The Case Against Judicial Election Reform

by Joel Rosch and Eva R. Rubin

It is part of the genius of American politics that our 50 states are in essence 50 laboratories of democracy allowing policymakers to learn from and build on the experience of other states. At N.C. Supreme Court Justice James G. Exum's request, the General Assembly is considering embarking upon just such an experiment in merit selection of future Tar Heel judges. By improving the *way* we choose our judges, supporters of merit selection believe, we *will get* better judges. But these advocates of merit selection —however sincere and well-intentioned they may be—would do well to consider the less-than-satisfactory experiences other states have had with merit selection. *So far, there is no evidence that merit selection has either improved the quality of judges in any of the states where it has been tried or that it has successfully removed politics from the selection of judges.* Those experiences ought to make North Carolina policymakers cautious about changing from a system that has, after all, worked reasonably well.

An initial problem with merit selection is the question of what 'merit' is, and another is who is meritorious. One person's notion of merit may not be another's, and the legal profession itself is sharply split on the issue. While the North Carolina Bar Association is in favor of merit selection, the N.C. Academy of Trial Lawyers, representing those lawyers most likely to try cases before judges, opposes that plan—not because they oppose the theory of 'merit,' but rather because they do not believe that it will ensure the selection of meritorious judges. A look at the past tells why.

During our nation's 200-year history, there have been a number of changes in the way our state judges are chosen. Until the 1840s, most states, as well as the federal government, allowed either the chief executive (the governor or the president) or the legislature to select judges. The election of Andrew Jackson as president in 1828 symbolized a growing movement for popular control over government. As this demand for popular control grew, a number of states adopted systems to choose their judges in partisan elections like other public officials. But during the Progressive Era, which began at the end of the 19th century, many states, expecially in the American west, opted for nonpartisan elections where judges run for election without a party label.[1]

In 1913, the American Judicature Society was founded to improve the way our courts worked. In this period, state judges—most of them still elected—began to reflect the anti-business sentiments associated with the growing tide of populism. The federal bench, which was appointed, was for the most part much friendlier to big business than the state judiciaries. Dominated by prominent attorneys who mostly represented commercial interests, the Judicature Society recommended isolating judicial selection as much as possible from popular control. Instead of holding elections, it recommended that governors choose judges only from lists generated by an independent commission composed mostly of lawyers. Citizens would only have the option of approving or disapproving the governor's choice after the judge has served for a brief period of time. This system was first adopted in 1940 by Missouri and is often called the Missouri Plan.[2] Supporters prefer the term merit selection while others call it the Bar Association Plan—because it would give state bar associations a dominant role in selecting judges. Supporters of merit selection in North Carolina today advocate something like the Missouri Plan.

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Methods used by each state to select judges usually reflect that particular state's culture and political history. (See Table 1, p. 18). Twelve states, including nine of the original 13 colonies, as well as the federal government, continue to allow elected officials to choose judges. Nonpartisan elections are most often found in the West, where statehood coincided with the Progressive Era. True to their Jacksonian traditions, southern states like North Carolina usually chose their judges in partisan elections.

Court Packing and Silk Stockings

The North Carolina Bar Association argues that a system modeled after the Missouri Plan is a better way to choose judges than having them run as politicians. Whenever there is a judicial vacancy, a panel of lawyers and nonlawyers would prepare a list of qualified attorneys from which the governor would appoint a judge. Unlike the present system, where judges run against each other, the merit system gives voters only the opportunity to decide whether to retain a judge. There would be no opposing candidate in such "elections."

The Bar Association says the present system of partisan elections discourages qualified lawyers, who do not want to be politicians, from running for judgeships. But David Blackwell, executive director of the North Carolina Academy of Trial Lawyers, sees things in a different light. Blackwell worries that under merit selection, the nomination process would become secretive and vested in the hands of a small, elite group of lawyers. He even objects to calling the bar association plan "merit selection." He asks, "Whose merit?" Calling the proposed plan "merit selection" implies that present judges are not meritorious, Blackwell contends. That's an implication with which he disagrees.

North Carolina judges have in fact had a good record with only isolated judicial scandals and few complaints about judicial incompetence, Blackwell notes. Many states with "merit selection," including Missouri, have in fact been rocked by judicial controversy.[3] In that state, one Supreme Court justice has accused the Chief Justice of influencing the judicial nominating commission in an effort to "pack" the court with three new justices who would vote with the chief on court administration issues. That brouhaha has undermined public confidence in Missouri's model system and eroded support for merit selection systems generally.

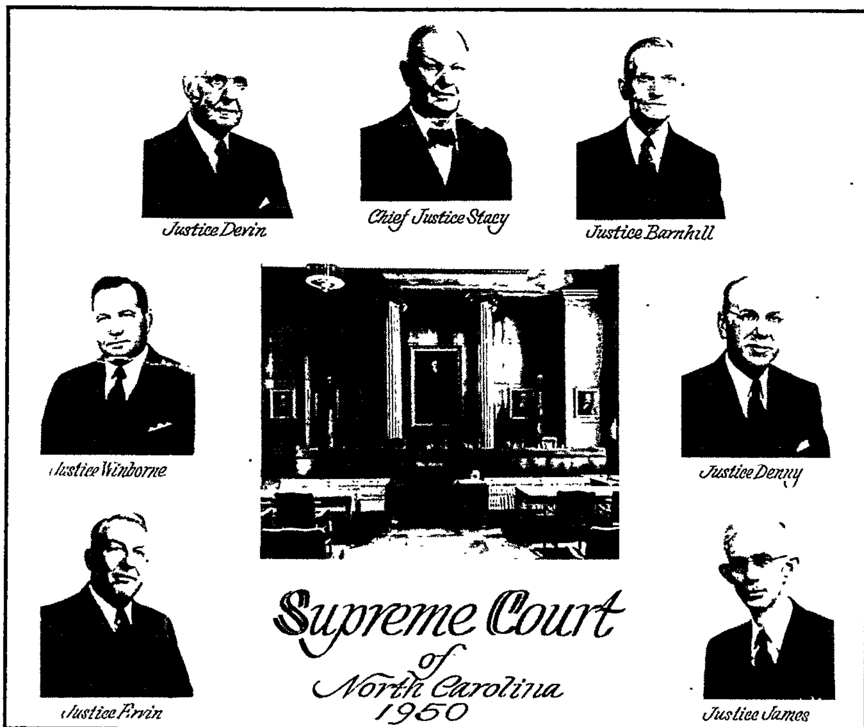
The concern of trial lawyers, both in North Carolina and elsewhere, is that merit selection plans would give bar associations far too much power over who becomes a judge. Traditionally bar associations, which are umbrella organizations representing many different kinds of attorneys, are dominated by lawyers who represent corporate clients and business interests.[4] Blackwell worries that merit selection would turn the selection of judges over to what he calls "silk stocking lawyers" representing corporate clients as opposed to trial lawyers who represent consumers, accident victims, and workers. That's what happened in Missouri. Blackwell contends that American history has proven the ballot box to be a good way to get things done.

The Elections Flap

The renewed interest in merit selection stems primarily from the 1986 judicial elections, when Democrats and Republicans fought bitterly over five seats on the state Supreme Court. A squad of conservatives interested in electing judges in harmony with their ideology leveled sharp attacks on the Democratic candidate for Chief Justice, Jim Exum. Both he and his Republican opponent, then-Chief Justice Rhoda Billings, were distressed by the virulent and partisan attacks, and Billings let it be known that she would prefer that the attacks cease. Both Billings and Exum support a merit form rather than an electoral system, but neither has explained how a merit system would eliminate scathing attacks on a sitting justice when he must stand for a retention vote. Nothing could halt an attack on the judge's character or on his record. In short, even with a merit system, there still might be partisan attacks that smack of the current system, and little would be gained.

Consider what happened just last year in California. In 1986, Chief Justice Rose Bird ran for retention under rules much like those proposed for North Carolina. The election was far nastier than the one in North Carolina and did far more damage to the legitimacy of that state's judiciary. It also proved to be one of the most expensive races for state judicial office in American history, (more than $7 million spent) and Bird lost her seat in the fracas. Among other things, Bird was accused of coddling criminals. Bird had voted against the death penalty in several capital cases, and one ad run by her detractors pictured the mothers of murder victims beseeching voters to "cast three votes for the death penalty."[5] The lesson seems clear. Not only will merit selection not encourage

Traditionally, judges in North Carolina are appointed to fill vacancies. Of the seven judges in this 1950 photo of the N.C. Supreme Court, six were first appointed to the court, and the seventh — Justice Walter Stacy, the only member elected to the court — became Chief Justice by appointment.



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lawyers to seek judicial office, but based on the experience from both California and Missouri, merit selection will not eliminate partisan conflict, either. Instead, it may prompt one-issue groups to target candidates they don't like and attempt to turn them out in a single-shot campaign.

Over the last 45 years, many states have experimented with merit selection plans similar to the one proposed for North Carolina. If these plans really resulted in better judges, we should be able to see some improvements in states that have adopted merit selection. But the best research we have on this question bears little evidence that merit selection produces better judges than an election system.

Consider these studies:

■ Judges chosen under merit selection have no more experience, and no better educational backgrounds, than judges chosen in partisan elections.[6] A 1972 study by Bradley Canon, a professor of political science at the University of Kentucky, examined judicial selection before and after merit selection, and found merit selection had no effect in producing more experienced or better educated judges.

■ Worse yet, in Missouri the quality of education among judges selected actually declined after the adoption of merit selection, according to a 1969 study by University of Missouri researchers Richard Watson and Ronald Downing.[7]

■ Rather than opening up the judicial profession to lawyers who otherwise would not run, as proponents claim, Henry Glick of the University of Florida found in a 1983 study that merit selection actually narrowed the pool of eligible lawyers by concentrating more heavily on local candidates for judgeships than elections had.[8]

■ Despite constant research, no one has found any evidence that judges chosen under merit selection do any better job than judges chosen under partisan election. Lawrence Baum, a specialist in judicial politics at Ohio State University, contends that the experiences of more than a dozen states over the last 45 years provide no objective evidence of this.[9]

Advocates of merit selection believe that turning judicial election over to a panel of lawyers and laymen will "take politics out" of the judicial selection process. Contrary to what supporters believe, the Academy of Trial Lawyers' Blackwell speculates, judicial politics under a system where judges are chosen in private by a small group are likely to be just as partisan and far nastier than when they are chosen in a public election. That is what has happened in other states. "I've long maintained that you can't keep politics out of the judiciary completely," says the University of Kentucky's Canon. "The Missouri Plan may keep politics out in the overtly partisan sense, but it doesn't keep it out in the ideological sense."[10]

Table 5. Actions Against North Carolina Judges by N.C. Supreme Court Since 1973

Judges Removed from the Bench for Misconduct

1. Judge Linwood Peoples of Henderson

Peoples, a District Court judge, resigned his seat in 1977 after he was accused by the N.C. Judicial Standards Commission of accepting money from defendants to settle traffic cases out of court. The Commission had recommended that Peoples be removed from office. In 1978, Peoples ran for Superior Court and won a seat, but the N.C. Supreme Court refused to seat him, ruling that his misconduct in office made him ineligible to retain his seat.

2. Judge William Martin of Hickory

Martin, a District Court judge, was removed from the bench by the N.C. Supreme Court in 1981 after the Judicial Standards Commission accused him of trying "to obtain sexual favors from female defendants who had matters pending before the courts." The Commission earlier had recommended in 1978 that Martin be removed from office, but the N.C. Supreme Court reduced that recommendation to a public censure of Judge Martin.

3. Judge Charles Kivett of Greensboro

Kivett, a Superior Court judge, was accused by N.C. Justice Department prosecutors in 1982 of sexual misconduct in office and of meting out light sentences to certain defendants at the request of a friend. The Judicial Standards Commission recommended that Kivett be removed, and the N.C. Supreme Court removed him from office in 1983.

4. Judge Wilton Hunt of Whiteville

Hunt, a District Court judge, was accused by the Commission of accepting bribes in an undercover operation conducted by law enforcement authorities. The N.C. Supreme Court removed Hunt from the bench in 1983.

Judges Censured

1. **District Court Judge E. E. Crutchfield** of Albemarle, 20th Judicial District, 1975, for *ex parte* disposition of several court cases.
2. **District Court Judge Joseph P. Edens** of Hickory, 25th Judicial District, 1976, for *ex parte* disposition of a case.
3. **District Court Judge George Stuhl** of Fayetteville, 12th Judicial District, 1977, for *ex parte* disposition of cases, making overtures to an arresting officer about his testimony, and improperly urging an assistant district attorney to take a dismissal in a case.
4. **District Court Judge Milton Nowell** of Goldsboro, 8th Judicial District, 1977, for *ex parte* disposition of cases.
5. **District Court Judge Herbert Hardy** of Goldsboro, 8th Judicial District, 1978, for *ex parte* disposition of cases and for writing another judge urging him to enter a certain sentence in a pending court case.
6. **Superior Court Judge Paul Wright** of Goldsboro, 8th Judicial District, 1985, for making a campaign contribution to a candidate in another race, contrary to judicial canon proscribing such political activity.

Censure Recommendation Pending

Superior Court Judge Kenneth Griffin of Charlotte, 26th Judicial District. Censure recommendation filed in 1986 for making inappropriate courtroom comment and making a derogatory gesture in court.

Note: The Judicial Standards Commission was set up in 1973. It recommends actions against judges to the N.C. Supreme Court, which is empowered to take disciplinary action against judges. Prior to that, the only way to remove a sitting judge in North Carolina was by impeachment.

Table 6. Salaries of N.C. Judges

Position	Salary
Chief Justice of the Supreme Court	$74,136
Associate Justices of the Supreme Court	$72,600
Chief Judge of the Court of Appeals	$70,284
Judges of the Court of Appeals	$68,748
Senior Resident Superior Court Judges	$63,048
Regular and Special Superior Court Judges	$61,044
Chief District Court Judges	$51,396
District Court Judges	$49,428

Note: These are base salaries, and do not include longevity increases.

Although there is no evidence that merit selection schemes remove politics from the process, they do change the nature of politics. According to a 1974 study conducted by the American Judicature Society—the group that first proposed merit selection—merit plans have not been able to remove partisan politics from the selection process. Instead, what actually appears to happen in states with merit selection is that bar associations split along partisan lines in ways resembling the political culture of the state when they choose panel members.[11]

Governors do not appoint lay people randomly to nominating commissions, but rather choose people who will do their bidding—political allies, friends, and other trusted water carriers. What we know of judicial selection in states with variants of the Missouri Plan is that governors use their appointees to put forward names of individuals they would like to see on the bench.[12] In some cases, merit selection allows governors to reward political supporters with judgeships while not appearing to make embarrassing patronage appointments. North Carolina Gov. Jim Hunt may have tried to do just that—avoid embarrassing appointments—in 1977 when he created by executive order his own merit nominating process, according to *The Charlotte Observer*.[13]

What Do You Get?

One further problem of merit selection plans is the demographics of the nominating commission. While the governor is usually the appointing authority, and while the legislature may do the confirming, it is the nominating commission which has enormous influence because it can choose the nominees—and it can choose *who will not* be a nominee for a judgeship. Surveys done of Missouri plan nominating committees around the United States have found that 97.8 percent of the members were white and 89.6 percent were male. While this might be explained by the predominantly white, male structure of the bar, even among the nonlawyers on these panels, business and banking executives tend to predominate.[14] Why is this important? If business, corporate and legal interests have such great influence on the nominating process, the successful judicial candidate may tend to reflect their views, rather than those of the populace at large.

Legitimate questions ought to be raised about the ability of such a system to produce a judiciary that will be sensitive to all interests. "The prevalence of these particular interests on the selection committees raises very serious doubts about the commissions' ability to produce a judiciary sensitive to all interests of the general public, writes Patrick Dunn in "Judicial Selection Process and the Missouri Plan."[15] While electoral politics is crude, it at least is relatively open for those who will see, and it can be analyzed, digested, and assessed.

But merit selection would offer little hope to N.C. Republicans, at least under Democratic governors. Traditionally, Republicans have not fared very well under our state's system of partisan elections, but they would not do well with merit selection, either, unless panels also reflect geographical distributions of Republican and Democratic strength. In the Appellate Division, only one state judge is Republican—Judge Robert Orr of the Court of Appeals, appointed to a post-election vacancy. There are no GOP members of the Superior Court, and a scant handful of District Judges. But, based upon what has happened in other states, they would probably have little to gain from merit selection here. In Missouri, it was believed that merit selection would break the hold the Democratic party had over the state judiciary. However, after the merit selection system was put in place, the percentage of Democratic

judges actually increased as the locus of politics shifted from elections to bar associations. The lesson here is that no matter which selection process is used, there is considerable room for the influence of other political institutions—including political parties and the other branches of government —to influence judicial selection.

How Can We Improve Judicial Elections?

By and large, North Carolina has not been troubled with the major judicial scandals that have rocked some other states. Apart from some problems with District Court judges and traffic cases, our judges have been relatively well behaved. That's not to say there aren't some pitfalls with judicial elections, however.

Consider these traditional drawbacks in North Carolina:

- Low voter participation in judicial elections and a lack of voter knowledge about candidates;
- Inadequate representation on the bench of women and minority judges; and
- An electoral system for Superior Court judges that discriminates against the minority political party because of the requirement that Superior Court judges run statewide, rather than within districts.

Low interest in judicial elections in North Carolina stems partly from the fact that many judicial candidates run unopposed—the minority party simply does not often nominate candidates for these posts. In part, this is due to the fact that all Superior Court judges have to run in statewide elections where voters are unlikely to have any information about a candidate except their political party, their gender, and possibly their race. This system is presently under court challenge by both the state Republican Party and the NAACP (see p. 19 for more). If Superior Court elections were held within judicial districts, as they are in most states, scores of contests would be more competitive. Citizens are more likely to take an interest in races that personally affect them and over which they have some measure of control.

Allowing Superior Court judges to be elected from the districts where they primarily reside is more likely to give qualified blacks, women and Republicans an opportunity to serve as judges than the proposed merit selection system. And it certainly would be fairer than the present electoral system.

One of the shortcomings of using popular elections to fill judicial posts is related to restraints on judicial campaigning. Judges cannot make political promises or take sides on controversial issues. They must build their campaigns around issues of training, character, family stability, church affiliation and education background. The typical election handout shows the candidate, his wife, his five children and his golden retriever posed in front of a fireplace in the family den. It tells us little about the qualifications of the candidate beyond

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Then – Associate Justice Rhoda Billings with Gov. Jim Martin on Aug. 1, 1986 when Billings was appointed Chief Justice. In the 1986 election, she was defeated by former Associate Justice Jim Exum for the Chief Justice post.

education and membership in civic or religious groups. Any method that could increase public knowledge about judicial races and increase the information flow about candidates would be helpful to North Carolina's citizens.

Some states, for instance, have developed ratings systems for judges. While early efforts at rating judges have been sharply criticized, usually by the rated judges, recent efforts have been well received. The N.C. Bar Association could do a great service by conducting periodic surveys of judges and those who practice before them and publishing those results regularly. In 1983, the Bar Association conducted such a survey, but the results were not published because, it said, it had made a commitment to keep the results confidential. Instead, a judicial evaluation was furnished to each judge so that he might see how he was perceived by the lawyers who practiced before him. The bar has no such follow-up in the works, says N.C. Bar Association President John Beard.[16]

An earlier survey, published in 1980 by the N.C. Center for Public Policy Research, asked lawyers for their opinions on members of the trial and appellate courts.[17] That survey was made public by the Center, and has been cited frequently in the media as one indication of a judge's overall performance, his perception by the bar, his professional characteristcs, and the perception of his work by fellow members of the judiciary. The Center is considering conducting another such survey of the judiciary in 1988.

Judicial Politics in the Future

Whether a state uses partisan elections, merit selection, nonpartisan elections, or any other method to choose its judges, the politics of judicial selection is always going to be more a function of the *political culture* of a state than the *form* of selection. The problem with recent judicial elections in North Carolina is not the system itself, but the fact that the political culture of the state is changing. As judicial elections become more partisan (and more expensive), a number of people, including former Chief Justice Susie Sharp and Chief Justice Exum, are worried that good candidates will not seek judicial office. Sharp rightly pointed out in 1977 that partisan elections worked well in the past because North Carolina was a one-party state, and real judicial elections were the exception rather than the rule.[18]

North Carolina is still evolving as a two-party state. What we have seen in other states indicates that increased competition will take place no matter which method we use to choose our judges. As partisan politics in North Carolina becomes more partisan, as it did in Missouri, or more ideological, as it has in California, the politics of judicial selection will get nastier and more expensive whether we turn it over to a small group of elite lawyers or leave it in the hands of the people. Partisan combat, in spite of Justice Exum's distaste for it, does not endanger the process unless it produces inferior and subservient judges. So far in North Carolina, it has not. There is no evidence that partisan elections are more likely to give us judges inferior to those who would be chosen under so-called merit selection. And with open elections, at least, we know who to blame if the quality of justice declines.

FOOTNOTES

[1]Lawrence Baum, *American Courts*, Houghton Mifflin, 1986, p. 92.

[2]*Ibid.*

[3]Paul Wenske, "Dissension Rocks Missouri Justices," *The National Law Journal*, May 27, 1985, p. 1.

[4]See Edward Lauman and John Heinz, "Specialization and Prestige in the Legal Profession: The Structure of Deference," *American Bar Foundation Research Journal*, 1977, pp. 155-216; Jerald Auerbach, *Unequal Justice*, Oxford University Press, 1976; John Heinz and Edward Lauman, *Chicago Lawyers: The Social Structure of the Bar*, Russell Sage, 1982.

[5]William Endicott, "'Twas the season to be nasty," *The California Journal*, Vol. 17, No. 12, December 1986, p. 582.

[6]Bradley Canon, "The Impact of Formal Selection Processes on the Characteristics of Judges — Reconsidered," *Law and Society Review*, 1972, pp. 588-589.

[7]Richard Watson and Ronald Downing, *The Politics of Bench and Bar*, John Wiley and Sons, 1963, pp. 205-219.

[8]Henry Glick, *Courts, Politics and Justice*, McGraw Hill, 1983, p. 89.

[9]Baum, pp. 106-107.

[10]Quoted from Wenske, p. 26.

[11]See esp. Allan Ashman and James Alfini, *The Key to Merit Selection: The Nominating Process*, American Judicature Society, 1974.

[12]Jerome R. Corsi, *An Introduction to Judicial Politics*, Prentice Hall, 1984, pp. 104-107.

[13]Ned Cline, "Hunt Was Warned About Patronage List for Judges," *The Charlotte Observer*, Sept. 1, 1977, p. 1A.

[14]Ashman and Alfini. See also Greg Casey et al., "A State Supreme Court in Crisis: The Case of Missouri," presented at the annual meeting of the Southwest Political Science Association, March 19, 1986, San Antonio, Texas.

[15]Patrick Dunn, "Judicial Selection and the Missouri Plan," *Courts, Law and Judicial Processes*, The Free Press, 1981, p. 109.

[16]The N.C. Bar Association, which conducted the survey, is sometimes confused with the N.C. State Bar, which is the regulatory agency that licenses and disciplines lawyers in North Carolina, and to which all licensed lawyers must belong. The N.C. Bar Association, on the other hand, is a voluntary professional association of lawyers in North Carolina for a variety of educational and other purposes, and membership is not mandatory.

[17]*Article IV: A Guide to the N.C. Judiciary*, First Edition, N.C. Center for Public Policy Research, 1980.

[18]Correspondence from Chief Justice Susie Sharp to the Hon. H. Parks Helms, March 9, 1977, pp. 1-2.