Building a Bench: A Close Look at State Appellate Courts Constructed by the Respective Methods of Judicial Selection

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 J.D. 1982, Stanford Law School. The author thanks Professor Margaret H. Lemos of Duke University for her insight, guidance, and constant patience, and Guangya Liu, Ph.D., for her data analysis. The author is grateful for the assistance of her judicial assistant, Stacy Stolz; her law clerks, Chase Haslam, Jennifer Lee-Cota, and Joni Noggle; and her extern, Robert Hill. The author also thanks Seth S. Andersen, Kevin M. Esterling, Betsy Grey, Lisa M. Holmes, John Rabiej, and Malia Reddick for their helpful comments on prior drafts. This article was written in partial fulfillment of the requirements for a Master of Laws in Judicial Studies from Duke University School of Law.

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INTRODUCTION

The qualities of a good judge are easy to name but sometimes difficult to discern and almost always impossible to quantify: intelligence, integrity, fairness, diligence, experience, judgment, perspective, compassion.[1] The Founders concluded the best way to ensure those qualities on the federal appellate bench was presidential appointment of judges, with the advice and consent of the Senate, and life tenure.[2] By contrast, the states have employed a variety of selection systems over time, each aimed—at least ostensibly—at producing the highest-quality appellate judges. But do any of the various selection methods produce appellate benches that are better than the others? Do any produce appellate benches that are significantly different from the others? Although several prior studies have sought to examine these questions, this Article presents a different analysis based on a broad set of data collected about each state appellate judge on the bench in early 2015. The findings shed new light on the characteristics of benches produced by the respective selection methods.[3]

Today, voters in twenty-two states elect their appellate judges.[4] When judges run in partisan elections, the initial winnowing of the candidates is done by the voters in primary elections, when they occur, or by party

1. *See* Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 28–29 (2004) (proposing means of measuring intellect, independence, effort, and quality of opinion-writing, based on objective performance measures); Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365, 1367–85 (2005) (discussing largely unquantifiable judicial "virtues," including incorruptibility, sobriety, courage, temperament, impartiality, diligence, carefulness, intelligence, learnedness, craft, skill, justice, equity, and "practical wisdom").

2. U.S. CONST. art. II, § 2, cl. 2.

3. *See* discussion *infra* Part III. The Author collected and analyzed the data described in the present Article.

4. *See* discussion *infra* Part II.B.

leadership, in the absence of contested primaries. In non-partisan election states, unable to rely on overt assistance from political parties, most judicial candidates are on their own to persuade voters of their qualifications. Although elections may not be the best means of ensuring high-quality judges—among other reasons, some unknowable proportion of the best would-be judges, by temperament, simply would never enter a campaign fray—proponents believe those concerns are outweighed by the accountability that elections impose on judges.[5]

Two states leave the selection of their appellate judges to the legislature.[6] In those states, judicial aspirants need not engage in traditional election campaigns; but, of course, the involvement of popularly elected legislators means that judicial selection in those two states is not free of politics.

In the other twenty-six states, the governor appoints members of the appellate courts.[7] Each of those states employs, to a greater or lesser degree, at least one element of what proponents call "merit selection,"[8] in which the governor's appointment power is constrained by an independent commission made up of both lawyers and non-lawyers who extensively review the qualifications of the applicants, then nominate candidates for appointment by the governor. In half of those states, the governor's power is further constrained by the requirement that the appointment be confirmed by a legislative or other elected body. Appointment systems are designed to free judicial candidates and judges from the appearance of conflicts—and actual conflicts—that may be unavoidable consequences of political campaigns and campaign fundraising in election systems. Proponents of appointment systems also believe the governor and the independent bodies that review and nominate prospective appointees are better than the voters in determining which judicial candidates have the necessary qualities for the bench. On the other hand, critics argue merit selection and like appointment systems unduly advantage the holders of traditional power in the legal world: bar associations, business interests, and large law firms.

This is a study of the objective characteristics of judges on state appellate benches produced by the five different selection methods: partisan election,

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5. *See, e.g.*, CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 7 (2009) ("Overall, we would expect judges chosen by democratic processes to reflect the political preferences of their states at the time they are chosen but also to be brought into line with the dominant coalition in the state by threat of electoral sanction.").

6. *See* discussion *infra* Part II.B.

7. *See* discussion *infra* Part II.B.

8. "Merit selection" is used throughout this Article to describe a selection process in which the governor appoints a judge from a slate of nominees proposed by an independent commission that has vetted and interviewed the applicants. In most merit-selection states, once appointed, a judge is subject to retention election at regular intervals thereafter. *See* discussion *infra* Part II.B.

non-partisan election, legislative selection, merit selection, and "merit–confirmation."[9] Although judges' subjective differences cannot be quantified, this Article analyzes a broad range of objective attributes, including gender, race, age, and the nature of a judge's prior legal experience, as well as arguably objective credentials such as judicial clerkships and attendance at ranked universities and law schools.[10]

The analysis starts from the premise that diversity enhances any appellate bench. Diverse life and work experiences, points of view, and educational backgrounds, as well as diversity in race, ethnicity, and gender, improve the work of an appellate bench. Diverse perspectives, knowledge and life experience promote a more robust exchange among the members of an appellate panel.[11] The broader a panel's collection of perspectives and experiences, the more informed its decision-making will be.[12] Not

9. "Merit-confirmation" is used throughout this Article to describe a selection process in which the governor nominates a judge after receiving the recommendation of an independent commission; the governor's nominee then must be confirmed by a separately elected body. *See* discussion *infra* Part II.B.

10. The nature of state appellate courts—in which panels of judges collaboratively decide cases—makes the appellate system a good subject for a study such as this, which considers the mix of characteristics possessed by judges on courts selected by various means. But the observations about the effects of selection methods also may apply, to some extent, to state trial court judges.

11. *See* Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 504–05 (2002); Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 494 (1979).

12. There is conflicting evidence about whether gender, race, or ethnicity affects how a judge decides cases. Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 235 (1987); Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 49 (2008). Multi-judge appellate panels are the best source of statistical analyses for this issue, but generally speaking, researchers find little to no effect on the outcomes of cases due to the presence of diversity among federal appellate panels. Boyd, Epstein, and Martin found significant differences, however, in how male and female judges decide gender discrimination cases. Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010). And the presence of a female judge on an appeals panel tends to cause male judges to favor the plaintiff in gender discrimination cases. *Id.* at 406; *see also* Elaine Martin & Barry Pyle, *Gender and Racial Diversification of State Supreme Courts*, 24 WOMEN & POL. 35, 36 (2002). Other researchers see the same effects with black federal appellate judges. Using matching methods, Kastellec showed that black judges are significantly more likely than comparable non-black appellate judges to vote in favor of affirmative action programs. Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 168 (2013). Moreover, as in the study by Boyd,

incidentally, diversity also enhances and widens public respect for the courts.[13]

This Article analyzes detailed career-path and other demographic data to determine the extent to which the various judicial selection methods advance diverse candidates to the bench. The results show many similarities among the mix of objective characteristics found on appellate benches across the states, regardless of selection method, but there are some important differences:

- "Merit-confirmation," in which the governor's appointment power is constrained both by an independent nominating commission that reviews and vets the applicants and also by an elected body with the power to confirm or reject the eventual appointee, produces the most distinctive bench. Appellate judges in merit-confirmation states tend to have more years of legal experience and include proportionately more former prosecutors, more other former government lawyers, more former judicial clerks, and more appointees with other prior judicial experience.[14]
- Proportionately more appellate judges in election states come from private practice than in merit-selection or merit-confirmation states. Fewer of them have prior judicial experience, and more of them were educated locally. Many judges in election states, however, first come to the bench when they are appointed to fill an interim vacancy. Although the prior literature had understood that the objective characteristics of those appointees generally are similar to their elected counterparts, this study shows that is not always so, at least with respect to career paths and some objective

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et al., a black appellate judge may have a multiplier effect in certain cases; non-black judges tend to vote differently on race-based affirmative action cases when they sit on a panel with a black judge. *Id.* at 175, 177. Because the presence of a black judge on a panel increases the chance that a non-black judge will vote in favor of affirmative action by 20%, a black judge's presence on a three-judge panel "nearly ensures that the panel will vote in favor of an affirmative action program." *Id.* at 168.

13. *See* Hurwitz & Lanier, *supra* note 12, at 49; *see also* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 138 (1997) ("With public confidence in the justice system plummeting, many argue that racial diversity on the bench will help disaffected racial minorities, in particular, to believe that they have a voice in the administration of justice."); KATE BERRY, BRENNAN CTR. FOR JUST., BUILDING A DIVERSE BENCH: A GUIDE FOR JUDICIAL NOMINATING COMMISSIONERS 4 (2016); TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 3 (2016); CIARA TORRES-SPELLISCY ET AL., BRENNAN CTR. FOR JUST., IMPROVING JUDICIAL DIVERSITY 4 (2010) ("Diversity on the bench is intimately linked to the American promise to provide equal justice for all.").

14. *See infra* Table 1.

> demographics. In several respects, most notably race, these appointed judges are significantly different from their elected counterparts. The distinctive characteristics of the appointed judges tend to bring the overall characteristics of the appellate benches in elected states more in line with the national norm across all selection methods.[15]
>
> - Nationwide, women are represented on state appellate benches at a rate slightly higher than their numbers among the practicing bar. By a significant margin, however, female candidates are disadvantaged by merit selection, but not by merit-confirmation. The data suggest that merit selection does not value private-practice or business-law experience in women to the same extent it values that experience in men. On the other hand, merit selection favors women with prior government-law experience and those who have served judicial clerkships.[16]
> - Finally, non-whites are represented across and within all selection methods at rates roughly equivalent to their representation in the bar. By a significant margin, however, non-whites on the bench are disproportionately female.[17]

Part I discusses the history of judicial selection in the states and reviews the prior empirical and theoretical literature concerning judicial selection methods and the differences among judges produced by those selection methods, mainly with respect to gender, race, and localism. Part II identifies the data gathered for this analysis and describes the particulars of the five methods of judicial selection employed by the states. As noted above, many states elect their appellate judges; in other states, judges are chosen by a formal merit-selection protocol; and in two states, the legislature selects appellate judges. Prior studies categorized appellate judges in all the other states as simply "appointed." Upon close review of the relevant legal mechanisms in those states, this Article concludes it is more appropriate to recognize that their judicial-selection protocols resemble those in merit-selection states, except that in these "merit-confirmation" states, the governor's appointment power also is constrained by the requirement that a separate elected body,

15. *See infra* Table 4.
16. *See infra* Table 5, Table 6, Table 7, Table 8, Table 9, Table 10, Table 11.
17. *See infra* Table 12, Table 13.

usually the legislature, must approve any appointee before he or she may take the bench.

Part III describes the results of the analysis. The typical characteristics of the judges across all selection methods, including career paths, education and other factors, are discussed first. The analysis shows that, although appellate benches in merit-selection states look much like those in election states, judges in merit-confirmation states display some significant differences. Next, this Article addresses some implications of popular election of judges, including (1) differences between the characteristics of judges in election states and those in merit-selection and merit-confirmation states; (2) differences in the characteristics of judges who first come to the bench in election states by appointment, rather than by election; and (3) differences between benches produced by partisan elections and by non-partisan elections. Finally, this Article discusses the proportionate representation of women and non-whites on the various appellate benches.

I. STATE APPELLATE-COURT JUDICIAL SELECTION METHODS

A. A Brief History

In the original thirteen states, judges either were appointed by the governor or chosen by the legislature.[18] Within eighty years, apparently influenced by Jacksonian democratic principles, a majority of states turned to popular election as a means of choosing their judges.[19] Eventually, the pendulum began to swing away from popular election, at least in some states. Today's "merit selection" has its origin in a proposal made in 1914 by Albert Kales, a co-founder of the American Judicature Society, or AJS.[20] AJS endorsed merit selection in 1920, and the American Bar Association followed suit in 1937.[21] Missouri was the first state to put the AJS and ABA model into effect when it adopted the "Nonpartisan Court Plan" in 1940.[22] Under what is now called the "Missouri Plan," or merit selection, an independent commission made

18. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176 n.1 (1980).

19. BONNEAU & HALL, *supra* note 5, at 5; Berkson, *supra* note 18, at 176; Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges–Reconsidered*, 6 LAW & SOC. REV. 579, 580 (1972); Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 167 (2007).

20. G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 293 (2007).

21. G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 65 (2012).

22. Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 536 (2008).

up of lawyers and non-lawyers interviews judicial candidates, then forwards its nominees to the governor, who must appoint one of the individuals the commission has nominated. Once on the bench, merit-selected judges run at regular intervals in uncontested retention elections.[23]

Many other states adopted some version of merit selection during the 1960s and 1970s.[24] Some proponents thought that because judicial applicants would not need to trade on partisan or other political involvement, merit selection would draw highly qualified individuals who might eschew an electoral process.[25] As a state supreme court justice in an election state said, "Why would a person want to give up their legal career to go out and campaign . . . you're going to have to [go] out and campaign for a long time, to counter the money, and it's going to get ugly and it's going to get dirty . . . Why would people want to do that?"[26]

Advocates argued merit selection would eliminate partisanship, politics, fundraising, and attendant perceived or actual influence-trading among judges.[27] Elected judges, it was thought, might owe their positions to patronage or to campaign donors and might be improperly influenced to rule in favor of those interests.[28] At the very least, the perception of justice is tarnished when the public believes judges may be influenced by campaign donors who helped put them on the bench.[29] Retired Justice Sandra Day O'Connor put

23. *See infra* Part II.B.4.

24. *See* AM. BAR ASS'N, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 7 (June 2008).

25. *See* Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 513 (1978); *see also* Caufield, *supra* note 19, at 174 (explaining that some number of highly qualified candidates may prefer to seek commission-based appointment because they are unwilling or unable to raise money for an election campaign).

26. SCOTT GREYTAK, ET AL., BRENNAN CTR. FOR JUST., BANKROLLING THE BENCH 11 (2015).

27. Glick, *supra* note 25, at 511–12; Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 713 (2009).

28. Glick, *supra* note 25, at 512.

29. JUSTICE AT STAKE CAMPAIGN, MARCH 2004 SURVEY HIGHLIGHTS: AMERICANS SPEAK OUT ON JUDICIAL ELECTIONS 1 (2004), http://www.justiceatstake.org/media/cms/ZogbyPollFactSheet_54663DAB970C6.pdf [https://perma.cc/7HVQ-H7TM]; JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 7 (2001), http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf [https://perma.cc/J8UU-JM7V]. According to Bonneau & Hall, 79% of businesspeople polled believed that contributions to judicial campaigns influence judges' decisions. BONNEAU & HALL, *supra* note 5, at 105.

the point plainly: "Unsurprisingly, people who live in states that hold partisan judicial elections are considerably more distrusting of their judges, and they're less likely to believe that the judges act fairly and impartially, and they're more likely to agree that judges are just politicians in robes."[30] And state judicial election campaigns can be quite expensive, particularly at the appellate level.[31]

Merit selection was supported as a way to "free judges from continuous partisan political obligations, permitting them to become genuinely independent both on and off the bench and able to devote themselves full-time to their court duties."[32] Some recent high-profile retention elections involving merit-selected judges on state supreme courts have seen campaign spending akin to the most hotly contested partisan or non-partisan elections.[33] Outside of those isolated instances, however, fundraising is irrelevant to most retention elections; by contrast, any judge facing a contested election must be prepared to solicit donations to finance his or her campaign. Finally, although partisanship may influence the governor's appointments in a merit-selection state, the fact that, by law, nominating commissions usually must be bipartisan tends to reduce partisanship influences on the nomination process.[34]

This is not to say that popular election of judges lacks support in the scholarship. Bonneau and Hall, who closely studied data relating to state supreme court elections between 1990 and 2004, concluded, "[J]udicial elections are powerful legitimacy-conferring institutions that enhance the quality of democracy and create an inextricable link between citizens and the judiciary."[35] The authors found "no systematic evidence" that hotly contested or expensive judicial campaigns undercut voters' respect for the judiciary.[36] To the contrary, they concluded that greater campaign spending

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30. Sandra Day O'Connor, Symposium Keynote Address, *State Judicial Independence–A National Concern*, 33 SEATTLE U. L. REV. 561, 564 (2010).

31. During the 2013–14 campaign season, more than $34.5 million was spent on state supreme court races in nineteen states. GREYTAK ET AL., *supra* note 26, at 2. Outside spending, including spending by independent social welfare organizations and political parties, represented 40% of that amount. *Id.* Candidates themselves raised and spent more than $20 million in those races. *Id.* at 9. Of the twenty-three contested judicial seats up during that election season, twenty-one were won by the candidate who raised the most money. *Id.* at 7.

32. Glick, *supra* note 25, at 513.

33. GREYTAK ET AL., *supra* note 26, at 20.

34. KEVIN M. ESTERLING & SETH S. ANDERSEN, DIVERSITY AND THE JUDICIAL MERIT SELECTION PROCESS: A STATISTICAL REPORT 11 (1999), http://judicialselection.us/uploads/documents/Diversity_and_the_Judicial_Merit_Se_9C4863118945B.pdf [https://perma.cc/6A2S-3JML]; *see also* BERRY, *supra* note 13.

35. BONNEAU & HALL, *supra* note 5, at 17.

36. *Id.* at 29.

triggers greater voter participation, thereby "strengthen[ing] the critical linkage between citizens and the bench."[37]

Although the debate about the best means of judicial selection continues in the literature, states seem content to maintain their respective preferred methods. Over the last twenty years, the number of state appellate benches chosen by merit selection rose only by four.[38] Today, thirty-three states and the District of Columbia use merit selection to choose at least some of their judges.[39]

B. Prior Empirical and Theoretical Literature

Acknowledging the difficulty of measuring judicial quality, considerable research nevertheless has sought insight into the results of the various judicial selection systems. Some researchers have concluded that appointment produces better benches than election. Cann analyzed data from a nationwide survey of some 2,400 state judges—including both appellate courts and trial courts—by the Justice at Stake Campaign between 2001 and 2002.[40] He found that judges in merit-selection and what he called "appointment" states "rate their state court system significantly higher [in quality] than judges in states where most judges are elected in partisan elections."[41] Studies show that elected judges are disciplined more frequently than other judges.[42] Meanwhile, there is considerable evidence that elections may influence judicial decision-making, particularly in criminal cases. Research collected by Berry found that television campaign commercials increasingly focus on judicial candidates' rulings in criminal cases.[43] And the more television commercials

37. *Id.* at 30.
38. Hurwitz & Lanier, *supra* note 12, at 52.
39. White & Reddick, *supra* note 22, at 536.
40. Damon Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226, 229 (2007).
41. *Id.* at 230. The author did not explain how he distinguished merit-selection states from "appointment" states; most of the states he classed as "appointment" presumably are in this study's "merit-confirmation" category.
42. Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline*, AM. JUDICATURE SOC'Y (2010), http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf [https://perma.cc/DDX4-ATKB]; White & Reddick, *supra* note 22, at 537 n.243 (collecting authorities); *see also* RACHEL PAINE CAUFIELD, AM. JUDICATURE SOC'Y, INSIDE MERIT SELECTION: A NATIONAL SURVEY OF JUDICIAL NOMINATING COMMISSIONERS 6–7 (2012).
43. KATE BERRY, BRENNAN CTR. FOR JUST., HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 1 (2015).

broadcast during a campaign season, "the less likely state supreme court justices are, on average, to rule in favor of criminal defendants."[44]

Merit selection was intended to focus judicial selection on applicants' professional and personal qualifications.[45] In a survey conducted in 2011 of members of state judicial nominating commissions, about 75% responded that their nominees are more qualified than judges who would be chosen by popular election.[46] It has been argued that appointive systems are more likely to produce judges with better education and more expertise, while elections produce judges who are more responsive, accessible, and accountable.[47] In analyzing written opinions issued by state supreme courts, Choi, Gulati, and Posner posited that the different selection systems may attract different kinds of individuals to the bench.[48] They concluded that appointed judges write higher-quality opinions than elected judges, but elected judges write more opinions.[49] The reason? Appointed judges "care about their reputation among a national community of like-minded professionals," but elected judges are more like politicians who "care about their reputation in the local community of lay voters and politicians."[50] Perhaps, the researchers concluded, various selection systems simply attract different judicial personalities.[51]

Much theoretical literature has considered whether the respective judicial selection methods may affect the gender, racial, or ethnic diversity of judges on appellate benches. Some critics of merit selection argue it disadvantages women, minorities, and those with non-traditional legal backgrounds who are less able to muster support from those who can influence the nominating

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44. *Id.* at 2. One study found that trial judges facing competitive election campaigns imposed more severe criminal sentences than judges facing retention elections. *Id.* at 9 (citing Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 108 (2007)). But judges up for retention also may be susceptible to campaign pressures. Another study found that, based on a review of capital cases in thirty-seven states, appointed state supreme court justices voted to reverse death sentences in 26% of appeals, while justices facing retention elections voted to reverse in 15% of appeals, and justices facing competitive elections reversed only 11% of the time. Dan Levine & Kristina Cooke, *Uneven Justice: In States with Elected High Court Judges, A Harder Line on Capital Punishment*, REUTERS (Sept. 22, 2015, 2:00 PM), http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/ [https://perma.cc/XC2N-7N9W]. Of course, many supporters of popular election of judges would not be dismayed by these observations. *See generally* BONNEAU & HALL, *supra* note 5.

45. Glick, *supra* note 25, at 513.

46. CAUFIELD, *supra* note 42, at 39.

47. Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make?*, 5 JUST. SYS. J. 25, 25 (1979).

48. Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 327 (2008).

49. *Id.* at 290.

50. *Id.* at 292.

51. *Id.* at 327.

commission or the governor.[52] These critics contend merit-selection systems are too influenced by established bar associations, which they argue tend to favor lawyers from large law firms and those associated with powerful business interests.[53] The result, they say, is that merit selection tends to reinforce elitist, majoritarian, and establishment decision-making.[54] The particular concern is that judges chosen by merit selection will tend to be non-diverse and predisposed to favor conservative outcomes, often at the expense of economic, racial, or cultural minorities.[55]

This criticism is not aimed solely at perceived majoritarian influences on the governor, who is the final decision-maker in a merit-selection state; the same claims also are leveled at the so-called independent nominating commissions that first vet judicial applicants in merit selection.[56] Critics of merit selection argue nominating commission members tend to come

52. Hurwitz & Lanier, *supra* note 12, at 49. A fewer number of critics argue that, to the contrary, merit selection unduly empowers liberal interests because state bar associations, which often select members of judicial nominating commissions in merit-selection states, are more likely to be liberal than conservative. Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 676–77 (2009).

53. Glick, *supra* note 25, at 532. In Caufield's survey of members of judicial nominating commissions in 2011, 36% self-identified as either strong or moderate Democrats; 22% identified themselves as strong or moderate Republicans. CAUFIELD, *supra* note 42, at 42. Although no information was provided about the political affiliation of the governors who appointed the commissioners or the voter registration numbers in their states, Caufield reported that commissioners appointed by the governor were both more likely to self-report as "strong" Democrats or "strong or moderate" Republicans than commission members elected or appointed by state bar associations. *Id.*

54. Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 SOC. SCI. Q. 111, 112 (1996); Glick & Emmert, *supra* note 12, at 230; Barbara Luck Graham, *Do Judicial Selection Systems Matter? A Study of Black Representation on State Courts*, 18 AM. POL. Q. 316, 32 (1990); Hurwitz & Lanier, *supra* note 12, at 50.

55. George W. Crockett, Jr., *Judicial Selection and the Black Experience*, 58 JUDICATURE 439, 441 (1975); Glick, *supra* note 25, at 532. "Critics of merit selection have long maintained that the process is dominated by state and local bar associations whose members overwhelmingly are white, male, Protestant, conservative 'establishment' attorneys who are inclined to favor their own with judicial positions." Glick & Emmert, *supra* note 12, at 230; *see also* Crockett, *supra* note 55, at 441.

56. "Among those who oppose merit selection, Judicial Nominating Commissions have been characterized as secret elite cabals controlled by the trial Bar, without public accountability and favoring 'liberal' applicants." CAUFIELD, *supra* note 42, at 5. Caufield's survey of members of judicial nominating commissions in 2011 found that the practices of their lawyer members were about evenly split between plaintiffs' and defense work. *Id.* at 15. About a third of the commissioners who responded to the survey were women, and only about 11% identified themselves as non-whites. *Id.* at 17; *see supra* note 53.

from large-firm, established business interests, mostly white and predominantly male.[57]

In response to these concerns, some states, by statute, rule, or informal custom, have adopted practices that consciously promote diversity.[58] Such practices can have positive results, up to a point. Based on a survey of ten merit-selection states, Esterling and Andersen found that independent commissions nominate minority judicial candidates at a higher rate than governors appoint minorities.[59] Moreover, in the six states from which detailed data were available, Esterling et. al reported that commissions nominated minority applicants at a higher rate than the applicant pool.[60] They found commissions nominated women and governors appointed women in numbers roughly proportionate to their presence in the applicant pool.[61]

The effects of judicial selection methods on gender, racial, and ethnic diversity have been the subjects of considerable empirical research. An early study concluded women and minorities represented a greater percentage of state appellate and trial-court judges selected through appointment systems—merit selection and otherwise—than through elections.[62] Henry, Koslow, Soffer, and Furey examined state appellate and trial-court judges together, and found that women represented 9.5% of judges selected through merit, 9.3% of judges appointed outside of formal merit-selection protocols, and 6.4% of judges in election states.[63] Henry et. al also reported that

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57. TORRES-SPELLISCY ET AL., *supra* note 13, at 8.

58. ESTERLING & ANDERSEN, *supra* note 34, at 11–12. For example, the Arizona constitution provides that nominating commissions "shall consider the diversity of the state's population, however the primary consideration shall be merit." ARIZ. CONST. art. VI, § 36. Arizona's uniform rules of procedure for nominating commissions state: "The goal . . . is to select judges who have outstanding professional competence and reputation and who are also sensitive to the needs of and held in high esteem by the communities they serve and who reflect, to the extent possible, the ethnic, racial and gender diversity of those communities." Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments, Rule 1, ARIZ. REV. STAT. ANN. § 17C (1993, current with amendments through July 1, 2016); *see* TORRES-SPELLISCY ET AL., *supra* note 13, at 2 (urging that judicial nominating commissions recruit more diverse applicants: "Expanding the pool of applicants at the start of the process is a key ingredient to ensuring a diverse 'short list' and ultimately a diverse bench."); *see also* BERRY, *supra* note 13; Leo M. Romero, *Enhancing Diversity in an Appointive System of Selecting Judges*, 34 FORDHAM URB. L.J. 485 (2007).

59. ESTERLING & ANDERSEN, *supra* note 34, at 6. They also found "that more diverse nominating commissions attract more diverse applicant pools and produce more diverse nominee lists." *Id.*

60. *Id.* at 17–18.

61. *Id.* at 17–19, 22, 28, Tables 5, 6, 9, 12.

62. M.L. HENRY, JR. ET AL., FUND FOR MODERN COURTS, INC., THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS 65 (1985).

63. *Id.* at 18–20.

minorities represented 7.9% of judges selected through merit, 10.2% of judges in appointment states, and 4.2% of judges in election states.[64]

In the thirty years since that early research, however, the prevailing view came to be that the particular selection system does not significantly affect the rates at which women and minorities make their way to the appellate bench. In 1996, for example, Alozie concluded that "women and minorities do equally poorly across all systems."[65] Hurwitz and Lanier studied state high court and intermediate appellate judges at three points in time over the twenty years since 1985, a period over which women and non-whites made substantial advances onto appellate benches.[66] They concluded that, for the most part, "there are few significant differences in rates of diversity across the various selection methods."[67] During each of the three periods they surveyed, "gubernatorial appointment," meaning appointment by the governor in states without formal merit-selection protocols, was more likely to favor women and minorities, combined, than election or merit selection, although by 2005, the differences were narrow and not statistically significant.[68] As Reddick, Nelson, and Caufield concluded, "[N]either appointive nor elective methods were consistently more successful, or less successful, in diversifying state judiciaries."[69]

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64. *Id.*

65. Alozie, *supra* note 54, at 112. The same author earlier had observed that "[i]n general, the data lead to the more fundamental observation that judicial selection methods do not seem to be the major agents some analysts think they are." Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315, 318 (1990).

66. Hurwitz & Lanier, *supra* note 12.

67. *Id.* at 52. They gathered racial and gender data for judges on courts of last resort and intermediate appellate courts for each of the 50 states, encompassing 1,310 judges on the bench as of June 30, 2005. *Id.* at 49–50; *see also* Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 85 (2001).

68. Hurwitz & Lanier, *supra* note 12, at 55–56, fig.2. Hurwitz and Lanier's group of "gubernatorial" appointment states included some, such as California, Maine, New Hampshire and New Jersey, in which panels of lawyers and non-lawyers forward prospective appointees to their governors, but in which the governor is not legally bound to choose from among the panel's nominees. *Id.* at 56; *see also infra* Part II.B.5 (describing judicial selection methods in those states).

69. MALIA REDDICK ET AL., AM. JUDICATURE SOC'Y, EXAMINING DIVERSITY OF STATE COURTS: HOW DOES THE JUDICIAL SELECTION ENVIRONMENT ADVANCE–AND INHIBIT–JUDICIAL DIVERSITY? 7 (Apr. 1, 2009), http://ssrn.com/abstract=2731012 [https://perma.cc/RYW6-HYMA].

The 2005 data concerning members of state supreme courts and intermediate appellate courts, however, showed that merit selection advanced significantly fewer women to the bench than other judicial selection methods. By contrast, "appointment" states, those without formal merit-selection protocols, produced a statistically significantly greater percentage of female judges.[70] Reddick et. al, concluded that the method of selection did not affect the gender composition of state courts of last resort, but that, taking into account the relevant political environments, "merit selection placed significantly fewer women on intermediate appellate courts than did partisan or nonpartisan elections."[71]

Beyond gender, race, and ethnicity, far less empirical research has focused on career paths and other attributes of appellate judges selected by the various methods. Studying members of state courts of last resort between 1961 and 1968, Canon found that more than half of all elected and merit-selected judges were former prosecutors, while fewer of what he called "appointed" judges and judges selected by legislatures had served as prosecutors.[72] On the other hand, more appointed judges and judges selected by the legislature had prior judicial experience than elected and merit-selected judges.[73]

Glick and Emmert studied members of state courts of last resort in 1980–81 and found that partisan election and legislative selection chose proportionately fewer former prosecutors than other selection methods.[74] They found that judges selected by legislatures were most likely to have prior judicial experience.[75] Studying other aspects of the judges' career paths,

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70. Hurwitz & Lanier, *supra* note 12, at 53 tbl.2. Hurwitz and Lanier also found, however, that merit selection advanced black judges at a greater rate than "gubernatorial appointment." *Id.* By contrast, black men fared about equally well in election states as in merit-selection states, although states that elected their judges chose a statistically significantly larger proportion of black female judges than were selected in "appointment" states, whether merit selection or otherwise. Merit-selection systems produced Hispanic male judges at more than double the rate in election states, but there were too few Hispanic women in the 2005 data set for any real quantitative analysis. *Id.*

71. REDDICK ET AL., *supra* note 69, at 4, 6. They reported that, although 37.6% of all intermediate appellate court judges were selected by merit, only 27.5% of female judges reached the intermediate appellate court via merit selection. *Id.* at 4.

72. Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges–Reconsidered*, 6 LAW & SOC'Y REV. 579, 589 tbl.1 (1972).

73. *Id.*

74. Glick & Emmert, *supra* note 12, at 232 tbl.1. Judges elected in non-partisan elections were most likely to have prosecutorial experience, followed by merit-selected judges, judges selected by gubernatorial appointment, judges elected in partisan elections and judges selected by legislature. *Id.* A study conducted in 1999 found that 28.3% of state supreme court justices in 1999 had been a prosecutor at some time in their careers. Martin & Pyle, *supra* note 12, at 42 tbl.2. Prosecutorial work was a more frequent career path for non-white female justices at 40%, but less likely for white women at 22.4%. *Id.*

75. Glick & Emmert, *supra* note 12, at 232 tbl.1. Nearly 79% of the judges selected by the legislature had served on another bench. Judges selected by way of partisan election,

they reported that 78.6% of judges selected by the legislature themselves had been legislators.[76] On the other hand, judges with prior legislative service represented no more than 21% of the benches chosen by any of the other selection methods.[77] In their study of supreme court elections from 1990 to 2004, Bonneau and Hall found evidence that voters seem to prefer candidates who have prior judicial experience.[78]

Researchers also have considered "localism," as demonstrated by attendance at in-state law schools or undergraduate institutions. Canon found that, of state supreme court judges sitting between 1961 and 1968, those chosen by partisan elections or by the legislature were most likely to have attended in-state undergraduate schools or law schools.[79] Appointed judges were least likely to have attended in-state law schools.[80] Similarly, Glick et. al observed that among members of state courts of last resort in 1980–81, judges selected by gubernatorial appointment were least likely to have attended in-state academic institutions.[81] Studying members of state courts of last resort in 1998–2000, Choi et. al likewise found that judges in election states were more likely to have attended an in-state law school.[82]

Finally, focusing on one possible objective measure of intellect, Glick et. al also found that while half of judges on state high courts in gubernatorial appointment states in 1980–81 went to prestigious law schools, other selection methods chose far fewer graduates of such institutions.[83] Similarly, Choi et. al found that appointed judges on state high courts during 1998–2000 were significantly more likely to have attended a higher-ranked law school than judges in election states.[84]

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gubernatorial appointment, and merit selection all boasted prior judicial experience in the mid-60% range; slightly fewer of the judges in non-partisan election states had prior judicial experience. *Id.*

76. When this Article cites the numerical results of others' research, it uses the numbers provided in their published findings. By contrast, this Article usually will round the numerical findings of this study to the nearest whole number for ease of reading. The tables herein describe the results more precisely.

77. Glick & Emmert, *supra* note 12, at 223 tbl.1.

78. BONNEAU & HALL, *supra* note 5, at 97–98.

79. Canon, *supra* note 72, at 581.

80. *Id.* at 589 tbl.1.

81. Glick & Emmert, *supra* note 12, at 232 tbl.1.

82. Choi et al., *supra* note 48, at 327.

83. Glick & Emmert, *supra* note 12, at 232 tbl.1. Similarly, more gubernatorial-appointed judges attended "prestigious" undergraduate institutions. *Id.*

84. Choi et al., *supra* note 48, at 327.

II. A CLOSE LOOK AT STATE APPELLATE JUDGES ON THE BENCH IN 2015

A. The Hypothesis: The Various Selection Methods, and Merit Selection in Particular, Produce Appellate Benches with Some Distinct Differences

Prior studies of judicial selection methods mostly focused on gender, racial, and ethnic diversity; a handful of early studies discussed the extent to which various selection systems welcome former prosecutors and experienced judges; and a few studies looked at localism factors. The goal of this study was to take a closer look at broader data relating to the judges sitting on state appellate courts in 2015. Appellate benches by nature are a mix of all varieties of temperament, experience, backgrounds, intellect, style, and expertise. The question is whether any of the various selection methods tend to produce a mix of those attributes that is significantly different from the others. The hypothesis was that, in particular, merit selection results in appellate benches different in nature from benches chosen by popular election. Perhaps judges selected by merit are more likely to be scholarly and more likely to come from commercial law firms that tend to hire from prestigious law schools. Merit selection may be more likely to favor that sort of lawyer, or perhaps that sort of lawyer is more likely to seek appointment through merit selection than to run for office. It also might be that, by contrast, election systems are more favorable for former prosecutors and lawyers with strong local ties, who might be more predisposed to enjoy the rough-and-tumble of campaigning and campaign fund-raising.

Another issue is whether merit selection tends to disadvantage women and minorities who seek state appellate benches. Considering the frequent criticism that merit selection unfairly favors elitist and establishment judicial aspirants, it is possible that a close look at the characteristics of the judges chosen by merit selection, compared to those chosen by other selection methods, might shed light on the validity of those criticisms.

To test these hypotheses, a wide range of information was gathered about judges on the bench in February 2015 on courts of last resort and intermediate appellate courts in all fifty states, including the state criminal appeals courts in Oklahoma and Texas. For each of the 1,285 judges in the set, the data included the judge's age at the time he or she was selected to the bench, and his or her gender, race, and ethnicity. Information also was gathered about the judges' educational backgrounds. Those who had served judicial clerkships were noted, as were those who had been elected to the American Law Institute or who had published law review articles before coming to the bench. Those who have taught at a college or university were identified, along with those with prior service on another trial or appellate bench and those who

had been in private practice and had practiced business law, commercial law, or complex commercial litigation before coming to the bench. Judges who had served as prosecutors at some point in their careers were identified; included in this group not only were those who had served as an elected District Attorney, County Attorney, or state Attorney General, but also those who were line prosecutors in such offices. In addition, judges who had practiced in other government-law capacities, for example, those who represented government agencies in civil litigation, were identified, as well as judges who had practiced in legal-aid or public-defender offices before coming to the bench.[85]

B. Categorizing the Selection Methods

The research produced more than two dozen data points with respect to each judge, which then were sorted according to the states' respective judicial selection methods.[86] Prior studies comparing the effects of various judicial selection methods have not stated plainly how and why they have categorized each of the states. The results of this study must be considered in light of those initial classification decisions, which are briefly described below.

1. Partisan Election

Voters in eight states—Alabama, Illinois, Louisiana, New Mexico, Ohio, Pennsylvania, Texas, and West Virginia—elected their appellate judges in partisan elections at the time of this study.[87] Ohio is in this category because,

85. The sources of the data gathered for this study were wide and varied. Great reliance was placed on official court websites, but much information also was obtained from the website Ballotpedia, formerly known as Judgepedia, gubernatorial press releases, candidate websites, law school and university publications, Westlaw, and online versions of local newspapers. *See* BALLOTPEDIA, https://ballotpedia.org/Main_Page [https://perma.cc/84TG-7D7R] (last visited Nov. 14, 2016); *see, e.g.*, ARIZ. COURTS, http://www.azcourts.gov/ [https://perma.cc/KU8T-35FS] (last visited Nov. 14, 2016).

86. As discussed *infra* Part III.C.2, a considerable number of appellate judges in "election" states actually come to the bench for the first time by appointment. The data allow for distinctions between the two groups.

87. This method is codified in each state's constitution, and some states list additional procedures elsewhere: Alabama (ALA. CONST. art. VI, § 152; ALA. CODE § 12-2-1 (LexisNexis 1975)); Illinois (ILL. CONST. art. VI, § 12(a)); Louisiana (LA. CONST. art. V, § 22(A); LA. STAT. ANN. § 18:401 (2004)); New Mexico (N.M. CONST. art. VI, § 33(A)); Ohio (OHIO CONST. art. IV, § 6(A); *see infra* note 88 (exploring Ohio's election laws)); Pennsylvania (PA. CONST. art. V, § 13(a); 25 PA. STAT. AND CONS. STAT. ANN. § 2872.1(8)–(10) (West 2007)); Texas (TEX. CONST. art. 5, §§ 2(c), 4(a), 6(b); TEX. CODE OF JUD. CONDUCT, Canon

even though its judicial candidates run in ostensibly non-partisan general elections, candidates are nominated in partisan primary elections and there is substantial evidence that partisanship predominates in the general election.[88]

Even in these partisan-election states, however, many appellate judges initially come to the bench by appointment, not election. In six of the states, the governor has the power to appoint a judge to fill a mid-term vacancy that occurs upon the death, resignation, retirement, or removal of an incumbent.[89] In two of those six, the governor may select the new judge from a list of nominees prepared by an independent judicial nominating commission.[90] In the remaining two partisan-election states, mid-term vacancies on appellate

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5(2)); and West Virginia (W. VA. CONST. art. 8, § 2). (Beginning in 2016, judicial elections in West Virginia are non-partisan. W. Va. Code Ann. § 3-1-16 (2016)).

88. Ohio's judicial election system has been called "nonpartisan in form but partisan in results." Kathleen L. Barber, *Ohio Judicial Elections–Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762, 770 (1971); *see also* Nancy Marion, Rick Farmer & Todd Moore, *Financing Ohio Supreme Court Elections 1992-2002: Campaign Finance and Judicial Selection*, 38 AKRON L. REV. 567, 573 (2005) ("The semi-partisan method employed in Ohio is known for producing partisan campaigning."). In the so-called non-partisan general election campaign, an Ohio judicial candidate may "[a]ppear with other candidates for public office on slate cards, sample ballots, and other publications of a political party that identify all of the candidates endorsed by the party in an election." OHIO CODE OF JUD. CONDUCT, R. 4.2(C)(4). Further, a judicial candidate's campaign may accept large sums in donations from political parties in the general election. Contribution limits are adjusted every four years in accordance with the Consumer Price Index; as of 2013, a political party could donate up to $333,000 to the campaign of a supreme court candidate for the general election and $72,700 to the general election of a court of appeals candidate. SUPREME COURT OF OHIO JUD. C., 2016 JUDICIAL CANDIDATE HANDBOOK 13, https://www.supremecourt.ohio.gov/Judiciary/candidates/handbook.pdf [https://perma.cc/3KKA-45HX] (last visited Nov. 16, 2016). As a result, even though judicial candidates appear on the general election ballot without party designation, voters are well aware of candidates' respective party affiliations. Cann, *supra* note 40, at 228.

89. ALA. CONST. art. VI, § 153 (appointee serves until the next general election after completion of a year in office); N.M. CONST. art. VI, § 35 (once appointed, new judge serves until next general election); OHIO CONST. art. IV, § 13 (appointee serves until first general election occurring more than forty days after the vacancy occurred, or, if the unexpired term ends within a year immediately following the date of such election, the appointment is for the unexpired term); PA. CONST. art. V, § 13(b) (when governor fills vacancy by appointment, new judge must be confirmed by vote of two-thirds of state senate; new judge serves until next election more than ten months after the vacancy occurred or for the remainder of the unexpired term, whichever period is shorter); TEX. CONST. art. V, § 28(a); W. VA. CONST. art. VIII, § 7; W. VA. CODE ANN. § 3-10-3a (LexisNexis 2008) (governor fills vacancy on supreme court of appeals by appointment pending special election or, if less than two years remains on unexpired term, until expiration of term); *see also* White v. Sturns, 651 S.W.2d 372, 374–76 (Tex. Civ. App. 1983) (holding that appointment requires senate confirmation and appointee serves until the next state general election).

90. N.M. CONST. art. VI, § 35 (allowing governor to appoint new judge from applicants recommended by appellate judges nominating commission); W. VA. CONST. art. VIII, § 7; W. VA. CODE § 3-10-3a (allowing governor to make appointment after receiving a list of qualified candidates from Judicial Vacancy Advisory Commission).

courts are filled by the supreme court.[91] Once appointed to fill an interim vacancy, the new judge in a partisan-election state may run as an incumbent in a subsequent election.

Five partisan-election states require that a judge who wants to remain in office after the end of a term must run again in another partisan election.[92] In three other states, having won election and having completed a full term in office, an incumbent judge may remain on the bench by surviving an up-or-down retention election without an opponent.[93]

2. Non-Partisan Election

In fourteen states at the time of this study—Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington and Wisconsin—voters elected members of the appellate bench in non-partisan elections.[94] Mid-term

91. *See, e.g.*, ILL. CONST. art. VI, § 12(c) (allowing appointee named more than sixty days before next general or judicial election to serve until election; appointee named less than sixty days before next primary election serves until the second general or judicial election following appointment); LA. CONST. art. V, § 22 (allowing appointee to sit pending special election; appointee may not run in special election).

92. *See, e.g.*, ALA. CONST. art. VI, § 152; LA. CONST. art. V, § 22; OHIO CONST. art. IV, § 6(A); TEX. CONST. art. V, §§ 2(c), 4(a), 6(b); W.VA. CONST. art. VIII, § 2.

93. ILL. CONST. art. VI, §§ 10, 12(d) (requiring affirmative vote of three-fifths of those voting for retention); N.M. CONST. art. VI, § 33(A) (requiring completion of initial eight-year term in office, and at least 57% of vote cast for retention); PA. CONST. art. V, § 15 (b) (requiring completion of ten-year term and majority vote for retention).

94. For the nuances in each state's procedures, see Arkansas (ARK. CONST. amend. 80, § 18(A)); Georgia (GA. CONST. art. VI, § 7, ¶ 1); Idaho (IDAHO CONST. art. V, § 6; IDAHO CODE §§ 34-117, -615, -1217 (2015) (election of justices to the supreme court); IDAHO CODE § 1-2404(4)(f) (2010) (election of justices to the court of appeals)); Kentucky (KY. CONST. § 117); Michigan (MICH. CONST. art. VI, §§ 2, 8; MICH. COMP. LAWS ANN. §§ 168.392, -.393, -.409a (West 2008) (supreme court justices nominated in partisan fashion but candidates run without party designation in general election; court of appeals judges both nominated and run in non-partisan elections)); Minnesota (MINN. CONST. art. VI, § 7; MINN. STAT. ANN. §§ 204D.14, 480A.02 (West 1992)); Mississippi (MISS. CONST. art. VI, § 145; MISS. CODE ANN. § 9-4-15 (West 1999) (election of members of court of appeals); MISS. CODE ANN. § 23-15-976 (West 2003)); Montana MONT. CONST. art. VII, § 8; MONT. CODE ANN. § 13-14-111 (2015)); Nevada (NEV. CONST. art. VI, §§ 3, 3A(2)); North Carolina (N.C. CONST. art. IV, § 16; N.C. GEN. STAT. § 163-322 (2009)); North Dakota (N.D. CONST. art. VI, § 7); Oregon (OR. CONST. art. VII, § 1 (amended); OR. REV. STAT. § 254.125(2) (2015)); Washington (WASH. CONST. art. VII, § 3; WASH. REV. CODE ANN. § 2.06.070 (West 2004)); and Wisconsin (WIS. CONST. art. VII, §§ 4(1), 5(2), 9; WIS. STAT. ANN. § 5.60(1) (West 2004)). As stated *supra* note 87, in 2016, West Virginia joined the ranks of states that elect their appellate judges in non-partisan elections. For purposes of this study, which analyzed data about

judicial vacancies in non-partisan states are filled by gubernatorial appointment.[95] As in partisan-election states, in a handful of non-partisan election states, when a mid-term vacancy occurs, an independent commission forwards nominations for the governor's consideration.[96]

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judges on the bench as of 2015, however, this Articles treats West Virginia as a partisan-election state.

95. Details of how vacancies are filled vary from state to state: Arkansas (ARK. CONST. amend. 80, § 18(B)); Georgia (GA. CONST. art. VI, § 7, ¶ III; *id.* ¶ IV ("An appointee to an elective office shall serve until a successor is duly selected and qualified and until January 1 of the year following the next general election which is more than six months after such person's appointment.")); Idaho (IDAHO CONST. art. V, § 19; IDAHO CODE § 1-2102(3) (2010) (allowing appointee to serve until general election following one year in office); IDAHO CODE §§ 2404(4)(b), (f) (2010) (allowing court of appeals vacancies to be filled in same manner as supreme court vacancies; appointee runs in election next preceding the expiration of the appointed term)); Kentucky (KY. CONST. § 118 (allowing chief justice to appoint if governor does not make appointment within sixty days)); Michigan (MICH. CONST. art. VI, § 23 (allowing appointee to hold office until the next January after a general election); MICH. COMP. LAWS ANN. §§ 168.404, -.409l(l)(1) (West 2014)); Minnesota (MINN. CONST. art. VI, § 8 (appointee holds office until next general election more than one year after appointment)); Mississippi (MISS. CODE ANN. §§ 9-1-103, 23-15-849 (West 2003) (allowing appointee to serve remaining unexpired term if less than half a term; however, if more than half a term remains, appointee serves until general election more than nine months after vacancy occurred)); Montana (MONT. CONST. art. VII, § 8(2); MONT. CODE ANN. §§ 3-1-1010, -1011 (West 2015) (governor appoints replacement from a list of nominees, subject to confirmation by state senate)); Nevada (NEV. CONST. art. VI, § 20 (allowing appointee to sit until next general election)); North Carolina (N.C. CONST. art. IV, § 19 (allowing appointee to sit until next election held more than sixty days after vacancy occurred)); North Dakota (N.D. CONST. art. VI, § 13; N.D. CENT. CODE ANN. § 27-25-04 (West 2006) (allowing governor to appoint a replacement or call a special election; appointee serves until next general election more than two years after appointment)); Oregon (OR. CONST. art. V, § 16 (allowing appointee to serve until after next election more than sixty-one days after appointment)); Washington (WASH. CONST. art. 4, § 3; WASH. REV. CODE ANN. § 2.06.080 (West 2004) (allowing appointee to sit until next general election)); and Wisconsin (WIS. CONST. art. VII, § 9 (allowing appointee to sit until next judicial election).

96. By executive order in Georgia, a Judicial Nominating Commission vets candidates and nominates potential appointees, but the governor is not required to appoint from among the nominees. Ga. Exec. Order No. 02.02.15.01 (Feb. 2, 2015), http://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/02.02.15.01.pdf [https://perma.cc/7JWF-RK9P]. In Idaho, the governor is allowed to make appointments from nominees submitted by such a commission. IDAHO CONST. art. V, § 19; IDAHO CODE § 1-2102(3); IDAHO CODE § 1-2404(4)(b) (filling vacancies on court of appeals in same manner as vacancies on supreme court). Kentucky follows a similar procedure. KY. CONST. § 118 (allowing governor to make appointment from nominees selected by judicial nominating commission); MONT. CONST. art. VII, § 8(2). In Montana, the governor is required to make appointments from nominees selected by a commission. MONT. CODE ANN. §§ 3-1-1010, -1011 (2015). The same is true in Nevada. NEV. CONST. art. VI, § 20 (requiring governor to make appointment from nominees selected by Commission on Judicial Selection). In North Dakota, the governor has more options. N.D. CONST. art. VI, § 13; N.D. CENT. CODE §§ 27-25-03, -04 (2016) (allowing governor to appoint replacement from among nominees submitted by judicial nominating committee, "[r]eturn the list of nominees and direct the committee to reconvene," or call special election to fill vacancy).

A judge who wins election and completes a full term in a non-partisan election state usually must run in another non-partisan election to remain in office.[97]

3. Legislative Selection

Two states, South Carolina and Virginia, leave the selection of their appellate judges to the legislature. In South Carolina, the bicameral General Assembly elects members of the state supreme court and court of appeals from nominees forwarded by the Judicial Merit Selection Commission.[98] If a vacancy occurs with less than a year remaining in the term, the governor may appoint a replacement, who holds office only through the unexpired term.[99] In Virginia, the two houses of the General Assembly elect members of the supreme court and the court of appeals; if a vacancy occurs while the General Assembly is not in session, the governor may appoint a successor to serve until thirty days after the beginning of the next legislative session.[100]

4. Merit Selection

Twelve states—Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee and Wyoming—use the classic version of merit selection to select their appellate judges.[101] In those states, there is an appointed independent bipartisan commission,

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97. For more detail regarding the precise form of these elections, see Arkansas (ARK. CONST. amend. 80, § 18(A)); Georgia (GA. CONST. art. VI, § 7, ¶ 1); Idaho (IDAHO CONST. art. V, § 6; IDAHO CODE § 34-615(1); § 1-2404(4)(b)); Kentucky (KY. CONST. § 117); Michigan (MICH. COMP. LAWS 168.392a, -399, -409e(3)); Minnesota (MINN. CONST. art. VI, § 7); Mississippi (MISS. CONST. art. VI, § 145; MISS. CODE ANN. § 9-4-15); Montana (MONT. CONST. art. VII, § 8(3) (allowing voters to "approve or reject" an incumbent if no candidate files to run against the incumbent)); Nevada (NEV. CONST. art. VI, §§ 3, 3A(2)); North Carolina (N.C. CONST. art. IV, § 16. *But see* N.C. GEN. STAT. § 7A-4.1 (requiring an elected supreme court justice who has completed full term and who wishes to remain on bench to sit for up-or-down retention, effective June 2015)); North Dakota (N.D. CONST. art. VI, § 7); Oregon (OR. CONST. art. VII, § 1); Washington (WASH. CONST. art. IV, § 3; WASH. REV. CODE § 2.06.070); and Wisconsin (WIS. CONST. art. VII, §§ 4(1), 5(2), 9).

98. S.C. CONST. art. V, §§ 3, 8, 27.

99. *Id.* § 18.

100. VA. CONST. art. VI, § 7.

101. In 2016, the Tennessee Code was amended to provide that future gubernatorial appointments to the appellate bench will require approval of a majority of both the state senate and the state house of representatives. TENN. CODE ANN. § 17-4-102 (2016); *see also infra* note 117.

made up of both lawyers and non-lawyers, which screens applications, vets and interviews the applicants, and then delivers a list of nominees to the governor for appointment.[102] In nearly all merit-selection states, the governor is obligated to appoint one of the nominees of the independent commission.[103] In Florida and Tennessee, when the governor is dissatisfied with the nominees, he or she may direct the commission to submit another list of nominees.[104] In most of the other merit-selection states, the governor's choices are limited to the commission's initial list.[105]

In each merit-selection state, an appellate judge stands for retention in an up-or-down election at some point after appointment, and at regular intervals thereafter.[106] In a retention election, the judge faces no opponent; voters are

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102. For more detail, see Alaska (ALASKA CONST. art. IV, §§ 5, 6); Arizona (ARIZ. CONST. art. VI, §§ 36, 37); Colorado (COLO. CONST. art. VI, § 20(1)); Florida (FLA. CONST. art. V, § 11; FLA. STAT. ANN. § 43.291 (West 2012)); Indiana (IND. CONST. art. VII, §§ 9, 10); Iowa (IOWA CONST. art. V, §§ 15, 16; IOWA CODE §§ 46.1–4, 46.14–15 (2016)); Missouri (MO. CONST. art. V, §§ 25(a), 25(d)); Nebraska (NEB. CONST. art. V, § 21); Oklahoma (OKLA. CONST. art. VII-B, §§ 3, 4); South Dakota (S.D. CONST. art. V, § 7); Tennessee (TENN. CONST. art. VI, § 3; TENN. CODE ANN. § 17-4-101 (2016); Tenn. Exec. Order No. 41 (Nov. 6, 2014), http://share.tn.gov/sos/pub/execorders/exec-orders-haslam41.pdf [https://perma.cc/44SH-64EB]); and Wyoming (WYO. CONST. art. 5, § 4(b)–(c)).

103. ESTERLING & ANDERSEN, *supra* note 34, at 11; Flango & Ducat, *supra* note 47, at 26.

104. *See* Florida (FLA. CONST. art. V, § 11(a); FLA. STAT. § 43.291(1)(a) (2016)); and Tennessee (TENN. CODE ANN. § 17-4-101 (2016); Tenn. Exec. Order No. 41, para. 5(b) (Nov. 6, 2014), http://share.tn.gov/sos/pub/execorders/exec-orders-haslam41.pdf [https://perma.cc/44SH-64EB]).

105. In Arizona, if the governor fails to appoint one of the commission's nominees within sixty days, the power to fill the judicial vacancy falls to the Chief Justice of the state supreme court. ARIZ. CONST. art. VI, § 37(C). Similar rules apply in: Colorado (COLO. CONST. art. VI, § 20(1) (allowing governor fifteen days to make appointment)); Indiana (IND. CONST. art. 7, § 10 (allowing governor sixty days before appointment by chief justice)); Iowa (IOWA CONST. art. V, § 15 (allowing governor thirty days before appointment by chief justice); IOWA CODE ANN. § 46.15(2) (same)); Missouri (MO. CONST. art. V, § 25(a) (allowing governor sixty days, otherwise the judicial nominating commission appoints)); Nebraska (NEB. CONST. art. V, § 21(1) (allowing governor sixty days)); Oklahoma (OKLA. CONST. art. VII-B § 4 (allowing governor sixty days before appointment by chief justice)); and Wyoming (WYO. CONST. art. 5, § 4(b) (allowing governor thirty days before appointment by chief justice)).

106. For precise retention timeframes, see Alaska (ALASKA CONST. art. IV, § 6 (requiring justices to stand for retention in the first general election held after completion of three years in office and, thereafter, every ten years)); Arizona (ARIZ. CONST. art. VI, §§ 4, 37(C), 38 (judge must stand for retention at first election after two years in office; every six years thereafter)); Colorado (COLO. CONST. art. VI, §§ 7, 20, 25; COLO. REV. STAT. ANN. § 13-4-104 (must stand for retention at first election after two years in office; every ten years thereafter for supreme court justice; eight years for court of appeals judge)); Florida (FLA. CONST. art. V, §§ 10, 11 (requiring retention election after one year in office and thereafter, every six years)); Indiana (IND. CONST. art. 7, § 11 (requiring retention election after two years in office, and thereafter every ten years)); Iowa (IOWA CONST. art. V, § 17 (requiring retention election after one year in office, and thereafter every eight years)); Missouri (MO. CONST. art. V, §§ 19, 25(c)(1) (next general election after one year in office, and thereafter every

asked simply whether to retain the judge in office, and to prevail, the judge must win more than a designated percentage of votes.

In addition to the dozen states already listed, Kansas is treated as a merit-selection state for purposes of this study. In 2013, the Kansas legislature passed and the governor signed into law a measure abandoning use of an independent nominating commission for court of appeals judges.[107] All but one of the judges sitting on the Kansas intermediate appellate court in February 2015, however, were appointed under the prior Missouri Plan system.

California also is treated as a merit-selection state even though it uses a variant of the traditional merit system. Since 1979, applicants for the bench in California are reviewed and rated by an independent commission created by statute and made up of lawyers and non-lawyers appointed by the California State Bar Association.[108] Called the "Commission on Judicial Nominees Evaluation," that body reports in confidence to the governor whether an applicant is exceptionally well qualified, well qualified, qualified, or not qualified, and the reasons therefor.[109] Although the commission's ratings do not formally constrain the governor's appointment prerogative, over the

twelve years)); Nebraska (NEB. CONST. art. V, § 21(3) (requiring retention election after three years; every six years thereafter)); Oklahoma (OKLA. CONST. art. VII-B, § 5; OKLA. STAT. ANN. tit. 20, § 30.18 (2016) (requiring retention election after twelve months; every six years thereafter)); South Dakota (S.D. CONST. art. V, § 7 (requiring retention election after three years; every eight years thereafter)); Tennessee (TENN. CODE ANN. § 17-4-105 (2016) (judge must stand for retention at first election more than thirty days after vacancy occurred; every eight years thereafter)); and Wyoming (WYO. CONST. art. 5, § 4(f)–(g) (judge must stand for retention at first election more than one year after appointment; every eight years thereafter)). Kansas also follows this convention. KAN. CONST. art. 3, § 5(c) (judge must stand for retention at first election after one year in office, and thereafter every six years).

107. KAN. CONST. art. 3, § 5. *But see* KAN. STAT. ANN. § 20-3020 (2015). Under the new procedure, although the governor is unconstrained by a nominating commission in filling vacancies on the court of appeals, the appointee must be confirmed by a majority of the state senate. KAN. STAT. ANN. § 20-3020(b). Notwithstanding the change in the method by which it chooses its intermediate appellate court judges, Kansas continues to use a Missouri Plan approach for its supreme court. *See* KAN. CONST. art. 3, § 5. In that process, the governor must select a new supreme court justice from a list of nominees submitted by the supreme court nominating commission. *Id.* § 5(a). If the governor does not make the appointment within sixty days, the chief justice may do so. *Id.* § 5(b). A justice sits for retention at the first general election held following twelve months in office, and at the completion of every six-year term thereafter. *Id.* § 5(c).

108. CAL. GOV'T CODE § 12011.5 (West 2016). The commission must contain both lawyer and non-lawyer members and must be "broadly representative of the ethnic, gender, and racial diversity of the population of California[.]" *Id.* § 12011.5(b).

109. CAL. GOV'T CODE § 12011.5(c).

years, the governor has appointed only a couple of appellate judges whom the commission found not qualified.[110] After the governor has made his or her selection, the appointee must be confirmed by the Commission on Judicial Appointments, a body made up of the Chief Justice, the Attorney General, and the senior presiding justice of the Court of Appeal.[111] Given its makeup, the Commission on Judicial Appointments seems unlikely to refuse to confirm any appointment by the governor.[112] Therefore, because the California Commission on Judicial Nominees Evaluation serves as a functional constraint on the governor's power to fill a judicial vacancy, and the Commission on Judicial Appointments seems less of a functional constraint, this study treats California as a merit-selection state, rather than a "merit-confirmation" state.

Finally, members of New York's intermediate appellate court, but not the members of its highest court, are selected through a variation of the Missouri Plan.[113] New York's general jurisdiction trial court is called the Supreme Court, and its intermediate appellate court is called the Appellate Division of the Supreme Court. Under the state constitution, the governor appoints members of the Appellate Division from among the current justices on the supreme court.[114] For many years, a Departmental Judicial Screening Committee, created by gubernatorial executive order, has evaluated and recommended candidates for all judicial positions in the Appellate Division.[115]

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110. CAL. CONST. art. VI, § 16. If the governor appoints an applicant the commission has rated "not qualified," the State Bar may disclose the unfavorable rating. CAL. GOV'T CODE § 12011.5(g). As a practical matter, that "threat of adverse publicity" has effectively constrained California governors from appointing applicants rated as not qualified. *See, e.g.*, Tina Bay, *San Bernardino Judge Chosen Despite Low JNE Rating*, METROPOLITAN NEWS ENTERPRISE, July 24, 2007, at 1, http://www.metnews.com/articles/2007/piro072407.htm [https://perma.cc/ZF44-ETHW]; Roger M. Grace, *San Bernardino Bench Has Its Version of 'Bagel Lady'–the 'Real Estate Guy,'* METROPOLITAN NEWS ENTERPRISE, July 24, 2007, at 7; Board *Approves Stricter JNE Rules*, CAL. BAR JOURNAL (Dec. 2010), http://www.calbarjournal.com/December2010/Top Headlines/TH5.aspx [https://perma.cc/JUN6-2HYR].

111. CAL. CONST. art. VI, §§ 7, 16(d)(2).

112. The Commission on Judicial Appointments holds a public hearing, at which it receives written and oral comments concerning the judicial nominee. *Guidelines for the Commission on Judicial Appointments*, CAL. COMM'N JUDICIAL APPOINTMENTS 5 (Nov. 19, 2007), http://www.courts.ca.gov/documents/guidelinescja.pdf [https://perma.cc/E2H3-CY5J]. The commission's role has been described as "more of a matter of form than substance," and its hearings described as "often more a pleasant public ceremony than a rigorous and contested examination of qualifications." John L. Dodd et al., *The Case for Judicial Appointments*, FEDERALIST SOC'Y (Jan. 1, 2003), http://www.fed-soc.org/publications/detail/the-case-for-judicial-appointments [https://perma.cc/DGM9-L9YA].

113. *See* discussion of New York's Court of Appeals, *infra* note 137.

114. N.Y. CONST. art. VI, § 4(c). Members of the supreme court are elected to fourteen-year terms in partisan elections, by district. *Id.* § 6(c).

115. *See, e.g.*, N.Y.C. BAR COUNCIL JUDICIAL ADMIN., JUDICIAL SELECTION METHODS IN THE STATE OF NEW YORK: A GUIDE TO UNDERSTANDING AND GETTING INVOLVED IN THE

Under the executive orders, the governor only may appoint justices to the Appellate Division that the judicial screening committee has found to be "highly qualified" or "well qualified."[116] Therefore, because each justice sitting on the Appellate Division in February 2015 was appointed by the governor from a list of candidates recommended by a screening committee, the members of that court are treated as merit-selected.

5. "Merit-Confirmation"

In the remaining eleven states—Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, Utah, and Vermont, and for New York's Court of Appeals—the governor appoints appellate judges subject to the approval of another elected body.[117] Earlier studies tended to label as "merit selection" any state that employed strict merit-selection protocols and label as simply "appointment" any other state whose governor was empowered to fill appellate judicial vacancies by appointment.[118] In characterizing the latter group as "appointment" states without further explanation, however, the prior literature does not acknowledge two significant constraints on the governor's appointment power in those states.

SELECTION PROCESS (2014), http://www2.nycbar.org/pdf/report/uploads/20072672-GuidetoJudicialSelectionMethodsinNewYork.pdf [https://perma.cc/SU46-U97T].

116. *Id.* at 34; N.Y. Exec. Order No. 9, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.9 (1983); N.Y. Exec. Order No. 4, N.Y. COMP. CODES R. & REGS. tit. 9, § 6.4 (2007); N.Y. Exec. Order No. 10, N.Y. COMP. CODES R. & REGS. tit. 9, § 5.10 (1995).

117. Appointments to the appellate bench in Tennessee after January 28, 2016 will require confirmation by the state senate and the state house of representatives. TENN. CODE ANN. § 17-4-102 (LEXIS through 2016 Sess.). This Article will treat Tennessee as a merit-selection state—not a merit-confirmation state—because each Tennessee judge in the 2015 data set was appointed under the prior statutory procedure.

118. For example, in their 2003 study, Hurwitz et al. distinguished between judges in "merit system" states and those in "elite nomination" states, the latter category being those in which judges are appointed by the governor or the legislature. Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 STATE POL. & POL'Y Q. 329, 335 (2003). In other studies, the same researchers grouped judges selected by "merit selection" separately from "legislative appointment" and "gubernatorial appointment." Hurwitz & Lanier, *supra* note 67, at 86. In their comprehensive 2008 report, they classified non-elected state judges as being "nominated by commission" or as the product of "gubernatorial appointment" or "legislative election." Hurwitz & Lanier, *supra* note 12, at 51. Reddick et al., distinguished judges chosen by "gubernatorial appointment" from those chosen by merit selection, and also broke out a small number of judges selected by "court appointment." REDDICK ET AL., *supra* note 69, at 3.

The first constraint is that, in each of the eleven states, a judicial nominating commission must screen applicants before the governor may make the appointment. In five of the states, the judicial nominating commission is created by the state constitution, just as in traditional merit-selection states.[119] In the remaining six states, judicial nominating commissions have been created by a series of long-standing executive orders.[120]

The second constraint is that, in each of the eleven states and for appointments to New York's Court of Appeals, the governor's appointee may not take the bench before being confirmed by a separately elected body. Although the prior literature studying state judicial selection methods has not assessed how a confirmation requirement may constrain the gubernatorial appointment prerogative, the constitutional requirement that the United States Senate must give its "advice and consent" to any judicial nomination has significantly restrained the President's power to appoint members of the federal bench. Through 2011, the Senate failed to confirm 36 of 160 presidential nominations to the United States Supreme Court.[121] Researchers have observed that the Senate has taken it upon itself more frequently over the past few decades to review not only a judicial nominee's professional

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119. *See* CONN. CONST. art. V, § 2; *id.* amends. XX, XXV; HAW. CONST. art. VI, § 3; R.I. CONST. art. X, § 4; UTAH CONST. art. VIII, § 8; VT. CONST. ch. II, § 32.

120. Those states are: Delaware (DEL. CONST. art IV, § 3; Del. Exec. Order No. 4, 12 Del. Reg. Regs. 1439 (May 1, 2009)); Maine (ME. CONST. art. V, § 8; Me. Exec. Order No. 9 FY 94/95 (Feb. 10, 1995); Me. Exec. Order No. 3, 291 Me. Gov't Reg. 1 (Apr. 2015) (referencing and reaffirming Executive Order No. 9 FY 94/95, which established the Governor's Committee on Judicial Appointments); *see also* NAT'L CTR. FOR STATE COURTS, *Methods of Judicial Selection: Maine*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=ME [https://perma.cc/4M6X-WCKG] (last visited Nov. 16, 2016) [hereinafter *Methods of Judicial Selection: Maine*]); Maryland (MD. CONST. art. IV, § 5A; Md. Exec. Order No. 01.01.2015.09, 42 Md. Reg. 416 (Feb. 20, 2015)); Massachusetts (MASS. CONST. ch. II, § 1, art. IX; Mass. Exec. Order No. 558, 1281 Mass. Reg. 1 (Feb. 27, 2015); Mass. Exec. Order No. 500, 1101 Mass. Reg. 9 (Apr. 4, 2008); Mass. Exec. Order No. 470, 1046 Mass. Reg. 3 (Feb. 24, 2006)); New Hampshire (N.H. CONST. art. 46, art. 60; N.H. Exec. Order No. 2013-06, 33 N.H. Rulemaking Reg. 19 (May 9, 2013); *see also* NAT'L CTR. FOR STATE COURTS, *Methods of Judicial Selection: New Hampshire*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=NH [https://perma.cc/3JLQ-8D73] (last visited Nov. 16, 2016) [hereinafter *Methods of Judicial Selection: New Hampshire*]); and New Jersey (N.J. CONST. art. VI, § 6, ¶ 1, § 3, ¶ 3 & § 7, ¶ 2; N.J. Exec. Order No. 36, 38 N.J. Reg. 4525(b) (Nov. 6, 2006); N.J. Exec. Order No. 32, 42 N.J. Reg. 1271(c) (July 6, 2010)).

121. Russell L. Weaver, *"Advice and Consent" in Historical Perspective*, 64 DUKE L.J. 1717, 1730 (2015) (citing RICHARD S. BETH & BETSY PALMER, CONG. RES. SERV., RL33247, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789–2011, at 1 (2011)); *see also* Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 85 (2001) (recounting episode in which Senator's threat to withhold "blue slip" caused President to withdraw a nomination to the circuit court of appeals).

credentials and intellectual qualifications, but also his or her ideology.[122] As a consequence, to ensure confirmation, Presidents have tended to moderate their selections "in the direction of the Senate's views."[123] Although information is not readily available about how often the respective elected bodies in merit-confirmation states vote to reject gubernatorial judicial appointees, the mere existence of the confirmation protocol necessarily constrains a governor's choice of whom to appoint. To the extent that the confirming body is of a different political party than the governor, or does not generally reflect the governor's judicial ideology, the confirmation requirement may pose a significant constraint on the governor's appointment prerogative.

Among merit-confirmation states, two states require that after the governor nominates one of the candidates forwarded by an independent judicial selection commission, the nominee must be appointed by a majority of both houses

122. Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296, 306 (2006). Over the past thirty years, "Senate voting over judicial nominees has followed a new regime: one that deemphasizes ethics, competence, and integrity and stresses instead politics, philosophy, and ideology." *Id.* at 296. According to one commentator, "the Senate today appears bent on using its limited confirmation power to impose ideological litmus tests on presidential nominees[,]" thereby "arrogating to itself the nomination as well as the confirmation power." John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 652 (2003).

123. Weaver, *supra* note 121, at 1731.

of the state legislature.[124] In Delaware,[125] Hawaii,[126] Maine,[127] Maryland,[128] New Jersey,[129] Utah[130] and Vermont,[131] the governor fills a vacancy on

124. In both Connecticut and Rhode Island, the governor is obligated to select from the commission's list of nominees. CONN. CONST. art. V, § 2; *id.* amends. XX, XXV; R.I. CONST. art. X, § 4. In Connecticut, at the conclusion of the judge's original term, the judge may remain on the bench if re-nominated by the governor and reappointed by the legislature. CONN. CONST. art. V, § 2; CONN. GEN. STAT. ANN. § 51-44a (2015). In Rhode Island, a state with no intermediate appellate court, members of the state supreme court enjoy lifetime appointments. R.I. CONST. art. X, § 4.

125. DEL. CONST. art IV, § 3; Del. Exec. Order No. 4, 12 Del. Reg. Regs. 1439 (May 1, 2009). The judicial nominating commission in Delaware is created by executive order, and the governor may request a supplemental list of nominees if he or she is dissatisfied with the first list. Del. Exec. Order No. 4, 12 Del. Reg. Regs. 1439 (May 1, 2009). Under the state constitution, three of the five supreme court justices must be of one of the two major political parties and the other two justices must be of the other party. DEL. CONST. art IV, § 3. After completion of a justice's twelve-year term, he or she must be reappointed by the governor and reconfirmed by the state senate. *Id.*

126. HAW. CONST. art. VI, § 3. The governor must select from the list of nominees submitted by the judicial selection commission; if the governor fails to make the appointment within thirty days, the selection commission may do so. *Id.* Upon completion of a ten-year term, the judge may be retained in office by vote of the judicial selection commission. *Id.*; *see also* HAW. JUDICIAL SELECTION COMM'N RULES 12(E).

127. ME. CONST. art. V, § 8. A bipartisan legislative committee made up of members of both houses reviews the appointee and recommends confirmation or denial. The recommendation of that bipartisan group "shall become final action of confirmation or denial" unless a two-thirds majority of those voting in the state senate overrides it. *Id.* By executive order, the current governor appointed a fourteen-member judicial selection commission to advise him with respect to judicial appointments. *See* Me. Exec. Order No. 9 FY 94/95 (Feb. 10, 1995); Me. Exec. Order No. 3, 291 Me. Gov't Reg. 1 (Apr. 2015) (referencing and reaffirming Executive Order No. 9 FY 94/95, which established the Governor's Committee on Judicial Appointments); *see also Methods of Judicial Selection: Maine*, *supra* note 120. Once appointed, a Maine appellate judge enjoys a seven-year term. ME. CONST. art. VI, § 4.

128. MD. CONST. art. IV, § 5A; Md. Exec. Order No. 01.01.2015.09, 42-4 Md. Reg. 416 (Feb. 20, 2015). The Maryland governor established a judicial nominating commission by executive order to recommend candidates for appointment to the appellate courts. *Id.*; *see also* NAT'L CTR. FOR STATE COURTS, *Judicial Selection in the States: Maryland*, http://www.judicialselection.us/judicial_selection/index.cfm?state=MD [https://perma.cc/Z2FZ-59CJ] (last visited Nov. 16, 2016). Once confirmed by the state senate, an appellate judge must stand for retention at the next general election following completion of his or her first year on the bench, and every ten years thereafter. MD. CONST. art. IV, § 5A(c)–(d).

129. N.J. CONST. art. VI, § 6, ¶ 1. The New Jersey governor appoints members of the supreme court and the superior court—the general jurisdiction trial court—subject to the advice and consent of the state senate. *Id.* The appellate division of the superior court serves as the state's intermediate court of appeals; its members are appointed from among the superior court bench by the chief justice. N.J. CONST. art. VI, § 3, ¶ 3, § 7, ¶ 2. By executive order, the governor has appointed a nominating commission that recommends candidates for judicial appointment, but the governor is not bound to select an applicant recommended by the commission. N.J. Exec. Order No. 36, 38 N.J. Reg. 4525(b) (Nov. 6, 2006). By custom, the New Jersey governor generally replaces an outgoing judge with an appointee of the same political party or philosophy. *See* NAT'L CTR. FOR STATE COURTS,

an appellate court after receiving recommendations of an independent nominating commission, but the governor's appointee may take the bench only after confirmation by the state senate.

In Massachusetts, candidates for the appeals court, but not the supreme judicial court, are vetted by a judicial nomination commission created by executive order.[132] The governor's appointments to both courts are effective only upon confirmation by the Governor's Council, also known as the Executive Council.[133] The Governor's Council is composed of the lieutenant governor and eight others, who are elected by district every two years.[134] In New Hampshire, the governor appoints members of the state supreme court, New Hampshire's only appellate court, subject to the consent of the five-member elected Governor's Council.[135] Since 2000, a judicial selection commission created by executive order recommends applicants to the governor.[136]

Finally, as referenced above, the members of New York's highest appellate court, the court of appeals, are appointed by the governor from nominees

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Judicial Selection in the States: New Jersey, http://www.judicialselection.us/judicial_selection/index.cfm?state=NJ [https://perma.cc/79AP-N99X] (last visited Nov. 16, 2016). The seven-member supreme court traditionally is composed of three Democrats and three Republicans; the chief justice traditionally belongs to the party of the appointing governor. *Id.* After completion of an initial seven-year term, upon reappointment, appointees "shall hold their offices during good behavior" until mandatory retirement at seventy. N.J. CONST. art. VI, § 6, ¶ 3.

130. UTAH CONST. art. VIII, § 8. The governor is required to select from the list of nominees submitted by the judicial nominating commission. *Id.* If the governor fails to make the appointment within thirty days, the chief justice of the supreme court may do so. *Id.* A newly confirmed judge must stand for retention at the first general election more than three years after appointment. *Id.* § 9. Thereafter, supreme court justices stand for retention every ten years; court of appeals judges, every six years. *Id.*

131. VT. CONST. ch. 2, § 32. The governor must make the appointment from the list of nominees submitted by the nominating commission; after completion of the initial six-year term, a judge may be retained on the bench unless a majority of those voting in the General Assembly votes against retention. *Id.* §§ 32, 34.

132. Mass. Exec. Order No. 558, 1281 Mass. Reg. 1 (Feb. 27, 2015); Mass. Exec. Order No. 500, 1101 Mass. Reg. 9 (Apr. 4, 2008); Mass. Exec. Order No. 470, 1046 Mass. Reg. 3 (Feb. 24, 2006).

133. MASS. CONST. pt. 2, ch. II, § 1, art. IX. Judicial appointments in Massachusetts are for life, subject to mandatory retirement at age seventy. MASS. CONST. pt. 2, ch. III, art. I, *amended by* MASS. CONST. amend. art. XCVIII.

134. MASS. CONST. pt. 2, ch. II, § 3, art. I; MASS. CONST. amend. art. XVI, *amended by* MASS. CONST. amend. art. LXXX, *repealed by* MASS. CONST. amend. art. LXXXII.

135. N.H. CONST. pt. 2, art. XLVI, art. LX. Once appointed, a judge on the supreme court sits until mandatory retirement at age 70. N.H. CONST. pt. 2, art. LXXVIII.

136. *Methods of Judicial Selection: New Hampshire*, *supra* note 120; N.H. Exec. Order No. 2013-06, 204 N.H. Gov't Reg. 26 (LexisNexis May 2013).

recommended by an independent commission on judicial nomination, subject to the consent of the state senate.[137]

III. FINDINGS AND ANALYSIS

A. Summary: Differences Among Benches Produced by the Various Selection Methods

The data in the new set allow a fresh look at the characteristics other researchers have studied and also allow analysis of a host of other objective characteristics, including more detailed information about the judges' prior legal careers and academic credentials. Altogether, the data show that merit-confirmation tends to produce the most distinctive appellate bench: those judges tend to have more years of legal experience and more judicial experience, more are former prosecutors, more have other government-law experience, and more are former judicial clerks. Judges in merit-selection states, by contrast, tend to bear objective characteristics roughly comparable to those in election states. Although, in general, the characteristics of judges in election states do not differ significantly from those of judges in other states, to a large extent, that is because so many of them first come to the bench by appointment, and those judges tend by large margins to bear the same characteristics of judges appointed through merit selection and merit–confirmation. As reported previously, merit selection disadvantages women; the data suggest that may be a consequence of the nature of their respective career paths.

As a caveat, a study like this can reveal relationships, but proof of cause and effect can be elusive. For one thing, the respective selection methods are not employed randomly across all regions of the United States. With important exceptions, judicial-election protocols tend to cluster in the South and in the Great Lakes, while merit selection tends to be found in and around the West and the Midwest, and merit-confirmation protocols tend to cluster in the Northeast. For that reason, when a particular characteristic is more commonly found among judges chosen by a particular selection method, we cannot know whether that is because of the states' respective selection methods, the preferences of their citizens, or the attributes of the judicial candidates who live in those states.[138] Nevertheless, the data reveal some powerful associations.

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137. N.Y. CONST. art. VI, § 2(c), (e). Once confirmed, court of appeals judges serve fourteen-year terms. N.Y. CONST. art. VI, § 2(a).

138. *See* Canon, *supra* note 19, at 581 (based on a study of state supreme court members who sat between 1961 and 1968, "there are considerable differences in the justices' backgrounds according to geographical region"); *see also* GEORGE & YOON, *supra* note 13, at 6 (showing judicial selection methods using a color-coded map of the United States).

Before discussing the data in detail, first, a broad snapshot of all the 1,285 appellate judges in the set. Their personal demographics:

- Average age at selection: fifty-one
- 35% are women
- 15% are non-white

With respect to career paths:

- 83% have private-practice experience
- 64% have prior judicial experience, usually service on a state trial court
- 38% have prosecutorial experience
- 25% have served as a government lawyer in a capacity other than as a prosecutor
- 12% served in legal aid or as a public defender

As for education and other scholarly credentials:

- 73% attended an un-ranked in-state law school
- 63% attended an un-ranked in-state undergraduate institution
- 27% served a judicial clerkship
- 26% served on a college or law-school faculty, either part-time or full-time, before or after coming on the bench
- 15% attended a ranked undergraduate institution
- 13% published law review articles before taking the bench
- 12% attended a ranked law school
- 7% are elected members of the American Law Institute

Table 1 shows the proportion of judges with these attributes, by selection method.[139] There are many similarities across the various benches, but some differences stand out.

1. Age

The data reveal statistically significant differences across the various selection methods in the ages at which the judges were chosen. On the average, the judges were just under fifty-one and one-half years old when they first joined the appellate bench. By a slight but statistically significant margin, judges in election states are younger than those in merit-selection,

139. *See infra* Table 1.

merit-confirmation, and legislative-selection states. Appointed judges have roughly two more years of legal experience than their elected counterparts.[140]

2. Gender

Women represent a little more than 35% of the judges, across all selection methods. Proportionately more women are on the bench in partisan-election states than in states that use any other selection method. As noted, a significantly smaller proportion of merit-selected judges, roughly 29%, are female.[141]

3. Race or Ethnicity

Overall, nearly 15% of the judges in the data set are non-white. No statistically significant differences appear across the various selection methods.[142]

4. Prior Judicial Experience

Across all selection methods, 64% of the judges have some prior judicial experience, including experience on a trial court or, in the case of a judge on a state's court of last resort, on an intermediate appellate court. By a statistically significant margin, however, appellate judges in merit-confirmation states are most likely to have prior judicial experience, at nearly 75%, and judges in non-partisan election states are least likely to have prior judicial experience, at roughly 58%.[143]

5. Private-Practice Experience

Judges in election states and those chosen through merit selection are significantly more likely to have practiced in the private sector than judges in merit-confirmation states.[144]

6. Commercial Law/Business Law Experience

This study sought to identify the judges with commercial-law or business-law experience, or who otherwise had practiced complex civil litigation before coming to the bench. Because of the ambiguous nature of the available information for many of the judges, this classification is more subjective

140. *See infra* Table 1.
141. *See infra* Table 1.
142. *See infra* Table 1.
143. *See infra* Table 1.
144. *See infra* Table 1.

than the others, and includes all of the judges who practiced in large law firms before they became judges, even if the specific nature of their practices could not be determined. Any differences across selection methods in the percentages of judges who practiced commercial law are not significant. This is true even though far more judges selected by the legislature have commercial-law experience than average.[145]

7. Former Prosecutors

Researchers studying state courts of last resort in 1980–81 concluded that a little fewer than a quarter of their members were former prosecutors.[146] The judges in the current data set, who include intermediate appellate court members as well as members of state courts of last resort, are considerably more likely to have prosecutorial experience—overall, nearly 38% are former prosecutors. To a statistically significant degree, merit-confirmation states choose more former prosecutors for their appellate benches than states using any other judicial selection method. Partisan-election states follow not far behind.[147]

8. Former Non-Prosecutorial Government Lawyers

Any judge who held a non-prosecutorial role in government legal service is categorized as a former "government lawyer." Included in this category are judges who served as in-house counsel to a state agency, counsel to a city or state executive, or who practiced civil litigation in the office of a state attorney general or municipal or county attorney. Perhaps not surprisingly, judges whose appointments required confirmation by a government body or who were selected by the legislature are significantly more likely to have government- law experience.[148]

145. *See infra* Table 1.
146. Glick & Emmert, *supra* note 12, at 232 tbl.1.
147. *See infra* Table 1.
148. Glick and Emmert's study of state high-court members in 1980–81 found that 78.6% of judges selected by the legislature had themselves been legislators; judges with prior legislative service totaled no more than 21% in any of the other selection methods. Glick & Emmert, *supra* note 12, at 232 tbl.1. Among all supreme court justices serving in 1999, 10.4% were former legislators. Martin & Pyle, *supra* note 12, at 42 tbl.2.

9. Former Legal Aid/Criminal Defense Lawyers

On the average, 12% of all the judges have some experience in legal aid, poverty law, or criminal defense agencies. Only slight differences appear across the various selection methods.[149]

10. Judicial Clerkships

Merit–confirmation puts the highest percentage of former clerks on the bench. Nearly 32% of all judges in the data set who were selected through merit–confirmation served judicial clerkships; slightly more than 26% of judges appointed through merit selection clerked.[150]

11. Education

Earlier researchers studying judges on state courts of last resort in 1980 and before found that more than 80% of the judges in partisan-election states attended in-state undergraduate or law schools.[151] In 1980, just under 70% of all supreme court members were educated in-state; by 1999, that percentage declined somewhat: roughly 59% attended college or law school in their state.[152] The later data set revealed that white women and non-white men, but not non-white women, were less likely to have been educated in state.[153]

In the current data set of state supreme court and intermediate appellate court judges, there are similarly strong in-state education connections among judges in election states. Of judges in partisan-election states, 84% attended in-state law schools, as did 72% of judges in non-partisan election states. At 61%, judges selected by merit–confirmation are least likely to have done so. Judges in partisan-election states also are the most likely to have attended an in-state undergraduate institution; 75% of them did so.[154]

Prior researchers found that, among judges on state courts of last resort in 1980–81, 50% of those who came to the bench through gubernatorial appointment, not including merit-selected judges, attended what the authors called "prestigious" law schools; 16% selected by merit did so, but fewer than 10% of judges selected by any other method did so.[155] Similarly, 27.3% of gubernatorial appointment judges in that data set went to "prestigious"

149. *See infra* Table 1.
150. *See infra* Table 1.
151. Canon, *supra* note 19, at 589 tbl.1; Glick & Emmert, *supra* note 12, at 232 tbl.1.
152. Martin & Pyle, *supra* note 12, at 46 tbl.5.
153. *Id.*
154. *See infra* Table 1.
155. Glick & Emmert, *supra* note 12, at 232 tbl.1.

undergraduate institutions; fewer than 10% of the judges selected by any other selection method did so.[156]

The U.S. News and World Report rankings were used to identify ranked law schools and undergraduate institutions for purposes of this study.[157] The ten highest-ranked law schools and the twenty highest-ranked colleges or universities are designated as "ranked" institutions for this study.[158]

The proportion of all the judges in the current set who graduated from ranked law schools is not large—only 11.5%—but there are wide differences among selection methods. Larger proportions of the judges in legislative-selection and merit-confirmation states—21% and 17%, respectively—attended ranked law schools. By contrast, only 3% of the judges in partisan-election states did so.[159]

Judges sitting in partisan-election states also are significantly less likely to have attended a ranked undergraduate institution. But, by contrast to the results with law schools, judges selected by the legislature are least likely to have attended a ranked undergraduate institution. The highest proportion of judges who attended ranked undergraduate schools is seen in non-partisan election states—at 18%—followed closely by judges selected by merit-confirmation and by merit selection.[160]

156. *Id.*

157. The rankings showed little variability from 2000-2015; the 2015 rankings therefore were selected for sake of convenience.

158. If a judge graduated from a ranked institution located in the state in which he or she sits, this study counts the judge as having attended a ranked school, not an in-state school. It is of course true that a host of law schools and undergraduate institutions that are unranked by this measure provide excellent educations to their students; likewise, there may be little to distinguish the tenth-ranked law school from the twelfth-ranked law school, or the eighteenth-ranked college or university from the twenty-second. Judges' class rankings might have been a more valid measure of their academic success or intellectual prowess, but those data were not readily available. Recognizing further that many high-achieving students who are admitted to ranked institutions cannot afford to enroll, national law-school and college rankings nevertheless provide some measure of their students' intellect—because ranked institutions are more selective—and, to a greater or lesser extent, the quality of their graduates' legal training.

159. Other researchers have observed that fewer judges on courts of last resort in election states are graduates of ranked law schools. *See* Choi et al., *supra* note 48, at 327.

160. *See infra* Table 1.

12. Other Scholarly Measures

This study identified law review articles published by judges in the data set before their authors went on the bench. There are no significant differences in those numbers among the judges, by selection method.[161]

By a significant margin, however, judges in merit-confirmation states are more likely to have been elected to the American Law Institute; judges in partisan-election states are next most likely to be elected ALI members.[162]

Finally, the data identified judges who taught part-time or full-time at a college, university or law school either before or after they came to the bench. Of the judges surveyed, 26% served in some faculty capacity. By a statistically significant margin, judges appointed by merit-confirmation or chosen by legislative selection were more likely to have taught at the undergraduate or graduate level.[163]

B. Merit Selection and Merit-Confirmation

The data plainly disprove the hypothesis that merit-selected judges as a group tend to be more scholarly and more likely to have business-law backgrounds than judges chosen by other selection methods. To the contrary, the objective characteristics of the judges chosen by merit selection, on the whole, are not dissimilar in most respects from those chosen by all selection methods, taken together. Merit-selected judges are slightly less likely than average to be former prosecutors and slightly less likely to have practiced other forms of government law. To be sure, they are slightly more likely than average to have attended a ranked law school, but other selection methods boast a higher percentage of ranked law-school graduates. And proportionately far fewer merit-selected judges than average are elected members of ALI.

Although the hypothesis about merit selection did not prove correct, that is not to say that all selection methods produce benches with roughly the same combination of characteristics. It turned out that merit-confirmation, not merit selection, results in courts with the most distinctive mix of characteristics. As shown in Table 1, judges selected by merit-confirmation have significantly more years of legal experience and are significantly older than other judges, by two years or more.[164] Significantly higher percentages of merit-confirmation judges served judicial clerkships, are elected members of ALI, and have taught in college or graduate school. A significantly greater percentage of merit-confirmation judges arrived at the appellate court having

161. *See infra* Table 1
162. *See infra* Table 1.
163. *See infra* Table 1.
164. *See infra* Table 1.

already served on another bench. On the other hand, a significantly smaller percentage of merit-confirmation judges come from private practice; instead, they are the most likely of all judges to have served as prosecutors or in other government-law positions.

Do the constraints imposed by the confirmation process in merit-confirmation states cause those benches to have a significantly different mix of characteristics than those in merit-selection states? Table 2 compares those two subsets of judges.[165] By and large, just as judges chosen by merit-confirmation are significantly different in many respects from other judges overall, benches in merit-confirmation states are significantly different from those in merit-selection states. By significant margins, more merit-confirmation judges than merit-selected judges are former prosecutors or other government lawyers, and more came to their current positions with prior judicial experience. On the other hand, merit-selected judges are significantly more likely than merit-confirmation judges to come from private practice. With respect to education credentials, judges selected by merit-confirmation are significantly less likely than merit-selected judges to have attended in-state law schools and in-state undergraduate institutions. Correspondingly, merit-confirmation judges are more likely to have attended ranked law schools or undergraduate schools, although the difference is not statistically significant. Judges selected by merit-confirmation are significantly more likely than merit-selected judges to have taught at the college or law school level, to have been elected to the American Law Institute, and to have published in a law review before coming to the bench.

The selection mechanisms employed in merit-confirmation states deserve further scrutiny, particularly in view of the distinctive mix of characteristics among the judges on the appellate bench in those states. Although strict merit-selection protocols are not in place in merit-confirmation states, the governor's appointment decisions are constrained in those states by an independent judicial nominating commission, just as in merit-selection states. The fact that judges selected by merit-confirmation are significantly different in many objective respects from those chosen by merit selection suggests that the additional constraint imposed by a confirmation requirement may have demonstrable effects. As noted above, commentators have argued that in the federal judicial appointment process, the Senate's power of advice and consent significantly constrains Presidential appointment power. In a similar fashion, it seems likely that governors in merit-confirmation states

165. *See infra* Table 2.

favor applicants they expect will appeal to the members of the elected body that must confirm judicial appointments. This may explain why more appellate judges in merit-confirmation states share objective credentials such as prior judicial experience, longer legal careers, and judicial clerkships.[166] In any event, these results, as well as the significantly greater proportion of merit-confirmation judges who come to the bench with prosecutorial experience and experience in other government law, deserve further research.

C. Implications of Popular Election of Judges

The data allow broad comparisons to be drawn between appellate judges in election states, both partisan and non-partisan, and appellate judges chosen by merit selection or merit–confirmation. They also permit analysis of two distinct aspects of popular election of judges: (1) whether the objective characteristics of judges appointed to fill interim vacancies in election states differ significantly from those of their elected colleagues; and (2) whether the characteristics of judges in partisan-election states differ significantly from those of judges in non-partisan election states.

1. Judges in Election States Compared to Judges in Merit-Selection, Merit-Confirmation States

As shown in Table 2, there are some significant differences between the characteristics of appellate judges in election states and those in merit-selection and merit-confirmation states, taken together.[167] Judges in election states are significantly more likely to be female than judges in merit-selection and merit-confirmation states.[168] Judges in election states are significantly younger and have correspondingly less legal experience than those selected by merit or merit-confirmation. By significant margins, judges in election states are less likely to have prior judicial experience but more likely to have private-practice experience. Not surprisingly, a significantly greater proportion of

166. Plenty of bright young law graduates choose not to seek judicial clerkships; nevertheless, given that judges tend to hire their clerks from students at the top of their law school classes, a judicial clerkship is an objective indication of intellectual merit. *See* Zoe Tillman, *Federal Appeals Judges Open Up About Clerk-Hiring Preferences*, NAT'L LAW J. (Nov. 16, 2015), http://www.nationallawjournal.com/id=1202742506773/Federal-Appeals-Judges-Open-Up-About-ClerkHiring-Preferences [https://perma.cc/NLA3-ENNV].

167. *See infra* Table 2.

168. Women are selected for the appellate bench in election states at a higher rate than they are elected to other state offices. Of all the judges in election states on the bench in 2015, nearly 39% are women. *See infra* Table 2. By contrast, in 2016, women represented about 25% all statewide elective officials and state legislators. Susan J. Carroll, *Women in State Government: Still Too Few*, *in* THE BOOK OF THE STATES 2016, at 448, 450, 452 (2016).

judges in election states attended in-state law schools and undergraduate schools. By contrast, a significantly greater percentage of merit-selected and merit-confirmation judges attended ranked law schools.

2. Interim Appointments in Election States

Upon close inspection, however, the comparison between the benches in election states and in appointment states is not as simple as it might appear. When an interim vacancy occurs in a state in which judges are elected, the governor usually is empowered to fill the vacancy by appointment, and that appointed judge then runs as an incumbent in the next election. Holmes and Emrey reported that 52% of judges on state courts of last resort in election states initially came to the bench by way of appointment.[169] Of the judges on state courts of last resort and intermediate appellate courts in 2015 who sit in election states, 41% first came to the bench by appointment.

It has been commonly thought that the precise means by which judges first come to the bench in election states—by election or by interim appointment—does not matter very much. For that proposition, most researchers cite Glick and Emmert, who reported that the only significant objective difference between elected members of state supreme courts in 1980–81 and their colleagues who were appointed to fill interim vacancies was that the first-elected judges were more likely to have been born in the state they serve.[170] In one sense, it does not matter whether a judge in an election state has been elected or appointed: the product of popular election as a means to select appellate judges is the entire composition of the appellate bench, including the judges who are first elected and those who are first appointed to fill interim vacancies. But distinctions between the two groups deserve analysis, if, for no other reason, because of the sheer numbers of those who are first appointed. Moreover, regardless of how a judge comes to the bench for the first time in an election state, he or she is likely to be reelected or retained in office.[171] To the extent that governors tend

169. Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 JUST. SYS. J. 1, 1 (2006).

170. Glick & Emmert, *supra* note 12, at 231.

171. Studying elections between 2000 and 2006, Streb, Frederick, and LaFrance found that 64.7% of state supreme court elections were contested, but only 26.6% of intermediate appellate court elections were contested. Matthew J. Streb et al., *Contestation, Competition, and the Potential for Accountability in Intermediate Appellate Court Elections*, 91 JUDICATURE 70, 73 tbl.1, 74. The same data show that when challenged, only 12.5% of state supreme court justices were defeated and 8% of intermediate appellate court judges were defeated.

to appoint judges with significantly different characteristics than those who are elected, therefore, study of those differences will advance understanding of the implications of popular election of judges, as a selection method. Although some researchers have considered the gender, race, and ethnicity of appointed judges in election states as a distinct group, no other study compares a wide range of objective characteristics of the judges in election states who are first appointed with those who are first elected.

Table 3 shows that, in several respects, appointed judges in election states bear significantly different characteristics from those of their elected colleagues.[172] Interim appointments usually have the effect of bringing the appellate benches in election states more in line with the norm produced by other selection methods. For example, among the statistically significant differences between elected and appointed judges in election states is that a significantly greater proportion of the appointed judges are non-white. This is particularly true in non-partisan election states, where more than 18% of the appointed judges but only 5% of the elected judges are non-white. By contrast, there is virtually no distinction between the proportion of women among judges first appointed and first elected to the bench in election states.

Judges in election states who first come to the bench by appointment, particularly in partisan-election states, are considerably more likely to have some commercial- or business-law experience than those who are elected. The opposite is true with prosecutorial experience, particularly in partisan-election states. Judges appointed to fill interim vacancies in partisan-election states are far less likely than those first elected to have practiced in legal aid or criminal defense, but no such distinction is seen in non-partisan election states. As for prior government-law experience, the proportion of judges actually elected in non-partisan election states who have practiced in government is smaller than in any other group of judges. When appointing authorities fill interim vacancies in non-partisan election states, however, nearly 24% of their appointments have prior government-law experience.

Turning to education, judges appointed to fill interim vacancies in election states are significantly less likely to have attended in-state law schools than those who are first elected. Although proportionately more appointees in

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Id. at 76. Bonneau and Hall found that, among judges on state courts of last resort between 1990 and 2004, only 5.2% of the incumbents in non-partisan election states who ran for reelection were defeated, whereas 31% in partisan-election states were defeated. BONNEAU & HALL, *supra* note 5, at Table 4.4. They found that judges appointed to fill interim vacancies are more likely to face a challenger when they run for election for the first time, and that appointed judges facing election for the first time generally performed "just over 3 percent worse, other things being equal, than their colleagues who have previously won elections to the high court bench." *Id.* at 97, 99.

172. *See infra* Table 3.

partisan-election states attended ranked law schools than those first elected, the opposite is true, by a wide margin, in non-partisan election states.

With respect to other intellectual credentials, significantly more elected members of the American Law Institute come to the bench through appointment than by election in partisan-election states, but there is virtually no distinction among the numbers of elected ALI members appointed and elected in non-partisan election states. Finally, by a significant margin, judges who are first appointed in election states are more likely to have published a law review article before coming to the bench than those who are first elected. The difference is particularly striking among judges in partisan-election states.

3. Partisan Elections and Non-Partisan Elections

The data also allow analysis of whether appellate benches in partisan-election states are significantly different from appellate benches in non-partisan election states. This analysis takes as a given that in both selection systems, a considerable number of the judges do not first come to the bench by election, but are appointed to fill interim vacancies. The question is whether the partisan or non-partisan nature of the two systems makes a difference in the resulting appellate benches.

At the outset, it should be noted that, in reality, it may be that many non-partisan judicial elections are only nominally so. For this study, Ohio is characterized as a partisan-election state, even though its judges are elected in ostensibly non-partisan general elections, because state law allows political parties wide latitude to participate in the non-partisan general election campaigns.[173] Even without the explicit endorsement of law, similar partisan influences may be brought to bear during general elections in other ostensibly non-partisan election states. Washington, for example, elects its judges in non-partisan general elections, but judges are nominated in partisan primary elections and the nominees typically seek party endorsements during their general election campaigns.[174] According to one former Chief Justice in Washington, voters are very much aware of judges' party affiliations, and judicial candidates' success at the polls parallels their parties' success in other general election contests.[175] And in Michigan, although court of appeals

173. *See* discussion *supra* at Part II.B.1.

174. Charles Wiggins, *The Washington State Supreme Court Election of 2006: Factors at Work and Lessons Learned*, 46 JUDGES' J. 33, 36 (2007).

175. *Id.* at 36–37.

judges are nominated and run in non-partisan elections, supreme court justices are nominated in partisan fashion but run in the general election on a non-partisan basis.[176]

With these caveats, there are very few statistically significant differences between members of the appellate benches in partisan-election states and those in non-partisan election states.[177]

Appellate judges in both partisan- and non-partisan election states are significantly younger and have fewer years of legal experience than their peers in other states when they take the bench. The same is true with prior judicial experience; significantly fewer judges in election states have prior experience on another bench, but the difference between judges in partisan- and non-partisan election states is not significant. By a significant margin, judges in election states are more likely to have private-practice experience, but there is no significant difference between the percentages of judges in partisan- and non-partisan election states with such experience.

Significant differences do appear, however, between the benches in partisan- and non-partisan election states when it comes to localism and academic credentials. The differences perhaps reflect, on the one hand, political parties' preferences for localism, and, on the other, the preferences of voters in non-partisan election states for judicial candidates with objective credentials signifying intellectual merit. Judges in partisan-election states are far more likely to have attended in-state law schools and undergraduate institutions than judges in non-partisan election states. Correspondingly, judges in non-partisan election states are significantly more likely to have attended ranked law schools and ranked undergraduate institutions. Finally, judges in non-partisan election states also are significantly more likely to have authored law review articles before coming to the bench.

D. Women on State Appellate Benches

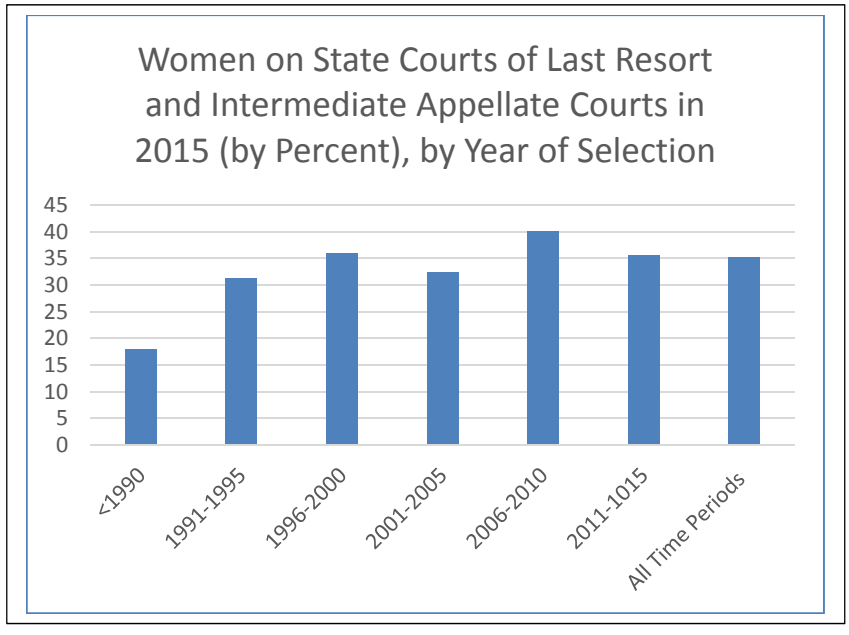
1. Under-Representation of Women on Benches Chosen by Merit Selection

Most of the recent research concerning the outcomes of the various judicial selection methods focused on the extent to which they promote women and minorities to the bench.[178] The data collected for this study, however, offer additional insights.

The table below shows the proportion of women among appellate judges in the current data set according to when they took the bench. Only 18%

176. MICH. CONST. art. VI, §§ 2, 8.
177. *See infra* Table 4.
178. *See* discussion *supra* at Part I.

of judges sitting in 2015 who took the bench before 1990 are women. Beginning in the 1990s, however, women made significant strides across all selection methods, peaking at slightly more than 40% among judges selected between 2006 and 2010 and settling to a little more than 35% of judges selected since 2011.



Although fewer than half of all state appellate judges on the bench in 2015 are female, their proportional representation does not compare unfavorably with U.S. employment data. According to the U.S. Statistical Abstract, 22.2% of the lawyers employed in 1989 were female.[179] By 2014, when more than 35% of all state appellate judges were female, women represented 32.9% of all employed lawyers in the country.[180] According to the American Bar Association, 35% of the licensed lawyers in the United States in 2015 were

179. U.S. DEP'T COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, SECTION 13: LABOR FORCE, EMPLOYMENT AND EARNINGS 395 tbl.652 (1991).

180. U.S. DEP'T COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, HOUSEHOLD DATA: ANNUAL AVERAGES 3 tbl.11 (2014).

female.[181] These observations are consistent with some studies concluding that the advancement of minority and female lawyers to the bench is related to their numbers in the pool of lawyers from which judges are drawn.[182]

The progress of women is not uniform across all selection methods, however. Table 5 shows the proportion of appellate judges in the set who are female, by selection method and selection date.[183] Women are chosen for state appellate courts at a statistically significantly lower rate in merit-selection states than in other states. Although more than 35% of all the judges in the data set are female, fewer than 29% of the judges in merit-selection states are female. No other selection method produces female appellate judges at a rate below 34%.[184] A separate multivariate analysis, Table 6, reveals that, holding all other factors constant and by a statistically significant margin, a state appellate judge selected by merit is 31% less likely to be a woman than a judge selected by any other method.[185]

Why do women seem to struggle for appointment in merit-selection states? By itself, a system in which the governor appoints a judge from among candidates vetted by an independent commission does not disproportionately disadvantage women: more than 36% of the appellate judges on the bench in 2015 selected through merit-confirmation are women. At bottom, merit

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181. AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2015).

182. REDDICK ET AL., *supra* note 69, at 3. These researchers concluded, however, that although there is a link between the number of female attorneys in a state and the number of women on that state's intermediate appellate court, the same cannot be said about women's representation on a state's court of last resort. *Id.* at 6. Of course, no state appellate bench perfectly reflects the demographics of the state's population, which may be quite different from those of the bar. *See* BERRY, *supra* note 13, at 5; GEORGE & YOON, *supra* note 13, at 11, 18.

183. *See infra* Table 5.

184. *See infra* Table 1. Although this study does not analyze state voter registration numbers, Reddick et al., found that more female judges are elected in states in which Democrats hold an edge in voter registration than in states in which Republicans outnumber Democrats. Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Racial and Gender Diversity on State Courts: An AJS Study*, 48 JUDGES' J. 28, 30 (2009). Likewise, they observed that more minorities are elected to the intermediate appellate bench in states in which Democrats outnumber Republicans than in states in which Republicans have the edge. *Id.*

185. Looking separately at the benches of state supreme courts and intermediate appellate courts in this Article's data set, merit selection places a smaller proportion of women both on high courts, at 30%, and intermediate appellate courts, at 28%, than any other selection method. The margin across all selection methods is statistically significant among the latter but not among the former. Reddick et al., studied state appellate and trial court judges in 2005. They found that although 37.6% of all of the members of states' intermediate appellate courts sitting in 2005 were the products of merit selection, only 27.5% of women on those benches were merit-selected. REDDICK ET AL., *supra* note 69, at 4 tbl.2. Multivariate analysis confirmed their conclusion that "merit selection placed significantly fewer women on intermediate appellate courts than did partisan or nonpartisan elections." *Id.* at 6. They found, however, that "merit selection and gubernatorial appointment systems did not place more, or fewer, women on state high courts or trial courts than did popular elections." *Id.*

selection allows a governor discretion to make an appointment from nominees submitted by an independent group of citizens who have systematically researched and interviewed the candidates. One study of ten states concluded that, in general, nominating commissions in merit-selection states tend to forward female nominees to the governor at rates comparable to women's representation among applicants.[186] Whether governors in merit-selection states tend to disproportionately select male nominees over female nominees because of political influences that favor men over women cannot be determined. But politics in general is not a sufficient explanation. After all, for women, the single most favorable appellate judicial selection method is partisan election, with non-partisan election not far behind.

At the end of the day in merit selection, the governor's choice of whom to appoint is subject to an unquantifiable mix of factors and influences, including, of course, the governor's ideological predilections.[187] The outcome also may depend in part on the governor's prior appointments, the existing composition of the appellate benches in the state, the overall political climate in the state, the strength and nature of the judicial candidates' records, and the weight of the influence their respective advocates may bring to bear on the nominating commission and the governor.[188]

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186. ESTERLING & ANDERSEN, *supra* note 34, at 17. By contrast, these researchers found that the nominating commissions forwarded minority candidates at a slightly higher rate than in the applicant pool. *Id.* at 17–18.

187. When Henry studied appointed appellate judges in 1985, he observed that the numbers of women and minorities named to the bench varied greatly depending on the governor. HENRY ET AL., *supra* note 62, at 25–27, 68–69. In California, for example, Gov. Edmund G. "Pat" Brown appointed twenty-six members of the appellate courts between 1959 and 1965; none of the appellate judges he appointed was a woman, and only two were non-whites. *Id.* at 25. Brown's successor, Gov. Ronald Reagan, appointed twenty men—no women—to the appellate bench between 1967 and 1974, and only one of them was non-white. *Id.* at 25. By contrast, Gov. Edmund G. "Jerry" Brown appointed sixty-five appellate judges, among them eleven women and eleven non-whites, between 1975-1982. *Id.* at 25; *see* Hurwitz & Lanier, *supra* note 12, at 56 (listing appointments by Democratic and Republican governors).

188. According to a study of all state appellate and general jurisdiction judges on the bench in 2008, Democratic governors appointed minorities—14.7%—and women—27.9%—at a higher rate than Republican governors, at 11% and 23.6%, respectively. Reddick et al., *supra* note 184, at 30. Considering appellate benches separately, Democratic governors appointed women to state courts of last resort and intermediate appellate courts at rates of 31.3% and 31.2%, respectively, compared to 28.3% and 23.3%, respectively, by Republican governors. *Id.* at 32. Democratic governors appointed minorities to state courts of last resort and intermediate appellate courts at rates of 17.4% and 16.2%; for Republican governors, the comparable numbers were 8.8% and 10.5%. *Id.* These data are consistent with the findings of scholars who have observed that liberal officeholders are more likely to select women

2. Clues Among the Data: Why Are Women Under-Represented in Merit Selection?

Perhaps an explanation of why merit selection seems to disadvantage women lies in the characteristics of the judges chosen by the various selection methods. Toward that end, this Article first will compare the attributes of female judges with the attributes of male judges across all selection methods. The focus then will turn to the characteristics of women chosen by merit selection to examine whether merit selection tends to (1) value certain characteristics in women differently than other judicial selection methods do, or (2) differently than merit selection itself values those characteristics in men.

Table 7 broadly compares selected characteristics of the female judges in the data set with those of the male judges.[189] By a statistically significant margin, female judges are much more likely than male judges to be non-white.[190] Multivariate analysis confirms the link between judges' gender and race: as shown in Table 6, to a statistically significant degree and holding all other factors constant, a white judge is 46% less likely than a non-white judge to be a woman.

Table 7 shows other differences between the female and male judges. By statistically significant margins, the female judges are less likely to have private-practice experience than the male judges, and the women who practiced in the private sector did so for fewer years.[191] The disparity in private-practice experience is not surprising. Historically, more male lawyers than female lawyers have joined private law firms and remained in private practice for significant periods. According to a study by the American Bar Association in 2005, 76.3% of the male lawyers in the United States were in private practice; only 71.6% of the female lawyers were in private practice.[192] Although many law firms have created new non-partner tiers for lawyers with several years of experience, the appellate judges on the bench in 2015 who came from private practice presumably came from the ranks of partners. But data collected by the National Association of Women

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and minorities for the bench. *See, e.g.*, Bratton & Spill, *supra* note 11, at 514; Hurwitz et al., *supra* note 118, at 338.

189. *See infra* Table 7.

190. *See infra* Part III.E (discussing non-whites' representation in the set of appellate judges).

191. The multivariate analysis in Table 6 demonstrates the same statistically significant outcome from a different perspective: holding all other factors constant, a judge with private-practice experience is 38% less likely to be a woman than a judge with another career path. *See infra* Table 6.

192. CLARA N. CARSON & JEEYOON PARK, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005, at 9 (2012).

Lawyers in 2015 show that women make up only 18% of law firm equity partners and 28% of non-equity partners.[193]

Beyond these differences, Table 7 shows no other statistically significant distinctions between the career paths of female judges in the overall data set and their male counterparts.[194] Given that, generally speaking, women are represented overall on state appellate benches at about the same rate as they are present in the practicing bar, among most selection methods it appears that career paths other than private practice provide women with satisfactory routes to the bench. Conversely, it appears that only in merit-selection states may a lack of private-practice experience disadvantage a female judicial aspirant.

Looking at other characteristics, female judges are more than a year younger than their male counterparts at the time of selection, a statistically significant margin. One reason may lie in the relative opportunity costs men and women must pay to join the bench. That is, to the extent that more men are earning lucrative incomes in private practice, they must forego more income to become judges than the women who seek to move to the bench from government-law, legal-aid, or criminal-defense practices.[195]

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193. Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues: Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms*, WOMEN LAW. J., no. 4, 2015, at 25, 26. These findings are consistent with those reported by the ABA, which found that women made up only 20.2% of all partners and 17% of equity partners in private law firms. AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2014) [hereinafter ABA]. The NAWL data reflect a slight upward progression for women, although it is not consistent year over year. According to the NAWL, 24% of new equity partners in 2014 were women, and "[a]mong the non-equity partners who graduated from law school in 2004 and later, 38 percent were women . . . ." Rikleen, *supra*, at 29–30. Both studies reported that about 44% of the associates in private law firms are women. *Id.* at 26; ABA, *supra*, at 2. Observers cite many different factors for why women fail to progress into partnership ranks at the same rate as men, including:

> [T]he impact of children and other family responsibilities on women's careers; bias, whether implicit or explicit; male-centered social norms and expectations about how to progress; outdated law firm cultures, policies, and structures that hinder the development of talent from diverse lawyers; the short-term business focus of many firms; and social norms among men versus women with respect to rainmaking and client development.

STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, AM. BAR FOUND., FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 3–4 (2015).

194. The female judges are more likely than the male judges to have served as criminal-defense or legal-aid lawyers or as civil-practice government lawyers, but the differences are not quite statistically significant. *See infra* Table 7.

195. The age difference between men and women in this data set is consistent with what Martin et al., observed between men and women on states' highest courts in 1999. At that

Table 6 also shows that, holding all other factors constant and by statistically significant margins, a judge who has been elected to the American Law Institute is much more likely to be a woman, as is a judge who has served a judicial clerkship. Judicial clerkships generally are awarded to recent law graduates based on class standing, faculty recommendations, writing ability, and service on academic law journals. While nearly 30% of the female judges are former judicial clerks, only 25% of the male judges chose to clerk.[196] It seems likely that new law-school graduates who are temperamentally inclined to seek judicial clerkships might include lawyers who, years later, would seek the intellectual challenges of the appellate bench.[197] That a higher proportion of the women than the men in the data set are former judicial law clerks, however, may indicate another factor also is at work. Although the difference between the percentages of former judicial clerks among the women and the men across all selection methods is—barely—not statistically significant, a clerkship might be an alternative means by which a woman may demonstrate the intelligence, integrity, and legal ability required for the appellate bench. This may be particularly true with respect to women who, for reasons of temperament or work/life balance, decide not to pursue partnerships in large law firms or high-profile positions in other legal arenas.[198]

Academic credentials might afford the same women another means of demonstrating they are worthy of judicial appointment. But by a significant margin, fewer female judges than male judges boast a degree from a ranked law school; more of the women than the men attended law school in the state in which they sit.[199]

The object of this analysis is to discern whether merit selection treats certain characteristics in women differently than other selection methods treat those characteristics, and ultimately, whether merit selection treats those characteristics differently in women than in men. Toward that end, the focus next turns to differences between the characteristics of male and female judges produced by the respective selection methods.

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time, the average age of white men at the time of selection to state supreme court benches was 50.5, compared to 48.3 for non-white men and 46.4 for white women. Martin & Pyle, *supra* note 12, at 41 tbl.1. The average age of all state supreme court justices when they attained the bench declined from 53 in 1980 and 1981 to 49.4 in 1999. *Id.* at 41.

196. *See infra* Table 7.

197. This may be true also for lawyers who, later in their career, seek election to the ALI.

198. According to the ABA, women filled 51% of all judicial clerkship positions during the 2009–2010 term (the most recent reported). ABA, *supra* note 193, at 5. During the 2011–2012 school year, however, women represented only 46.7% of law school enrollment. *Id.*

199. *See infra* Table 7. At the same time, as shown in Table 6, to a statistically significant degree and holding other factors constant, judges who attended in-state undergraduate institutions are less likely than otherwise to be female. *See infra* Table 6.

As seen in Table 8, there are few statistically significant differences in the relative characteristics of men and women chosen by the respective selection methods.[200] In other words, when male or female judges on average tend to be more or less likely to have had a particular career path, that same tendency usually is seen across all selection methods. There are three exceptions, however, arising on benches in merit-selection states. First, the significant overall private-practice differential between male and female members of the bench is greatest by far in merit-selection states. Among those judges, nearly 89% of the men have practiced in the private sector; only 74% of the women have done so. Second, the difference between the men and women who have commercial- or business-law experience is much greater in merit selection—25% and 15%, respectively—than elsewhere. Third, a significantly greater percentage of women chosen by merit selection have served judicial clerkships than their male counterparts—36% compared to 22%. Although, as noted, female judges overall are more likely than male judges to have clerked, in no other selection method is the margin statistically significant.

For a closer look, Tables 9 and 10 show the results of multivariate analyses of the career paths of judges chosen by merit selection and those chosen by all other selection methods.[201] In terms of prior legal experience, holding all other factors constant, judges chosen by merit selection who have private-practice experience are significantly less likely to be female than those without private-practice experience. Although judges chosen by other selection methods who have practiced in the private sector also are less likely to be female than those with other career paths, the difference is not statistically significant. By contrast, holding everything else constant, a merit-selected judge who has practiced in government is 40% more likely to be a woman than a merit-selected judge without government-law experience. At the same time, a judge with prior government experience who is selected by any other method is no more likely to be a woman than one without prior government experience. A judge selected by merit who served a judicial clerkship is more than twice as likely to be a woman as a judge who did not clerk; no similar disparity is seen among judges selected by other methods.

In sum, female judges in merit-selection states are considerably less likely to have private-practice or business-law experience than male judges

200. *See infra* Table 8.
201. *See infra* Table 9, Table 10.

in merit-selection states or than female judges in other states.[202] By itself, the relatively low rate of women in private practice does not explain why proportionately fewer women are chosen by merit selection than by other selection methods. It is not simply that merit selection prefers private-practice and business-law experience: other selection methods in which women succeed at about the same rate as they are represented in the bar choose even higher percentages of judges with private-practice experience than does merit selection.[203]

One possible explanation consistent with the data is that merit selection does not value women's private-practice and business-law experience to the same degree as it values men's private-practice and business-law experience, and does not value women's private-practice and business-law experience to the same degree that other selection methods do. Why might this be so? The explanation may lie in the *nature* of women's private-practice experiences.

As discussed, female judges' private-practice careers are shorter than those of male judges. This is true across the bar: according to a 2005 ABA study, 81.1% of all women thirty-nine years of age or younger were in private practice; of women forty years and older, that percentage dropped to 65.1%.[204] The subjective nature of the commercial-law demographic and the ambiguity of the available data sources makes it difficult to track the duration of the judges' respective experiences in business law or complex litigation, but there is no reason to conclude that the same distinction does not exist in the respective careers of the male judges and the female judges who come from that subset of private practice.

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202. As shown in Table 11, of the female judges selected by merit selection, 74% have practiced in the private sector; by contrast, 80% of female judges selected by other means have private-practice experience. For purposes of comparison, Table 11 shows that proportionately *more* of the male judges (nearly 89%) chosen by merit selection have practiced in the private sector than the male judges chosen by other methods (85%). Further, although the differences are not statistically significant, male judges who come to the bench through merit selection are more likely to have private-practice experience than in other selection methods. *See infra* Table 11. The percentage of women who have prior government-law experience is roughly the same across all selection methods, but men selected by merit are less likely than men selected by other means to have served government in a non-prosecutorial role. And, in contrast to their female counterparts, men chosen by merit selection are not more likely to have served judicial clerkships (in fact, they are less likely to have done so than men selected by other means). *See id.*

203. As shown in Table 1, higher percentages of judges in election and legislative-selection states have practiced in the private sector than in merit-selection states. *See infra* Table 1.

204. Comparable figures for men were 87% and 73.6%, respectively. CARSON & PARK, *supra* note 192, at 9–10; *see also* TORRES-SPELLISCY ET AL., *supra* note 13, at 7 ("To the extent that Commissioners [in merit selection states] view being a partner as a mark of quality for judicial nominating Commissions, the apparent discrimination inherent in the partnership track at law firms may stall the careers of more female judicial applicants.").

Viewing these facts through the lens of merit selection, women who have spent less time as partners at large law firms or in other business-law practices may be less likely than their male counterparts to have formed significant relationships with clients that can influence appointment in merit-selection states. Recall that critics of merit selection contend it unduly favors applicants supported by the traditionally powerful, including state bar leaders and business interests. It seems possible that to the extent those interests carry weight in merit selection, they tend to favor male candidates over female candidates. Implicit bias may be at work, but more fundamentally, the nature of women's experiences in private practice may hinder them from gaining support among business interests and bar leadership in merit selection.[205] Fewer women in private practice are equity partners in their law firms; it would seem to follow that fewer women manage significant business–client relationships for their firms.[206] Put simply, to the extent that business interests wield influence in merit selection, they may be more likely to exercise that influence in favor of the lawyers who have represented them in significant roles, and, at least to date, those lawyers tend to be male, not female.

Establishment and business interests are not the only influences brought to bear on the nominating commission and the governor in merit selection, and merit does not seem to advantage men over women when they share career paths other than private practice. In fact, as noted, merit selection is a more favorable path to the bench for women than men with prior non-prosecutorial government service.[207] Nationwide, on a proportionate basis, half again as many more female lawyers than male lawyers are in government service.[208] Consistent with female lawyers' greater representation in government service, proportionately more female judges than male judges are former government lawyers, although the difference is not statistically significant

205. *See* ESTERLING & ANDERSEN, *supra* note 34, at 11 (nominating commissions "should incorporate the value of diversity into their deliberations"); TORRES-SPELLISCY ET AL., *supra* note 13, at 2, 11, 36 (urging judicial nominating commissions to "grapple fully with implicit bias").

206. A random survey of cases filed in the Northern District of Illinois in 2013 showed that "[i]n civil cases, men are three times more likely than women to appear as lead counsel and to appear as trial attorneys." SCHARF & LIEBENBERG, *supra* note 193, at 4. The disparity is even more pronounced in litigation typically involving business: 85% of lead counsel in contract cases were men. *Id.* at 10.

207. *See infra* Table 11.

208. CARSON & PARK, *supra* note 192, at 9. According to data collected in 2005, 3.9% of all employed male lawyers practiced in state or local government; 6.5% of all employed female lawyers did so. *Id.*

across all selection methods.[209] The difference is greatest among merit-selected judges, however, where 28% of the female judges but only 19% of the male judges have prior non-prosecutorial governmental service.[210] Some contend that women are more likely to find equal opportunity in public-sector jobs than in the private sector.[211] To the extent that is true for female lawyers, it suggests that, in general, women may succeed in government practice to a greater degree than in private practice.[212] Perhaps that explains why merit selection seems to value prior government-law experience among women more than it values their prior private-practice experience.[213]

Other objective credentials also advantage a woman seeking appointment through merit selection. A judicial clerkship is much more valuable to a woman in a merit-selection state than in a state with another selection method. Recall that, holding all other factors constant, a merit-selected judge who has served a clerkship is more than twice as likely to be a woman than one without a clerkship.[214] Although merit selection chooses about the same percentage of former law clerks as other selection systems, by a significant margin, it chooses more women than men who have clerked.[215]

By the same token, about the same proportion—13%—of the female judges and the male judges on merit-selected benches graduated from ranked law schools.[216] That is about the average among all the male judges, but only 8% of all the female judges graduated from ranked law schools.[217] These data indicate that, by contrast to private-practice experience and commercial- or business-law experience, a degree from a ranked law school is an objective

209. *See infra* Table 7.

210. *See infra* Table 8. Consistent with these results, holding all other factors constant, a merit-selected judge who comes from government service is 40% more likely to be a woman than a judge with another career path. *See infra* Table 9.

211. *See, e.g.*, DAVID COOPER, MARY GABLE & ALGERNON AUSTIN, ECON. POLICY INST., THE PUBLIC-SECTOR JOBS CRISIS 2 (2012) ("Though discrimination in the public sector likely still exists, government remains a model of how to achieve greater equality in employment and workplace diversity." (citation omitted)).

212. A random study of cases filed in the Northern District of Illinois in 2013 showed "a greater likelihood of women being lead counsel in civil cases" in which a government entity—federal, state or municipal—was a party. SCHARF & LIEBENBERG, *supra* note 193, at 11.

213. Similarly, as shown in Tables 1 and 8, although merit selection chooses far fewer former prosecutors than former private practitioners, about the same percentage of women as men selected by merit are former prosecutors. *See infra* Table 1, Table 8.

214. *Compare infra* Table 9, *with infra* Table 10. A judicial clerkship also advantages a female judicial aspirant in other selection systems, but not to the same degree.

215. *See infra* Table 1, Table 8.

216. *See infra* Table 8.

217. *See infra* Table 7.

credential to which merit selection gives equal and considerable weight, regardless of gender.[218]

In summary, it seems quite possible that the underrepresentation of women on appellate benches in merit-selection states may be related to how merit selection treats women's private-practice experience. By all analyses, female judicial candidates from private practice and those with commercial- and business-law experience do not succeed at the same rate as men with those career paths in merit selection and as comparable women in other selection systems. These results may lend support to the proposition that, as critics have argued, merit selection may unduly advantage judicial aspirants who have developed strong relationships with business and other establishment interests. To the extent that, for whatever reason, women in private practice have not developed those relationships, they may be disadvantaged by merit selection. The same gender differences are not seen among benches in merit-confirmation states, where the governor's choice of whom to appoint is constrained by a confirmation requirement. This topic deserves additional research, but perhaps whatever gender disparities result from the influence that business interests wield in merit selection in favor of lawyers who have represented them in private practice are outweighed in merit-confirmation by the wider universe of political interests implicated by a confirmation requirement.

The persistent gender disparity on merit-selected appellate benches argues in favor of continued efforts among judicial nominating commissions and governors in merit-selection states to recruit diverse judicial applicants and give fair weight to comparable experiences of female candidates.[219] At the same time, the data also show that merit selection fairly recognizes and values other prior legal experience and credentials in women. Merit selection seems

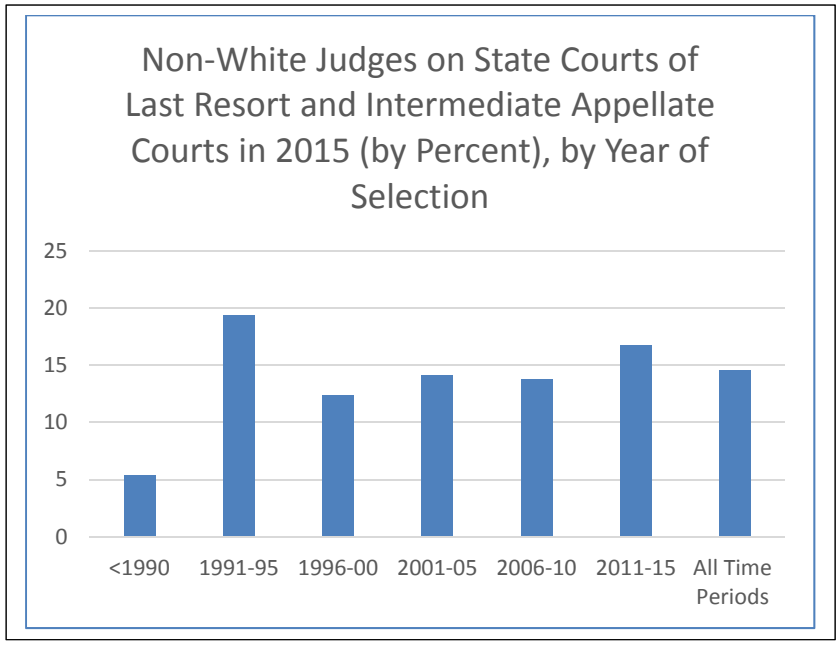
218. Among judges selected by other methods, by a statistically significant margin, a judge who attended a ranked law school is less likely to be a woman. *Compare infra* Table 9, *with infra* Table 10.

219. For example, a business executive in a merit-selection state may contact the nominating commission or the governor with praise for a judicial candidate to whom that executive entrusted his company's representation in a high-stakes negotiation or litigation. That opinion is entitled to due weight, but best practices would require commission members and the governor also to consciously consider whether another candidate with a different career path may have comparable intellect, judgment, integrity and perspective. *See* Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 90, 118, 120 (2007); Steven Zeidman, *Careful What You Wish For: Tough Questions, Honest Answers, and Innovative Approaches to Appointive Judicial Selection*, 34 FORDHAM URB. L.J. 473, 476–78 (2007); TORRES-SPELLISCY ET AL., *supra* note 13, at 11–12.

to give equal weight to a woman's prior prosecutorial experience as it gives to a man's. And, to a greater extent than other selection methods, merit selection seems to value a woman's other government-law experience. Merit selection also seems to afford significantly greater weight to a judicial clerkship served by a woman than by a man; this may afford success to a woman who has served a clerkship but lacks private-practice or business-law experience. Along with a judicial clerkship, a degree from a ranked law school is another credential of intellectual competence that may help a female applicant succeed in merit selection even if she is unable to call on business interests for support with the nominating commission or the governor.

E. Non-Whites on State Appellate Benches

As shown in the chart below, from barely more than 5% of judges selected before 1990, non-whites now make up nearly 15% of the members of state appellate courts.[220] That percentage is only slightly below the rate at which non-whites today are represented in the national labor market for lawyers. According to the U.S. Statistical Abstract, 15.7% of the employed lawyers in the United States in 2014 were black, Asian, Hispanic, or Latino.[221]



220. This study classed Black, Asian, Hispanic and Latino judges together as non-white.
221. STATISTICAL ABSTRACT, *supra* note 180, at 3 tbl.11.

Study of the proportion of non-whites among the members of the bar in each state is beyond the scope of this project, but Reddick found in 2008 that "states with a higher percentage of minority attorneys were more likely to have minority judges," both in their appellate courts and on their trial benches.[222] Further, that relationship existed without regard to the political affiliation of the governor or party registration numbers.[223] Alozie likewise found that the proportion of Hispanic and black judges in a state correlated to the percentage of Hispanics and blacks among the practicing bar.[224]

Table 12 shows that, viewed broadly, although there are some differences among selection methods in the rates at which non-whites have been selected to the bench, they are not statistically significant.[225] Categorized by formal selection methods, between 12.55% and 17.24% of appellate judges sitting in 2015 are non-whites. The significant drop-off in the proportion of women who come to the bench in merit-selection states is not seen among non-whites. Although only non-partisan election states have a smaller percentage than merit selection of non-whites on their appellate benches, non-whites are not statistically significantly disadvantaged in merit-selection states.

The respective presence of non-whites on the appellate bench in election states, however, is due in large part to the appointing authorities, not to the voters. By a statistically significant margin, judges who are appointed to fill interim vacancies in election states are more likely to be non-white than their colleagues who first come to the bench by election in those states—18% compared to 11%. The margin is the starkest in non-partisan election states.[226] Based on their study of state courts of last resort in election states

222. REDDICK ET AL., *supra* note 69, at 6.

223. *Id.*

224. Alozie, *supra* note 65, at 318, 324. Alozie examined Hispanics and blacks separately and found no indication that increased Hispanic voter registration may cause appointing authorities to appoint more Hispanics. *Id.* at 320. He found, however, that increases in the number of Hispanic voters do significantly increase Hispanics' chances of winning the bench in partisan-election states. *Id.* The same was not true with blacks, however. He speculated that, while voters can readily distinguish Hispanic judicial candidates by their names, that is not so with black candidates. *Id.* at 323.

225. *See infra* Table 12.

226. *See infra* Table 3. These findings are not inconsistent with those of Reddick et al., who concluded that 89.2% of all minority judges on state courts of last resort in 2008 were selected by gubernatorial appointment (including merit, merit-confirmation and appointment to fill interim vacancies in election states). REDDICK ET AL., *supra* note 69, at 4 tbl.2. That percentage is significantly higher than the proportion (67.1%) of all the state high court judges in the study who were appointed by a governor. *Id.* Their multivariate analysis also concluded that, in considering judges on state high courts, "[a]ppointive methods" (of all varieties) were

from 1964–2004, Holmes and Emery likewise observed that non-white judges are advantaged by interim appointment.[227] Although only 4% of first-elected judges in Holmes et. al's study were non-white, 11% of the judges appointed to fill interim vacancies were non-white.[228] Given the relatively small representation of non-whites on state appellate benches at the time of this study, it is difficult to draw statistically significant data-based explanations for these observations. Non-whites seeking election to the bench, however, face the usual obstacles encountered by minority political candidates when the relevant voter pool is not substantially diverse.[229] On the other hand, when governors fill interim vacancies by appointment in election states, they may be more inclined than the general electorate to select non-white candidates.[230]

Finally, as shown in Table 7, non-whites are statistically significantly overrepresented among female judges in the data set. While nearly 21% of the female judges are non-white, just under half that figure—roughly 11%—of the male judges are non-white.

CONCLUSIONS

The data collected for the current study reveal significant distinctions among the benches chosen by the various selection methods.

Close study of the selection mechanisms in the various states that employ what prior studies broadly have called "appointment" systems reveals that gubernatorial appointments in those states in fact are subject to two significant constraints—an independent nominating commission akin to that mandated in merit-selection states, and a legal requirement that the governor's choice be confirmed by a separately elected body before the appointee may take

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more favorable to minorities than elections. *Id.* at 6 tbl.3. For state intermediate appellate courts, however, they found no relationship between selection method and racial diversity. *Id.* at 6.

227. Holmes & Emrey, *supra* note 169, at 7.

228. *Id.* They also found that while 15% of interim appointments by Democratic governors were of non-whites, Republican governors appointed non-whites at the rate of 7%. *Id.* at 10.

229. Writing about the black experience in Michigan, where judges are chosen by direct election, Crockett observed that "blacks were not appointed to judicial vacancies in anything like representative numbers until the late 1960's when their voting potential reached the point where they could elect black judges of their own selection and were no longer dependent on appointments[.]" Crockett, *supra* note 55, at 442. When Reddick studied the environment from which appellate judges on the bench in 2008 were drawn, she concluded that "statewide selection may have enhanced prospects for women to serve on courts of last resort but limited such opportunities for minorities." She cited data showing that although 80.3% of judges on state courts of last resort were selected on a statewide basis, 83.7% of female judges and 75.7% of minority judges were selected in that manner. REDDICK ET AL., *supra* note 69, at 4.

230. REDDICK ET AL., *supra* note 69, at 4.

the bench. These constraints in merit-confirmation states result in distinctive appellate benches, with more former prosecutors and government lawyers, more former trial court judges, and fewer judges who come from private practice. Judges chosen by merit-confirmation also have had longer legal careers than judges selected by other means, and more have served judicial clerkships.

Otherwise, the objective characteristics of appellate judges in election states are significantly different in only a handful of respects from those of judges appointed through merit selection and merit-confirmation. More of the judges in election states than in merit-selection or merit–confirmation states come from private practice, fewer of them have prior judicial experience, and more of them were educated locally. But prior researchers understood that the objective characteristics of judges appointed to fill interim vacancies in election states are not very different from those of judges who first come to the bench by election. The data in this study demonstrate that is not so: in several respects, most notably race, appointed judges in election states are significantly different from their elected counterparts, in ways that tend to bring the characteristics of the entire elected bench more in line with the norm across all selection methods.

The data do not offer conclusive explanations for these findings, which deserve additional research. It seems possible that to the extent the characteristics of appellate judges in merit-confirmation states are different from those of judges in merit-selection states, the reason has less to do with the governor's appointment power and more to do with the power of the elected body that must confirm an appointment. Further study might be directed to the factors at play when governors or other authorities in election states fill interim vacancies on the appellate bench by appointment, and why they so frequently select judges who are distinctively different in some respects from the appointees' elected colleagues.

Across all states, women are represented on state appellate benches at a rate slightly higher than their numbers among the practicing bar, nationwide. By a significant margin, however, female candidates are disadvantaged by merit selection, but not by merit-confirmation. Additional study of the characteristics of judicial applicants in merit-selection states, compared to those of the candidates that nominating commissions advance and the judges the governors finally appoint, may help explain the disparity. How the confirmation requirement in merit-confirmation states affects a governor's decision of whether to appoint a man or a woman also deserves scrutiny. At present, however, the data suggest that merit selection does not value private-

practice or business-law experience in women to the same extent it values that experience in men, and does not value such experience in women to the same extent as other selection methods do. Insofar as this anomaly may be related to women's difficulties in mustering support among so-called establishment or business interests that are thought to wield power in merit selection, conscious efforts by the nominating commission and the governor to give thoughtful consideration to the career paths of female candidates may overcome that disadvantage. In the meantime, merit selection favors women with prior government-law experience and those who can demonstrate objective intellectual credentials such as a judicial clerkship or a degree from a ranked law school.

Finally, non-whites are represented across and within all selection methods at rates roughly equivalent to their representation in the bar. By a significant margin, however, non-whites on the bench in election states were first appointed, not elected. And overall, women on the appellate bench are disproportionately non-white. These disparities also deserve further attention.

TABLES

Table 1: All Judges, by State Selection Method

	All Judges	Merit	Merit-Confirm	Partisan Election	Non-Partisan Election	Legis	P=
N Judges	1285	362	269	357	263	29	
% Women	35.18	28.73	36.43	39.44	37.26	34.48	0.047
% Non-White	14.55	14.09	16.73	14.72	12.55	17.24	0.791
Age at selection	51.45	51.22	53.31	50.91	50.6	51.45	0.000
Years post-law school as of selection	24.94	25.02	27	23.97	23.94	25.83	0
Former judicial law clerk (by %)	26.61	26.04	31.97	22.22	28.9	20.69	0.067
Average* yrs as judicial law clerk	1.86	2.37	1.2	2.27	1.66	1	0.000
Prior judicial experience (by %)	64.12	62.98	74.72	61.94	57.79	65.52	0.001
Average prior yrs as a judge	10.98	11.45	10.89	11.44	9.61	11.68	
Private-practice experience (by %)	83.27	84.53	74.35	86.07	87.02	86.21	0
Average yrs private practice	13.92	14.08	13.52	13.73	14.32	13.75	0.893
Commercial law/business law experience (by %)	23.35	22.1	24.54	21.67	24.33	37.93	0.321
Prosecutorial experience (by %)	37.82	34.25	43.87	40.83	33.46	31.03	0.037
Average yrs prosecutor	8.71	8.48	9.08	8.25	8.88	14.2	0.288
Gov't law experience (non-prosecutor) (by %)	24.82	21.82	32.71	23.89	21.29	31.03	0.01
Average yrs gov't lawyer (non-prosecutor)	7.75	7.29	9.05	6.42	8	7.86	0.151
Legal aid/crim defense experience (by %)	11.75	11.05	11.15	11.11	14.12	13.79	0.747
Average yrs legal aid/crim defense	6.34	6.32	6.04	5.71	7.19	3.5	0.838
In-state law school (by %)	73.15	71.27	61.34	83.89	71.86	82.76	0
Ranked law school (by %)	11.53	13.26	16.79	3.06	14.07	20.69	0
In-state undergrad (by %)	62.88	62.12	49.44	75	62.6	68.97	0
Ranked undergrad (by %)	14.5	14.36	18.22	9.19	18.7	6.9	0.003
Taught in college or law school (by %)	25.99	24.03	33.09	21.67	27	31.01	0.019
Elected to ALI (by %)	7	4.7	10.41	8.06	5.7	3.45	0.048
Authored prior law review article(s)	13.46	13.54	13.01	10.56	17.11	17.24	0.196
Average prior law review articles	2.46	2.18	4.17	1.55	2.07	3.6	0.004

* "Average" in this Table means the average for all those judges in the category who share the designated legal experience or characteristic.

Table 2: Judges in Merit-Selection and Merit-Confirmation States, Election States							
	All Judges	Merit	Merit-Confirm	*P* =	Merit Selection, Merit-Confirmation States	Election States	*P* =
N Judges	1285	362	269		631	620	
% Women	35.23	28.73	36.43	0.0403	32.01	38.52	0.016
% Non-White	14.55	14.09	17.47	0.3515	15.24	13.8	0.471
Age at selection	51.44	51.22	53.31	0.0001	52.11	50.8	0.0016
Years post-law school as of selection	24.9	25.02	27	0.0002	25.86	23.96	0
Former judicial law clerk (by %)	26.61	26.24	31.97	0.1034	28.57	25.04	0.158
Prior judicial experience (by %)	64.11	62.98	74.72	0.0017	67.99	60.19	0.004
Private-practice experience (by %)	83.27	84.53	74.35	0.0015	80.19	86.47	0.003
Average* yrs private practice	13.92	14.08	13.52	0.4827	13.86	13.99	0.8152
Commercial law/business law experience (by %)	23.35	22.1	24.54	0.4738	23.14	22.79	0.885
Prosecutorial experience (by %)	37.82	34.25	43.87	0.014	38.35	37.72	0.818
Average yrs prosecutor	8.64	8.48	9.08	0.4754	8.78	8.49	0.6422
Gov't law experience (non-prosecutor) (by %)	24.64	21.82	32.71	0.0021	26.47	22.79	0.131
Average yrs gov't lawyer	7.75	7.29	9.05	0.118	8.24	7.11	0.1498
Legal aid/crim defense experience (by %)	11.75	11.05	11.15	0.9677	11.09	12.38	0.479
Average yrs legal aid/crim defense	6.33	6.32	6.04	0.8424	6.2	6.6	0.7241
In-state law school (by %)	73.15	71.27	61.34	0.0086	67.04	78.81	0
Ranked law school (by %)	11.53	13.26	16.73	0.2248	14.76	7.7	0
In-state undergrad (by %)	62.88	62.12	49.44	0.0015	56.71	69.74	0
Ranked undergrad (by %)	14.5	14.36	18.22	0.1926	16.01	13.2	0.161
Taught in college or law school (by %)	25.99	24.03	33.09	0.0121	27.89	23.92	0.108
Elected to ALI (by %)	7	4.7	10.41	0.0058	7.13	7.06	0.962
Authored prior law review articie(s) (by %)	13.46	13.54	13.01	0.8481	13.31	13.32	0.996
Average prior law review articles	2.46	2.18	4.17	0.0278	3.01	1.83	0.0167

* "Average" in this Table means the average of all those judges in the category who share the designated legal experience or characteristic.

Table 3: Elected and Appointed Judges in Election States

	All Judges	All Election States (elected)	All Election States (appointed)	P=	Partisan Election States (elected judges)	Partisan Election States (appointed judges)	Non-Partisan Election States (elected judges)	Non-Partisan Election States (appointed judges)
N Judges	1285	370	253		251	106	116	147
% Women	35.18	38.65	38.33	0.9381	39.76	38.68	36.21	38.1
% Non-White	14.55	11.08	17.79	0.017	13.78	16.98	5.17	18.37
Age at selection	51.45	50.71	50.88	0.7965	50.58	51.7	50.99	50.29
Years post-law school at selection	24.94	23.63	24.44	0.2099	23.49	25.13	23.93	23.95
Former judicial law clerk (by %)	26.61	22.7	28.46	0.1037	20.47	26.42	27.59	29.93
Average* yrs as judicial law clerk	1.86	2.16	1.75	0.2358	2.4	2.04	1.78	1.57
Prior judicial experience (by %)	64.12	61.35	58.5	0.4757	61.81	62.26	60.34	55.78
Average prior yrs as a judge	10.98	10.54	10.94	0.5543	11.31	11.77	8.89	10.25
Private practice experience (by %)	83.27	85.87	87.35	0.5964	86.56	84.91	84.35	89.12
Average yrs private practice	13.92	13.77	14.29	0.5159	13.19	14.94	14.93	13.84
Commercial law/business law experience (by %)	23.35	18.64	28.85	0.0028	17.32	32.08	21.55	26.53
Prosecutorial experience (by %)	37.82	41.35	32.41	0.0238	44.09	33.02	35.34	31.97
Average yrs prosecutor	8.71	8.18	9.06	0.3491	7.59	10.17	9.6	8.19
Gov't law experience (non-prosecutor) (by %)	24.82	21.62	24.5	0.4001	23.23	25.47	18.1	23.81
Average yrs gov't lawyer (non-prosecutor)	7.75	6.52	7.79	0.2161	6.52	6.23	6.53	8.9
Legal aid/crim defense experience (by %)	11.75	13.28	11.07	0.4114	13.39	5.66	13.04	14.97
Average yrs legal aid/crim defense	6.34	6.26	7.1	0.6527	5.89	4.67	6.77	7.5
In-state law school (by %)	73.15	84.05	71.15	0.0001	87.01	76.42	77.59	67.35
Ranked law school (by %)	11.53	7.3	8.3	0.6454	2.76	3.77	17.24	11.56
In-state undergrad (by %)	62.88	72.4	65.87	0.0826	76.89	70.48	62.61	62.59
Ranked undergrad (by %)	14.5	13.24	13.04	0.9424	9.09	9.43	22.61	15.65
Taught in college or law school (by %)	25.99	22.97	25.3	0.5051	20.47	24.53	28.45	25.85
Elected to ALI (by %)	7	5.41	9.49	0.051	5.12	15.09	6.03	5.44
Authored prior law review article(s)	13.46	10	18.18	0.0031	7.09	18.87	16.38	17.69
Average prior law review articles	2.46	1.73	1.91	0.633	1.28	1.8	2.16	2

* "Average" in this table means the average of all those judges in the category who share the designated legal experience or characteristic.

Table 4: Judges in Partisan Election States, Non-Partisan Election States							
	All Judges	Election States	All Other States	*P*=	Partisan Election States	Non-Partisan Election States	*P*=
N Judges	1285	616	660		360	263	
% Women	35.18	38.52	32.12	0.016	39.44	37.26	0.58
% Non-White	14.55	13.8	15.33	0.732	14.72	12.55	0.4378
Age at selection	51.45	50.78	52.08	0.0017	50.91	50.6	0.6306
Years post-law school at selection	24.94	23.96	25.86	0	23.97	23.94	0.956
Former judicial law clerk (by %)	26.61	25.04	28.22	0.198	22.22	28.9	0.0577
Average* yrs as judicial law clerk	1.86	1.97	1.78	0.509	2.27	1.66	0.0746
Prior judicial experience (by %)	64.12	60.19	67.88	0.0041	61.94	57.79	0.2967
Average prior yrs as a judge	10.98	10.7	11.21	0.2579	11.44	9.61	0.006
Private practice experience (by %)	83.27	86.47	80.45	0.004	86.07	87.02	0.7328
Average yrs private practice	13.92	13.99	13.86	0.8061	13.73	14.32	0.4642
Commercial law/business law experience (by %)	23.35	22.79	23.79	0.674	21.67	24.33	0.4338
Prosecutorial experience (by %)	37.82	37.72	38.03	0.909	40.83	33.46	0.0609
Average yrs prosecutor	8.71	8.49	8.9	0.5142	8.25	8.88	0.4984
Gov't law experience (non-prosecutor) (by %)	24.82	22.79	26.67	0.108	23.89	21.29	0.4463
Average yrs gov't lawyer (non-prosecutor)	7.75	7.11	8.22	0.1537	6.42	8	0.1249
Legal aid/crim defense experience (by %)	11.75	12.38	11.21	0.517	11.11	14.12	0.261
Average yrs legal aid/crim defense	6.34	6.6	6.1	0.6587	5.71	7.19	0.4254
In-state law school (by %)	73.15	78.81	67.73	0	83.89	71.86	0.0003
Ranked law school (by %)	11.53	7.7	15.02	0	3.06	14.07	0
In-state undergrad (by %)	62.88	69.74	57.25	0	75	62.6	0.0009
Ranked undergrad (by %)	14.5	13.2	15.61	0.222	9.17	18.63	0.0005
Taught in college or law school (by %)	25.99	23.92	28.03	0.093	21.67	27	0.1239
Elected to ALI (by %)	7	7.06	6.97	0.948	8.06	5.7	0.2584
Authored prior law review article(s)	13.46	13.32	13.48	0.932	10.56	17.11	0.0174
Average prior law review articles	2.46	1.83	3.04	0.0127	1.55	2.07	0.1774

* "Average" in this Table means the average of all those judges in the category who share the designated legal experience or characteristic.

Table 5: Female Judges, by Selection Method, Selection Date

Selection Method	≤ 1990	1991-1995	1996-2000	2001-2005	2006-2010	2011-2015	All Time Periods
All Selection Methods (percent women)	17.86	31.18	35.95	32.37	40.11	35.58	35.23
Merit Selection	18.18	14.29	30.19	26.98	33.04	29.35	28.73
Merit-Confirmation	15	42.86	37.04	35.71	37.33	40.26	36.43
Partisan Election States	13.33	35.48	50	38.36	48.89	32.71	39.44
Non Partisan Election States	22.22	40	28	27.66	46.67	37.93	37.26
Legislative Selection	100		0	0	21.43	75	34.48
P=	0.283	0.132	0.113	0.441	0.064	0.093	0.047

Table 6: All Judges, Selected Characteristics		
Women	Odds Ratio	*P*=
Merit selection	0.685	**
White	0.536	***
Age	0.975	**
Judicial clerkship	1.381	*
Prior judicial experience	1.230	
Private-practice experience	0.622	**
Commercial/business law experience		
Former prosecutor	0.841	
Former gov't lawyer (non-prosecutor)	1.141	
Legal aid/crim defense exp.	1.222	
In-state law school	1.381	*
Ranked law school	0.622	*
In-state undergrad	0.713	*
Ranked undergrad	0.956	
Elected to ALI	2.003	**
Law review author	0.811	
Constant	4.620	**
*p<.05, **p<.01, ***p<.001		

Table 7: All Judges, Characteristics by Gender				
	All Judges	Women	Men	*P*
N Judges	1285	452	833	
% Non-White	14.55	20.62	11.31	0
Age at selection	51.44	50.69	51.84	0.0081
Former judicial law clerk (by %)	26.61	29.65	25	0.072
Average* yrs as judicial law clerk	1.86	2.01	1.77	0.3031
Former trial judge (by %)	58.44	60.4	57.4	0.2984
Average yrs as trial judge	10.85	10.74	10.92	0.7059
Private-practice experience (by %)	83.37	78.71	85.9	0.001
Average yrs private practice	13.92	12.24	14.75	0
Commercial law/business law experience (by %)	23.3	21.68	24.19	0.3108
Prosecutorial experience (by %)	37.88	37.17	38.27	0.6985
Average yrs prosecutor	8.71	8.17	8.99	0.2154
Gov't law experience (non-prosecutor) (by %)	24.79	27.21	23.47	0.1378
Average yrs govt lawyer (non-prosecutor)	7.75	7.04	8.19	0.1429
Legal aid/crim defense experience (by %)	11.75	13.97	10.56	0.071
Average yrs legal aid/crim defense	6.39	7.26	5.74	0.1826
In-state law school (by %)	73.11	75.22	71.96	0.218
Ranked law school (by %)	11.46	8.41	13.12	0.0114
In-state undergrad (by %)	63.32	60.27	64.97	0.0966
Ranked undergrad (by %)	14.42	13.05	15.16	0.3046
Taught in college or law school (by %)	25.99	24.78	26.71	0.4507
Elected to ALI (by %)	7	9.51	5.66	0.0097
Authored prior law review article(s) (by %)	13.41	12.17	14.08	0.3375
Average prior law review articles	2.46	2.07	2.64	0.2797

* "Average" in this Table means the average of all those judges in the Category who share the designated legal experience or characteristic.

Table 8: All Judges, by Gender, State Selection Method						
	Merit			Merit-Confirm		
	Women	Men	*P*=	Women	Men	*P*=
N Judges	104	258		98	171	
Age at selection	50.56	51.48	0.2387	52.66	53.68	0.2405
Former judicial law clerk (by %)	35.58	22.18	0.0085	28.57	33.92	0.3674
Average* yrs as judicial law clerk	2.44	2.33	0.842	1.11	1.24	0.1464
Prior judicial experience (by %)	65.38	62.02	0.5493	77.55	73.1	0.4207
Average prior yrs as a judge	12.33	11.07	0.1934	11.68	10.4	0.1506
Private-practice experience (by %)	74.04	88.76	0.0004	70.41	76.61	0.2641
Average yrs private practice	11.47	14.94	0.0027	12.49	14.08	0.2029
Commercial law/business law experience (by %)	15.38	24.81	0.0508	22.45	25.73	0.5489
Prosecutorial experience (by %)	34.62	34.11	0.927	43.88	43.86	0.9977
Average yrs prosecutor	8.48	8.48	0.9987	9.15	9.05	0.9264
Gov't law experience (non-prosecutor) (by %)	27.88	19.38	0.0767	33.67	32.16	0.8004
Average yrs govt lawyer (non-prosecutor)	6.74	7.58	0.5783	7.41	10	0.1383
Legal aid/crim defense experience (by %)	14.42	9.69	0.1947	13.27	9.94	0.4065
Average yrs legal aid/crim defense	8.18	5.3	0.1678	5.67	6.38	0.7242
In-state law school (by %)	71.15	71.32	0.9752	67.35	57.89	0.1265
Ranked law school (by %)	13.46	13.18	0.9429	12.25	19.3	0.1368
In-state undergrad (by %)	66.02	60.55	0.335	41.24	54.12	0.0431
Ranked undergrad (by %)	14.42	14.34	0.984	15.31	19.88	0.3512
Taught in college or law school (by %)	23.08	24.42	0.7876	29.59	35.09	0.3584
Elected to ALI (by %)	6.73	3.88	0.2465	11.22	9.94	0.7413
Authored prior law review article(s) (by %)	14.42	13.18	0.7549	11.22	14.04	0.5114
Average prior law review articles	2.07	2.24	0.8072	2.64	4.88	0.2834

* "Average" in this Table means the average of all those judges in the category who share the designated legal experience or characteristic.

† Table 8 continues on the next page.

Table 8: All Judges, by Gender, State Selection Method (continued)									
	Partisan Election			Non-Partisan Election			Legis		
	Women	Men	*P*=	Women	Men	*P*=	Women	Men	*P*=
N Judges	143	218		98	165		10	19	
Age at selection	50.14	51.4	0.1484	49.56	51.21	0.1031	51.5	51.42	0.9697
Former judicial law clerk (by %)	24.65	20.64	0.373	32.65	26.67	0.3022	20	21.05	0.9493
Average* yrs as judicial law clerk	2.49	2.09	0.5279	1.84	1.52	0.2633			
Prior judicial experience (by %)	61.97	61.93	0.9931	62.24	55.15	0.2618	80	57.89	0.2492
Average prior yrs as a judge	10.91	11.8	0.3005	9.02	10.02	0.3364	10.88	12.27	0.5981
Private-practice experience (by %)	85.11	86.7	0.6718	81.63	90.24	0.0449	90	84.21	0.6807
Average yrs private practice	11.81	14.96	0.0025	13.25	14.88	0.2111	13.71	13.77	0.9859
Commercial law/business law experience (by %)	21.13	22.02	0.8415	27.55	22.42	0.3507	30	42.11	0.5401
Prosecutorial experience (by %)	37.32	43.12	0.2755	33.67	33.33	0.9551	30	31.58	0.9334
Average yrs prosecutor	6.82	8.96	0.0614	7.73	9.52	0.2812	15	13.67	0.9218
Gov't law experience (non-prosecutor)	27.46	21.56	0.2001	18.37	23.03	0.3737	40	26.32	0.467
Average yrs govt lawyer (non-prosecutor)	6.22	6.63	0.7278	8.94	7.52	0.4528	2	10.2	0.2343
Legal aid/crim defense experience (by %)	13.38	9.63	0.2701	15.46	13.33	0.6341	10	15.79	0.6807
Average yrs legal aid/crim defense	6.73	4.6	0.26312	8.5	6.37	0.4596			
In-state law school (by %)	87.32	81.65	0.1533	68.37	73.94	0.3331	90	78.95	0.4718
Ranked law school (by %)	2.11	3.67	0.4029	8.16	17.58	0.0339	10	26.32	0.3198
In-state undergrad (by %)	73.05	76.28	0.4927	54.64	67.27	0.0414	60	73.68	0.467
Ranked undergrad (by %)	9.86	8.72	0.7142	15.31	20.61	0.2876	0	10.53	0.3046
Taught in college or law school (by %)	21.83	21.56	0.9515	26.53	27.27	0.8962	20	36.84	0.3694
Elected to ALI (by %)	10.56	6.42	0.1591	9.18	3.64	0.0611	10	0	0.1723
Authored prior law review article(s) (by %)	9.86	11.01	0.7294	13.27	19.39	0.2034	20	15.79	0.7849
Average prior law review articles	1.71	1.46	0.5553	1.69	2.22	0.4335	4	3.6	0.8703

* "Average" in this Table means the average of all those judges in the category who share the designated legal experience or characteristic.

Table 9: Judges Chosen by Merit Selection		
Women	Odds Ratio	*P* =
White	0.67	
Age	0.982	
Judicial clerkship	2.049	**
Prior judicial experience	1.193	
Private-practice experience	0.426	*
Commercial/business law experience	0.667	
Former prosecutor	0.786	
Former gov't lawyer (non-prosecutor)	1.411	
Legal aid/crim defense experience	1.286	
In-state law school	0.945	
Ranked law school	0.972	
In-state undergrad	1.41	
Ranked undergrad	0.901	
Elected to ALI	2.215	
Law review author	0.878	
Constant	1.911	
*p<.05, **p<.01, ***p<.001		

Table 10: Judges Chosen by All Other Selection Methods		
Women	Odds Ratio	*P* =
White	0.538	**
Age	0.972	**
Judicial clerkship	1.186	
Prior judicial experience	1.24	
Private-practice experience	0.701	
Commercial/business law experience	1.085	
Former prosecutor	0.861	
Former gov't lawyer	1.064	
Legal aid/crim defense experience	1.254	
In-state law school	1.561	*
Ranked law school	0.506	*
In-state undergrad	0.568	***
Ranked undergrad	0.959	
Elected to ALI	2.037	**
Law review author	0.767	
Constant	5.513	**
*p<.05, **p<.01, ***p<.001		

Table 11: Female, Male Judges Selected by Merit Selection and by All Other Methods

	Female Judges in Merit-Selection States	Female Judges in All Other States	P=	Male Judges in Merit-Selection States	Male Judges in All Other States	P=
N Judges	104	345		258	573	
Years post-law school at selection	23.85	23.43	0.5961	25.49	25.79	0.5953
Former judicial law clerk (by %)	35.58	27.87	0.1318	22.18	26.35	0.2
Average* yrs as judicial law clerk	2.44	1.85	0.1826	2.23	1.56	0.0108
Prior judicial experience (by %)	65.38	66.95	0.7665	62.02	63.18	0.7491
Average prior yrs as a judge	12.34	10.66	0.0624	11.07	10.88	0.7515
Private-practice experience (by %)	74.04	80.12	0.185	88.76	84.62	0.1125
Average yrs private practice	11.47	12.46	0.3167	14.94	14.66	0.7057
Commercial law/business law experience (by %)	15.39	23.56	0.076	24.81	23.91	0.7803
Prosecutorial experience (by %)	34.62	37.93	0.5403	34.11	40.14	0.0981
Average yrs prosecutor	8.48	8.08	0.7198	8.48	9.2	0.416
Gov't law experience (non-prosecutor) (by %)	27.88	27.01	0.861	19.38	25.31	0.0623
Average yrs govt lawyer (non-prosecutor)	6.74	7.13	0.7435	7.58	8.43	0.4874
Legal aid/crim defense experience (by %)	14.42	13.83	0.8793	9.69	10.99	0.5722
Average yrs legal aid/crim defense	8.18	6.97	0.5377	5.3	5.84	0.7368
In-state law school (by %)	71.15	76.44	0.2745	71.32	72.25	0.782
Ranked law school (by %)	13.46	6.9	0.0343	13.18	13.09	0.9719
In-state undergrad (by %)	66.02	58.55	0.1748	60.55	66.96	0.0742
Ranked undergrad (by %)	14.42	12.64	0.6374	14.34	15.53	0.6582
Taught in college or law school (by %)	23.08	25.29	0.6477	24.42	27.75	0.316
Elected to ALI (by %)	6.7	10.34	0.2714	3.88	6.46	0.1364
Authored prior law review article(s) (by %)	14.42	11.49	0.4239	13.18	14.49	0.6168
Average prior law review articles	2.07	2.08	0.9915	2.24	2.81	0.421

* "Average" in this Table means the average of all those judges in the category who share the designated legal experience or characteristic.

Table 12: Non-White Judges, by Selection Method, Selection Date							
Selection Method	**≤1990**	**1991-95**	**1996-00**	**2001-05**	**2006-10**	**2011-15**	**All Time Periods**
All Selection Methods (percent Non-White)	5.36	19.35	12.42	14.11	13.82	16.76	14.59
Merit Selection	0	14.29	9.43	15.87	17.39	13.04	14.09
Merit-Confirmation	10	21.43	3.7	16.07	12	27.63	16.79
Partisan Election States	0	29.03	18.18	9.59	13.33	15.89	14.72
Non-Partisan Election States	11.11	10	20	17.02	8	12.64	12.55
Legislative Selection	0		0	0	28.57	12.5	17.24
P=	0.563	0.323	0.235	0.694	0.188	0.235	0.706

Table 13: Non-White Judges, by Gender and State Selection Method					
	Merit	Merit-Confirm	Partisan Election States	Non-Partisan Election States	Legis
All Judges, % Non-White	14.09	16.79	14.72	12.55	17.24
Female Judges, % Non-White	20.12	22.68	23.94	15.31	10
Male Judges, % Non-White	11.63	13.45	8.72	10.91	12.05
P=	0.0341	0.0523	0.0001	0.2998	0.4718