



## DOES MERIT SELECTION WORK?

BY GBEMENDE E. JOHNSON

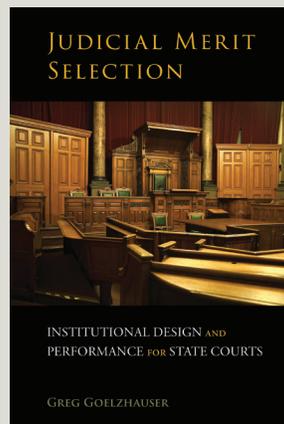
As states such as Iowa and Pennsylvania debate their judicial selection systems,<sup>1</sup> whether merit selection works is the key question that motivates Greg Goelzhauser's innovative and timely inquiry in *Judicial Merit Selection: Institutional Design and Performance for State Courts*, the latest addition to Goelzhauser's extensive research on state judicial merit selection.<sup>2</sup>

The identifying feature of merit selection is its two-stage appointment process: An appointed commission winnows a list of candidates and then forwards that list of candidates to the governor for appointment. As Goelzhauser explains, existing scholarship illuminates the way in which merit selection influences judicial outcomes; however, there is much we do not know about the process of merit selection. Goelzhauser, a political science professor at Utah State University, refers to this dearth as a "black box." The substantial variation that accompanies constitutional and

statutory design of merit selection systems also receives scant attention from scholars. Do some institutional specifications make certain merit selection systems more susceptible to capture, which could affect the system's ability to deliver on things

like the appointment of high-quality jurists? In addition, how does merit selection affect the applicant pools for judicial vacancies? These questions are particularly important given that "from 2000 through 2016 a plurality of justices to join state supreme courts for the first time did so via merit selection."

Before presenting his analyses, Goelzhauser provides a brief overview of the history of judicial selection in the states. His discussion of the use of judicial selection in a variety of specifications at the federal level (i.e., for federal magistrate judges) and internationally illustrates that American states are not the only laboratories for institutional experimentation with merit selection. Then, using multi-method research approaches involving meticulous case study analyses and impressive original datasets, Goelzhauser provides an insightful and thought-provoking exploration of the stages and implementation of judicial merit selection.



### **Judicial Merit Selection: Institutional Design and Performance for State Courts**

BY GREG GOELZHAUSER

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According to Goelzhauser, merit selection supporters argue that the use of commissioners with requisite legal experience reduces the influence of partisan and patronage considerations, which presumably leads to higher-quality judicial appointees and greater access to judicial office for traditionally underrepresented groups. However, critics of merit selection assert that “merit selection merely moves the political focal point to the nominating commission,” and therefore the promises of higher-quality candidates and increased diversity fail to sufficiently materialize.

One component of Goelzhauser’s analysis of whether merit selection “works” involves examination across three key metrics: judicial quality, judge diversity, and the influence of partisanship. Goelzhauser assesses these metrics through an exploration of the expressive and progressive ambition of eligible attorneys and judges when vacancies emerge, and an in-depth examination of the implementation stage of merit selection (i.e., commission action when a vacancy occurs). He continues to traverse the merit selection process with an analysis of factors that influence commission nomination and the governor’s ultimate appointment. Finally, he examines how the institutional design of merit selection affects committee capture, which could negatively affect merit selection performance.

Goelzhauser provides a vivid picture of commission deliberations during the vacancy stage. He examines a commission’s screening and interview of applicants for an open position on the Arizona Court of Appeals, offering detailed information regarding the commissioners and candidates. He also effectively relays the dialogue between commissioners about par-

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ticular candidates and, when possible, provides the votes of individual commissioners. Readers also gain insight into the questions posed by commissioners to candidates during the interview stage (after the commission has narrowed the list of applicants). Questions regarding judicial philosophy, accountability, and favored or disfavored appellate decisions are a few of the queries posed to applicants. Some answers to commissioner questions suggested strategic behavior on the part of applicants whose partisan leaning was slightly out-of-step with the state political environment.

One particularly interesting section is Goelzhauser’s discussion of the public comment period during the commission’s screening of applicants. He notes, “All the speakers were attorneys or judges who knew the applicants in a professional capacity, and comments were uniformly positive.” One concern expressed about merit selection is the removal of direct public participation in the selection process, as compared to elections. However, Goelzhauser’s discussion illustrates that some states allow for modest inclusion of public views on potential nominees. Importantly, he notes that the time provided for

public comment was limited in both the screening and interview stage, and those who spoke usually were connected to the candidates. Upon reading Goelzhauser’s description, one wonders whether expanded opportunities for public comment could help assuage concerns of transparency and public participation in the merit selection process.

Goelzhauser also explores, using quantitative analyses, why commissions and governors nominate and appoint particular applicants. He writes, “if merit selection works as intended, commissions and governors should be selecting on qualifications and diversity rather than political considerations.” To explore this premise systematically, Goelzhauser submitted public record requests to all states employing merit selection; only Nebraska supplied the information needed to properly investigate the factors that influence commission and governor choice. As Goelzhauser notes throughout the book, transparency gaps complicate assessment of merit selection performance from a multi-state perspective; however, Nebraska’s merit selection system is representative of merit systems in a number of states, so the analyses and findings offer broader insights useful beyond Nebraska state lines.

Goelzhauser provides clear empirical measures for his concepts of interest. Years of professional experience, public and private practice experience, and law school quality are a few of the factors used to assess judicial qualifications, and partisan affiliation is measured using the candidate’s partisan identification and campaign donation history. Variables such as longer length of judicial experience (up to a point) and receiving professional honors increase the probability ▶

of commission nomination. These findings would seem to bode well for those who champion merit selection's ability to ensure that quality jurists are nominated and appointed.

However, Goelzhauser also finds that women applicants are disadvantaged in terms of having their nominations forwarded by commissions to the governor. Similarly, partisanship emerges as a significant factor in whether a commission forwards a nomination to the governor, with Democrats (before controlling for professional experiences) and nonpartisans disadvantaged when compared to Republicans in some model specifications. Goelzhauser finds consistent evidence of the influence of partisanship at the gubernatorial appointment stage, with Democrats being systematically disadvantaged in regards to appointment probability. Presumably, these results would vary depending on which party is dominant in state politics. The findings for gender at the commission stage and partisanship at the commission and gubernatorial appointment stages seem to "point to merit selection's institutional failure to deliver on certain core promises."

Goelzhauser presents a novel and persuasive theory of expressive and progressive ambition. Ambition for public office has been explored extensively in the electoral context (particularly legislative); however, we know far less about what motivates the decision to apply for judicial vacancies in merit systems. The decision to run for office entails substantial cost that may dissuade potential candidates. Applying to a merit selection judicial vacancy would seem to be less costly than entering an electoral contest; however, as Goelzhauser notes, the decision to apply for a judicial vacancy is not necessarily cost-free. And the promise of

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higher-quality judges, greater diversity, and reduced partisanship seems to be highly dependent on whether the merit selection applicant pool is somehow "distorted." A distorted pool can lead to distorted merit selection outcomes.

To empirically test his propositions, Goelzhauser amasses an impressive dataset with approximately 190,000 judge-vacancy observations from Alaska that include "individuals who applied for each judicial vacancy since admission to statehood." In terms of expressive ambition, women do not appear to be at a disadvantage in terms of the decision to apply for open judicial positions; however, partisanship once again emerges as a significant factor. Specifically, attorneys who are ideologically congruent with the appointing governor are more likely to apply for vacant judgeships. This once again calls into question the claim that merit selection helps to at least moderate the influence of partisanship in the judicial selection process.

Goelzhauser challenges the "institutional homogeneity assumption" that typically accompanies research on merit selection commissions. One of the highlights and contributions of Chapter 5 is Goelzhauser's detailed account of the myriad ways in which merit selection commissions vary across institutional metrics. Specifically, states vary in how much

commission appointment authority is allocated to the governor and entities such as the legislature, the state bar association, and other sitting judges. Goelzhauser also explains that the lawyer-layperson balance of the committee itself varies by state.

The overarching concern here, of course, is capture, and the deleterious effects on judicial performance of certain interests working to shape a judiciary that aligns with their preferences rather than a judiciary that is selected by merit. Goelzhauser presents a comprehensive analysis of all state supreme court merit selection appointments between 1942 and 2016 to discern whether institutional design influences the quality and diversity of judicial appointees. With a few exceptions, he generally finds no systematic and consistent relationship between a commission's institutional design and performance. In light of these findings, Goelzhauser recommends that those invested in merit selection turn their attention to attendant issues such as "candidate pool construction and commission decision-making."

The "answer" to the question of whether merit selection works is understandably complex, and Goelzhauser concludes by assessing his findings in light of the normative goals and expectations of merit selection. He remarks that there is clear value in allowing all interested parties, especially women and minorities, to apply for judicial vacancies and in constraining executive appointment power. However, he pointedly notes that serious concerns of transparency accompany merit selection systems, concerns that are as important as the other findings produced by Goelzhauser's analyses. In fact, increased transparency for information related to merit selection

processes is Goelzhauser's "first design recommendation." In response to his public records requests for information such as "lists of applicants by vacancy" and "lists of commission nominees," he notes, "most states reported discarding the relevant information or having laws exempting [the lists] from disclosure." There are of course valid reasons for withholding certain types of information related to judicial applications, given privacy concerns. However, the lack of accessible data makes it difficult for researchers and policymakers to compare and assess the performance of merit selection systems across states and "precludes even the possibility of meaningful internal evaluation." Goelzhauser offers useful and practical suggestions for ways in which states can facilitate increased transparency, such as anonymizing applicant data. Greater transparency from states is clearly necessary for continued assessment of merit selection performance.

Goelzhauser's work sheds new light on judicial merit selection processes and raises important questions for future researchers. It is also timely, as several states continue to tinker with the way judges are appointed. Iowa Governor Kim Reynolds recently signed legislation that would increase her appointment power over the state's judicial merit selection commission<sup>3</sup> by removing the senior supreme court justice from the 17-member commission and giving the governor the authority to fill that particular seat. The change also gives the gover-

nor a majority of appointments to the committee. Republicans argued that the move was necessary to increase the public's representation on the commission through gubernatorial selection. Democrats described the move as a "power grab."<sup>4</sup> The impact of this change is yet to be seen; however, Goelzhauser's discussion in *Judicial Merit Selection: Institutional Design and Performance for State Courts* provides a much-needed theoretical and empirical lens through which to examine the motivations and potential consequences of such institutional adjustments.

Goelzhauser's research is particularly important now given that heated debates over the judiciary, such as in Iowa, are not likely to ebb under current levels of political polarization. I highly recommend *Judicial Merit Selection: Institutional Design and Performance for State Courts* to students and scholars of judicial politics, comparative institutionalists, legal scholars, transparency advocates, and state officials.



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<sup>1</sup> Caroline Cummings, *Gov. Kim Reynolds Signs Bill Making Changes to Judicial Selection Process*, Fox 28 (May 9, 2019), <https://cbs2iowa.com/news/local/gov-kim-reynolds-signs-bill-making-changes-to-judicial-selection-process>; Mark Scoloro, *House Panel Advances Changes in Pennsylvania Judge Elections*, AP News (April 30, 2019), <https://www.apnews.com/6eb05e080f-c6417692ed59e2fe952794>.

<sup>2</sup> See Greg Goelzhauser, *Does Merit Selection Work? Evidence from Commission and Gubernatorial Choices*, 6 J.L. & COURTS 155 (Spring 2018); CHOOSING STATE SUPREME COURT JUSTICES: MERIT SELECTION AND THE CONSEQUENCES OF INSTITUTIONAL REFORM (2016).

<sup>3</sup> See Cummings, *supra* note 1.

<sup>4</sup> *Id.*



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