



Judicial Selection White Papers

The Case for Judicial Appointments

Judicial Appointments White Paper Task Force

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EXECUTIVE SUMMARY

The current struggle over how best to select the members of the state and federal judiciaries began in the debates leading to the adoption of the United States Constitution in 1787, continued as more states joined the union in the late 18th and early 19th centuries, and is still going strong. The main elements of the controversy have not varied, and the question posed has remained the same: Is it more appropriate in a constitutional republic supposedly governed by the rule of law to have judges *appointed by an executive or elected by the people*?

Advocates of election models, particularly social scientists, argue that accountability is of paramount importance and contend that as policymakers, judges resemble legislators; if judges do or should routinely make policy decisions, a lack of direct electoral accountability runs counter to democratic principles. If judges are to be independent, they should be independent of the other branches – whose abuses they must curb – rather than of the general public. Those who support appointment, by contrast, borrowing from the most basic tenets of Constitutional theory argued by Alexander Hamilton in Federalist 78, believe that judges should have relatively little discretion and must follow established legal rules to protect people from the tyranny of arbitrary power from wherever it emanates, even from the popular will. Judges cannot be independent if they must worry about re-election; it is instead preferable to hold accountable those political branches responsible for appointment, and, if necessary, to remove judges who fail to do their jobs through the impeachment process.

It is the clear conclusion of this White Paper that advocates of the appointment model have the better of the argument, and thus that appointment is a preferable means of judicial selection. In the states which use the appointment means of judicial selection, those bodies charged with selection responsibilities – governors, legislatures, nominating commissions, or some combination of the three – enjoy an informational advantage over the general public in evaluating potential jurists. With little information about judges on the ballot, voters in partisan elections have no choice but to rely on party cues, thus linking selection to national or local partisan issues rather than qualifications or actual job performance. There is a certain unappealing crassness about the election of judges that threatens the reverence for and the legitimacy of the bench. In states with elected judiciaries, judges must hustle votes and they must raise money for campaigns. To do both, they must depend heavily upon lawyers who appear before them, which can create impropriety and appearances of impropriety, and which horribly conflicts with the judicial duties of fairness and impartiality in decision-making.

The partisan election process, then, is not only demeaning to judges and casts doubt over their impartiality, but the empirical evidence shows that the selection process often becomes captive to the interests of plaintiffs' lawyers in the trial bar. Plaintiffs' lawyers generally are disproportionately high financial contributors to election campaigns, and the defense bar does not have adequate incentives to join the battle. Non-partisan elections are not much better, since voter choices become even more arbitrary, elections become even more of an "insiders' game," and the risk of capture by self-interested segments of the bar is just as great. Governors and legislatures, by contrast, are generally more responsible, more informed and duly elected representatives of the electorate who have superior access to information concerning potential jurists. An appointment model is more likely to reduce the role that irrelevant criteria, self-interest, and chance will play in the selection of judges.

The empirical evidence increasingly demonstrates that where there are partisan or even non-partisan elections, judges either feel pressure to conform to popular opinion or to favor the interests of those who contribute to their judicial campaigns. As trial lawyers have become increasingly important contributors to such campaigns the cause of civil justice reform has suffered, as elected judges have, for the most part, been more likely to frustrate the reform efforts of legislatures. In addition, in states with partisan judicial elections it is more likely that higher judgments will be recovered by plaintiffs bringing suit against out-of-state corporations, particularly where the poverty level of the state is high, and there is great income inequality in the state. There is great risk of the frustration of civil justice reform efforts even by judges picked through so-called "merit systems" (where a judicial nominating commission forwards names for appointment to the governor), because the organized bar—which may be captured by elements hostile to civil justice reform—often controls the nominating commissions.

If Hamilton was right about the need for an independent judiciary, and if the rule of law is still an important goal in American life (and it certainly is the position of the Federalist Society that he was and it is), then it is appropriate to conclude, as we do here, that the best method of selecting judges is the appointments method praised by Federalist 78 and instituted in the United States Constitution: appointment by the chief

executive, exercising his or her own discretion, with confirmation by the legislature. The friends of the rule of law and of civil justice reform ought to conclude that their best course is not to support elections or even the "merit system" but to argue for a return to the Federal model for the states. Some states which still follow this model – most notably Connecticut and Delaware—have outstanding civil justice systems, and have responded to the needs of the business community.

One of the most promising developments for civil justice reform, it was recently believed, was the capture, since 1994, of state legislatures and gubernatorial mansions by Republicans and conservatives sympathetic to reigning in the litigation explosion through tort reform. The empirical data reviewed in this White Paper suggests, however, that lasting reform will not be achieved until governors and legislators exert more control over judicial appointments, and move their state selection processes back to the federal model of gubernatorial discretion in appointments followed by legislative confirmation. The prospects for the accomplishment of this goal are better than they have been in decades, because of the willingness of legislatures and governors to push for civil justice reform. In recent years, however, it has been shown that legislation alone will not accomplish civil justice reform, because partisan judges will reject such laws. Legislatures and governors ought to settle for nothing less than changing the means of judicial selection to lessen the risk of such pernicious judicial partisanship. At a minimum, if the friends of civil justice reform are inclined to support "merit selection" models instead of straight executive appointments, they must understand that they must be vigilant in ensuring that the organized bar associations in their states do not become captured by anti-tort reform interests, and that, in particular, such bar associations are not permitted to control the chokepoints in the judicial screening process.

1. Judicial Appointments: The Historical Origin

For centuries, as the common law evolved, there was no question about how judges were selected or who selected them: they were appointed by the King. Insofar as there was any controversy about the judge's role, it focused upon the scope of the sovereign's power to extend the reach of the royal courts to the resolution of disputes that might otherwise have been left to the discretion of the local baron. That the King had the right to pick the royal judges was not in dispute. The Royal prerogative commanded no great respect from the makers of the American Revolution, who complained, in their Declaration of Independence, that the King had "made judges depend on his will alone, for the tenure of their offices, and the amount and payment of their salaries." But the Americans' solution to this problem was merely to transfer the power to appoint to others. In the case of federal judges, of course, this meant the President with the advice and consent of the Senate. In eight of the original thirteen states, however, the appointment power was given directly to the legislature, the other five opting for a model similar to the federal system: appointment by the governor subject to confirmation by the legislature. In the early years of the Republic, the legislature was generally perceived as the democratic branch of government while the executive, even when elected, was viewed as potentially anti-democratic. Inasmuch as neither the President nor the Senate was directly elected, it may fairly be said that the drafters of state constitutions opted for a more democratic alternative than the drafters of the federal constitution, but the idea of direct election of judges was still a generation away.

Even so, the current struggle over how best to select the members of the state and federal judiciaries began in the debates leading to the adoption of the United States Constitution in 1787, continued as more states joined the union in the late 18th and early 19th centuries, and is still going strong. The main elements of the controversy have not varied, and the question posed has remained the same: Is it more appropriate in a constitutional republic to have judicial branch officials sworn to apply the law with the utmost objectivity and independence appointed by an executive or elected by the people? Remarkably, although the provision of the United States Constitution which provides for lifetime tenure for judges appointed by the President has never been altered, most states, for the purpose of choosing their own judges, have opted for some sort of popular election, at either the point of initial judicial selection, or for later retention.

The *Federalist Papers*, the series of essays originally published in New York by Hamilton, Madison, and Jay arguing for the adoption of the proposed Federal Constitution, made the now classic arguments in favor of the proposed Article III and its provision that federal judges be appointed by the President, with the advice and consent of the Senate, and that the appointments be for life. Alexander Hamilton, in *Federalist No. 78*, argued that a judiciary appointed for life constituted the citadel of the public justice and public security because to subject the judiciary to periodic appointments or elections might lead judges to decide cases to curry popular favor, instead of objectively applying the law:

If the power of making [periodical judicial appointments] was committed . . . to the people, or the persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

The lifetime appointments granted to the federal judiciary in the Federal Constitution were looked upon by the framers and by the ratifying states as a crucial step in the preservation of republican government, including the important aspect of the protection of minorities. To quote again from Hamilton:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovation in the government, and serious oppressions of the minor party in the community.

By the time of the Presidency of Andrew Jackson, however, following the addition of more states and the increasing popularity of Jacksonian democratic rhetoric, many states began to move to an elected judiciary. The Hamiltonian desire for an independent judiciary, at the state level at least, was giving way to a concern that unelected judges, especially those who made unpopular decisions, were not answerable to the electorate. This is evident from the statistic that the first 29 states entering the Union provided for an appointed judiciary, but most of the states joining the Union after President Jackson's presidency opted for an elected judiciary. The first state to provide for direct election of appellate judges was Mississippi in 1832. Thereafter, the rush toward election was essentially unchecked. All but two of the sixteen constitutional conventions between 1846 and 1860 provided for the popular election of both appellate and inferior judges and by the Civil War the people of most states elected not only lower courts but also their Supreme Courts. Beginning with the admission of Missouri in 1832, every state which entered the Union until 1958 adopted constitutional provisions providing for an elected judiciary.

Though all the states entering the Union since 1832 adopted constitutions providing for judicial election, there was still significant and principled opposition to the idea of a popularly elected judiciary. For instance, during the 1868 North Carolina constitutional convention it was observed, much in the manner of the *Federalist*, that:

The qualifications of a good judiciary are that they must be learned in the law, wise to apply it, independent, honest and fearless to enforce it even against the people upon some occasions. The judiciary should therefore be proof to any temptation, for not infrequent popular clamor has denounced an honest Judge for the fearless enforcement of the law, when afterwards at cooler moments candid men have confessed a higher respect for him.

European observers of these nineteenth century developments viewed with alarm the movement within the states toward elected judiciaries. Two of the most astute European scholars of American government, the Frenchman Alexis de Tocqueville and the Englishman James Bryce, cautioned that an elected judiciary would bring dire results to America. The most famous such statement was Tocqueville's:

Under some [state] constitutions the judges are elected and subject to frequent reelection. I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates independence, not judicial power only but the democratic republic itself has been attacked.

What could be seen by Tocqueville and Bryce may not have been as evident to the democratic Americans themselves. Many of the states which proceeded to enact constitutional provisions providing for an elected judiciary – even those states like Michigan which changed from an appointed to an elected judiciary – did so with relatively little debate or fanfare.

The Jacksonian era change from appointed to elected judges has been attributed to the triumph of "emotion" over "reason," but it unquestionably had a political element. As the least democratic branch of government, the judiciary changed much more slowly than the elected branches and was viewed by the Jacksonian Democrats as a bastion of unresponsive aristocracy. The introduction of elections stood to benefit those who had proved themselves adept at winning elections, and it is fair to assume that at least some Democrats believed there would be more Democratic judges in electoral systems than in appointive systems.

Recent research has further suggested that the movement toward an elected judiciary in the states was not simply an unthinking byproduct of Jacksonian rhetoric, and there were justifications for judicial elections offered that evinced some theoretical sophistication. It appears that not just demagoguery, but a sincerely felt belief that popularly elected judges would actually be more independent than appointed ones motivated some advocates of judicial elections. Their theory was that elected judges could avoid both the dangers of

cronyism with governors or reluctance to overrule the acts of legislatures, because they would have an independent base of support with the electorate itself. There is some evidence that elected judges in the nineteenth century did feel freer to overturn the acts of legislatures, but the risk to the rule of law posed by judges beholden to popular electors the problem that worried Hamilton, Tocqueville, and Bryce was still a real one.

II. The "Merit System" and Other Developments After the Jacksonian Era

1. Traditional Appointment

As indicated earlier, appointment was originally the preferred method of judicial selection in America. Because of their negative experiences while English colonies, the original thirteen states did, however, place restrictions on the power to appoint either by placing the power in the hands of the legislature or by subjecting the governor's selections to approval by the legislature or a commission, although the judges themselves generally were appointed for life tenure during good behavior. Since Independence, states have diverged from the early systems and have employed a variety of processes for judicial selection, each with its proponents and detractors. Though as indicated in Section I, the Jacksonian Era brought with it the view judges should be elected, the pendulum began to swing back again in the late nineteenth and early twentieth centuries, during the Progressive Era. Motivated by an abhorrence of excessive partisanship and political corruption, the Progressives hoped to free the judiciary from both. They thus favored "non-partisan" election models for judges and, from 1913 on, proposed various "Merit Plans" involving nominating commissions and gubernatorial appointment coupled with non-partisan "retention elections" after a given term. The purpose of such plans was to produce better-qualified and independent judges who were chosen for their judicial competence rather than for their political loyalty. The Progressives – who then dominated bar associations and "good government" groups – met with considerable apparent success such that merit selection has become the most prevalent method of appointing state appellate judges; no state adopting this method has ever totally abandoned it.

2. Legislative Appointments

Legislative, rather than gubernatorial appointment, is now used in four states, Rhode Island, South Carolina, Virginia and Connecticut. In Rhode Island, the legislature only appoints members of the Supreme Court, while in South Carolina and Virginia, judges at both the trial and appellate levels are appointed by the Legislature. In Connecticut, the Governor recommends a candidate to the legislature whose name has been submitted by a nominating commission. Although proponents of the legislative appointment method assert that members of the legislature may be better equipped to select judges and may be more familiar with the candidates than the people, this conclusion has not been supported by empirical evidence. As this is now the least used method of judicial selection, it could probably be concluded that for most states, the flaws in this method are seen to outweigh any perceived advantages. Obvious problems with legislative appointments include the danger of partisan politics, the possibility of cronyism, and the limitations imposed by the fact that it is likely that there will be only a narrow field of candidates known to the legislators.

3. Gubernatorial Appointment

Gubernatorial appointment, it could be said, remains the preferred manner in which to fill vacancies for both appellate judges and for trial judges. In 16 states, governors directly fill appellate court vacancies, while in 29 states governors appoint from slates provided by nominating commissions. For trial courts, governors have discretion in 18 states, and nominating commissions recommend slates for the governor in 27 states.

A majority of the states now follow some variation of the "merit system" circumscribing the discretion of the appointing authority. There are variations within such systems, and even restrictions on the gubernatorial appointment power apart from the standard requirement that nominations come from a commission-supplied list. For example, in New Jersey the governor appoints judges with the advice and consent of the state senate. In California, as will be discussed further below, the governor first must submit candidates to a commission appointed by the organized, mandatory bar association, which then evaluates and rates the candidates. In all these models, there is generally a subsequent retention election

The basic advantages of the gubernatorial appointment model, whether with gubernatorial discretion or with selection from a commission's list, are (1) that one individual is ultimately responsible for the selection of judges, and (2) that judicial candidates need not suffer the ordeal of a partisan political campaign, for which an ideal judicial candidate may be ill-suited. Nevertheless, there is some clear danger of partisan rewards in a gubernatorial appointment system, as Jacksonian reformers understood.

1. The "Missouri Plan"

"Merit selection," or the "Missouri Plan," as it is also known, is now the most prevalent method of judicial selection for appellate courts and is only slightly less favored for selecting trial court judges. It is currently employed by at least 33 states and the District of Columbia. As indicated earlier, the

Missouri Plan grew out of the Progressive reform movement shortly after the beginning of the twentieth century and, in particular, can be attributed to the influence of Roscoe Pound, then Dean of the University of Nebraska School of Law; John H. Wigmore, then Dean of Northwestern University School of Law; and Albert Kales, a colleague of Wigmore's at Northwestern. The first concrete proposal regarding such a plan came from Kales in 1914. Pound expressed his concern that with the advent of judicial elections, respect for the bench had diminished, because judges were forced to become politicians, and could no longer be seen to be above the partisan fray. The essential feature of the reform proposals was that they provided for judicial selection from nominations initially proposed by a specially-created commission, one which was supposed to be above politics.

The most noteworthy of the commission plans was the one adopted in 1940 in Missouri. Pursuant to the "Missouri Plan," a commission was selected and composed of (1) lawyers selected by the bar, (2) lay persons selected by the governor, and (3) a sitting judge, who served as chair. The commission nominated three candidates for each judicial vacancy, and the governor then appointed judges from that list, after which the judge had to stand for a retention election at the next general election. This plan remains in effect today. As one commentator described it:

After a period on the bench, judges face voters on the question of whether they should be retained in office. Judges who receive the required number of affirmative votes in this uncontested plebiscite earn a full term in office. At the end of each succeeding term, judges again face voters on a retention ballot. If a judge is rejected, the process of appointment is reinstated.

The Missouri Plan was a practical compromise between the goals of judicial independence and public accountability. The combined system of initial merit selection and subsequent retention elections was designed to obtain quality judges, maintain their independence by insulating them from political influences, and provide public accountability through a mechanism for removal of judges.

Following Pound, Wigmore, and Kales, proponents of merit selection argue that its primary benefit is the removal of politics from the initial judicial selection process. The theory is that "merit selection" maximizes the role of legal professionals who are best equipped to evaluate the qualifications of potential judges. As one scholar has observed:

[M]erit selection fosters the nonpolitical selection of qualified judicial candidates. It involves informed input from citizens (nonlawyer) and experienced lawyers, involves a rigorous initial review process, places the responsibility of selection upon a screening panel [and] a state's chief executive, and subjects that successful candidate to a review of professional performance by the electorate.

Others have argued that the merit system avoids the problem, existing in partisan judicial elections, where judges may be accountable to local political party leaders who may control access to the judicial ballot. Merit appointments, so the theory goes, should result in lawyers or lower court judges without political connections, and therefore lead to the Hamiltonian goal of judicial independence.

It has also been observed that successful practitioners cannot afford the time away from their practice or the concomitant decrease in income required to campaign for office in partisan elections. It is also true that many government attorneys, who might make excellent judges, do not have the funds to run for office, and are restricted in their campaigning by requirements that they be physically present at their jobs. It has therefore been maintained that the "merit selection" scheme creates a larger possible pool of talent for the bench than does partisan election.

Opponents of the merit system have, however, turned this argument on its head. They maintain that particular groups may be excluded from attaining positions on the bench in a "merit system." It can be argued that "Merit Plans" have a built-in bias toward whatever group of lawyers control local bar associations. Some research has even indicated that merit selection systems consistently favor Protestants and underselect Catholics and Jews relative to other judicial selection systems. Partisan election, in contrast, is more likely to select religious minorities.

Other students of merit selection have observed that the practice under merit plans has simply not supported the theory. To have any hope of achieving its asserted goals, such a plan must be based upon provisions which ensure a truly independent, impartial and diverse nominating commission, with the power and resources to investigate thoroughly those who come before it as candidates. In general, the plans currently in use have not included such provisions. The result has been that, while partisan political consideration may, to a certain extent, have been removed from the selection process, politics remains an important factor. The forum for such political considerations has merely been shifted from the electoral arena to the commissions and to the governors' mansions.

There is general agreement that the success of this "merit system" depends upon the composition and the powers of the nominating commission. Unfortunately, the members of

judicial screening committees are often politicians or chosen by politicians. Several studies have demonstrated a tendency toward under-representation of minorities on the nominating commissions. Generally, the highest percentage of commissioners are in their 40's and 50's. The great majority are white, reflecting the relatively low minority representation at the bar of most states. Although there is some male/female imbalance in the composition of the commissions in some states, others have roughly the same percentage of female representation as the attorney population as a whole, and Iowa even requires gender balance on its commission. With respect to religious backgrounds, although Protestants predominate in many states, in others Jews have a greater presence on the commissions than in the population as a whole.

Commissioners are generally highly educated (even the non-lawyer members) and have had high levels of political and civic involvement, with many having held public office and/or positions in political parties. Most of the lawyer members of the commissions come from small firms and have been active in bar politics, many having obtained their position by way of a bar election. It is also true, however, that attorneys from large firms are often appointed by governors to judicial selection commissions.

Other difficulties in merit selection are caused by tensions between the lawyer and the non-lawyer commission members. Many lawyers apparently believe the lay members have little to contribute because they do not actually understand and appreciate the role of a judge in our legal system. Lay members, on the other hand, can be suspicious of what they may perceive as an "old boy" network on the part of lawyers, and, in particular, they may resent the common attorney domination of commissions. Where some members of commissions are appointed by the governor and others are not, there can also be friction resulting from a belief that gubernatorial appointees will not function with true independence from politics.

There are apparently several problems with the retention elections, the other prominent feature of "merit selection." At least one commentator has noted that even retention elections can force judges to behave like politicians. It does seem to be true, however, that judges themselves do not favor eliminating retention elections, although most judges do believe that their behavior on the bench is affected by the fact they face retention elections. Some twenty states now have retention elections, with terms varying from four to twenty years, with six years as the most common judicial term. The precise influence of retention elections is elusive, because almost 99 percent of judges are returned to office in retention elections. One explanation for the low voter interest in retention elections, where they are uncontested and/or nonpartisan, is that there is little public awareness of the issues involved, or the prior behavior of candidates for retention. Without a party label to go on, and without any substantial information on the candidates, the public has little on which to base a retention decision vote, and the outcome seems to be to leave things as they are.

In spite of these difficulties with the merit system, as indicated earlier, as yet no state which has implemented the merit plan has abandoned it. Movement to a merit system from an elective system may be difficult to achieve as well. An attempt to move from an electoral system to a merit system in Ohio was defeated when labor groups and the major political parties united to argue that a merit system for judges would take away citizens' voting rights.

2. **The California Variant**

California employs what might be described as a "reverse merit plan." This is not true in the sense that candidates who lack merit are sought, but, rather that in California an appointed commission reviews candidates submitted to them by the Governor, rather than their submitting names to him or her. Although the California Constitution provides that judges of the Supreme Court and Court of Appeal are to be elected for a twelve-year term (Cal. Const. art. 6, sec. 16, subd.(a)), the practice is that they are appointed by the Governor to fill unexpired terms, and then must go through a non-contested retention election. Pursuant to Constitutional provision, California trial court judges are also elected, but the election, although non-partisan, may be contested. (Cal. Const. art. 6, Sec. 16, subd. (b)). Even in the case of the trial courts, however, judges are generally chosen when the Governor appoints a candidate to an unexpired six-year term. If no appointment is made, candidates may run for the open seat.

Before a gubernatorial appointment is made, however, nominations to the Supreme Court and Court of Appeal must be confirmed by special bodies, known as the Commissions on Judicial Appointments, composed of California legal officials. Approval by these bodies is often more of a matter of form than substance. For the Supreme Court, nominations are confirmed by a Commission composed of the Chief Justice, the Attorney General, and the Senior Presiding

Justice of the Court of Appeal. For Court of Appeal positions, in addition to the Chief Justice and the Attorney General, the Commission includes the Presiding Justice of the District in which the new justice will serve. Hearings on nominees by these Commissions are often more a pleasant public ceremony than a rigorous and contested examination of qualifications.

There is a more important commission which now must review judicial candidates who are appointed by California's Governor rather than elected. This body is formally known as the Commission on Judicial Nominees Evaluation (abbreviated "JNE") and is commonly referred to as the "Jenny Commission." (See Cal. Govt. Code Sec. 12011.5.) The JNE Commission was created after Republican Lt. Governor Mike Curb made appointments to the bench when Democrat Governor Jerry Brown was out of the state. To prevent a recurrence of this practice, the California Legislature enacted a law requiring any judicial appointment candidates to first be reviewed by the JNE Commission before an appointment was made.

The JNE commissioners are appointed by the Board of Governors of the State Bar. They all serve without pay, although they are reimbursed for printing, mailing and travel expenses. At the present time there are thirty commissioners, who generally serve for three one-year terms. The composition is required to be roughly representative of the gender and minority composition of the state, and to include the same percentage of public members as the Board of Governors. There are currently four public members on the JNE Commission. The Commission evaluates some 300 to 350 candidates per year.

The Governor must submit the name of any person he plans to appoint to the bench to the JNE Commission ninety days before such an appointment. The Commission then undertakes an independent investigation of the candidate and issues one of four ratings: "exceptionally well qualified," "well qualified," "qualified" or "not qualified." It is also the Commission's practice to issue a brief, usually one page, report regarding its findings. The Commission's report is transmitted to the Governor's appointment secretary but is not made public by the Commission, with two exceptions. One is that the State Bar, acting through the Board of Governors, has the right to make public a report if the Governor appoints a candidate who received a "not qualified" rating. (Cal. Govt. ' 12011.5, subd. (g).) This rarely occurs. The other instance in which the JNE report becomes public is that the report is often read at the confirmation hearing for appellate and supreme court justices before the Commission on Judicial Appointments. The governor's office, however, is not bound by the same confidentiality requirements as the JNE, and generally reports the findings to candidates who are found "not qualified" for whom an appeals procedure of the "not qualified" finding is provided.

Only a minority of candidates are found "not qualified," although there are reports that this figure approximates 25%. The standard for "qualified" is that the candidate for the trial bench must possess "qualities and attributes considered to equip a person to perform the judicial function adequately and satisfactorily." A "not qualified" rating means that the candidate has been found to possess "less than the minimum qualities and attributes considered necessary to perform the judicial function adequately and satisfactorily." Generally, candidates are only found to be "not qualified" if there is a significant temperament issue or a demonstrated lack of candor in a candidate's failure to disclose information on his or her application for the judiciary. There have, however, been occasions when the jurisprudential views of a nominee may also have led to a "non qualified" rating, as is suggested in the following section.

The JNE investigation is conducted on a confidential basis. Two commissioners are assigned to investigate each candidate, with four commissioners investigating the appellate candidates. Questionnaires are mailed to every judge in the county for which the candidate is being considered, as well as fifty to seventy-five attorneys and judges whose names have been submitted by the candidate. In addition, every person mentioned in the comprehensive application for judicial appointment submitted by the candidate usually receives a questionnaire. The application includes a listing of the candidate's past employment, significant cases, litigation in which the candidate has been a party, and other personal information. For judges seeking elevation and candidates who recently have worked either as a prosecutor or a criminal defense counsel, questionnaires are mailed to deputy district attorney and deputy public defenders as well as a sampling of the criminal defense bar. Finally, a large mailing is sent to a random list of attorneys in the county who are believed to have practices causing them to come into contact with the candidate. This list can include from 100 to 500 attorneys, depending on the size of the county.

The questionnaire itself seeks the opinion of the "rater," the person filling out the form, concerning the candidate's professional ability, professional experience, judicial temperament, professional reputation, work ethic, work-related health and any potential bias. In addition, it seeks the rater's conclusion as to an overall rating, chosen from the four categories. The identity of the raters is never revealed to the candidate. The anonymous feature of the ratings opens the possibility of concealed personal attacks, and this has been a persistent criticism of

the system, but it can also be argued that few raters would provide candid, negative information concerning a sitting judge before whom they regularly appear or concerning a candidate before whom the rater might appear once the candidate is appointed to the bench. Because there is a possibility that persons or groups may seek to sabotage a particular candidate with false or misleading information, in order for the JNE system properly to function, JNE commissioners must strive to avoid this possibility, and therefore must require substantial corroboration of any serious negative comments. The advocates of the JNE system believe this can be done; its critics are less sure.

After the investigation, the candidate is interviewed by the investigating commissioners. Any negative criticisms are given to the candidate several days beforehand and are the primary focus of discussion at the interview. The investigating commissioners prepare a report and make a recommendation to the commission as a whole, which then votes to assign one of the four ratings, and prepares its report.

While California's system might be described as a "reverse merit plan," it has been presented in some detail here because of the fact that it illustrates the manner in which Judicial Selection Commissions might function to secure a maximum amount of information about a nominee. It is likely that the California plan has many features in common with more traditional "merit" plans, although it gives the Governor more discretion than do other "merit system" plans. **III. The Current Working of the Appointments and Election Systems in the States**

There has been no shortage of analysis of the pros and cons of the states' different judicial selection methods. Unfortunately, much of the literature approaches the subject from an "abstract" or conceptual perspective and reflects the authors' subjective preferences for or bias against certain methods without taking into account the increasingly obvious factual context in the past 25-30 years: In contested judicial elections (partisan or non-partisan), well-funded special interest groups, primarily the plaintiffs' trial bar, expend enormous resources to install appellate judges sympathetic to their cause. This runs the risk of fostering a public perception that courts are not neutral or impartial arbiters, and creates a risk that campaign fundraising – with most of the contributions coming from practicing lawyers who appear before the judge in question – will lead to actual or perceived favoritism.

1. Contested Elections

Proponents of judicial elections contend that no other system makes judges as accountable to the public they serve. Critics assert that this accountability is at the expense of judicial independence, the counter-majoritarian role which distinguishes judges from other elected officeholders. Electoral accountability and judicial independence are in fact inconsistent goals. The relative advantages and disadvantages of electing judges depends in large part on how high a priority one places on one goal versus the other. In the modern era of "legal realism," in which judges seem to have more freedom to render decisions based on their own personal and/or political beliefs (rather than on adhering to neutral precedents or principles), holding judges accountable for their decisions takes on great importance. In fact, the modern trend toward judicial overreaching makes public accountability increasingly important, since there is no other way of limiting judges to their proper role once they are on the bench. At the same time, contested judicial elections introduce a partisan, ideological component into the branch of government that, at least in theory, is *supposed* to be "above politics." Whatever "legal realism" might suggest, the basic Anglo-American ideal of "rule of law," or the notion that ours is "a government of laws not men," depends on judicial objectivity.

Contested judicial elections have appeared to degenerate in a growing number of states into an auction for control of the civil justice system. In Texas, Louisiana, Alabama, North Carolina, and Pennsylvania, states using contested partisan elections, millions of dollars are raised and spent each election cycle, with the principal contributions coming from the plaintiffs' personal injury bar on the one hand and the insurance defense bar on the other. In 1988, candidates for the six open seats on the Texas Supreme Court raised over \$10 million; candidates for the Chief Justice position alone raised almost \$4 million. Two years earlier in California, three sitting justices spent nearly \$4.5 million in an unsuccessful effort to retain their seats on the state Supreme Court; individuals and groups working against their retention spent another \$7 million. Also in 1986, the two candidates for Chief Justice of the Ohio Supreme Court spent over \$3 million.

It should come as no surprise that the largest contributing group to judicial election campaigns is the lawyers. It must be understood, however, that contributions to the judicial elections regime by plaintiff lawyers runs a strong risk that judges, responding to this constituency,

could render decisions inconsistent with the objectives of the civil justice reform movement. Indeed, as we will see in more detail in the following section, there is strong evidence that this has happened in many states whose courts have declared tort reform statutes unconstitutional. Moreover, the notion advanced by some that contributions to election campaigns by defense lawyers will somehow serve as a counterbalance, appears untenable. As US Court of Appeals Judges Ralph Winter and Laurence Silberman have both pointed out in recent addresses to the Federalist Society, too many defense lawyers have strong disincentives to play an active role in civil justice reform – after all, they too stand to benefit from excessive litigation activity in the form of more billable hours.

It might be thought that "non-partisan" judicial elections, found in many states, are superior to "partisan elections," but this does not seem to be the case. Thus, it has been suggested that "for most practical purposes non-partisan elections may best be understood as merely a subspecies of partisan elections . . . Most commentators contend that, far from being an improvement upon partisan elections, nonpartisan elections are an inferior alternative to partisan elections because they possess all of the vices of partisan elections and none of their virtues." Voters know little about the candidates, and don't have the voting cue of party affiliation available to them. In both cases, incumbents overwhelmingly win re-election. Non-partisan races can be just as expensive as partisan races, as demonstrated by multi-million dollar campaigns for the Ohio Supreme Court. In both types of contested elections, moreover, judges are subject to challenge for making controversial rulings, whether or not the judge was following the law. The threat of electoral challenge can chill the exercise of judicial decisionmaking.

In theory, retention elections were believed to institute a measure of public accountability without the unbridled politicization of contested elections, but since incumbents are virtually always retained, it is not clear that retention elections perform this accountability function, although there is some evidence from the occasional battle over retention elections (such as the recent one in California) that judges are sensitive to the possibility that they may not be retained. Still, where a retention battle is hotly contested, as was true for the California Supreme Court Justices alluded to earlier, the same politicization problems and risks of response to the demands of constituencies which have made massive campaign contributions are present.

2. Appointment (Executive or Legislative)

Advantages of the appointment process are that candidates are shielded from the rigors of elective politics, at least initially, and appointments for a substantial term foster judicial independence (New York, for example, uses a 14-year term). Governors are arguably better suited to evaluate the fitness of judicial candidates than are ordinary voters, and the appointment decision, while undoubtedly political to some degree, is tempered by the accountability the governor has to the voters for the judges he or she appoints. Disadvantages include the potential that judicial appointments will be used as "rewards" or "favors" for personal or political considerations, rather than the selection of the "best qualified" candidates. Moreover, gubernatorial appointment of judges, especially without legislative confirmation, arguably vests too much power in the executive without adequate checks. Another disadvantage is that gubernatorial appointment, by itself, can promote judicial independence at the expense of public accountability. As one commentator explains,

It is certainly true, as proponents of appointive methods of selection and retention contend, that, of the various methods in use in the United States today, appointment (coupled with long tenure) is most likely to ensure the independence of judges. But not everyone is an ardent supporter of a system in which judges are, for all practical purposes, free of all constraints upon their actions. For, while judges who are free of all meaningful constraints (truly independent) are, indeed, in a position to decide matters impartially and without concern for how their decisions will be received by the public, there is no guarantee that they will do so. Thus, "[t]he advantage of the appointment process is, depending on one's ideology, also its weakness. That is, the system promotes judicial independence by having no substantial check on the judge after the confirmation process." In return for true independence, one must face the rather substantial risk that judges will pursue personal agendas, either political or otherwise, which are at odds with their responsibilities.

3. Merit Selection

As indicated earlier, merit selection is essentially a combination of appointment and election (of the "retention" variety) methods, intended to de-politicize the process and produce "higher quality" judges. Whether merit selection achieves either goal, however, is subject to dispute. The distinguishing features of merit selection are (a) a nominating commission to assist in the initial appointment from a group of candidates deemed to be "qualified," and (b) a yes/no retention election some period of time after the initial appointment.

Proponents of merit selection claim that it produces better quality judges than those appointed without input from a nominating commission, although there is no empirical support for this claim. Proponents also contend that the process is "less political" because a nominating commission (usually controlled by the organized bar) has input at the appointment stage. "Opponents claim that far from taking politics out of the system, merit plans engender a somewhat subterranean process of bar and bench politics that is far removed from popular control." It has also been suggested that "merit plans are biased toward upper-status lawyers, who tend to control local bar associations." In the words of one commentator, "[m]erit selection does not take politics out of the judicial selection process. It merely changes the nature of the political process involved. It substitutes bar and elitist politics for those of the electorate as a whole." Campaign contributions from individual lawyers cannot be discounted as an important influence on the selection of judges, but it does appear that state and local bar associations, as organized bodies, have little influence in judicial elections. Bar endorsements do not appear to hold much sway with voters.

Still, "membership on merit selection nominating commissions improves lawyers' sense of their influence." Surveys of bar leaders demonstrate that of all the methods used to select state supreme court justices, they are most confident of their ability to affect the deliberations of judicial nominating commissions that are part of some form of merit selection plan. "Given these responses, it is not surprising that attorneys and bar associations have been strong advocates of judicial merit selection." In Ohio, the organized bar (among other proponents) tried unsuccessfully to implement a merit selection plan to replace the current judicial election system. Opponents, who defeated the proposal by a 2-1 margin in 1987, contended that "an 'elite' group of lawyers [would control] who will sit on the bench," if a nominating commission meeting behind closed doors replaced the electoral political process.

This intuition is well-founded. In California, as we have seen, the "nominating commission," the Judicial Nominees Evaluation ("JNE") Commission, is an agency of the State Bar of California. The Governors of the State Bar appoint the JNE Commission, and, accordingly, the composition of the commission will be likely to reflect the views of the persons appointing them. At the present time the JNE Commission has a cross-section of prosecutors and defense attorneys, big-firm types, small-firm types and solo practitioners, but just as any state bar association runs the risk of capture by particular interests, so do bar-selected commissions such as the JNE Commission. Moreover, since conservatives and civil justice reform advocates are generally minorities in the bar, it is likely that they will be minorities on nominating commissions such as the JNE Commission.

As we saw in the last section, in California, although JNE does not actually nominate candidates for judicial appointments, the Governor is forbidden to make an appointment until JNE has conducted a confidential evaluation and rating of the candidate. For 20 years, the threat of adverse publicity deterred governors from appointing candidates rated "not qualified" by JNE, even though JNE delivered this rating with some frequency. Until 1996, none of the nominees rated "non qualified" were appointed to the bench, giving JNE an effective blackball – or *de facto* veto power – over trial and appellate court appointments.

As we have seen, this near *de facto* veto power is wielded by a group of unelected, unaccountable commissioners and raters whose evaluations and ratings are made in secrecy. Many, if not most members of JNE accept service on the Commission for altruistic reasons, but critics of the JNE system, reflecting on the great power wielded by the JNE commissioners, have suggested that appointment to JNE is too often a prize sought by activists with particular political agendas (The current Chair of the JNE Commission, for example, is an ACLU chapter president). In any event, there is no doubt that service on JNE is an especially time-consuming Bar function, so that only the most determined are willing to serve. While JNE may have become more balanced as of late, historically, JNE has been dominated by solo practitioners, and, in recent years JNE leaders have included a variety of persons identified with particular social agendas. Because JNE operates in secrecy, it is largely invisible to the public, most of whom are unaware that the group even exists, and public accountability for JNE is problematic.

Even in California most appointments to the judiciary may not have political overtones, but it is nonetheless true that JNE was plunged into the public spotlight in 1996 when Governor Pete Wilson, for the first time in JNE's history, disregarded a "not qualified" rating and appointed to the California Supreme Court a remarkable African-American woman, Janice Brown. Wilson had previously appointed Brown to the Court of Appeal with JNE rating her "qualified" for that position. Moreover, she had previously served as Wilson's Legal Affairs Secretary; unlike other candidates, Wilson was personally familiar with Brown's legal abilities and qualifications. Brown's appointment to the California Supreme Court despite JNE's opposition created a furor because she is an outspoken and eloquent conservative. JNE's "not qualified" rating was widely perceived as motivated by political or ideological considerations.

Wilson defied JNE twice more as governor, appointing to the Superior Court and the Court of Appeal candidates he believed to be well-qualified, even though they were rated "not qualified" by JNE. There is no way of knowing whether some of the many candidates rated "not qualified" over the years – who were not appointed to the bench – were victims of partisan prejudice rather than objective evaluation. Even more troubling, the specter of an (undeserved) "not qualified" rating may deter governors from even submitting the names of candidates with strong conservative views. This possibility was noted in an article written prior to the 1996 controversy involving Janice Brown:

Perhaps the crucial determination of the effectiveness of [merit selection] committee endorsements is whether the recommendations are made public. Publicizing judicial appointments that do not have bar support is designed to deter the governor. According to an attorney in California, where this is practiced, "The State Bar has vigorously resisted efforts to strip the 'hammer' from the powers of the Judicial Nominees Evaluation Committee, i.e., the right of the Commission to announce its negative recommendation should the Governor nevertheless appoint a nominee who received such a rating. I am not aware of a Governor's ignoring the threat of the hammer and it may be that the existence of this power influences nominations in the first instance."

Critics of the JNE Commission have argued that in the guise of "merit selection," those with special interests serving on JNE may have the practical power to keep off the bench judges who might support civil justice reform (and remember that opponents of civil justice reform might include both representatives of the plaintiffs' and defendants' bar, all of whom profit by increasing litigation), who might follow a philosophy of judicial restraint, and who might favor the death penalty. In this regard it should be observed that Janice Brown, whom the JNE sought to exclude, has proven to be a powerful voice for civil justice reform on the California Supreme Court.

The California experience is not unique. At least in states where the organized bar has been "captured" by partisans of a particular stripe, critics have charged that the "merit selection" process has become just another form of political influence. Researchers agree that there is no evidence that merit selection produces higher quality judges. As many commentators have noted, the most significant feature of the "Missouri Plan" is that the evaluation process is not open to the public and is insulated from public scrutiny and accountability. These conditions heighten the potential for "cronyism." One scholar observes that "[l]awyer-representatives on nominating commissions are pre-occupied with the decisional propensities of potential judges." Merit selection is favored by elements who wish to influence public policy outside of the elective political process "because it provides an opportunity to reduce the dominant party's influence in [judicial] selection." Lawyers prefer merit selection because it gives them a bigger voice than other selection techniques. Inasmuch as lawyers as a group already exert significant influence over public policy, it is certainly debatable whether this is a reason to favor merit selection, which "vastly reduce[s] public participation in judicial selection."

In light of the growing popularity of merit selection, greater attention and empirical research are needed on the behind-the-scenes political influence of the organized bar. It is undisputed that merit selection panels are not representative of the public and give the organized bar disproportionate influence into the selection of judges. Indeed, "[o]fficials of state bar associations have been the first to admit that the merit selection system provides them with the most effective means of influencing the choice of who will serve on the bench." Therefore, as one commentator has pointed out:

"Considering that merit selection/merit retention has been touted as a panacea for the dilemma of selecting judges, a variety of questions must be addressed. .

Since nominating commissions have been considered the cornerstone of the system, the social system of the commission nominations and gubernatorial appointments deserves attention. How does one obtain an appointment to the commission? How does the commission screen? Does the commission actually recruit? How have commissions responded to the gubernatorial choice? How is the commission lobbied?"

As is true for any interest group, there is a risk that the organized bar can become increasingly out of step with mainstream public opinion – some have found such a phenomenon in the American Bar Association's recent advocacy of left-of-center public policy positions, or in the recent struggle over the funding of California's state bar. It is thus appropriate to have some skepticism with regard to the purported benefits of having unaccountable lawyer-activists meeting in secret to develop "approved" lists of judicial candidates from which democratically-elected governors must select appointments to the bench. Still, in practice, retention election systems such as California's appear to have worked reasonably well, preserving all but three appellate judges since the retention election system was implemented in 1934. The three judges who voters decided to remove from the California Supreme Court—Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso—were apparently perceived by the general public to be jurists who were not objectively applying precedents or statutes, but who were seeking, through judicial overreaching, to enact their subjective preferences into law.

The weak link in California's system, like merit selection systems everywhere, is the bar-controlled "nominating commission," which critics charge attracts the most partisan elements of a very political bar. Ironically, if the critics are correct, then "merit selection" is close to a return to the very "ward politics" or "patronage spoils" system that merit selection was intended to eliminate. "Merit selection" can allow certain elements, such as the plaintiffs' personal injury bar and other special interest groups, to exert disproportionate influence over the appointment of judges, with little or no public scrutiny or accountability.

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IV. The Effect Of The Method Of Judicial Selection On Judicial Decisions.

Was Hamilton correct that if judges were selected by the people judges would depart from the dictates of the law to do what they believed was popular? Regardless of the manner in which the periodic appointments or reappointments occur, do state court judges consult popular opinion in deciding cases? Or, in addition to the period for which judges are appointed, does the manner in which state court judges are selected impact on their decision-making? It is commonly thought that the prospect of judicial election/re-election causes judges to be "tough on crime." But what effect does the method of judicial selection (and retention) have on issues concerning civil justice?

1. The Impact of Election, Retention, and Campaign Funding Raising

A. Impartial Justice or Partisan Decision Making?

The goal of the judicial process is to provide impartial justice to all litigants who come before the courts, but studies comparing Supreme Court behavior in states with different types of judicial selection have concluded that "[w]here judges are selected in highly partisan circumstances and depend upon a highly partisan constituency for continuance in office, they may act in ways which will cultivate support for that constituency, that is, exhibit partisan tendencies in their judicial decision-making." The length of the justices' terms has an impact on that: A study examining two partisan election states, two nonpartisan election states, and two Missouri plan states found that "partisan selection increased party voting in judicial policymaking and that long terms tended to decrease the importance of party voting in each kind of selection system."

Justices on elected supreme courts often act in a predictably partisan manner – and are expected to do so by the citizens who voted for them. This is demonstrated, for example, by a study of 54 nonunanimous decisions of the Illinois Supreme Court – to which justices are elected by partisan ballot, but then subject to

"yes/no" retention elections.

The Illinois civil cases studied, which were decided in the years 1991-1993, involved a wide variety of legal issues and fact patterns, yet, over this wide variety the justices' votes were consistent essentially along partisan lines. The justices' votes were consistent 95 percent of the time; in personal injury subset of cases, the justices voted consistently 94 percent of the time. It is clear that "the justices have an attitude that guides their decision-making," their party affiliation (or ideology). In civil cases, Democratic justices voted in a manner that could be characterized as "liberal" 77.9 percent of the time, while Republicans voted in a manner that could be characterized as "conservative" 60 percent; in the personal injury cases, Democrats voted liberal in 76.5 percent of the cases and Republicans voted conservative in 66.7 percent of the cases. Thus, for the Illinois Supreme Court, "party affiliation is a principal predictor of voting

behavior." There appears to be no reason to believe that the Illinois Supreme Court is unique among state supreme courts selected by partisan elections.

This partisan decision-rendering phenomenon has also been observed in other states with partisan judicial elections, although in varying degrees depending on the length of the term to which the justices are elected. For example, when Pennsylvania Supreme Court justices served 21-year terms, and "were not continually resocialized into partisan values by involvement with party activists and voters in periodic reelection campaigns," the partisanship displayed in judicial policymaking was only moderately strong. Other state supreme courts selected by partisan elections – especially in the South where the two party systems are a recent phenomenon – also exhibit partisan bloc voting. This is the case, for example, in Alabama and Texas.

State supreme courts selected by partisan elections are not alone in acting in a partisan manner. Some states with nonpartisan judicial elections also display partisan voting behavior; although other supreme courts selected in nonpartisan elections display far less—or no—partisanship. For example, partisanship and dissent on the Michigan Supreme Court increased with the appointment of Democratic justices after 1948, and Democratic and Republican blocs emerged.

A severe example of partisan behavior in judicial elections can be found in the experience in Ohio. Ohio is nominally a state in which there are nonpartisan judicial elections, but in 1982 and again in 1984, a Democratic slate of candidates for the Ohio Supreme Court ran expressly partisan advertising. In 1982, one such ad said:

Thirty million dollars – that's what the Democratic Supreme Court saved us in just one year by saying no to utility rate hikes. . . . A quarter century of judicial experience, insisting on tough safety standards for the worker, holding the line on unfair taxes, backing our police to fight crime. Let's keep the people's court Democratic.

Similarly, in 1984, the two candidates for the Ohio Supreme Court who identified themselves as Democrats ran another campaign advertisement on utility rates:

Remember when Republicans controlled the Ohio Supreme Court? Ohioans' utility rates skyrocketed. Then we elected a Democratic majority . . . They got tough on utility companies and saved you over \$90 million in utility rate requests alone.

Approximately 10 days before the election, Ohioans received utility rebate checks as a result of an Ohio Supreme Court decision—accompanied by a letter from the Democratic Chief Justice, one of the candidates, on court stationery. The partisanship of the Ohio Supreme Court continues to this day, with the Ohio Supreme Court and the Ohio General Assembly locked in a struggle over important legal issues, including the nature and extent of civil liability, damages, tort reform, and educational funding. This struggle was most recently manifested in the Ohio Supreme Court's August 16, 1999 decision which held that the tort reform legislation enacted in 1996 was unconstitutional *in toto* and in which the majority excoriated the Ohio General Assembly for attempting to usurp judicial authority.

B. The Impact of Campaign Funding and Financing on Decisions

As we have seen, judicial elections, particularly retention elections, do not tend to be high profile elections. Accordingly, those who make contributions to judicial candidates – or who consistently vote in judicial elections – tend to be those individuals or corporations with the most at stake: entities which are frequent litigants and the lawyers who routinely represent litigants in those cases. Trial lawyers, in particular, "engage in repeated interactions with the same judges and so have the greatest incentive to make campaign contributions." For many years, organized labor and trial lawyers in states with judicial elections have "supported and even groomed candidates for election."

This has forced the business community, which has been concerned with civil justice reform, and has, to some extent achieved its goals in the state legislatures, to involve itself in the partisan election struggle. As one student of the phenomenon, Charles Mantesian, has observed:

[t]he emerging interest of business forces in who sits on the bench is to some degree a response to the trial lawyer, labor, and other traditionally Democratic lobbies, which, having lost control of various statehouses, are now taking the fight to the courthouse on a wide range of issues.

In response to the monies these traditional Democratic lobbies have spent for years on judicial elections, business-oriented political action committees or organizations have expended substantial amounts to support candidates supporting business-related positions in the past several election cycles.

The most notorious examples of the partisan funding of judicial elections have occurred in Texas, Alabama, and Ohio. In the 1980s, the Texas Supreme Court emerged as "perhaps the most notorious appeals court in the nation, controlled by a trial lawyer-backed majority whose scandalous fund-raising practices landed them an unwanted appearance on network television's *60 Minutes*." One of the best known examples of this phenomenon is the *Texaco v. Pennzoil* case, where the lead counsel for Pennzoil (who was a liberal Democrat) donated \$10,000 to the campaign of the trial judge hearing the case (a conservative Republican) only two days before filing an answer and served on the judge's campaign steering committee. Texaco representatives donated \$72,700 to several justices on the Texas Supreme Court, and Pennzoil donated more than \$315,000 to the justices; three of the justices were not even up for reelection. Pennzoil received a \$10.53 billion award. Texas plaintiffs' lawyers have continued to donate large amounts to the campaigns of candidates for Texas Supreme Court. Between 1992 and 1996, Texas plaintiffs lawyers contributed \$4.8 million to Texas Supreme Court candidates. Similarly, in 1994 and 1996, plaintiffs' lawyers contributed \$3.8 million to Texas Supreme Court candidates. Looking solely at the seven winning candidates for the Texas Supreme Court in 1994 and 1996, more than 40% (or approximately \$3.7 million out of a total of almost \$9.2 million) of the funds raised for their campaigns came from parties and lawyers with cases before the Supreme Court or from those closely linked to those parties. The result of Texas judicial campaign contributions was demonstrated in a recent Texas poll: 83 percent of the respondents thought Texas judges were strongly or somewhat influenced in their decisions by contributions; only 7 percent did not think that Texas judges are influenced by campaign contributions. As Chief Justice Thomas R. Phillips of the Texas Supreme Court noted:

These attributes [party labels and campaign contributions] of Texas justice do compromise the appearance of fairness. When judges are labeled as Democrats or Republicans, how can you convince the public that the law is a judge's only constituency? And when a winning litigant has contributed thousands of dollars to the judge's campaign, how do you ever persuade the losing party that only the facts of the case were considered?

In Alabama, sitting Supreme Court justices and plaintiffs' lawyers-backed candidates for the Alabama Supreme Court received in excess of \$1.3 million in campaign contributions from plaintiffs' lawyers since 1990. Between 1992 and 1996, Ohio trial lawyers contributed almost \$800,000 to four justices on the Ohio Supreme Court who repeatedly voted against the business-favored position. In Pennsylvania's 1995 Supreme Court race, the two Democratic candidates raised 78 percent and 85 percent, respectively, from lawyers. One year later, Pennsylvania Supreme Court Justice Russell Nigro received \$458,473 from lawyers, mostly members of the plaintiffs' bar.

Even when contributions are smaller, both individually and in the aggregate, they can be influential. A study of judicial campaign funding practices in Illinois from 1980 through 1990—where, with a few exceptions, judicial elections have tended to be relatively inexpensive—suggests that campaign contributions are made to curry favor with the judges to whom the contributions are made. In Illinois, as elsewhere, attorneys were the largest single source of campaign funds for nearly all categories of judicial campaigns, with candidates for retention receiving the largest percentage of attorney contributions. Contributions were usually small, and it is likely that attorneys were not trying to buy a favorable outcome in a particular case. Rather, "[i]t is more likely that attorneys, who constitute the largest group of contributors, believe their contributions may enhance their relationship with a judge, which could provide an edge in a very close case or affect the many small matters subject to judicial discretion that arise in a lawsuit." Surprisingly, "[C]ontributions frequently were given to candidates either sure to win or sure to lose. More often than not, candidates who ran in elections they could not lose received the most contributions." The conclusion is inescapable that the contributions were made to gain favor with the judge:

[M]any contributors to judicial campaigns in Illinois are giving for reasons other than to ensure the election of qualified candidates. The fact that the bulk of funds are raised by sure winners and sure losers who are sitting judges makes it fair to

assume that some contributors believe they are getting something for their money, even if it is something less than the most blatant judicial partiality.

This pattern of campaign contributions by lawyers occurs in other states, and can be observed, for example, in the behavior of political action committees ("PAC") funding of supreme court elections in North Carolina. In that state, the dominant participant in judicial campaigns has been the North Carolina Academy of Trial Lawyers, a prominent plaintiffs' lawyers association which supports their interests. The North Carolina Academy of Trial Lawyers has been the biggest PAC contributor to such campaigns; prior to 1994 (when business-related PACs contributed a substantial amount to supreme court candidates), North Carolina business PACs had contributed minimal amounts to state supreme court candidates. As with individual contributors in Illinois, PACs tend to fund the expected winners of judicial races and usually are more supportive of incumbents. There is also a clear connection between PAC contributions and party affiliation; until the 1994 elections, PACs were strong supporters of Democratic candidates.

Anecdotal evidence is also consistent with these observations. For example, one lawyer is reported as saying, "My client knew that the opposing lawyer contributed \$400 to the judge's campaign. My client does not believe the judge called the shots impartially. He is angry with me for not having moved to disqualify the judge. Every close call went against us. I have some doubts myself."

C. Retention Elections Make Judges More Sensitive to Public Opinion, But Do Not Make Them More Independent

As we have seen, in an attempt to find a compromise between judicial accountability and judicial independence, many states adopted the Missouri Plan which combines initial merit selection and subsequent retention elections. Unfortunately, the empirical and anecdotal evidence strongly suggests that retention elections make judges more sensitive (and responsive) to public opinion, but do not give judges the independence or security to make the controversial rulings which might be dictated by an objective interpretation of the law.

The results of a 1991 survey of current and former appellate and state court judges who stood for retention in 1986, 1988, and 1990 demonstrate that, despite the low probability of defeat, retention elections do affect judicial behavior: "The vast majority of judges report that behavior on the bench is affected by retention elections." Only 7 percent of the responses indicated that retention elections caused judges to feel "[m]ore secure to make controversial rulings" and only 5.7 percent thought that "[n]o partisan politics means impartiality." In contrast, 27.6% of the responses indicated that judges are "[m]ore sensitive to public opinion" as a result of retention elections, and 15.4% of the responses indicated that retention elections cause judges to "[a]void controversial cases and rulings."

These survey results are borne out by other evidence. California Supreme Court Justice Otto Kaus has stated that he cannot be sure that his vote on an important case in 1982 was not influenced by his awareness that the outcome could affect his chances in the 1982 retention election. Justice Joseph Grodin, also of the California Supreme Court, cannot rule out the possibility his votes in important cases in 1986 were affected by the 1986 retention election. Justice Grodin concludes that the phenomenon of voters casting their retention ballots on the basis of whether they like the results in the cases the judge has decided sends the message to judges that

if they want to avoid negative votes, it is best to produce results with which the voters will agree. The risk that judges will receive and act upon that message, unconsciously if not consciously, is substantial. . . . In any event, the potential that the pendency or threat of a judicial election is like to have for distorting the proper exercise of the judicial function is substantial, and palpable.

The influence of retention elections on judicial behavior is not limited to the highest state courts. One commentator notes that the southeastern Michigan state court judge who ordered General Motors not to shut down an auto plant in a community heavily dependent on the plant for employment had a very strong incentive to rule as he did.

2. Awards Against Out-of-State Businesses Are Greater In States with Elected Judiciaries than in Non-elected States.

In *The Product Liability Mess*, Justice Richard Neely of the West Virginia Supreme Court of Appeals stated:

As long as I am allowed to redistribute wealth from out-of-state companies to

injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me. . . .

It should be obvious that the in-state local plaintiff, his witnesses, and his friends can all vote for the judge, while the out-of-state defendant can't even be relied upon to send a campaign donation.

Justice Neely's statements make logical sense for an elected judiciary: State court plaintiffs tend to be residents of the state who can vote either for or against the judge in the next election – and who can be expected to tell their friends, neighbors and relatives about the judge – whereas the out-of-state defendant has no vote, making the in-state plaintiff more politically important (and powerful) to the elected judge. Moreover, judicial campaigns mean judges must finance their campaigns – and the main source of donations to judicial campaigns is trial lawyers, who have an interest in obtaining large awards for their clients. Thus, "[r]edistributing wealth from out-of-state defendants to in-state plaintiffs is a judge's way of providing constituency service."

A recent study by Alexander Tabarrok and Eric Helland establishes the existence of this wealth redistribution and quantifies it. They found that awards against out-of-state firms were higher than average tort awards in general, but the out-of-state penalty was larger in states where judges were elected; tort awards in states with elected judiciaries were \$364,950 above average, while such awards in states with non-elected judiciaries were \$219,980 above average, a difference of \$144,970. However, awards against in-state corporations were not significantly higher in elected than they were in nonelected state courts. Looking at this from a vote-maximizing perspective, this behavior is entirely logical: Employees of in-state businesses can vote and make campaign contributions too; accordingly, elected judges have an incentive not to redistribute wealth from in-state business defendants to in-state plaintiffs. Mean awards in cases with out-of-state defendants were much higher in states with partisan judicial elections, significantly higher than in states with non-partisan judicial elections or with appointed judges, although awards in states with nonpartisan judicial elections were similar to awards in states with

appointed judiciaries. Awards in trials with out-of-state defendants were \$268,180 higher in states with partisan judicial elections than in states with nonpartisan judicial elections or appointed judiciaries, and the median awards were \$38,000 higher. The study also observed that in states with elected judiciaries, punitive damages awards were "especially large" in cases involving out-of-state defendants. The authors of the study concluded:

Since most plaintiffs are in-state voters and many defendants are out-of-state nonvoters, elected judges have an incentive to service their constituency by aiding plaintiffs. A particularly low-cost method of aiding plaintiffs is to transfer wealth from out-of-state business defendants to in-state plaintiffs. Campaign contributions from trial lawyers are also likely to increase the proportion of 'high-award' judges in elected states. . . . We have strong evidence that in cases with out-of-state defendants awards are much higher in partisan elected states than in other types of judicial systems. Difference in means tests and regression results show that the expected total award in partisan elected states with out-of-state defendants is approximately \$240,000 higher than in other states.

This study has important implications with respect to the effect of the manner in which judges are selected on strategic forum selection by plaintiffs. Holding everything else constant, a plaintiff or (perhaps more importantly) a plaintiff's lawyer can significantly increase the recovery by bringing suit in a state with partisan judicial elections. Thus,

[b]y choosing whom to sue (the manufacturer of the product, the retailer, the shipper, and so on) plaintiffs have considerable ability to forum shop. . . . [P]laintiffs can raise awards significantly above the average by carefully choosing the states in which they sue. Plaintiffs have strong incentives to sue in states with elected judges, high poverty rates, and also high per capita income (together the last conditions imply high income inequality).

These conclusions also suggest why so much of the class action litigation that is carried on in state court – and the state class action litigation abuse – occurs in states with elected judiciaries, and in particular, in states with partisan judicial elections. In most class action litigation, the deep-pocket defendant is usually an out-of-state corporation and at least some of the named plaintiffs are residents of the state in which the case is filed. If the class action is filed in a state with an elected judiciary, the judge has an incentive to favor these in-state plaintiffs at the expense of the class action defendant, the out-of-state corporation. This is borne out by Congressional testimony concerning class actions: According to one witness, one reason why Alabama was "ground zero in the explosion of class actions targeting corporations" and a "class action speed trap" is that "[s]everal members of [Alabama's] state plaintiffs' bar have figured out that

many of our state trial court judges—all of whom are elected—would be very flexible about class actions if asked to do so."

3. Tort Reform Has Fared Worse in States With Elective Judiciaries Than in States With Non-Elective Judiciaries.

Tort reform has become an important civil justice issue. Accordingly, to gauge whether the manner in which judges are selected in each state may have an impact on whether the state supreme court upholds the constitutionality of tort reform, a review of the cases in which the courts passed on the constitutionality of the relevant tort reform measures since January 1983 was undertaken. This analysis is not conclusive, because conclusions can be reached only after tort reform measures have been adopted by state legislatures, then challenged in state courts, and then either upheld or held unconstitutional. Some states have not adopted tort reform measures. States that have not adopted any of the most common tort reform measures (relating to joint and several liability, non-economic damages, collateral sources, prejudgment interest, and punitive damages) include Arkansas, Delaware, Massachusetts, Pennsylvania, and West Virginia. Our sample size is also relatively small—there are a total of only 216 decisions.

Because of the wide variety of tort reform measures that were considered in the cases reviewed, it is beyond the scope of this examination to present a complete scientific statistical analysis of the decisions. Nevertheless, a review of the decisions gives a strong impression that the elected state supreme courts tend to invalidate substantive tort reform measures at a greater rate than non-elected state supreme courts. When elected state supreme courts do sustain tort reform measures, those measures tend to be less substantive measures, such as statutes of limitation or statutes of repose. In contrast, non-elected state supreme courts tend to uphold the constitutionality of substantive tort reform measures at a greater rate than states where there are judicial elections, and when those non-elected state supreme courts invalidate tort reform measures, the measures tend to be less substantive. Without assigning any normative weight to the type of tort reform measures considered, 7 of 23 states with elected state supreme courts (or 30%) have invalidated more tort reform measures than they have upheld, or have invalidated *in toto* comprehensive tort reform measures. In contrast, only 5 of the 27 states with non-elected state supreme courts (or 18.5%) have invalidated more tort reform measures than they have upheld.

Since limiting (or capping) damages is seen as a key substantive tort reform measure, an analysis was performed of the cases in which state supreme courts passed on the constitutionality of such caps (whether the caps limit aggregate, general, non-economic, or punitive damages). Supreme Courts in states where there are partisan judicial elections upheld caps on damages in two cases (28% of the time) and invalidated such caps in five cases (72% of the time). Supreme Courts from states with nonpartisan judicial elections upheld caps on damages in three cases (30% of the time) and invalidated such caps in seven cases (70% of the time). Supreme Courts in states with merit selection upheld caps on damages in eight cases (72% of the time) and invalidated such caps in three cases (28% of the time). Appointed supreme courts upheld caps on damages in three cases (60% of the time) and invalidated such caps in two cases (40% of the time). *In the aggregate, elected supreme courts have only upheld caps on damages in 29% of the cases, while non-elected supreme courts have upheld caps on damages in 69% of the cases.* The data strongly suggests that damage caps stand a better chance of surviving in states where there are not judicial elections, especially partisan elections.

A similar analysis has been done combining examination of caps on damages with medical malpractice screening panels, both of which are highly controversial tort reform measures. Supreme Courts in states with partisan judicial elections upheld such measures in 20% of the cases and invalidated them in 80% of the cases; supreme courts in states with nonpartisan judicial elections upheld the measures in 83% of the cases and invalidated them in 17% of the cases; supreme courts appointed by governors upheld such measures in 67% of the cases and invalidated them in 33% of the cases; while merit-appointed supreme courts upheld the measures in 73% of the cases and invalidated

them in 27% of the cases. Here again, at least for states with partisan judicial elections, there is a higher tendency to reject the reforms.

Several state Supreme Courts have invalidated significant or comprehensive tort reform measures. These states include Alabama (partisan elections), Arizona (merit appointed, with retention election), Illinois (partisan elections, with retention election), and Ohio (nominally nonpartisan elections, but with de facto party endorsements of slates). Arizona's Supreme Court has invalidated a number of tort reform measures because of specific provisions in the Arizona Constitution which prohibit the legislature from eliminating causes of action and placing limits on liability for damages.

The Ohio Supreme Court holds the distinction of having issued the greatest number of opinions invalidating tort reform measures, having invalidated every major provision of the comprehensive tort reform measure passed by the Ohio General Assembly in 1987 and having recently invalidated, *in toto*, the comprehensive

tort reform measure adopted by the Ohio General Assembly in 1996. The Ohio Supreme Court's recent 4-3 decision is particularly noteworthy because the lawsuit challenging the 1996 Tort Reform measure was brought by the Ohio Academy of Trial Lawyers and the Ohio AFL-CIO (and their respective executive directors). These plaintiffs sought a writ of mandamus or prohibition against the legislative reforms, and the Ohio Supreme Court decided the case over the objection of the dissenters that the plaintiffs lacked standing. The Illinois Supreme Court also invalidated *in toto* the comprehensive tort reform measure adopted by the Illinois General Assembly.

In the 1980s and into the 1990s, the Alabama Supreme Court – like the Texas Supreme Court – proved itself to be the friend of plaintiffs' lawyers by invalidating many tort reform measures. Since 1994, Republican justices have held a majority in the Alabama Supreme Court, and have begun to correct what ought properly to be regarded as the tort law excesses of the Alabama Supreme Court under the prior chief justice. Similarly, the Texas Supreme Court, which wrought dramatic changes in tort law in the 1980s, which had strongly favored plaintiffs and plaintiffs' attorneys, is now controlled by Republican justices and recently issued more opinions sustaining tort reform than it has invalidating tort reform measures. Even so, these dramatic changes in control of the Alabama and Texas Supreme Courts – which are reflected in the respective treatments of tort reform – cannot be viewed as complete victories for business or the proponents of civil justice reform. In order for there to be a properly functioning civil justice system, and in order for business to be conducted with efficiency and dispatch, there must be in place known and settled law. The changes being wrought by the Alabama and Texas Supreme Courts, while recently favorable to business and civil justice reform, still demonstrate that *stare decisis* does not prevail in these jurisdictions. What has once swung one way can thus swing back again. There is always the danger that, if Democratic justices regain control of the Alabama and Texas Supreme Courts, they could undo all the Republican-controlled Courts have done.

Another important consideration for business and for civil justice reform is how the supreme courts of the major commercial states within each category have treated tort reform. The major commercial states with elected state supreme courts are: Illinois (partisan elections), Michigan (nonpartisan elections), Ohio (nominally nonpartisan elections), Pennsylvania (partisan elections), and Texas (partisan elections). Although Illinois' Supreme Court has upheld tort reform measures in eight cases and invalidated tort reform measures in only three cases, the Court's most recent decisions have invalidated the tort reform measures at issue in the cases, including the decision invalidating the comprehensive tort reform measure adopted by the Illinois General Assembly *in toto*. The Ohio Supreme Court's record on sustaining tort reform measures is abysmal. It has invalidated such measures in 18 cases, and sustained only two tort reform measures. At this time, the Michigan, Pennsylvania, and Texas Supreme Courts have favorable records on tort reform, having sustained more tort reform measures than they have invalidated. On the important tort reform issues, the Michigan Supreme Court has sustained a statute providing for the admissibility of collateral source evidence, and the Texas Supreme Court has sustained a cap on general damages.

The major commercial states with non-elective supreme courts include: California ("reverse" merit selection, with retention election), Florida (merit selection, with retention election), Missouri (merit selection, with retention election), Connecticut (appointment), Delaware (appointment), Massachusetts (appointment), New York (appointment), and New Jersey (appointment). The supreme courts of all of these states have favorable records on tort reform, having sustained more tort reform measures than they have invalidated, individually and in

the aggregate. Only the Connecticut Supreme Court (offset of collateral sources benefits), the Florida Supreme Court (statute of repose, cap on noneconomic damages), and the Missouri Supreme Court (statute of limitations) have invalidated tort reform measures. Tort reform measures sustained include reforms relating to joint and several liability (California); capping non-economic damages (California, Missouri); capping economic and non-economic damages in certain circumstances (Florida), the collateral source rule (California), medical malpractice screening panels (New Jersey), and other tort reform measures.

While the evidence is not free from ambiguity, it is clear enough to demonstrate that with regard to major tort reform measures, states in which there are Supreme Court Justices subject to partisan elections are more likely than others to invalidate such legislation. While the partisan tide can turn in such states, as it has recently done in Texas and Alabama, there is always the possibility that the tide can be once again turned back, and reforms once again frustrated by hostile partisan courts.

V. Conclusions

There seems to be general agreement that no single subject has consumed as many pages in law reviews over the past 50 years as the subject of judicial selection, but until recently there appeared to be a rough consensus among empirical social scientists that the method of judicial selection had little impact on the quality of judges selected or on the outcome of cases over which they presided. This conventional wisdom, may, however, be about to change, as a result of one of the very latest pieces of research, published this year in the University of Chicagos prestigious Journal of Law and Economics. The authors, Alexander

Tabarrock and Eric Helland begin their piece with a quote from Justice Richard Neely, of the West Virginia Supreme Court of Appeals from a state with partisan judicial elections, quoted at length in the last section of this paper, but worth repeating in part:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

Following an exhaustive study of jury verdicts in forty-eight states, Tabarrok and Helland suggest that Justice Neely's thoughts are apparently shared by many other judges. They concluded that there was significant support for the propositions that (1) elected judges will redistribute wealth from out-of-state businesses to in-state plaintiffs, (2) the realities of campaign financing require judges to seek and accept campaign funding from trial lawyers, who uniformly are interested in larger awards, (3) jury awards are larger in states where the judiciary is elected rather than appointed, and (4) the demand for redistribution will increase as poverty increases and, thus, that awards will be larger in states with greater poverty.

A study published earlier this year in the *Journal of Legal Studies* suggested that there may be more uncertainty and thus a higher rate of litigation in states where the judiciary is appointed rather than elected, since selection by appointment brings with it greater judicial independence, and this leads to greater judicial discretion. That study was limited to cases involving public utility regulation (where there was 40% more litigation in states where judges were appointed), and state Supreme Court litigation generally (where there were 10% more filings in states where judges were appointed). Even this study reported, however, that at the trial court level there was no significant difference in the amount of litigation between jurisdictions where judges were appointed and those where they were elected. Since what happens at the trial court level is probably the most important concern for anyone seeking to plan for or to avoid litigation, it would appear that any uncertainty caused by the appointive method of selection is not an important factor.

While empirical studies have yet to confirm a difference in the quality of appointed and elected judges, there is at least anecdotal evidence, known to most lawyers, which argues in favor of the appointive system. Thus, Delaware's appointive judicial system has become the unchallenged pre-eminent expositor the law of corporations, mergers and acquisitions, and duty of care of corporate officials. The same might be said of Connecticut's appointive judicial system, and it has been noted by one lawyer, that "on at least one occasion I have had a client who has asked us to pursue summary judgment motions in Connecticut because the client felt that it would get a more even-handed decision here that it could use in courts in other states." Similarly, New York, with its appointive highest court and elected lower courts, has a reputation for being a "favorable jurisdiction for banks and insurers and, with some exceptions, as a bad place to look for punitive damages." In contrast, some states, particularly in the South, now have reputations as being favorable jurisdictions for plaintiffs and unfavorable for corporate defendants. The Illinois Supreme Court, selected as a result of partisan election, has garnered criticism from left and right alike, for "anti-intellectualism," for being an "embarrassment," and for producing "unpredictable" decisions which are "rarely cited elsewhere for the force of their logic or the power of their insight." Although this anecdotal evidence about the quality of judges or judicial systems can reveal information about the quality of judges in a particular state, it is currently impossible to perform a systematic comparison of judges or judicial quality across states or methods of appointment.

As we have stressed throughout this paper, there has been a long struggle in the states over the method of judicial selection because there has been a conflict between the goals sought to be achieved regarding the judiciary. The two goals stressed by Alexander Hamilton in Federalist 78, and championed principally by opponents of judicial elections are: (1) the independence of the judiciary (in order to promote the rule of law) and (2) the quality of the judges themselves (believed to be best secured by placing them above partisan politics). Proponents of judicial elections, beginning with the Jacksonian Era, and continuing through to the present have argued that elections better secure two other goals: (1) judges who will be accountable to the people, the true sovereigns in America, and (2) judges who will reflect the makeup of the population the judiciary serves.

There is little doubt, however, that the second set of two goals (accountable judges and representative judges) has less regard for the rule of law, and encourages judicial policy-making from the bench, since, as Justice Neely suggests, judges will seek to satisfy those they regard as their constituents, even if a more cautious approach would be dictated by the principles of *stare decisis* or by principles of judicial conservatism. This difficulty rarely bothers social scientists from the academy, who have uniformly concluded that judges will inevitably make policy, and who, as a group, do not seem to evince much regard for the Hamiltonian ideal of the rule of law.

The Missouri Plan or "merit selection" offered the promise of combining the best features of the appointive

system (high quality candidates) with the advantages of public accountability (through retention elections), and thus a means of reconciling the divergent goals suggested above. Unfortunately, as we have seen, it is not clear that the Missouri Plan has delivered on its promise. There seems to be no evidence that the Missouri Plan has led to the selection of judges of a particularly high caliber or particularly free from partisan or interest group ties. Indeed, perhaps the most important factor in what will happen under the Missouri Plan's merit system is who will be controlling the panels which will be forwarding names to the appointive authority.

There seems to be a general understanding that the Missouri Plan affords the organized bar an opportunity for increased political power, because the organized bar is likely to be influential in staffing and selecting nominating panels. Where a particular interest group controls the organized bar, we can expect to see judicial selections reflecting the interests of that particular group. In Missouri itself, it has recently been argued with great force, the plaintiff's bar has succeeded in dominating the state at all levels of government, and this has made Missouri, in at least one year, America's No. 1 plaintiff's venue. The merit system, it would appear, offers no protection against plaintiffs seeking extraordinary damage recovery. The possibility of bar capture of Missouri Plan nominating commissions is underscored as well by the California experience. Judicial selection in California differs from the Missouri Plan because the governor first produces nominees before a commission passes on them, but, as we have seen, the California JNE does exercise something very close to a veto power.

An equally serious criticism of the Missouri Plan is that the benefits of the retention elections which are part and parcel of the plan appear to be almost as illusory as the promise of merit selection. Studies have conclusively demonstrated that voter turnout in retention elections is disturbingly light, three out of four voters can be counted on to favor retention under virtually all circumstances, and 98.8% of the judges up for retention elections are retained. As the study that revealed these figures suggested, those who maintain that retention elections serve to insulate judges from popular control seem to be correct. In fairness, the California experience does suggest that retention elections can be used to remove judges who appear to be straying too far from what is expected of them, but it cannot be said with certainty that the California experience is not the exception that proves the rule. It appears then, that the Missouri Plan neither delivers higher quality judges nor necessarily subjects them to public accountability.

In spite of Justice Neely's comments, it cannot yet be categorically stated that states in which there are partisan elections are the worst in terms of encouraging massive jury verdicts and thus discouraging outsiders from doing business in the state, but future studies may well confirm this, and some of the recent data tends strongly in that direction. As indicated in the prior section of this paper, it does appear, taking into account the most recent data, that the method of judicial selection has some direct bearing on state courts willingness to overturn recent tort reforms which seek to place caps on judgements, or otherwise to reduce the amount of costly litigation. Both appointive and elective states have on occasion been both hostile and friendly to such litigation, though the recent overall judicial trend appears to be hostile to such legislation, especially in states with partisan judicial elections. Perhaps most significantly, in both Alabama and Illinois, states with partisan judicial elections, there have been recent major defeats for tort reform as reform statutes have been declared unconstitutional. Even so, in Texas, the locus of the multi-billion dollar *Pennzoil* case, significant tort law reforms have survived Constitutional challenge, and, more recently Alabama's Supreme Court appears to have changed course. Still, in any state with partisan judicial elections *stare decisis* can be less significant than implementing a politically-favored policy, and reforms sustained are subject to future frustration.

For states with either contested elections or "merit selection" systems, the most intractable core problem is the possible influence of campaign contributions by, or control over appointments panels manifested by the trial bar, particularly where the trial bar exerts control over bar organizations, as has happened in Missouri. Opponents of large verdicts in tort cases brought against corporations could counter the influence of the trial bar in selected judicial contests, as happened, for example, with the retention election defeats of Justice Rose Bird and two of her Supreme Court Associates in California, but such a victory seems exceptional, as the statistics on retention elections reveal. Justice Neely's views suggest that such victories might be short-lived, as the incentives for judges in partisan elections to curry popular favor, or the opportunities for the organized bar to influence merit selection or the California variant are not likely to dissipate.

If Hamilton was right about the need for an independent judiciary, and if the rule of law is still an important goal in American life (and it certainly is the position of the Federalist Society that he was and it is no matter what the view of social scientists in the academy), then there is still much to be said for the method of selecting judges praised by Federalist 78 and instituted in the United States Constitution: appointment by the chief executive, exercising his or her own discretion, with confirmation by the legislature. If the costs of litigation continue to balloon (and the spate of tobacco and gun cases brought recently suggest that this is likely), the friends of the rule of law might ponder whether their best course is not even the merit system, but a return to the Federal model for the states. Those who point to recent California experience might suggest that at the state level accountability for judges requires some form of retention elections rather

than lifetime tenure, but the data on retention elections is so far inconclusive.

One of the most promising developments for civil justice reform, it was recently believed, was the capture of legislatures and gubernatorial mansions by Republicans and conservatives sympathetic to reigning in the litigation explosion through tort reform. The empirical data reviewed in this White Paper suggests, however, that lasting reform will not be achieved until governors and legislators exert more control over judicial appointments, ideally through appointments by governors and confirmation by legislatures. At a minimum, if the friends of civil justice reform are inclined to support merit selection they must understand that they must be vigilant in ensuring either that the organized bar associations in their states do not become captured by anti-tort reform interests, and that, in particular, such bar associations are not permitted to control the chokepoints in the judicial screening process.

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