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Judicial Selection and Tenure: A Brief History of Judicial Reform in the State of California

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INTRODUCTION

The importance of judges to the quality of our judiciary is self-evident. What has not been clear in the past, however, is how best to select and retain capable, independent judges. While numerous alternatives of judicial selection have been tried in the United States, they all derive from two fundamental theories of selection: popular election or appointment.

The Federal system of appointing judges has never been substantially reformed. When the system has on occasion broken down it has been attributed by some to insufficient insulation from political forces.[1] The appointment of mediocre judges on the basis of their political credentials rather than their judicial competence has initiated periodic challenges to the method of selecting federal judges.[2] These challenges, however, never succeeded in altering the process as originally designed by the Founding Fathers.

To a far greater extent, state judiciaries have been the target of reformers since the 1820's, and unlike the attacks aimed at the federal system, these reform movements proved highly successful in changing the method of selecting judges. During the popular upsurge of the Jacksonian era many states rewrote their constitutions,

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[1]Glenn Winters, ed., "Judicial Selection and Tenure." Selected Readings: Judicial Selection and Tenure, (Chicago: American Judicature Society, 1967), 29.

[2]Larry Berkson and Susan Carbon, The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates (Chicago: American Judicature Society, 1980), chapter 2, taken from Larry Berkson, et al, Judicial Selection in the United States: A Compendium of Provisions (Chicago: American Judicature Society, 1980), 8.

replacing the appointive method by the popular election of judges. Considered more democratic because judges were fully accountable and therefore less susceptible to the corruption of entrenched privilege, this process spread across the nation until, by the time of the Civil War, a majority of states had popularly elected judiciaries. All states entering the Union after 1846 included provisions for the election of all or some of its judges.[1] California's judicial system was a product of this democratizing trend, reflected by the inclusion of an elected judiciary in both its original Constitution of 1849 and a revised document in 1879.

After experimenting with the electoral system for several decades, however, voters of California became dissatisfied and amended their constitution in 1934. Using the recently adopted tool of the initiative, Californians substituted the appointive, limited tenure system of selection for the electoral process. They also retained a measure of public accountability, however, through the inclusion of an innovative technique, now known as the retention election.

The 1934 constitutional amendment marked a radical reversal in form to the earlier method of appointment that had been almost universally abandoned by state governments in the early half of the nineteenth century. How and why this change occurred is the topic of this paper. After a brief examination of the history of judicial selection and tenure in the United States, the essay explores the progressive movement in California, with special attention paid to its

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[1] James Willard Hurst, The Growth of American Law (Boston: Little, Brown and Company, 1950), 122.

effects on the evolution of judicial reform in the state. An additional section will examine the legal profession's role in the reform movement. Finally, the paper turns to the contest between the State Bar Association and the California State Chamber of Commerce in effecting the 1934 reform.

Due to the professional interest and expertise of the legal profession, one might expect it to have played a dominant role in the attempt to alter the procedure for selecting and retaining judges. In California, however, a lay organization, the State Chamber of Commerce, took the lead and successfully coordinated the passage of a comprehensive judicial reform package which included a measure for the selection and tenure of California's supreme court and appellate court justices. This measure, partially derived from models conceived and advanced by legal scholars, differed in crucial respects from a similar plan presented by the State Bar Association of California in that same election. Despite subtle--though highly important--differences between the two, the voters of California approved the chamber's plan for judicial selection over that of the state bar, due primarily to the more diligent campaign efforts of the chamber. In light of the ouster of three California supreme court justices in 1984 and subsequent concern over the independence of our state judiciary, an examination into the origins of the present system of selecting and retaining supreme court and appellate court justices is highly pertinent.

PART I: THE SELECTION OF JUDGES IN AMERICAN HISTORY

Prior to 1700 judges in England were appointed by the king and were subject to arbitrary removal upon his whim. This form of tenure is referred to as "at pleasure," and it remained part of English practice until the Revolution of 1688. The Glorious Revolution, as it later came to be known, engendered a series of reforms aimed at the enhancement of parliamentary power at the expense of the king. Among the measures eventually taken was the Act of Settlement (1700), which established the principle of judicial tenure "during good behavior," essentially meaning life tenure. Under this new concept of holding office, judges could only be removed by joint action of both houses of Parliament.[1] This tenure practice was bolstered by further reform, enacted in 1761, which provided for continued tenure of the judiciary following the monarch's death.[2] The effect of these measures was the steady growth of an independent judiciary in England.

Judicial reform in the mother country did not, however, extend to the thirteen colonies. The king continued the practice of appointing colonial judges, who not only served "at pleasure" but collected their salaries from the monarch as well.[3] The result in the eyes of colonists was a lack of judicial independence, and it became a

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[1] Marvin Comisky and Philip C. Patterson. The Judiciary--Selection, Compensation, Ethics, and Discipline (New York: Quorum books, 1987) 3.

[2] "Variations on a Theme--Selection and Tenure of Judges", 36 Southern California Law Review 4, Vols. 13-14 (1962). Cited from Comisky and Patterson, 3.

[3] Susan B. Carbon and Larry C. Berkson. Judicial Retention Elections in the United States (Chicago: American Judicature Society, 1980) 1.

source of discontent within the budding revolutionary movement. Naturally there were many other important issues involved in the deterioration of relations with England, but the issue of judicial independence became a crucial factor in its own right, particularly when Parliament expanded the power of its vice-admiralty courts in 1764 and began to use them with greater frequency.

Clearly the colonists were preoccupied with the establishment of an independent judiciary, and equally clear was the perception that the greatest danger to the attainment of that goal was a powerful executive. Many colonists believed they could solve this problem and guarantee judicial independence by granting life tenure for judges and separating the executive from the selection process. It was widely believed at the time that by detaching the executive from the selection process a better, and certainly more independent judiciary would result.

This attitude is best understood in the context of the American Revolution. While it was in fact the activities of a parliament dominated by mercantilist interests that strained relations with the colonies, many colonists believed that it was the king himself who was threatening their relatively autonomous status. Another factor in the colonists' thinking was their experience with the royal governors. Many provincial officials received their appointment from and served at the pleasure of the governors, who were in turn royal appointees. It was in part this perception of their experiences with the English king and the royal governors that explains colonists' attitude toward executive power, and their determination to create

an independent judiciary powerful enough to stand alone and act as a check against potential abuse of power by the executive.

That the colonists had a specific target in mind is evidenced by the method of selecting judges adopted by the original thirteen states. Eight of the thirteen provided for legislative appointment with life tenure, i.e. "during good behavior." The other five states allowed for executive appointment of the judiciary, but diluted his authority by requiring him to either consult with or gain the approbation of the governor's council for all judicial appointments.[1] Some governors were themselves legislative appointments.[2] Further, with life tenure, the only method of removing a judge was by impeachment, a process carried out by the legislature.

It should be repeated, however, that the colonial leaders' objective was simply to remove the governor from the selection process; judicial selection by appointment remained the preferred method by nearly universal consensus. The appointment of judges, though not in the hands of the governor, would still be reserved for a small, elite group of legislators. Even the Antifederalists, whose overriding concern was that the national government should not be too powerful--perhaps as many as two-thirds of them opposed plans for a federal supreme court--never raised the argument that the proposed court was undemocratic because of its lack of public accountability. Antifederalists opposed the Supreme Court because they feared it represented a dangerous consolidation of power in the

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[1]Larry Berkson et al. Judicial Selection in the United States: A Compendium of Provisions (Chicago: American Judicature Society, 1981), 3.

[2]James Willard Hurst. The Growth of American Law-The Law Makers (Boston: Little, Brown and Company, 1950) 122.

national government, not because its judges were appointed rather than elected.[1]

Appointment of the Federal judiciary reflected the Founding Fathers general lack of faith in the electorate. The careful reader of the Constitution will notice that the president himself is chosen by an electoral college, not the people at large. Senators were not directly elected by the people until this century. Finally, property requirements for voting restricted the selection of representatives to a small portion of the population. Likewise, the Founding Fathers considered the electorate incapable of properly assessing a judge's qualifications for the purposes of making judicial selections and subsequently took steps to exclude them from the process. The Federal Constitution of 1787 empowered the executive to make all judicial appointments at the Federal level, with the Senate given the authority to accept or reject the president's nomination. Following suit, all thirteen of the original states established appointive systems of one form or another for their judiciaries. The idea of judicial selection by popular election, accompanied by limited tenure, simply was not yet conceived as a possibility.

In light of this deep concern for judicial independence and the deep commitment to the appointive system shared by most in the early republic, it is difficult to understand the sudden and nearly complete transformation of the state judiciaries from appointive systems with life tenure to elective ones with limited tenure in the 1830's. It seems even more odd when one considers the fact that the

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[1] Jackson Turner Main. The Antifederalists: Critics of the Constitution 1781-1788 (New York: W. W. Norton & Company, 1960) 13-19, 155-9.

Federal system was unaffected entirely by the forces of reform. Historians have not adequately explained how and why the Federal system remained immune to these democratic impulses, but they have done better accounting for the move to elective systems in the states.

The changes that the state judiciaries underwent are best understood when viewed within the context of Jacksonian Democracy. The establishment of universal white male suffrage, along with other democratizing reforms, characterizes the era as one that extended the scope of popular control. Government had come to appear to many as distant and unresponsive. These perceptions sparked demands for reform, and it was widely believed that more democracy could cure all of the political system's ills. The popular election of judges for short terms seemed a particularly promising method for curing a pressing governmental problem.

Although the beginnings of the transformation can be traced back a little further, the movement for elected state judiciaries began in earnest during the era of Jacksonian Democracy, circa 1820's and 1830's. Over the next several years the attack on appointed judiciaries as the protectors of wealthy property owners gained momentum. Mississippi became the first state to select all of its judges by popular election in 1832.[1] Increasingly the reasons for change were assumed rather than debated. In New York, which converted to an elected judiciary in 1846...

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[1]Glenn R. Winters, ed. Selected Readings--Judicial Selection and Tenure (Chicago: American Judicature Society, 1967) 30.

> The debates on an elective judiciary were brief; there was apparently little need to discuss the abuses of the appointive system, or its failures, or why election would be better. A few delegates argued cogently for the retention of the old system, and indeed forecast the possible evils if the judiciary fell under political domination....But the spirit of reform carried the day.[1]

New York's action touched off a wave of conversions to the elective-limited tenure system. Every state entering the Union after 1846, including California, stipulated the election of all or some of its judges. By the outbreak of the Civil War twenty-four out of thirty-four states had adopted the elective system.[2] The typical approach was to combine limited tenure with the elective system, as opposed to life tenure, which remained a feature of appointive systems.

This trend continued until the late nineteenth century when dissatisfaction with the state judiciaries began to surface once again. A new corrupting force seemed to be threatening judicial independence. The culprit was the political party, widely perceived to be in control of the electoral process, which, as a result of earlier reforms, now included the selection of the judiciary. The stakes were sufficiently high to attract the attention of a wide array of citizens, professional groups, and reformers, who scrambled to find a new solution to an old, persisting problem.

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[1]Russell Niles,"The Popular Election of Judges in Historical Perspective," The Record of the Bar of the City of New York. (November, 1966), 523. Cited from Berkson, 3.

[2]Hurst, 123; Carbon, 1.

Part II:Rising Dissatisfaction With Elected Judges

Almost from the beginning of the experiment with elective judiciaries, results did not fulfill the expectations of its supporters. As early as 1853, delegates to the Massachusetts Constitutional Convention, pointing to the example of New York, refused to adopt a provision which would have replaced their appointive judiciary with an elective one.[1] Opponents of the change in Massachusetts argued that the judiciary in New York had become mired in politics. They were not alone in this assessment, as indicated by the subsequent debate which arose in New York over the merits of their new method of selecting judges. By 1873, there was widespread support in New York to revert back to the appointive system.[2]

The principal concern at the time was the extent to which political "machines" had come to dominate the electoral process. Unlike the somewhat vague "privileged groups" which Jacksonian Democrats had earlier bemoaned, late nineteenth century special interests had taken highly visible, tangible form. Political machines and large corporations had effectively taken over control of the political process around the nation, especially at the local and state level. One factor that was particularly upsetting to reformers was that control over the electoral process now meant control over judicial selection. This development, along with a variety of other

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[1]Larry Berkson, Scott Beller, and Michele Grimaldi. Judicial Elections in the United States: A Compendium of Provisions. (Chicago: American Judicature Society, 1981) p 4.

[2]Ibid.

issues, provoked a period a sweeping reforms now known as the Progressive Era.

In general the Progressive movement was a popular response to the many changes wrought by the Industrial Revolution. To this day the era eludes precise definition. The term came to apply to all who viewed themselves as "progressive." It was at once a national movement, and simultaneously a grass-roots phenomenon with unique local variations. Although it meant different things to different people, certain broad themes do stand out. Among these was a widespread belief that government, particularly on the state and local levels, had become ineffective, unresponsive, and corrupted by corporate interests, often working through equally corrupt political machines. Progressives sought to create more ethical and efficient government by freeing it from such influences. While a majority of progressives nation-wide believed that reform could be achieved by expanding democratic direct control over government, this was not always the case. Other progressives saw danger in greater popular control and suggested a greater role for expert oversight in its stead.

The progressive movement in California began in earnest in the first few years of this century. Reformers directed their efforts at corrupt, pervasive political machines tied in locally with public service corporations, and at the state level with the Southern Pacific Railroad.[1] The first popular wave of judicial reform in California was rooted in the perceived control of the court system by the railroad

[1]Ibid., 50.

interests. There was, in fact, no state at the time where the influence of corporate power was more complete than in California. The Southern Pacific Railroad was the most powerful entity in the state until the progressives effectively removed it from state politics in 1911. [1] The "Octopus," as it was commonly referred to, had established a railroad monopoly in California during the 1870's, and sought to maintain its dominant commercial position through political influence. The Southern Pacific's influence over the affairs of the state of California prior to 1911 was extensive.

One of the most troublesome obstacles blocking the curtailment of the Railroad's power was a pliant state supreme court. Between 1895 and 1910 the state's highest court heard seventy-nine cases involving disputes over rate reductions, and ruled in favor of the railroad fifty-seven times. [2] Of all the governmental branches, in fact, the judiciary was widely regarded by progressives as being most thoroughly under the control of the Southern Pacific. [3] This perception damaged the high court's esteem among Californians, leading to a broad based movement to reform the state's judiciary.

Ultimate success over the Southern Pacific, along with judicial reform, would not come until the progressives gained clear control of the state government, and that meant winning the governorship. In

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[1]Nearly any work on California history or the Progressive movement in California repeats this theme. I have relied primarily on what appear to be the two authoritative treatments of the California progressives. See George E. Mowry. The California Progressives. (Berkeley: University of California Press, 1951) 13-14; and Spencer C. Olin, Jr. California's Prodigal Sons: Hiram Johnson and the Progressives 1911-1917. (Berkeley and Los Angeles: University of California Press, 1968) 2-5.

[2]Olin, 3.

[3]Dr. John R. Haynes, "Birth of Democracy in California," MSS, 3, Haynes Foundation, Los Angeles. Citation borrowed from Mowry, 14.

1910 the progressive Lincoln-Roosevelt Republican League, recently formed by the state's leading progressives, placed a full-slate ticket on the primary ballot.[1] Their candidate for governor was a successful San Francisco attorney named Hiram Johnson, whose record as a progressive was impeccable, and was widely regarded by the League as the best possible candidate. With some reluctance over giving up the pleasures of a quiet life and a lucrative law practice, Johnson eventually gave in to their persistent pleas.

Johnson won the election, and in his first message to the 1911 legislative session, he requested a number of constitutional amendments, including provisions for the tools of self-democracy. Johnson believed, as did many of his progressive allies, that once in place, the proposed initiative, recall, and referendum measures would not only strike an immediate blow at the power base of the Southern Pacific, but also ensure that no other corporation could ever again attain the kind of power that the railroad had enjoyed. The initiative and referendum proposals sparked bitter debate within the legislature. Conservative foes viewed them as dangerous implements which could be used by "radical elements."[2] None, however, was attacked as bitterly as the proposed recall provision, which would apply to all elected officials, including judges.

Even among progressives nation-wide, there was considerable difference of opinion over the merits of expanding popular control of government. While a majority of progressives, both in California and

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[1]In a note of no small irony, these selections were made by the same highly undemocratic procedure of the caucus employed by the machines.
[2]Mowry, 139-141; and Olin, 43-56.

around the country, did believe in the wisdom and goodness of the people at large, some, notably Herbert Croly, expressed a contrary view. What was needed was not more democracy, he insisted, but rather more able leadership--particularly in the executive branch. This split in progressives' thinking was nowhere more evident than over the proposed recall provision. Even Theodore Roosevelt was initially opposed to the recall, specifically because of its applicability to judges.[1] President William H. Taft also vigorously opposed subjecting judges to such a high degree of public accountability . The recall of judges, he believed, would lead to the destabilization of government, and control by a radical few. His assertion that such a measure could only lead to evil was quoted extensively by other conservative opponents.[2]

Johnson successfully linked the battle for the recall to the attack on corporate abuse by calling the American judiciary "the last great bulwark of privilege," the "last stand of corporate aggression...We would rather that the judges keep their ears to the ground," responded Johnson to critics of the measure, "than to the railroad tracks in California."[3] Once in office, Johnson had built a powerful political organization that succeeded in passing most of his reforms, and while even some of his closest allies wavered on the recall issue, Johnson stood firmly by it. If legislators could be recalled, Johnson insisted, so too should judges be subject to the same test.

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[1]Mowry, 141.
[2]Ibid. 148.
[3]Ibid.

Owing in large part to the efforts of the governor, the recall eventually passed in the legislature, and was subsequently adopted by the general electorate in November, 1911, along with the initiative and referendum measures. The recall's huge margin of victory evidenced the low esteem to which the judiciary had fallen. While the initiative proposal was barely passed by the electorate, the voters of California approved the recall by greater than a three to one margin.[1]

The session of 1911 marked a high point for California progressives. With most of their reform agenda enacted, and the emasculation of the Southern Pacific as a political force in the state, widespread enthusiasm for reform died out. With regard to judicial reform, it appears that most people were satisfied with the adoption of the recall. It was widely believed at the time that the recall would sufficiently improve the quality of the judiciary by removing poor judges individually. It would be many years in California until efforts were taken to fundamentally alter the judiciary by changing the method of selecting and retaining judges.

The recall, however, failed to address the root of the problem--that unqualified candidates were being elevated to the bench in the first place. Therefore, despite passage of the recall, debate over judicial selection persisted within certain circles, notably the legal profession. The ongoing debate, however, now had to contend with the effects of the progressive era. Progressive achievements shaped the course of future judicial reform in two major ways. First, the

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[1]Ibid. 149.

tools for greater democracy were permanently in the hands of California voters. The success of later reform movements was linked directly to their adoption. Second, the progressive era generated an enduring progressive-populism, with which future reformers would have to contend.

Interest in improving the judiciary--all branches of government actually--was certainly stimulated in part by progressive reformers. However, the movement to rehabilitate the judicial system by changing the method of selection and forms of tenure for judges had a distinct existence and a momentum all its own. California had adopted the recall in 1911. Nationally the debate over this issue peaked the following year in 1912. As in California, the implementation of this measure seemed to have satisfied the general public's desire for judicial reform. Interest in these issues among special groups, however, remained strong. They had appeared there well before progressivism caught fire as a national movement. And after 1912, despite the decline in popular interest, the quality of justice--i.e., the qualifications of judges and the best method of selection--persisted as a lively topic among a handful of scholars and professional men.[1]

A revived interest in the quality of justice, and in particular the method of selecting judges, occurred in isolated circles during the early years of the twentieth century. At the time, the overwhelming majority of professional and scholarly opinion in America favored

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[1]Hurst, 139.

the appointive system over the elective one.[1] The legal community itself was a prolific source of articles and written opinions on the subject of judicial selection. Around the nation, law reviews and bar journals repeated the majority sentiment that appointment produces a higher quality of judges than does election. Numerous articles detailed the dangers of electing judges:

> ...[T]he theory of the elective system, in its most favorable light, is to modify the conscience of the judge to accord with popular desire; and in its most evil aspect to stultify his conscience and destroy the law to appease the mob. Both propositions are utterly destructive of system and tend to chaotic confusion, breeding anarchy and ruin ultimately.[2]

Most of these writers were similarly distrustful of the new tools of direct democracy. Seen in this light, they appear to have blended progressive ideals and goals. On the one hand, they embraced efforts to clean up government and make it more efficient. This kind of impulse was universal among progressives. On the other hand, advocates of the appointive system viewed popular control over government, particularly in its relation to the judiciary, with great apprehension. This facet of their ideology more closely parallels the thinking of anti-populist progressives such as Herbert Croly.

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[1]Ibid. I cite Hurst here, but I am not relying on his opinion. I have looked at a sufficient number of articles from this period, and am myself convinced of this fact. They all echo similar sentiments, and are simply too numerous to list here. The curious reader need only peruse any of the more prominent legal publications: American Law Review, (one example is "Elective Judiciary and Democracy," by Hal Greer, 1909); American Bar Association Journal; or the Journal of the American Judicature Society.

[2]Hal Greer. "Elective Judiciary and Democracy," 43 American Law Review, Jan-Feb, 1909.

Ironically, the critics' most pointed complaint against elective judiciaries was not that the electoral process produced a poorer quality of judge--though they did make this charge--but rather that the popular election of judges was a farce, an election in name only. "It is one of our most absurd bits of political hypocrisy," remarked one observer," that we actually talk and act as if our judges were elected whenever the method of selection is, in form, by popular election."[1] What actually had happened was that the electoral procedure of selecting judges had evolved into a de facto system of appointment. What reformers disliked was not that judges were in effect being appointed, but rather how they were being appointed. While the appointive systems remained appointive in both substance and form, the elective method had become an appointive system in two ways, both of which were linked to the rise of political parties.[2]

In the first instance, where a single political party had come to dominate the electoral process by controlling the nominating machinery, the general electorate served more as a ratifying power than an electoral one. Generally, after 1870, the public acted as a potential check against the judicial selections of political machines. Even in this reduced role, however, this potential was never realized due to a severe lack of interest in judicial elections, particularly in dense urban areas where the judiciary seemed remote from daily life for many people.[3] The public's next chance to influence the de facto

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[1]Albert M. Kales. "Methods of Selecting and Retiring Judges." An address delivered at the meeting of the Minnesota State Bar Association held at St. Paul, August 20, 1914. As it appears in the Journal of the American Judicature Society June. 1927: vol 11.

[2]Hurst, 129.

[3]Ibid. 130-132.

appointive process was during occasional renomination and reselection of judges. Once again, however, voter interest was low, and the tendency was almost automatically to return a sitting judge.

This first instance in which elective systems turned into appointive ones partially explains the virulent anti-party sentiment shared by many progressives. There were myriad other complaints against the political parties of that era, but their ability to manipulate the judiciary in this fashion was prominent among them. In California, progressives took concrete steps to eliminate partisan influence on the selection of judges. In 1911 Hiram Johnson secured the passage of an amendment which made the election of all judges non-partisan.[1] Johnson failed in his efforts to secure another amendment in 1915 which would have eliminated party distinction from all state offices.[2] The problem with this type of solution, however, lay in the fact that Johnson, and many others, assumed that most judges were initially chosen by the electorate. On this point they were wrong. Most judges were, in fact, appointed in the first instance--either by political parties, or, in special circumstances, by the governor.

The second way in which a nominally elective system turned into an appointive system in practice occurred in those states where judges had long tenure, coupled with the practice of filling premature vacancies by governor's appointment. If a judge became ill, or too old to continue in office before the end of a term, the governor would fill the vacancy pending the next judicial election. Even though this

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[1]Olin, 44.
[2]Ibid. 111-112.

procedure usually included voter ratification of the governor's appointments, in practice it amounted to a process of unrestricted appointment by the governor, owing, once again, to the tendency on the part of the electorate to almost automatically return sitting judges.[1] Incumbency tended to give a practically insurmountable advantage to sitting judges at election time. The percentage of judges that reached the bench by popular election in the first instance were astoundingly low in California, particularly in the large urban centers of Los Angeles and San Francisco counties.[2]

Thus it appears that under so-called elective systems of selecting judges, voters had little actual power. In one situation powerful political machines controlled the electoral process, and thus the selection of judges. Subsequently, efforts were undertaken to remove organized parties from judicial selection. Hiram Johnson wanted to remove them from the electoral process entirely. Smoke-filled caucuses and nominating conventions are hardly constitutional instruments, and it is understandable that those alienated by that type of system would seek to extricate the electoral process from it. Direct primaries, another progressive reform, certainly did succeed in reducing the power of political parties, and made the entire process far more democratic than it had been previously. But the elimination of party designation on the ballot for judicial candidates--a progressive check on party power--failed to recognize the reality that most judges were not truly elected anyway. It was from concern with the advantages given to incumbent judges--elevated to

[1]Hurst, 129-134.

[2]Figures for this appear in the next section (page 33).

the bench by special appointment--that a comprehensive solution to the problem of judicial selection arose. The author of the plan was an Illinois law professor named Albert M. Kales.

Kales astutely recognized that any effort to reform the judiciary would have to take into account the prevailing populist sentiment of his time. He first introduced his three-point plan in 1914, with the publication of a book entitled Unpopular Government in the United States.[1] The first part of his plan called for a special nominating council, made up of presiding judges, who would review judicial candidates strictly on the basis of their qualifications and professional merits. The second part of the plan endowed an elected chief justice with the power to fill all vacancies. Every other appointment had to be selected from the list of eligible candidates provided by the nominating council. The third part of the plan was included to placate progressives' desire to maintain a measure of popular control over the judiciary. This element of the plan called for limited tenure, subject to voter approval, whereby the judge would run unopposed in a special judicial election. The only question that would be asked would be: "Shall Judge... be continued in office?" If a majority voted "yes," then the judge would remain in office. If a majority voted "no," then the provisions for filling a vacancy would immediately go into effect. This procedure eventually became known as a retention election.

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[1] Albert M. Kales. Unpopular Government in the United States (Chicago: University of Chicago Press, 1914) chpt. 17. Cited from Carbon and Berkson, 6. The ingredients of his commission plan also appear in the above cited article, "Methods of Selecting and Retiring Judges," by Albert Kales.

What Kales hoped to accomplish with his plan was to combine the best features of the appointive and elective systems, while eliminating the worst. It is clear from his own words that he preferred appointment--in fact he insisted it was really the only viable method of selection--and in all likelihood would have preferred to omit the retention elections entirely, but he knew that political realities simply would not allow that. Kales' goal, therefore, was to replace existing methods of de facto appointment with a constitutionally prescribed process. Like many others, he felt the problem was the most acute in the heavily populated urban areas.

> It is impossible to escape the conclusion that in a metropolitan district with one hundred thousand voters and upward, the selection of judges by the electorate is practically impossible. It is equally certain that the judges in such a community must be selected by some appointing power. It is more and more apparent everywhere that the selection of judges by the electorate is a myth and that in reality all efforts at election by the people result in the development of some sort of extra legal appointing power. The real and only questions therefore become: What is the sound principle upon which to create an appointing power and how far do our actual or proposed appointing powers conform to such principle?

Over the next several years, those concerned with the quality of justice continued to debate the issue of how to best select and retain judges. Kales' plan stimulated widespread discussion, and the "commission plan," as it was subsequently dubbed, became the preferred plan of many legal experts. A number of variations emerged, but they all included the three constituent elements of the plan as outlined by Kales. Differences arose mainly over peripheral

questions, such as who the appointing power would be, and how long a judge would serve before facing the public in a retention election.[1]

The Kales plan did not seek to replace the elective system of selecting judges with an appointive one. Rather, claiming that the election of judges under an elective system was a myth, it sought to replace existing methods of appointment with a more responsible, constitutional procedure for appointing judges. Kales primary innovation lay in the retention election, which catered to prevailing political trends, and made his appointment plan more palatable to those reluctant to relinquish their supposed control over the judiciary. He also took into consideration voter apathy, and low voter knowledge in judicial elections. This he did not try to resolve, or even discourage. Kales believed that if a judge was performing his responsibilities properly, the nature of the job should keep him out of the public eye. By running judges unopposed, it was hoped that judges could be insulated even further from political machinations.

Perhaps the most important thing to realize about Kales' plan, however, is that it was intended as a comprehensive solution to the problem of judicial selection and tenure. The various components were only to be used in conjunction with one another, never individually. The retention election served not only as a placebo to populist progressives, it also provided the system with an easy means of removing an outstandingly bad judge should all other

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[1]In a retention election, only the names of incumbent officials appear on the ballot. The electorate is asked simply, "Shall Judge... remain in office?" If a majority votes "Yes," then the official is retained. If a majority votes "No," than the official is immediately removed from office.

safeguards fail.[1] Retention elections were designed to ensure long tenure. It was hoped that by providing greater security of tenure, more highly talented lawyers could be attracted to accept nomination to the bench, and thus enhance the quality of justice around the country. The judicial council served to seek out and nominate the most eligible candidates available. Retention elections, which were invented to appease the forces of democratic populism, were also designed to keep judges in office for a long time. Incumbency proved a huge advantage to sitting judges in contested elections. Their advantage in uncontested elections became even greater.

Thus the dangers of an irresponsible appointment were greater under the Kales plan, but this was to be counterbalanced by the judicial council, whose sole purpose would be to carefully screen the qualifications of every judicial candidate, and by the fact that the pool of talented candidates from which to select would be greatly enlarged due to the added job security provided by the retention election process. That the three elements of the Kales plan were to be used in combination was imperative:

> [F]rom their inception, retention elections have always been linked to the commission plan. Although many proponents of appointed judges have argued against adoption of retention elections, they have always clearly expressed the belief that if a state wanted to adopt retention elections, it should first adopt the nominating commission method of selection. None of those who developed the plan and none of the commissions which has reviewed it have ever suggested that retention elections be

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[1]Carbon and Berkson, 8. (The recall, which proved a prohibitively cumbersome procedure for removing bad judges, never fulfilled the expectations of its original supporters, who had hoped it would provide a quick, easy means for doing so.)

adopted in the absence of a commission which recommends candidates on the basis of professional merit.[1]

What California did in 1934 was clearly a departure from what the designers of the retention election, Kales foremost, intended. Why that came to pass is the topic of the following sections.

[1]Ibid.

Part III: The Legal Profession in California Seeks Reform

Across the country lawyers and judges alike lamented the condition of the judiciary at the state and local level, particularly in the larger cities. As public criticism mounted, lawyers, through their bar associations took it upon themselves to search for and enact meaningful reforms to improve the quality of justice and mend the profession's battered image. Discussion was carried out on all levels, within local bar associations, state bars, and the national organ of the legal profession, the American Bar Association. Although this high level of interest was not always matched within the general public, the selection of judges remained a lively topic within the legal community as a means of improving the legal system. The legal profession produced many articles on the topic in that period. Their position on these issues, as well as their role in the movement for reform, are crucial elements to this treatment.

The problems associated with selecting judges by popular election were not discovered by lawyers suddenly, or at any definite point in time. Dissatisfaction revealed itself persistently over the course of many years. Demands for reform must also be viewed within the context of concern with the quality of justice in general, both within and without the legal profession. The creation of the Judicial Council in 1926, and the incorporation in 1927 of the California State Bar Association, which were both viewed as steps toward improving the quality of justice, indicate efforts to bring more unity and greater organization to the state's legal system.

Soon after its inception the state bar announced its intention to make the subject of judicial selection their top priority. The President of the state bar, Thomas C. Ridgeway of Los Angeles, cited growing popular criticism of the judicial system and agreed that much of it was justified. "In the way of reform," he addressed the members of the Bar, "we might profitably turn our attention to the proper method of choosing judges."[1] He went on to add that the breakdown in the judiciary was attributed by many to the direct primary, "which permits the incompetent and unfit to seek election," and advocated a change in the present method of selecting judges.[2]

Legal critics of the elective system defined the problem in strikingly similar terms over the next several years. In general, they claimed that the process of waging political campaigns for judicial office was both costly and detrimental to the quality of judges elevated to the bench. More often than not it was the superior politician who would win office, they argued, and not the most qualified candidate for the position. In fact, they asserted, the very qualities desired in a judge usually made the best candidates for the job ill-suited for political campaigning. The greatest danger of all, however, was that the overall quality of the judiciary suffered because many of the ablest legal minds shied away from the political process entirely, leaving the field from which to select judges open primarily to those least fit for the office.

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[1]Thomas C. Ridgeway, "A Message From the President." 1 California State Bar Journal. April, 1927.
[2]Ibid.

In conjunction with President Ridgeway's article, Perry Evans of the San Francisco Bar proposed to the state association a constitutional amendment to alter the method of selecting judges . Assembly Constitutional Amendment No. 30 was a resurrected form of a similar proposal which had failed in the State Senate in 1915.[1] The Chandler amendment, which failed in 1915 despite the endorsement of the California, Los Angeles, and San Francisco Bar Associations, proposed that all judges be appointed by the governor, subject to a confirmatory vote of the electors of the state, district, or county, as the case may be.*

To eliminate the political scramble that ensues when a judge's term expires, ACA No. 30 proposed that if a judge desires to remain in office, he must declare his candidacy and the people will vote in an uncontested election whether or not to retain him. If the judge is not retained, then the governor must appoint a replacement, to be approved by the people at the next general election by the same uncontested election process. This proposal was similar to the Kales plan of appointment followed by confirmation in an uncontested election, but unlike the Kales plan it lacked any provision for a special nominating commission to carefully screen the qualifications of prospective candidates before they can be considered for appointment.

Evans argued that by taking the middle ground between the elective and appointive systems, it would achieve the benefits which

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[1]Perry Evans, "An Explanation of Assembly Constitutional Amendment No. 30." Ibid.

*The California Bar Association was distinct from the State Bar Association, which was incorporated by state charter in 1927.

both have to offer when combined, while eliminating the evils of each system when applied individually. By subjecting judges to the electorate periodically, it would preserve the democratic principles of the elective system and reserve for the people ultimate control of the judiciary. By assigning the task of appointment to the governor, more responsible selections would be made than under the free-for-all situation that characterized the current elective method. The governor was the right choice to act as the appointing power, Evans argued, in that he is "more directly the representative of the people than any other officer. Not only have we the example of the Federal Government,...but it is perfectly logical to place this responsibility in the Chief Executive of the Government."[1]

Evans' reference to the Federal System attests that these lawyers were considering other systems of judicial selection as models. Not only was the federal government consistently referred to by advocates of an appointed judiciary, but the idea of an elected judiciary as an anomaly among all the civilized nations in the world was frequently raised as well. The fact that no other country in the world, democratic or not, elected its judges was used to show that the elective system was an aberration, and to deflect the criticism that appointment was undemocratic. Even the "greatest democrat in American history [Thomas Jefferson]," the bar association asserted, "...never dreamt that it was an essential element of democracy that the office of judge be thrown open to the scramble of popular election."[2]

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[1]Ibid.
[2]Ibid.

On the other side of the debate were those who opposed an appointed judiciary and defended the elective system. One such lawyer defined the problem at hand in different terms altogether. The real problem was not with the judges, nor the method of selecting them, but rather with the legal system itself and specifically what came to be known as "'the law's delay."[1] In other words, the opposing viewpoint argued that even if an appointed judiciary did raise the quality of the bench, the fundamental problem of the legal system dragging its feet with complicated procedures and constant delays would still exist. This viewpoint argued further that lawyers themselves were to blame for the condition of the courts by creating delays through various means; the judges played but a minor role in such cases. Finally, this writer challenged advocates of reform to demonstrate that an appointed judiciary would act with any greater degree of diligence or energy in the expedition of justice than an elected one. "On the contrary," he asserted, "it would seem that the certainty of tenure under the appointive system would have the opposite effect, because of the lack of the check that reelection necessarily has in the elected case."[2] Judges were not to blame for the condition of the legal system, rather, it was the system itself that is flawed. The solution, therefore, lay not in improving the quality of judges by changing the method of selection, but in attending to the procedural delays inherent in the system that obstructed the administration of justice.

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[1]Charles Craig, "The Other Side of the Shield," 1 California State Bar Journal. (hereafter cited as CSBJ) May, 1927.
[2]Ibid.

The author of the article also articulated the most common objection to an appointed judiciary: that it was inconsistent with a democratic system of government. An appointive, or semi-appointive judiciary "will tend to inject into our wholly democratic form of government a kind of cloistered hierarchy of transcendental, intellectual superiority, exclusive, aloof, mysterious, cold, self-satisfied, ponderously dignified, and frequently late [judges]."[1] With no sense of public accountability, he argued, appointed judges would be unresponsive and remote to the sentiments of the people they were supposed to be serving.

This author did interject one unique variation on the argument against appointing judges; not only have elected judges served the people every bit as well as any appointed judiciary in the nation, he maintained, but even if the elective system does produce mediocrity on the bench, that is not only acceptable, but in many aspects desirable. "There is mediocrity everywhere about us...in the Federal Government...in all the learned professions. It is rampant in our great democracy; it is the common heritage of the great masses of mankind." In one final twist of logic, the author claims that since the whole of society was in general mediocre, mediocrity on the bench was "better suited to our democratic institutions than superior intelligence, for the man of modest talents is more generally directly of the people...and, generally speaking, has more of the milk of human kindness in him than a mere intellectual giant."[2]

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[1]Ibid.
[2]Ibid.

Another alternative remedy advanced for a sluggish justice system was greater supervision of judges. Like the advocates of changing the selection process, proponents of greater supervision, too, found judges lacking in the performance of their duties.[1] The solution, however, lay not in changing the method of selecting judges, but in more closely supervising their work. Human nature, insisted this group, dictated that some judges, irrespective of the means that they were originally elevated to the bench, would simply not do their work. An appointed judiciary would do nothing to solve this problem. What was needed was that some agency, perhaps the Judicial Council, supervise the work of judges and keep them on their toes. Another step that could have been taken to eliminate courtroom delays, according to the advocates of supervision, was to require judges to adopt a uniform set of rules for handling law and motion matters.

Numerous other alternatives to changing the method of judicial selection appeared over the next several years. In his parting message to the Los Angeles Bar Association in 1932, outgoing president Irving M. Walker acknowledged some procedural defects, but "most of the proper criticism of the courts and of the administration of justice arises out of the circumstances that there are inefficient judges and lawyers who do not measure up to the best standards of their profession."[2] The problem as he defined it was largely one of personnel. The solution he favored would elevate the

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[1]Everett McCeager, "Do Judges Really Work?" 2 CSBJ. June, 1927.
[2]Irving M. Walker, "Congestion in Our Courts." 7 Los Angeles Bar Association Bulletin. (hereafter LABB) March, 1932.

standards of admission to the bar in the first place. The fact that judges were inefficient was not, he believed, attributable to the method by which they were selected. Rather judges were unfit because the lot from which they were selected was generally of poor quality. By raising the quality of lawyers, the quality of judges would naturally follow.

Another alternative that was discussed and experimented with in a number of large cities across the country was the bar plebiscite. Many bar associations customarily held plebiscites prior to judicial elections to determine which candidate(s) would receive official bar endorsement. It was considered a duty by the bar to inform the public of its findings in order to facilitate the election of the most qualified candidates to judicial office. Many lawyers felt that the bar alone could fulfill this responsibility, as only fellow lawyers could intelligently determine who from its ranks should be elevated to the bench. Former Judge John Perry Wood recommended that the Los Angeles Bar institute a new, more "scientific and correct determination by the bar of the qualifications of judicial candidates."[1] While Wood did not consider it an ideal solution, he did believe it to be the best solution possible "under present methods of judicial selection." It is clear from Wood's tone that he considered the present system of judicial selection far from ideal.

The point of all this is to show that there was no universally recognized definition of the problem even within the legal profession. The only thing agreed upon was that the justice system was not

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[1]John Perry Wood, "The New Plebiscite Method," Los Angeles Bar Bulletin, March, 1932.

working satisfactorily. Not all observers were content to blame it on the judges, nor was there agreement among those who did as to the means of improving the situation. The majority of opinion did, however, favor structural reform in the method of selecting judges. The consensus among those advocating change was that appointment, in any form, was the preferred method of selecting judges. Some lawyers believed that the situation with the judges had become so bad that any change at all would mean improvement.

Just two months after presenting his bar plebiscite proposal, Judge Wood offered a plan for a new method of selecting judges. As the problem of political judicial campaigns worsened, especially in the larger counties, Judge Wood insisted that nothing could salvage the system short of a constitutional amendment to change the method of selection. Since the problem was more severe in the larger cities, and particularly in Los Angeles County, the amendment could be made applicable to that county alone. Judge Wood expressed his confidence that "doubtless the rest of the state would be willing to allow that county to make the experiment."[1]

The plan proposed by Judge Wood would apply only to superior court and municipal court judges of Los Angeles. It provided for appointment by the governor for six year terms. The governor, however, would be restricted to a list of eligible candidates nominated by a special board of five consisting of the chief justice of the state supreme court, the presiding justice of division 1 of the district court of appeals, and three laymen elected by the people.

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[1]John Perry Wood, "Suggested Study Plans of a Method for Selection of Judges." LABB, May, 1932.

The board would serve without pay, and make its recommendations of which judges should be retained to the governor prior to each election. The governor would be required to reappoint these judges to additional six year terms. Judge Wood subsequently headed a Committee on Judicial Selection appointed by the Los Angeles Bar to examine judicial selection in other states and countries, and suggest a plan for Los Angeles County. The July report of the committee endorsed Wood's plan as presented previously with only minor modifications.[1]

The advantage of this plan, as explained in the committee report, was that it embodied the essence of the pro-appointment argument. It would solve the problem of rising numbers of judicial candidates and the voters' inability to intelligently chose from so large a number. The problem was reaching intolerable proportions in the eyes of many bar members and laymen alike. One hundred and five candidates had announced themselves as candidates for the 1932 primaries alone. Another advantage was the proposal's consistency with the principles of representative democracy; it retained for the people ultimate control of the judiciary. It also promised to reduce costs by eliminating the necessity of political campaigns. It would purge the bench of incompetent judges within six years, and, by insulating the judiciary from politics, would attract a superior class of candidates. This too would save money, it was stated, because better judges would work more efficiently, saving

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[1]John Perry Wood, Chairman, Wm. Anderson, Frank James, J. Lordell, and Oscar Lawler, "Judicial Office and Its Administration Becoming Matters of Politics," LABB. July, 1932.

litigants and taxpayers money in the short term, and precluding in the long term the necessity of constantly adding more judgeships. Contemporary opinion held that the poor work performance of less capable judges necessitated hiring more judges.

The State Bar Association was actively researching the issue of judicial selection at this time, coordinating its efforts with various law schools in California. The conclusions reached in its investigation closely resembled those of the Los Angeles Bar. An extensive study was conducted of judicial selection around the world , analyzing and comparing the various procedures for selection, tenure, and retirement of judges.[1] The state bar was putting considerable energy into studying the problem, into looking at other models and examining alternatives. Their preliminary report did not advocate any particular program. It simply stated "the general opinion in this country that selection of judges by popular election is at least fairly satisfactory in the less populous districts, and that it is generally unsatisfactory in large cities."[2]

The May report of the research department compared the various proposals for judicial selection circulating around the country at the time. Again the committee refrained from endorsing any single plan, and instead requested that each of the State Bar's sections report their opinions on the subject. This report also brought to light one of the glaring discrepancies in the so-called "elective" method of selecting judges. It pointed out that of the

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[1]Professor Evan Haynes, "Selection, Tenure and Retirement of Judges," CSBJ. April, 1932.
[2]Ibid.

superior court judges throughout the state, one hundred were originally appointed, and only sixty-one were originally elected.[1] In four of the state's largest cities the situation was even more striking. In San Francisco, Los Angeles, Oakland, and San Diego, two-thirds were originally appointed.

This de facto appointed judiciary arose out of the constitutional procedure for the governor to fill judicial vacancies. If a judge became ill, died, retired, or for some reason left office in the middle of a term, it was the governor's duty to fill the vacancy. As the debate over judicial selection intensified both sides pointed to the high percentage of judges originally appointed to the bench in order to strengthen their argument. Opponents of reform charged that an appointive judiciary would mean little change in the quality of judges since most of them were appointed as it is. Reformers countered that the problem was not simply appointment, but rather the unrestricted power of appointment enjoyed by the governor under existing guidelines. Besides, they asserted, even though a judge may be originally appointed, he must still face the electorate in a contested political election when his short term expired, and this had the effect of discouraging many qualified candidates from accepting appointment in the first place.

Alluding to these figures, the research department's report debunked the notion that just because a high percentage of the state's judges were originally appointed and not elected, California was operating under an appointive judiciary. "It is of course not

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[1]Evan Haynes, "Selection, Tenure and Retirement of Judges." CSBJ. May, 1932.

true...that our system of selecting judges has the qualities, whether good or bad, of a system that selects two-thirds by appointment, nor has it two-thirds of the qualities of an appointive system."[1] In other words, simply because most of the judges in California were, in fact, appointed, did not mean that the system was functioning as if it were an officially appointive one. Once they received their appointment to the bench, judges still had to face the electorate in contested political elections every few years if they desired to remain in office. Such political races not only demanded a great deal of a judge's time, which otherwise could have been spent more productively, but also deterred many able lawyers from accepting an appointment in the first place. The system as it stood, therefore, was neither a truly appointive, nor an elective one. Rather, it was in reality a bastardized combination of the two, which failed to maximize the benefits of either system.

Seeking the opinion of its members, the State Bar conducted a plebiscite on the matter of judicial selection. Although no single plan of election or appointment received a majority, only one-fourth of those who voted favored the existing system. The remaining three-fourths were evenly divided between appointment and nomination by the bar.[2] With some sort of change being favored by so great a majority, the State Bar decided to act in conjunction with the Los Angeles Bar, which had already been working on a draft for a

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[1]Ibid.

[2]"The Recent Bar Plebiscite: Report of the Section Committee." CSBJ. November, 1932.

proposed constitutional amendment, and present the legislature with a proposal.

The State Bar Committee on the Selection of Judges tentatively agreed in January, 1933 to a plan to be submitted to the Legislature, contingent upon approval by the board of governors. The committee itself was composed of lawyers from Los Angeles and San Francisco, illustrating the fact once again that the problem was greater in the larger cities. The plan they agreed upon was a compromise proposal, incorporating elements of both the Los Angeles Bar plan and the so-called Commonwealth Club plan. The California Commonwealth Club, based in San Francisco, was a civic organization active in many social and political issues. Variations on their suggestions for judicial selection had been endorsed in the past by the State Bar. It did not differ greatly in principal from that of the Los Angeles Bar, the main differences being over who would serve on the nominating commission.

The proposed constitutional amendment related only to superior courts in counties of over 200,000 people. Subdivision 1 lengthened the term of office to six years, after which a judge could declare himself a candidate to succeed himself and would face the electorate in an uncontested election. If a judge decided not to run, or a vacancy occurred for any other reason, the governor would nominate a suitable person for the office. This nominee would serve the rest of the term, then run unopposed in the next general election. The candidates for the governor's appointments would be limited to a list of eligible candidates presented to him by a special nominating commission, to be composed of the chief justice of the state supreme

court, the presiding justice of of the district court of appeals in the appellate district in which the appointment is to be made, and the member of the state senate representing that county.[1]

One of the significant elements of the proposal is that it was not compulsory of any county should the amendment pass. Any county with a population of over 200,000 could, if its electors chose to do so, adopt the provisions for judicial selection therein, but it was not required that they do so. This provision was included to meet the possible objections of smaller communities, where the problem of voter ignorance in judicial elections was not perceived to be nearly as severe. Furthermore, once a county did adopt this system, it could, if dissatisfied, revert to their previous elective method. This crucial elective provision was lost on many of the proposal's critics.

The plan was approved by the board of governors in March, and subsequently introduced into the State Assembly as ACA No. 98 in April. The proposed amendment was not considered a perfect solution by its backers. It was, nonetheless, praised as a significant step towards improving the legal system by producing a higher quality of judges, particularly in the larger counties such as Los Angeles. While there was significant debate over exactly who the nominating commission would comprise, all of those backing the reform favored the principle of the commission.[2] It was felt that members of this special commission were simply better equipped to evaluate a candidate's judicial qualifications than either a

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[1]"The Selection of Judges," CSBJ, March, 1933.

[2]Guy R. Crump, "A Message From the President--Selection of Judges." CSBJ. April, 1933.

commission made up entirely of laymen, or the public at large. The design, they argued, would eliminate the problems associated with an elective system of judicial selection, as well as the dangers of unrestricted appointment by the governor.

That the problem was perceived largely as one unique to the heavily populated counties means that the proposal addressed the chief problem in these areas: the inability of voters to familiarize themselves with an ever expanding number of judicial candidates. As for the supreme court and the district courts of appeal, the number of judges was relatively small and their terms were long (12 years). The quality of judges at the appellate level was considered satisfactory by lawyers and did not receive the amount of attention given to the trial courts.[1] A state bar plebiscite was conducted, and found a large majority of those voting to be in favor of ACA No. 98 (40% returned ballots). The measure was opposed by a majority of bar members in only two small counties.[2]

ACA No. 98, the legal profession's proposal for reforming the method of judicial selection.passed both houses of the State Legislature by the necessary two-thirds majority in July, 1933. One modification to the amendment was made by the legislature, changing the population requirement from 200,000 to counties with 1.5 million people, which had the effect of limiting it to L.A. County alone.

Opponents of the measure immediately attacked the commission plan, charging that it would expose the process of judicial

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[1]Byron C. Hanna, "The Selection of Judges." CSBJ. May, 1933.
[2]Ibid. "Result of State Bar Plebiscite on Judicial Selection."

selection to special interests, who could more easily manipulate a small group than the entire electorate.[1] It was also questioned how voters, unable to wisely select judges, could be expected to intelligently select members for such a commission. What the state bar could and should do, in opponents' estimate, was to seek greater control over the judiciary by creating a code of ethics for judges and judicial candidates, and getting authority to discipline for violations. The state bar could then collect and disseminate reliable and truthful information to the voters so they they can more intelligently make their selections.[2] Furthermore, it added presciently, "it is psychologically and politically inexpedient for the legal profession to sponsor a plan which will divest the people of the selection of their judges. It would be far better for the profession to help the people by giving them something instead of taking something away."

While this final argument eventually proved prophetic, most of these criticisms reveal that critics of reform either failed to recognize the reality of the elective system--that it did not actually produce elected judges--or lacked an understanding of the proposed amendment itself. Advocates of the plan did expect, with a certain degree of logic, that voters could, in fact, responsibly select a small group of nominators as well as they could select scores of judges in each general election. Furthermore, under the extant "elective" system there had been in fact only one person making judicial appointments to fill vacancies--the governor--who made

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[1]Saul S. Klein, "Answer to Proposed Plan of Judicial Selection. " CSBJ. May, 1933.
[2]Ibid.

appointments without any type of restrictions. Thus the argument that a small commission could easily come under the control of special interests missed the point that at the time only one person made appointments. Under the commission plan this responsibility was to be divided between the nominating commission, made up of elected officials, and the governor who made the final appointment.

The objection to the amendment, that it takes away the people's franchise, also failed to recognize that as it stood, only a small percentage of judges reached the bench in the first instance by popular election anyway.[1] The notion, an accurate one, that the elective system of selecting judges was elective in name only was becoming common currency among those advocating reform. Incumbency provided a huge advantage to candidates in judicial elections, therefore any appointment to fill a vacancy usually proved to be of long duration. By one attorney's estimation, only two out of fifty superior court judges in Los Angeles had attained their position by popular election in the first instance.[2] That figure points to the fact that L.A. did not have at the time a truly elective method of selecting judges. ACA No. 98 proposed to substitute a system that would restrict the governor's ability to make unsupervised judicial appointments.

The debate raged back and forth within the legal community for the next several months, with the vast majority favoring the substitution of the appointive method for the elective one. ACA No.

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[1]Rosalind Goodrich Bates, "Eliminating Political Appointments. " CSBJ. August, 1933.
[2]Ibid.

98 was not advanced as a panacea, but it was praised by many as step in the right direction. The only permanent remedy, reformers insisted, would be to make all judges appointed. By giving Los Angeles the chance to abandon the elective system in favor a commission plan, the majority of opinion within the legal community felt that progress would certainly be achieved.

Part IV: The Role of the California State Chamber of Commerce

The legal profession was not the only group in California interested in the selection and tenure of judges. A wide variety of business and civic groups eventually became involved in the issue as well. One group in particular proved instrumental in determining the course of judicial reform in the state: the California State Chamber of Commerce. Out of its desire to reduce the level of crime in California, the organization launched a campaign for comprehensive judicial reform, which included a measure for judicial selection and tenure. The 1934 adoption of the chamber's judicial appointment/retention system was the story of one judicial selection measure--possibly inferior in design and conception--succeeding over another due to the more active, better coordinated efforts of its sponsors. In the end the voters of California ratified the chamber of commerce's version of judicial selection. This section will attempt to explain exactly how this happened.

In contrast to the legal profession's long-running technical interest in the problem of judicial selection, the chamber of commerce's engagement was less theoretically motivated, rooted more in events external to the judicial system. The brutal lynching of a prominent San Jose figure aroused the attention of the state to a crime problem that, even prior to this incident, was perceived by many to be worsening. The murder in San Jose, along with a number of other notorious criminal acts, convinced many that the judicial

system was not effectively meeting the challenge of a growing crime problem.

The chamber's annual report, published in May, 1934, best illustrates the nature of its involvement. From this report, it is clear that concern over the costs associated with rising crime was paramount. The four measures were packaged as a crime reducing program " to bring about a better administration of justice [which] would save to the business interests and private citizens of the state many millions of dollars annually..."[1]

The chamber of commerce first considered the issue at a board of directors meeting in San Francisco in mid-December, 1933. Discussing recent incidents "reflecting a lack of public confidence in speedy and effective administration of justice," the board arrived at "the feeling that public sentiment is ripe for strong leadership to bring about a speedier administration of justice."[2] The board subsequently approved a motion empowering the president of the chamber to appoint a special committee to look into the question further, and if possible convene a conference on the topic. The board also approved publicizing its interest in the issue of reducing crime in the state. Aware that many other groups had been involved with various reforms in the administration of justice for years, the chamber recognized that it was functioning primarily in a coordinating capacity. It hoped to develop a forceful program behind which all groups might unite.

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[1]Chamber of Commerce, Annual Report, May, 1934.
[2]Minutes from Board of Directors Meeting. San Francisco, St. Francis Hotel, December 15, 1933. President C.C. Teague presiding. page 9.

Working toward that goal, the chamber created the Committee on Better Administration of Justice, chaired by Joseph R. Knowland, which met several times and conferred with a number of other organizations interested in judicial reform--including the State Bar Association. Guided by a list of twenty-seven objectives, the special committee eventually settled on six legislative proposals, (which ultimately was reduced to four), and recommended that the initiative method be employed to secure their enactment.[1] The first of these was a proposal for the selection of judges by appointment, which was not necessarily sought for its own sake, but as a means to rein in crime. The other measures pertained primarily to criminal procedure and administrative affairs. By April, the final list of four initiative proposals was settled upon, at which time the committee announced its intention of calling a meeting of all interested groups in order to obtain their united and active support behind the four measures. The committee also planned a signature gathering campaign (in the event that the meeting proved satisfactory) to get the propositions on the ballot and further promote them.

From the beginning it is evident that the chamber did not take lightly the task ahead of them. Even at this preliminary stage its members were discussing the potential problems associated with a signature gathering drive--their chances of securing enough signatures through voluntary efforts, and if necessary, the costs of

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[1]Minutes from Board of Directors Meetings. Hotel Del Monte, February 10, 1934; and Los Angeles, March 16, 1934. (Their reasons for cutting the list down to four proposals were not explicit. It is, however, evident from later remarks that attempting to promote even four initiatives was considered highly ambitious by the chamber's directors.)

acquiring the aid of professional services to circulate petitions.[1] The chamber also took great care from the start to enlist outside help from politically active women's groups in the state, such as the California Federation of Women's Clubs and the California League of Women Voters. The planning and collaboration paid off as these groups supplied invaluable assistance to the eventual success of the organization's campaign.

Although the first signs of recognized opposition to the chamber's proposal didn't come until May, the wording of minutes from a board of directors meeting indicate that supporters of Assembly Constitutional Amendment No. 98 had been attacking the chamber plan for judicial selection for some time.[2] Interestingly, the main concern of this group was not necessarily the content of the chamber measure, but rather that it might invite added opposition to ACA No. 98. Appearing before the board as a representative of the Los Angeles Bar, Byron Hanna explained that ACA No. 98 was already under attack on the alleged grounds that it deprived voters of their franchise with regard to the election of judges, and that by submitting their own plan, the chamber would kindle fresh attacks both at their own proposal, as well as the embattled ACA No. 98. Hanna further expressed his fear that should the chamber proceed with their own proposition for the selection of judges, both measures would fail. Feeling that the chamber's proposal had no hope of victory, he appealed to the board to abandon it and join efforts with the bar to secure passage of ACA No. 98. The board unanimously

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[1]Ibid. San Francisco, April 20, 1934.
[2]Ibid. Los Angeles, May 25, 1934.

demurred on these appeals, and decided to aggressively pursue its full program of four measures, including the plan for the selection of judges.

The first detailed explanation of the four initiatives appeared in June. While the chamber was not nearly as prolific on the topic in expressing its specific aims, its arguments for reforming the procedure for judicial selection closely paralleled those advanced by supporters of ACA No. 98. For one thing, it was agreed that the electoral system forced judges to waste far too much of their time campaigning. By the chamber's estimate, "judges are compelled to spend one-fourth of their time in political activities. For their own protection they should be freed from political influence."[1] In accordance with the legal profession's measure, sponsors of the chamber plan expressed the idea that appointment of judges was favorable to the free-for-all situation created by the elective system.* The chamber's plan also included the principle of retention elections, but did not, as did the supporters of ACA No. 98, elaborate on whether they were intended to guarantee long tenure or not. Given the other similarities between the two plans, as well as the arguments advanced by the sponsors of each, it is likely that this was indeed the case.

That, however, is where the similarities between the two proposals end. ACA No. 98 was designed specifically for the chaotic conditions in metropolitan Los Angeles. In so populous a region,

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[1] California Journal of Development, "The Move to Prevent Crime," June, 1934. Published monthly by the California State Chamber of Commerce.

*Recall the high number of judicial candidates that had announced themselves in the 1932 primaries.

nearly all observers concurred that familiarization with scores of judicial candidates was impossible. Even though most judges were appointed in the first instance anyway, they still had to contend with the demands of waging political campaigns every couple years if they desired to remain in office. This meant that the voters of populous regions had to select from a vast number of judicial candidates on a regular basis. To eliminate the problem of voter ignorance unique to superior court judges in a large urban district, the authors of ACA No. 98 proposed a measure dealing specifically with that class of judge, and limited its applicability to large population centers.[1]

These reformers directed their efforts where they perceived the problem to be the most acute--namely, the selection of trial judges in heavily populated areas. The quality of judges on the appellate level, and thus the method of their selection, was generally considered satisfactory by members of the bar. Even though most of those judges were in fact appointed as well, due to the small number of positions to fill and the inherent visibility of each appointment, the bar association believed that a blatantly political move by the governor would receive a great deal of attention. In contrast, the chamber proposed to alter the method of selecting state appellate and supreme court justices immediately, and as a secondary objective, provide each county with the option of adopting the same procedure for their superior court judges.

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[1]At the time, the 1.5 million population requirement would have limited the measure to Los Angeles County alone.

The second, and more important difference between ACA No. 98 and the chamber's proposal for judicial selection, was the exact procedure for making appointments. Consistent with the method of selecting judges as promoted by Kales, ACA No. 98 called for a special nominating commission to screen judicial candidates' qualifications , and subsequently nominate them for appointment. The nominating commission was intended to act as a safeguard against irresponsible or blatantly political appointments by the appointing power (in this case the governor). Under the chamber's plan, a commission on qualifications--consisting of the chief justice of the supreme court, the presiding justice of the district court of appeals in the district in which the vacancy occurs, and the attorney general--would act not as a nominating body, but would serve in the greatly reduced capacity of confirming the governor's appointments. By thus reducing the commission's role to a ratifying body, (rather than a nominating body--that would restrict the governor's selections to a carefully screened list of qualified judicial candidates), this design was clearly inconsistent with the original intentions of the commission, or Kales plan.[1]

The California State Bar Association actively campaigned to get their proposal approved by the voters, evidenced by the creation of a "Committee on Public Education Regarding Assembly Constitutional Amendment No. 98." The committee, chaired by John Perry Wood, was intended to carry on a campaign between the time of its creation

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[1]Refer back to page 22.

(October, 1933) and the general election the following year in November.[1] This campaign, however, was apparently limited. First of all, the state bar appointed the committee nine full months after the legislature had passed its measure back in January, 1933. While the L.A. Bar Bulletin announced in October that Wood had waged an effective campaign by both radio and press to bring it to the attention of the voting public, such efforts are not evident in the popular press or bar publications during the period.[2]

In contrast, the chamber embarked on a much more active campaign. An ambitious signature gathering drive not only succeeded in qualifying its initiatives for the November ballot, but also generated a great deal of popular support in the process. By enlisting the aid of the California Federation of Women's Clubs and the California League of Women Voters, the chamber procured thousands of signatures (free of charge), and, in addition to that, gained the support of many politically active women's organizations. Contracts had also been made with professional signature gathering firms, which facilitated the completion of an impressive effort.[3]

Another, and perhaps crucial, difference was the course taken by the chamber to enact its anti-crime package into law. While the bar association decided to work through the state legislature, the chamber of commerce opted for the initiative method. The president of the chamber, Joseph Knowland, reasoned that since similar reforms had previously failed in the legislature, the initiative method

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[1]LABB., October, 1933.
[2]Ibid. October, 1934.
[3]Activity Report, Minutes from Board of Directors meeting. Del Monte, June 29, 1934.

was their only hope. Because "most of these measures had," explained Knowland, "at one time or another, been before the State Legislature, the group decided to bring them before the people as initiative constitutional amendments."[1]

The chamber made the justice program its top priority, and despite the emergence of various obstacles to their goal, the initiative campaign made rapid progress. The first of these obstacles was opposition by a large number of attorneys in Los Angeles, engaged in the practice of criminal law. The other was from various women's groups which were apparently under the impression that they had not been properly consulted in the matter.[2]

The Committee on Better Administration of Justice issued its report in August, and announced that the signature drive to qualify the initiatives for the ballot had concluded, with the necessary number of signatures having been greatly exceeded. According to their figures, some 32,300 volunteer signatures were gathered on each of the four proposals, along with 78,000 for each petition that were purchased in Los Angeles County.

Interestingly, the committee reported that it had purposely refrained from giving any extensive publicity to the program, "in order to avoid, as far as possible, organized opposition this early in the campaign." The remainder of the committee's report outlined its plans for a massive publicity campaign to combat this lack of voter awareness. Limiting publicity early in the campaign may have

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[1]California Journal of Development, "California Girds for War on Crime," by Joseph R. Knowland, president of the California State Chamber of Commerce. July, 1934.

[2]Minutes from a Board of Directors Meeting, Los Angeles, August 3, 1934.

succeeded in preventing organized opposition from taking root, but the strategy distanced many potential supporters from their program as well. Subsequently, the special committee announced plans to publish and distribute information about the program on a massive scale. Newspapers and magazines were to be contacted to publicize the initiatives (and gain their endorsement if possible), and speakers' bureaus set up to educate the electorate. Furthermore, the anti-crime initiatives may have enjoyed the active support of many sponsoring organizations, but, the chamber admitted, that support was limited primarily to the executive heads of those groups and did not extend to the rank and file.

By early September, the four initiatives had been allotted ballot numbers by the Secretary of State: No. 3 -- Selection of judges and confirmation by vote of the people; No. 4 -- Powers and duties of attorney general for administration of justice; No. 5 -- Comment on evidence and failure of defendant to testify; and No. 6 -- Plea of guilty before committing magistrate. The committee believed that appearing on the ballot in a group gave the program a distinct advantage, in that it provided easy voter identification.[1]

The publicity campaign was held off until September 15, at which time the chamber undertook a media blitz. Cards, pamphlets and speakers' manuals were distributed, speakers' bureaus were organized, and endorsements from major state-wide groups were circulated throughout California. Well known figures from both Southern and Northern California were selected to write the official

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[1]Minutes from Board of Directors Meeting, Sacramento, September 7, 1934.

ballot pamphlet arguments in favor of the four initiative amendments. The special committee reported that it was still not facing any organized opposition to its measures, but were anticipating it once the publicity started.[1]

Organized opposition to the chamber's anti-crime program, however, never materialized; at least, there is no evidence of it. One likely source of opposition was eliminated when the state bar held a convention prior to the November elections and endorsed the entire chamber of commerce program, including the judicial selection measure. Beyond its endorsement of the program, however, the bar offered very little in terms of an explanation of the various measures. The Los Angeles Bar Bulletin, for instance, mentioned merely that the state bar convention had endorsed the chamber of commerce measure on the selection of judges, and that it differed from No. 98 "in that it extends a similar system to the higher courts as well, and requires ratification of the governor's appointments by a commission composed of the chief justice, the attorney general and the senior presiding justice of the appellate court."[2] No notice of the endorsement appeared in the California State Bar Journal.

By October, the chamber's publicity campaign was in full swing. The Special Committee on Better Administration of Justice reported to the board of directors that ninety thousand digests of the measures had been distributed, and that nearly one hundred speakers were appearing daily before various groups throughout the

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[1]Report of the Committee on Better Administration of Justice to the Board of Directors, September 7, 1934.
[2]LABB., September 20, 1934, p 5.

state. The committee also reported that its measures were receiving the support of approximately 95% of the California press. With the election just days away, there was still no sign of concerted opposition anywhere in the state.[1] The important Southern District further reported that all signs indicated a favorable vote would be cast in their region. It also claimed to have received teacher groups' support for their amendments, and commented on the particularly important support they were getting from various businesses around the state.

In its final report before the election, the special committee expressed great confidence that the amendments would succeed at the polls. Radio broadcasts, news releases, and metropolitan billboards were being used. The committee did caution that a light vote on all the propositions was likely, due to the intense gubernatorial campaign between incumbent Republican Frank Merriam and Democrat Upton Sinclair. They apparently did not believe that high interest in the governor's race would translate into a high proposition vote. However, the committee also expressed its belief that "the fact that our propositions are numbered low on the ballot and that our supporters are interested enough to be sure to vote, reacts to our advantage."[2] ACA No. 98 appeared on the ballot as proposition 14.

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[1]Minutes from Board of Directors Meeting, October 26, 1934.

[2]Report of Committee on Better Administration of Justice to the board of Directors, October 26, 1934. (Actually, election results for the initiatives do not support their logic. Voter turnout remained relatively high for all twenty-three of the initiatives that appeared on the ballot--averaging around 1.4 million votes cast, compared with a total of 2.3 million votes cast for governor.) These statistics taken from the Statement of Vote for the November 6, 1934 election.

The gubernatorial campaign itself was an important element to the fate of the chamber of commerce's program. Sinclair was branded a radical and a communist by opposing Republicans and Democrats alike. His candidacy evoked fears of sweeping social reforms if he and his EPIC plan reached the statehouse. The major California newspapers stirred popular fears of radicalism and overwhelmingly supported the reelection of Governor Merriam. The chamber's initiatives, advertised as crime reducing measures, could only have benefitted from this conservative political environment.

The major newspapers of the state also supported the chamber's program on its own merits. The Los Angeles Times, which had been paying close attention to the problems of its local judiciary, endorsed all four amendments. A string of editorial pieces lamented the condition of the city's elected judiciary and praised the benefits of an appointive system.[1] The Times culminated its support two days before the election, when it not only endorsed the chamber's four initiatives, but supported the bar's proposal (proposition 14) as well. The paper praised proposition 3 as

> an initiative designed to lift the judiciary out of politics...Sponsored by thoughtful students of our judicial procedure, this plan does not in any sense remove direct control by the people of our courts, but does eliminate the necessity for political campaigning by our judges.
>
> The provision for approval by disinterested and exceptionally qualified experts of the individuals nominated by the governor is positive guarantee of the integrity, professional training and experience and temperamental fitness of those selected for judicial service.

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[1] "Judges and Politics," Los Angeles Times, September 18, 1934. Section II, page 4.

> The Times wholeheartedly recommends a vote of "Yes" on this proposal.[1]

The arguments presented in favor of proposition 14 were essentially the same, and the Times urged a vote of "Yes" on it as well.

Major Northern California newspapers exhibited a similar bent. The San Francisco Chronicle, for example, endorsed all four of the chamber's initiatives and proposition 14. The chamber initiatives received support as crime reducing measures. On proposition 14, an editorial piece praised it as "a good measure [that] applies only in L.A. county; which can follow it or not if it likes. No reason why the rest of the state should not let L.A. try this if it wants to."[2]

Despite this dual endorsement, however, the chamber program received a greater amount of attention than proposition 14. In an election dominated by a heated gubernatorial race and in which a great number of initiatives (twenty-three in all) confronted the voters, this disparity in coverage may have amounted to tacit support of the chamber's proposal over the bar's. Supporting evidence of this can be distilled from a series of editorials that appeared in the San Francisco Chronicle immediately prior to the state elections.

On November 1, the Chronicle offered its endorsement to both judicial selection measures, crediting each plan as a means of obtaining better judges. The paper followed on November 5th, (one day before the election), with a piece that cautioned the electorate of

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[1]"Times' Recommendations For Next Tuesday's State Elections," L.A. Times, November 4, 1934. Section I, page 12.
[2]"Chronicle's Guide to Measures on the Ballot," S.F. Chronicle, November 4, 1934.

the difficulty of intelligently sifting through so many ballot proposals. Taking a swipe at all the proposals sponsored by the state legislature, the article bemoaned the trouble with the "technical amendments submitted by the Legislature" and contrasted them with the initiatives. "On initiative propositions it is different," the editorial asserted. "They as a rule deal with broad policies upon which the voter has an opinion or can reach one through the arguments."[1] Even though the Chronicle continued to openly support proposition 14, this would seem to confirm its favoritism regarding the chamber's measure.

The Chronicle's scoring of the legislative propositions did not end with the election, as illustrated by another editorial piece that appeared in the aftermath. Apparently taking an indirect swipe at proposition 14, the article berated the legislature for once again failing to accurately gauge public sentiment. It pointed to the rejection at the polls of measures originating within the legislature, as opposed to the success of initiative, or "popularly" sponsored measures.[2]

It is, of course, difficult to assess what effect, if any, such endorsements had on the outcome of the election, but it can be stated with certainty that these major newspapers more actively supported

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[1]"Voters Must Tackle Ballot Propositions," S.F. Chronicle, November 5, 1934. Section I, page 12.

[2]"Initiative Vote Shows Legislators Mistaken," S.F. Chronicle, November 16, 1934. Section I, page 14. (Actually, this assessment fails to hold up. Of the 23 proposals submitted to the electorate state-wide, six of ten initiative measures passed, while eight of thirteen measures originating in legislature also passed. It thus appears that no such conclusion can be made decisively. These figures were taken from the "Statement of Vote at General Election Held on November 6, 1934 in the State of California.")

proposition 3 than number 14. It is further possible that by omission, one proposal was favored over the other even though both received overt endorsement.

The ultimate proof of the lack of organized opposition to the chamber program is revealed by the absence of any arguments against any of its four proposals on the sample ballot.[1] Meanwhile, at the request of the chamber's special committee, thoughtful arguments in favor of each of the anti-crime initiatives were submitted by a broad array of esteemed citizens: the vice president-at-large of the California Federation of Women's Clubs, President Rufus von Kleinsmid of the University of Southern California, District Attorney Earl Warren of Alameda County, and other attorneys and businessmen. Such a wide variety of advocates may have given many voters the impression of a broad based support for the measures--which was, in fact, the case.

In contrast, arguments both for and against proposition 14 (ACA No. 98) appeared on the sample ballot. Two assemblymen offered the argument for the measure. They simply reiterated the same points that had been made for years in support of an appointive judiciary: that the current procedure for selecting judges was mired in politics, that appointment was consistent with the original intentions of the Founding Fathers, and that it would improve the quality of the bench and the judicial system.

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[1]"Proposed Amendments to Constitution. Propositions and Laws to be submitted to the electors of the state of California at the general election to be held Tuesday, November 6, 1934."

The argument against proposition 14 was written by another assemblymen. Ira S. Hatch of the 70th Assembly District called the proposal a piece of "'class legislation'...[which is] entirely foreign to constitutional approval," and would "confer special political privileges to but one county of the State, which can not be enjoyed by any of the others." He argued further that it replaced the direct primary method with bureaucratic control, "which should not be permitted in any popular democratic form of government." It would not, he claimed, eliminate political influence from the process of selecting judges, but would simply complicate an already complex political situation, and until some foolproof measure was devised, the system should stand as it is.

Taken together, the collection of factors examined here does provide some insight into the fate of the judicial reform movement in California. First, there is the absence of any organized opposition to the chamber's program--best illustrated by the lack of arguments against it on the ballot. At the same time, respected public figures presented arguments in favor of those initiatives. Second, the state bar proposal did meet with notable opposition from various sectors, including the state legislature (evidenced by the assemblyman's submission of the argument against proposition 14), and among dissenting lawyers within the bar itself (illustrated by the considerable debate that took place within the legal community on the issue of judicial selection). Further, there is the possibility of favoritism among the state's press for the chamber's proposal over the state bar's. It is, of course, difficult to definitively assess what effect these factors may have had on the electorate.

In 1984, when Rose Bird and two other supreme court justices were ousted in a highly publicized retention election, unprecedented in the state's history, grave doubts about the integrity and independence of the state judiciary began to circulate. The roots of the 1984 retention controversy lay in the debates over judicial independence and tenure begun in the Progressive era and decided in the 1934 election. An examination of the procedure for selecting our judges--and particularly the origins of that procedure--eventually led to the discovery of a year-long debate surrounding efforts to revert to the previously abandoned appointive method of selecting judges. What surfaced next was the genesis of alternative proposals to replace a nominally elected judiciary with an appointive one. The 1934 election witnessed the competition between two such judicial selection alternatives. The chamber of commerce's judicial selection/tenure plan passed due the more forceful campaign waged by its sponsors.

This is not intended to be a cynical account of how well-financed organizations can successfully manipulate the "popular" initiative method. After all, ACA No. 98 originated from within the legal profession itself--also a well financed, and arguably elitist, self-serving interest group that may have sought simply to reserve the appointment of judges for itself. Ultimately the election results speak for themselves. The state bar simply did not succeed in generating widespread popular support for its measure. Propositions 4, 5, and 6 passed by huge margins, while proposition 3 passed by a healthy 70,000 plus votes. ACA No. 98 (proposition 14), on the

other hand, was rejected by majorities in 44 counties, including Los Angeles, San Francisco, and Sacramento.[1]

The judicial selection process now in place (and in question since the controversy of 1984) did not come into being without considerable debate at the time, nor without an available alternative. Not one, but two proposals for reforming judicial selection went before the voters of California in 1934. The measure proposed by the legal profession, which was more consistent with the original conception of how to implement retention elections, was substantially different in process than the chamber's plan. The retention election was originally designed to provide judges with long tenure, but was never intended to be used without the implementation of an expert nominating commission. James Willard Hurst's The Growth of American Law is incorrect, then, when it asserts that California adopted "in substance" the Kales plan in 1934.[2] What California actually adopted was a plan fundamentally inconsistent with that conceived by Kales.

It is difficult to declare whether or not the 1934 plan has had any appreciable effects on the quality of the state judiciary. After all, in its fifty years of existence, 1984 marked the first time in its history that any judge failed to be retained in such an election.

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[1]The three measures won by margins of greater than 2-1 in each case. Proposition 3 was adopted by a vote of 810,320 to 734,857, winning majorities in 33 of 58 counties, including Los Angeles(by nearly 20,000 votes), and San Francisco (by less than 7,000 votes). No. 3 was rejected in Sacramento by a vote of nearly 2-1. The vote of prop. 14 was very close in L.A., losing 303,179 to 312,072. All taken from the official Statement of Vote, for the November 6, 1934 election, compiled by the secretary of state.

[2]James Willard Hurst, The Growth of American Law--The Law Makers. (Boston: Little, Brown and Company, 1950) 134

Those who originally conceived the retention election tenure system would have been reassured by the stability of tenure provided by the plan, but would also have misgivings about the absence of a nominating commission. As for the authors of the chamber plan, they simply did not explicitly state whether they intended it to provide long tenure or not, though it is likely that they did. Furthermore, it is impossible to speculate on how any of them would have stood on the Rose Bird removal. For, in addition to guaranteeing long tenure, retention elections were also intended to provide the electorate with an easy method for removing "outstandingly bad" judges. If Rose Bird's qualifications as a judge were the main issue in 1984, then her ouster can be said to have fulfilled the expectations of the 1934 plan. If, however, extraneous political issues were at play, then the authors of the 1934 plan would have to recognize the infiltration of political forces into their process of judicial selection.

Although the actual effects of the 1934 plan on the quality of the state's higher courts cannot be determined, other conclusions about the plan can be drawn from the historical record. For instance, despite the amendment's provision that any county may adopt the same method of selecting its superior court judges, not a single county, including Los Angeles, has ever done so. During the same period, a number of other states--consciously looking at the example set by California--implemented procedures for judicial selection more in line with the Kales' plan. Missouri did so in 1940, for example. The debate over judicial selection has been a lively topic throughout California's history, and is likely to remain so as long as

interest in a skilled, independent judiciary is a concern of the American people.