

Judicial Selection in California

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Executive Summary

Systems for selecting state judges vary dramatically across the United States, comprising a complex range of elective and appointive mechanisms. Each of these systems has its advantages and disadvantages for important judicial values. For instance, popularly-elected judges may be more accountable to their state’s electorate, but that same accountability might cause them to impose harsh sentences on criminal defendants or otherwise disfavor unpopular litigants—especially as election season approaches.¹ By examining how different state systems serve or disserve these values, it may be possible to distill broader recommendations to create a fairer and better judiciary.

This report, part of a broader investigation into judicial selection by the Brennan Center for Justice at New York University, surveys California’s method for selecting judges. California uses a unique hybrid system, combining elements of both the elective and appointive selection models. While California citizens do have the power to elect trial court judges in specific circumstances, the governor appoints the vast majority of judges at the superior (trial), intermediate appellate, and Supreme Court levels.

Focusing on California therefore makes sense: if this hybrid works well for California, it might offer the best of both worlds to other states. The report draws on public documents, state archives, and interviews with stakeholders throughout the California judicial community to assess the selection system’s performance in five key areas: quality, independence, accountability and legitimacy, public confidence, and diversity.

Before judges are appointed, they undergo a series of vetting processes including two judicial commissions. Unlike their counterparts in true “Missouri-plan” merit selection states, the California judicial commissions only consider candidates who have already been selected by the governor. The commissions do not select and present a slate of candidates to the governor; rather, the governor selects and presents a slate of candidates to the commissions for evaluation.

California adopted its judicial selection system in 1934 in an effort to increase the quality and independence of the state’s appellate courts. For the most part, the system has fulfilled these goals without excessive partisan political machinations or significant influence by special interest groups. However, the successful execution of the California judicial selection process does not appear to be due to the structure of the process. Indeed, the history of the system is marked by several examples illuminating the potential limits of the structural mechanisms of selection. Because the California judicial selection system’s relatively successful operation may depend on the state’s unique size, history, demographics, and politics, the system as a whole may not be suitable for adoption in other states.

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Introduction

Purpose of Study

This study was performed by a team of Stanford Law School students on behalf of the Brennan Center for Justice at New York University Law School. The Brennan Center asked the team to perform a case study of the California judicial selection system in order to better understand the formal and informal structures of judicial selection in the state, how the resulting system operates, and whether the system might be recommended for application in other states grappling with challenges to the judicial system and the democratic process.²

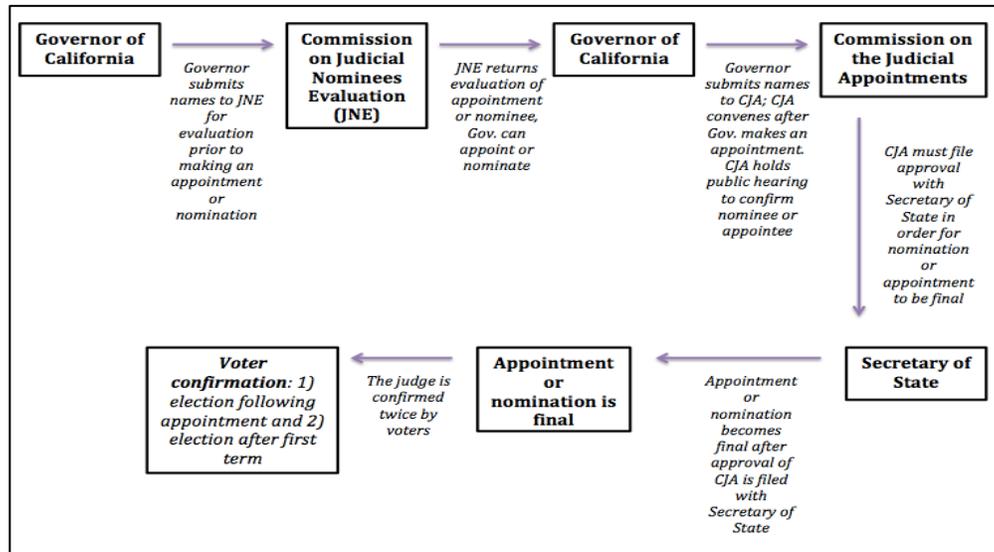
This paper first briefly explores the history of the judicial selection process in California in order to understand the various interest groups which have influenced the current structure and to highlight a number of key controversies which have shaped the perceptions of judicial selection. It next details the current process of judicial selection, drawing upon objective sources such as the state constitution; various statutes; secondary sources; and interviews with judges, lawyers, members of the executive branch, and scholars in the field. Finally, this paper analyzes the California system of judicial selection on five value metrics identified by the Brennan Center as integral to a functioning judicial system in a democratic society: (1) judicial independence, (2) judicial accountability and democratic legitimacy, (3) quality judges, (4) public confidence, and (5) judicial diversity. It incorporates throughout a number of reflections and recommendations for attempting to export the California system to other states.

California's Selection Method

Article VI of the California Constitution mandates that when a vacancy arises on either the Court of Appeal (the state's intermediate appellate court) or Supreme Court, justices are appointed by the governor and thereafter appear on the ballot in statewide retention elections every 12 years.³ The constitutionally and statutorily established judicial selection system is remarkable for its lack of formal requirements or public transparency during the appointment process.⁴ A statute demands that the governor seek a state bar committee's evaluation of a candidate's quality,⁵ and the Constitution requires a three-member commission to approve the governor's nominees.⁶ The only statutory requirement is that, with a few minor exceptions, the governor is prohibited from appointing anyone who did not complete the JNE process.⁷ Therefore, many parts of the current process, although used consistently for the last 80 years, are not statutorily mandated, and thus could theoretically be undone by any governor.

The vast majority of prospective judges in California first complete a lengthy application, marking the initial step in the long and complex process of securing an appointment to the appellate or Supreme Court bench.⁸ The Governor's office conducts initial investigations of applicants and has complete discretion to determine who will continue the nomination process. The Governor's office then submits a list of potential candidates to the Judicial Nominees Evaluation (JNE) Commission

for a formal and documented—but not public—vetting process.⁹ The JNE Commission evaluates each candidate’s credentials and conducts extensive reference checks throughout the legal community before determining the rating of the candidate on a four point scale and presenting a detailed report to the governor.¹⁰ The governor may then nominate any individual who has been vetted by the JNE for appointment to the bench, sending the nominee for review by the Commission on Judicial Appointments (CJA).¹¹ If the nominee is confirmed by the CJA, she is then officially appointed to the bench.¹²



Summary of Values

The core values driving California’s approach to judicial selection have remained constant over time. Since at least the 1910s, stakeholders in the process have emphasized the need for well-qualified, high-quality judges with substantial independence but ultimately subject to some public accountability. Governor Edmund “Jerry” Brown ushered in a new focus on judicial diversity during his first administration in the 1970s and early ‘80s, making it a priority to appoint more women and people of color to the appellate bench. Subsequent governors, regardless of their party affiliation or policy views, have largely followed in Brown’s footsteps, though California courts still fail to fully reflect the diversity of the state’s population.

During the California courts’ moments of greatest public crisis and change—the 1934 ballot initiative and the 1986 recall movement (discussed in detail below)—highly salient issues, particularly those involving crime and the death penalty, have driven the public and political debate, often with the backing of powerful business interests. The judicial selection system is without significant structural tools to prevent such political reactions from affecting the judiciary. The appointment system is remarkably centralized in the office of the governor, without much public input or transparency in the early stages. While the two selection commissions help ensure quality judges, the broad

discretion of the governor both before and between the commissions' vetting processes allows for potential special interest influence and perhaps even capture.¹³ Furthermore, while the diversity of the bench has increased in recent years, there is no formal structural support that requires diversity of judicial nominees to be a primary consideration. Rather, personal gubernatorial initiatives deserve the credit for increased judicial diversity. Lastly, especially in considering judicial accountability and independence, retention elections are perhaps the most controversial part of the system: they obviously help guarantee accountability, but are in constant tension with judges' independence. Although there is potential for financial and political influence over judicial selection, there is little evidence that outside forces have shaped it to date. Multiple stakeholders thus posit that it is the particular cultural and political makeup of California, not any structural mechanism, that produces in such generally positive outcomes.

Therefore, although the California system has had broad success in achieving many of these values, the particular political and social makeup of the state has undoubtedly played a role, and therefore simply transplanting the system into another state would likely not yield the same results. However, there are a number of mechanisms within the California system that deserve recognition and recommendation, and a number of places where additional structures could result in greater guarantees of quality, diversity, accountability, and independence.

A Brief History

This section provides a brief survey of a few key moments in the history of California’s process of judicial selection that—by legislative mandate or political example—shaped the contours of the present-day system. The system’s historical evolution informs both the values that it purports to serve and the perception of modern-day members of the legal community and public.

California’s current system for appointing appellate court judges dates back to 1934, when, after nearly two decades of pushing similar measures in the legislature, a group of judicial reform advocates successfully amended the state constitution by ballot initiative. Prior to 1934, California followed the national trend and elected both its trial and appellate judges.

On the whole, the California system has performed without fanfare or controversy. No step in the process routinely garners much attention in the legal community or among the broader public.

There are outliers. The system faced an early challenge when a governor and an attorney general faced off over a controversial appointee, and the successful 1986 campaign to recall three Supreme Court justices still looms large in the judiciary’s collective memory. Some smaller controversies, like one governor’s decision to ignore an unfavorable commission recommendation, also dot the historical landscape.

Origins of the Current System

In 1934, California implemented its current selection system as part of a package of ballot initiatives aimed at curbing crime through judicial administration. A wave of high-profile killings and robberies captivated the state in the early 1930s, galvanizing popular interest in judicial reform.

At first, opinion among reformers favored imitating the federal system, with the caveat that for all the state’s courts, the governor would appoint life-tenured judges from a list compiled by a three-member nominating committee.¹⁴ But concern soon mounted that the voters would balk at allowing judges to serve for life, a concern that remains relevant in reform discussions in California today. As a more palatable alternative, the Commonwealth Club of San Francisco lobbied to resurrect a version of an old proposal from the 1920s, with the governor appointing judges and the voters confirming them at the ballot box.¹⁵ The Club argued that its proposal guaranteed quality and independence without forfeiting public accountability.¹⁶ The statewide committee was convinced and adopted the Club’s proposal with two changes: it now featured a three-member evaluation committee that would rate nominees after the governor chose them, theoretically helping to ensure judicial quality, and it allowed individual counties to choose whether to adopt the system for their Superior Court judges.¹⁷ This was the California model nearly as it appears today.

With a broad range of endorsements, this measure, titled Proposition 3, won a strong majority in the 1934 election.¹⁸ Its accompanying ballot materials presented it as a companion to other tough-on-crime measures and—again echoing the themes of quality and independence—as a way of ensuring

that judges would be “honest, intelligent, and fearless.”¹⁹ They cast the governor and the Commission on Qualifications in a more minor role, asserting that “ultimate control would remain in the hands of the people,” who “would have a power . . . of vetoing an appointment of the Governor.”²⁰ To hear Proposition 3’s proponents tell it, the appointive system did little to reallocate decision-making from the people to the executive—a narrative that, in light of how much power the governor actually wields in judicial selection today, now seems either disingenuous or strikingly naïve.

Proposition 3—now housed in Article VI of the Constitution—took effect immediately, with sitting appellate judges subject to retention elections at the end of their terms.²¹ The State Bar soon began to play an informal but important role in the appointment process, forming fact-finding committees to investigate Supreme Court nominees as part of the Commission on Qualifications’ confirmation process.²²

Notable Controversies

The Max Radin Nomination

One of the California selection system’s earliest—and, to this day, highest-profile—controversies came in 1940, when a politically-charged Commission on Judicial Qualifications rejected Governor Culbert Olson’s nomination of Max Radin to the Supreme Court. The Radin affair marks one of only a handful of times that the Commission on Judicial Qualifications (the predecessor to the Commission on Judicial Appointments) has rejected a nominee, and it eventually led to an expansion of the role of the Commission.

A prominent Boalt Hall professor, Radin was as well known for his left-wing views as for his scholarship. He had attracted the wrath of law-and-order conservatives several times in the late 1930s, vocally supporting defendants and suspects in a series of controversial trials and investigations.²³ Then-attorney general Earl Warren was particularly suspicious of Radin and, by some accounts, harbored a vitriolic personal dislike of the nominee.²⁴ In his capacity as a member of the Commission on Judicial Qualifications, Warren asked the president of the State Bar to prepare a report on Radin.²⁵

The Bar convened a committee that produced a wide-reaching, sometimes critical, occasionally unsubstantiated, but ultimately balanced report on Radin’s professional history and reputation.²⁶ But when the committee sent its findings to the Bar’s Board of Governors, the Board went beyond its traditional role of forwarding the report to the attorney general without editorial comment. Instead, ten of its fifteen members voted to advise the Commission on Judicial Qualifications against confirming Radin, citing concerns ranging from his controversial views to some questionable ethical decisions to even the possibility that he might have been a Communist.²⁷

Armed with the Bar’s recommendation, Attorney General Warren was able to convince one of his fellow Commission members to join him in voting against Radin’s confirmation.²⁸ In a marked contrast from the “coronations” that the Commission’s modern equivalent conducts today²⁹ and the

brief public sessions that it had previously convened in the 1930s,³⁰ Warren's attack culminated in "a stormy two hour session" of a hearing.³¹ Radin, perhaps frustrated by the entire process and the *ad hominem* attacks it had unleashed against him, asked Governor Olsen to withdraw his nomination.³²

The Radin affair may have provided an object-lesson to later governors about the consequences of selecting a controversial nominee. Whatever the reason, another major controversy would not arise for decades to come.

The 1986 Retention Election

In 1986, an unprecedented combination of public outrage and corporate campaign spending led to three of then-Governor Jerry Brown's Supreme Court appointees—Rose Bird, Cruz Reynoso, and Joseph Grodin—losing their seats in a retention election that captured national attention and continues to loom large in California's collective judicial and political memory.

Beginning in the 1960s and '70s, against the backdrop of national social justice movements and sweeping demographic and economic changes across the state, the California Supreme Court cemented a decidedly left-wing orientation.³³ Under Chief Justices Traynor and Bird, the Court handed down progressive decisions generally favorable to criminal defendants and civil plaintiffs. These spanned a host of controversial areas of law: criminal procedure, the death penalty, nondiscrimination, property rights, zoning, divorce, product liability, medical malpractice, and regulation of big business and agriculture.³⁴ Frequently, the Court "staked out more activist positions . . . than the United States Supreme Court was willing to take," placing California well outside the national mainstream.³⁵ The justices often insulated their holdings from federal review by deciding cases on adequate and independent state grounds, earning them further ire from social conservatives, tough-on-crime groups, and myriad business interests left with no recourse but campaigns to amend the state constitution by ballot initiative.³⁶ These frustrations came to a head in the mid-1980s, when a range of factors presented the Court's opponents with a unique opportunity to reshape its membership and jurisprudence.

First and foremost, public outcry over the Court's attitude towards the death penalty had reached new highs. In 1972, before many of its 1986 members had taken the bench, the Court had held capital punishment unconstitutional,³⁷ but a strong majority of voters reinstated the death penalty by constitutional amendment just months later.³⁸ The U.S. Supreme Court had effectively placed a moratorium on executions nationwide shortly before the amendment passed.³⁹ But when the federal high court reaffirmed the death penalty's constitutionality four years later in *Gregg v. Georgia* as long as states followed certain sentencing practices,⁴⁰ California's legislature and voters soon responded with a *Gregg*-compliant statute and capital punishment ballot initiative.⁴¹

Despite this response, by 1986 the California Supreme Court had overturned death sentences in 53 of the 56 mandatory appeals it had heard since reinstatement; not a single inmate had been executed.⁴² The Court's opponents thus had a powerful and accessible argument that the justices

were flouting popular will and engaging in judicial activism. Over 70 percent of voters had favored reinstatement and public support remained high into the 1980s, climbing as high as 83 percent by some accounts in 1985.⁴³

With the recall effort poised to center on the death penalty, Chief Justice Bird and Justices Reynoso and Grodin made particularly attractive targets. The chief justice had always been a controversial figure; she had faced allegations of partisanship and poor temperament during her appointment process and throughout her time on the Court.⁴⁴ More recently, she had not voted to uphold a single death sentence.⁴⁵ Reynoso and Grodin, while less widely reviled, had voted to affirm capital sentences on only a handful of occasions,⁴⁶ and had long irritated business interests with their pro-union stances.

Second, an unusually high proportion of the high court's justices were up for a retention vote, and the election also featured a prominent and hard-fought gubernatorial race.⁴⁷ As a result, a successful recall campaign would give the governor an opportunity to dramatically alter the Court's ideological balance. Incumbent Governor George Deukmejian recognized this. He made judicial reform a central plank of his reelection platform, coupling his opposition to retaining the three target justices with a vow to appoint judges with "an overriding concern for public safety."⁴⁸

Third, an extensive and well-funded network of organizations mobilized to campaign heavily and spend generously to portray the three justices as soft-on-crime liberal activists. In addition to Deukmejian, the recall campaign's leaders included a statewide coalition of prosecutors and two organizations that had previously lobbied against the Court in general and Chief Justice Bird in particular: Crime Victims for Court Reform and Californians to Defeat Rose Bird. These groups retained experienced publicists and strategists and solicited hefty contributions from industries aggrieved by the Court's direction, including oil and gas companies, car dealerships, banks, real estate firms, and (most of all) agribusiness.⁴⁹ Their overall spending totaled more than \$5.5 million—"phenomenally high" for any California election and unprecedented in the state's history of judicial elections.⁵⁰

The justices' campaigns were haphazard by comparison. They began in earnest only months before the election and were characterized by only scattered support from major public figures and minimal public outreach.⁵¹ The plaintiffs' bar, especially personal-injury lawyers, made significant contributions, but the pro-retention camp's overall fundraising still totaled less than half of its opponent's.⁵² Former governor Pat Brown mounted a late-stage effort to salvage the campaign, joining Chief Justice Bird in painting the recall as a politicized right-wing assault on judicial independence, but to no avail.⁵³ All three justices lost their seats by significant margins, with only 34 percent of voters casting their ballots to retain Chief Justice Bird.⁵⁴

The 1986 election indeed reshaped the Supreme Court and repudiated much of the Traynor and Bird courts' progressive jurisprudence. Governor Deukmejian won reelection and appointed three new justices. Under the leadership of Chief Justice Malcolm M. Lewis, the Court reasserted a more pro-business and anti-taxation stance, and it routinely upheld capital convictions under harmless error doctrine.⁵⁵

The constellation of factors that led to the recall has not recurred. Observers are divided, however, as to whether the 1986 election has led governors to appoint more moderate justices or chilled judicial independence by making judges more fearful of anti-retention campaigns in controversial cases.⁵⁶ One interview participant theorized, however, that the election might have “sent a message” that California’s death penalty is sacrosanct, affecting judicial behavior at least with regard to that topic.⁵⁷

The Janice Rogers Brown Nomination

In March 1996, Republican governor Pete Wilson nominated Court of Appeal Justice Janice Rogers Brown to the Supreme Court to fill Justice Ronald M. George’s seat (Wilson simultaneously elevated George to the position of chief justice).⁵⁸ Brown had previously worked as Wilson’s legal affairs secretary, and she would be the first African American woman to serve on the court.⁵⁹ She was also, however, the first Supreme Court nominee in California history to receive a “not qualified” rating from the JNE Commission or its informal predecessor.⁶⁰

The details of JNE reports usually remain secret until the candidate is nominated and their hearing with the Commission on Judicial Appointments (CJA) takes place, but a copy of Brown’s leaked to the press, citing the nominee’s relative inexperience and allegations that she was “insensitive to established legal precedent, had difficulty grasping complex civil litigation, lacked compassion and intellectual tolerance for opposing views, misunderstood legal standards and was slow to produce opinions.”⁶¹ There was also some concern, based on her scholarly writing and previous opinions, that Brown would bring a conservative partisan bias to the bench.⁶²

Brown’s allies, including some of her colleagues on the Court of Appeal, were quick to dispute these characterizations.⁶³ Wilson pushed forward with the nomination, and the Commission on Judicial Appointments confirmed Brown unanimously.⁶⁴ Some contemporary commentators on California’s judicial selection process cite the Rogers Brown episode to show the limits of the JNE Commission’s power: its reports may increase or decrease the political costs associated with a nomination, but they are unlikely to deter an otherwise committed governor.⁶⁵

Historical Takeaways

Several themes recur throughout the history of California’s judicial selection system. First, the same set of values—independence, quality, and efficiency—has dominated the debate over judicial selection since the beginning. Diversity, while a relatively recent addition to these values, has assumed a similar importance. Second, in the moments of crisis and change that have most shaped the system, calls for reform have most often come from elite voices like politicians, members of the Bar, and business interests. When these elites have sought to rally popular support, they often have often invoked high-profile criminal justice issues. Third, even among elites, individual personalities have often exercised outsized influence.

The continued relevance of these themes today suggests that they may be related to something structural about the California system, discussed in detail below. Its heavy reliance on a few individuals, like the governor and the members of the confirmation commission, could help explain the historical influence of polarizing and determined figures, and could caution against the transplantation of the California system into another state with a different political and social context.

Key Institutional Actors

The Governor

California’s judicial selection process, which has few structural checks or guarantees of transparency, is marked by the governor’s almost unfettered role in nominating candidates. Given the governor’s wide latitude, there is likely variation in the internal processes used by each governor. Furthermore, the lack of transparency makes it nearly impossible to reliably compare the processes used across different governors. Therefore, this section will focus on the administration and policies of the current governor, Edmund “Jerry” Brown.

Immediately after the governor’s office receives a potentially promising application for judicial appointment, one of Governor Brown’s legal secretaries begins research into the candidate.⁶⁶ These staff members review the candidate’s biographical information and publications and contact references, fellow lawyers, judges the candidate has appeared before, and acquaintances who can possibly speak to her qualifications.⁶⁷ Brown’s legal aides play an especially important role in this process, though perhaps less so now than under previous governors who had less familiarity with the California legal community.⁶⁸ Indeed, both Brown and his predecessors have often appointed their own legal affairs staff to the bench; at least six current appellate justices previously served as gubernatorial staffers.⁶⁹

The governor also frequently looks to networks in the local legal community to gather additional information about potential candidate’s backgrounds and qualifications.⁷⁰ Reliance on these networks, known formally as Judicial Selection Advisory Committees (“JSACs”)—or, more colloquially as “secret committees”—goes back most likely to Governor George Deukmejian’s administration, if not further.⁷¹ The current administration has divided the state into seven regions, each with its own local committee.⁷² These committees are meant to provide an element of local input and knowledge into the governor’s nominations—an otherwise difficult task in a state as large and as politically, demographically, socially, and economically diverse as California. Their role is to provide the governor with as much information as possible about a candidate so that he may advance those individuals who are likely to further his goals, whether those be related to specific policies or more generally to increasing diversity on the bench.⁷³ Committees’ investigations and subsequent recommendations are not primarily focused on politics.⁷⁴ Rather, committee members examine qualifications, how active a potential judge is in her community, and overall temperament (whether there are any notable character flaws).⁷⁵ Once the committee members have completed their investigation, they meet face-to-face and issue a report to the governor based on their findings.⁷⁶ This report includes a summary of what they discovered during the investigation and a recommendation.⁷⁷

The JSACs are not formal or statutorily-created mechanisms. Membership is confidential, hence their common name of “secret committees.” They have been criticized for this opacity for two reasons. First, their secrecy has risks of perpetuating “old boys’ clubs” at the expense of women and minority candidates. As one report noted, “[m]any in the minority legal community and women’s

attorney organizations do not know the identity of members on the committees and often do not have access to the ‘inner circles.’”⁷⁸ Second, they are in no way known by or accountable to the public.

There are few procedural restraints on the governor in the judicial selection process. Once his office receives the JSACs’ report on a particular candidate, it is up to the governor alone whether to submit that candidate to the JNE for consideration. After the JNE completes its review, it is again up to the governor alone whether to submit the name to the CJA. The governor is the first and last arbiter of who to nominate. There may be political considerations and calculations that limit a governor’s choices, but those are extrinsic to the formal process, giving the governor wide latitude in selecting judicial nominees.

A number of participants explained that even the dedication and attention given to the process of judicial appointments depends on the interests of the governor.⁷⁹ Current Governor Brown, who has a J.D. and practiced law in a number of capacities, has taken an active role in judicial appointments.⁸⁰ Others, like former governor Arnold Schwarzenegger, were reportedly less involved in the process and could not rely on personal relationships or a detailed understanding of the legal field in California in appointing judges.⁸¹ Whether this made room for other interests to play a stronger role is unclear.

One of the obvious questions raised by such an opaque process is whether and to what extent special interests gain access to the governor or his staff to either put forward judicial candidates’ names or to weigh in on candidates in consideration. The various interviews conducted indicate that special interests do not play a particularly strong role in judicial appointments under Governor Brown.⁸² One interviewee stated that interests groups and personal politicking by governors are not present in the process and that Governor Brown and his legal appointments secretary do not personally know all but a handful of potential appellate nominees.⁸³ Another interviewee acknowledged that although the governor certainly makes appointments with knowledge of the particular candidates’ political leanings and areas of focus,

it’s not as if the NRDC [Natural Resources Defense Council] or UFW [United Farm Workers] goes straight to the Governor to pitch an appointee. But letters are written and can be written on behalf of potential nominees; Governor Brown weighs letters against what constituents would want. So, some attention would be paid to special interests, but not in the direct way one might think.⁸⁴

In sum, judicial selection in California is a very governor-centric process. As one interviewee stated, the success of the system is “heavily dependent on the governor. There is no merit selection, no significant constraints on the governor’s authority Whether it works well depends largely on who the governor is.”⁸⁵ Each governor personally chooses, with no check at all, which staff member will be in charge of judicial appointments for the initial vetting, as well as who will be on the “secret

committees” to further vet the potential candidates. The governor unilaterally decides which names to send to the JNE commission and who to nominate for final approval by the CJA.

This process has seemed to work well in California despite the potential for partisanship. With the exception of former Governor Deukmejian’s role in the 1986 Supreme Court retention elections, there has been limited politicization of the system by governors of either party, and most participants seem pleased with the process overall.

The Commissions

There are two commissions involved in the California judicial selection process: the Commission on Judicial Nominees Evaluation (JNE) and the Commission on Judicial Appointments (CJA). The CJA is a constitutional organ of the judicial branch, while the JNE is a statutorily-created entity under the State Bar of California.⁸⁶

The commissions are involved at different phases and in different capacities during the judicial selection process. Once the governor has identified an individual he or she wishes to nominate to the Supreme Court or the Court of Appeal, he or she must submit the individual’s name to the JNE for evaluation prior to formally exercising the constitutional right of appointment.⁸⁷ After the JNE returns its evaluation of the appointee or nominee, the governor can formally nominate an individual.⁸⁸ The CJA will then convene (after the Governor makes the nomination), hold a public hearing, and vote on the nominee’s confirmation.⁸⁹ After the CJA has confirmed the nominee, that commission must file its approval with the Secretary of State; only after the CJA’s approval can the nomination become final.⁹⁰

The Commission on Judicial Nominees Evaluation

Members of the JNE Commission serve on a volunteer basis, and are expected to participate in 12-14 meetings a year, committing about 40 hours of their time each month to JNE activities.⁹¹ Their terms are for one year, and a commissioner can serve for a maximum of three consecutive terms. Members are “lawyers in active practice, retired judges and public members (non-lawyers).”⁹² The Board of Trustees of the State Bar of California appoints the JNE’s members, designating one of them its chair.⁹³ The Board can remove commissioners at will, with or without cause.⁹⁴ The Bar explains that an ideal JNE commissioner will “have the skills and experience to assess candidates for judicial appointment in a thorough, objective and professional manner and to provide timely and well-written reports while maintaining a strict code of confidentiality.”⁹⁵ The JNE aims to consider many aspects of a candidate’s background when selecting commissioners so that the commission reflects the state’s diversity in terms of race, gender, practice area, location, and a number of other factors.⁹⁶ New JNE members undergo training to help make them aware of implicit biases that might influence their opinions of candidates.⁹⁷

Once the governor submits a candidate's name to the JNE, the JNE chair assigns two or three commission members to complete the evaluation process on that individual.⁹⁸ The candidate provides the JNE with approximately 50-75 personal references to whom the JNE sends confidential comment forms for evaluations of the candidate's ability to serve as a member of the judiciary.⁹⁹ The JNE sends similar forms to judicial officers working in the county in which the candidate is being considered to serve, as well as to the Supreme Court and appellate district, as appropriate.¹⁰⁰ For candidates for appellate judgeships, it is common for the JNE to review well over 100 confidential comment forms. For Supreme Court candidates, that number can exceed 300.¹⁰¹ If JNE members receive a confidential comment form that indicates anything negative about the candidate, they will make a "reasonable effort" to reach that specific evaluator and find out details.¹⁰² The investigating commissioners read each review, as well as additional outside information such as criminal records, personal records, or any other documentation relevant to the candidate's ability to serve on the judiciary.¹⁰³

After conducting their investigation and deliberations, the JNE will rate an individual as being exceptionally well qualified (EWQ), well qualified (WQ), qualified (Q), or not qualified (NQ). These ratings are not made public unless the governor appoints an individual who received an NQ rating.¹⁰⁴ "Generally, everyone is qualified [i.e. has a Q rating] until they are not"; only substantial, corroborated criticism from at least two people will cause a candidate's rating to decrease.¹⁰⁵ These criticisms must speak to the candidate's competence as a judicial officer (for example, a criticism of her ethical behavior). The candidate has the opportunity to refute or explain such criticism during a private interview with the commissioners, although the source of the criticism is kept confidential.¹⁰⁶

The State Bar Rules outlining the qualities sought in judicial candidates are illuminating. State Bar Rule 7.25 states:

In evaluating the qualifications of judicial candidates, the commission must consider the extent to which candidates possess the following qualities, the absence of any one of which is not intended to be disqualifying: impartiality, freedom from bias, industry, integrity, honesty, legal experience broadly, professional skills, intellectual capacity, judgment, community respect, commitment to equal justice, judicial temperament, communication skills, and job-related health.

In addition (A) Superior court candidates are expected to have the qualities of decisiveness, oral communication skills, and patience; (B) Court of Appeal candidates are expected to have the qualities of collegiality, writing ability, and scholarship; and (C) Supreme Court candidates are expected to have the qualities of collegiality, writing ability, scholarship, distinction in the profession, and breadth and depth of experience.

An EWQ candidate will be a person who is well regarded in their field, with superior writing skills and likely with publications in their name. Individuals who are only journeymen in their field will likely stay at a rating of Q.

Once the investigating commissioners have determined a rating, that rating and the reasoning behind it are presented to the full JNE Commission at one of their six annual meetings, at which time the entire JNE votes on the official rating the candidate will receive. The JNE Commission then presents an abbreviated version of the report to the governor's office, accompanied by the final rating.

None of the information received by the JNE during the investigation process or during the evaluation process can be released; all such information is kept completely confidential and recommendations are reported only to the governor.¹⁰⁷ There are only two exceptions to this confidentiality requirement. First, if the governor appoints a person rated NQ to a *trial* court, the State Bar may make its rating public after due notice.¹⁰⁸ Second, if the governor appoints a candidate with an NQ rating to the appellate bench, the JNE rating and reasons can be disclosed to the CJA.¹⁰⁹

While ratings of NQ are very rare (in part because the governor's office will perform its own vetting before submitting a candidate's name to the JNE), candidates with problems temperaments or recognized biases have received them.¹¹⁰ As noted in the historical section, a rating of NQ does not prevent the governor's office from nominating the candidate to the CJA; however, it can influence public perception of the candidates who are nominated, as the ratings will eventually become public.¹¹¹ A candidate does have recourse if he receives a rating of NQ; a special body within the JNE evaluates appeals from a challenged NQ rating.¹¹²

Governor Brown has never appointed anyone who received an NQ rating.¹¹³ Based on this information, one could infer—but not conclude with certainty—that the governor values the judgments and determinations made by the JNE. Whether or not the JNE is actually influential, however, clearly depends on the gubernatorial administration. Given that the JNE evaluation process is not binding and follows other unofficial vetting processes, there is no guarantee of consistency.

The Commission on Judicial Appointments

The Commission on Judicial Appointments comprises three members: the chief justice of the Supreme Court, the attorney general, and the senior presiding justice of the Court of Appeals of the the district in which the nominee would sit.¹¹⁴ The third member of the Commission changes when a Supreme Court justice is being considered: in that instance, instead of a senior presiding justice from the relevant district, the third member is the senior-most presiding justice of the Courts of Appeal in the entire state.¹¹⁵

Before the confirmation hearing with the CJA, the attorney general's office does another round of vetting of the candidate. This process consists of gathering information on the candidate through additional interviews and document collection. Given that the attorney general is the only member of the CJA with a full time staff who can be tasked with the process of gathering information, there

is the potential that he or she could exercise inordinate influence on the CJA process.¹¹⁶ One interviewee suggested that a dedicated CJA staff would reduce the risk that the attorney general could hijack the proceedings.¹¹⁷ However, it seems that this part of the process has not been widely politicized, even without safeguards to prevent this from happening.¹¹⁸

CJA hearings are largely formalities; the Commission rarely rejects a nominee.¹¹⁹ The CJA has rejected only a handful of nominees since California adopted its current system, often in politically charged circumstances.¹²⁰ One reason the CJA may rarely decline to confirm a governor's appointment is because, both the JNE and the governor's office has already vetted every candidate it considers.¹²¹

Unlike the JNE, the CJA transparently provides candidates with information.¹²² As part of the CJA process, candidates can see the information gathered regarding their fitness as a member of the judiciary, as well as their overall JNE rating.¹²³

The Electorate

Court of Appeal and Supreme Court justices must be confirmed by the voters in retention elections that coincide with the gubernatorial election immediately following their appointment to the bench, and then every twelve years afterwards, while superior court judges are subject to retention elections every six years.¹²⁴ In a retention election, each individual judge is running unopposed, and the voters are simply presented with a yes-or-no choice whether to keep the judge for an additional term. The question presented to the voters is: "Shall [name of justice] be elected to the office for the term provided by law?"¹²⁵ If 50 percent or more of the voters answer "Yes," the justice is retained for the subsequent term; if not, she will not be retained.¹²⁶ The long terms of appellate justices combined with retention elections was instituted as a compromise between the values of judicial independence and accountability.¹²⁷

There are a number of criticisms of the retention election process.

First, there are exceptions to the standard time frame at both the superior and appellate court levels. For example, if an appellate or justice position is filled in the middle of the twelve year term, the newly appointed justice will face a retention election both in the gubernatorial election immediately following appointment and at the end of the original justice's 12 year term.¹²⁸ Furthermore, if a superior court judge times her retirement correctly, she can force her open seat to go to election rather than allow the governor to fill it in the usual process.¹²⁹

Second, "[i]t is indisputable that, in judicial retention elections, many voters make decisions on how, or if, to vote based on cues drawn from a justice's name as it appears on the ballot."¹³⁰ For example, in four elections in the 1980s and 1990s, "women justices tend[ed] to receive 1.5 percentage-points more ["Yes" votes] than their male counterparts."¹³¹ The ethnicity inferred from the judge's surname plays a role as well. Latino-sounding last names received 1.58 percent fewer votes than their Anglo-Saxon counterparts, while Germanic-sounding last names received 1.5

percent fewer and Jewish-sounding last names received 1.59 percentage points fewer .¹³² It is an “open secret” among members of the judiciary and others involved with the process that a justice’s name can influence the number of “Yes” votes she receives, and that the apparent ethnicity of her name will be a driving force.¹³³

Finally, while California’s judicial elections rarely attract much attention from the media or interest groups, some observers worry that they are vulnerable to outsized influence and politicization.¹³⁴ The 1986 retention election stands as a stark reminder that few structural constraints would stand in the way of a dedicated effort to reshape the bench at the ballot box, especially given the right constellation of interest group funding and political will. Members of the judicial community have noted that Superior Court elections, because they usually feature smaller campaigns and fewer voters, would be especially easy to influence.¹³⁵

Values Assessment

Independence

Judicial independence is generally a highly regarded value in California and the existing system serves it well, with a few important exceptions. At the appellate and Supreme Court level, the long judicial terms followed by retention elections should prevent justices from any excessive allegiance to their appointing governor.¹³⁶ Indeed, retention elections, the primary mechanism by which the political will of the majority might undermine judicial independence, are infrequent and generally low in ballot salience.¹³⁷ Since voters have the opportunity to unseat a judge only once every twelve years, the odds are low that a particular issue will both arise close enough to an election year and arouse enough public sentiment to drive campaign spending and voter turnout.

However, the governor's significant role in the California system may shape gubernatorial candidates' incentives in a way that threatens judicial independence. Instead of promising simply to appoint certain types of judges, a prospective governor might find it advantageous to run against the current bench and urge her supporters not to retain certain judges, increasing her chances of having more vacant seats to fill when she takes office.

The 1986 recall of three left-leaning Supreme Court justices is the state's sole historical example of a major gubernatorial and electoral threat to judicial independence. There is reason to believe that the convergence of factors that raised that election's profile was unique—or at least very rare. But no structural constraints would prevent a concerted and well-funded effort to reshape the appellate bench could succeed even absent the other factors present in 1986. The death penalty, water rights, environmental regulations, and land use all present highly political issues in California which, given the right case and political circumstances, could become similarly challenging.

The 1986 election might have placed other judges on notice that they too could fall victim to popular sentiment, reducing their willingness to independently apply the law on controversial matters, especially the death penalty and criminal law in general. On the eve of the 1986 election, Supreme Court Justice Otto Kaus compared the thought of a retention election when hearing a controversial case to “finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving.”¹³⁸ Some commentators, with this concern in mind, have suggested reforms to more aggressively insulate the California courts—or at least some appellate courts—from political pressure. These proposals include limiting justices to a single fifteen-year term, granting them lifetime appointments subject to legislative confirmation, and introducing a public financing system for judicial elections.¹³⁹

While nothing in our research suggests that the independence of California's Superior Courts is routinely compromised in practice, these judges undoubtedly enjoy fewer *structural* safeguards against political interference with their duties. They stand for election twice as often as their

appellate counterparts, and although the races are nonpartisan, they often run opposed. Multiple interview participants expressed concern that determined interest groups could mount politically-motivated challenges to an unfriendly judge with relative ease,¹⁴⁰ eventually normalizing the kind of massive spending and vitriolic campaign rhetoric that often occur in other states.

In both the appellate and trial-level selection processes, it is possible that informal pre-selection mechanisms exert a weak negative influence on judicial independence. Given the state's large size and the relative complexity of seeking election to the Superior Court, local and regional bar associations and networks of attorneys are especially influential. As such, well-connected lawyers may be more likely to become judges. If participation in these networks either requires or foments a particular jurisprudential worldview, one might worry about an ex ante judicial bias towards or against certain litigants or positions, though a governor conscious of these issues could take steps to avert them by appointing diverse nominees. It is difficult, in any case, to imagine a selection model in which these forces would not be present to some degree.¹⁴¹ Little about the California system suggests that it is particularly vulnerable to them.

One recent and high-profile criminal case in Silicon Valley's Santa Clara County has attracted national attention and could offer a real-world lesson in Superior Court judges' vulnerability to electoral backlash. The controversy arose when Judge Aaron Persky sentenced Brock Turner, a Stanford University undergraduate convicted of sexually assaulting an unconscious victim, to six months in jail. Among his sentencing considerations, Judge Persky observed that Turner had no prior record and that he believed a longer sentence would "have a severe impact on" Turner, whom he did not consider "a danger to others."¹⁴² Victims' rights groups and other activists called for Judge Persky's removal—and, if he refused to resign, a campaign to defeat him in at the ballot box.¹⁴³ They noted that Turner (who is white) received a significantly lighter sentence than most similar defendants, and that his conviction carried a non-mandatory statutory minimum sentence of two years.¹⁴⁴ Others, including the judge's own retention campaign, decry these efforts as an assault on judicial independence and a disproportionate backlash to a single decision.¹⁴⁵ As in the 1986 election, the Turner case taps into broader statewide debates, this time on topics including sexual violence, race, and criminal justice. A state commission has cleared Judge Persky of misconduct, and the judge has transferred to hearing only civil cases at his own request, but his critics have vowed to continue their efforts to remove him from the bench entirely.¹⁴⁶ It remains to be seen in 2017 whether the recall campaign against him will be successful and if it will have any effect on other judges' view of their role and independence.

Accountability and Democratic Legitimacy

The California system contains two primary mechanisms for judicial accountability and democratic legitimacy. First, all Court of Appeal and Supreme Court judges are appointed by the democratically elected governor. The governor, as a political actor, is theoretically accountable to the public for those appointments. If certain judicial decisions, particularly in high profile cases or highly politically salient issues, do not reflect public opinion, the governor may be held accountable.¹⁴⁷ In California, this has rarely proven to be an actively used check on judicial accountability. Rarely, if ever, has a governor been held responsible for the opinions of his judicial appointments, either through second term elections or public perception of his tenure as a governor.¹⁴⁸ The reasons for this are not clear, but likely relate to the state's large size and diversity of the population and to the public's relative lack of interest in the judiciary as compared to other electoral issues. The one significant exception is, of course, the 1986 gubernatorial election and its interplay with the retention election of the three Supreme Court justices. George Deukmejian made judicial reform and the death penalty a centerpiece of his campaign, aligning the retention and gubernatorial elections in a manner that likely increased the salience of both.

The second, more direct opportunity to consider both judicial accountability and democratic legitimacy is through retention elections. In theory, analyzing retention elections would be the best way to evaluate how democratic legitimacy plays a role in the California system. But in practice, retention elections of Court of Appeal and Supreme Court justices have not generally become the focus of significant political activity, with the exception of the contested retention election of 1986. Whether this was an example of accountability and democratic legitimacy playing a proper and positive role is difficult to conclude, particularly given the role of the death penalty as a political hook. In other words, it is unclear whether retention elections actually provide democratic legitimacy to the California judicial selection system or simply allow strong interest groups to remove judges that do not rule in their favor. Judges report that retention elections have little to no impact on their decisions.¹⁴⁹ But many judges and observers were skeptical that judges can ever put the prospect of an election out of their minds completely.¹⁵⁰

Several factors may help explain the low salience of California's judicial elections. It might be that California's current judiciary, being one of the most diverse, reflects the values and priorities of the state, which makes it seem like the population is less concerned, when in reality they are simply in agreement with judicial appointments. This is not necessarily a recipe for success because in the event of a rift between the priorities of the governor and the citizens of California, there is little the citizens can do to express their disagreement before a judge is appointed. Indeed, some of the participants expressed the concern that simply because overt politicking and financing have not played much of a role over the past 30 years does not mean they will not in the future.¹⁵¹ Several participants expressed the concern that as the federal judicial system becomes increasingly political, it is only a matter of time before the same happens in California.¹⁵²

While not a guarantee, retention elections do allow for the possibility that political, financial, and populist sentiments could unseat any judge in California, much like they did in 1986. The challenge now is trying to determine whether those types of political influences are what is meant

by the phrase “democratic legitimacy,” or if that type of politicking has a place in the judicial system. On the one hand, it could be argued that in 1986, the people had their voices heard.¹⁵³ They wanted their Supreme Court to be tougher with regards to the death penalty, and therefore they voted “no” for three justices who had a history of overturning death sentences. On the other hand, it could be said that the reason we value judicial independence so much is to protect judges and justices from this exact type of political pressure and backlash.¹⁵⁴ Judges who felt their job was to decide cases on the merits were removed from the highest court in California because people wanted more death sentences. Therefore, a tension still exists between providing the public an opportunity to voice their frustration and preserving the judicial independence that judges need to do their job impartially, making it difficult to say if California has found the right balance in its judicial selection process.

Quality

Measuring the quality of judges is a difficult task, in part because it is unclear what metrics or proxies would best get at the “quality” of a judge.¹⁵⁵ However, there are a number of attributes that most agree that a desirable candidate should possess, including an appropriate temperament, integrity, a lack of bias, diversity in perspective and experience, and competence to interpret and apply laws.¹⁵⁶

The California system has a number of structures in place that seek to identify and advance candidates with these attributes, and many of the participants interviewed had very positive perceptions about its success in doing so. As discussed at length above, there are multiple informal (governor’s office, JSAC, minority outreach efforts) and formal (JNE, CJA) mechanisms vetting each candidate for judicial office. Indeed, simply looking at the number of structures and people, and amount of time spent on examination and vetting, it would seem that judicial quality is among the highest of priorities for Californians. Although the governor is not required to conform to the outcome of any or all of these vetting structures, there are certain levers triggering public, and therefore political, exposure should the governor push forward with a candidate considered to be unqualified by the JNE Commission, the designated representative of the State Bar and the public.¹⁵⁷ One interviewee said California’s process “absolutely increases quality” because it “ferrets out” any candidates with serious flaws.¹⁵⁸

A body like the JNE, and to a lesser extent one like the CJA, could be a useful tool for other states to adopt in order to further advance the goal of quality in their own judicial selection processes. The JNE gives a thorough, independent evaluation of a candidate’s preparedness to serve as a member of the judiciary, and the CJA acts as a final, more public evaluation of each nominee. However, the JNE has no veto power or ability to prevent unqualified candidates from becoming judges, so its existence is not a guarantee of quality.¹⁵⁹ While the CJA does have a veto power, this power has rarely been used in California. Although the CJA’s veto power is a useful check on the governor’s office, in a state with a high degree of tension between the judiciary and the governor’s office, a body like

the CJA could become overly political, threatening the perception of judicial independence and thus public confidence. Therefore, although the JNE and CJA both serve important functions in the state of California, a mere transplant of the two into another state with a substantially different political climate would not necessarily result in a higher degree of quality in the judiciary.

Public Confidence

Few scientific studies of Californians' view of their court system exist, and none has directly examined the relationship between judicial selection and public confidence.

A wide-reaching 2005 survey reported that 67 percent of Californians rated the courts as “good,” “very good,” or “excellent”—a dramatic improvement from the survey’s prior administration in 1992, when only 46 percent of respondents held such positive views of the court system.¹⁶⁰ A roughly similar proportion of those surveyed believed that “decisions are unbiased” and that “[c]ourts make sure judges follow rules,” though somewhat fewer attorneys than laypeople trusted judges to adhere to proper procedures.¹⁶¹ But overall knowledge of the courts was low: 64 percent of respondents said that they were not familiar at all or only somewhat familiar with the system.¹⁶²

The state’s judicial selection process is likely only one of myriad factors affecting public trust in the judiciary. Only slightly more Californians receive their information about courts from news sources than from televised trials, dramas, and even “television judges like ‘Judge Judy.’”¹⁶³ As a result, public perceptions may be skewed towards especially dramatic or high-profile issues and cases, with little attention paid to how judges come to the bench.

The relative opacity of the selection process, especially for appellate judges, does little to change this. Because so much of California’s judicial selection happens behind closed doors—whether in the governor’s office, among informal bar associations, or at the JNE commission—the public has few opportunities to gain knowledge about, much less evaluate, candidates. The few public steps in the process, like the CJA hearings and retention elections, are usually low-salience formalities. In short, while overall trust in the California courts is relatively high, it is difficult to conclude that the state’s judicial selection process deserves the credit.

Diversity

Even given its underrepresentation of minorities, it cannot be denied that—compared to other states—California has yielded a relatively diverse judicial bench. According to the most recent statistics from the American Bar Association’s National Database on Judicial Diversity in State Courts, California’s judiciary enjoyed one of the highest percentages of racial and ethnic minorities in the country. Trailing behind only Hawaii (67 percent minorities), the District of Columbia (56 percent), and New Mexico (30 percent), California’s percentage of racial and ethnic minority judges was 23 percent.¹⁶⁴

Since 2006, state law has required the JNE to collect and report on its recommendations “by ethnicity, race, gender, gender identity, sexual orientation, areas of legal practice and employment, disability, and veteran status.”¹⁶⁵ Comparing the oldest (2006) with the most recent report (2016) available on the website, one can see the progress across the past decade with regard to minority representation in the judiciary. In fact, even the measurements of minority representation show significant change: while the 2006 report features only ethnicity and gender as categories,¹⁶⁶ the 2016 report also includes veteran’s and disability status, as well as gender identity and sexual orientation.¹⁶⁷

However, evaluating diversity as a transmutable value of the California judicial system would likely not be successful. Simply put, there are no real, translatable structural components in the California judicial selection system to ensure diversity. One might almost call it a happy accident—one precipitated by Governor Jerry Brown. As noted previously, it was Governor Brown who

ushered in a new focus on judicial diversity during his first administration in the 1970s and early ‘80s, making it a priority to appoint more women and people of color to the appellate bench... In the governor’s first three years in office, over 40% of the judges he appointed were women and/or people of color.¹⁶⁸

Brown’s initiative drew criticism from many in the legal community who alleged that he was appointing unqualified judges to fill his diversity quotas.¹⁶⁹ While the administration vigorously contested these charges, it acknowledged that finding minority candidates (especially those who met the constitutional requirement of having been a member of the bar for at least ten years) was relatively more difficult than finding white male lawyers, who were dramatically overrepresented in the legal community.¹⁷⁰ To help identify potential nominees, Brown’s legal appointments staff turned to local bar associations, especially those representing female and non-white lawyers.¹⁷¹

In the minds of some observers, Brown’s approach to appointments had a lasting effect not just on the bench, but on how governors view judicial selection. One member of the legal community noted that since the first Jerry Brown administration, every governor—regardless of political or jurisprudential philosophy—has remained conscious of diversity in making his selections.¹⁷² Others, however, question the impact of this putative focus on diversity, noting that California’s courts remain overwhelmingly white and male, albeit marginally less so than in the 1970s and 1980s.¹⁷³ Professional background, educational credentials, and other non-racial and non-gender characteristics seem to have figured less in both the first Brown administration’s diversity efforts and those of subsequent governors.

Governor Brown’s first administration left behind a functioning legacy of diversity consciousness, but it must be noted that this was a mark of the man, not of the institution. The JNE may feature diversity as one of its criteria for hiring commissioners, but the JNE’s decisions are not binding and the entire commission’s degree of influence can change with every newly elected governor. Without a mechanism to ensure that the JNE’s decisions are mandatory, minorities cannot and

should not safely rely on the commission's structure (even if it may be diversity-oriented) to ensure their representation.

The current governor also instituted a policy of outreach (via the "secret committees" or his staff members) to contact minority bar associations for qualified, diverse nominees—another activity that is not statutorily required, but solely dependent on the governor.¹⁷⁴ As another example, while the Statewide Demographics Reports are a significant collection of data on the diversity of the bench, they are principally prepared for the governor's office. These reports are essentially report cards without any codified flags for improvement. If these reports were incorporated by statute and used as benchmarks for annual goals in increasing minority representation (either by the JNE or the Governor's office), the demographics reports might carry substantial weight and could serve as replicable tools for other states.

Ultimately, the act of encouraging and ensuring diversity on the judicial bench is one that lies—somewhat precariously—in the hands of the Governor of California. A new governor could legally undo much of the diversity in California's current judiciary. Although this theoretical governor might face political ramifications and fail to secure another term, this in turn makes the state of diversity on the judiciary dependent on the California electorate, which leaves no institutional safeguard for minorities and minority representation on the bench.

In addition to traditional diversity classifications based on race, gender, sexual orientation, or disability, two interviewees flagged professional diversity as an important priority. According to one interviewee, JNE members are instructed to not just consider whether candidates have traditional trial experience (a quality that tends to favor white male partners at large firms).¹⁷⁵ JNE commissioners must also look at a candidate's management or transactional experience and other backgrounds that would translate into being an effective judge.¹⁷⁶ Another interviewee emphasized that many plaintiffs' lawyers fail to secure judicial appointments because they lack the bandwidth and support.¹⁷⁷ Non-profit and plaintiffs' attorneys face some ethical issues—such as whether they should be taking on new cases and new clients when they could potentially be leaving—that are less of a concern for attorneys at firms.¹⁷⁸ This problem is exacerbated by the opaque application process since candidates' applications can be in limbo for years.¹⁷⁹

Overall, while California has been successful at promoting diversity, there is no institutional mechanism that ensures this will be a consistent priority from one gubernatorial administration to the next. The lack of such a structural mechanism for ensuring diversity might not be an "issue" for California; as an abstract value, diversity might be important enough to the political culture of California to maintain a high level of priority for all elected officials. However, this would clearly be an obstacle in recommending the California system of judicial selection to other states with different political and cultural climates.

Minority Bar Associations

The State Bar of California is the largest state bar in the United States, with approximately 250,000 members.¹⁸⁰ Distinct from the official structure of the State Bar, there are about 240 voluntary bar services that serve specifically specialty, minority, and women's groups.¹⁸¹ The State Bar "works to create and preserve a dynamic partnership with these local bars and other state and national bars."¹⁸² Of these 240 groups, 66 are listed on the State Bar's website as minority bar associations. These minority bar associations provide support and networking opportunities for minority lawyers and members of the larger legal community across California; they can also serve as advocates for their memberships and causes through communications with the governor's office.¹⁸³

The majority of interviewees considered diversity a deeply ingrained value in the culture of California and its judiciary. The strong presence of minority bar associations in California would also seem to be a positive indication of the state of legal diversity in the state. However, not all interviewees were as optimistic about the state of diversity on the bench, and one cautioned us to take the widespread praise of California's judicial diversity "with a grain of salt."¹⁸⁴

Interviewees cited the Jerry Brown administration as being enormously helpful to minorities in the legal community, noting that his staff members are frequently willing to take meetings and phone calls with minority bar association representatives.¹⁸⁵ The role of minority bar associations is to serve as advocates in a system that does not have regulations to ensure minority representation.¹⁸⁶ Even so, not everyone is overwhelmingly impressed with the state of minority representation on the bench in the state. As an example, although Latinas make up one in five Californians, there has never been a Latin female on the California Supreme Court.¹⁸⁷

Interviewees also commented on the sometimes deceptive nature of the statistics: the numbers (such as those in the State Demographics Report) may demonstrate an increase over time in diversity on the bench in California, the statistics are not sufficiently praiseworthy: "In a 70 percent minority state, it is outrageous that this is what the numbers look like."¹⁸⁸ While comparatively California is a progressive state, there is still much left to be desired in terms of actual representation; minorities are not proportionately represented across the board on the bench. To take a specific minority group as an example: as of the 2016 Statewide Demographics Report, 9.9 percent of all judges in California were Hispanic or Latino.¹⁸⁹ However, approximately 40 percent of the population of California is Hispanic or Latino.¹⁹⁰ Our team reached out to over a dozen representatives from minority bar associations but only received responses from three.

Conclusions

The individuals who have shaped judicial history in California (for good and for ill) were doubtless products of their time, but also of a state far larger, more diverse, and more ideologically polarized than many others. Likewise, California's judicial selection system may interact with other aspects of its constitutional and political structure in distinctive ways. The relative ease and frequency of direct democracy (through ballot initiatives) in California, for instance, can place its electorate in close dialogue with the judiciary, as during the struggle between the Supreme Court and the voters over the death penalty in the 1980s. At the same time, the state's size may make it difficult to amass the funds and political will for a non-retention campaign absent a hot-button political issue (at least where statewide elections for the Supreme Court are concerned).

Nonetheless, other jurisdictions might want to consider certain aspects of the California system. The JNE commission, while it lacks any binding power, seems to have functioned well both in its current form and in its more informal pre-1979 incarnation. It seems possible that JNE reports exert a moderating influence on governors' nominating practices, incentivizing them to choose experienced and high-quality nominees to avoid a spectacle like the Janice Rogers Brown episode. The same may not be true for the Commission on Judicial Appointments, which appears to have functioned either as a rubberstamp (as it does today) or a political cudgel (as in the hands of previous governors). It is possible that the CJA's relative transparency—unique among the institutions involved in California's selection process—could enhance the bench's democratic legitimacy in theory, but little in the historical record suggests that it actually does so.

1 See, e.g., KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 7-11 (2015), available at <https://www.brennancenter.org/publication/how-judicial-elections-impact-criminal-cases>.

2 This paper will contribute to the Brennan Center's national project on judicial selection, which includes several white papers, see, e.g., ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, RETHINKING JUDICIAL SELECTION IN STATE COURTS (2016).

3 CAL. CONST. art. VI, § 16.

4 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016); Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016); Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 16, 2016).

5 CAL. GOV'T CODE § 10211.5 (West 2016).

6 CAL. CONST. art. VI, §§ 7, 16(d)(2).

7 CAL. GOV'T CODE § 12011.5 (West 2016); Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 16, 2016).

8 Very occasionally, the governor's office may reach out to high-level prospective candidates who have not applied for a judgeship. Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 16, 2016).

9 CAL. GOV. CODE § 12011.5 (West 2016).

10 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 4, 2016).

11 *Id.*

12 *Id.*

13 See Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a*

Commission-Based Selection System, 34 FORDHAM URB. L. J. 125, 146 (2007) (“[M]any commissions have lawyer members that gain their seats . . . through nomination by special interest groups. The composition of nominating commissions thus raises some serious concerns with regard to legitimacy.”); Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 796-97 (2004).

¹⁴ Malcolm Smith, *The California Method of Selecting Judges*, 3 STAN. L. REV. 571, 582 (1951).

¹⁵ *Id.* at 583.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 586.

¹⁹ VOTER INFORMATION GUIDE FOR 1934 GENERAL ELECTION 8 (1934).

²⁰ *Id.*

²¹ CAL. CONST. art. VI § 16(d).

²² EDWARD G. WHITE, EARL WARREN: A PUBLIC LIFE 62 (1982).

²³ See DAVID MARGOLICK, THE NOMINATION OF MAX RADIN: PEOPLE, POLITICS, AND THE CALIFORNIA SUPREME COURT 7-11, 18-22 (recounting Radin’s role in the sensational “Modesto dynamiters” trial and an investigation into a controversial state agency).

²⁴ *Id.* at 24; WHITE, *supra* note 24, at 66. *But see* Smith, *supra* note 15, at 593 (“Governor Warren later appointed Professor Radin to a high state commission, and it is certain that no animosity existed in either direction.”)

²⁵ MARGOLICK, *supra* note 24, at 7-11, 18, 28.

²⁶ *Id.* at 32-33.

²⁷ WHITE, *supra* note 24, at 63.

²⁸ *Max Radin Rejected as State Justice*, L.A. TIMES, Jul. 23, 1940.

²⁹ Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Nov. 1, 2016).

³⁰ MARGOLICK, *supra* note 25, at 35.

³¹ KEVIN STARR, EMBATTLED DREAMS: CALIFORNIA IN WAR AND PEACE, 1940-1950 256 (2003).

³² *Traynor Named to High Bench*, L.A. TIMES, Aug. 1, 1940.

³³ Harry N. Schreiber, *The Liberal Court: Ascendancy and Crisis*, in CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER: THE HISTORY OF THE CALIFORNIA SUPREME COURT 327, 345-47 (Harry N. Schreiber ed., 2016)

³⁴ *Id.* at 345.

³⁵ John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 83, 86-87 (1986).

³⁶ Schreiber, *supra* note 35, at 345.

³⁷ *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

³⁸ Death Penalty in the California Constitution, Cal. Ballot Initiative Proposition 17 (approved Nov. 7, 1972) (codified at CAL. CONST. art. 1, § 27).

³⁹ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁴⁰ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁴¹ Death Penalty Act, Cal. Ballot Initiative Proposition 7 (approved Nov. 7, 1978).

⁴² Culver & Wold, *supra* note 37, at 86.

⁴³ Bud Lembke, *Democrats, Students, Minorities Vote Low*, L.A. TIMES, Dec. 11, 1978.

⁴⁴ Culver & Wold, *supra* note 37, at 84,

⁴⁵ Schreiber, *supra* note 35, at 483; *see also* LOUIS WILLIAM BARNETT ET AL., JERRY BROWN’S JUDICIAL LEGACY: THE DESTRUCTION OF THE CALIFORNIA JUDICIARY 79, 91-93 (1982) (denouncing Bird as Brown’s “former campaign chauffeur” and “a person with no experience” and accusing her of political manipulation of the courts).

⁴⁶ Schreiber, *supra* note 35, at 483.

⁴⁷ The California Poll (Apr. 3, 1985) (83 percent support for death penalty); Dan Morain, *California Debate Agony Over Resuming Executions*, L.A. TIMES, Aug. 18, 1985 (75 percent support for death penalty).

⁴⁸ John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 355 (1986).

⁴⁹ Schreiber, *supra* note 35, at 480-81.

⁵⁰ Wold & Culver, *supra* note 50, at 350.

⁵¹ *Id.* at 348-49.

⁵² *Id.* at 350.

⁵³ *Id.*; Schreiber, *supra* note 35, at 483.

⁵⁴ Wold & Culver, *supra* note 50, at 350.

55 Bob Egelko, *The Lucas Years, 1987-1996*, in CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER: THE HISTORY OF THE CALIFORNIA SUPREME COURT 515, 515-16 (Harry N. Schreiber ed. 2016).

56 Thomas D. Elias, *Brown's Chance to Make Over High Court*, SONOMA INDEX-TRIB., Jul. 8, 2014 (comparing Jerry Brown's appointments in 2010s with appointments in 1970s); Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Nov. 1, 2016) (expressing doubt as to any effect on judicial independence); Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016) (same); Interview by Elena Mercado & Reece Trevor with participant (Oct. 21, 2016) (positing that 1986 election could have lasting influence, at least subconsciously, on judges).

57 Interview by Elena Mercado & Reece Trevor with participant (Oct. 21, 2016).

58 Maura Dolan, *Wilson Picks Appellate Judge for High Court*, L.A. TIMES, Mar. 29, 1996.

59 *Id.*

60 *Id.*

61 Maura Dolan, *Bar Faults High Court Nominee in Key Areas*, L.A. TIMES, Apr. 26, 1996.

62 Maura Dolan, *Court Nominee's Writings Expressed Strong Views*, L.A. TIMES, May 1, 1996.

63 *Id.*; see also *Justice Brown Confirmed*, SACRAMENTO OBSERVER, May 8, 1996; Maura Dolan, *Bar Faults High Court Nominee in Key Areas*, L.A. TIMES, Apr. 26, 1996.

64 *Justice Brown Confirmed*, SACRAMENTO OBSERVER, May 8, 1996.

65 Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Nov. 1, 2016); Interview by Elena Mercado & Reece Trevor with participant (Oct. 21, 2016).

66 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 16, 2016).

67 This part of the process is not publicly transparent. Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016); Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant [Groban] (Nov. 16, 2016).

68 Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016); Interview by Elena Mercado & Reece Trevor with participant (Oct. 21, 2016).

69 *Chief Justice Tani Cantil-Sakauye*, CALIFORNIA COURTS, <http://www.courts.ca.gov/2664.htm>; *Jim Humes*, CALIFORNIA COURTS <http://www.courts.ca.gov/20495.htm>; *Peter J. Siggins*, CALIFORNIA COURTS, <http://www.courts.ca.gov/7660.htm>; *J. Anthony Kline*, CALIFORNIA COURTS, <http://www.courts.ca.gov/7654.htm>; *Louis Mauro*, CALIFORNIA COURTS, <http://www.courts.ca.gov/5189.htm>; *Andrea Lynn Hoch*, CALIFORNIA COURTS, <http://www.courts.ca.gov/13423.htm>.

70 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016); Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016).

71 *Id.* See also JUDICIAL BRANCH: REPORT AND RECOMMENDATIONS FROM 2011 SUMMIT ON JUDICIAL DIVERSITY, REPORT TO THE JUDICIAL COUNCIL at 15 (Oct. 2, 2012), available at <http://www.courts.ca.gov/documents/jc-20121026-item1.pdf>.

72 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 16, 2016).

73 *Id.*

74 Interview by Alexa Graumlich with participant (Feb. 15, 2017).

75 *Id.*

76 *Id.*

77 *Id.*

78 JUDICIAL BRANCH: REPORT AND RECOMMENDATIONS FROM 2011 SUMMIT ON JUDICIAL DIVERSITY, REPORT TO THE JUDICIAL COUNCIL 15 (Oct. 2, 2012), available at <http://www.courts.ca.gov/documents/jc-20121026-item1.pdf>.

79 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016); Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Nov. 1, 2016).

80 *Id.*

81 Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Nov. 1, 2016).

82 Interview by Elena Mercado with participant (Nov. 20, 2016).

83 Interview by Alexa Graumlich with participant (Feb. 15, 2017).

84 Interview by Elena Mercado with participant (Nov. 20, 2016).

85 Interview by Juan Pablo Perez-Sangimino & Lucy Ricca with participant (Oct. 19, 2016).

86 CAL. CONST. art. VI, § 7; CAL. GOV'T CODE § 12011.5 (West 2016).

87 CAL. GOV'T CODE § 12011.5 (West 2016)

88 *Id.*

89 *Id.*

90 CAL. CONST. art. VI, § 16.

91 *Commission on Judicial Nominees Evaluation*, STATE BAR OF CAL., <http://cc.calbar.ca.gov/CommitteesCommissions/OtherEntityAppointments/JudicialNomineesEvaluation.aspx> (last visited Apr. 6, 2017) <http://cc.calbar.ca.gov/CommitteesCommissions/OtherEntityAppointments/JudicialNomineesEvaluation.aspx> (last visited Apr. 6, 2017).

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *See* Cal. State Bar Rule 7.2(C), available at <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=49Aq1IKMz54%3d&tabid=1230> (stating that membership of the JNE “is to consist of a variety of persons of different backgrounds, abilities, interests, and opinions who are broadly representative of the ethnic, sexual, and racial diversity of the population of California.”) *See also* Interview by Elena Mercado & Christen Philips with participant (Nov. 1, 2016).

97 Interview by Elena Mercado & Christen Philips with participant (Nov. 1, 2016).

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 Interview by Alexa Graumlich with participant (Feb. 15, 2017).

103 It should be noted that the State Bar Rules require JNE commissioners to disclose to the chair any potential conflicts of interest raised by a relationship (business, personal, familial, etc.) with any candidate. The chair then determines whether the disclosed conflict presents actual influence or impartiality or the appearance thereof. Cal. State Bar Rules 7.23 and 7.24, available at <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=49Aq1IKMz54%3d&tabid=1230> (last visited Apr. 11, 2017).

104 California Bar Journal, *Board approves stricter JNE rules* (Dec. 2010) <http://www.calbarjournal.com/December2010/TopHeadlines/TH5.aspx>.

105 *Id.*

106 *Id.*

107 Cal. State Bar Rule 7.20(A) states that “[d]isclosure is prohibited even of the name of a candidate or the fact that the commission is considering a candidate.” *See also* The State Bar of California, *Judicial Nominees Evaluation Frequently Asked Questions*, <http://www.calbar.ca.gov/AboutUs/JudicialNomineesEvaluation/FAQ.aspx> (last visited Apr. 5, 2017).

108 CAL. GOV’T CODE § 12011.5(g) (West 2016).

109 CAL. GOV’T CODE § 12011.5(h) (West 2016).

110 Interview by Elena Mercado & Christen Philips with participant (Nov. 1, 2016).

111 *Id.*

112 *Id.*

113 *Id.*

114 “Commission on Judicial Appointments,” CALIFORNIA COURTS, <http://www.courts.ca.gov/5367.htm> (last visited Apr. 11, 2017).

115 *Id.*

116 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 4, 2016).

117 Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016).

118 Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016); Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016).

119 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016).

120 *See generally* Edwin Chen, *4 Judges Blocked by Deukmejian*, Dec. 30, 1982 (recounting rejection of four Jerry Brown appointees in 1982); David Margolick, *THE NOMINATION OF MAX RADIN: PEOPLE, POLITICS, AND THE CALIFORNIA SUPREME COURT (1977)* (recounting Radin’s nomination and rejection).

121 *Id.*

122 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 4, 2016).

123 *Id.*

124 CAL. CONST. art. VI, § 16.

125 Shaun Hoting, *The Crocodile in the Bathtub: An Examination of California's System For Judicial Selection*, 4 AM. UNIV. CRIM. L. BRIEF 1, 2-15 (2009).

126 *Id.*

127 Gerald F. Uelmen, *California Judicial Retention Elections*, 28 SANTA CLARA L. REV. 333, 333 (1988).

128 Shaun Hoting, *The Crocodile in the Bathtub: An Examination of California's System For Judicial Selection*, 4 AM. UNIV. CRIM. L. BRIEF 1, 2-15 (2009).

129 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 16, 2016).

130 Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J. L. & POL. 643, 651 (2002).

131 *Id.* at 656.

132 *Id.* at 659-662.

133 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 4, 2016).

134 *See, e.g.*, Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Nov. 1, 2016).

135 *Id.*

136 The California Legislature has no role that we could determine in the current system.

137 Matthew J. Streb et al., *Voter Rolloff in a Low-Information Context: Evidence from Intermediate Appellate Court Elections*, 37 AM. POL. RES. 644, 649 (2009) (finding that average “voter rolloff,” a salience proxy that reflects the proportion of voters who cast a ballot but did not vote for or against a judicial candidate, was 39.89 percent in court of appeal retention elections from 2000 to 2007).

138 Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Polarization*, 72 NOTRE DAME L. REV. 1133, 1133 (2014).

139 Ronald M. George, CHIEF: THE QUEST FOR JUSTICE IN CALIFORNIA 742-43 (2013); Joseph Grodin, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 183-85 (1989).

140 Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Nov. 1, 2016); Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016).

141 *See* Grodin, *supra* note 130, at 183 (“[I]t is impossible (and in my view undesirable) to exclude politics from the selection process altogether.”).

142 Sam Levin, *Ex-Stanford Swimmer Gets Six Months in Jail and Probation for Sexual Assault*, THE GUARDIAN, Jun. 2, 2016.

143 *See, e.g.*, Michele Dauber, *Judge Should be Recalled for His Role in the Stanford Sexual Assault Case*, WASH. POST, Jun. 21, 2016 (calling for Persky’s removal in election); *Frequently Asked Questions*, RECALL JUDGE AARON PERSKY, <http://www.recallaaronpersky.com/factsheet> (last visited Dec. 8, 2016); Maria Ruiz, *Remove Judge Aaron Persky from the Bench for Decision in Brock Turner Rape Case*, CHANGE.ORG, <https://www.change.org/p/california-state-house-impeach-judge-aaron-persky> (last visited Dec. 8, 2016) (petition to California legislators with over 1.3 million signatures calling for “impeachment hearings”). Note that Michele Dauber, one of the leading advocates for Persky’s ouster, is a member of the Stanford Law School faculty. Other members of the Stanford Law community have also made public statements about the case, some opposing the recall efforts. *See, e.g.*, Tracey Kaplan, *Leading Law School Professors Issue Letter Opposing Judge’s Recall*, MERCURY NEWS, Jul. 27, 2016 (letter opposing recall signed by several Stanford Law faculty). Neither Professor Dauber nor any other advocate on either side of the debate was involved with this project; this paper takes no position on either Brock Turner’s sentence or the efforts to remove Judge Persky.

144 *Id.*

145 Veronica Rocha, *Recall of Judge in Stanford Rape Case Poses “Threat to Judicial Independence,” Lawyers Say*, L.A. TIMES, Jun. 16, 2016 (summarizing Turner case and arguments for and against Persky’s recall); *About Judicial Independence*, RETAIN JUDGE PERSKY, <http://www.retainjudgepersky.com/about-judicial-independence-1/> (last visited Dec. 8, 2016) (compiling as part of retention campaign links to materials condemning attacks on judicial independence).

146 COMMISSION ON JUD. PERFORMANCE, COMMISSION ON JUDICIAL PERFORMANCE CLOSES INVESTIGATION OF JUDGE AARON PERSKY (Dec. 19, 2016), *available at* <https://assets.documentcloud.org/documents/3242542/Persky-Explanatory-Statement-12-19-16.pdf>; Christine Hauser, *Judge in Stanford Sexual Assault Trial Will No Longer Hear Criminal Cases*, N.Y. TIMES, Aug. 26, 2016.

147 Interview by Juan Pablo Perez-Sangimino & Lucy Ricca with participant (Oct. 19, 2016).

148 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016).

149 Interview by Christen Philips & Lucy Ricca with participant (Dec. 7, 2016); Shaun Hoting, *The Crocodile in the Bathtub: An Examination of California's System for Judicial Selection*, 4 AM. UNIV. CRIM. L. BRIEF 1, 2-15 (2009).

150 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016); Interview by Juan Pablo Perez-Sangimino & Lucy Ricca with participant (Oct. 19, 2016); Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016); Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 4, 2016); Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 16, 2016). *See also* Shaun Hoting, *The Crocodile in the Bathtub: An Examination of California's System for Judicial Selection*, 4 AM. UNIV. CRIM. L. BRIEF 1, 2-15 (2009).

151 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 10, 2016); Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 16, 2016); Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Nov. 1, 2016); Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016).

152 Interview by Juan Pablo Perez-Sangimino & Lucy Ricca with participant (Oct. 19, 2016); Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Nov. 1, 2016); Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016).

153 Interview by Juan Pablo Perez-Sangimino & Lucy Ricca with participant [Grodin] (Oct. 19, 2016).

154 *Id.*

155 BANNON, *supra* note 2, at 22.

156 *Id.*

157 For example, the case of Janice Rogers Brown illustrates the political cost of nominating a candidate who has received a rating of NQ. See the section on history for more details.

158 Interview by Alexa Graumlich with participant (Feb. 15, 2017).

159 *See* Frank Mickadeit, *How We Pick Judges in California Really Stinks*, ORANGE CTY. REG. (Aug. 21, 2013) (decrying as “problematic” that “only check on the governor is a political one”).

160 DAVID B. ROTTMAN, JUD. COUNCIL OF CAL., TRUST & CONFIDENCE IN THE CALIFORNIA COURTS 8 (2005).

161 *Id.* at 9.

162 *Id.* at 11.

163 *Id.*

165 CAL. BAR ASS'N, *Judicial Nominees Evaluation 2015 Statewide Demographic Report*, <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=k-hgLYZdb9Y%3d&tabid=224&mid=1534> (last visited Apr. 13, 2017).

166 CAL. BAR ASS'N, *Commission on Judicial Nominees Evaluation 2006 Statewide Demographic Report*, <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=E9llfu672Uo%3d&tabid=3552> (last visited Apr. 13, 2017).

167 JUDICIAL COUNCIL OF CAL., *Demographic Data Provided by Judges and Justices Relative to Gender, Race/Ethnicity, Gender Identity/Sexual Orientation*, Cal. Courts, available at <http://www.courts.ca.gov/documents/2016-Demographic-Report.pdf> (Dec. 31, 2015).

168 American Bar Association Standing Committee on Judicial Independence, available at <https://apps.americanbar.org/abanet/jd/display/national.cfm> (June 2010).

169 *Id.*

170 *Id.*; Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016).

171 *Id.*

172 Interview by Juan Pablo Perez-Sangimino & Reece Trevor with participant (Oct. 31, 2016).

173 Interview by Elena Mercado with participant (Nov. 23, 2016) (stating that exclusion of Latinos from judicial appointments amounts to “judicial apartheid” and is not attributable to a lack of qualified candidates); *See also* Judicial Council of California, *Demographic Data Provided by Judges and Justices Relative to Gender, Race/Ethnicity, Gender Identity/Sexual Orientation*, CAL. COURTS, available at <http://www.courts.ca.gov/documents/2016-Demographic-Report.pdf> (Dec. 31, 2015) (finding that 67.1 percent of judges identify as male and 69.1 percent of judges identify as white).

174 Interview by Juan Pablo Perez-Sangimino & Christen Philips with participant (Nov. 4, 2016).

175 Interview by Alexa Graumlich with participant (Feb. 15, 2017).

176 *Id.*

177 Interview by Alexa Graumlich & Lucy Ricca with participant (Mar. 2, 2017).

178 *Id.*

179 *Id.*

180 JUDICIAL COUNCIL OF CAL., *Fact Sheet: California Judicial Branch*, available at http://www.courts.ca.gov/documents/Calif_Judicial_Branch.pdf (Jan. 2015).

181 STATE BAR OF CAL., *Voluntary Bar Services*, <http://www.calbar.ca.gov/AboutUs/BarRelationsOutreach.aspx> (last visited Apr. 13, 2017).

182 *Id.*

183 Interview by Elena Mercado with participant (Nov. 23, 2016).

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 JUDICIAL COUNCIL OF CAL., *Demographic Data Provided by Judges and Justices Relative to Gender, Race/Ethnicity, Gender Identity/Sexual Orientation*, CAL. COURTS, available at <http://www.courts.ca.gov/documents/2016-Demographic-Report.pdf> (Dec. 31, 2015).

190 Javier Panzar, *It's official: Latinos now outnumber whites in California*, L.A. TIMES (July 8, 2015), <http://www.latimes.com/local/california/la-me-census-latinos-20150708-story.html>