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JUDICIAL SELECTION AS PRACTICED
UNDER THE 1972 MONTANA CONSTITUTION:
AN ASSESSMENT OF THE IDEALS OF JUDICIAL SELECTION
COMPARED WITH ITS EXERCISE IN THE STATE OF MONTANA

by
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Chairman: James J. Lopach

Since the state's second constitution was adopted in 1972, Montana's supreme court justices have been selected through a hybrid process that uses both a merit appointment system and an elective system. Though essentially an elective system, the appointment process is used when mid-term vacancies occur—when justices leave office during their terms. Between 1973 and 1994 six vacancies on the state's high court were filled by appointment and nine by election.

Montana's hybrid system offers the material by which the theory of judicial selection, a theory which begins in the Revolution era of United States history, can be examined against its results. The judiciary presents a peculiar problem for democratic societies. It needs to be sufficiently independent from popular will to allow it to make impartial decisions that may displease the public, but are necessary to protect individual rights or to uphold the fairness of the law. At the same time, it must be responsive enough to the public to be consistent with basic democratic principles. To the extent that justices of the Montana Supreme Court make law, the "people" have a right to elect—or unseat—them.

The theory of judicial selection received a practical workout at the Montana Constitutional Convention of 1972. Delegates to that convention drew up the judicial article of the Montana constitution after debating the same theories that the national framers in 1787 worked through. They came to more populist conclusions than the national framers had. The appointment and election processes they designed have borne out many of their fears. Recent elections and appointments are examined. Some of the people involved speak about the process. Nonpartisan elections are recommended to fill all Montana's high court seats.
TABLE OF CONTENTS

CHAPTER ONE: EARLY HISTORY OF JUDICIAL SELECTION: COMPETING VALUES

A. Judicial Independence in Early State Constitutions ............. 1
B. The National Constitution of 1787 ................................. 6
C. Judges as Policy-makers ................................................. 11
D. Judicial Character ............................................................. 15
E. Judicial Selection on State High Courts .............................. 17

CHAPTER TWO: MONTANA GRAPPLES WITH JUDICIAL SELECTION AS IT REWRITES ITS CONSTITUTION IN 1972

Introduction ................................................................. 21
A. Montana's Movement for Judicial Reform ......................... 23
B. Debate Over the Judiciary at the Constitutional Convention 25
   1. General Sparring ......................................................... 25
   2. Arguments Favoring an Appointive Plan ...................... 28
   3. Arguments For Elected Judges ................................. 31
   4. The Battle for Publicly Financed Judicial Elections ...... 35
C. Conclusions ..................................................................... 39

CHAPTER THREE: JUSTICES' EXPERIENCE WITH THE ELECTIVE AND APPOINTE ASPECTS OF MONTANA'S JUDICIAL SELECTION PROCESS

Introduction ......................................................................... 40
A. Views on the Scope of Judicial Policy-making Powers Define
   Justices' Views on Accountability to the Public ............... 41
B. Judicial Ethics and Campaigning Justices ......................... 45
C. Campaign Finance .............................................................. 50
D. The Appointment Process ................................................ 56

 iii

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CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

Introduction ................................................................. 62

A. The Election Process Preferred ........................................... 63
   1. The Importance of “Influence” ................................. 63
   2. The Extent of the Policy-making Role of Justices
      and Its Effect on How Justices Should Be Chosen
      in a Democratic Society ......................................... 67
   3. The Relative Abilities of the Electorate and Nominating
      Commissions to Select Good Judges ...................... 69
   4. Can Judicial Independence Be Secured in an
      Elective System? ................................................. 74

B. Recommendations .......................................................... 75

CHART: SEATS ON THE MONTANA SUPREME COURT
       SINCE THE CONSTITUTIONAL CONVENTION .............. 80

BIBLIOGRAPHY ............................................................... 81
CHAPTER I
EARLY HISTORY OF JUDICIAL SELECTION: COMPETING VALUES
A. JUDICIAL INDEPENDENCE IN EARLY STATE CONSTITUTIONS

Judicial independence is a confusing concept. Some of the confusion arises out of the peculiar metamorphosis of the judiciary during the contentious decade of the 1780s. The final product of this conflict—an unelected national judiciary empowered with judicial review—leaves the impression that judicial independence has always been characterized in American government by a high degree of freedom from popular influence, freedom that flows from an assumption that the "professionalism" of the decision-making role of judges—the technical work of reviewing laws—should remove judges from popular selection. In fact, this profile took shape only after heated debate among the citizens of the early Republic who took seriously the loss of democratic accountability represented in the formation of an unelected judiciary empowered to negate some actions of their democratically elected legislatures. Examination of judicial independence is inextricably tied to an analysis of the judiciary's power, for the American judiciary armed with judicial review became a whole new political force, and independent in a way not all Americans had envisioned it. An examination of the diverse meanings of judicial independence in the American judiciary's formative years brings new life to the debate over judicial selection for Montana's high court.

Gordon S. Wood, in his Pulitzer Prize-winning book *The Radicalism of the American Revolution*, calls the creation of the independent judiciary "the most
dramatic institutional transformation in the early Republic.”¹ The conflict
that preceded the creation of this powerful judiciary reveals varied opinion
behind the definition of judicial independence. During this period, the
Federalists, led by James Madison, wrested the protection of “private property
and minority rights” away from “the interests of the enhanced public power of
the new republican governments”² in part through the creation of the national
judiciary. Wood writes:

These efforts to carve out an exclusive sphere of activity for the
judiciary, a sphere where the adjudicating of private rights was removed
from politics and legislative power, contributed to the remarkable
process by which the judiciary in America suddenly emerged out of its
colonial insignificance to become by 1800 the principal means by which
popular legislatures were controlled and limited.³

The transformation from “colonial insignificance” to the “principal means by
which popular legislatures were controlled and limited” is in large measure the
story of arriving at the modern meaning of “judicial independence.”

The first American constitutions, those drawn up by states between
1776 and 1780, show a marked confusion over judicial independence. This
confusion arises in part because while in theory it was easy to declare the
judicial branch independent, in fact it was difficult to create an independently
powerful judiciary without endowing it with some form of policy-making power.
Eventually, of course, this power would be the power of judicial review.

¹ Gordon S. Wood, The Radicalism of the American Revolution (New

² Ibid.

³ Ibid., 323.
Nearly all the state constitutions framed prior to the national Constitution of 1787 contained specific language declaring an interest in separating the branches of government. These declarations no doubt owe their existence to their framers' dedication to the political theory of Montesquieu, whose major contribution to the separation of powers "doctrine" was the addition of an independent judiciary. But the state framers had a problem applying Montesquieu's theory because it was based on a "mixed government" model predicated on a society with well-defined class barriers. Montesquieu's interest in separation of powers was to divide power among different classes—monarchy, aristocracy and democracy. The English and French judiciaries did not provide good models for separation of powers in the early republics of the American states. The framers' confusion over how to apply the concept of separation of powers to their judiciaries is evident in the fact that the provisions regarding judicial functions are found interspersed throughout their constitutions in articles describing both the executive and the legislative branches.

The earlier constitutions—those of Pennsylvania and New York, for example—contain provisions for the judiciary which do not clearly separate that branch from the legislative or executive. Both the duties and the personnel of the judicial branches in these constitutions are sometimes shared.

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5 Ibid., 154.
with the executive and legislative branches. In New York the body charged
with the power most closely resembling "judicial review" was composed of the
governor, chancellor and supreme court judges and could send legislation back
to the general assembly on grounds that the legislation was incompatible with
constitutional provisions, subject to a two-thirds-majority legislative override.  
Pennsylvania, an anomaly among state constitutions because of its strongly
democratic flavor, created a "Council of Censors," a large elected body with the
power to review all laws passed by the legislature and to throw out any that did
not conform to the principles of the state's constitution. Though its power
most closely approximates what today is called "judicial review," the
Pennsylvania Council of Censors was not its Supreme Court, and looked much
more like an arm of the legislative branch.

Other clues show that Revolution-era Americans were divided over the
meaning of judicial "independence." Evidence from the first state constitutions
points to the possibility that some factions in Revolution-era society wanted
judicial independence for reasons other than to protect elite minorities and their
property rights from the power of the majority's will.

Most of the new state constitutions provided for life terms for state high
court justices, limited only by the justices' good behavior. Although this might
seem to indicate an interest in removing the judiciary from the influence of the
people, in fact, it may have been a step toward greater popular control. Willi

6 Francis Newton Thorpe, A Constitutional History of the American
People, 1776-1850 (New York, 1898), vol. 5, 2628.

7 Thorpe, vol. 6, 3091.
Paul Adams suggests in *The First American Constitutions* that framers of early state constitutions were loath to use the British example that allowed terms to be limited “by the pleasure of the Crown.” Only South Carolina, Adams points out, retained the “during pleasure” (of the governor) language. Viewed in this light, allowing judges to sit until they died or misbehaved enough to warrant impeachment showed some desire to hold judges accountable to the people, rather than to allow one person—a governor, or as in the past “the Crown”—to determine a judge’s fitness for office. Such provisions were less democratic than terms limited to a specified number of years, but term limitations of this nature were rare in early state constitutional provisions for the highest courts. (Pennsylvania, of course, provides the exception.)

Provisions for judicial salaries represent another aspect of state constitutions that may be misread when searching for the meaning of judicial independence. Certainly a salaried judiciary was a more independent judiciary, but independent of what? Marvin L. Michael Kay argues in “The North Carolina Regulation, 1766-1776: A Class Conflict” that the back country farmers who opposed the Whig elites in North Carolina during the 1776 framing of its constitution favored a paid judiciary, and that the provision establishing remuneration of supreme court justices by salary instead of by

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fees was a Whig concession to the agrarian majority. In some places, North Carolina among them, the “user fee” court system had helped to support the interests of a wealthy elite against the small land and tax claims of poorer settlers. In North Carolina, at least, the salaried judiciary was meant to keep its courts independent of control by moneyed interests.

B. THE NATIONAL CONSTITUTION OF 1787

The judicial article in the national Constitution of 1787 would seem to represent the victory of the elitist vision of framers like James Madison over the more democratically inclined vision held by some of the earlier state framers. It is not that simple, though. Although the framers endowed the United States Supreme Court with independence from popular participation in the selection of Supreme Court justices, the power of the Court evolved over time. The framers did not give the Court the power of judicial review outright. They may have intended the Court to exercise judicial review, but they did not explicitly write that power into the Constitution. The power of judicial review is the key element establishing judicial independence from the other two branches of government. With the Constitution of 1787 the examination of judicial independence clearly requires two separate discussions, one about structural independence from the voters and the other about separation of powers among the three branches of government. Independence from popular


10 Ibid., 76.
will was built into the Constitution through provisions for life terms for judges and selection by the president with confirmation by the Senate (the more elite of the two houses in the legislative branch). But independence from the legislative and executive branches was produced by the Court itself when it assumed the power of judicial review.

In fact, views on the principle of judicial independence vary depending on the observer's understanding of the role of the Court. James Madison, the person whose vision of an independent judiciary probably most influenced the national model, provides a good example of the confusion that sets in when these two distinct types of independence — independence from the people versus independence from the other branches — converge in the national judiciary. Madison insisted that "an effective Judiciary establishment commensurate to the legislative authority was essential. A Government without proper Executive and Judiciary would be a mere trunk of a body without arms or legs to act or move."11 Apparently Madison strongly favored a judiciary independent from the legislative and executive branches. Yet Madison was leary of allowing the unelected Supreme Court to practice judicial review. Madison's recommendation in the Virginia Plan was to give a "council of revision" composed of "the Executive and a convenient number of the National Judiciary" the authority to examine "every act of the National Legislature before it shall operate, and every act of a particular Legislature

before a Negative thereon shall be final," subject to a legislative override.¹²
The proposal for the council of revision was defeated at the Philadelphia
Convention. During the subsequent debate over extending the jurisdiction of
the Supreme Court to “all cases arising under this Constitution” and the laws
passed by Congress, Madison “denied that the Supreme Court had a general
power to interpret the Constitution.”¹³ In 1788 Madison reiterated his belief
that the judiciary did not possess the general power of expounding the
Constitution because that would elevate the judicial branch over the legislative
branch.¹⁴ It was to this limited judiciary that Madison extended independence
from voter control.

The clearest example of the link between judicial independence from the
people and the nature of judicial power comes from the Antifederalist essayist
Brutus. Brutus would seem to agree that the unique character of the judiciary
necessitated distancing it from popular selection. “[I]t would be improper,”
Brutus wrote, “that the judicial should be elective, because their business
requires that they should possess a degree of law knowledge, which is acquired
only by a regular education, and besides it is fit that they should be placed, in a
certain degree in an independent situation, that they may maintain firmness

¹² Ibid., 223.
¹³ Ibid., 235.
¹⁴ Ibid., 236.
and steadiness in their decisions.\textsuperscript{15} But Brutus, who wrote in his No. XI essay that allowing the Court to judge all matters "in law and equity" would in effect give the Court power "to explain the constitution according to the reasoning spirit of it, without being confined to words or letter,"\textsuperscript{16} recommended a democratically selected superbody empowered to get rid of justices who displeased the popular majority. "This supreme controlling power [over the judiciary] should be in the choice of the people, or else you establish an authority independent, and not amenable at all, which is repugnant to the principles of a free government."\textsuperscript{17} Brutus envisioned a Court independent enough to interpret the Constitution; he was therefore not willing to give it as much independence from the people as Madison allowed it.

Brutus' willingness to accept an unelected judiciary was not necessarily a typical sample of popular reaction to the new Constitution's provisions for judicial selection. The framers' desire to establish a professional judiciary very much independent of the people met with firm opposition. Wood claims "populist radicals" of the period went down swinging against the movement toward law as "a science removed from politics and comprehended by only an


\textsuperscript{16} \textit{Ibid.}, No. XI, 164.

\textsuperscript{17} \textit{Ibid.}, No. XVI, 188.
enlightened few who needed to be educated in special professional law schools."\textsuperscript{18}

This opposition was overcome by persistent efforts of the government itself. Wood claims, "The desire for an independent expert judiciary was bred by the continuing and ever renewed fears of democratic politics."\textsuperscript{19} By 1831, when Alexis de Tocqueville wrote \textit{Democracy in America}, the judiciary was sufficiently powerful and independent to suggest to Tocqueville that the courts "are the visible organs by which the legal profession is enabled to control the democracy."\textsuperscript{20} The pre-1787 vision of the courts as a democratic institution, in which the "power of judging was to be exercised by juries drawn periodically from the people"; and in which "in the exercise of the jury function the people were themselves to be judges"\textsuperscript{21} was in temporary abeyance. Under the new national Constitution, "the establishment of an independent judicial power [meant] transforming [the] jury system into a judiciary and juries into judges."\textsuperscript{22} This "professionalism" of the law established another aspect of judicial independence, the one most responsible for the belief that the judiciary cannot be popularly selected. The idea of a highly trained, expert judiciary

\textsuperscript{18} Wood, 323.

\textsuperscript{19} \textit{Ibid.}

\textsuperscript{20} Alexis de Toqueville, \textit{Democracy in America} (Part I, 278), as quoted in Wood, 325.

\textsuperscript{21} Erler, 153.

\textsuperscript{22} \textit{Ibid.}, 154.
evolved from the provisions in Article III of the 1787 Constitution and from political pressures of the early Republic.

C. JUDGES AS POLICY-MAKERS

Whether the framers intended it for them or not, justices assumed an important policy role as soon as they asserted the power of judicial review. Brutus' fear that Supreme Court justices would be able to "explain the constitution according to the reasoning spirit of it" became reality, though it may have stopped short of his prediction that they would not be "confined to [its] words or letter." A justice's power to negate legislation deemed "unconstitutional" may be limited by strict constructionism or expanded by broad interpretation. All justices believe they are confined by the words and letter of the constitution, but each views that limitation differently. Within the spectrum of varying judicial attitudes toward their freedom to interpret the words of the Constitution lies the territory of "judicial discretion." The variety of acceptable definitions of judicial discretion is apparent in the views of two distinguished twentieth century Supreme Court justices, Oliver Wendell Holmes and Felix Frankfurter.

Holmes, reacting against the common belief of his time that judges could operate as disembodied automatons, weighing the pros and cons of any legal problem dispassionately and without personal reaction, described the role of the judge this way:

The life of the law has not been logic; it has been experience.... The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had
a good deal more to do than the syllogism in determining the rules by which good men should be governed.\textsuperscript{23}

Holmes' description sounds like modern judicial realism. Because the courts have the power to affect policy, they will affect policy. Because the courts' personnel is human, experience will color justices' logic.

Like Holmes, Frankfurter sees a subjective element in the work of a judge: the Court's task, according to Frankfurter, "is to seize the permanent, more or less, from the feelings and fluctuations of the transient."\textsuperscript{24} But in the same speech before the Pennsylvania Law School, Frankfurter went on to express hostility to the idea that a Supreme Court justice is "left at large to exercise his private wisdom."\textsuperscript{25} Somewhere between Holmes' realistic allowance that judicial decision-making is more experience than logic and Frankfurter's admonition that no judge is free simply to decide cases as he pleases lies a very fine line, a very subjective line—the line which separates permissible judicial policy-making from the impermissible.

Some argue that the independence of the judiciary from popular election creates—and also in some measure should limit—the policy-making discretion of the judiciary. Judge Richard Posner, a Reagan appointee to the federal bench, writing in 1984 in favor of limits to judicial activism, lays the blame for federal judicial activism squarely at the door of the political branches: "the

\textsuperscript{23} \textit{Ibid.}, 2.


\textsuperscript{25} Frankfurter, 794.
political branches are happy to shift responsibility for unpopular policies to the federal courts, which are a kind of lightning rod since the judges cannot be voted out of office.\textsuperscript{26} Posner calls the modern legislative process "undisciplined"\textsuperscript{27} and charges that legislative waffling on the issues which divide society creates a vacuum which justices have no choice but to fill with decisions that amount to judicial lawmaking. When the legislative branch does act, it does so in such a way as to force the courts further into setting policy. "Some statutes indeed, are so general that they merely provide an initial impetus to the creation of bodies of frankly judge-made law," according to Posner.\textsuperscript{28} Posner finds this especially disturbing in areas "on which there is no ethical consensus"\textsuperscript{29} (abortion, for example).

Posner faults constitutional interpretation as having fallen into similar patterns of judicial policy-making. Partly the inevitable result of moving away in time from the date of constitutional enactment, but "especially since many such provisions seem deliberately couched in vague and general terms," justices' interpretation of the Constitution is more and more simply justices setting public policy, Posner claims.\textsuperscript{30}


\textsuperscript{27} Posner, 6.

\textsuperscript{28} Posner, 5.

\textsuperscript{29} Posner, 17.

\textsuperscript{30} Ibid., 6.
Montana's Supreme Court has certainly been affected by judicial policy-making of this nature. One justice demonstrated the court's willingness to accept a policy-making role, writing in an opinion, "Where the Legislature fails to take cognizance of important legal obligations and fails to provide the appropriate remedies, this Court will not hesitate to act." Such willingness to enter the legislative arena has placed the Montana Supreme Court in a number of controversial positions, probably the most noticeable of which was its central role in rewriting school funding legislation. The court's critics have charged it with the "creation out of whole cloth of a 'fundamental right' [to access to the courts] limiting the legislature" and of "rather cavalierly [disregarding] a recent constituent assembly and the authorized and good faith decisions of the legislative representatives."

Posner suggests that, while the judicial independence written into the constitutional makeup of the judiciary invites judicial activism, that very structural independence should tell judges to limit their policy-making. He argues: "What can fairly be inferred from the constitutional scheme is that the judges are not to exercise the same freewheeling legislative discretion as


the elected representatives...." 34 In other words, the framers could accept a limited policy-making role for unelected justices, but would balk at the policy-making latitude allowed to unelected federal judges today.

D. JUDICIAL CHARACTER

Since justices are endowed with a policy-making power limited to a large extent only by their own discretion, the character of judges becomes a central issue. Like all the essential factors governing an effective judiciary, the debate over judicial character—and over the best way to staff a court with persons possessed of the necessary personal virtues—is as old as the first efforts of states to create the third branch of government. The core elements of the debate have changed little, even though at the state level methods of selection have fluctuated between elitist appointment provisions to wide-open democratic election and back again.

The essential qualities of good judges inspire endless commentary. Michael Polelle, a professor at John Marshall Law School writing in favor of reform to the selection of federal judges, suggests that Americans would do well to read William Penn's thoughts on the law from Penn's 1682 tract *The Frame of Government of Pennsylvania*:

I know some say, let us have good laws, and no matter for the men who execute them: but let them consider, that though good laws do well, good men do better: for good laws may want good men, and be abolished or evaded by ill men; but good men will never want good laws, nor suffer ill ones. 35

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34 Posner, 16.

Benjamin Cardozo echoes Penn in his enjoinder that “[t]here is no guaranty of justice...except the personality of the judge.”36

The consensus of informed opinion on the qualities that make a good judge can be summed up in a paraphrase of Justice Potter Stewart’s exasperated statement about the difficulty of defining obscenity: no one is able to define precisely these qualities, but everyone knows them when they see them. Frankfurter called for both intellectual and moral qualities in “technically equipped lawyers” who are “widely read and deeply cultivated.” Among the judge’s moral qualities should be “a disposition to be detached and withdrawn.”37 “Greatness in the law,” Frankfurter summarized in his speech to the Pennsylvania Law School, citing examples of justices who fit each definition,

is not a standardized quality, nor are the elements that combine to attain it. [It may be] the power of penetrating analysis exerted by a trenchant mind [Bradley];...persistence in a point of view forcefully expressed over a long judicial stretch [Field];...coherent judicial philosophy, expressed with pungency and brilliance [Holmes];...resourceful deployment of vast experience and an originating mind [Brandeis];...the influence of a singularly endearing personality in the service of sweet reason [Cardozo];...[or] the kind of vigor that exerts moral authority over others [Hughes].38

Posner offers a vision of the “bedrock elements of judicial workmanship” which mirrors Frankfurter’s:


37 Frankfurter, 793-795.

38 Ibid., 784.
Self-discipline (implying among other things due submission to the authority of statutes, precedents, and other sources of law), knowledge of law and thoroughness of legal research, a lucid writing style, a power of logical analysis, common sense, experience of life, a commitment to reason and relatedly to the avoidance of 'result-oriented' decisions in the narrow sense in which I should like to see the term used, openness to colleagues' views, intelligence, hard work—...all are indeed the bedrock elements of judicial workmanship.39

These definitions contain common elements—good judges are disciplined, smart and well-trained legally; they also have common sense and wisdom. The connection of these characteristic to the process of selecting judges becomes problematic because none of these qualities is readily apparent to an electorate, at least to an electorate informed the way the modern electorate is, through political campaigns which rely heavily on cosmetic information. Nevertheless, in almost half of the states, supreme court justices are popularly elected, at least in theory.

E. JUDICIAL SELECTION OF STATE HIGH COURTS

Given the difficulty balancing the competing values involved, it is not surprising that there are almost 50 different methods used for selecting judges in the 50 states. "There is an almost endless combination of mechanisms used to select state judges," wrote Lyle Warrick in the overview chapter of the American Judicature Society's 1993 compendium of provisions for selecting state judges.40 Generalizations can be made, however, especially if one narrows the focus to judicial selection procedures for state high courts.

39 Posner, 22.

Warrick’s research reveals that states are equally divided today between those which hold elections for initial selection of supreme court justices and those which use nominating commissions to advise governors in supreme court justice appointments. Of the 22 states which elect their supreme courts initially, 10 hold partisan elections and 12 hold nonpartisan elections. While 22 states fill high court vacancies with the commission/governor plan, Warrick documents 32 states using commission plans to aid the governor in selecting some or all of their judicial officers, with 10 of these having adopted or extended a previous commission plan during the 1980s. The AJS’ compendium had to be updated from its original 1980 publication in large measure simply because so many states had changed from elective to appointive systems. With so many states opting to jetison elected judiciaries, Montana’s system, which provides for initial election of all judicial officers and gubernatorial appointment of interim vacancies, deserves re-examination.

Proponents of an appointment process say it is a more efficient means of finding the most highly qualified persons. Their opponents argue that the political elements of this process—nomination and confirmation by “insiders” to the government’s power circles—produce judges who fit the political necessities of the well-placed, but who are not necessarily cast in the mold recommended by Frankfurter or Posner. In other words, if a Republican president is replacing a black Supreme Court justice, the president may want to scan the horizon to find a black Republican—any black Republican with the minimum qualifications for a Supreme Court appointment. That black

41 Ibid., 5-6.
Republican may become a Supreme Court justice, not because the candidate is the most qualified—having, in fact, received the lowest ABA rating ever among persons considered for such appointments—but because this candidate fits the political necessities, in this case being both black and a member of the Republican Party. 

Debate over what constitutes a healthy measure of popular control over judicial selection has changed little in principle from the time of the Revolution. On its surface the evidence of judicial selection as it is practiced both on the federal and state level would appear to support Alexander Hamilton’s argument that allowing “the people” more control over the process of judicial selection is foolhardy. Hamilton argued that even allowing the House of Representatives a hand in judicial selection was going too far. The House, he argued, would be too slow, too “interested,” too divided among themselves in political favors and debts, to produce an effective judiciary. Hamilton, of course, favored a judiciary chosen by one person thereby increasing accountability for the appointments and reducing (he believed) the chance of appointment of political hacks and cronies. In fact, the reason so many states wanted to reform their elected judiciaries in the early 1900s was that

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machine politics had overtaken state judicial selection by the late 1800s,\textsuperscript{43} exactly the fear Hamilton expressed in \textit{The Federalist}.

All judicial selection processes involve a critical compromise. To get some of Hamilton’s elitist expertise in finding the most qualified judges, voters may be willing to give up some of the ideal of popular sovereignty. On the other hand, Montanans—at least in theory—currently trust the people with all the power of selection. Each variable in the selection process requires examination, not of its purpose, but of its results, for the purposes of judicial selection methods may not produce the intended results.\textsuperscript{44}


\textsuperscript{44} McClellan, 541.
CHAPTER TWO

MONTANA GRAPPLIES WITH JUDICIAL SELECTION AS IT REWRITES ITS CONSTITUTION IN 1972

INTRODUCTION

Recent arguments about judicial selection are strikingly similar to old ones. When Montanans wrote a new constitution in 1972, the debate over judicial selection produced arguments and solutions that were mere restatements of founders' philosophies. The main dispute separating delegates was whether to adopt a "merit" selection system. Under merit selection, judges are chosen by a citizen committee that screens candidates to recruit the best qualified persons. Though the idea gained momentum in the twentieth century at the state level, its thrust is in line with Brutus' 1780 suggestion that federal judges be nominated through just such a "superbody." Arguments against merit selection always hinge on the policy-making power vested in the judiciary, as they did when Madison and Hamilton wrestled with the issue. That some would suggest that participation in judicial selection should be confined to a single participant—the governor—would not surprise Hamilton devotees. That others would suggest that judges endowed with a policy-making role should be selected in a process that assures accountability to voters would not surprise students of Madison. Montana's solution in 1972 was to retain the elected judiciary while revamping the system which produced interim appointments.

Dissatisfaction with Montana's elective system of selecting judges brewed throughout the 1960s. Rumblings of discontent about the state's
judicial system in general were one of the major motivators behind the call for wholesale constitutional revision, a movement which accelerated through the late 1960s and culminated in the 1972 Constitutional Convention. Though the state's system of electing its judiciary changed little as a result of the new constitution, the heated debate over the constitution's judicial provisions reveals themes that run through all Montana's politics and that connect Montana's debate over judicial selection to those experienced nationwide since 1776. Defining judicial independence and striking an acceptable balance between that independence and accountability to the people remain the central issues. Underlying each issue is the problem presented by "influence," or the fear that the judiciary could be compromised if its selection allowed specific interests to gain control of the selection process.

In Montana's politics of 1972, the "influence" most suspected—and feared—was that of the state's three great corporations, the Anaconda Company, Burlington Northern Railroad and Montana Power Company. Fear of this influence was a driving force in the general debate over the merits of electing judges versus appointing them. The convention flip-flopped twice over what was then a novel idea—publicly financed judicial elections, a recommendation born entirely out of a desire to avoid an unhealthy wielding of influence on the courts. The jagged course that this proposal took through the convention shows again and again the importance delegates attached to "influence."
A. MONTANA'S MOVEMENT FOR JUDICIAL REFORM, 1966-1972

The movement for judicial reform took its first official step when 104 citizens met to examine weaknesses in the state’s judicial system at a September 29, 1966, conference in Great Falls. The citizens determined, among other things, that “[p]resent nonpartisan elections have not succeeded in removing Montana judges from political pressures and uncertainties.” The citizens’ report recommended that judges be nominated by a screening board and appointed by the governor to be approved or disapproved at intervals by the voters. The delegation further recommended that a committee begin to study revamping Montana’s judicial system, especially its selection process. This committee studied the judicial system for five years before submitting the so-called “Montana Plan” to the Constitutional Convention. In the interim, David R. Mason and William F. Crowley, both University of Montana Law School professors, published their 1967 *Montana Law Review* article, “Montana’s Judicial System—A Blueprint for Modernization,” which formed the substance of the eventual Montana Plan.

In their article Mason and Crowley concentrated on selling a more centrally controlled and—they hoped—more efficient judiciary, a “system” with the supreme court as the administrative authority over the lower courts. The lower courts would be reorganized to reflect Montana’s new urban population majority. The article did not emphasize judicial selection, but the professors did recommend that the state’s constitution should be amended to “[p]ermits the

legislature to provide methods of selection other than election for members of the judiciary.”

In October 1971, with the election of delegates to the constitutional convention in sight, the University of Montana Law School unveiled its Montana Plan, the product of five years’ development. The elements of judicial selection under the Montana Plan were refinements of the Missouri Plan, the prototype for “merit” selection proposals.

Under the Montana Plan both supreme court justices and district court judges would be chosen by the governor from lists of two to four names submitted by a nominating committee composed of lawyers and members of the general public. Once on the bench, judges would run “against their records” periodically—that is, unopposed by alternative candidates. Should voters elect to retire a judge under this system, the screening committee would nominate new judicial candidates and the governor would appoint one from among these nominees. Further, a “research and qualifications” committee of lawyers, judges and members of the public would have authority to investigate improper judicial conduct and to recommend that a judge be retired, censured or removed.


47 The movement for merit selection of judges began in the early 1900s and was implemented full scale for the first time in Missouri in 1940. Merit selection was a reaction against state judicial election campaigns, especially those of the late nineteenth century, which were dominated by party machine politics. Sandra Muckelston, “The Judiciary,” Constitutional Convention Study No. 14, 136.
from the bench. The law school's committee presented this plan as an alternative to the 1889 Constitution's elective provisions.

B. DEBATE OVER THE JUDICIARY AT THE CONSTITUTIONAL CONVENTION

1. General Sparring

The convention's judiciary committee split 5-4 regarding the Montana Plan, with the minority supporting it. The committee's split was indicative of the whole convention's sharp division over the judiciary. Debate over the plan on the floor of the convention reveals that elective-versus-appointive judiciary was the stickiest issue about the judicial article, although the whole article was controversial.

The division of opinion boiled down to a decision whether to support a "modernized," but admittedly experimental, court system along the lines of the Montana Plan, or to adhere to the old system with its populist features, the most obvious of which was the election of judges. Because the initial floor debate on February 26 was dominated by lawyers and confusing to many delegates, the convention became mired in uncertainty. The division among

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49 Judiciary committee chairman David Holland (Butte) and delegates Cedor Aronow (Shelby), Leslie Eskildsen (Malta), Rod Hanson (Fairfield) and John Schiltz (Billings) voted as the majority against the Montana Plan. Committee vice-chairman Catherine Pemberton (Broadus), Jean Bowman (Billings), Ben Berg (Bozeman) and Mason Melvin (Bozeman) voted in favor of the Montana Plan. Jean M. Bowman, "The Judicial Article: What Went Wrong?" 51 Montana Law Review 429, 494 n. 7.
delegates inspired Chairman Leo Graybill, a Great Falls lawyer, to abandon his characteristic non-committal attitude and to offer the delegates some advice:

[T]his is, of course, a complicated area and you must either choose to become educated or you must choose to follow one of the two leads, the majority or the minority report....[E]ither make up your mind to become educated or find some bellwether to follow and we'll try and get through this on Tuesday rather rapidly.  

Delegates seeking knowledgeable “bellwethers” had a large cast to choose from at the convention. The floor leaders for the debate were Dave Holland, a 47-year-old Butte lawyer who supported the majority report, including an elected judiciary, and Ben Berg, a 55-year-old Bozeman lawyer who wanted an appointed judiciary and supported the minority report. However, Holland and Berg were not the only lawyers at the convention who could tutor unschooled delegates. In fact, nearly a quarter—24—of the 100 delegates were lawyers, the largest occupational group represented at the convention.  

By contrast, farmers/ranchers, the second largest occupational group represented, had 19 delegates.  

50 Montana Constitutional Convention Transcripts, (hereafter Transcript), 1979, 1057.  

51 The preponderance of lawyers was a standing joke at the convention, and one that was exercised regularly during the debate over the judiciary. Delegates often facetiously requested one lawyer or another to “translate” a provision, or joked about the lawyer influence. (“DELEGATE AASHEIM: Mr. President, could a simple citizen ask a question? (Laughter).”); or, from Aasheim again, “Mr. President, I'm going to wait until the legal fraternity gets their arguments settled, then I'm going to ask mine.”) Montana Constitutional Convention Transcript, (hereafter Transcript), 1979, 1057.  

Though the whole article inspired division among delegates, the most divisive issue was judicial selection. Delegate Magnus Aasheim's motion to postpone any discussion of Section 2 (powers of the judiciary) until the Tuesday session indicates the importance delegates attached to the method of judicial selection:

It looks to me like we're giving the court powers before we know how they are to be selected. Now, later on, we are going to determine whether they are going to be elected by the people or by some body, and I think—in my judgment, it would make a difference how much power we are going to delegate them....

Aasheim's logic carried the vote on Section 2. After the convention was unable to come to terms on sections 3 (supreme court organization) or 4 (district court powers), the delegates voted to adjourn and take up the whole article fresh the following Tuesday.

Over the weekend, an informal committee of lawyers met to iron out differences between the minority and majority positions so that the floor debate would be better managed and less confusing to delegates not as familiar with the court system. Cedar Aronow and Jack Schiltz, both lawyers and members of the judiciary committee, met with Berg and James Garlington, a lawyer from Missoula. Aronow began Tuesday's debate by outlining the general compromises this group had arrived at and noting the differences they could not get around. Among these differences, of course, was judicial selection. As the floor debate over selection shows, divergent

53 Ibid., 1043.

54 Ibid., 1069.
beliefs—strongly held, persuasively argued, and grounded in opposing principles—underpinned the separation regarding judicial selection among delegates. The debate further reveals that a lot of the separation sprang from different ideas about “influence,” and how best to insulate the courts from it.

2. Arguments Favoring an Appointive Plan

The arguments presented to delegates at the convention for appointed judges involved four main points: (1) the screening committee would produce better judges because it would study qualifications professionally and dispassionately; (2) the elective system already in use was not really elective because so many judges were initially appointed to the bench, then ran as incumbents, an advantage that nearly always secured their re-election; (3) accountability to voters would actually be improved by the people’s representation on the screening committee, as opposed to the existing nomination system, which vested full appointment power in the governor; and (4) judges would have to run on their records, which allowed enough voter accountability.

Just as Brutus pointed out in the Antifederalist papers of the 1780s, so delegates to Montana’s Constitutional Convention also argued: judges required a “degree of knowledge” and education, which created unique problems for their democratic selection. The idea behind the minority report’s plan for judicial selection was systematically to identify, recruit and select good judicial timbre among the legal community. The judiciary committee’s minority report left the design of the judicial nominating committee to the legislature, but recommended that the legislature create a large “blue-ribbon” committee, with
membership statutorily nonpartisan and representative of widely varied geographical regions. The minority report favored a large committee to reduce influence by "some vested interest." To secure democratic accountability, the plan called for senate confirmation of the governor's nominee chosen from among two to three names submitted by the nominating committee. Finally, in the first primary election following an appointment, the new judge's name would appear on the ballot. As a compromise to populism, the minority plan amended the Montana Plan to provide that any lawyer could run against the judge in this first primary election. After that, however, judges would run against their records every four years in the general election.

Most delegates supporting the appointed judiciary commented about the inability of the electorate to know enough about judicial candidates to make good choices. Berg, introducing the minority plan, said good judges are impartial, skilled and know their business. They must have the courage of their convictions and be "free from the onslaught of prejudice"—not traits, Berg argued, that win popularity. Qualities that make a candidate popular would not necessarily make a good judge, Berg argued. The minority plan was a superior selection process because candidates would get "a good, thorough screening" by "eighteen men" bent on finding the most qualified person.

55 Ibid., 1023.

56 Ibid.

57 Ibid., 1024.
The second major argument voiced by supporters of the minority report was grounded in the belief that judges were more often initially appointed than elected under the existing "elective" system. Jean Bowman, a Billings League of Women Voters activist, addressed this point in the early debate over selection, complaining that the system was in effect an appointive one marred by very limited participation: the governor alone selected judges for interim appointments "without consulting anybody." Further, Bowman said, once appointed, a judge sat for life because "we [voters], more or less like sheep, go and reappoint them." Bowman argued that, since the so-called elective process was in practice a fairly undemocratic appointive one, the minority recommendations would actually increase democratic involvement.

The arguments about the appointive nature of the elective system require some statistical explanation. Research on Montana's elected supreme court shows that, between 1889 and 1977, 64 percent of supreme court justices began their tenures with election. However, from the time those elections became nonpartisan in 1936, the instances of justices gaining seats initially through election drops to 61 percent. It is widely believed that incumbency confers an almost insurmountable advantage in judicial elections. In fact, incumbents in Montana do win supreme court elections easily: between 1948 and 1985 only one supreme court justice failed to achieve re-election. Yet appointment to the bench does not bestow the incumbency

58 Ibid., 1091.

59 Ibid., 1031.
advantage automatically: only seven of fifteen appointees to the supreme
court between 1889 and 1977 who ran for the court following their
appointment regained their seats.\textsuperscript{60} Whether delegates' fears about the
advantages of incumbency were real or perceived (four out of the five justice
sitting on the supreme court in 1972 had been appointed originally), these
worries occupied much of the debate over the judiciary.

Finally, delegates touted the minority plan's requirement that judges run
against their records as sufficient for voter accountability. The minority plan,
Berg said, still leaves the judge "facing a very powerful electorate outside his
door every four years." This should assuage the fears raised by the majority
that the appointive system would produce arrogant "tyrants," Berg said.\textsuperscript{61}

3. Arguments for Elected Judges

Arguments for elected judges relied on three main supports. The first
was that the judicial powers, especially the powers of the supreme court,
necessitated a popular check. Schiltz underscored the policy-making nature of
the supreme court's role and its relationship to electoral accountability:

\begin{quote}
[I]t's more important to elect supreme court judges than it
is district court judges. The district court judges aren't
making policy. And it's the policy that the supreme court
makes that should be rejected or adopted by the
electorate....[W]e have, with Mr. Holland's plan [for an
elected judiciary] the best screening process in the world,
and that is the electorate.\textsuperscript{62}
\end{quote}

\textsuperscript{60} James J. Lopach, \textit{We the People of Montana: the Workings of Popular

\textsuperscript{61} Transcript, 1024.

\textsuperscript{62} Ibid., 1090.
Or, as Schiltz wrote in 1993, still defending an elected judiciary, “they should go to the people periodically to atone for their stewardship.” On a more ideological plane, Cedar Aronow pointed out that “no matter what broad powers or rights you provide for people in the Bill of Rights, the value of those rights [is] dependent entirely on how the court interprets them.” Aronow’s comment reflects a belief that what the delegates wrote in 1972 would be given life through court interpretation, and that the judges entrusted with this power must be accountable to the citizens.

The second supporting argument was that election produces the best judges. Contrary to Berg’s assertion that the electorate was ill-equipped to identify judicial expertise, Holland suggested that election produces judges who are politicians, and “the basic attributes of a politician are actually pretty good for a judge.” “Basically,” Holland elaborated, “what you want is a fair man who can comprehend what the law is and hope he has enough human understanding to get by.” Holland suspected that appointed systems allowed “arrogance” to creep into the judiciary, and pointed to judges on the federal bench as an example.


64 Transcript, 1069.

65 Ibid., 1016.

66 Ibid., 1017.
The pivotal argument regarding elective selection had to do with influence. This argument gave the majority report the swing vote necessary to create a majority. Rod Hanson, a Democrat and electric co-op manager from Fairfield who served on the nine-member committee, said he came to the convention favoring the appointment process recommended in the Montana Plan, but changed his position because he decided a judicial nominating commission would be particularly susceptible to corporate influence. He had learned that the sixteen-member commission formed to advise the judiciary committee—whose bi-partisan appointments by the house of representatives, senate, supreme court and governor intended to produce an impartial body—included four attorneys for the Montana Power Company, one of whom became chairman of the commission. Hanson said he voted for an elective plan because he thought corporate control of a statewide election would be harder to achieve than corporate control of an eighteen-member committee.

In fact, the minority plan reflected the power of this argument, too. Rather than commit the design of the nominating committee to the constitution, Berg found it necessary to leave that design to the legislature. The reason for this, as various comments in the transcript attest, was that the judiciary committee could not agree on a design that would insulate the committee from corporate influence.

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Both sides tried to divine the wishes of the electorate as to appointive or elective systems, and to claim those wishes supported their argument. Berg said the main people to please with judicial selection were “not judges, but citizens,” and that the appointive system is what the citizens wanted.68 Bowman argued that to offer the Holland plan to the voters who would eventually ratify the constitution would be to offer them no choice at all. The people should be given a chance to vote on an appointive judiciary, she said.69

Holland argued the opposite point: “I submit to you that the people of this state want to elect their judges and, if we come out of here with an appointive system...this thing alone...could bring down the whole Constitution.”70 Holland cited a variety of polls to support his claim. First, a survey done by political science students at the University of Montana February 7-22, 1972, found that 125 of 189 persons questioned rejected judicial appointment. Although law students polled supported an appointment process 67-16, a poll of lawyers in general practice favored an elected judiciary 256-241; among trial lawyers, an overwhelming 78-34 favored elected supreme court justices, with an even higher number favoring elected district court judges, 82-29.71

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68 Ibid., 1022.

69 Ibid., 1091.

70 Ibid., 1013.

71 Ibid., 1013-1014. Of course, lawyers’ desire to have judges elected may not spring entirely from devotion to democratic principles, a subject covered in greater detail on pages 50-56.
After several inconclusive votes on selection, the convention finally agreed unanimously on the compromise provisions that form the current system for judicial selection in Montana. Under the current plan, judges are elected in an open election if no incumbent files. Incumbents may face challengers in both the primary and general election. If no challenger files against the incumbent, the incumbent must face the voters as an “accept or reject” option. Other vacancies are filled through gubernatorial appointment, but the governor is advised by a nominating commission whose membership is statutorily defined; the senate confirms judicial appointments. While this system is in some ways a hybrid of the majority and minority proposals, it is basically an elective plan.

4. The Battle for Publicly Financed Judicial Elections

The question of corporate influence—or influence of any contributor to a judicial campaign—gave rise to the most interesting debate on judicial selection, the debate over public financing of judicial campaigns. A provision for publicly financed supreme court campaigns narrowly missed inclusion in the constitution, finally defeated on March 16—after a dramatic call of the convention to round up two missing delegates—in a 49-48 vote.\(^2\) (Although the majority of those voting favored the provision, Rule 51 of the convention stated that provisions included in the constitution had to pass by a majority of the elected delegates, a majority of 51.) The final vote came after the idea was voted in and out of the proposed constitution two different times.

Public financing of judicial elections was proposed by Billings lawyer John Schiltz, a Democrat who had suffered a landslide defeat in an attempt to unseat Chief Justice James Harrison in 1970. Schiltz lost to Harrison 89,171 to 28,568, after running on a platform that Harrison's campaign contributions from corporate interests affected his decisions. Schiltz accepted no campaign contributions from lawyers. Schiltz submitted his proposal that all state judicial campaigns be publicly funded as a separate minority report from the judiciary committee on which he served. It was first debated on February 29, after the delegates had voted on the rest of the substance of the judicial article. It passed 46-45. Later the same day, the delegates reconsidered the provision; in its last action of the day the convention voted 49-47 to delete the section providing for publicly financed judicial campaigns. On March 13, with 11 delegates absent, the convention voted 55-32 in favor of a revised provision that allowed for public financing of only supreme court elections. The new provision went to the Style and Drafting Committee, but was defeated March 16 in the dramatic vote that closed the final debate on the judicial article as a whole.

The close votes on the section and its roller-coaster trip through the subparagraphs of Roberts Rules of Order attest to the vigorous interest delegates had in the publicly financed elections, an idea which at the time was entirely new. Publicly financed presidential elections were still two years away, and the Watergate scandal, with its links to campaign finance and eventual campaign finance reform, was in its embryonic stages. Delegates' comments on the provision reveal that, again, the central issue dividing
delegates was "independence," particularly independence from influence, either perceived or real.

Schiltz argued that any discussion of independence for the judiciary needed to address lawyers' campaign contributions. "[T]his is your sole source of campaign funds when you're running for the Supreme Court. You either have lawyers who give it to you in case you'd win or you have lawyers who are afraid not to give it to you or you get it from lawyers who are genuinely interested in your philosophy of what a court out to be." Assuring the "purity of our judges" could best be accomplished by eliminating lawyers as the main source of campaign donations, Schiltz argued.

Not only did delegates fear the influence of lawyers who contributed to judicial campaigns, but, again, they greatly feared corporate influence. Graybill stepped down from the chair in order to comment on this issue. Trying to save the provision on its reconsideration on February 29, Graybill argued:

> [T]he whole issue is are we going to let the Judiciary continue to get its money to run for contested Supreme Court offices by getting it from big...corporations and concerns who have a lot of litigation in the Supreme Court?...[T]he Supreme Court ought to be a place where the few clients who use it a lot ought not to be able to contribute large sums to a Supreme Court candidate..."\(^75\)

In a similar vein, arguing March 13 for the revised provision that affected supreme court elections only, Wade Dahood, a lawyer from Anaconda, said,

\(^73\) Ibid., 1026.

\(^74\) Ibid., 1137.

\(^75\) Ibid., 1167.
"The taxpayer, above all, should have paramount interest in this proposal. He is the one that is affected by the quality of justice more than anyone else."

Dahood went on to detail the many cases decided in the supreme court that pit the interests of "ordinary taxpayers" against those of corporations—tax cases, assessment cases, zoning cases.... Both Dahood and Graybill saw public campaign financing as a tool by which the interests of "ordinary taxpayers" could be protected from the influence exerted by Montana's big corporations, whose interest in the court was naturally greater than any citizen's because the corporations appeared as parties in the supreme court more often.

Though publicly funded judicial campaigns failed to achieve constitutional status, the idea was tried on a small scale for a brief time. Between 1975 and 1993 campaigns for supreme court seats were given a share of the state's public campaign fund. The money for this fund came from voluntary contributions from taxpayers who indicated their support through a check-off box on their Montana tax returns. Since "volunteering" funds this way meant paying money to the fund over and above one's tax burden, participation was not high. The fund was eliminated in the 1993 session of the legislature because it had attracted a scant $1,600 per year, $1,200 less than the Department of Revenue claimed the fund's administration cost the state. The $1,600 had to be divided among candidates for the judiciary and

76 Ibid., 2201.


78 Ibid., 3.
for governor and lieutenant governor. This experiment with publicly financed elections clearly failed, but perhaps only because the voluntary nature of the contributions doomed the program from the start.

C. CONCLUSIONS

The delegates to the 1972 Montana Constitutional Convention could not agree how to solve the problem of influence in supreme court selection. They chose to retain an elective process at least in part to thwart such influence, then they narrowly defeated public financing of those elections. Montana history appears to show that judicial elections were more competitive when they were partisan. Since eliminating the elective process is probably unlikely, the next area of study will be an examination of the election of judges in practice, with emphasis on the election's competitive qualities and its susceptibility to influence.
CHAPTER THREE
JUSTICES' EXPERIENCE WITH THE ELECTIVE AND APPOINTIVE ASPECTS OF MONTANA'S JUDICIAL SELECTION PROCESS

INTRODUCTION

There is no perfect system of judicial selection. On that much justices agree. But the relative imperfections of the two main systems—appointive and elective—offer justices ample room for disagreement. Each justice finds specific imperfections distressing. One complains that the electorate is poorly informed and too demanding; another that the Judicial Nomination Commission is staffed by political hacks. The questions raised by justices who have experienced judicial selection firsthand reflect the same conundrum that stymied the framers in 1789: how can the judiciary be responsive to people while maintaining judicial independence and impartiality? The state's constitutional framers offered a hybrid system of appointment and election as a practical solution to this dilemma. One justice has called their solution the worst of any of the fifty states.\(^79\) Another justice sums up the problem of balancing the competing values of independence and accountability: it is not that there is no good system for choosing judges, but there is no perfect system, and the advantages of one system tend to be the reverse of the advantages over the other.\(^80\)

\(^79\) Lopach, 150. The sentiment is Justice John C. Harrison's.

The issues that separated Antifederalists from Federalists in 1789 and Montana's constitutional framers Dave Holland and Dan Berg in 1972 also separate justices on the Montana Supreme Court today. Just as beliefs among constitutional framers writing almost 200 years apart turned on their individual views of the policy-making role of the judiciary, so with some of Montana's justices. Not surprisingly, the justice who views the court's policy-making power to be narrow and confined is more comfortable with an appointive judicial selection process. The justice who believes the court makes policy "every day of the week" prefers the elective process of selection. Within the election process there is room for further division of opinion among those most intimately familiar with it. Some justices favor vigorous campaign debate; others feel more confined by the Canons of Judicial Ethics. All three of the justices interviewed felt uncomfortable with the current system of judicial election finance.

A. VIEWS ON THE SCOPE OF JUDICIAL POLICY-MAKING POWERS DEFINE JUSTICES' VIEWS ON ACCOUNTABILITY TO THE PUBLIC

Justices view the role of the court differently. Chief Justice Jean Turnage, who was elected to the court in 1984 to replace Chief Justice Frank Haswell, described the court's policy-making power as extremely limited. "Under our constitution we cannot legislate, but we can create law...when there is no legislation to cover that matter," Turnage said. "If we will uphold our oath of office we must recognize that people create the law through their legislature and not through the courts."77 Justice Karla Gray, appointed

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initially in 1991 to fill a midterm vacancy created by the resignation of Diane Barz, echoes Turnage’s view of the strictures placed on judicial policy-making. “Our policy-making role is a very small part of what we do. There are cases certainly where we do make policy directly.... But those are primarily sort of development-of-the-common-law kinds of issues. And they are relatively few and far between.”^\textsuperscript{78} Justice Terry Trieweiler, who was elected initially in 1990 and then tried unsuccessfully to unseat Chief Justice Turnage in the 1992 election, differs sharply from Turnage and Gray:

[W]e make policy every time we decide a gray area of the law. I agree that if a statute is clear then we have no business varying from its plain language. But if it’s clear it doesn’t often get up here. The only reason it usually gets here is because it’s unclear and in order to apply it we need to apply our own value system to arrive at what we think is the proper result.... Everybody who is here knows we do that every day of the week. What they don’t want you to know is that they’re doing it from a value system different from yours.^\textsuperscript{79}

With views on their roles this widely separated, it is scarcely surprising to find Trieweiler on the opposite end of the spectrum from Turnage and Gray regarding judicial selection processes. Trieweiler’s support for the elective process is much more vigorous than either Turnage’s or Gray’s. Turnage takes a realist’s position regarding the merits of elective systems versus those of appointive ones. “In Montana there is little or no possibility of appointed judges. We are a state that wants to and will hang on to the right to vote for people, including judges,” Turnage said. He pointed out that the state requires

\textsuperscript{78} Gray interview transcript, 3.

appointed judges to run “promptly,” at the first statewide election following their appointment. Yet Turnage is critical of appointive systems in general, noting that “no one yet has come up with a sanitized method of appointment.” Turnage said appointment processes tend to be tainted by partisan politics.⁸⁰

Gray favors an appointive judiciary over an elected judiciary, but strongly criticizes the federal system of appointment because of its life tenures.⁸¹ Gray would prefer a variation on the Missouri Plan, with a provision for retention elections. She adamantly suggests that the appointing body have “plenty of public input,” including a provision for open meetings.⁸²

Trieweiler’s view is the polar opposite.⁸³ “[T]he appointive judiciary is a farce,” he said. “I think it’s much more political than elections.”⁸⁴ Trieweiler holds that appointed justices become better judges after they face an election because “an election is a very humanizing experience. It’s a very leveling experience.... You do humbling things day after day after day. And that makes you a better person. It gives you a broader, a deeper perspective, a greater

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⁸⁰ Turnage interview.

⁸¹ Gray interview transcript, 5.

⁸² Ibid., 14.

⁸³ Interestingly, Gray, who favors an appointment system of judicial selection, first won her seat on the court through appointment. She says she doubts she would have served on the court if she had had to run in the first instance. (Gray interview transcript, 1.) Conversely, Trieweiler, who favors an elective system first won his seat through election, and says he doubts he could ever have been appointed. (Trieweiler interview transcript, 9.)

⁸⁴ Trieweiler interview transcript, 6.
Trieweiler offered as an example his belief that he is a better judge on tribal jurisdiction issues as a result of campaigns which forced him to meet with tribes on Montana's seven reservations.

Gray shared some of Trieweiler's beliefs about the effect of elections on judges, but said that retention elections were sufficient to provide the benefits of the election process. "I think it is a good idea, even though we are not a political body and are not supposed to take popularity polls on the issue[s] and then vote accordingly. The system where you never have to go out there and meet Montanans, I mean real live people, and ask them for their vote and their support—I think it's important that we keep that," she said.86

However, Gray's view of the role of a justice in the political process limited her willingness to give all the selection power to the people. She identified several pitfalls awaiting justices on the campaign trail. Voters are accustomed to electing representatives and to holding their elected officials accountable for their representation. Voters who do not believe their legislator, governor or city council member is representing their views are entitled to unseat those representatives. Although Montana's justices are elected and must campaign like any other elected official seeking support, Gray points out that justices "are not elected to respond to the public will...or what a majority of people in a district or in the state...might think about a given issue on any

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85 Ibid., 8.

86 Gray interview transcript, 6.
given day.... People are not supposed to call us and lobby us for results.”

Gray's experience campaigning taught her that voters do not readily accept
the difference between her candidacy for the supreme court and someone else's
candidacy for the state legislature. "To most voters if you're running for
election you're a politician. If you're a politician they can and should hold your
feet to the fire about your views on everything from soup to nuts." Gray said
voters get frustrated when judicial candidates cannot answer some questions
because of judicial ethics and cannot make any campaign promises.

B. JUDICIAL ETHICS AND CAMPAIGNING JUSTICES

The strictures placed on judicial candidates by the Canons of Judicial
Ethics raise difficulties for campaigning justices. The race between Turnage
and Trieweiler in 1992 spotlighted these issues vividly. In a campaign called
“nasty” in news accounts, the candidates split early and decisively over the
scope of allowable comment under the Canons of Judicial Ethics. After
appearing together at a meeting of the Senior Citizens Association in Conrad

87 Gray interview transcript, 2.

88 Ibid., 3.

89 Lorna Thackeray, “Trieweiler snipes at Turnage for skipping debate,”
The Billings Gazette, September 26, 1992, 3B.

90 The canons' provision on candidacy for office states: “A candidate for
judicial position should not make or suffer others to make for him, promises of
conduct in office which appeal to the cupidity or prejudices of the appointing or
electing power; he should not announce in advance his conclusions of law on
disputed issues to secure class support, and he should do nothing while a
candidate to create the impression that if chosen, he will administer his office
with bias, partiality or improper discrimination.” Lawyers' Deskbook &
August 29, 1992, each candidate hurled charges of impropriety at the other, including accusations of violations of the canons. Turnage claimed, among other things, that Trieweiler acted unethically by discussing a case before the high court. Trieweiler said he made only a passing reference to the case in question, a May 1990 decision in which the court limited the amount of money that can be awarded when contracts are broken. He said he addressed more fully a case regarding tax refunds to federal retirees. Since no official record of the meeting was kept, there was no definitive answer about the charges and countercharges.91 The candidates never appeared together again. In late September, Trieweiler publicly criticized Turnage for missing a scheduled joint appearance before the Yellowstone County Bar Association. Association president Rick Cebull read a letter from Turnage excusing his absence. The letter explained that Turnage had a previous commitment in Western Montana and again accused Trieweiler of referring to pending cases.92 The pending cases remained unnamed and the voters were not informed beyond the newspaper account detailing Turnage's complaints about Trieweiler and Trieweiler's equally damning complaints about Turnage.

If voters relied on press accounts to inform them about the division between Trieweiler and Turnage regarding the Canons of Judicial Ethics, they were not only underinformed, but were almost certainly confused by a canon that would not allow comment on certain cases or issues, yet was apparently


92 Thackeray, "Trieweiler snipes...", op. cit., 3B.
mute regarding personal attacks. Though press accounts were sketchy with
details of supporting arguments behind charges of ethical violations of the
canons, they documented generously the personal charges and countercharges
leveled as the campaign unfolded. These charges included: Trieweiler decrying
Turnage's participation in bank cases while serving on a bank board and
Turnage's reply that Trieweiler improperly represented himself at the high
court in a case involving a dispute with Trieweiler's Whitefish neighbors;93
Turnage's claim that Trieweiler hoped to unseat him in order to pack the court
with "former trial lawyers such as himself" and Trieweiler's answer that such
a charge "would really be stupid";94 Trieweiler's counter-claim that Turnage
"run[s] this court like the Legislature rather than a court" and that Turnage
had too close a political relationship with the current governor Stan
Stephens;95 and Turnage's salvo that Trieweiler's "very big ego" and deep
pockets were the driving forces behind his candidacy.96 Though each news
story reflected an effort to get to the bottom of each of the charges flung, the
overwhelming weight of the coverage reflected a campaign rightly called
"nasty."

93 "Justice candidates trade accusations again," The Billings Gazette,

94 Bill Skidmore, "Turnage says Trieweiler seeks to 'pack' high court,"
The Billings Gazette, September 30, 1992, 5C.

95 Skidmore, "Court candidates trade charges," The Billings Gazette,
June 26, 1992, 2B.

96 "Turnage lashes out at Trieweiler," The Billings Gazette, June 24,
1992, 8A.
In the waning days of the campaign the Lee Enterprise newspapers commissioned a poll of voters which revealed that Trieweiler’s decisive edge over Turnage in the primary (56 percent to 44 percent) was gone. In its place was a race too close to call, with roughly 18 percent of the voters registering “unfavorable name recognition” to both candidates. Trieweiler ended up the loser, by a margin so close (194,747 to 193,706) that he considered asking for a recount.

If this is what elections for the supreme court can be, is the elective process healthy? Turnage said the press’ natural inclination to emphasize confrontation rather than consensus (“someone could be elevated to sainthood in Billings and they wouldn’t pay any attention to it”) did not damage the court. Further, he said the coverage of the campaign, while lamentably not “a really scholarly job,” did produce an informed electorate. However, Turnage said he would be happier with press coverage that analyzed the role of the court in peoples’ lives. Trieweiler also expressed some dissatisfaction with press coverage, particularly of the campaign’s financing and what he felt was too shallow a treatment of the competing judicial philosophies of the candidates.

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98 “Defeated Trieweiler may ask recount,” *The Billings Gazette*, November 4, 1992, 2B.

99 Turnage interview.

100 Trieweiler interview transcript, 12.

101 Ibid., 17-18.
But he said the “high profile” election produced a better informed electorate than most judicial races and a population certainly better informed than it is through an appointive process: “It wasn't good for me—I hated it—but I think it was really good. I think it was the best thing that ever happened to people in this state in terms of learning something about their judiciary.”\textsuperscript{102}

Furthermore, Trieweiler said he thinks his races, particularly the first one in 1990 against former Attorney General Mike Greeley, “raised the level of consciousness about the courts and the court” and would encourage other attorneys to run for the court.\textsuperscript{103} Trieweiler said his victory over Greeley proved that a political unknown could defeat a “strong political figure” in a court race.\textsuperscript{104}

Not surprisingly, Turnage and Trieweiler have vastly different opinions today about allowable comment under the Canons of Judicial Ethics. Turnage’s interpretation of the canons would preclude most comment on cases. Turnage believes future cases, current cases and past cases are off limits to campaign debate. Justices “can’t talk about [the cases] that were there because they come back, not as the same case but as the same issue,” Turnage said. Turnage said the reason the canons were adopted “was to keep [justices] from promising voters that they’d go along with them, vote their way. This would not only be pre-deciding issues, but selling your vote. Justice

\textsuperscript{102} Ibid., 11.

\textsuperscript{103} Ibid., 9.

\textsuperscript{104} Ibid., 10.
is not for sale."  

Turnage’s moral certainty about the issue of campaign debate places any issue that might come before the court out of the realm of candidates’ comment.

Trieweiler’s view, held with as much moral conviction, is much broader. “There’s no canon... that prevents you from discussing decisions that you’ve already made.” Trieweiler said candidates who have not been on the court and have no record have a problem because they can address only what they might do prospectively, but he said voters can and should compare the voting records of judicial candidates and “ask them why they did what they did.” Their votes and reasoning are a matter of public record, anyway, because votes and reasoning form the essence of judicial opinions, he said.

C. CAMPAIGN FINANCE

Winning—and even losing—a “high profile” statewide election takes money, and the source of money for supreme court elections remains a sticking point for many of the same reasons raised by Montana convention delegates in 1972. Then the fear was of corporate influence. Today, in addition to fear of corporate influence, there is a strong sentiment that the plaintiffs’ bar—lawyers making their livelihood from damage awards to plaintiffs—may try to “buy” supreme court elections.

105 Turnage interview.

106 Trieweiler interview transcript, 18.

107 Ibid., 19.
The finances of the Turnage-Trieweiler race offer a good example of the problems inherent in financing a judicial campaign. Trieweiler raised $163,434 and spent $163,229. Turnage raised $209,404 and spent $209,304. By contrast, Attorney General Joe Mazurek raised and spent about $105,000 defeating Republican challenger Jack Sands. Karla Gray, running to keep her seat against lukewarm opposition from Joseph Nascimento, raised about $65,000. Nascimento raised roughly $2,000, most of it his own money. Lawyers or their spouses who contributed more than $35 accounted for about 68 percent of Trieweiler's total contributions. They contributed $92,585, many contributing the maximum allowable $750. Turnage raised almost $40,000 from lawyers contributing more than $35, or 20 percent of those contributions to his campaign. Other identifiable constituencies appearing on Turnage's campaign contributors' list are banker/broker/investor/CPA contributions totalling just over $17,700 (9 percent of his contributions over $35); and doctors and hospital interests, who contributed $20,187 (10 percent).

The PAC contributions are even more revealing. Trieweiler picked up the maximum allowable contribution, $2,000, from the Montana Education Association, the state's largest teachers union, and from a group called Montana Law-PAC. He received $1,000 apiece from the Chauffeurs Teamsters & Helpers and the Friends of Max Baucus. Local teachers unions in Billings, Butte, Glendive, Great Falls, Helena and Missoula all contributed smaller amounts ranging from $100 to $900. He also picked up contributions

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from the state AFL-CIO and union organizations in Spokane and Cleveland. Turnage’s $2,000 PAC contributions came from the Contractors of Montana, the Medical PAC and the Montana Auto Dealers PAC. The Realtors PAC donated $1,000. Moulton, Bellingham, Longo & Mather and Dorsey Whitney, large Billings firms with corporate clients, donated $1,500 and $1,000 respectively through their PAC’s. Other PAC contributions to Turnage ranged from $96.76 to $750 and came from the Montana Independent Bankers Association, First Bank System, Norwest (Bank) State PAC, Atlantic Richfield, Burlington Northern and the Plum Creek Good Government Fund in Seattle.109

The sources of this money are clearly identifiable as separate interests. Business interests, large law firms specializing in defending insurance companies, medical interests—traditional Republican constituencies—contributed to Turnage. Labor unions, plaintiffs’ attorneys, even Montana’s Democratic Senator—traditional Democratic constituencies—contributed to Trieweiler. Significantly, Trieweiler’s contributions lagged behind Turnage’s to the extent that, after the poll results showing the race to be a dead heat were released in late October, Trieweiler put $17,950 of his own money into his campaign.

Turnage, who made an issue out of campaign financing by charging Trieweiler with trying to buy the election, says he cannot say today who gave money to his campaign. “I would hope that’s typical,” he said, because it would

109 All judicial campaign finance information is from the official reports filed with the state Fair Campaign Practices office, Ed Argenbright, commissioner.
be “a gross violation of your oath of office to keep track” and favor contributors. Turnage said he doubted the contributions by lawyers to him and Trieweiler could accurately be documented as “plaintiffs” and “defense” attorney money because most Montana law firms—indeed, most Montana lawyers—do not isolate their practice to only defense or plaintiffs work. In fact, Turnage believes most lawyers have less interest in the supreme court elections than in district court elections simply because most lawyers do not come before the supreme court. Of the 3,500 lawyers licensed to practice in Montana, Turnage says only 500 or so are in court regularly. Turnage said the outcome of the supreme court race will not improve odds for either plaintiffs or defense attorneys. “There may be some feeling among those actively litigating that they have an interest in the outcome” of the election, Turnage said, particularly among “the plaintiffs bar because they want bigger and better lawsuits.” But Turnage said both defense and plaintiffs attorneys, if the bar could be divided as such, share an overriding common interest in more litigation. Electing one justice or another would not affect that overriding common goal, Turnage said.\textsuperscript{110}

Trieweiler differed. Calling campaign financing “the only problem I have with the elective judiciary,”\textsuperscript{111} he said his ability to raise money was hampered “because I don’t have a wealthy constituency, other than lawyers.”\textsuperscript{112}

\textsuperscript{110} Turnage interview.

\textsuperscript{111} Trieweiler interview transcript, 2.

\textsuperscript{112} Ibid., 3.
Further, Trieweiler thought that campaign contributions do buy something, not something as grossly wrong as a justice's vote on a case, but something more subtle. He said he frequently has “major contributors on both sides of the case, so all of the time you are voting against people who are major contributors.” However he pointed out that not every case that comes before the court gets the same degree of attention because there is so much work to do. Cases involving friends or lawyers he thinks highly of will get more careful attention, Trieweiler said. However, Trieweiler did not see an effort to buy “influence”—if that means buying a justice’s vote—as the major motivator behind campaign contributions. The reason lawyers give, and the reason the money from plaintiffs attorneys goes to one camp while defense attorneys contribute to another, is because the contributors believe they are giving to a person whose philosophy is similar to their own. “We end up getting supported by people who think the way we do. ...[B]ankers support Turnage because Turnage is a banker. He comes to the court thinking like a banker and they know that and that’s why they support him. He doesn’t think like a banker because he got contributions from bankers.”

Turnage, Trieweiler and Gray all doubted that lawyers’ “interest” in the outcome of a judicial election amounted to their influence over the court’s decisions. “We necessarily have to take money from lawyers because the general public is not interested enough or doesn’t understand enough to care enough to be involved in a judicial campaign, especially [a supreme court

113 Ibid., 13-14.
campaign],” Gray said. “And so we take money from all kinds of lawyers. And they come up here and they lose cases.”

Turnage noted that campaign contributions are one way of gaining voice in a nation devoted to free speech. For example, Turnage said, teachers contribute to candidates for the superintendent of the office of public instruction, and no one would suggest that the teachers’ interest in the outcome of that race should preclude their contributions.

Finally, Trieweiler said that limitations on campaign contributions and publicizing them cuts the effect of contributors’ influence on the court. “If somebody could contribute $50,000 to a candidate they could probably buy an awful lot of influence, but when an individual can only contribute $750—no one is going to risk their career for a $750 contribution. Even though they might really appreciate it, and think fondly of that person, they are not going to jeopardize their future for a $750 contribution.”

Campaign expenditures offer another field for examination. Given that court issues are complicated, 30-second spots on television and radio, which are the biggest expense in court campaigns, may not add anything significant to voters’ understanding of the court. Turnage, who hired Fifth Avenue Advertising in Helena to handle all his media advertising for $64,000, said one problem he has with the elective system is that a candidate with money can

114 Gray interview transcript, 6-7.

115 Turnage interview.

116 Trieweiler interview transcript, 16.
“overwhelm the voters with a media blast.” Trieweiler, on the other hand, who spent around $69,000 on radio and TV advertising, views advertising as “a good way to overcome an unfair advantage that your opponent might have because of that person's political connections.”

Although all of the justices had some reservations about public financing of judicial elections, they all favored it in principle. Trieweiler noted that the provisions for qualifying for the money would be critical. Tumage said he doubted that Montana, with the many burdens on its budget, would be able adequately to fund statewide judicial campaigns, though he thought the idea a good one as long as the funds were limited and accepting the funds meant that you could not put other money into the campaign.

D. THE APPOINTMENT PROCESS

The appointment process, which has filled six out of the 15 judicial openings since the 1973 creation of the Judicial Nomination Commission, raises a spate of different questions. Recent controversies focus on two problems with Montana's appointment system. The first involves the method members of the Judicial Nomination Commission use to fill supreme court vacancies. The second centers on the selection of members of the nominating commission itself.

First, when James Nelson of Cut Bank was appointed to the supreme court by Governor Marc Racicot in April 1993, the political division among

117 Turnage interview.

118 Trieweiler interview transcript, 17.
members of the Judicial Nomination Commission became public knowledge. The tally sheet submitted to the governor by the Judicial Nomination Commission was published in newspapers statewide April 9, 1993. It showed that four of the commissioners rated Roger Tippy of Helena first among the nine applicants who survived the commission's first cut, while three of the commissioners rated Tippy either last or eighth among the nine finalists. Tippy had been Turnage's campaign manager in the Turnage-Trieweiler race. Charles Johnson, the Lee Newspapers Bureau Chief, relied on handwriting comparisons and analysis by "court watchers" to determine that the first-place votes came from the commission's four non-attorneys, all appointed by Stan Stephens, the Republican governor Trieweiler had accused Turnage of being too familiar with. The last-place and eighth-place votes were believed to be from the commission's two lawyers, appointed by the state supreme court, and the commission chairman, District Judge James Sorte, chosen by his fellow district judges. James Regnier, a Missoula lawyer, received first- or second-place votes from the commissioners who rated Tippy at the bottom and seventh-, eighth- or ninth-place votes from three of the four other commissioners. One commissioner rated Tippy first and Regnier second, but the rest of the votes follow a similar pattern: if Tippy was at the top of a commissioner's list, Regnier was at the bottom and vice versa.

The result of such a voting procedure, assuming that the commission does contain a number of loyal party appointees, is that the candidate least offensive to either side will get the commission's highest recommendation. In this case, that was Richard Ranney of Missoula, who got one first-place vote,
two second-place votes, three fourth-place votes and a sixth-place vote. The fact that the commission must send at least three names and may send up to five names to the governor and that the governor must choose from this list checks this weakness in the procedure. The names of both Regnier and Tippy were submitted to the governor, along with Ranney's, Gerald Allen's and James Nelson's.\textsuperscript{119} The governor chose Nelson April 16 from among this group. Nelson was the lowest-rated of the five candidates whose names were submitted under the commission's procedure. Racicot's decision was made after the press reports revealed the divided voting among commission members.

The division among commissioners involved in the Nelson appointment hints at problems with the selection of members of the Judicial Nomination Commission. The legislature amended the statute governing the membership of the commission in 1991, allowing for staggered terms. As Johnson pointed out in his April 9 news article, the Judicial Nomination Commission was structured with terms that meant the sitting governor chose judges from lists submitted by a commission dominated by his predecessor's appointees. "Through most of his term, Republican Stephens, for example, got recommendations from a commission on which four of the seven members were appointed by his predecessor, Democratic Gov. Ted Schwinden," Johnson wrote.\textsuperscript{120} However, Stephens, having complained about the choices given him

\textsuperscript{119} Charles S. Johnson, "Tally shows split on judicial commission," \textit{The Billings Gazette}, April 9, 1993, 3C.

\textsuperscript{120} \textit{Ibid.}
by the commission, urged the 1991 Legislature to change the terms, which it did. One member of that commission said that the Legislature intended to get rid of all the sitting commissioners in 1991. But since the supreme court appointed the lawyer members, the Legislature had to settle for ousting the lay members only. The 1991 change meant Stephens could appoint all new lay members, the result of which appears on the April 1993 tally sheet.

Controversy around the membership of the commission brewed again in January 1994 when the supreme court made its two appointments to the body. This time, Trieweiler accused Turnage of trying to stack the commission by replacing the two members without fully involving the court’s other six judges. Trieweiler claims that appointments to the judicial nominating commission in the past were done after a conference discussion. In this instance, however, Trieweiler says Turnage proposed replacements for sitting members Robert James and C.W. Leaphart Jr. without conference discussion. Turnage got five signatures on the order replacing Leaphart and James before Trieweiler knew the appointment was being considered. Trieweiler, who is the only justice not to have signed the order, publicly charged Turnage with an

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123 Trieweiler interview transcript, 4.
effort to pack the commission with members who shared Turnage's philosophy.\textsuperscript{124}

These problems with the makeup of the nominating commission aside, it should be noted that every justice interviewed believed James Nelson to be a good appointment. Therefore, even a highly partisan commission cannot completely control the outcome of the selection. Furthermore, Gray said she preferred an appointed judiciary to an elected one because "the kinds of things that you have to be good at to get elected in the first instance are not necessarily the kinds of things that make you a good judge.”\textsuperscript{125} Gray said a nominating commission is a better screen for the kinds of qualities that do make good justice, including community involvement. “Unless you’ve been the kind of lawyer whose cases are more often in the public eye and get a lot of media attention,” it is hard to build the statewide constituency that could win you an election, she said.\textsuperscript{126} She preferred the odds with a nominating commission.

As Gray pointed out in the beginning, no system is perfect and the advantages of one tend to be the disadvantages of the other. The nominating commission may be susceptible to cronyism, but it allows a relatively unknown figure politically, like Gray, an opportunity to interview for and land a job she wants and—according to lawyers on both sides of the defense/plaintiffs

\textsuperscript{124} Johnson, “Trieweiler: Turnage…”

\textsuperscript{125} Gray interview transcript, 13-14.

\textsuperscript{126} Ibid., 1.
divide—is good at. Yet Trieweiler, who also wanted the job very much, doubted the nomination system would ever choose him, and advocates doing away with it altogether in favor of the "survival of the fittest" aspects of the election method.
CHAPTER FOUR
CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

Justice Gray's observation that each method of judicial selection has strengths and weaknesses, and that the strengths of the elective method tend to be the inverse of those of the appointive method and vice versa, provides the best beginning point from which to offer conclusions and recommendations. Anyone's recommendations regarding judicial selection will be predicated on the relative value the observer assigns to the competing elements that define the judiciary in a democracy. The resultant balance will either favor popular checks on judicial power or place greater weight on what Gray called "the truly critical independence and impartiality of the judiciary." 127 One's view of the policy-making power of the court profoundly affects one's beliefs about how much authority the public should have over the selection of judges. But those views probably arise out of an even more fundamental source. John Schiltz, arguing before Montana's Constitutional Convention that the electorate provides "the best screening process in the world," 128 Terry Trieweiler saying that "I have a lot more faith in the electorate than I have in nominating commissions" 129 — even Gordon Wood writing about the politics of the 1780s — may be reacting as much to a heartfelt belief in populism as to a

127 Gray interview transcript, 2.
128 Transcript, 1090.
129 Trieweiler interview transcript, 7.
dispassionate evaluation of the evidence. Similarly Gray—and Alexander Hamilton, for that matter—may be predisposed to view with suspicion “the people” as evaluators of judicial quality. Both sides are equally right. The analyst is left with Madison McClellan’s recommendation that the variables in the selection process should be analyzed not for their purposes but for their results, because the methods may not produce the intended results.

A. THE ELECTION PROCESS PREFERRED

Evidence from Montana’s recent judicial selections suggests that election is a superior system to the appointive system used in Montana. Naturally, this conclusion is not without qualification. There is no perfect system. But overall, the weaknesses of the elective system as practiced are less damaging than the weaknesses of the appointive system as practiced. The weaknesses of both systems can be analyzed and compared when divided into the following categories: (1) the importance of “influence,” defined here as the desire of (and relative success of) various groups to control the selection process; (2) the extent of justices’ policy-making power and its effect on how justices should be chosen in a democratic society; (3) the relative abilities of the electorate or a nominating commission to find and select good justices; (4) whether judicial independence can be secured in an elective system.

1. The Importance of “Influence”

Both the elective and appointive systems are susceptible to influence—that is, the desire of various groups to control the outcome of the selection process—but of different kinds, or from different groups. The major problem affecting the elective process is summed up in Chief Justice Turnage’s
complaint that a candidate with a lot of money can “overwhelm the voters
with a media blast.” Since races for the supreme court are statewide, a
vigorously contested race costs at least $150,000. Both Turnage and
Trieweiler spent over that amount in 1992. Whether this money comes from
lawyers, as it did with Trieweiler, or from traditional Republican constituencies,
as it did with Turnage, one cannot assume it comes without strings. Lawyers
who, in combination with their spouses, contributed $1,500 to Trieweiler’s
campaign certainly expected to get something out of that investment.
Probably they expected nothing more than to elect a kindred spirit to a court
that does have a significant role to play in their livelihood. Also, Turnage’s
campaign contributors might be sorry to discover that he has no idea who they
are. Though civic spirit is not to be completely discounted as a motivator for
campaign contributions, it is doubtful that pure civic-mindedness could
account for $200,000 in campaign contributions.

The biggest weakness to the elective system is campaign financing. A
lot of money poured into a judicial campaign does influence the outcome of the
election. In this respect Chief Justice Turnage is wrong: justice, at least in
terms of seats on the supreme court, certainly is for sale. It costs about
$200,000. However, it is being sold at a competitive auction to many people
for relatively small amounts. The competitive aspect of the fundraising may
be the best protection people can hope for against one interest controlling the
process. Though Trieweiler’s constituency—clearly identifiable as a
“Democratic” one—did not raise as much money as Turnage’s clearly

130 Turnage interview.
Republican constituency, it raised a competitive sum. As long as these two interests are free to compete for seats on the court, they should balance one another out.

Limits to campaign contributions and publication of the contributors' lists help reduce the "influence" purchased through campaign contributions, but they do not eliminate it. Trieweiler is probably right that no one is going to jeopardize a career for a $750 contribution. That the justices vote in cases generally in keeping with the interests which financed their elections should surprise no one. Voters who did not know that Turnage and Trieweiler had raised a lot of money, and who did not have a general idea of where it came from, have only themselves to blame. This is not a perfect system, but publication of contributors' lists and limits to contributions help make it superior to the alternative.

Even taking into account the imperfections of the elective system regarding influence, the elective method is clearly superior to the appointive method, which is plagued with a different sort of influence problem. The controversies over the current commission's membership confirm the 1972 Constitutional Convention's delegates' worst fears. Their suspicions that commissions were susceptible to control by factions are proven right by the membership and operation of the current Judicial Nomination Commision. The commission's redesign in 1991 allowed it to become a political tool. The votes detailed in the April 9, 1993, Lee newspaper story show that four of the seven members on that commission voted for political favorites. One member admitted in the newspaper story that "[t]he Stephens appointees are more
inclined to pick some who tend to be more conservative people in the broad sense of the term.”¹³¹ Since then, the supreme court replaced the two lawyer members of the commission in a procedure that was tainted by partisanship. Trieweiler’s complaint that his voice was silenced in this appointment process is well taken.

Possibly the current membership’s clearly political agenda is an aberration. C.W. William Leaphart Jr., who served on the commission from 1978—six years after the commission’s creation by the Legislature following the Constitutional Convention—until 1994, says the commission did not appoint justices to fill any political agenda until the 1991 Legislature revised the commission’s makeup. Leaphart said he believed one of the commission’s prime tasks was to keep the governor’s cronies from achieving seats on the supreme court, and he thought the commission prior to 1991 had accomplished this goal.¹³² On the other hand, there was no particular reason for a rift to develop between the commission and the governor prior to 1991 because all the governors were Democrats after the Constitutional Convention until Stan Stephens was elected in 1988.

Leaphart predicts the commission’s membership will balance out again in time. Nevertheless, its membership and conduct today—especially in the light of the January 1994 appointments by the supreme court—strengthen

¹³¹ Charles S. Johnson, “Tally shows split on judicial commission,” The Billings Gazette, April 9, 1993, 3C. The comment came from James Mockler of Helena, a Stephens appointee.

¹³² Leaphart interview.
the argument that commissions are more susceptible to rigging than elections are. This is politics, and interested groups will try to engineer the outcome. Both methods are tainted, but it is harder to fix an election involving 400,000 voters than it is to fix a commission with seven members.

2. The Extent of the Policy-Making Role of Justices and Its Effect on How Justices Should Be Chosen in a Democratic Society

The most persuasive reason that supreme court justices should be elected rather than appointed is simply that they do make policy. The people have every right to control the membership of the supreme court based on that tenet alone. Certainly their policy-making role is limited, but even under Gray's or Turnage's vision of the policy-making role of a justice—that it occurs only rarely and is highly confined—the cases in which it does occur are important to people.

More important, the justice's "philosophy"—which Holmes insisted was more "experience" than "logic"—has more effect on decisions than either Gray or Turnage would allow. Supreme court justices affect the lives of people as certainly as any legislator. They affect people intimately when they rule that a stillborn baby is a person for purposes of seeking damages against a doctor. They affect people importantly when they rule that the state improperly taxed federal retirees and that it must refund those taxes no matter how adversely the state's budget may be affected by the refunds. In each of these examples, justices decide out of a rational process more in keeping with Holmes' views than with Frankfurter's. The life of the law, when the decision is to determine legal "personhood" for a stillbirth, certainly must be experience and not logic.
as Holmes suggested. Though logic plays a role in this as in any legal argument, the determination in this case supports Holmes' theory that "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy...even the prejudices which judges share with their fellow-men" have a bigger role to play. The justices themselves as much as admitted this when the majority opinion held that all subsequent questions of this nature will need to be decided on a case-by-case basis.

Justices ruling on these complex issues may feel frustrated by their accountability to voters who have never read a supreme court opinion. But voters do have a right to "hold their feet to the fire," as Gray put it, even if "the law"—meaning attention to precedent and judicial restraint—imposes constraints on how the justice rules. In the end, all justices, equally constrained by "the law," disagree significantly about what the law says. Voters are as capable of evaluating justices' legal opinions as are the lay members of a judicial nomination commission. They are entitled to do so by the effects of judicial decisions. The justices should remedy the problem of the ill-informed electorate by being more forthcoming during political campaigns about decisions and reasoning. Their philosophies are an important part of how they decide cases. Their voting records do reveal their philosophies. After all, even under the Missouri Plan, the prototype for the appointive judiciary, judges must run "against their records."
3. The Relative Abilities of the Electorate and Nominating Commissions to Select Good Justices

On its face, a judicial nominating commission like Montana's, composed of two lawyers, a judge and four lay members, ought to do a better job selecting qualified people for the court than the electorate can. Leaphart said the commission made it a regular practice to telephone attorneys around the state to find out about candidates for judicial nomination. The lawyers on the commission called other lawyers to find out if the nominees were competent lawyers, were well thought of in the legal community, and were up to the demands of the court's case load.\textsuperscript{133} This seems a far superior method of finding good judges than relying on voters who may have only a vague idea of what supreme court justices do.

The electorate does not systematically "select" good candidates to run for the supreme court under the current system. Candidates self-select based on factors which may not have anything to do with whether they will be good judges. The main factor operating on this selection process is money. If candidates cannot attract the money to support a statewide race, they should not run. Gray is probably right that this criterion eliminates a lot of lawyers who have not had media attention or who do not appeal to a specific moneyed constituency, like plaintiffs attorneys or doctors.

Trieweiler's answer to the weaknesses of the selection features of the elective system is unconvincing. True, the elective process produced him. The characteristics he possesses—his liberal philosophy, his open communication

\textsuperscript{133} Leaphart interview.
style—are healthy for the court and unlikely to have won him appointment, at least by the current commission. But his experience in the 1992 chief justice race is not likely to inspire others to follow in his footsteps, as he suggested. He himself admitted it was unpleasant. Perhaps his 1990 race against Greeley is a better example of a race to inspire others to run. But the fact is that in 1994 two seats on the supreme court will be filled in uncontested races.

This raises another aspect of weakness in the elective process: 1994's uncontested elections may indicate that the elective process discourages interest among lawyers in sitting on the court. In a typical judicial appointment, at least 20 lawyers apply for the seat, yet in the 1994 supreme court election two candidates will run unopposed. One of the candidates, Nelson, is an incumbent only by virtue of his 1992 appointment, hardly entitling him to a firm hold on the seat; the other is a newcomer to politics running unopposed for an open seat. One of the former lawyer members of the Judicial Nomination Commission argues that these uncontested races show a major weakness in the elective system—it does not generate the interest that the appointive system does.\(^\text{134}\)

Trieweiler argued that the element of risk involved in an election to the supreme court naturally reduces interest. "I have a feeling," he said, "there are a lot of qualified lawyers who have the attitude if someone hands me this job, or if I can be appointed to it, I'd like to be a judge."\(^\text{135}\) Trieweiler made clear

\(^\text{134}\) Robert James, interview by author, Telephone interview, Billings, Montana, April 1, 1994.

\(^\text{135}\) Trieweiler interview transcript, 9.
that he felt this interest was inferior to the interest of a candidate willing to subject himself to the rigors of a statewide campaign.

There is no easy answer to these weaknesses in the elective system, but both John Schiltz and Terry Trieweiler, who ran for chief justice of the supreme court and lost, offer persuasive defense of the elective system over the appointive system. Schiltz said in the debate over judicial selection at the Montana Constitutional Convention, "if I have to choose between one or the other, I'm going to the electorate every time, because I had a chance to be elected.... At least I had a chance."\textsuperscript{136} Trieweiler echoed this sentiment throughout his interview. Without contested elections, no one can take the risk to unseat a justice and the result for the public is an impermissible loss of voice.

Finally, two more persuasive complaints about the electorate's ability to select good justices are that voters are poorly informed and that they tend to send the same judges back to office again and again—"like sheep," as Jean Bowman argued on the floor of Montana's constitutional convention.\textsuperscript{137} Gray correctly identified the weakness in the second argument: it presupposes that more justices should be thrown out.\textsuperscript{138} In fact, justices do lose their seats periodically and over issues that matter to the electorate. Justice Gene Daly lost to L.C. Gulbrandson in 1982 after a campaign dominated by a "law and

\textsuperscript{136} Transcript, 1027.

\textsuperscript{137} Transcript, 1031.

\textsuperscript{138} Gray interview transcript, 4.
order" theme. The most celebrated example among believers in the election system is Paul Hatfield's 1976 victory over sitting justice Wesley Castles for the chief justice's seat. Hatfield ran against Castles' record, saying that the court had fallen under the influence of the state's major corporations. The voters chose Hatfield even though Castles had served on the court since 1958.139

Justices and scholars agree that the electorate is not well informed about courts, their role, or their personnel. Justices and scholars disagree over how to improve voter information. Gray was uncomfortable with any kind of campaign tactic that might increase the voters' misunderstanding that a supreme court justice is similar to a representative. For instance, she balked at the idea of any sort of "judicial report card" of the type that political action committees produce for legislative candidates. The issues involved in casting a judicial vote are much too complicated to be simplified on a "voter tally sheet," Gray said. Trieweiler, on the other hand, had no problem with tally sheets on judicial votes. Trieweiler was confident that he could "explain [his] votes to at least 51 percent of the voters' satisfaction, if [he] had a chance."140 The main

139 Schiltz mentioned the Hatfield-Castles race in correspondence, but the main source of information regarding the race was Trieweiler. Trieweiler interview transcripts, 1. Hatfield was not the first candidate to challenge a member of the 1960s supreme court on the issue of its alleged corporate favoritism. Schiltz also tried the tactic. An October 6, 1970, Schiltz campaign advertisement from The Billings Gazette reads, "In the last 5 years, 107 cases involving persons injured through negligence have come before the Supreme Court. In 72 of these cases, district judges or juries had found for the injured person. My opponent voted to reverse the district judges or juries in 45 of these cases—62 percent." Schiltz' opponent was James Harrison.

140 Trieweiler interview transcript, 6.
thing missing from judicial campaigns is the opportunity for candidates to explain votes without concern that they will violate the Canons of Judicial Ethics.

Trieweiler suggested one method to improve voter information would be televised candidate forums sponsored by the University of Montana Law School. He said he and his opponent in the 1990 election, Mike Greeley, participated in a number of such forums, never televised. The law school's participation, with questions devised and asked by law professors, should dispense with the difficulties presented by the Canons of Judicial Ethics. Candidates should not resist answering questions posed by informed legal experts.

Despite its weaknesses in identifying and selecting good judicial character, the elective process is superior to the appointive process in this area. Leaphart said the current commission is more interested in justices' political connections than in their suitability to the work of a supreme court justice. The purpose of the judicial nominating commission—to find qualified lawyers to serve as judges and to check a governor's power to pack the court—may not achieve its intended result with the current commission.

The electorate may not have any better record than the nominating commission at producing the intended result, but all the justices interviewed agreed that justices should face the electorate. Trieweiler believed the election process actually improved any justice's performance. Gray thought retention elections were sufficient to provide accountability to the public. However, giving voters only "accept or reject" options, without giving them someone to
vote for, takes away the whole point of voting. A retention election would become the thing critics fear elections to be now, the voters' rubber-stamp of a judge they never chose in the first place.

4. Can Judicial Independence Be Secured in an Elective System?

The most difficult hurdle to surmount while arguing in favor of electing judges involves judicial independence. Elections are won by majorities and "tyranny of the majority" has been an identified evil since Madison's time. Elected judges have much to fear from unpopular decisions. Though Trieweiler claims to have made more unpopular decisions than any other current justice\textsuperscript{141} and is convinced he could explain his decisions to voters,\textsuperscript{142} Gray's problem with elections is well taken. She says the court is not a political body. It is a legal body. "And therein is the hugest chasm that anyone could imagine," she said.\textsuperscript{143} Gray worries about the elements of the election process that reinforce the impression among voters that the court is a political body. For example, Gray said popular majorities may unseat a justice because of a perceived deficiency on the court, such as the perception that the court is not tough enough on criminals. The problem with this action reflects voters' misunderstanding of the courts and their role. Gray said, "The remedy, if there is sufficient popular support, is to go to the Legislature and get tougher laws.

\textsuperscript{141} He may be right. A December 31, 1993 \textit{Billings Gazette} article points out that Trieweiler was the supreme court's most frequent dissenter for the third straight year. David Fenner, "Trieweiler had most high court dissents," \textit{The Billings Gazette}, December 31, 1993, C1.

\textsuperscript{142} Trieweiler interview transcript, 6.

\textsuperscript{143} Gray interview transcript, 3.
That's part of the chasm between responding to what may at a moment be the popular will or the perceived will, and our job of following and of applying the law."\textsuperscript{144} Gray's "chasm" and the financing of judicial elections are the biggest problems with electing judges. Judges must have the courage and independence to make an unpopular decision.

The elective process does protect a different kind of judicial independence, however. Terry Trieweiler may be right that no nominating commission would have chosen him, although Leaphart says the pre-1991 nominating commission would have recommended Trieweiler. He is certainly correct in his assertion that only the election process allows an aspiring judge to "control [his] own destiny." Trieweiler's complaint that the appointive process puts the aspiring justice's fate into the hands of "a small clique of politically appointed people" needs to be balanced against Gray's concerns about the fickle nature of democratic majorities. Judicial independence, if viewed as complete independence from electoral majorities, will not be achieved through the elective process. But a more critical kind of independence is lost through the appointive process. Not only is the appointive process more susceptible to control by powerful cliques, but it also takes away the freedom of a candidate to throw his hat in the ring, to run the best campaign he can, and to trust himself to the voters.

B. RECOMMENDATIONS

Montana would benefit from electing all its supreme court justices, even those who are filling mid-term vacancies. Some of the flaws in the elective

\textsuperscript{144}Ibid., 5.
process—the risk assumed by challenging an incumbent, the difficulty of running a statewide campaign without a support system, the problems raising money—could be reduced by making the elections partisan.

Justice Gray argued persuasively against partisan judicial elections, saying that party “labels” would feed the voter misconception that “we represent if not individual voters’ views, party’s views.... I do think it would be easier for voters because they are used to having those labels and translating those labels into a certain package of personal views...but that isn’t what we’re supposed to come here to do.” The trend in judicial selection reform is to move away from elections generally, and far away from partisan elections. In fact, there are only 10 states that use partisan elections to select supreme court justices, and one of those (Pennsylvania) is in the middle of a scandal over its partisan election process that may well lead to an entirely appointive system. Of those remaining, six are deep South states which may have partisan elections as a holdover from their Democratic machine days.

Nevertheless, partisan elections are a more forthright way to conduct a selection process that is in fact run on something like “party lines” anyway. The practical result of the elections process is to divide candidates—and the resources candidates rely on—into two readily identifiable camps. Identifying the constituencies officially with party labels would only be calling a spade a spade. Trieweiler’s point that bankers gave money to Turnage because Turnage thinks like a banker is important, especially since not all the voters might have known Turnage’s philosophy or background. In fact, Turnage’s

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145 Gray interview transcript, 13.
case offers an excellent example of the way nonpartisan campaigns muddy the waters of an election. Turnage's ties to the Republican Party are longstanding. He was the Republican leader in the Senate for many years before he came to the supreme court. His judicial philosophy certainly reflects the same values he held in the Senate. Why shouldn't all the voters be given the benefit of his party label when he runs for the supreme court? The voters would gain because, as Gray noted, they are used to processing candidates using party labels.

Party support would alleviate some of the problems experienced by judicial candidates. They would not be faced with running a statewide campaign with no support system. Some of their funding would come from the party, lessening their reliance on lawyer contributions. Also, with the party fronting the opposition candidate, incumbents would more likely face vigorous opposition. This guess is borne out in statistics from Montana's partisan judicial election days, when 52 percent of supreme court justices experienced "meaningful opposition."146

A second recommendation is public financing of judicial campaigns. All of the justices interviewed favored public financing in principle. They know that this method is superior to relying on lawyers' contributions. They know that lawyers' contributions do form the major part of supreme court "war chests," despite Turnage's impressive fundraising in other quarters. However, in light of the fact that the state legislature only last year did away with this provision, it is not a very realistic proposal.

146 Lopach, 157.
Since neither of these two recommendations is likely to find a following, these less disruptive amendments could be made to the current system:

1. To reduce the stress and expense of a statewide campaign, justices could be elected on a regional basis, like members of the Public Service Commission. This change could increase the perception that supreme court justices “represent” specific interests, in this case regional ones; and it might lessen the court’s role as the Montana Supreme Court, the only court that belongs to the whole state.

2. Televised debates between judicial candidates could be sponsored by the University of Montana Law School. This is an essential reform to a system that everyone agrees is deeply flawed by a poorly informed electorate. More vigorous debate is essential to improving voters’ understanding of the court and its role, but the Canons of Judicial Ethics do place restraints on what shape this debate can take. The present system affords a sanctuary for a justice who does not want to talk about his record. Putting supreme court debates in the hands of professionals at the law school is a good way to get around this problem.

3. Lawyers might entertain the possibility of setting up an anonymous campaign fund, rather than donating sums to individual candidates. While the justices interviewed did not think this a bad idea exactly, they knew it was an impractical one. Turnage identified a key weakness in this plan, that some lawyers would not give money if they thought it would end up with a candidate they did not approve of. Also, as Gray pointed out, such funding might increase
the perception that lawyers have a greater interest in the supreme court than ordinary citizens do.

4. The method of choosing members of the Judicial Nomination Commission could be revamped to insulate it from one-sided partisan influence. Equal representation by members of each party could be required on the commission. Such a restriction now applies to other boards, including the Board of Public Education. Since the Judicial Nomination Commission plays an integral role in placing people on the state supreme court, its membership should certainly be bi-partisan, much more certainly than boards with less consequence. Appointments to the supreme court have an enormous effect on public policy and should reflect the participation of both parties, not just the participation of the party in power at any given time.

5. The supreme court should establish a protocol that requires a conference for choosing its members on the Judicial Nomination Commission. Trieweiler complained publicly that the supreme court’s January 1994 appointments to the commission were made without sufficient involvement by members of the court. Without a rule governing this selection process it is possible through informal persuasion to control these critical appointments. The whole court should discuss, then decide on, its appointments to the Judicial Nomination Commission.
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These seats were added by the 1979 Legislature.

Frank Morrison elected, 1980
Fred Weber elected, 1980
L.C. Gulbrandson elected, 1982
William Hunt elected, 1984
R.C. McDonough appt., 1987
Diane Barz appt., 1989
Karla M. Gray appt., 1991
James Nelson appt., 1993
Weber
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