1 | Introduction

Merit selection for state supreme court justices is one of the most important institutional innovations of the last century. Under merit selection, a commission—often comprising some combination of judges, attorneys, and the general public—is tasked with considering applications from candidates vying to fill a judicial vacancy. After reviewing applications, the commission's ostensible goal is to forward the best-available candidates to the governor, who then decides whom to appoint to the bench.[1] Amid America's long history of selecting judges by elite appointment or popular elections, merit selection for state supreme court justices made its institutional debut in 1940. Since 1940, more than half of all states have adopted merit selection to choose at least some of their state supreme court justices. Moreover, this institutional reform remains at the forefront of the public policy debate over judicial selection, with numerous states currently debating whether to adopt or abolish merit selection. After using merit selection to select supreme court justices for more than half a century, for example, serious efforts are under way in Kansas to switch to unilateral gubernatorial appointment.[2] And after using partisan elections to select supreme court justices for nearly a century, various stakeholders are debating whether to adopt merit selection in Pennsylvania.[3]

As policy makers and other stakeholders continue debating merit selection's efficacy, it is important to understand how this selection mechanism works in relation to alternative institutional arrangements for choosing judges. The overarching argument for merit selection is that it insulates judicial selection decisions from political pressure. As a result of this insulation, proponents contend, merit selection yields better-qualified judges than other selection systems. Indeed, the implication that merit selection yields better-qualified judges is built into the name such that the proposition seems true by definition. As the longtime merit selection advocacy group American Judicature Society put it, "It is called 'merit selection' because the judicial nomination commission chooses applicants on the basis of their qualifications, not on the basis of political or social connections" (American Judicature Society, n.d.).[4] Critics, however, claim that merit selection is at best a "propagandistic misnomer" (Dimino 2004, 803) and a "sound bite that . . . bears no relation to reality" (Phenicie 2012). For every claim that "merit selection produces judges who are, on the whole, better qualified and less political" (Salomon and Rubens 1992, 21), another finds "no evidence that merit selection produces higher quality judges" while warning of the "heighten[ed] . . . potential for 'cronyism'" under it (Dodd et al. 2003).

The merit selection debate has long focused on judicial qualifications. More recently, stakeholders in the merit selection debate have also made claims about the connection between institutional reform and judicial diversity. Many proponents claim that insulating judicial selection decisions from political pressure increases the likelihood that members of historically underrepresented groups such as women and racial minorities will be chosen. One scholar claimed, for example, that "there is no question but that the merit selection system affords greater opportunities for women and minorities to find their way to the bench" (Krivosha 1987, 19). But for each assertion that "states using merit selection have a more diverse judiciary than states that don't" (Mah 1994), another suggests that "merit selection . . . has not helped diversify the state court judiciary in terms of race, ethnicity or gender" (Maute 2000, 1198).

Conflicting claims about the consequences of merit selection for issues such as judicial qualifications and diversity are empirical in nature

(cf. Bonneau and Hall 2009). Nonetheless, much like the broader judicial selection and retention debates, positions on these questions are often driven more by prior normative commitments than empirical observation. To be sure, numerous empirical studies have examined whether merit selection is more or less likely to produce state supreme court justices with particular characteristics.[5] As informative as these studies are, however, many were undertaken when merit selection was in its infancy. Moreover, much of the existing literature relies on data from narrow time windows and small samples of states. In addition, few studies account for the method by which particular judges were selected. These limitations make it difficult to draw confident conclusions about the core question of whether merit selection produces different types of judges. Absent firm empirical evidence regarding the consequences of alternative institutional arrangements, we are left to speculate.

In this book, I use new data on more than 1,500 state supreme court justices seated from 1960 through 2014, along with extensive biographical information collected for these justices, to undertake the first large-scale empirical analysis of whether merit selection produces judges with characteristics that systematically differ from judges produced by other selection systems. The results have important implications for the core policy debate regarding whether merit selection "populate[s] the bench with individuals who are qualitatively different" than judges chosen under other selection systems (Caufield 2010, 766). Moreover, this project contributes to the broader debate concerning comparative institutional performance with respect to state judicial selection.

While the empirical results have normative implications, they are not employed here to advance an argument for or against any particular judicial selection mechanism. Although the outcomes analyzed here play a central role in contemporary policy debates over the efficacy of various judicial selection institutions, reasonable observers can disagree over how to weight their relative importance. Moreover, while the outcomes analyzed here are among the most referred to in contemporary judicial selection debates, they are certainly not the only relevant factors worth considering when determining which selection system to adopt. One prevalent argument against merit selection, for

example, is that it is inconsistent with democratic values (e.g., Olszewski 2004; Schneider 2010; Uehlein and Wilderman 2002).[6] To the extent that some stakeholders consider this point dispositive, empirical evidence concerning institutional performance is likely to be of secondary importance. As discussed further in the Conclusion, debates over the "best" judicial selection system are particularly complex given little agreement about what selection systems are supposed to accomplish. Even if the debate cannot be resolved here, however, the results help inform the discussion and provide insight into the relationship between selection institutions and the characteristics of justices chosen to serve on state supreme courts.

Clarifying Merit Selection

The phrase "merit selection" regularly engenders conceptual confusion. Thus, I clarify what merit selection means at the outset. As an initial matter, merit selection should be distinguished from the "merit plan" or "Missouri plan." Although these three phrases are often used interchangeably, the former is conceptually distinct from the latter two. As noted previously, merit selection's core component is the use of a commission to winnow judicial candidates before elite appointment. Under the merit plan, judges are chosen through merit selection and retained through retention elections.[7] Consequently, merit selection is a necessary but not a sufficient condition for instituting the merit plan. Indeed, merit selection can be linked to any retention institution based on preferences concerning the trade-off between judicial independence and accountability.[8] Rhode Island, for example, combines merit selection with life tenure.[9] In 2015, Oregon legislators proposed amending the state's constitution to switch from nonpartisan elections for selection and retention to merit selection with merit-based reappointment by the nominating commission after a fixed term.[10] This variation illustrates the need for distinguishing debates over judicial selection and retention in the states (cf. Ware 2009, 751).[11]

Distinguishing merit selection from the merit plan is not the only complicating issue underlying empirical examinations of merit selection. Notwithstanding general agreement regarding merit selection's core feature, there seems to be disagreement over which states use

merit selection to fill supreme court vacancies. Recent articles listing merit selection states, for example, have counts ranging from fifteen to twenty-eight.[12] Even scholars employing an indicator for merit selection states in quantitative analyses seem to differ over which states to include (see, e.g., Choi, Gulati, and Posner 2010; Kang and Shepherd 2011; McLeod 2012). That scholars appear to mean different things when referring to merit selection raises considerable concern about the inferences that can be drawn from the literature examining merit selection's consequences. Moreover, this classification issue fundamentally affects our ability to draw inferences about judicial selection institutions more generally: that there are differences in categorizing states using merit selection necessarily means there are differences in categorizing some of the states using alternative selection methods.

Merit selection categorization issues do not proceed merely from the tendency to conflate merit selection and the merit plan. Most contemporary merit selection lists correctly include every state that employs the merit plan. Differences arise over which states to include in addition to those operating under the merit plan. California seems to be the most common mistaken inclusion in merit selection lists. In California, a governor's supreme court nominee must be confirmed by the Commission on Judicial Appointments before taking office.[13] This institutional arrangement effectively inverts merit selection, affording the commission veto power over an otherwise unconstrained gubernatorial choice rather than constraining it ex ante. Other states are mistakenly excluded from merit selection lists, including Connecticut, Hawaii, New York, and Rhode Island. Each of these states uses a nominating commission to screen applicants for supreme court vacancies. Although it is not clear why these states are sometimes excluded, it may be because of their somewhat irregular institutional combinations of merit selection with retention mechanisms other than retention elections.

Voluntary merit selection systems are another source of confusion when attempting to list merit selection states. As opposed to states that enact merit selection through statute or constitutional amendment, voluntary merit selection systems are unilaterally devised and implemented by governors—often through executive order (Lowe 1971; Vandenberg 1983). As such, they can also be abolished through

unilateral executive action. In fact, original-enacting or subsequently elected governors have abolished several merit selection systems initially established through unilateral gubernatorial action. The comparative institutional transiency inherent in voluntary merit selection systems complicates efforts to locate information about their presence and operation. Indeed, no comprehensive listing of these plans seems to be available. As a result, scholars tend to include some but not all of the known voluntary merit selection system states in their listings.

One additional factor complicates efforts to evaluate merit selection's consequences. Contrary to most institutions governing state judiciaries, merit selection is both a state-level and justice-level phenomenon. All supreme court justices serving contemporaneously within a state are presumed to be subject to the same retention institution, term limit, and mandatory retirement age.[14] But the same is not true with respect to judicial selection institutions. Currently, seven states employ merit selection for interim appointments to their supreme courts but not otherwise. This dual institutional arrangement exemplifies the broader phenomenon of mixed judicial selection systems, in which different institutional mechanisms are used to fill regular and interim vacancies. Notwithstanding these dual arrangements, scholars generally do not account for how particular state supreme court justices were seated when evaluating the consequences of different institutional design choices regarding judicial selection. Given that a substantial proportion of state supreme court justices obtain their seats through interim appointments (Holmes and Emrey 2006), it is important to account for the way that specific justices took the bench when evaluating comparative institutional performance regarding judicial selection.

Table 1.1 groups states that have employed commission-based judicial appointments for their supreme courts into four categories.[15] The first column lists states that have adopted merit selection for all their supreme court justices, distinguishing between those that have done so through statute or constitutional amendment (toward the top) and those that have done so through unilateral gubernatorial action (toward the bottom).[16] The third column lists states that have adopted merit selection for interim appointments, distinguishing between those that have done so through statute or constitutional amendment

TABLE 1.1 MERIT SELECTION SYSTEMS

All appointments	Adoption	Interim appointments	Adoption
Constitutional and statutory			
Alaska	1959	Idaho	1967
Arizona	1974	Kentucky	1975
Colorado	1966	Montana	1972
Connecticut	1986	Nevada	1976
Florida	1972	New Mexico	1988
Hawaii	1978	North Dakota	1976
Indiana	1970	Utah	1967–1985
Iowa	1962	West Virginia	2010
Kansas	1958		
Missouri	1940		
Nebraska	1962		
New York	1977		
Oklahoma	1967		
Rhode Island	1994		
South Dakota	1980		
Tennessee	1971–1974, 1994–2013		
Utah	1985		
Vermont	1967		
Wyoming	1972		
Voluntary			
Delaware	1977	Colorado	1964–1966
Maine	2011	Florida	1971–1972
Maryland	1970	Georgia	1972
Massachusetts	1975	Mississippi	1980–1991
New Hampshire	2000	Montana	1968–1972
New York	1975–1977	New Mexico	1952–1988
Tennessee	2013	North Carolina	2011–2012
		Ohio	1972–1974
		Pennsylvania	1973–1994
		South Dakota	1977–1980
		West Virginia	1981–2010
		Wisconsin	1983

(toward the top) and those that have done so through unilateral gubernatorial action (toward the bottom). The adoption columns denote the year each plan was adopted; years listed alone indicate that the plan was still in operation through 2014. Eighteen states employed nonvoluntary merit selection plans to choose all supreme court justices at the

end of 2014, and another seven states employed nonvoluntary merit selection plans for interim appointments. At least six states employed voluntary merit selection plans at the end of 2014, with two others using them to fill only interim vacancies.

Merit selection's proponents regularly suggest that no state adopting merit selection subsequently switched to a different system (see, e.g., Finley 2003, 55; Phillips 2009, 93). This claim is sometimes made to demonstrate merit selection's success. Table 1.1 reveals two caveats to this claim. First, several states have abolished voluntary merit selection plans. Mississippi's "fleeting" (Case 1992, 26–29) experiment with voluntary merit selection, for example, spanned three gubernatorial administrations. More recently, North Carolina's experiment with voluntary merit selection lasted for even less time. Declaring, "There is no place for politics when it comes to choosing the state's most honored and influential legal servants," Democratic North Carolina governor Bev Perdue issued an executive order establishing voluntary merit selection in 2011 (Hardin 2011). One year later, and about one month before Republican governor-elect Pat McCrory assumed office, Governor Perdue issued another executive order "temporarily" suspending the commission in order to unilaterally fill a supreme court vacancy before leaving office (see Perdue 2012). Governor McCrory formally abolished the commission after taking office (see McCrory 2013).

The second caveat involves Tennessee's somewhat peculiar history with merit selection. Before November 2014, Tennessee's constitution provided that "judges of the Supreme Court shall be elected by the qualified voters of the state."[17] Notwithstanding this language, Tennessee enacted legislation in 1971 adopting merit selection for its appellate judges (see Fitzpatrick 2008). Although the statutory provision instituting merit selection for state supreme court justices was repealed in 1974, it was reimplemented by statute in 1994 and persisted into 2012 despite concerns about its constitutionality. In 2012, the state legislature allowed the law's sunset clause to take effect, and the nominating commission ceased operations in 2013. After cessation, Governor Bill Haslam created a voluntary merit selection plan by executive order. In 2014, voters approved a constitutional amendment giving the governor unilateral appointment authority, and the voluntary merit selection plan remained in place.

Ambiguity in the existing literature necessitates adopting a clear and objective decision rule regarding which states employ merit selection to choose state supreme court justices. In the empirical analyses presented in Chapters 3 through 5, I focus exclusively on nonvoluntary merit selection institutions. The primary difficulties with including voluntary merit selection systems are that their comparative institutional transiency can make it difficult to know which states have employed them, when they were functioning, and how they operated.[18] Where appropriate, however, I note how inferences about comparative institutional performance change when including known voluntary merit selection plans. This approach offers the benefits of transparency and replicability while allowing readers to draw their own conclusions about merit selection's consequences if there are conflicting results. Overall, however, the results are substantively similar regardless of whether voluntary merit selection plans are included with nonvoluntary plans.

Why Study Merit Selection?

The U.S. Supreme Court is easily the most publicly visible and researched court in the nation—perhaps the world. Nonetheless, state supreme courts are far more active and arguably have a greater aggregate policy impact. From 1995 through 2010, for example, state supreme courts decided over 16,000 percent more cases than the U.S. Supreme Court.[19] Furthermore, the average state supreme court decided about 30 percent more cases than the U.S. Supreme Court per year during this period. State supreme courts are often leaders in shaping public policy in areas such as education and civil liberties (Howard and Steigerwalt 2012). And state supreme court dockets cover nearly the entire range of public (e.g., constitutional and criminal) and private (e.g., contracts and torts) law (see Kritzer et al. 2007).[20] Although any particular state supreme court decision is unlikely to garner national attention, many are salient within states (e.g., Cann and Wilhelm 2011; Vining and Wilhelm 2011; Vining et al. 2010). Furthermore, in addition to enjoying the last word on most questions concerning state law, state supreme courts regularly decide important federal questions.[21] In short, "state supreme courts are powerful institutions with a

dramatic impact upon the American political landscape" (Brace, Hall, and Langer 2001, 82).

The judicial decision-making literature offers another justification for taking judicial selection seriously. Scholars have long debated the determinants of judicial behavior (e.g., Epstein, Landes, and Posner 2013; Geyh 2011; Segal and Spaeth 2002), with alternative accounts emphasizing factors such as law, policy preferences, and institutional constraints. Although this complex debate shows no signs of imminent resolution, nearly everyone seems to agree that judges are not merely automatons uniformly disposing cases through a mechanical process that can be mastered only with years of specialized legal training.[22] At a minimum, appellate judges on courts of last resort occasionally resolve difficult legal questions on which reasonable minds can differ (see, e.g., Farber and Sherry 2008; Posner 2005; Zorn and Bowie 2010). This discretionary space in how important legal questions are resolved justifies paying careful attention to judicial selection decisions.

Understanding judicial selection also contributes to the developing mosaic of evidence regarding the consequences of institutional reform with respect to state judiciaries. Interstate institutional experimentation allows stakeholders to glean important insights about comparative institutional performance. With respect to state courts, for example, scholars have studied the impact of judicial selection and retention institutions on an array of political phenomena, including voting and elections (e.g., Bonneau and Cann 2015a, 2015b; Bonneau and Loepp 2014; Melinda Gann Hall 2007, 2015; Kritzer 2015), campaign spending (e.g., Bonneau 2004, 2005, 2007; Hall and Bonneau 2008), separate opinion writing (e.g., Boyea 2007, 2010; Brace and Hall 1990, 1993), tenure on the bench (e.g., Boyea 2010; Melinda Gann Hall 2001b, 2013), perceptions of institutional legitimacy (e.g., Benesh 2006; Cann and Yates 2007; Gibson 2012), judicial performance (e.g., Cann 2006; Goelzhauser 2012; Goelzhauser and Cann 2014; M. Nelson 2013), and judicial decision making (e.g., Brace and Boyea 2008; Canes-Wrone, Clark, and Kelly 2014; Melinda Gann Hall 1992).[23] Thoroughly examining merit selection's comparative institutional performance necessarily dictates measuring the impact of other judicial selection systems. As a result, the study of merit selection is effectively

a broader inquiry into the consequences of institutional reform in the area of state judicial selection.

Debates over institutional design choices concerning state judicial selection and retention also permeate contemporary political discourse. For example, recent U.S. Supreme Court decisions 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) helped bring debates concerning state judicial selection and retention into sharp national focus.[24] And merit selection in particular has been at the forefront of the contemporary debate over state judicial selection. Former U.S. Supreme Court justice Sandra Day O'Connor, for example, has devoted a considerable portion of her postretirement public life to advocating for merit selection.[25] Moreover, numerous states are currently considering whether to adopt, expand, limit, modify, or abolish merit selection for some or all of their judges. From 2009 through 2014, legislators in thirty states introduced a total of 390 bills involving merit selection.[26] In comparison, legislators in twenty-two states introduced a total of 136 bills that involved judicial selection institutions other than merit selection during the same period.[27]

The merit selection debate is also quickly expanding beyond the American states. There have been numerous discussions, for example, about commission-based judicial selection at the federal level (see, e.g., Sharon and Pettibone 1987; C. Smith 1987; Winters 1972). Moreover, other countries are beginning to experiment with commission-based judicial selection (see, e.g., J. Bell 2003; Evans and Williams 2008; Maute 2007). In 2006, the British Parliament abolished the position of lord chancellor, which historically controlled many judicial selection decisions, and instituted the Judicial Appointments Commission.[28] The new commission ostensibly sorts candidates on the basis of merit for judicial offices in England and Wales and some courts with jurisdiction over Northern Ireland and Scotland. After selecting a candidate, the commission forwards the name to the relevant appointing authority, who can accept the nomination or return it for another with written justification accompanying the rejection.[29] Northern Ireland's Judicial Appointments Commission and Scotland's Judicial Appointments Board operate similarly to the British commission in their respective countries.[30] Most recently, India is on the verge of

implementing constitutional reform to establish a National Judicial Appointments Commission to select judges.[31]

Overview of the Chapters

How did merit selection originate? The institutional framework governing federal judicial selection has been fairly stable since the U.S. Constitution's ratification in 1789. The state level, however, has had considerable experimentation with judicial selection institutions since the first Revolutionary-era constitutions were adopted. Although these Revolutionary-era constitutions built on English and colonial judicial selection models using unilateral appointment, states soon began experimenting with elections. After a long period of experimentation and gradual institutional change, dissatisfaction with predominant selection methods led to the development of variations on what is now commonly called merit selection during the early part of the nineteenth century. Chapter 2 traces merit selection's rise by emphasizing the gradual institutional evolution and contemporary political shocks that motivated consideration of commission-based judicial selection reform.

The next three chapters analyze the relationship between judicial selection institutions and various outcomes of interest using new data on state supreme court seatings from 1960 through 2014. In Chapter 3, I analyze whether certain judicial selection institutions favor candidates with different types of professional experience. This issue has gained importance with recent political and scholarly reflection on the consequences of experiential diversity for collegial courts and from growing understanding of how professional experiences inform judicial decision making. Moreover, professional experience provides the lens through which commentators have addressed the question of whether merit selection enhances or mitigates the importance of political connections in judicial selection decisions. Using new employment categories and extensive original data on the professional experiences possessed by state supreme court justices seated during the sample period, the results suggest there is little difference in the types of experiences favored across selection systems.

For decades, merit selection's proponents and critics have made bold claims about the system's performance in yielding better-qualified judges. Chapter 4 addresses this core question in the debate. Unfortunately, the little empirical evidence that exists on this question does not lend itself to confident conclusions about the relationship between judicial selection systems and qualifications. Using an array of measures to capture judicial qualifications, the results presented in Chapter 4 add nuance to our understanding of the relationship between selection systems and qualifications while generally supporting the position that there are few systematic differences. Indeed, selection systems perform similarly with respect to sorting on various measures of judicial experience. Although there are some differences across selection institutions in terms of educational quality and performance, no system enjoys a systematic advantage over the others.

While the debate over how to design judicial selection institutions has long focused on qualifications, recent decades have seen burgeoning interest in the relationship between selection institutions and judicial diversification with respect to women and racial minorities. This issue has become particularly salient in debates over merit selection, with proponents arguing that their favored system increases judicial diversity by reducing the importance of political connections and critics arguing that at best it has no effect and at worst a deleterious one on diversity. After tracing the development of political interest in judicial diversity and the consequences of selection institutions for realizing this goal, Chapter 5 analyzes the relationship between judicial selection systems and the seating of women and racial minorities on state supreme courts. The results suggest that appointment systems outperform merit selection and elections in some categories and that merit selection outperforms elections in others.

Chapter 6 concludes by summarizing the results, discussing normative implications, and highlighting important issues for future research. Ultimately, the results presented throughout this book have important normative implications that must be considered in combination with a flourishing literature on the consequences of institutional design choices concerning state judicial selection and retention. Determining which judicial selection system is "best" may be a complicated task,

but at a minimum it is one that requires piecing together the mosaic of research on state courts, considering normative questions involving issues such as the trade-off between accountability and independence, determining how to weight the available information, and updating our prior beliefs as new information becomes available. Even within the scope of this study, no single selection system emerges as "best" relative to the others. Rather, it seems that certain selection systems outperform others in certain areas but mostly perform similarly. While this may not be the message that any system's staunchest supporters or critics would hope for, it is consistent with the complexity of the broader debate and should nonetheless help inform policy discussions.