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Articles and Responses

The Impact of “Merit Selection” on the Characteristics of Rhode Island Judges

Michael J. Yelnosky*

INTRODUCTION

I approach the issue of the impact of selection processes on the characteristics and performance of judges with some trepidation. There is a massive literature on the subject,¹ and it continues to command the attention of very talented and influential judges, social scientists, and legal academics.²

I dipped my toe into these waters in 1996, two years after Rhode Island’s adoption of a “merit selection”³ system for judges

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1. *E.g.*, Roy A. Schotland, *Summit on Improving Judicial Selection: Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1366 (2001) (“No subject in American law has gotten as much ink, and as much sweat, over so many years.”).

2. *See, e.g.*, Symposium, *Measuring Judges and Justice*, 58 DUKE L.J. 1173 (2009).

3. I use the phrase “merit selection” throughout to refer to a selection system in which a nominating commission screens candidates for appointment and forwards the names of acceptable candidates to the appointing authority. *See* American Judicature Society, *Frequently Asked Questions*, http://www.ajs.org/selection/sel_faqs.asp (last visited Aug. 15, 2010).

on all its courts. I published an article in the inaugural issue of this law review based on my study of the early experience with merit selection in Rhode Island.⁴ I concluded, among other things, that “the new selection process . . . improves the chances that lawyers of all personal and professional backgrounds will be considered and selected for judicial vacancies.”⁵ I am now faced with the prospect of having that conclusion challenged by the results of the past fifteen years.

Nevertheless, testing that preliminary conclusion is the focus of this article – the impact of merit selection on the types of individuals who become judges in Rhode Island. Many others have studied the impact of merit selection, but most studies are based on interstate comparisons – on comparisons, for example, of the educational background of judges in merit selection states and states that elect judges.⁶ The results are quite informative, but it can be challenging for researchers to distinguish between differences attributable to selection processes and local conditions.

By contrast, I can assess more directly the impact of Rhode Island’s merit selection system by taking advantage of what might be described as “laboratory conditions” for the study. Quite simply, I have compared the characteristics of the cohort of judges in Rhode Island before merit selection and the cohort selected during the subsequent fifteen years.⁷ Fifteen years is a relatively short period, and the dataset is modest (116 judges), but the comparison seems a useful way to help enrich the conversation about merit selection in Rhode Island by adding some data to the existing store of assertions and anecdotes.

4. Michael J. Yelnosky, *Rhode Island’s Judicial Nominating Commission: Can “Reform” Become Reality?*, 1 ROGER WILLIAMS U.L. REV. 87 (1996).

5. *Id.* at 88.

6. For a description of some of these studies see Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 537-38 (2008). A few intrastate studies of judges selected before and after implementation of a merit selection system are discussed in Henry R. Glick, *The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 526-27 (1978).

7. I completed the research for this paper in November 2009. Any changes to the state judiciary since that time are not reflected in the data.

I. CHARACTERISTICS OF RHODE ISLAND JUDGES BEFORE MERIT SELECTION

Because there is no consensus on the characteristics of judges upon which to base an analysis of the impact of merit selection, I consulted Rhode Island's merit selection statute and the existing literature. I also tried to identify characteristics that seemed important given what I knew about the legislative history of Rhode Island's particular brand of merit selection. After determining what information was actually available, I obtained the following information on each judge: (1) gender; (2) race; (3) place of birth (RI or other); (4) undergraduate education (in-state or out-of-state and school attended); (5) legal education (school attended and prestigious or other); and (6) prior state government employment (yes or no and if yes, work in the legislature, the attorney general's office, or the executive branch).⁸

I found the following with respect to the sixty-two judges on Rhode Island's courts at the time the state implemented the merit selection system. 27.4% were women, and 4.8% were non-white. 78.9% were born in Rhode Island. 56.5% received their undergraduate degrees from an institution in Rhode Island. By far, the most common undergraduate institution attended was Providence College. 32.3% of the judges in Rhode Island in 1994 were graduates of Providence College.⁹

A majority of judges in Rhode Island in 1994 had attended one of two law schools. 61.3% attended either Boston University or Suffolk University, with an equal percentage (30.6%) attending each.¹⁰ 17.7% had attended one of the 16 most prestigious

8. Rhode Island law directs the Judicial Nominating Commission to consider, although not exclusively, the "intellect, ability, temperament, impartiality, diligence, experience, maturity, education, publications, and record of public, community, and government service" of all applicants. R.I. GEN LAWS §8-16.1-4(a) (Supp. 2008). The statute further directs the Commission to "exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the judiciary." *Id.* §8-16.1-4(b). A seminal study upon which I relied in deciding what other background data to collect is Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1987).

9. *See infra* tbl.1, col. B.

10. *Id.*

national law schools.¹¹

Finally, I found that 71.7% of the judges in Rhode Island had worked in state government before being appointed to the bench. 33.3% had either been legislators or served as counsel to a legislative leader, 21.7% had worked in the attorney general's office, and 11.7% had worked in the executive branch.¹²

II. CHARACTERISTICS OF RHODE ISLAND'S MERIT SELECTION JUDGES

I then examined the same characteristics for the fifty-four judges appointed under the merit selection system and compared the two cohorts. The percentage of women named to the bench under merit selection, 25.9%, was slightly lower than the percentage of women on the bench in 1994, 27.4%.¹³ However, due to differential retirement rates of male and female judges on the bench in 1994, 36.8% of Rhode Island's judges today are women, a percentage that compares quite favorably with other New England states.¹⁴

The percentage of non-whites appointed under merit selection, 7.4%, exceeded the percentage of non-whites on the bench in 1994, 4.8%.¹⁵ Thus, it appears the prospects for non-

11. *Id.* Those sixteen schools are Yale, Harvard, Stanford, Columbia, NYU, California (Berkeley), Chicago, Pennsylvania, Michigan, Duke, Northwestern, Virginia, Cornell, Georgetown, UCLA, and Texas. I assembled this list from the latest version of the infamous *U.S. News & World Report* rankings. U.S. News & World Report, Rankings: Best Law Schools, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/rankings> (last visited Aug. 15, 2010).

12. *See infra* tbl.1, col. B.

13. *See infra* tbl.1, cols. B, C & D. According to a representative of the Rhode Island Bar Association, 31% of the 6030 members are female. Conversation with Frederick D. Massie, Director of Communications and Rhode Island Bar Journal Editor, Rhode Island Bar Association (Sept. 11, 2009).

14. Thus, although approximately one in four judges appointed since 1994 was a woman, the percentage of women on the Rhode Island bench has increased from 27.4% in 1994 to 36.8% today. Rhode Island is now second in New England on this measure. American Judicature Society, Diversity of the Bench, http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state=? (last visited Aug. 15, 2010) [hereinafter Diversity of the Bench] (Vermont (38.2%), Massachusetts (34.2%), Connecticut (26.3%), New Hampshire (25.9%), Maine (20.8%)).

15. *See infra* tbl.1, cols. B, C & D. The Rhode Island Bar Association does not maintain records of the racial or ethnic background of its members.

whites to be appointed have increased somewhat under merit selection. And although only approximately one in four judges appointed under merit selection was a woman, the percentage of women on Rhode Island's courts has increased markedly since the advent of merit selection in 1994.

There is no evidence merit selection has influenced the number of candidates born outside Rhode Island appointed to the bench.¹⁶ However, the percentage of merit selection judges who attended undergraduate institutions in Rhode Island is slightly lower than the 1994 cohort,¹⁷ and the decrease in the percentage of judges who attended Providence College was quite pronounced – a 10% decrease (from 32.3% to 22.2%).¹⁸ Thus, “merit selection”

Interview with Frederick D. Massie, Director of Communications and Rhode Island Bar Journal Editor, Rhode Island Bar Association (Sept. 10, 2009). My informal conversations with minority leaders in the Rhode Island bar suggest that less than 2% of Rhode Island's lawyers are black or Latino. I have no information that would permit me to even estimate the number of Asian or Native American members of the Rhode Island bar. The U.S. Census Bureau reports that 0.6% of Rhode Islanders are “American Indian” and 2.8% are Asian. U.S. Census Bureau, State & County Facts, <http://quickfacts.census.gov/qfd/states/44000.html> (last visited Aug. 15, 2010). At the moment, 7% of Rhode Island's judges are non-white, which places Rhode Island third in New England on this measure. See Diversity of the Bench, *supra* note 14, (Connecticut (15.5%), Massachusetts (8.7%), Maine (0%), New Hampshire (0%), and Vermont (0%)). However, because the number of non-white judges in Rhode Island is so small, a slight change can appear to have a large impact.

16. See *infra* tbl.1, cols. B & C (78.8% of merit selection judges were born in Rhode Island, while 78.9% of the judges on the bench in 1994 were native Rhode Islanders).

17. 53.7% of merit selection judges attended undergraduate institutions in Rhode Island compared to 56.5% of the judges on the bench in 1994. See *id.* In future studies it may be appropriate to eliminate Brown University as an “undergraduate institution in Rhode Island” because to the extent that this category is intended to focus on “localism,” Brown's national student body suggests it is not a “local” school. See Glick & Emmert, *supra* note 8, at 231-32. The Rhode Island Bar Association's recordkeeping makes it impossible for the Association to efficiently retrieve data about the educational background of its members. Interview with Frederick D. Massie, Director of Communications and Rhode Island Bar Journal Editor, Rhode Island Bar Association (Sept. 10, 2009).

18. That 10% decrease was not statistically significant at the .05 level. The p value was .1146. See *infra* tbl.1, cols. B, C & D. 21.2% of the members of the General Assembly attended Providence College. Rhode Island General Assembly, <http://sos.ri.gov/govdirectory/index.php?page=IdxGenAss> (last visited Aug. 15, 2010).

may be helping to produce a somewhat more diverse bench in terms of undergraduate educational background.

The most dramatic change in educational background has been the shift under merit selection away from lawyers who attended Boston University School of Law. There has been a simultaneous and less dramatic shift towards lawyers who attended Suffolk University School of Law. In 1994, 30.6% of judges in Rhode Island had graduated from Boston University; by contrast, 14.8% of the judges appointed under "merit selection" received their legal education at Boston University, a statistically significant decrease.¹⁹ The percentage of judges appointed under merit selection who graduated from Suffolk was 37%, while 30.6% of the judges on the bench in Rhode Island in 1994 received their legal education at Suffolk.²⁰ Over half of the merit selection judges, like the 1994 cohort, attended either Boston University or Suffolk, but the percentage decreased from 61.2% to 51.9%.²¹ However, the percentage of judges who went to the same law school has increased under merit selection, and while Boston University and Suffolk formerly shared the top spot, it is now occupied firmly by Suffolk.²²

Thus, since merit selection, the legal education of judges as measured by law school attended has become both more and less homogeneous. The percentage of judges who attended one of two law schools has decreased, but the percentage of judges who attended the same law school – Suffolk – has increased. Second, the shift in concentration from Boston University to Suffolk may be part of a more general trend in favor of less prestigious law school credentials. 11.1% of merit selection judges attended one of the sixteen most prestigious national law schools compared to 17.7% of the 1994 cohort.²³

Finally, individuals who previously worked in state government appear to have fared far less well under merit

19. *See infra* tbl.1, cols. B & C.

20. *Id.*

21. *Id.*

22. *Id.* 45.6% of the judges currently on the Rhode Island bench and 26.4% of the lawyers in the General Assembly went to Suffolk. Rhode Island General Assembly, *supra* note 18.

23. *See infra* tbl.1, cols. B, C & D. None of the lawyers in the General Assembly attended one of the sixteen most prestigious national law schools. Rhode Island General Assembly, *supra* note 18.

selection. In 1994, 71.7% of the judges in Rhode Island had worked in state government before being appointed to the bench. By contrast, 55.6% of merit selection judges had previously worked in state government, which is a statistically significant decrease.²⁴ Perhaps most notably, given the concerns about the influence of the General Assembly on the Rhode Island judiciary that animated the shift to merit selection (both in terms of former legislators being named to the bench and the General Assembly's influence on the selection process) far fewer merit selection judges had previously been legislators or counsel to a legislative leader. 20.4% of merit selection judges had that prior experience compared to 33.3% of the judges on Rhode Island's courts in 1994, another statistically significant decrease.²⁵ There has been almost no change in the percentage of judges who had previous experience in the attorney general's office, and there has been a moderate decrease in the percentage of judges who had previously worked in the executive branch.²⁶

CONCLUSION

It is important to emphasize two aspects of this study. First, my conclusions, as well as others that might be suggested by the data, should be viewed with caution. The dataset is small, the time period studied is relatively short, the characteristics studied are limited, I did not consider all of the potential judges on the lists provided by the Judicial Nominating Commission, I did not consider any magistrates, and only two governors (both Republicans) have made the vast majority of selections under the new system.²⁷ I offer the following conclusions more as preliminary findings that I hope will spark a more sustained conversation about the best ways to measure the success or failure of Rhode Island's merit selection process.

24. See *infra* tbl.1, cols. B, C & D.

25. See *id.*

26. *Id.*

27. Governor Almond selected twenty judges, and Governor Carcieri has selected twenty-four. Governor Sundlun selected ten. I examined the group of judges selected by each Governor to determine whether any differed markedly from the others. There were some minor differences, but only one was statistically significant. Governor Almond selected a significantly higher percentage of judges who had attended undergraduate schools in state. See *infra* tbl.2.

Second, merit selection appears to have had little if any impact on most of the background characteristics I studied. That finding is consistent with most of the literature on the impact of merit selection.²⁸ One important characteristic that seems to have been influenced only mildly by merit selection includes the race and gender of judges appointed in Rhode Island. On the one hand, since merit selection, the percentage of women and minorities on the bench has increased. However, the absolute selection rate for women and minorities remains relatively low. Given that increasing the gender, ethnic, and racial diversity of the bench was an articulated goal of merit selection, the selection rates for women and minorities warrant continued attention.²⁹

However, some of the characteristics of the two cohorts of judges are sufficiently different to be worth noting. For example, merit selection judges are less likely than their predecessors to have graduated from Providence College, and far fewer graduated from Boston University School of Law, suggesting more diversity in educational background. On the other hand, an increasing number of judges chosen under merit selection attended the same law school – Suffolk – and even under merit selection over half of the judges selected attended either Boston University or Suffolk. That homogeneity of legal education may impede the creation of a culture of innovation and diversity on the courts. Three of the five members of the Supreme Court, Rhode Island’s only “collegial” court, are graduates of the same law school – Suffolk. Both that court, and the judiciary as a whole, seem likely to benefit from the presence of lawyers who did not attend Suffolk. Moreover, there appears to be little justification for favoring Suffolk graduates to

28. See Michael W. Bowers, *Judicial Selection in the States: What Do We Know and When Did We Know It?*, 2 RESEARCH ON JUDICIAL SELECTION 3, 10-14 (American Judicature Society 2002).

29. As I suggested in 1996, one way for observers to track progress in this regard would be for the Judicial Nominating Commission to release the names of all those who apply for a vacancy and not just the names of those the Commission selects for interviews. Yelnosky, *supra* note 4, at 125. Moreover, to my knowledge the Commission has never fulfilled its statutory obligation to issue annual reports on the racial, gender, and ethnic composition of the applicant pools for judicial vacancies. See R.I. GEN. LAWS §8-16.1-4(b) (Supp. 2008) (“[T]he commission shall report to the general assembly and to the governor on (i) the statistics regarding the race, ethnicity, and gender of applicants considered by the commission in the previous year The report shall be made available to the public.”).

the exclusion of graduates of schools of equal or arguably higher quality.³⁰

This “preference” for graduates from Suffolk under merit selection may be part of a general trend away from preferring judicial candidates who have attended more prestigious law schools. Of course, the prestige of the law school attended by a lawyer may say little or nothing about important aspects of judicial behavior, such as temperament, for example, (or, dare I say it, empathy) but it is at least relevant to some other important aspects, such as intellect and legal knowledge. This trend away from lawyers from elite law schools also warrants continued scrutiny.

By far, the most robust finding of the possible impact of merit selection is the decline in the number of lawyers selected who had worked in state government. Perhaps the most promising finding is that only one in five merit selection judges worked in the General Assembly as legislators or legislative counsel to House or Senate leadership. Reducing the influence of the General Assembly on the judiciary was a primary motivation for the switch to merit selection, and at least by the measure I have used, the early returns suggest it may be helping accomplish that goal.

30. Cf. Patrick J. Glen, *Harvard and Yale Ascendant: The Legal Education of the Justices from Holmes to Kagan*, (Georgetown Pub. Law & Legal Theory, Working Paper No. 10-30, 2010), available at <http://ssrn.com/abstract=1616846> (criticizing the predominance of the graduates of two law schools on the United States Supreme Court).

**THE IMPACT OF “MERIT SELECTION” ON THE
CHARACTERISTICS OF RHODE ISLAND JUDGES**

**TABLE 1: CHARACTERISTICS OF RHODE ISLAND JUDGES BEFORE AND AFTER
MERIT SELECTION**

A.	B. 1994 Cohort N=62*	C. Merit Selection Cohort N=54*	D. % Change
Female Gender	27.4%	25.9%	-1.5%
Non-White	4.8%	7.4%	+2.6%
Born in Rhode Island	78.9% (n=57)	78.8% (n=52)	-0.1%
Undergraduate Education			
In Rhode Island	56.5%	53.7%	-2.8%
Providence College	32.3%	22.2%	-10.1%
Legal Education			
Boston University	30.6%	14.8%	-15.8%**
Suffolk University	30.6%	37%	+6.4%
BU or Suffolk	61.2%	51.9%	-9.3%
Prestigious	17.7%	11.1%	-6.6%
Work in State Government			
Yes	71.7% (n=60)	55.6%	-16.1%**
Legislative Branch	33.3%	20.4%	-12.9%**
Attorney General's Office	21.7%	22.2%	+.5%
Executive Branch	11.7%	5.6%	-6.1%

*except where indicated

** significant at the .05 level or higher

TABLE 2: MERIT SELECTION PRACTICES BY RHODE ISLAND GOVERNOR

A.	B.	C.	D.	E.
	Aggregate Merit Selection Data N=54*	Governor Sundlun N=10*	Governor Almond N=20*	Governor Carcieri N=24*
Female	25.9%	20%	30%	25%
Gender				
Non-White	7.4%	10%	5%	8.3%
Born in Rhode Island	78.8% (n=52)	70%	85%	77.3%(n=22)
Undergraduate Education				
In Rhode Island	53.7%	40%	75%**	41.7%
Providence College	22.2%	30%	20%	20.8%
Legal Education				
Boston University	14.8%	20%	25%	4.2%
Suffolk University	37%	20%	35%	45.8%
BU or Suffolk	51.9%	40%	60%	50%
Prestigious	11.1%	10%	15%	8.3%
Work in State Government				
Yes	55.6%	50%	50%	62.5%
Legislative Branch	20.4%	30%	20%	16.7%
Attorney General's Office	22.2%	10%	25%	25%
Executive Branch	5.6%	10%	5%	4.2%

*except where indicated

** approaching significance at the .05 level – p=.0561