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Judicial Selection - What is Right for Mississippi

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JUDICIAL SELECTION — WHAT IS RIGHT FOR MISSISSIPPI?

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I. JUDICIAL SELECTION METHODS

Judicial selection in the fifty states is either by election or by appointment. There are many variations of these two methods. Elections may be partisan or nonpartisan. Appointment may be by governor or legislature with or without nominations by a judicial nominating commission. If appointed and in a few cases if elected, a judge may be subject to a retention election which may be opposed or unopposed, partisan or nonpartisan. In some states, a judge is reappointed by either the governor or the legislature. Many states have a hybrid system which allows for appointment of some judges and election of others.

A. Initial Terms

1. Legislative Appointment/Election

Judicial selection in a few states is by legislative appointment or election. These states are Connecticut, South Carolina, and Virginia. In Connecticut, judges are appointed by the general assembly following nomination by the governor who selects the nominee from a list of candidates submitted by a judicial selection commission.[1] In South Carolina, judges are elected by a majority vote of the general assembly[2] upon nominations submitted by the Judicial Merit Selection Commission.[3] In Virginia, judges are chosen by a majority vote of the general assembly.[4]

2. Gubernatorial Appointment

No state allows a governor to appoint judges without some form of input by others. In some states, the governor's nomination is subject to the approval of others. California and New Hampshire require that the governor's appointment be confirmed by a judicial nominating body,[5] while Maine, New Jersey, Delaware,[6] and Maryland[7] require that the Senate approve the appointment.[8]

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1. CONN. CONST. art. 5, 2.
2. S.C. CODE ANN. 2-19-90 (Supp. 2001).
3. S.C. CODE ANN. 2-19-80 (Supp. 2001). Nominations submitted by the commission are binding on the general assembly and if the assembly rejects all nominations, the commission must submit additional nominations.
4. VA. CONST. art. VI, 7.
5. CAL. CONST. art. 6, 16 (1966); N.H. CONST. pt. 2, art. 46.
6. The Delaware Constitution provides for gubernatorial appointment with the Senate's consent. However, the governor has created a judicial nominating commission. Harry L. Witte, *Judicial Selection in the People's Democratic Republic of Pennsylvania: Here the People Rule?*, 68 TEMP. L. REV. 1079, 1084 n. 25 (1995).
7. As in Delaware, the Maryland governor in 1975 created a nominating commission by executive order which [e]ach subsequent governor has maintained and followed .... The nominating commission submits a list to the governor who selects a person from the list. Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998,* 58 MD. L. REV. 528, 574 (1999).
8. ME. CONST. art. 5, pt. 1, 8; N.J. CONST. art. 6, 6, & 1; DEL. CONST. art. IV, 3; MD. CONST. art. IV, 5A (1976).

More frequently, however, the governor must select a judge from a list of nominations submitted by a judicial nominating body. The states which have this requirement include Alaska,[9] Arizona,[10] Colorado,[11] Florida,[12] Hawaii,[13] Indiana, [14] Iowa,[15] Kansas,[16] Massachusetts,[17] Missouri,[18] Nebraska,[19] New Mexico,[20] New York,[21] Oklahoma,[22] Rhode Island,[23] South Dakota,[24] Tennessee,[25] Utah,[26] Vermont,[27] and Wyoming.[28]

3. Election

The remaining states elect their judges. Elections may be partisan or nonpartisan. Those states which choose judges by partisan election include Alabama,[29] Illinois,[30] Louisiana,[31] North Carolina,[32] Pennsylvania,[33] Texas,[34] and West Virginia.[35] States electing their judges on a nonpartisan basis are Arkansas,[36] Georgia,[37] Idaho,[38] Kentucky,[39] Michigan,[40] Minnesota,[41] Mississippi,[42] Montana,[43] Nevada,[44] North Dakota,[45] Ohio,[46] Oregon,[47] Washington,[48] and Wisconsin.[49]

9. ALASKA CONST. art. IV, 5.
10. ARIZ. CONST. art. 6, 37 (1974).
11. COLO. CONST. art. VI, 20.
12. FLA. CONST. art. 5, 11 (1972).
13. HAW. CONST. art. VI, 3 (the governor's appointment must receive consent of the senate).
14. IND. CONST. art. 7, 10.
15. IOWA CONST. art. 5, 15 (1962).
16. KAN. CONST. art. 3, 5.
17. MASS. CONST. pt. 2, cl. 2, 1, art. 9.
18. MO. CONST. art. 5, 25(a).
19. NEB. CONST. art. V, 21.
20. N.M. CONST. art. VI, 35.
21. N.Y. CONST. art. 6, 2 (1961).
22. OKLA. CONST. art. 7-B, 4 (1967).
23. R.I. CONST. art. 10, 4 (the governor's nomination must receive consent of the senate and the house of representatives).
24. S.D. CONST. art. V, 7.
25. TENN. CODE ANN. 17-4-112 (1994).
26. UTAH CONST. art. VIII, 8.
27. VT. CONST. ch. II, 32.
28. WYO. CONST. art. 5, 4.
29. ALA. CODE 17-2-2 (1995).
30. ILL. CONST. art. 6, 12.
31. LA. CONST. art. 5, 22.
32. N.C. CONST. art. IV, 16.
33. PA. CONST. art. 5, 13.
34. TEX. CONST. art. 5, 2.
35. W. VA. CODE ANN. 3-1-16 (Michie 1999).
36. ARK. CONST. amend. 80, 18 (2000).
37. GA. CONST. art. 6, 7, & 1.
38. IDAHO CONST. art. VI, 7 (1934).
39. KY. CONST. 117.
40. MICH. CONST. art. 6, 2.
41. MINN. STAT. ANN. 204B.06(6) (West Supp. 2002).
42. MISS. CODE ANN. 23-15-976 (2001).
43. MONT. CODE ANN. 13-14-211 (2001).
44. NEV. CONST. art. 6, 3; NEV. REV. STAT. ANN. 293.195 (Michie 1997).
45. N.D. CENT. CODE 16.1-11-08 (Supp. 2001).
46. OHIO CONST. art. IV, 6; OHIO REV. CODE ANN. 3505.04 (West 1995); OHIO REV. CODE ANN. 3513.13 (West 1995). Ohio judges run in a partisan primary election and a nonpartisan general election.
47. OR. REV. STAT. 254.005 (2001).
48. WASH. REV. CODE ANN. 29.21.070 (1993).
49. WIS. CONST. art. 7, 9.

B. Subsequent Terms

As with initial judicial selection, a variety of methods exist for selection of judges for subsequent terms. The most prevalent method is a nonpartisan retention election in which voters decide if the judge should be retained in office. Such an election is a feature of merit selection which was first proposed by the American Judicature Society.[50] States which have such elections include Alaska,[51] Arizona,[52] California,[53] Colorado,[54] Florida,[55] Illinois,[56] Indiana,[57] Iowa,[58] Kansas,[59] Maryland,[60] Missouri,[61] Nebraska,[62] Oklahoma,[63] Pennsylvania,[64] South Dakota,[65] Utah,[66] and Wyoming.[67]

Some judges are reappointed to subsequent terms in the same manner in which they are appointed initially. Those states where judges are reappointed include Connecticut,[68] Delaware,[69] Hawaii,[70] Maine,[71] New York,[72] and Virginia.[73] In South Carolina and Vermont, judges are retained by vote of the general assembly.[74] In New Hampshire, Massachusetts and Rhode Island, judges hold office during good behavior.[75] In New Jersey, judges hold their offices during good behavior upon reappointment after their initial terms.[76]

A number of states have a system which is unlike any other. In Tennessee, the candidate for office of judge runs in an uncontested nonpartisan retention election unless the judicial evaluation commission makes a recommendation against retention of an incumbent appellate judge but the judge nevertheless files or has filed the declaration of candidacy, in which case the judge must run in a contested election.[77] Montana's system is similar in that the incumbent runs in a retention election if unopposed.[78] In New Mexico, the appointed judge must first run in a partisan election after which he is eligible to run in nonpartisan retention elections.[79]

50. *See* Albert M. Kales, *Methods of Selecting and Retiring Judges,* 12 J. AM. JUDICATURE SOC'Y 133 (1928).
51. ALASKA CONST. art. IV, 6.
52. ARIZ. CONST. art. 6, 38 (1974).
53. CAL. CONST. art. 6, 16 (1966).
54. COLO. CONST. art. VI, 25 (1966).
55. FLA. CONST. art. 5, 10 (1972); FLA. STAT. ANN. 105.041 (West Supp. 2002).
56. ILL. CONST. art. 6, 12.
57. IND. CONST. art. 7, 11; IND. CODE ANN. 3-11-2-13 (Michie Supp. 2001).
58. IOWA CONST. art. 5, 17 (1962); IOWA CODE ANN. 46.21 (West Supp. 2001).
59. KAN. CONST. art. 3, 5.
60. MD. CONST. art. IV, 5A (1976).
61. MO. CONST. art. 5, 25(c)(1).
62. NEB. CONST. art. V, 21.
63. OKLA. CONST. art. 7-B, 2 (1967).
64. PA. CONST. art. 5, 15.
65. S.D. CONST. art. 5, 7.
66. UTAH CONST. art. VIII, 9.
67. WYO. CONST. art. 5, 4.
68. CONN. GEN. STAT. ANN. 51-44a (West Supp. 2001).
69. DEL. CONST. art. IV, 3.
70. HAW. CONST. art. VI, 3 (1968) (term of office of justice or judge is renewed by commission).
71. ME. CONST. art. 6, 4.
72. N.Y. CONST. art. 6, 2 (1961).
73. VA. CONST. art. 6, 7.
74. S.C. CODE ANN. 2-19-80 (West Supp. 2001); VT. STAT. ANN. tit. 4, 4 (1999).
75. N.H. CONST. Pt. 2, art. 73; MASS. CONST. Pt. 2, Cl. 3, art. I; R.I. CONST. art. 10, 5.
76. N.J. CONST. art. 6, 6, & 3.
77. TENN. CODE ANN. 17-4-115 (Supp. 2001).
78. MONT. CONST. art. 7, 8.
79. N.M. CONST. art. VI, 33 (1988).

C. Hybrid Systems

While some of the preceding methods of judicial selection may apply to all judges within the state, the selection method given for each particular state represents the method which applies to the state's highest court. Most states have a hybrid system of judicial selection, i.e., they employ different selection methods for different courts. Judges of the appellate courts may be appointed while judges of trial courts may be elected. Some examples include Arizona which provides for election of judges of the superior court in counties having a population of less than two hundred and fifty thousand and appointment of all other judges;[80] New York where only judges serving on the court of appeals are appointed;[81] and Oklahoma which provides for the nonpartisan election of district court judges[82] and for appointment of justices of the supreme court and judges of the court of criminal appeals.[83]

In other states, voters are allowed to choose different selection methods for judges within the same court. In California, superior court judges are elected unless the electors of a county choose to make the appointment system applicable to those judges.[84] Voters in Florida are allowed to determine whether circuit or county court judges will be selected by merit selection and retention or by election.[85] In Kansas, a majority of electors in each judicial district may adopt a nonpartisan method of selection of district court judges rather than election.[86] Missouri provides for appointment of judges of the supreme court, the court of appeals, and the circuit courts within the city of St. Louis and Jackson County.[87] For judicial circuits outside the city of St. Louis and Jackson County, a majority of voters may choose to provide for appointment of judges rather than election.[88] In Washington, the city legislative body in cities having a population of less than four hundred thousand may choose to select municipal judges by appointment rather than election.[89]

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80. ARIZ. CONST. art. 6, 12 (1960); ARIZ. CONST. art. 6, 30 (1960).

81. N.Y. CONST. art. 6, 6 (1961) (supreme court justices); N.Y. CONST. art. 6, 10 (1961) (county court judges); N.Y. CONST. art. 6, 16 (1961) (district court judges).

82. OKLA. CONST. art. 7, 9 (1967).

83. OKLA. CONST. art. 7-B, 2 (1967).

84. CAL. CONST. art. 6, 16 (1966) (Electors of a county, by majority of those voting and in a manner the Legislature shall provide, may make [the appointment] system of selection applicable to judges of superior courts.).

85. FLA. CONST. art. 5, 10 (1972) (A vote to exercise a local option to select circuit court judges and county court judges by merit selection and retention rather than by election shall be held in each circuit and county at the general election in the year 2000.).

86. KAN. CONST. art. 3, 6 (The district judges shall be elected by the electors of the respective judicial districts unless the electors of a judicial district have adopted and not subsequently rejected a method of nonpartisan selection.).

87. MO. CONST. art. 5, 25(a).

88. MO. CONST. art. 5, 25(b) (At any general election the qualified voters of any judicial circuit outside of the city of St. Louis and Jackson County, may by a majority of those voting on the question elect to have the circuit and associate circuit judges appointed by the governor in the manner provided for the appointment of judges to the courts . . .).

89. WASH. REV. CODE ANN. 3.46.050 (West 1988).

II. HISTORICAL OVERVIEW OF JUDICIAL SELECTION IN MISSISSIPPI

Judicial selection in Mississippi has gone through several phases. In 1817, Mississippi drafted its first Constitution which provided that judges would be appointed.[90] While the Constitution did not clarify who would do the appointing, an act passed in 1822 gave the appointive power to the general assembly.[91] When the Constitution was revised in 1832, all judgeships became elective.[92] Mississippi became the first state to provide for election of all judges.[93] Following the Civil War, a new Constitution was drafted in 1868, and judges again became appointive, this time by the Governor with the advice and consent of the Senate.[94]

Appointment by the Governor remained Mississippi's choice for judicial selection when its final Constitution was adopted in 1890.[95] However, the Legislature in 1898 adopted a resolution to be submitted to the voters which would amend the Constitution to provide for elective rather than appointive judges for the supreme court and chancery and circuit courts.[96] When the voters approved the amendment, the Legislature adopted a resolution to insert the amendment into the Constitution.[97] The Supreme Court decided, however, that the process by which the amendment had been adopted violated section 273 of the Constitution.[98]

In 1910, the Legislature again adopted a concurrent resolution proposing to amend the Constitution to provide that judges of the circuit and chancery courts be elected rather than appointed[99] and after a majority of voters approved the amendment, the Legislature passed a resolution in 1912 to insert the amendment to elect the judges into the Constitution.[100] The Supreme Court upheld the amendment in a 1914 decision.[101] In 1914, the Legislature passed a resolution to amend

90. MISS. CONST. OF 1817 art. 5, 2 (There shall be appointed in this State not less than four nor more than eight judges of the supreme and superior courts . . .).

91. 1832 REV. CODE MISS. ch. 15, 1 (Be it enacted by the senate and house of representatives of the state of Mississippi, in general assembly convened, That there shall be established in this state, a court to be styled The Supreme Court of the State of Mississippi; which court shall consist of the judges heretofore appointed, or who may hereafter be appointed, by the general assembly, judges of the supreme court . . .).

92. MISS. CONST. OF 1832, art. 4, 2 (The high court of errors and appeals shall consist of three judges, any two of whom shall form a quorum. The Legislature shall divide the State into three districts, and the qualified electors of each district shall elect one of said judges for the term of six years.); MISS. CONST. OF 1832, art. 4, 11 (The judges of the circuit court shall be elected by the qualified electors of each judicial district . . .); MISS. CONST. OF 1832, art. 4, 16 (The chancellor shall be elected by the qualified electors of the whole State . . .).

93. SARI S. ESCOVITZ, JUDICIAL SELECTION AND TENURE 5 (1975).

94. MISS. CONST. OF 1868, art. 6, 2 (The supreme court shall consist of three judges, who shall be appointed by the Governor, by and with the consent of the Senate . . .); MISS. CONST. OF 1868, art. 6, 11 (The judges of the circuit court shall be appointed by the Governor, with the advice and consent of the Senate . . .); MISS. CONST. OF 1868, art. 6, 17 (Chancellors shall be appointed in the same manner as the judges of the circuit court.).

95. MISS. CONST. art. 6, 145 (The Legislature shall divide the State into three supreme court districts, and the Governor, by and with the advice and consent of the Senate, shall appoint one judge for and from each district . . .); MISS. CONST. art. 6, 153 (The judges of the circuit courts and of the chancery courts shall be appointed by the Governor, with the advice and consent of the Senate . . .).

96. 1898 MISS. LAWS ch. 83.

97. 1900 MISS. LAWS ch. 199.

98. State ex. rel McClurg v. Powell, 77 Miss. 543, 27 So. 927 (1900). The court held that because the amendment which was submitted to the voters in one election proposed to repeal sections 145, 149, 151, 152 and 153 of the Constitution which dealt with different matters, the process violated section 273 of the Constitution which provides that an amendment cannot be adopted unless it receives a majority of votes, *i.e.*, the amendments should have been submitted to the voters in separate elections.

99. 1910 MISS. LAWS ch. 358.

100. 1912 MISS. LAWS ch. 415.

101. State ex. rel Collins v. Jones, 106 Miss. 522, 64 So. 241 (1914). The court held that the amendment had been properly submitted and received the requisite number of votes.

the Constitution to provide for the election of supreme court judges.[102] The amendment was approved by the voters and inserted into the Constitution when the Legislature met in 1916.[103]

The method of electing judges in Mississippi remained virtually unchanged until 1994 when the Legislature enacted the Nonpartisan Judicial Election Act.[104] All judgeships are now considered to be nonpartisan offices and judicial candidates are prohibited from campaigning or qualifying for such an office based on party affiliation.[105]

III. Is Change Possible in Mississippi?

Although judicial selection has always been an issue much debated, there are a number of reasons why judicial selection continues to be a topic of interest. These reasons include the money spent on judicial campaigns,[106] interest group involvement,[107] campaign contributions made by lawyers who practice before the judges they are supporting,[108] negative campaigning,[109] and low voter recognition of judicial candidates.[110] These are problems which have become increasingly apparent in recent judicial elections in Mississippi. Proponents of merit selection argue that these problems can be corrected by adoption of a merit selection system. The American Bar Association supports merit selection and has recently approved standards to serve as a waypoint for states which move in the direction of such a system.[111]

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102. 1914 Miss. Laws ch. 514.

103. 1916 Miss. Laws ch. 156.

104. 1994 Miss. Laws ch. 564.

105. Miss. Code Ann. 23-15-976 (2001).

106. Judicial elections are becoming more and more like political elections every day, experts say. For example, in Ohio where judicial elections are nonpartisan, the cost of the race for chief justice in 1980 was $100,000 but rose to $2.7 million six years later. Mark Hansen, *A Run for the Bench,* 84 A.B.A. J. 68, 69 (Oct. 1998).

107. National interest groups are becoming more involved in state judicial elections. These national groups are able to make sizeable contributions which have an influence on the elections. The goal [of the interest groups] is both to make direct campaign contributions and to pay for issue advertising. Anthony Champagne, *Interest Groups and Judicial Elections,* 34 Loy. L.A. L. Rev. 1391, 1399 (2001).

108. Contributions from attorneys vary from state to state and court to court. For example, a study of California judicial candidates showed that attorneys constituted 39 percent of the contributors to Superior Court candidates while attorneys in Florida and Texas constituted half of the contributors to judicial candidates. There are exceptions, however. A candidate for circuit court in Florida received 95 percent of his funding from attorneys, and a candidate for the Texas Criminal Court of Appeals received 88 percent of the cost of his campaign from attorneys. Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors,* 40 Stan. L. Rev. 449, 458-59 (1988).

109. In Michigan, for example, the Republican Party sponsored an ad which included the word pedophile beside a judge's name while the Democratic Party described an incumbent as not black enough. In Wisconsin, a number of justices on the supreme court publicly criticized the chief justice during her reelection campaign. During the process, the Wisconsin Supreme Court lost some dignity. Randall T. Shepard, *Judicial Independence and the Problem of Elections: We Have Met the Enemy and He Is Us.,* 20 Quinnipiac L. Rev. 753, 757-58 (2001).

110. That voters have low recognition of judicial candidates is shown by an exit poll conducted of voters in Cleveland, Ohio, who were asked to identify three judicial candidates for whom they had just voted and only five percent were able to do so. Low voter recognition is also apparent by the fact the in virtually every election the drop-off of voters marking the top of their ballots for general candidates and not marking the bottom portion for judicial candidates is at or above fifty percent. David Barnhizer, *On the Make: Campaign Funding and the Corrupting of the American Judiciary,* 50 Cath. U.L. Rev. 361, 406 (2001).

111. *Standards on State Judicial Selection* (American Bar Ass'n Standing Comm. on Judicial Independence, July 2000).

Under the merit selection plan as first proposed by Albert Kales who served as the vice-president of the American Judicature Society, the chief justice of the district would be given the authority to appoint judges in that district. To act as a control on the chief justice's power, he would be subject to a retention election at frequent intervals. Appointed judges would also face retention elections at intervals of three years, six years, nine years, and then until retirement by death, resignation or age limit.[112] Harold Laski proposed a variation on the Kales plan which substituted the governor as the appointing authority rather than the chief justice. This revised plan consisted of a judicial nominating commission, appointment by the governor, and a nonpartisan, noncompetitive retention election and is the basis of merit selection systems in place today. The plan became known as the Missouri Plan when Missouri became the first state to adopt it.[113] Interestingly, only thirteen states have adopted the Kales-Laski plan in its entirety for their highest courts. They are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Utah, and Wyoming. Of these, only Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming have adopted the plan for both appellate and trial judges.[114]

As can be seen from the history of judicial selection in Mississippi, Mississippi has experimented with almost every method of judicial selection. Judges at times have been appointed by either the general assembly or the governor. When election finally became the method of choice, elections were partisan until 1994 at which time they became nonpartisan. Mississippi has even had some experience with merit selection. Whenever a vacancy occurs in a judicial office, the governor is authorized to appoint a judge who serves for the unexpired term or until an election is held.[115] Some past governors established a judicial nominating committee to assist in making these mid-term appointments.[116]

Whether Mississippi would ever be able to change its method of judicial selection from election to merit selection is considered doubtful. That change is possible, however, has been demonstrated in other states. Although it has been said by one commentator that "[d]espite the tremendous advantages to merit selection of judges, voters in the . . . states with electoral review of judges are unlikely to disenfranchise themselves and amend their state constitutions to remove judges

112. Albert M. Kales, *Methods of Selecting and Retiring Judges,* 12 J. AM. JUDICATURE SOC'Y 133 (1928).

113. SARI S. ESCOVITZ, JUDICIAL SELECTION AND TENURE 9 (1975).

114. *See* 33 THE BOOK OF THE STATES 137-39 (The Council of State Governments 2000).

115. MISS. CODE ANN. 9-1-103 (1991).

116. David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi,* 13 MISS. C.L. REV. 1, 26 (1992). This article provides a detailed description of the systems which were implemented by Governors William Winter, William Allain and Ray Mabus.

from the political process,"[117] seven states have adopted merit selection as their method of choice for judges of the highest courts in those states in the past twenty-five years. Those states are Florida (1976), New York (1977), Hawaii (1978), South Dakota (1980), New Mexico (1988), Rhode Island (1994), and Tennessee (1994). South Carolina made a move toward such a system in 1997 by creating a Judicial Nominating Commission which makes binding recommendations to the general assembly.

However, merit selection has been defeated in a number of states by either the legislature or the voters. States which have considered and rejected merit selection include Illinois,[118] Louisiana,[119] North Carolina,[120] Pennsylvania,[121] Texas,[122] West Virginia,[123] Arkansas,[124] Minnesota,[125] and Ohio.[126]

As is seen by a review of the selection methods utilized in the fifty states, there are many systems in use including many variations on the pure merit selection plan as originally proposed by Kales and Laski. Although changing the method for the entire judiciary in Mississippi may not be a viable option, the Legislature should consider adopting merit selection for the justices of the Supreme Court, which is a policy-making court. Daniel R. Pinello conducted an empirical study on whether the judicial selection method affects policy made by state supreme courts. He chose six states which select justices by gubernatorial appointment, legislative selection, and popular election and limited the areas of law used to compare judicial policies to business, criminal procedure, and family. He concluded that the selection method does in fact impact judicial policy and that elect-

117. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections,* 74 CHI.-KENT L. REV. 133, 149 (1998).

118. In 1970, Illinois voters chose election of judges over appointment. Jackson Williams, *Irreconcilable Principles: Law, Politics, and the Illinois Supreme Court,* 18 N. ILL. U.L. REV. 267, 270 (1998). In 1988, a merit selection plan was proposed by a number of legislators in both the House and Senate but was defeated by legislators opposing the plan. Rene A. Torrado, Jr., *The Challenge of Merit Selection,* 10 CBA REC. 10 (Apr. 1996).

119. In 1998, a merit selection plan was proposed in the Louisiana legislature following a particularly bitter campaign between the Chief Justice of the Supreme Court and his opponent. W. Raley Alford, III, *The Biased Expert Witness in Louisiana Tort Law: Existing Mechanisms of Control and Proposals for Change,* 61 LA. L. REV. 181, 202 n.157 (2000).

120. Efforts to reform North Carolina's method of judicial selection have been introduced in almost every session of the General Assembly since 1971 with little success. Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges?,* 76 N.C.L. REV. 2266, 2267 n.12 (1998).

121. In 1990, a bill proposing merit selection of judges in Pennsylvania was narrowly defeated. Bridget E. Montgomery & Christopher C. Conner, *Partisan Elections: The Albatross of Pennsylvania's Appellate Judiciary,* 98 DICK. L. REV. 1, 11 (1993).

122. Merit selection plans have been proposed and defeated in Texas in 1995 and 1999. Thomas R. Phillips, *Responses to Professor Carrington,* 53 SMU L. REV. 277, 282 (2000).

123. Joint resolutions proposing merit selection in West Virginia have died in committee. Stephen D. Annand & Roberta F. Green, *Legislative and Judicial Controls of Contingency Fees in Tort Cases,* 99 W. VA. L. REV. 81, 98 n.44 (1996).

124. A merit selection system proposed in Arkansas in 1990 passed the senate but failed to pass the house. Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas,* 17 U.ARK. LITTLE ROCK L. REV. 281, 323 (1995).

125. In 1972, a merit selection plan was recommended by a Commission but rejected by the Minnesota Legislature. Laura Benson, *The Minnesota Judicial Selection Process: Rejecting Judicial Elections in Favor of a Merit Plan,* 19 WM. MITCHELL L. REV. 765, 783 (1993).

126. In 1987, Ohio voters defeated a merit selection proposal by a 2 to 1 margin. John D. Felice & John C. Kilwein, *Strike One, Strike Two . . .: The History of and Prospect for Judicial Reform in Ohio,* 75 JUDICATURE 193, 193 (1992).

ed judges are reactive to public opinion, while appointed ones who never face popular confirmation are largely free of its constraint.[127] From his findings, Pinello categorized courts as either active or passive. Active courts are those which see their task in public policymaking as equal to that of other branches and include the courts in states where the justices were either appointed by the governor or were popularly elected.[128] Pinello further categorized active courts as innovative (appointed) or reactive (popularly elected) and found that innovative courts had the freedom to adopt unpopular polices while reactive courts are wedded both to policy preferences dictated by public opinion . . . and to the needs of business which may arise in part because an election process requires substantial campaign contributions from business to win judicial races.[129]

A merit selection plan for the Supreme Court has a greater chance of success with voters than does a plan which would change the method of selection for the entire state. A study of proposed merit judicial selection plans from 1941 until 1980 found that merit plans have been more successful before the voters when limited to the selection of appellate judges. Seventy-five to 80 per cent of such plans were successful, compared to from just 55-60 per cent of the plans which proposed to include appellate judges and a substantial number of trial court judges as well. Put differently, of the five states in which the plan was rejected by the voters, four were attempts to extend the plan to both the appellate and major trial courts.[130]

IV. CONCLUSION

Mississippi remains one of the states which chooses its judiciary by election. The fact that elections are now nonpartisan has not removed the problems inherent in elective systems. Because of the importance of the Supreme Court's role as a policy-making body and because a merit selection system would provide the Court with some degree of independence and restore a measure of public confidence in our judiciary, the Legislature should afford the voters an opportunity to amend the Constitution to provide for a merit selection system at the supreme court level.

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127. DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY 130 (Greenwood Press, 1995).

128. PINELLO, *supra* note 127, at 134.

129. PINELLO, *supra* note 127, at 135.

130. Philip L. Dubois, *Voter Responses to Court Reform: Merit Judicial Selection on the Ballot,* 73 JUDICATURE 238, 243 (1990).