How should judges be selected? This seemingly simple question has gripped the American polity since its inception, when the Declaration of Independence included judicial selection among its most prominent grievances against the Crown. The “endless judicial selection debate” (Geyh 2008) persists to this day due to its high stakes. As Alexis de Tocqueville ([1835] 1969, 270) observed, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” With an eye toward understanding and influencing how courts resolve these political questions, there is a natural emphasis on making sure the “best” judges reach the bench—however that concept is understood. Absent the overlapping consensus needed to reach this sort of agreement, however, attention turns to identifying the mechanisms most likely to deliver favored outcomes. As a result, the debate over how to design judicial selection institutions has become firmly entrenched as a fundamental point of interest in American politics.

The American states have been the epicenter for this debate since the founding, when those who drafted and ratified the first state constitutions grappled with how to design judicial selection institutions in order to avoid the menaces of colonial rule. Although initial preferences
tended toward variations on the familiar mechanism of elite appointment, judicial elections emerged as a prominent alternative in the middle of the nineteenth century, with subsequent debates focusing on whether they should be contested on a partisan or nonpartisan basis. Continued popular discontent led to further experimentation in the middle of the nineteenth century when a commission-aided form of elite appointment known as “merit selection” took center stage. The contemporary judicial selection debate largely revolves around these institutional alternatives. But while much is known about unilateral elite appointment and judicial elections—as a result of repeated in-depth study and observation over a long time horizon—merit selection remains relatively shrouded in mystery.3

Under merit selection, judicial vacancies are filled through a two-stage process. First, a nominating commission winnows applications submitted by prospective judges and nominates a short list of candidates for the governor’s consideration. Second, the governor makes the appointment from the list of commission-forwarded nominees. In essence, nominating commissions serve as an ex ante constraint on gubernatorial appointments, in place of or in addition to the familiar federal model of ex post legislative constraint through confirmation. While there is inconsistency with respect to nomenclature, I distinguish “merit selection” from the “merit (or Missouri) plan” (see also Goelzhauser 2018a). The latter is reserved for systems that combine commission-aided judicial selection with retention elections after an initial term in office. Thus, merit selection is a necessary but insufficient condition for establishing a merit plan system. This conceptual distinction is important in part because states may combine merit selection with any retention mechanism.4

Proponents of merit selection make several arguments for its use in place of other prominent methods such as unilateral elite appointment and contestable election.5 The bedrock argument for merit selection is that it de-emphasizes politics while stressing qualifications. Furthermore, many proponents add that emphasizing qualifications over politics increases judicial diversification. Nominating commissions are the key institutional innovation in both instances. These bodies, which typically include lawyers and nonlawyers appointed by actors such as governors and state bar associations, are thought to be sufficiently
removed from the political process that drives gubernatorial decisions and election outcomes to ensure a focus on qualifications. In turn, this nonpartisan environment encourages meritorious individuals—including members of historically underrepresented groups such as women and racial minorities—to apply for consideration.

Critics contend that merit selection is no less political. Instead, merit selection merely moves the political focal point to the nominating commission. If commissioners are no less incentivized than others to implement partisan priorities, those selected for the bench are unlikely to be more qualified or diverse on average. Moreover, merit selection can obscure the importance of politics relative to other prominent methods by vesting power in a comparatively opaque and unaccountable institution. If commissioners are accountable, it is only to their appointers. Either way the resulting decision-making calculus does not emphasize qualifications or diversity as first-order priorities. Some critics worry that commission politics and a lack of accountability may yield an even less qualified and diverse bench.

Arguments for and against merit selection that do not emphasize commissions tend to not be about merit selection per se. Proponents, for example, may argue that merit selection is to be favored in light of the growing influence of money in judicial elections. Critics may argue that it deprives people of an opportunity to select judges. Although considerations such as these are important to the broader judicial selection debate, they are not unique to merit selection. Rather, they tend to pit judicial elections against appointment systems more generally, of which merit selection is merely one type. Less money may be spent on directing judicial selection outcomes in states with competitive elections than in those with merit selection (unless that money is merely redirected to, say, the governor), but if so that may also be true for unilateral appointment states. And that people have less say in merit selection outcomes than under contestable election is essentially true by definition, but it is also true for unilateral appointment. In contrast to these arguments, those concerning merit selection in particular typically emphasize the importance of nominating commissions since they are what make the institution unique.

This brings us to the book’s motivating question: Does merit selection work? Policy makers, scholars, and other stakeholders have been
asking this question for nearly a century. Most of the existing empirical scholarship on this question engages in comparative constitutional analysis. In a previous book (Goelzhauser 2016), for example, I leveraged data on all state supreme court seatings from 1960 through 2014 to analyze whether there were meaningful differences across selection systems with respect to experience, qualifications, and diversity. While there are some important differences across systems with respect to diversity, there seems to be little difference with respect to experience and qualifications. And no mechanism consistently performs better or worse along these dimensions. Similar results have been found in other studies engaging in comparative institutional performance to evaluate judicial selection institutions.7

Comparative institutional analysis is fundamental for understanding selection system performance, but comprehensively evaluating merit selection requires additional attention to the institutional dynamics that make it unique. The limitation with existing comparative institutional analyses is that we only observe the final outcome (e.g., whether a particular vacancy yields a woman or someone with previous judicial experience). This emphasis on observable final outcomes poses two problems for efforts to understand and evaluate merit selection. First, merit selection systems are treated as if they are institutionally homogeneous. Although there are advantages to grouping merit selection states together, such as analytical parsimony and generalizing about shared features such as commission use, doing so masks institutional variation in system design that may impact performance. Second, the commission-aided process that makes merit selection unique is typically treated as a black box in studies of comparative institutional performance.

There have been two extensive efforts to detail and evaluate merit selection’s inner workings. In The Politics of the Bench and the Bar, Watson and Downing (1969) present a case study of merit selection’s early implementation in Missouri.8 Drawing from extensive surveys and interviews, they offer rich descriptions on a range of issues from how governors influence the selection process to the background characteristics of judges chosen under the plan. Five years later, Ashman and Alfini (1974) published The Key to Judicial Merit Selection. Respectively, Ashman and Alfini were director and associate director of
the American Judicature Society, an organization that spearheaded merit selection’s spread for nearly a century. Ashman and Alfini’s account, which the American Judicature Society published, evaluated merit selection’s use in five jurisdictions and offered recommendations for improving its implementation.

Notwithstanding these important early accounts, progress toward developing a better understanding of merit selection and evaluating its institutional performance has stalled. This stasis is particularly stark in light of the considerable advancement made in recent years toward understanding the dynamics of other prominent judicial selection institutions. Indeed, merit selection remains cloaked in mystery nearly a century after its first large-scale adoption by Missouri in 1940.

Fundamental questions about merit selection that remain unanswered include: What does implementation look like in practice? What determines whether eligible attorneys apply for consideration? What are the determinants of commission and gubernatorial selections from their relevant choice sets? And how does the design of these systems impact performance? In this book, I address these questions using multiple methodological approaches and a wealth of new information procured from a variety of sources such as public records requests. The result is a project that has important implications for evaluating merit selection’s institutional performance and the broader judicial selection debate.

Before introducing the book’s aims in greater detail, it is important to take a brief step back to understand how merit selection became such a prominent institution.

**Merit Selection’s Spread**

The story of merit selection’s rise is part of a broader one concerning institutional experimentation with respect to judicial selection in the states. After declaring independence from Great Britain in 1776, states began replacing their colonial charters with new constitutions. Colonial-era judges were selected by the Crown and served at its pleasure. Wary of replicating institutional arrangements that centralized too much power over judicial selection in a unitary executive branch, states dispersed authority to ensure meaningful checks and balances. The most common early constitutional arrangements delegated power over
Chapter 1

Judicial selection to state legislatures or governors working in conjunction with an executive council. One commonality was that the first wave of state constitutions relied almost exclusively on elite methods for picking judges.

Appointment remained the status quo through the middle of the nineteenth century. Vermont’s 1777 Constitution called for the popular election of county judges, but this experiment was short lived as its 1786 Constitution gave comprehensive judicial selection authority to the legislature. With the predominance of judicial appointment mechanisms in Great Britain and the first states, it is no surprise that delegates to the Constitutional Convention in 1787 do not seem to have seriously considered employing elections to seat federal judges (Volcansek and Lafon 1988, 30). Instead, the framers further entrenched elite appointment as the favored mechanism by vesting judicial selection power in the president subject to Senate confirmation. At the turn of the century, however, Georgia adopted elections for certain trial court judges and Mississippi became the first state to elect judges at various levels of its hierarchy.

The spread of Jacksonian democracy throughout the second quarter of the nineteenth century, with its emphasis on institutional reforms designed to increase popular accountability, elevated judicial elections as a credible alternative to appointment mechanisms. Nonetheless, appointment methods remained dominant until New York adopted judicial elections with its 1846 Constitution. Judicial elections spread quickly after New York’s adoption, with numerous newly admitted states providing for them in their original constitutions while several existing states switched through constitutional reform (see Hanssen 2004). Explanations for the rise of judicial elections are multifaceted (e.g., K. Hall 1984; C. Nelson 1993; Shugerman 2010), but populist demand is thought to have been strengthened by a growing sentiment that elites were too often distributing appointments as political patronage with little regard for qualifications or ex post institutional performance.

As judicial elections spread, many stakeholders grew concerned with the extent to which political parties seemed to be influencing judicial elections. These concerns were especially prevalent through the turn of the twentieth century, when political machines such as Tammany Hall in New York and Pendergast in Kansas City were said to
control judicial elections as a means to ensuring the realization of political agendas without judicial interference. In short, many perceived that the switch from appointment to partisan election merely changed who could expect to use judicial positions as patronage, with a concern for qualifications remaining secondary at best. Emboldened by Progressive Era initiatives to curtail machine power, reformers pushed for the use of nonpartisan judicial elections. During the first quarter of the twentieth century, Arizona entered the Union with a constitution providing for nonpartisan judicial elections, and several states switched from partisan to nonpartisan elections through constitutional reform.

As with previous reform efforts, frustration with nonpartisan elections mounted quickly. Stakeholders observed that nonpartisan elections seemed no less political than the partisan variety as a procedural matter, with judicial quality impacted little as a result (Shugerman 2012, 170). In an address to the American Bar Association (ABA), former president William Howard Taft captured contemporary sentiment by condemning the switch from partisan to nonpartisan election in part because the latter lacked a meaningful signal to guide voter decision making. But Taft, who would later be appointed chief justice of the U.S. Supreme Court, was no fan of partisan elections either, lamenting that “now in no case can the office seek the man” (Taft 1913, 422). With little popular appetite for elite appointment given its own perceived problems, the time was ripe for experimentation.

Merit selection’s intellectual roots can be traced to the early twentieth century. After fits and starts toward commission-aided judicial selection by scholars and bar associations during the first three decades of the twentieth century, the reform movement received an important push when the ABA passed a resolution in 1937 calling for its adoption in the states (Wood 1937). Momentum was further aided by a broader push to improve the quality of judicial administration (see Goelzhauser 2016, 22–31). Enhancing the quality of the bench was thought to be a way to improve judicial administration, and in turn commission-aided judicial selection was considered a way to improve the bench. Buttressed by predominant legal thought, which emphasized the profession’s technicality and complexity, early proposals made lawyers key participants in the decision-making process. Ostensibly, lawyers would use their expertise to ensure that high-quality judges were selected.
As noted previously, Missouri became the first state to adopt merit selection on a large scale, doing so by initiative in 1940. Missouri was an outlier for nearly two decades until neighboring Kansas adopted the reform in 1958. In 1959, Alaska entered the Union as the first state to use merit selection for all its constitutionally prescribed judges. The reform movement spread considerably over the next three decades. While the determinants of merit selection’s expansion are complex (see, e.g., Dubois 1990a, 1990b; Hanssen 2004; Puro, Bergerson, and Puro 1985), the subject’s leading scholar concludes, “merit succeeded in the states where business had grown powerful enough to support a campaign for merit selection, but also where labor and urban machines had not yet reached enough power to block those campaigns” (Shugerman 2012, 210). Now more than half of all states use merit selection to fill at least some of their judicial vacancies. Figure 1.1 maps the states that have a constitutional (darkly shaded) or statutory (lightly shaded) rule adopting merit selection for at least their highest courts.  

*Figure 1.1 Merit Selection in the United States (Note: States darkly shaded instituted constitutional merit selection; states lightly shaded instituted statutory merit selection; unshaded states use other selection mechanisms.)*
Moreover, from 2000 through 2016 a plurality of justices to join state supreme courts for the first time did so via merit selection.\textsuperscript{11}

There have also been experiments with judicial merit selection at the federal level (see, e.g., Goldman 1997, 236–284).\textsuperscript{12} In 1977, President Jimmy Carter issued an executive order establishing the U.S. Circuit Judge Nominating Commission, which had thirteen panels allocated by federal judicial circuit.\textsuperscript{13} The panels were to “include members of both sexes, members of minority groups, and approximately equal numbers of lawyers and nonlawyers,” all of whom were appointed by the president to make nonbinding recommendations to fill vacancies on the circuit courts of appeal. In 1978, Carter issued an executive order outlining “standards and guidelines for the merit selection of United States district court judges,” stipulating that “the use of commissions to . . . make recommendations for district judge is encouraged.”\textsuperscript{14} Although President Ronald Reagan rescinded these executive orders, senators in various states continue to use commissions to help inform decisions concerning federal judicial appointments.\textsuperscript{15}

Commission-based selection systems have been more formally imposed for federal judges who are not subject to presidential nomination and Senate confirmation under Article III of the U.S. Constitution. Federal magistrate judges, who assist district court judges with case management, are appointed by majority vote of the district court judges in a district. The authorizing statute dictates that selections be “pursuant to standards and procedures promulgated by the Judicial Conference of the United States,” which is headed by the chief justice of the U.S. Supreme Court and includes the chief judge of each circuit court, chief judge of the U.S. Court of International Trade, and select district court judges.\textsuperscript{16} In promulgated regulations, the Judicial Conference stipulated that a “merit selection panel” should be convened prior to the appointment or reappointment of any magistrate judge.\textsuperscript{17} Panel members are appointed by the judges and include “lawyers and other members of the community,” at least two of which must be nonlawyers.\textsuperscript{18} The panels consider applications from interested individuals and make nonbinding recommendations to the court. Federal bankruptcy judges are selected in a similar manner.

There have also been calls to introduce merit selection for the appointment of U.S. Supreme Court justices (e.g., Voorhees 1975).\textsuperscript{19} As
frustration mounts with the politicization of federal judicial selection, merit selection has been touted as a way to reduce partisan rancor and emphasize qualifications. While supermajority requirements make constitutional amendment costly, intermediate proposals suggest extending Carter’s model of voluntary merit selection by executive order to the appointment of U.S. Supreme Court justices. Impressed with the perceived quality of Alaska’s judges, prominent constitutional law scholar and dean of the Berkeley School of Law Erwin Chemerinsky proposed that the president create a merit selection commission charged with “present[ing] the president with the most qualified individuals,” which he argues would allow nominees to “come to the Senate with a stronger presumption of competence and perhaps be more likely to receive bipartisan support” (Chemerinsky 2015, 302). With respect to the threat of institutional intransigency, Chemerinsky suggests “that once a courageous president creates the system . . . political pressure will be great for others to follow the practice of merit selection” (302).

Commission-aided judicial selection is also spreading across the globe. In 1988, Canada implemented judicial advisory committees to assist with appointments to a variety of lower courts (Hausegger et al. 2010, 636). While announcing the creation of these advisory committees, partially in response to concerns about patronage driving previous judicial appointments, Minister of Justice Ray Hnatyshyn declared, “The concept of merit is central to the new appointments process.” Notwithstanding concerns about advisory committee performance (see, e.g., Leishman 2008; Riddell, Hausegger, and Hennigar 2008; Russell and Ziegel 1991), Prime Minister Justin Trudeau adopted a version of commission-aided appointment to help fill vacancies on the Supreme Court of Canada in 2016. In this version, applications are submitted to the Independent Advisory Board for the Supreme Court of Canada Judicial Appointments, a body of lawyers and nonlawyers, which in turn conducts a “merit-based review” (Report of the Independent Advisory Board for the Supreme Court of Canada Judicial Appointments 2016, 9) before submitting a nonbinding list of qualified candidates to the prime minister. Prime Minister Trudeau (2016) defended the new process with reference to a need for finding “jurists of the highest caliber” who “represent the diversity of our great country.”
Great Britain also makes regular use of commission-aided judicial selection. As part of the Constitutional Reform Act of 2005, the Judicial Appointments Commission was instituted to consider applications and make nonbinding recommendations for vacancies across a variety of courts in England and Wales, as well as some with jurisdiction over all of Great Britain.22 Lawyers and nonlawyers comprise the Commission, which is required to make selections “solely on merit” while “hav[ing] regard to the need to encourage diversity in the range of persons available for selection for appointments.”23 Also in 2005, the Northern Ireland Judicial Appointments Commission was established with direction to “recommend applicants solely on the basis of merit” and “engage in a programme of action to secure, so far as it is reasonably practicable to do so, that a range of persons reflective of the community in Northern Ireland is available for consideration.”24 In 2008, after several years as an ad hoc entity, the Judicial Appointments Board of Scotland was formally instituted with a charge to make recommendations “solely on merit.”25 With almost identical language to the Constitutional Reform Act of 2005, the board is also charged with “hav[ing] regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to a judicial office.”26

Other countries have experimented with commission-aided judicial selection as well. Israel adopted one of the world’s first commission-aided judicial selection systems in 1953 with its Judicial Selection Committee (see Salzberger 2006). In what is now a familiar story, frustration with a politicized judicial selection process and the perception that judgeships were being allocated on the basis of patronage precipitated the creation of Ireland’s Judicial Appointments Advisory Board in 1995 (Feenan 2008, 40; O’Malley, Quinlan, and Mair 2012, 218). South Africa’s Constitution establishes the Judicial Service Commission, which has powers that vary by court, including mandatory presidential consultation, presidential selection, and presidential selection from a list of forwarded nominees.27 Judicial advisory panels assist with appointments in Australia by making recommendations after “assess[ing] . . . the merits of eligible candidates,”28 and there have been calls to establish a more formal commission-aided process (e.g., Davis and Williams 2003, 856–863; Evans and Williams 2008). In India,
an effort to replace the collegium system of judicial selection by judges with a National Judicial Appointments Commission by constitutional amendment was struck down by the country’s high court in 2015 (see Abeyratne 2017).

The Broader Debate

Notwithstanding global expansion and experimentation at the federal level, the American states continue to be the epicenter of debate over merit selection. Prominent figures regularly call for the state-level adoption of judicial merit selection. Retired U.S. Supreme Court justice Sandra Day O’Connor regularly promotes merit selection (e.g., O’Connor 2009) and has partnered with the Institute for the Advancement of the American Legal System to propose the “O’Connor Judicial Selection Plan,” which combines merit selection with judicial performance evaluations and retention elections. A bipartisan group of former Pennsylvania governors has repeatedly urged merit selection’s adoption in their state, arguing that “having in place a system by which any qualified candidate can apply for an open seat on the appellate bench and be considered by a bipartisan, diverse group of citizens from across the commonwealth—a group tasked with evaluating the strength of that candidate’s professional and personal qualifications to serve—is a far better system than one in which random ballot position, fund-raising, and campaigning are determining factors” (Thornburgh et al. 2017). And sitting chief justice of the North Carolina Supreme Court Mark Martin urged the state to adopt merit selection by constitutional amendment, contending that such a move would be a “step away from ordinary politics,” allowing prospective judges to be evaluated “in an objective and non-ideological way” (Barrett 2017).

State legislators, meanwhile, routinely debate merit selection’s use. In 2016 alone, for example, thirty-eight bills were introduced across twelve states to adopt, abolish, or modify the use of merit selection. While it has been decades since a state adopted merit selection on a large scale, Pennsylvania has been the most prominent to credibly consider a switch in recent years. In early 2017, the Pennsylvania House Judiciary Committee unanimously approved a measure proposing a constitutional amendment instituting merit selection in place of par-
tisan elections for appellate judges. On the other side, serious efforts have been undertaken in Kansas and Oklahoma to abolish merit selection. In 2013, Kansas passed statutory reform eliminating merit selection for its intermediate court of appeals, and in 2016 the state house narrowly voted against forwarding a proposed constitutional amendment to abolish merit selection for the state’s highest court (Morris 2014; Carpenter 2016). In early 2017, the Oklahoma Senate approved a proposed constitutional amendment abolishing merit selection for the state’s appellate courts.

Discussions concerning merit selection are necessarily part of the broader judicial selection debate as stakeholders search for the optimal institutional arrangement. Given the importance of state courts in the American political order, the judicial selection debate is unlikely to fade anytime soon. In recent years, even the U.S. Supreme Court has fueled the debate through decisions that strike at the core of issues concerning state judicial selection in cases such as Republican Party of Minnesota v. White (2002), Caperton v. A. T. Massey Coal Co. (2009), and Williams-Yulee v. The Florida Bar (2015). These disputes are indications that, if anything, the stakes are increasing over time as state supreme courts issue more opinions addressing salient policy measures while interest groups invest more heavily in directing judicial selection outcomes. And the debate’s importance only magnifies when considering the consequences of its resolution for fundamental issues such as representation and institutional legitimacy.

This book contributes to the judicial selection debate by offering systematic evidence about how merit selection works in practice. In doing so, I emphasize important questions about institutional design and performance that have not previously been addressed in the literature. This endeavor is critical given merit selection’s prominence in the judicial selection debate, combined with the historical reliance on rhetoric over empirical evidence by many of the institution’s prominent proponents and critics. The results have important implications for our understanding of how merit selection works. Moreover, the results can be combined with our already extensive understanding of other judicial selection institutions (see, e.g., Baum, Klein, and Streb 2017; Bonneau and Cann 2015; Bonneau and M. G. Hall 2009, 2017; Cann and Yates 2016; Dubois 1980; M. G. Hall 2015a; Gibson 2012;...
Goelzhauser 2016; Kritzer 2015; Streb 2007; Tarr 2012) to further enhance the quality of the broader policy debate. In addition to these core policy implications, individual parts of the project make theoretical and empirical contributions to fundamental issues concerning topics such as judicial quality, institutional capture, political ambition, diversity, and representation.

It is also important to emphasize what this book does not address. While the phrases “judicial selection” and “judicial retention” are often used interchangeably, and sometimes for good reason as when the subject matter focuses on judicial elections, it is important to distinguish them here (see Goelzhauser 2018a). Selection emphasizes how judges come to fill vacancies in the first instance; retention emphasizes how they remain on the bench. Merit selection is primarily a selection institution. The debate over merit selection emphasizes whether individuals with certain characteristics are chosen to fill particular judicial vacancies. Specifically, the core arguments center around whether a commission-aided process generates a more qualified and diverse bench. As a result, these are the questions I emphasize here. Adjacent questions concerning retention elections (e.g., Canes-Wrone, Clark, and Park 2012; Kritzer 2015, ch. 7; Tarr 2009), which some states have combined with merit selection to enact a broader “merit plan,” and ex post judicial performance (e.g., Cann 2007; Choi, Gulati, and Posner 2010; Owens et al. 2015) are important but fall outside this project’s scope. Compared to the inner workings of merit selection addressed here, these subjects are also relatively well studied.

Chapter Summary

How does judicial merit selection operate in practice? The nominating commissions that make merit selection unique are poorly understood and often opaque institutions that work in relative obscurity. Notwithstanding the considerable power nominating commissions wield in winnowing applicants prior to gubernatorial appointment, few actually know what goes on during commission proceedings and no systematic inside accounts have emerged at the state level. To understand merit selection’s inner workings, chapter 2 offers an in-depth case study of proceedings to fill an Arizona Court of Appeals vacancy in 2016. By
leveraging details obtained from public records requests and in-person observation at the two relevant meetings of the Arizona Commission on Appellate Court Appointments, I am able to provide a rich descriptive account of events that moves from the vacancy announcement to eventual appointment. This first of its kind case study sets the stage for the ensuing quantitative analyses by identifying key questions and institutional design choices that may drive merit selection outcomes.

Why do commissions and governors choose some candidates over others? Merit selection’s proponents have argued from inception that their favored mechanism would emphasize qualifications over politics, with recent generations adding that it enhances diversity. The existing literature examines these claims by engaging in comparative institutional analysis, but this approach does not account for the two-stage process that makes merit selection unique. In chapter 3, I analyze the determinants of commission and gubernatorial selections from relevant choice sets using original data secured by public records requests from Nebraska—the only state able to provide sufficient information to enable rigorous quantitative analysis. The results suggest that commissions and governors select on certain qualifications, but women are disadvantaged at the commission stage and partisanship is relevant at both stages. The results have important implications for understanding merit selection’s institutional performance and provide a road map for evaluating other systems going forward. This type of analysis gets to the core of what merit selection is supposed to accomplish and highlights how a lack of transparency frustrates performance evaluation.

What motivates judicial ambition under merit selection? Issues concerning candidate pool construction under merit selection have received little attention. The implicit assumption may be that merit selection pools reflect the underlying distribution of eligible attorneys, but this is an empirical question and there is reason to think that pools may be distorted. In chapter 4, I develop a theory of judicial ambition under merit selection that emphasizes how potential barriers to office may distort candidate pools along three fundamental dimensions: qualifications, diversity, and politics. I test this theory using two original data sets and unique historical information from Alaska detailing the name of every applicant for a judicial vacancy since admission to statehood. These data are used to analyze why attorneys seek
judgeships in the first place and why sitting judges seek promotion. The results suggest that decisions to seek office are associated with partisan considerations, while decisions to seek promotion are associated with election results and bar performance evaluations—ostensible qualifications with limitations that may allow for second-order pool distortions. In addition to enhancing our understanding of pool composition under merit selection, this chapter contributes to the broader study of political ambition.

How does merit selection system design impact performance? Merit selection systems are often grouped together and treated as if they are institutionally homogeneous. In practice, however, merit selection systems differ considerably with respect to institutional design. Rules that give governors and bar associations more control over commissioner appointments have received particular attention as design choices that may impact performance. In chapter 5, I relax the homogeneity assumption that dominates empirical studies of merit selection system performance. I begin by developing a broader theory of institutional capture emphasizing how particular interests can gain control over the selection process. Using original data on every state supreme court justice chosen under merit selection from the first in Missouri in 1942 through 2016, I examine whether institutional design differences that potentially implicate commission capture result in observable differences with respect to performance in seating qualified and diverse justices. The results demonstrate that these design choices do not systematically impact performance, suggesting that the considerable policy attention afforded to them may be misplaced given design issues highlighted in previous chapters.

Does judicial merit selection work? In chapter 6, I return to the book’s motivating question. After reviewing the empirical evidence presented throughout the book, I discuss important public policy implications. Issues addressed here include lack of transparency as a hindrance to performance evaluation, low numbers of applicants, applicant pool distortion along key dimensions of interest to the broader debate, commission and gubernatorial decisions that are driven at least in part by political considerations and possible biases, and potentially overstated concerns about capture. I also discuss implications for the broader judicial selection debate and avenues for future research.