



THE LEAGUE OF WOMEN VOTERS OF SOUTH CAROLINA  
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**A GOOD IDEA POORLY EXECUTED**  
**Judicial Selection and Diversity in South Carolina<sup>1</sup>**

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**ABSTRACT**

Merit-based systems of judicial selection have the advantage of privileging ability over political connections, popularity, and wealth. The advantage is diluted in South Carolina's merit selection process, however, by legislative control of every substantive aspect of judicial selection, appointment, and retention. Drawing upon the research data of Professor Constance Anastopoulo on diversity and judicial selection, this paper considers the impact of extensive legislative involvement in judicial selection by focusing on the degree of racial and gender diversity in South Carolina's courts. The paper further proposes reform measures that: (1) preserve the strongest elements of the merit-based system; (2) institute a greater balance of power among the branches of government; and (3) provide greater opportunities for women and persons of color to become members of the judiciary. The paper concludes with suggestions for further research to assist in proper benchmarking and monitoring of judicial diversity efforts.

**INTRODUCTION**

In Federalist 78, Alexander Hamilton viewed the judicial branch of the federal government as something of a hothouse flower. America's fledgling federal courts required just the precise amount of support and independence in order to flourish. Of the judiciary in comparison to the executive and legislative branches of

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government, Hamilton said the judicial branch had “neither FORCE nor WILL, but merely judgment; and must depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>3</sup> While Hamilton acknowledged judicial dependence upon the executive to effectuate decisions from the bench, he was especially concerned about the danger posed to the judiciary by entanglements with the other branches of government. Quoting Montesquieu, Hamilton cautioned “there is not liberty if the power of judging be not separated from the legislative and executive powers.”<sup>4</sup>

As critical as judicial independence is for the proper administration of justice, the composition of the courts also plays a role in ensuring that judicial bodies carry out their duties fairly, impartially, and to the benefit of all. Diversity in the courts is not simply a good for its own sake. Having judges that reflect the populations they serve is good both for those sitting on the bench and those who appear before it. The court system affects ordinary citizens in a way that neither the legislature nor executive can. Judicial action impacts the life, liberty, and property of private individuals. Civil judgments, injunctions, divorce decrees, and prison sentences make real the power of the government in the life of the average person. Because of this unique position of the justice system, it is necessary that those who dispense justice be familiar with the communities they serve and the realities of life for the inhabitants of those communities.

Moreover, judges benefit from a diversity of opinions among their colleagues. Scholars of judicial behavior and judges themselves have observed that diversity enhances the quality of judicial decision-making. Justice Lewis Powell observed, “a member of a previously excluded group can bring insights to the Court that the rest of its members lack.”<sup>5</sup> In a similar vein, Justice Ruth Bader Ginsburg noted that a “system of justice is the richer for the diversity of background and experience of its participants.”<sup>6</sup> For all these reasons, diversity within the judicial system is fundamental.

Since the time of Hamilton, South Carolina’s legislative branch has selected the members of the judicial branch.<sup>7</sup> As Hamilton warned in Federalist 78, giving one branch of government the authority to appoint another branch has the potential to compromise the separation of powers and ultimately undermine the rule of law. These concerns ring true in South Carolina in three ways. First, the current arrangement for judicial selection compromises the balance of power among the three branches of government. Second, and on a related issue, the selection process

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<sup>3</sup> THE FEDERALIST NO. 78 (Alexander Hamilton) (concerning the judiciary department)

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

<sup>5</sup> Ciara Torres-Spelliscy, Monique Chase, and Emma Greenman, *Improving Judicial Diversity*, Brennan Center for Justice (2010), p. 5.

<sup>6</sup> *Id.*

<sup>7</sup> American Judicature Society, *History of Reform Efforts: South Carolina*, [http://www.judicialselection.us/judicial\\_selection/reform\\_efforts/formal\\_changes\\_since\\_inception.cfm?state=SC](http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=SC) (July 28, 2012).

calls into question the separation of powers between the judicial, legislative, and executive branches. This issue lately has been more real than theoretical.<sup>8</sup> Third, the selection system as currently structured does not produce a judiciary that looks like the state.

This paper examines judicial selection methods and diversity in the South Carolina court system. Section I provides an overview of the judicial branch in the state, including the constitutional provisions establishing the judiciary and general descriptions of the courts considered in this study. Section II discusses the way in which judges are selected in South Carolina, focusing on the work of the Judicial Merit Selection Commission (“JMSC”), the entity charged with evaluating candidates for certain judicial bodies. In Section III, the paper relies upon data compiled by Professor Constance Anastopoulo, some of which is available on the website of the League of Women Voters of Greenville County, to present a landscape of the gender and racial demographics of the South Carolina Bench. The paper then considers the impact of the work of the JMSC on gender and racial diversity in Section IV. Section V offers suggestions for improving the merit selection process, while Section VI concludes with recommendations for additional research.

## **I. South Carolina’s Judicial System: An Overview**

The current Constitution of the State of South Carolina was ratified in 1895 and, like its predecessor documents, established a strong legislative state.<sup>9</sup> Although there have been significant revisions to the Constitution since its ratification, the General Assembly remains the most powerful branch of government. Nowhere is legislative dominance more evident than in the judicial selection process. Article V of the South Carolina Constitution establishes a unified court system. With limited exceptions, discussed below, the General Assembly plays a central role in evaluating and selecting members throughout the state judiciary. What follows are descriptions of each of the courts examined in this study.

The South Carolina Supreme Court, the state court of final appeal, consists of a Chief Justice and four Associate Justices.<sup>10</sup> All five justices serve ten-year terms upon selection by the General Assembly after being deemed qualified by the Judicial Merit Selection Commission.<sup>11</sup> The Court sits en banc, exercising mandatory jurisdiction in civil, capital criminal, criminal, juvenile, and disciplinary cases as well as certified questions from federal courts, original proceedings, and interlocutory decision cases. The Supreme Court has discretion to hear cases involving some civil, noncapital

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<sup>8</sup> See, e.g., *Segars-Andrews v. JMSC*, 387 S.C. 109 (2010) (concerning JMSC finding a sitting South Carolina Family Court Judge unqualified for retention on the bench).

<sup>9</sup> See, generally, C. Blease Graham, *The South Carolina State Constitution*, (Oxford: Oxford University Press, 2011).

<sup>10</sup> S.C. Const. Art. V, Sec. 2.

<sup>11</sup> *Id.* at Sec. 3.

criminal, administrative agency, and juvenile matters, in addition to some interlocutory decisions and original proceedings.<sup>12</sup>

The South Carolina Court of Appeals was established in 1983 as an intermediate appellate court. Nine judges—a Chief Judge and eight Associate Judges—currently serve on the Court.<sup>13</sup> As with the Supreme Court, members of the Court of Appeals are selected by the General Assembly after being deemed qualified by the Judicial Merit Selection Commission.<sup>14</sup> The Court of Appeals sits in three three-judge panels or en banc.<sup>15</sup> Court of Appeals proceedings are conducted throughout the state. Judges on the Court of Appeals serve staggered terms of six years.<sup>16</sup> The Court has mandatory jurisdiction to hear appeals from the Circuit Court and the Family Court except for those matters expressly within the jurisdiction of the Supreme Court.<sup>17</sup> The Court of Appeals also may hear matters referred by the Supreme Court, but has no discretionary jurisdiction.<sup>18</sup>

The South Carolina Circuit Court is the state’s trial court of general jurisdiction and operates in 16 circuits across the 46 counties in the state.<sup>19</sup> The 46 Circuit Court Judges each serve staggered six-year terms and rotate among the sixteen circuits based on assignments made by the Chief Justice. At least one resident judge in each circuit maintains chambers in the judge’s home county within that circuit.

The Circuit Court hears matters in tort, contract, real property, and civil law.<sup>20</sup> The Circuit Court is divided into two branches: the Court of Common Pleas hears civil cases and the Court of General Sessions functions as the criminal court.<sup>21</sup> The court also has limited jurisdiction to hear appeals from the Probate Court, Magistrate’s Court, and Municipal Court.<sup>22</sup> The Circuit Court also hears appeals from matters concerning state administrative and regulatory agencies heard in the Administrative Law Judge Division.<sup>23</sup> Jury trials are conducted in all matters except appellate cases.<sup>24</sup>

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<sup>12</sup> South Carolina Supreme Court, <http://www.sccourts.org/supreme/> (July 30, 2012).

<sup>13</sup> South Carolina Court of Appeals, <http://www.sccourts.org/appeals/> (July 30, 2012).

<sup>14</sup> S.C. Const. Art. V, Sec. 8.

<sup>15</sup> *Id.* at Sec. 7.

<sup>16</sup> *Id.* at Sec. 8.

<sup>17</sup> <http://www.sccourts.org/appeals/>

<sup>18</sup> <http://www.sccourts.org/appeals/>

<sup>19</sup> S.C. Const. Art. V, Sec. 11.

<sup>20</sup> South Carolina Circuit Court, <http://www.sccourts.org/circuitCourt/> (July 30, 2012).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Masters-in-equity support the work of the Circuit Court. Masters are primarily involved in discovery and evidentiary matters referred to them by the Circuit Court.<sup>25</sup> Masters-in-equity have authority to rule on all motions, compel production of evidence and rule on its admissibility, and call and examine witnesses under oath.<sup>26</sup> They also may conduct sales under certain circumstances.<sup>27</sup> There currently are 21 Masters-in-equity, serving in either part-time or full-time capacities, for terms of six years each.<sup>28</sup> The Governor appoints all Masters-in-equity with the advice and consent of the General Assembly.<sup>29</sup>

South Carolina Family Courts were established in 1976 to exercise exclusive jurisdiction in matters of domestic and family law.<sup>30</sup> A total of 52 judges currently serve on South Carolina Family Court, with at least two assigned to each of the 16 judicial circuits across the state.<sup>31</sup> Family Court Judges serve staggered six-year terms and rotate among the counties within their circuit or beyond as dictated by caseload requirements.<sup>32</sup>

In addition to having exclusive jurisdiction over matters of family and domestic law, the Family Court also exercises exclusive jurisdiction over minors under the age of seventeen charged with violating any state law or municipal ordinance.<sup>33</sup> Matters involving serious criminal charges may be transferred from Family Court to the Circuit Court.<sup>34</sup>

South Carolina's Probate Court is the only popularly elected body in the judicial system.<sup>35</sup> One judge is elected in each of the 46 counties to serve a four-year term. Probate judges preside over cases involving marriage licenses, trusts and estates, guardianship and conservatorship, minor settlements under \$25,000 and involuntary commitment proceedings.<sup>36</sup> They share jurisdiction with the Circuit Court in power-of-attorney matters.<sup>37</sup>

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<sup>25</sup> South Carolina Masters-in-Equity, <http://www.sccourts.org/mastersCourt/> (July 30, 2012)

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> South Carolina Family Court <http://www.sccourts.org/familyCourt/> (July 30, 2012)

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> South Carolina Probate Court, <http://www.sccourts.org/probateCourt/> (July 30, 2012).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

The South Carolina Magistrate Court currently has 305 judges serving four-year terms in the county in which they are appointed.<sup>38</sup> Magistrates hear criminal trial cases involving offenses in which the maximum penalty is \$500 and/or 30 days incarceration.<sup>39</sup> Magistrates have authority to set bail, preside over preliminary hearings, and issue arrest and search warrants.<sup>40</sup> Magistrates may hear civil matters where the amount in controversy does not exceed \$7500.<sup>41</sup> The Governor appoints each Magistrate with the advice and consent of the Senate.<sup>42</sup> There is no requirement that a Magistrate be a lawyer or have legal training.<sup>43</sup>

Each municipality in South Carolina has the authority to establish a municipal court with jurisdiction over all cases involving municipal ordinances or any matters occurring within the municipality in which the maximum penalty is \$500 and/or 30 days in jail.<sup>44</sup> Municipal Courts also may hear cases transferred from the General Sessions Court of the South Carolina Circuit Court where the penalty does not exceed one year in jail and/or a \$5000 fine.<sup>45</sup>

Municipal Court Judges are appointed by the Municipal Council of the local jurisdiction and may serve terms of no longer than four years.<sup>46</sup> There are currently 253 judges serving as Municipal Court judges in over 200 municipalities across the state.<sup>47</sup> Municipal Court judges have jurisdiction in criminal matters only and enjoy identical powers and duties as Magistrates in performing their function.<sup>48</sup>

Municipalities also have two alternatives to selecting judges to serve on a Municipal Court. First, local governments may enter into an agreement with county authorities to use the Magistrate Court to prosecute cases that would otherwise be heard in Municipal Court.<sup>49</sup> Second, municipal councils may contract with county governments to use magistrates to serve Municipal Court Judges.<sup>50</sup>

## **II. How Judges are Made: The South Carolina Approach**

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<sup>38</sup> South Carolina Magistrate Court, <http://www.sccourts.org/magistrateCourt/> (July 30, 2012).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> S.C. Const. Art. V, Sec. 26.

<sup>43</sup> <http://www.sccourts.org/magistrateCourt/>

<sup>44</sup> South Carolina Municipal Court, <http://www.sccourts.org/municipalCourt/> (July 30, 2012).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

Judges in South Carolina are selected in a number of different ways, depending on the court in question. The General Assembly directly selects judges for the Supreme Court, the Court of Appeals, the Circuit Court, Family Court, and Administrative Law Courts.<sup>51</sup> In each instance, candidates for these judicial posts are evaluated by the Judicial Merit Selection Commission, which forwards the names of up to three qualified candidates for each open slot on the court in question. The General Assembly then votes on the candidates and selects one to fill the vacancy on the bench. The legislature provides advice and consent on gubernatorial nominations for Masters-in-Equity and Magistrate Court vacancies.<sup>52</sup>

The JMISC has no involvement in the selection of judges for South Carolina's Probate Court, Magistrate Court or Municipal Court. Probate Court judges have the distinction of being the only members of the state bench who are chosen through popular elections. Magistrates serve by gubernatorial appointment with the advice and consent of the Senate and Municipal Court judges are appointed at the local level by Municipal Councils.

A 1996 amendment to the South Carolina Constitution established the JMISC after extensive lobbying by the South Carolina Bar, among others, to create an independent body to recommend judicial candidates to the General Assembly.<sup>53</sup> There also were concerns about potential advantages enjoyed by former legislators in the selection process administered by their former colleagues in the General Assembly. At the inception of the JMISC, all five of the justices on the SC Supreme Court were former members of the General Assembly.

The JMISC is made up of ten Commissioners, five selected by the Speaker of the House of Representatives, three by the Chairman of the Senate Judiciary Committee, and two by the President Pro Tempore of the Senate. Within the group of five selected by the Speaker of the House, three members must be sitting members of the chamber in question and two must be selected from the general public. Any three of the five members selected by the two officers of the Senate must be sitting Senators. Individuals from the general public must fill the two remaining seats controlled by the Senate.

The composition of the JMISC warrants closer examination given the critical function performed by the group in evaluating and ultimately winnowing the pool of

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<sup>51</sup> S.C. Const. Art. V.

<sup>52</sup> Both Houses of the General Assembly provide advice and consent in the gubernatorial appointment of Masters-in-Equity. Only the SC Senate provides advice and consent in the gubernatorial appointment of Magistrates.

<sup>53</sup> [http://www.judicialselection.us/judicial\\_selection/reform\\_efforts/formal\\_changes\\_since\\_inception.cfm?state=SC](http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=SC)

qualified judicial candidates. Four of the six legislators are Republicans.<sup>54</sup> One of the ten current members of the JMSC is female.<sup>55</sup> Three African-Americans serve as JMSC members. Of the four public members, three have legal training. One of the attorneys serving as a public member is the brother of the Speaker of the House, who appointed him to the position. Prior to his elevation to the post of Lieutenant Governor, Sen. Glenn McConnell selected all of the Senate's JMSC members in his dual capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, the two offices with appointment authority for the Senate contingent. Senator McConnell also served as one of the Senate's five members and chairman of the JMSC.

The JMSC publishes upcoming judicial vacancies, including those where sitting judges are seeking reappointment. All potential candidates must communicate their interest to the JMSC and submit to a background check, a personal interview, and an examination on court procedure, unless they previously have served on the bench. The JMSC consults members of the South Carolina Bar and the general public through two additional bodies created to evaluate judicial candidates: the Judicial Qualifications Committee of the South Carolina Bar ("JQC") and five Citizens Committees on Judicial Qualifications ("CCJQ") located in defined regions of the state.<sup>56</sup> The JQC submits a determination of whether the candidate is fit for judicial selection based on interviews with the candidates and members of the bar who are familiar with the candidates' experience, ability, qualifications, and character. The CCJQ is made up of no more than eight members selected by the chairman of the JMSC. The committee provides a report to the JMSC for all candidates in their designated region based on interviews with the candidates and individuals who know the candidates either personally or professionally.<sup>57</sup>

After collecting input from the CCJQ and the JQC, along with its own investigations and examination, the JMSC issues a report designating each candidate as either qualified or not qualified for the seat in question. Though there may be more qualified candidates, a maximum of three names are then submitted by the JMSC for consideration by the members of the General Assembly. Once the candidates for selection are identified, they may seek pledges of support from members of the General Assembly in advance of the vote to fill the vacancy. The General Assembly votes in a joint session to select one candidate for each position.

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<sup>54</sup> Judicial Merit Selection Commission Members, <http://www.scstatehouse.gov/judicialmeritpage/JMSCMembersFall2012.pdf> (July 29 2012).

<sup>55</sup> *Id.*

<sup>56</sup> American Judicature Society, *Methods of Judicial Selection: South Carolina*, [http://www.judicialselection.us/judicial\\_selection/methods/judicial\\_nominating\\_commissions.cfm?state=SC](http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=SC) (July 27, 2012).

<sup>57</sup> *Id.*



Members of the South Carolina Supreme Court, the Court of Appeal, the Circuit Court, and the Family Court are all selected in the manner outlined above. There is no executive involvement in either nomination or selection. There is no judicial involvement in either nomination or evaluation. To the extent there is involvement by the public and the Bar, it is heavily mediated and constrained by the legislature. For example, neither the JQC nor the CCJQ has the authority to suggest potential candidates to the JMSC. There currently is no mechanism for recruiting or cultivating judicial candidates, either through the JMSC or the SC Bar. The chairman of the JMSC, a sitting member of the legislature, appoints all participants on the Citizens Committees, the only body established to provide public input in the selection process of four of the state's most important courts.

The unofficial part of the judicial selection process is as important as the official one and entails considerable cost. Pursuing a vacancy on the bench requires devoting a substantial amount of time to gaining visibility among the members of the General Assembly, the electors who ultimately will be voting to fill the seat. This means time away from work and a resulting loss of income due to having to campaign in Columbia. Once the selection season gets underway, judicial candidates typically gather each morning in places like the legislators' parking garage and stand by the door into the legislative office building to introduce themselves. During the remainder of the day, candidates essentially lobby for their cause by seeking out opportunities to informally interact with legislators and build name recognition. Although legislators are not permitted to pledge support for any candidate before the JMSC makes its recommendations, the intent of these interactions between candidates and representatives clearly is for prospective judges to discern which legislators are leaning towards certain judicial candidates and which are still open to further wooing.

This unofficial part of the process raises four primary concerns. First, and most obviously, requiring judicial candidates to seek the favor of legislators for the privilege of being appointed and retained on the bench does damage to notions of judicial independence and separation of powers. As one legislator currently serving on the JMSC commented recently of judicial candidates, "We're not asking them to be judges, they're asking us to be judges."<sup>58</sup> It is in the act of asking that the balance of power among South Carolina's three branches of government tilts considerably towards the legislature. South Carolina judges always must be sensitive to legislative concerns if for no other reason than that it makes good sense politically. To be sure, federal judicial nominees also must secure legislative support to be confirmed. In the federal example, however, nominees have been proposed by the executive and, once confirmed, no will longer rely on the legislature to retain their positions on the bench.

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<sup>58</sup> S.C. State Sen. Jake Knotts, comments at League of Women Voters Forum on Judicial Diversity, Columbia, S.C. (August 7, 2012).

Second, in this environment of retail politics, former legislators seeking judicial seats enjoy distinct advantages over individuals who are not generally known among members of the General Assembly. Former members retain floor privileges in the General Assembly, allowing them access to their former colleagues that is not available to candidates who did not serve in the legislature. Members may prefer their former colleagues or, for those legislators with little to no interest in the selection process, familiar names may be the easiest way of making a selection.

Third, any advantage conveyed upon former legislators seeking judicial positions further diminishes prospects for further diversification of South Carolina's judiciary. No women currently serve in the South Carolina Senate, which has 46 members. A total of 16 women—eight Democrats and Republicans each—serve in the 124-member South Carolina House of Representatives. Of the former legislators currently serving on the bench, only one, the Chief Justice, is female. If former legislators continue to be popular judicial candidates, that nominee pool will remain overwhelmingly white and male for the foreseeable future.

Finally pursuing a judicial appointment requires a significant personal and financial investment. Candidates must take time away from work to travel to Columbia when the General Assembly is in session to meet with members and attempt to secure support. Those who cannot afford the time away from work or family are disadvantaged in the process. This is especially true for judicial candidates who have not previously served in the legislature. For unknowns, time spent making the rounds of legislators' offices can mean the difference between securing a judicial appointment or being passed over.

### **III. Who Serves? A Demographic Snapshot of the South Carolina Judiciary**

South Carolina's courts do not look like South Carolina. This is true with respect to both gender and racial diversity. Women account for 48.7% of the population in the state, yet only 33.8% of the judges in South Carolina are female.<sup>59</sup> The percentage of females on the bench roughly corresponds with the percentage of female members of the South Carolina Bar.<sup>60</sup> In neither case, however, is the increasing gender parity among law school graduates reflected in increased numbers of female members of the bar or on the bench.

Among African-Americans, similar disparities exist with respect to representation in the general population. South Carolina's population is 27.9% African-American.<sup>61</sup> Only 17.9% of South Carolina judges are African-American.<sup>62</sup>

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<sup>59</sup> Data collected by Prof. Constance Anastopoulo, available at League of Women Voters of Greenville County, *Judicial Diversity*, [http://greenvilleco.sc.lwvnet.org/sc\\_demographics.html](http://greenvilleco.sc.lwvnet.org/sc_demographics.html) (July 10, 2012) (hereinafter, "Anastopoulo data")

<sup>60</sup> The S.C. Bar reports 32.4% female members out of a total membership of 14,329.

<sup>61</sup> Anastopoulo data.

Hispanics account for 5.1% of the general population in South Carolina and make up 0.3% of the judiciary.<sup>63</sup> Asians are 1.3% of the population and comprise 0.4% of the judges in the state.<sup>64</sup> Accurate benchmarking for racial diversity is more difficult to determine because there appear to be no reliable statistics on the racial demographics of the South Carolina legal community.

In addition, former legislators continue to account for a considerable percentage of judges serving on South Carolina's three highest courts. Two of the five members of the Supreme Court formerly served in the General Assembly. Another justice is the spouse of a member of the General Assembly. Four of the nine judges on the Court of Appeals previously served in the legislature. Eleven of the 46 Circuit Court Judges are former members of either the SC Senate or House. Two of the eleven previously served on the Senate Judiciary Committee. An additional Circuit Court Judge is the spouse of a legislator. Only two of the 52 judges in the South Carolina Family Court previously served in the General Assembly. One of the two judges served on the Senate Judiciary Committee.

What follow are descriptions of the gender and racial demographics of all the courts examined in this study. The descriptions cover two general groups of judicial bodies: (1) those in which only the JMSC screens and the General Assembly selects members and (2) those courts with selection processes that differ from the standard approach involving only JMSC screening and a vote of the entire General Assembly.

#### **A. JMSC-Selected Courts**

The JMSC has demonstrated no inclination to promote greater gender and racial diversity in South Carolina's courts. The Supreme Court is the most diverse of the courts in which the JMSC serves a screening function. Two of the five justices on the Court are female, accounting for a 40% representation of women on the state's highest court. One of the five justices is African-American, making up 20% of the Court. While these percentages compare favorably to other courts within the South Carolina judicial system, three points are worth noting. First, in the 16 years since the inception of the JMSC, only one African-American and one woman—both sitting justices—have been appointed to the Supreme Court. Second, the small sample size of sitting justices overstates the impact of even a small amount of diversity. For example, the addition of a second woman on the Court doubled the percentage of female justices. Third, until the selection of current Justice Kay Hearn, the South Carolina Supreme Court never had more than one female and one African-American justice serving at the same time.

The nine-member South Carolina Court of Appeals, the intermediate appellate court in the state and another body for which the JMSC screens and nominates

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

members, has one African-American and two female judges.<sup>65</sup> These judges collectively account for 11% and 22% of the court's membership, respectively.

The larger courts whose members are nominated by the JMSC do not fare any better in terms of achieving representative diversity. Of the 46 members of the South Carolina Circuit Court, 17% are female and 11% are African-American.<sup>66</sup> The Family Court system has greater gender representation with 35% females, but is still only 13% African-American.<sup>67</sup> Again, in none of the court systems does the makeup of the court reflect the gender or racial diversity within the state.

The JMSC also screens candidates seeking to become Masters-in-Equity. Upon legislative approval, the names of those individuals are then forwarded to the Governor for appointment. This group is the least diverse in terms of gender and among the least diverse judicial bodies in terms of race. There are only 2 females among the 21 Masters-of-Equity, comprising 10% of the total.<sup>68</sup> African-Americans account for only 5% of the total group, with only one African-American serving in this capacity.<sup>69</sup>

## **B. Non-JMSC-Selected Courts**

The one court system that is completely elected via popular vote, the Probate Court, is at once the most and least diverse court in South Carolina. It is the only court with a majority of female members (28 of 46, for a total of 61%).<sup>70</sup> The Probate Court also has a slightly smaller percentage of African-Americans than the Office of Masters-in-Equity, at 4% (2 out of 46).<sup>71</sup>

The remaining two non-JMSC-appointed judicial bodies are similarly mixed on the issue of diversity. The Municipal Court system, in which judges are appointed by the Municipal Council, is the second most diverse in terms of gender. Of the 253 Municipal Court judges in South Carolina, 104, or 41% are female.<sup>72</sup> This is also only one of two court systems in the state with judges of color other than African-Americans, who make up 17.4% of the Municipal Court system.<sup>73</sup> There currently are three Asian Municipal Court judges (1.2%) and one Hispanic judge (0.4%).<sup>74</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

The Magistrate's Court, whose members are appointed by the Governor, is the most diverse judicial body in terms of race, yet it still is not reflective of the overall demographics of the state. African-Americans account for 23.3% of the court's membership (71 out of 305) and Hispanics for another 0.3% (1 out of 305).<sup>75</sup> The Magistrate Court system has 85 females out of 305 total magistrates, or 28% of the total number.<sup>76</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

#### **IV. Observations on Judicial Demographics and Judicial Selection**

Three key observations emerge from this review of the demographic data and selection processes for South Carolina's courts. First, the merit selection method of choosing judges likely is preferable to judicial elections in South Carolina. While empirical studies suggest that one method of judicial selection is not superior to another, there are unique features of the South Carolina political system that would make it unsuitable to judicial elections. Whether they are conducted to fill vacancies or only in cases of retention, elections inject an element of heightened politicization of the judiciary. This is of particular concern due to the prolonged periods of extreme partisan domination in modern South Carolina history, from the near-absolute control of Southern Democrats during most of the 20<sup>th</sup> Century to the current primacy of the Republican Party. In a state where coroner's races are partisan contests, electing judges would only magnify the influence of political party affiliation, regardless of whether said party affiliation has any bearing on the candidate's qualifications or ability. This likely would be the case even if the judicial races were nominally non-partisan.

Additionally, candidates for seats on the bench would be required to raise substantial amounts of money to contest a judicial election. As is the case in elections in the executive and legislative branch, wealthy campaign donors often expect to have increased access to the candidates they support. The possibility of influence peddling and other forms of corruption would be highly corrosive to the impartiality required in any effective justice system. Furthermore, requirements to raise large sums of money would eliminate otherwise qualified but less well-connected candidates from seeking judicial positions. The increased promotion of popularity and money in the selection process for South Carolina's judges would not address the issues of separation of powers and diversity that currently exist under the merit selection process as presently constructed.

A second observation is that, while the merit selection system is preferable for choosing South Carolina's judges, there nevertheless are concerns about the manner in which the selection process is conducted. The General Assembly presently controls every significant feature of the judicial selection process. Members of the legislature evaluate prospective judicial candidates, recommend qualified candidates for selection, vote on the candidates offered for selection, and then engage in the same process should those candidates wish to be retained or additional terms of service on the bench. Neither the executive nor the judicial branch plays a meaningful role in identifying, selecting, or evaluating members of the bench. The state bar and private citizens participate only in vetting candidates, and even then through a mechanism that is heavily mediated by the General Assembly, including the appointment of all citizen participants. Any efforts to change the system as it currently functions would require a constitutional amendment, the process for which must originate in the General Assembly.<sup>77</sup> The outsized role of the legislature

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<sup>77</sup> S.C. Const. Art. XVI, Sec. 1.

calls into question basic precepts of separation of powers and judicial independence, even in a “strong legislative state” such as South Carolina.

The opportunity for legislative influence on the judiciary, whether subtle or overt, is demonstrable. Recent controversies regarding retirements and denied retention requests indicate that legislative influence is real.<sup>78</sup> As one retired Circuit Court judge observed, “[I]t’s going to get worse to the point where a judge on any semi-controversial case will think, ‘What will the Legislature think if I rule this way?’”<sup>79</sup>

A third and final observation is that the JMSC does not have a mandate to actively promote the identification of diverse qualified judicial candidates. To date, the JMSC has compiled a disappointing record in diversifying the judiciary in South Carolina. While promoting judicial diversity is not expressly within the scope of the JMSC’s duties, it has been unimpressive in fulfilling the function it was meant to serve. The JMSC has demonstrated what would charitably be termed modest success in addressing the number of former legislators appoint the bench, one of the primary concerns animating the Commission’s creation. Former legislators continue to secure plum judicial assignments. They account for almost half of the members of the Supreme Court and Court of Appeals and make up almost one quarter of the Circuit Court.

Lack of diversity on the Court of Appeals and the Circuit Court, specifically, is of equal concern. Among the five justices on the Supreme Court, only the Chief Justice, a former legislator, did not serve on either the Court of Appeals or the Circuit Court. This is significant because service on either court may be an indicator of the pool for future candidates for state Supreme Court and federal judicial appointments. If the Court of Appeals and the Circuit Court are not diverse—and they are not currently—it does not bode well for the prospects for greater diversity among future appointments to the state’s highest court or nominations to federal court.

The JMSC represents an untapped resource for promoting the appointment of qualified, diverse judicial candidates. It can only fulfill this promise, however, if it is constitutionally empowered to do so and is itself composed of a diverse membership beyond the members, appointees, and associates of the General Assembly. To function optimally, the merit selection process needs to eliminate excessive legislative entanglement and the actively seek a diverse pool of qualified judicial candidates. As currently constructed, the selection system communicates an image of favoritism within the process. The Supreme Court, Court of Appeals, and the Circuit Court all have significant representation of former legislators. This is noteworthy in

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<sup>78</sup> See, e.g., Robert Behre, *Action Against Family Court Judge Concerns Lawyers*, THE STATE, Dec. 16, 2009, available at:

<http://www.thestate.com/2009/12/16/1072935/action-against-family-court-judge.html#.UCE39o4z0os> (June 16, 2012).

<sup>79</sup> *Id.*

light of the fact that legislators are, by and large, doing the selecting. It also is important because of the limited diversity among members of the General Assembly. There are no women among South Carolina's 46 State Senators and only 16 females out of 124 members in the House of Representatives. There are 9 African-Americans in the Senate and 29 in the House.

It is worth noting that the more diverse courts also generally have the fewest number of former legislators. This may be attributable to some perceived level of prestige attached to the higher courts. Given the way in which service on the Court of Appeals or the Circuit Court may serve as a springboard to the state Supreme Court or perhaps to the U.S. District Court or the U.S. Circuit Court of Appeals, this is not unusual. When presented with attractive opportunities to join the Court of Appeals or Circuit Court, former legislators may opt against pursuing seats on courts of more limited jurisdiction, and long-term career prospects, such as Family Court or Probate Court.

## **V. Improving the Selection Process**

Until the citizens of South Carolina decide that they prefer an alternative to the Legislative State, it is reasonable to assume that judicial selection will remain within the purview of the General Assembly. There are meaningful reform measures that nevertheless would allow for a greater range of consultation and collaboration while maintaining the legislature's ultimate authority to vote on who sits on some of South Carolina's most important judicial bodies. These reforms would have the added benefit of bringing diversity to the selection process and, potentially, to the judiciary itself.

As a first step, the JMSC include appointees from the executive branch and perhaps the South Carolina Bar. Legislators could continue to serve as JMSC members but, given that they ultimately vote on selection, there is a need for other branches of government and sectors of civil society to substantively weigh in on the process of candidate evaluation. To this end, the Citizens Committees on Judicial Qualifications should be appointed by multiple sources—not only the General Assembly—with an eye toward making the Committees broadly representative of the demographics of the state. Offering the Governor, the Supreme Court, the Bar, and/or local authorities an opportunity to make CCJQ appointments would improve the chances of empanelling a more diverse group of citizen evaluators. Authorizing a more diverse CCJQ to actively seek out diverse candidates would only enhance the possibility of attracting qualified diverse judicial candidates to the selection process.

An additional reform would be to explicitly empower the JMSC itself to seek to develop a pool of qualified judicial candidates who are diverse across a number of facets, such as geographical origin, professional experience, gender, and race. Both the CCJQ and the JQC could assist the JMSC in this project. Although people of color make up a substantial portion of South Carolina's population, the state has not officially recognized the need to reflect its demographic diversity in the instruments



of government. Actively promoting the recruitment and cultivation of qualified diverse candidates would send a positive message to talented lawyers and future lawyers regarding the trajectory of their careers as attorneys practicing in South Carolina.

The third and final proposed reform would be to concretize the state's official commitment to greater diversity on the bench by creating an entity within the Supreme Court or the South Carolina Bar to implement a far-reaching pipeline program to both identify talented students interested in the law and to increase public knowledge of the law and legal process. A "Committee for Diversity in the Bench and Bar" would serve as the institutional home for efforts to address the persistent lack of diversity in South Carolina's courts. The work of this committee would encompass much of the educational efforts already underway in the South Carolina Bar in addition to more intensive programs to work with grade-school and college students to build skills that are essential to the legal profession, such as analytical writing, active listening, reading comprehension, critical thinking, and oral advocacy.

## **VI. Areas of Additional Research**

Further research would greatly benefit the design and implementation of the reform measures outlined above. South Carolina's historical aversion to transparency in government<sup>80</sup> has made it difficult to compile useful databases to establish benchmarks for judicial diversity or to measure changes in the demographic makeup of the bench over time. To correct this shortcoming, further research is required to compile the names of all qualified candidates forwarded by the JMSC to the General Assembly to fill vacant judicial seats. This list would provide some insight into the characteristics and qualifications of successful judicial candidates. In addition, all qualified and JMSC-recommended candidates could then be tracked to determine whether they eventually assumed seats on the bench, the courts on which they served, and the likelihood of being retained in instances where sitting judges sought retention.

Further examination of the JMSC itself would be useful for evaluating the impact of any structural changes that would occur to the role and/or composition of the Commission. Demographic information on the gender, race, profession, and geographic origin of each member of the JMSC would constitute a useful starting point for efforts to monitor ensure that the JMSC remains representative of all areas and citizens in the state. A longitudinal analysis of the composition of the JMSC and

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<sup>80</sup> See, e.g., State Integrity Investigation, *South Carolina Corruption Risk Report Card*, [http://www.stateintegrity.org/south\\_carolina](http://www.stateintegrity.org/south_carolina) (July 31, 2012). South Carolina received an overall grade of "F," with specific grades of "F" in, among other categories, Public Access to Information, Legislative Accountability, Judicial Accountability, Executive Accountability, and Ethics Enforcement Agencies.

the CCJQ would further support efforts to measure diversity among those participating in the selection process.

At a more basic level, regularly updated longitudinal analysis of law school graduates would be an effective means of monitoring the potential pool of judicial candidates and tracking their ultimate career paths. Collecting this data over multiple generations of law school graduates would be a valuable tool for identifying and mentoring judicial candidates, regardless of their background. This data would respond to a number of key heretofore-unanswered questions, among them: How many women and students of color are graduating from South Carolina's two law schools? How do they use their law degree after graduation? What are their long-term career goals?

Beyond the study of law school graduates, there is a need for a comprehensive compilation of basic demographic data (gender, race, age, law school attended, etc.) for all attorneys admitted to practice in South Carolina. This would include whether those attorneys remained in the practice of the law after being admitted to the South Carolina Bar and whether they continued to live and practice in the state. Identifying lawyers who have either left the practice or left the state may yield greater insight into how women and attorneys of color view their career prospects within the legal profession, generally, and with respect to potential judicial appointments, specifically.

### **CONCLUSION**

South Carolina's courts continue to carefully ply the waters of judicial independence in the face of direct and overt legislative involvement in evaluating judicial candidates and appointing and reappointing judges to the bench. As in the time of Hamilton, the courts are armed only with judgment in seeking to do justice on behalf of the citizens of the state. The merit selection process ensures that judges are qualified and of suitable temperament to sit impartially as jurists. Yet, as currently implemented, the merit selection process calls into question basic separation of powers arrangements and does nothing to expand opportunities for judicial service to a broader segment of the population. South Carolina has the makings of a judicial selection system that could serve as a model for other states. Curbing legislative over-involvement in the process would allow merit selection to realize its full potential to create an independent, highly qualified judicial branch that reflects the great diversity within South Carolina.

*The League of Women Voters, a nonpartisan political organization, encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. Membership in the League is open to men and women of all ages.*