the appearance of justice might be compromised. Those who had not known the judge personally prior to appearing before the bench would be disadvantaged vis-à-vis those who had known the judge previously.\textsuperscript{176}

Alternative B

§ 1 The Judicial Nominating Commission shall consist of twelve persons elected popularly by proportional representation and four nonvoting members selected as follows: one member of the State Bar Association, elected by all members of the State Bar Association; one judge, elected by all judges of courts of record in the state; one full-time teacher in a law school within the state accredited by the American Bar Association, elected by all full-time law teachers in accredited law schools within the state; and one full-time, nonlawyer teacher in an accredited university,

\textsuperscript{173} See \textit{National Advisory Commission on Criminal Justice Standards and Goals, Courts 145} (1973).

\textsuperscript{174} G. \textit{Verpraet, supra} note 10, at 60–63.

\textsuperscript{175} Several states already have a single commission to nominate judges for the whole state. \textit{See, e.g.}, Wyo. \textit{Const. art. 5, § 4}.

\textsuperscript{176} Lon Fuller suggested that there is a tension between the desire for due process and the desire to be treated as an individual. Fuller, \textit{Two Principles of Human Association}, in \textit{Voluntary Associations} [NOMOS XII] 3 (J. Pennock & J. Chapman eds. 1969). Intimacy is a virtue so long as the individual is a member of the intimate group and the decision is favorable. If one is not an intimate or if the decision is unfavorable, due process seems to be the preferred concept.
§ 2 Whenever a vacancy occurs in a court of record within the state, the Judicial Nominating Commission shall prepare a list of twelve well-qualified candidates for the position. A unanimous vote of the twelve voting commissioners shall be required for inclusion of a candidate on the list. Once the list has been prepared, the person to fill the vacancy shall be selected by lot from among those persons on the list.

Commentary

Most of the discussion of alternative A could be repeated here. Alternative B differs from alternative A only in regard to the composition of the nominating commission. Alternative B does not explicitly recognize special interest groups. Such groups have to organize, therefore, to elect lay persons representing their beliefs, attitudes, and values. Since more commissioners are elected under a system of proportional representation by the general population, minorities constituting a small proportion of the general population will be more likely to gain representation on the commission. Finally, members of the commission with greater expertise cannot dominate other members who lack such expertise;" such expertise is available to everyone in the form of four nonvoting members of the commission. Furthermore, as was true under alternative A, final selection is by lot.

Alternative C

§ 1 The Judicial Nominating Commission shall consist of the following: two lawyers, elected by the State Bar Association; six persons popularly elected by proportional representation, of whom one must be a lawyer and five must be nonlawyers; two judges, elected by all judges of courts of record in the state; one full-time member of a faculty of a law school in a state accredited by the American Bar Association, elected by all full-time members of the law school faculties of accredited law schools in the state; and one full-time member of a nonlawyer faculty of an accredited university within the state, elected by all nonlawyer full-time teachers in accredited universities in the state.

177. This situation is to be contrasted with that in Missouri, where the judge member of the commission is usually unduly influential. See R. WATSON & R. DOWNING, supra note 1, at 339.
§ 2 When a vacancy occurs, the Judicial Nominating Commission shall:

a. actively recruit candidates by publicizing the vacancy in various appropriate print media and by personally soliciting persons worthy of consideration;

b. acting as a full commission, interview each person whom at least one member of the Commission wants to interview;

c. disqualify any person after an interview if nine of the commissioners vote to disqualify; and

d. select twelve nominees from among those interviewed but not disqualified, with each member of the Commission choosing one of the nominees. No two members, however, may nominate the same person. If more than one member wants to nominate the same person, the lot shall be used to determine which of these members shall have the first right to nominate.

§ 3 The vacancy shall be filled by lot from among those persons nominated in accordance with § 2.

Commentary

The nominating commission under alternative C is the same as the commission under alternative A. The process of selection is altered, however, to handle possible disruption through noncooperation. Under alternative C, the commission first acts as a recruiting commission, then as a screening commission, and finally as a nominating commission. To ensure full minority participation, any candidate is entitled to an interview if even one commissioner requests such action. Screening occurs only after an interview; thus, a decision to disqualify is taken on the basis of the most complete information available, including those intangible qualities revealed only through a personal interview.

Under alternative C, no one person can disrupt the proceedings through noncooperation since no individual is given a veto power. On the other hand, no one commissioner is guaranteed a nominee of his or her choice since such candidates can be excluded at the screening stage. Once again, this alternative will work only if the commissioners act in good faith. Furthermore, this alternative preserves the central feature of final selection by lot.

Alternative D

§ 1 When a judicial vacancy occurs, the Judicial Screening Committee [selected in accordance with the provisions of § 1, al-
ternative A] shall screen any person interested in seeking the judgeship and shall certify those who are deemed [well] qualified.

§ 2 Those certified as [well] qualified under § 1 shall receive [a specified sum] from public funds to be used for campaigning in accordance with the limitations contained in § 7B(1) of the ABA’s Code of Judicial Conduct.

§ 3 On the basis of proportional representation, voters shall select twelve nominees from among those certified as [well] qualified under § 1.

§ 4 Following the election under § 3, the judge shall be selected by lot from among the twelve nominees selected under § 3.

Commentary

Alternative D gives the electorate a greater and more direct role in the selection of nominees. Minimum qualifications, whether “qualified” or “well qualified,” are secured by a screening committee, which must certify each candidate appropriately before that person’s name can appear on the ballot. Public financing mitigates the disadvantage now burdening minorities and imppecunious candidates. Once again, the selection of a relatively large number of nominees (here through proportional representation) assures representativeness, as does final selection by lot.

2. Federal Judges

Here, the basic question is whether there are special considerations relating to federal judges that should lead to a different method of judicial selection from that proposed for the states. No such considerations seem to exist, however, with regard to the Supreme Court, courts of appeals, and district courts. Indeed, to the extent that federal courts have been involved more in policymaking than state courts,178 the need for representativeness would seem to be greater in the federal judiciary than in the state

178. The assumption on the part of many people today is that the Supreme Court is “making law” to a greater extent than the lower federal courts and the state courts. Exhibit “A” might very well be Roe v. Wade, 410 U.S. 113 (1973), in which the Court placed substantial restrictions on the power of the states to enforce abortion laws. The assumption should not be made, however, that such policymaking is, or has been, the special province of the United States Supreme Court. Even in colonial days, the courts exercised considerable policymaking in regard to slavery. For example see A. HIGGINBOTTOM, IN THE MATTER OF COLOR 28 (1978). Even in England, where there is no written constitution to which a court can appeal, the House of Lords has rendered decisions incorporating substantial policymaking. See, e.g., Shaw v. Director of Public Prosecutions, [1962] A.C. 220 (1961), in which the House of Lords upheld a prosecution for “conspiracy to corrupt public
judiciary. A federal constitutional amendment would be required, however, to implement any one of the four alternatives outlined in the previous sections. On the national level, alternatives A or C are the most manageable of the four. Perhaps primary elections would be required for those commissioners not selected by proportional representation; the single transferable vote would make such elections unnecessary in the case of those selected by proportional representation. A more difficult question, however, relates to the tenure and discipline of federal judges, a matter dealt with in another article.\(^{179}\)

One federal judicial officer, however, deserves special mention: the United States Magistrate.\(^{180}\) Magistrates are now selected by the district courts, utilizing merit selection panels.\(^{181}\) If district court judges were themselves more representative (because selected, for example, in accordance with alternative A, B, C, or D), then perhaps it would be appropriate to leave final selection to the district court. Such a system of selection would not be appropriate, however, in districts containing only a few judges. Moreover, the present system does not give assurance of ultimate representativeness; therefore, even here, one of these alternatives is preferable, although implementation of one of them would probably require a constitutional amendment.\(^{182}\)

V. CONCLUSION

Despite assertions to the contrary, credible evidence suggests that some form of merit selection can produce better judges than a system of election.\(^{183}\) The real challenge is to design a system that can achieve the twin goals of quality and representativeness. Quality of judicial personnel is an obvious goal. Representativeness in regard to beliefs, attitudes, and values is an appropriate

\(^{179}\) See note 54 supra.


\(^{182}\) It seems unlikely that Congress, consistently with Art. II, § 2, cl. 2 of the Constitution, could grant the “Courts of Law” the power to appoint magistrates while limiting the courts' choice to persons selected by lot. Cf. Buckley v. Valeo, 424 U.S. 1 (1976) (invalidation of appointment provision that departed from literal terms of the Appointments Clause by involving members of Congress in the appointment of members of the Federal Elections Commission).

\(^{183}\) See notes 109-10, 124-26 & 128-33 supra and accompanying text.
goal because of the absence of consensus on such beliefs, attitudes, and values.

This Article has proposed four alternatives to achieve these goals. Each proposal involves the use of proportional representation, either in the selection of at least some of the commissioners or more directly in the selection of the nominees, and ultimate selection by lot from among the relatively large number of nominees.

There is no perfect way to select judges, just as there are no perfect judges. Yet, at present, all reasonable possibilities for judicial selection have not been exhausted. The four proposals in this Article, while adding to the possibilities for judicial selection, certainly do not exhaust all possibilities for reform. Nevertheless, these proposals do indicate that a better system of judicial selection can and should be implemented.

APPENDIX

Social Science Assistance in the Discovery of Information Pertinent to the Judicial Selection Process

1. Competence

In the past, social science techniques have been used in legal contexts. Such techniques have been used in the development of standardized tests, such as the Law School Admissions Test; law school examinations, however, traditionally have required essays. In addition, various state bar examinations today often include standardized portions (the Multistate Bar Examination). Furthermore, with respect to lawyer competence, at least two quantitative studies have been published recently. No ef-
fort has been made, however, to correlate the law school related tests (LSAT, law school examinations, and bar examinations) with evaluations of lawyer competency— a subject that presumably is relevant to the judicial selection process. Although these lawyer competency studies may be "quantitative," in the sense that they can be scored and summarized numerically, they depend on subjective evaluations.

2. Representativeness

Characteristics other than competence, however, may appear at first glance to be more amenable to quantitative, possibly less subjective, analyses. Representativeness, for example, has already been shown to be an important factor. Suppose, for instance, that individuals want to select a judge who is generally sympathetic to persons accused of crime to balance a court that contains judges hostile to such accused persons, or vice versa. Several techniques are available. If consideration should be given to a presently sitting appellate judge for promotion to a higher court, such techniques as cumulative scaling or bloc analysis could be employed. Cumulative scaling attempts to measure the extent to which individual judges on a collegial court can be compared on a continuum regarding attitudes towards a particular type of case.

In


190. Attempts have been made to relate grades in law school or grades on the Law School Admissions Test to performance on the bar examination. Carlson & Werts, Relationships Among Law School Predictors, Law School Performance, and Bar Examination Results, in 3 Law Sch. Admission Council, Law Sch. Admission Research 211 (1977). In two studies of the competence of trial lawyers, the investigators made no effort to relate the evaluation of lawyers to their performance in law school or to their performance on the Law School Admissions Test. See note 189 supra.

191. In a study of the competence of lawyers appearing in federal courts, the investigators caution that

It is important to recognize that everything in this report is ultimately founded on the judgments of judges and lawyers about the quality of lawyer performances. Judges were asked to evaluate particular performances without being given any standard of the measurement of performance quality. Judges and lawyers were asked for their opinions about the quality of lawyer performances, again without being given any standard.

A. PARTRIDGE & G. BERMANT, supra note 189, at 1. A further indicator of the subjectivity of the evaluation is found in the following statement: "Another part of the research showed that district judges are not highly consistent with one another in rating performances using the seven category scale provided in the research instruments." Id. at 5.

192. Such scales are cumulative in the sense that as an individual progresses along the scale, that person encounters judges who are, for example, increasingly more sympathetic toward persons accused of a crime. Cases are arranged so that the first category includes cases in which virtually all judges, including those with minimal sympathy for the accused,
contrast, bloc analysis attempts to identify groups of judges on a collegiate court who vote together in certain types of cases. Apart from methodological differences, these two techniques thus represent differences in emphasis. There is a degree of overlap that is demonstrated, for example, by the fact that cumulative scaling may suggest groups of judges who respond similarly to a particular type of issue.

These techniques, despite their statistical sophistication, are often imprecise and subjective. Tendencies may be detected in groups of judges, or even in single judges, but these techniques do not ensure the infallible prediction of how a judge will decide a close case. Although such prediction is not impossible, however, the question remains whether complicated statistical techniques can reveal more than nonstatistical analysis by an experienced court observer.

Part of the problem is inherent in social science: the application to human beings of techniques and assumptions that characterize the physical sciences. By looking for similarities that will

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193. See generally W. Murphy & J. Tanenhaus, supra note 192, at 159–76.


195. See, e.g., id; G. Schubert, The Judicial Mind Revisited (1974). Three types of analyses used in the second work are “principal-components factor analysis, oblique factor analysis, and smallest-space analysis.” Id. at ix.


197. See, e.g., Fuller, Human Purpose and Natural Law, 3 Nat. L.F. 68 (1958); Nagel, On the Fusion of Fact and Value: A Reply to Professor Fuller, 3 Nat. L.F. 77 (1958); Fuller, A Rejoinder to Professor Nagel, 3 Nat. L.F. 83 (1958); Nagel, Fact, Value and Human Purpose, 4 Nat. L.F. 26 (1959).
permit classification, social scientists often unduly simplify. Much of the actual complexity is disregarded, sometimes because it does not fit neatly into the researcher's conceptual or statistical model. One common deficiency, for example, is the consideration of only nonunanimous decisions of a multimember court. Although the reason for this exclusion is understandable—unanimous decisions reveal nothing about the differences between and among members of the court—the exclusion nevertheless may result in a distorted view of the court's work. This distortion may occur because dissents, which are the only clues to differences among court members that are utilized by bloc voting and cumulative scaling techniques, may not accurately reflect the

200. In his study of Supreme Court opinions announced during the 1962 term, for example, Schubert indicated that he excluded, among other cases, those pertaining merely to jurisdictional issues. Schubert, supra note 197, at 112. It is not always easy, however, to distinguish between "jurisdictional issues" and issues on the merits. Court watchers have long suspected that decisions in the area of "standing," "political questions," "ripeness," and "mootness" sometimes conceal substantive decisions that might otherwise be unpopular with vocal minorities. See, e.g., Laird v. Tatum, 408 U.S. 1 (1972) (finding of plaintiff's lack of standing to challenge army surveillance of civilian political activity apparently based on a decision on the merits).

Some of the complexity that is absent from such social science studies is illustrated by the following passage:

In appraising the significance of a dissenting opinion it should be remembered that judges often, tacitly or openly, use the threat of a dissent to obtain some modification in the majority opinion. In deciding how firmly to hold out, the judge inclined toward dissent would be less than human if he were not influenced by the attractiveness of the role in which a dissent casts him. Or suppose that his appointment to the bench was heralded by the National Review or the Nation as bringing a wholesome 'conservative' or 'liberal' influence to the court. The cases he confronts offer him for a long time no opportunity to demonstrate to those who believe in his judicial philosophy that he has not deserted them. In such situations the opportunity to write a dissenting opinion in an appropriate case becomes especially attractive and he is likely to take full advantage of the occasion. Since he is relieved of any complicity in the decision actually reached, he may in fact be moved to show by words that his 'personal values and attitudes' remain what they were when he was just a plain, ordinary citizen. In so doing he will please not only his well-wishers but the researchers as well, for his dissent will help to load the figures in favor of a result that the researcher, if he too is human, cannot but hope will emerge from his labor.

In his report on researches of the kind under discussion, Grossman asserts that "these explorations' will 'tend to focus on properties of behavior which are amenable to generalization—for example, on judges' votes rather than on their opinions.' But this emphasis will surely be misplaced if, as may very well be the case, the primary motive for casting the dissenting vote was to procure the opportunity to write the dissenting opinion. And it should be remembered that filing a dissent without opinion can often be interpreted as staking out a claim to write a dissenting opinion on a later and perhaps more suspicious occasion.


201. In one of his studies, Schubert notes that "unanimous and jurisdictional decisions are excluded." G. SCHUBERT, supra note 194, at 44.
actual differences among those court members. Moreover, many cases defy easy classification, especially those in which the opposing parties' claims rely on fundamental values, sometimes even the same value.

If a particular candidate is not currently on a collegial court,

202. Fuller describes the problem in this fashion:

In estimating how much is left out when unanimous decisions are excluded from the study, one must recall that the impression of solidarity conveyed by such decisions can be quite spurious. One of the most perceptive of our state judges once attempted to describe how unanimous decisions look to those who reach them. With his own court, he said, some of these decisions were rated as 90-10, while others might be rated as 51-49, in the second class it having been touch-and-go as to how they would finally be decided. The 90-10 decisions furnish a firm foundation for a future development; the principle implicit in them is likely to be extended broadly by analogy. Cases of the second class will be likely to meet an opposite fate. The 51-49 decisions do not necessarily represent any division of opinion among the court; all the judges may have felt substantially the same way and all may have been equally pulled just past the point of indecision in finally reaching a unanimous conclusion. When we thus look behind the blank outer wall of unanimity, it becomes apparent how much judicial preference schedules may be falsified (say, on a Guttman scaling) when unanimous decisions are left out of account. It should be remembered that the reciprocal adjustments and compromises that go into a unanimous decision may have a carry-over effect on the judge who, in a later case, debates whether to file a dissenting opinion.

The chief distortion introduced by the exclusion of unanimous decisions results not from the fact that a veil is drawn over divergencies that may lie behind such decisions, but from the undue weight it lends to dissent. By entering a dissent a judge gains for himself the opportunity to engage in a very special form of literary exercise, the dissenting opinion.

Fuller, supra note 200, at 1610.

203. It is understood well by constitutional experts, for example, that there is a tension between the free exercise and establishment clauses of the first amendment. In such cases as Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), a failure to grant an exemption from an otherwise general governmental requirement was regarded as an infringement of free exercise rights. The granting of such an exemption, however, could be regarded as an establishment of religion because it prefers those individuals who adhere to a particular religious belief over those individuals who adhere to other religious beliefs or no belief at all. Despite this tension, one of Schubert's subscales simply is entitled "religious freedom." G. SCHUBERT, supra note 195, at 154. It is not evident, therefore, whether the Verner and Yoder decisions can be categorized simply under the rubric of "religious freedom."

One of Schubert's scales is "political [as contrasted with economic] liberalism." Id. Presumably, "political liberalism" includes supporting claims based on the freedom of speech. This definition raises the question of how to categorize such cases as Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In Red Lion, the argument can be made that the decision to uphold FCC regulations which require broadcasters to provide time to candidates whose opponents have been endorsed by the television station is inconsistent with first amendment rights, since the television station is limited in what it can say on the air. Alternatively, given the present technological limitations on broadcasting, the FCC regulation can be regarded as consistent with the first amendment because it promotes fuller discussion of political matters and gives media access to those persons who would otherwise not have such access and thus the opportunity to speak freely before the public. The challenge, therefore, is in determining which side of this case represents "political liberalism."
techniques such as bloc voting and cumulative scaling are unavailable. There are, however, studies that have attempted to show correlations between certain background characteristics of a judge and his or her decisions in actual cases. The knowledge of these background characteristics of a candidate may permit the prediction of his or her decisions in certain cases.

One of the principal problems with these efforts, which also occurs with bloc voting and cumulative scaling, is imprecision. In one instance, for example, a complex statistical technique known as multiple regression was used to show the extent to which party affiliation was related to decisions in criminal and economic cases. Although party affiliation accounted for forty-four percent of the variance in the economic cases, party affiliation accounted for only seven percent of the variance in criminal cases. Thus, knowledge of a candidate's party preference would not permit the accurate prediction of that candidate's judicial behavior in criminal cases. These observations do not suggest, however, that political science studies are useless because a conception of the larger picture is often helpful. Information, for example, on the extent to which judges on a particular court are representative of the relevant community may be useful, although such studies seem to be of doubtful utility in evaluating a specific person.

204. E.g., S. Nagel, supra note 79.
205. By itself, each judicial characteristic cannot explain a large part of the variance among judges' decisional propensities. For example, if one were to rely only upon political party affiliation to predict a judge's tendency to find for the defense in criminal cases, one could account for only 7 percent of the variance (or 0.0625 squared); using the twelve variables for which standardized regression weights could be computed, one can account for 43 percent of the variance. In fact, one can account for 25 percent of the variance by just using the variables of political party affiliation, attitude on economic issues and attitude toward treatment of criminals... These three variables had substantial, non-redundant correlations with the tendency to hold for the defense in criminal cases.

The effect of multiple correlation used to interpret data collected from judges hearing civil cases involving economic issues is more dramatic. Without this more sophisticated analysis, political party affiliation accounts for only 14 percent of the variance. When adjustments for the effect of other variables are made, however, political party affiliation can account for 44 percent of the variance. If the sum of the additional variance explained by each of the ten variables for which the computer could find standardized regression weights... is computed, approximately 90 percent of the variance of the dependent variable can thus be explained.

206. See note 79 supra and accompanying text.
3. **Impartiality and Openmindedness**

In addition to quality and representativeness, the judicial characteristics of independence, impartiality, and openmindedness are desirable. Independence may be a function of the conditions under which a judge holds office: e.g., length of term and the possibilities of discipline and removal.\(^{207}\) To the extent that independence varies among candidates it may depend on the candidate’s financial or other interests.\(^{208}\) Presumably, such independence

\(^{207}\) Presumably, the greatest amount of independence is provided by the federal system, under which judges enjoy life tenure with a guarantee of undiminished salary. U.S. CONST. art. III, § 1. In the federal context, a common assumption has been that the only possibility of removal is through the impeachment process. U.S. CONST., art. II, § 4; Note, *Judicial Disability and the Good Behavior Clause*, 85 YALE L.J. 706 (1976). Contra, Snarr & Parker, *The “Good Behavior” Alternative to Impeachment: A Proposal for the More Effective Use of Judicial Councils*, 4 J. CONTEMP. L. 38 (1977) (assumption that judiciary has the power to police itself). With respect to state judgeships, at or near the other end of the spectrum is Alabama, where even supreme court judges have only a six-year term, ALA. CONST. amend. 328, § 6.15, and can be removed by a Court of the Judiciary, *id.* at § 6.18, on the recommendation of a judicial inquiry commission, *id.* at § 6.17, for “violation of a canon of judicial ethics, misconduct in office, [or] failure to perform his duties . . . .” *Id.* at § 6.18.

\(^{208}\) When, for example, the Senate was considering Justice Fortas for the chief justiceship of the United States Supreme Court, an issue arose regarding the propriety of his receiving $50,000 for his participation in a seminar conducted at American University. The following excerpts from the senate hearings illustrate the kinds of problems that may arise when a judge participates in extrajudicial activities for a fee:

*Mr. Chairman, during the noon recess, I have had opportunity to look at the biographies in “Who’s Who” of the five gentlemen who are mentioned by Dean Tennery, as having contributed $30,000 to American University for the purpose of financing the summer seminar at which Justice Fortas presided. The five gentlemen are no ordinary group of men. They are all important leaders in the business and financial world. As I look over their biographies, I see one man who describes himself as the chairman of the New York Stock Exchange. Two of them are directors of Braniff Airways. Three of them are deeply involved in the department store business. They hold important posts on banks and insurance companies and on major utilities.

Any one of these men could easily become involved in any number of suits which might reach the Supreme Court. They represent a complex of business and financial holdings that could scarcely be extricated from anything touching upon the Nation’s economy. It would place the nominee in a difficult position if any one of these holdings were involved in litigation before the Court.

In studying these biographies, I was surprised to find that none of them, despite their numerous business and philanthropist connection, has apparently ever had anything to do with American University. I find that they have gone to such schools as Tulane, New York University, Dartmouth, Harvard, University of Rochester, Columbia, and Ohio State. One of the gentlemen belongs to the Visiting Committee of Harvard University and is a member of the Corporation of Northeastern University. Yet all of them, when approached by Mr. Paul Porter, suddenly opened their purse strings to American University, with which they had no connection recorded in “Who’s Who,” and which is not even in the city where any of them live or work. This appears to be an extraordinary burst of spontaneous generosity.*

_Nominations of Abe Fortas and Homer Thornberry: Hearings on Nomination of Abe Fortas_
can be assessed without resort to social science methodologies.

Impartiality and openmindedness, however, have been the subject of social science study. At the outset, the determination must be made whether these characteristics are separable phenomena, since one might be related to ideology while the other might be related to basic personality.

The first major effort to resolve this question evolved from an investigation of antisemitism during World War II.\(^{209}\) In 1950, a report on the use of an attitude scale, the "F" scale, was published.\(^{210}\) Although the title of the work suggested a general test of authoritarianism, which might include the notion of a lack of openmindedness,\(^ {211}\) this scale was, more accurately, a test of "right wing" authoritarianism—hence the name "F" scale ("F" standing for "facist").\(^ {212}\)

Later, Milton Rokeach developed a "dogmatism" scale\(^ {213}\) that, in his view, measured an underlying personality trait unrelated to ideology. He found for instance, that English Communists were the most dogmatic of any group that he tested.\(^ {214}\) This finding appeared to refute the conclusion of those who had claimed to find an association between "right wing" political views and dogmatism.\(^ {215}\)

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\(^{211}\) It might be hypothesized that one reason why people in modern society—even those who are otherwise intelligent or "informed"—resort to primitive, oversimplified explanations of human events is that so many of the ideas and observations needed for an adequate account are not allowed to enter into the calculations: because they are affect-laden and potentially anxiety-producing, the weak ego cannot include them within its scheme of things.

\(^{212}\) Id. at 236.

\(^{213}\) Id. at 224.

\(^{214}\) Id. at 115.

\(^{215}\) Curiously, some researchers have tended to ignore this central principle of Rokeach's research—that there is no necessary relationship between dogmatism or authoritarianism and any particular political view. In Jurow, New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971), for example, the author referred to another scale developed by Rokeach as a "conservatism-liberalism scale." Id. at 579. Jurow missed the whole point; "[c]onservatism-liberalism scale" was not such a scale but was rather an "opinionation" scale that was designed to measure general intolerance. M. Rokeach, supra note 60, at 80. Possibly Jurow's error illustrates
According to Rokeach, the essence of the open mind is the capacity to "receive, evaluate, and act on relevant information received from the outside on its own intrinsic merits, unencumbered by irrelevant factors in the situation arising from within the person or from the outside." Perhaps, then, openmindedness is distinguishable from impartiality, with the latter trait suggesting an ideological standard.

If it is assumed for the sake of argument, that Rokeach is correct, the question arises whether openmindedness can be tested. To address that question, an examination should be made of Rokeach's dogmatism scale—a series of forty statements with which an individual can express agreement or disagreement on a six-point scale, ranging from plus three ("I agree very much") to minus three ("I disagree very much"). Apart from methodological problems of special interest to social scientists, problems may arise because of possible ambiguity in some of the statements. One statement, for example, reads: "The principles I have come to believe in are quite different from those believed in by most people." Agreement with this statement supposedly is indicative of the closed mind. As Rokeach himself has written elsewhere, however, an attitude is more than an attitude toward an
object in the abstract; it also includes an attitude toward the situation or context in which the object is perceived. The problem with the quoted statement is that its context is unclear. Depending on the part of the country in which one lives, one might be able to answer quite accurately that his or her principles differ from those of most people in that part of the country. A person whose views are similar to those of even the moderate members of the British Labor Party, for example, can accurately state that his or her views differ from those of most people in west Texas.

Another statement in Rokeach's dogmatism scale which is supposed to indicate a closed mind, is the following: "In this complicated world of ours the only way we can know what's going on is to rely on leaders or experts who can be trusted." Again, the context is unclear. If the question related to whether more money should be spent on extracurricular activities at the local high school, one might agree that a person should be able to discover the pertinent facts for himself or herself and make an independent decision. If the question, however, is whether SALT II should be ratified or the MX missile system deployed, the vast majority of people will have to rely on the advice of other persons whose judgment is trusted.

Thus, there is some doubt as to whether Rokeach's dogmatism scale could be used successfully to discover dogmatism, especially among lawyers, who have been trained to focus on the ways in which a different context can make a difference in the application of the same general principle. This doubt should not lead to the conclusion that Rokeach is necessarily wrong as his conclusions

222. An individual living in west Texas cannot escape the conclusion that many people in this area have not accepted the desirability or legitimacy of labor unions, much less the doctrine of the British Labor Party concerning the governmental ownership of major transportation systems and industries.
223. M. ROKEACH, supra note 60, at 79.
225. E.g., compare N.Y. Times, July 1, 1979, § 4, at 20, col. 3, with N.Y. Times, Aug. 8, 1979, § 1, at 6, col. 4.
226. In his famous series of lectures to first-year law students at Columbia, Karl Llewellyn said, among other things:

"Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him. You are not to think that the words mean what they might if they stood alone. You are to have your eye on the case in hand, and to learn how to interpret all that has been said merely as a reason for deciding that case that way.

may have intuitive appeal. His methodology simply may be of limited utility in the assessment of potential judges.

Apart from personality, the question arises whether there are some acceptable or unacceptable political beliefs for which testing may be desirable, on the assumption that unacceptable political beliefs might constitute a lack of impartiality. Although people disagree about many fundamental political issues, some views are enshrined in the Constitution as interpreted by the Supreme Court. The Court, for example, has held that the concept of due process includes the notion that the prosecution in a criminal case has the burden of proving guilt beyond a reasonable doubt.\footnote{Jackson v. Virginia, 433 U.S. 307 (1979); \emph{In re Winship}, 397 U.S. 358 (1970). But cf. \citeauthor{patterson} v. New York, 432 U.S. 197 (1977) (prosecution not required to prove absence of mitigating circumstances beyond a reasonable doubt when absence of mitigating circumstances is not made an explicit element of the offense).}

Arguably, any person not agreeing with this principal lacks impartiality in criminal cases.\footnote{An analogous situation apparently arises in New York City. There, a candidate for a criminal court judgeship is excluded if he or she believes that the purpose of bail is other than to assure presence at trial. Conversation between Stuart Summit, Executive Secretary of the Mayor’s Committee on the Judiciary, and R.P. Davidow, Spring, 1975. This qualification is especially interesting, since it is supported only in dictum in \citeauthor{stack} v. \citeauthor{boyle}, 342 U.S. 1 (1951); the principle of \citeauthor{stack} is not universally accepted in the United States—unlike the principle of the requirement of proof beyond a reasonable doubt.}
The issue then becomes whether a test can be devised to discover this lack of impartiality before a judge’s selection.

At least one social scientist claims that the best test of attitudes is the most direct one.\footnote{Jurow, \emph{supra} note 217, at 593.}
The problem, of course, is that there is a “correct” answer to a question about burden of proof and standard of proof—correct, that is, from the standpoint of one trained in the American legal tradition. A judicial candidate can be reasonably certain that an expression of disbelief in the concept that the prosecution must prove guilt beyond a reasonable doubt, will result in an unfavorable consideration.\footnote{In regard to a question with an obviously correct answer, there is always the problem of “deliberate dissimulation by persons who may be trying to present themselves in a particular light.” Christie & Cook, \emph{A Guide to Published Literature Relating to the Authoritarian Personality Through 1956}, 45 J. PSYCH. 171, 175 (1958).}

There may, however, be a test of “prosecution-proneness” or “defense-proneness” as developed by George Jurow in his Capital Punishment Attitude Questionnaire.\footnote{Jurow, \emph{supra} note 215, at 599.} That questionnaire consists of two parts: (1) a question regarding general attitudes to-
ward capital punishment; and (2) an inquiry into the probable action of the respondent based on the assumption that the respondent is on a jury in a capital case. Jurow found in one study that answers to the second question were significantly related to decisions in one or two mock criminal trials. Arguably, the second question suffers from the same defect as that found in the question about burden of proof—that is, it contains a "professionally correct" response: "I would consider all of the penalties provided by law and the facts and circumstances of the particular case." When this questionnaire was given to law students and judges in another study, however, it was discovered that a large number of those who did not respond to the neutral position in regard to general attitudes, did not shift to this "professionally correct" response on the second question. Thus, this questionnaire may be used effectively to test for "prosecution-proneness" or "defense-proneness," although a problem remains as to the correct standard by which to interpret the results. In the case of burden of proof, a constitutional standard exists; in the case of the death penalty, no such standard exists since the Supreme Court has held that capital punishment is a permissible penalty in certain circumstances.

Jurow's Capital Punishment Attitude Questionnaire

232. Check the one statement which best summarizes your general views about capital punishment (the death penalty) in criminal cases:
1. I am opposed to capital punishment under any circumstances.
2. I am opposed to capital punishment except in a few cases where it may be appropriate.
3. I am neither generally opposed nor generally in favor of capital punishment.
4. I am in favor of capital punishment except in a few cases where it may not be appropriate.
5. I am in favor of capital punishment as an appropriate penalty.

_Id._ (emphasis in the original).

233. Assume you are on a jury to determine the sentence for a defendant who has already been convicted of a very serious crime. If the law gives you a choice of death, or life imprisonment, or some other penalty: (check one only)
1. I could not vote for the death penalty regardless of the facts and circumstances of the case.
2. There are some kinds of cases in which I know I could not vote for the death penalty even if the law allowed me to, but others in which I would be willing to consider voting for it.
3. I would consider all of the penalties provided by the law and the facts and circumstances of the particular case.
4. I would usually vote for the death penalty in a case where the law allows me to.
5. I would always vote for the death penalty in a case where the law allows me to.

_Id._ (emphasis in the original).

234. _Id._ at 582.
236. The Supreme Court has upheld death penalty statutes that attempt to limit the
thus cannot be regarded legitimately as a test of bias, since there is no generally accepted standard by which to determine bias.\textsuperscript{237} If, however, the attempt is made to achieve a balance of opinion on a collegial court in regard to one fundamental legal issue, this test might be of some utility.\textsuperscript{238}

A final consideration, in view of the possibility of dissimulation, concerns the propriety of securing appropriate information through a polygraph test or psychiatric examination.\textsuperscript{239} Each of these techniques has its methodological problems, including the subjectivity inherent in an analysis of the results.\textsuperscript{240} In addition,
many people might find these techniques demeaning and thus incompatible with the dignity of the office. Unless we regard judges as above all criticism, however, the former objections appear to be the more substantial ones.

Examiner Diagnosis of Truth and Deception, 62 J. CRIM. L.C. & P.S. 276, 279 (1971). On the one hand, it is possible to be impressed by the relatively high degree of accuracy with which the judgments were made regarding truth or falsity; on the other hand, it is possible to be impressed by the relatively large degree of error with respect to a technique that is said to be so scientific. (Would such rates of error be regarded as acceptable, for example, in regard to tests for venereal disease?).