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INTRODUCTION

Thank you to the Fordham Urban Law Journal for this opportunity to participate in the debate over the recent United Kingdom Constitutional Reform Act of 2005 (“CRA”),1 which was delineated so comprehensively by Professor Maute, particularly the potential of the new judicial appointment processes it instituted for diversifying the judiciary.2 Spurred by Professor Maute’s suggestion that these reforms could provide lessons for the U.S. selection system, the conversation has been broadened by subsequent contributors to encompass themes such as the meaning and value of diversity, the means by which progress on diversity can be measured, and the question of merit, representativeness and judicial legitimacy.3 In this

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1. The various countries that make up the United Kingdom (U.K.) have their own legal systems, but these are all subject to the Supreme Court. See The Supreme Court and the United Kingdom’s Legal System, SUPREME CT., http://www.supremecourt.gov.uk/docs/supreme-court-and-the-ueks-legal-system.pdf (last visited Dec. 12, 2013). Some discussion of the judiciary of lower courts may therefore solely refer to that of England and Wales.


contribution I will restrict myself to commenting on the U.K. judicial appointment process. I begin, however, with a brief summary of the key points of the conversation to date.

**The City Square Discussion Thus Far**

The initial response to Professor Maute’s paper was skeptical about her enthusiasm for the U.K. constitutional reforms and called on her to explain how they might help to increase judicial diversity in the United States.\(^4\) In her contribution, Ms. Fennell went on to pinpoint two key difficulties in the diversity debate. Firstly, she questioned how progress might be measured (other than by “nose-counts”). Secondly, she noted that, to the extent traditional legitimating claims of “perspectiveless” judging are becoming less sustainable, arguments suggesting “outsiders” will judge “differently” (and arguments applauding that difference) run up against the difficulty of establishing and reproducing judicial legitimacy.\(^5\) In her reply Professor Maute focused on the dangers of essentialism, observing that increased numbers of “outsiders” cannot be expected to result automatically in increased empathy towards marginalized communities\(^6\) – an insight which weakens one of the principal arguments made for a more diverse judiciary.\(^7\)

The next contribution did not engage directly with the diversity/objectivity conundrum, but instead focused on the concerns

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\(^4\) See generally Fennell, supra note 3.

\(^5\) See Fennell, supra note 3, at 15-16. She notes the weakening of these claims as a result of the increasingly widely held belief that “judicial characteristics matter to legal outcomes[,]” but also points to the resilience of legal formalism, citing Samuel P. Jordan, who comments that “[t]here is a strong predisposition in the American legal system toward the formalist notion that judges perform their function without recourse to personal ideology or past experience.” *Id.* (citing Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. REV. 55, 63, 66 (2007)). The early 1970s in the U.K. saw increasing skepticism about legal formalism, even among the senior judiciary. For instance, Lord Reid described the declaratory theory of judging to be a “fairy tale.” Lord Reid, *The Judge as Law Maker*, 12 J. SOC’Y PUB. TCHR. L. 22, 22 (1972).


\(^7\) For a recent exposition of this argument see generally ERIKA RACKLEY, WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY (2013).
that both the U.K. and U.S. selection systems are elitist. Echoing Professor Maute, Professor Jackson underlined the significance of representativeness for the legitimacy of both the judiciary and the wider social system, since this “gives a sense that all people, not just the rich or powerful, have a chance to be judges and to receive justice from a court.”

He then moved to consider the U.S. appointment system in detail and, in particular, the argument that the commission system in some states is elitist because of the disproportionate influence over appointments exercised by the legal profession. For Professor Jackson, however, the system is defensible because “lawyers are in fact better than the general public at identifying good judicial candidates.” He nevertheless suggested that the charge of elitism or lawyer dominance might be reduced if the U.S. emulated the CRA by making the selection of laypersons an independent process and increasing their numbers on nominating commissions.

The final contribution to the debate returned to the value of diversity. Like Professor Jackson, Professor Lau first emphasized the importance of representativeness, which he described as a “linchpin of legitimacy and faith in the legal system.” However, as with Professor Maute’s discussion, there may be a tension between his recognition that a judge’s social identity is not necessarily predictive of his or her decision in a case and his argument that a representative judiciary would have different life experiences, which would in turn lead to “better decisions, more legitimacy, and greater impartiality.”

The potential contradictions embedded in this claim are perhaps underscored by the subsequent discussion of the deeply political nature of judicial appointment in the U.S., where the question of

8. See Jackson, supra note 3, at 57 (observing that the U.K.’s new selection commission system is both similar to the “Missouri Plan,” which is often accused of being an elitist selection system, and intended to correct elitism).
9. Id. at 58. In a similar vein, Sally Kenney argues that courts are essentially representative institutions and that the case for diversification, which includes more women judges, is a question of democratic citizenship rights. See, e.g., SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 108-34, 178-79 (2013).
10. See Jackson, supra note 3, at 59-64.
11. Id. at 61.
12. See id. at 65-66.
14. Id. at 73 (citing Kevin R. Johnson & Luis Fuentes-Rohwer, A Principled Approach to the Quest for Racial Diversity on the Judiciary, 10 MICH. J. RACE & L. 5 (2004)).
diversity appears to be a highly significant factor. His suggested solution to this explicitly political system endorsed Professor Maute’s argument that the U.S. could benefit from adopting a process of appointment modeled on the CRA since this would be “driven solely by merit, and a bipartisan and non-political commission . . . would make the selections.” This last point raises a further difficulty with the diversity debate, namely what constitutes merit.

**A U.K. Perspective**

There are many aspects to the exchanges summarized here that deserve further engagement and that could be enriched by reflections on the U.K. system — both because its heavy reliance on ‘secret soundings’ made it the epitome of archaic elitism prior to reform, and also because the reformed system is having little impact on the demographic profile of the higher reaches of the judiciary. Yet it has been over 20 years since key members of the English judiciary began to acknowledge the need to diversify its ranks. In 1992 for instance, the then Lord Chief Justice, Lord Taylor, stated in a public lecture that “[t]he present imbalance between male and female, white and black in the judiciary is obvious” and claimed “the balance will be redressed in the next few years.” The failure of this prediction, together with the blatant anachronism of the secret soundings system and the continuing pressure for change, made constitutional reform irresistible.

The primary contribution of the CRA to diversifying the judiciary has been the establishment of an independent Judicial Appointments Commission (“JAC”). However, the potential of this body to

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15. See id. at 74-75, 78-79 (noting the vast amount of power Congress exerts over the Federal judiciary and the great increase in partisanship surrounding appointments in recent times).

16. Id. at 79.

17. See Lord Elwyn Jones, In My Times: An Autobiography 265 (Weidenfeld & Nicolson eds. 1983) (clarifying why the system of selection was known as “secret soundings[:]” “when a vacancy had to be filled, the heads of Division . . . were invited into my office to consider likely names. Usually we agreed as to the one most meriting appointment. Occasionally two names were equally supported. Then the choice was left to me”). See generally Maute, supra note 2, at 404-22.

18. Criticisms of the uniform social composition and political views of the judiciary long preceded this, and were subsequently stimulated by the ongoing diversification of solicitors and (to a lesser extent) barristers. See, e.g., John Griffiths, The Politics of the Judiciary 18-22 (1977).

modernize the judiciary to any significant extent is undermined by the limitations placed on its powers: first, and most notably, it is not empowered to appoint judges, but is instead limited to selecting candidates and auditing the process of appointment; second, separate processes of selection apply to the Court of Appeal and Supreme Court; and, finally, while it is obliged to give regard to the need to encourage diversity in the range of persons available for selection for appointment,\(^\text{20}\) this duty was initially made subject to an overriding duty that selection must solely be on the basis of merit (making no reference to diversity).\(^\text{21}\) Despite the relative weakness of these measures, Lord Falconer, then Lord Chancellor, predicted that they would quickly address the diversity gap, stating that within “five years’ time, I do want to see every under-represented group applying in proportion to its presence in the pool. At every level. In our tribunals and in our courts. Progressing from post to post, according to ability. Regardless of gender, race, disability, sexual orientation, religion or age.”\(^\text{22}\)

This expression of faith in the probability of imminent and dramatic progress on diversity is a key defense against a more interventionist strategy based on, for example, quotas.\(^\text{23}\) Its credibility depends on a belief that, first, merit is an unproblematic concept, entirely unrelated to context and capable of objective measurement, and second, selectors are entirely free of both conscious and unconscious bias, uninfluenced by personal connections, the social category of a candidate, and cultural stereotypes.\(^\text{24}\) Such beliefs are derived from the “commonsense” evolutionist narrative of society, which conceptualizes labor markets


\(^{23}\) The case for quotas has nevertheless been strongly argued. See Kate Malleson, Gender Quotas for the Judiciary in England and Wales, in Gender and Judging 481 (Ulrike Schultz & Gisela Shaw eds., 2013).

\(^{24}\) See, e.g., id.
as inherently neutral and individual actors as free agents. When contradictions and stresses arise in this narrative, rectifying forces that are similarly informed by principles of rationality and abstract justice will emerge to correct them. For Iris Marion Young, however, this meritocratic narrative is a myth that legitimizes social inequalities and serves to block reform. If we take this view, then it is possible to view weak reforms such as those enacted by the CRA as reinforcing this myth: while they are too limited to produce substantive change, they nevertheless make it possible to attribute responsibility for lack of progress to the ‘de-merit’ of outsider candidates whose deficient quality, and/or career choices slow what otherwise would be a natural “trickle-up.”

This negative interpretation of the CRA is largely vindicated by the very limited progress that has been made in terms of diversifying the judiciary since its enactment. Although this period has seen significant diversification of the lower levels of the judiciary, this must be contextualized by the general increase during the same period in the numbers of lower level judges. Moreover, there has been very little progress in diversifying the higher courts, and, consequently, the appointments process has been subjected to parliamentary scrutiny. The responses of key figures have been strikingly complacent. For instance, in September 2010, the Justice Committee’s examination of the JAC’s work elicited the following articulation by Jonathan Sumption, Queen’s Counsel, of the deficit model:

Clearly, the diversity of appointments is extremely sensitive to the profile of the higher reaches of the legal professions. My own

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25. This narrative originated with the Enlightenment belief in social laws that produced progressive social change. See John Mattausch, *Chance and Societal Change*, 51 Soc. Rev. 506, 516-18 (2003). It is exemplified by Maine’s thesis that law and society developed from status to contract, see Henry Sumner Maine, *Ancient Law* 141 (Dorset Press 1986), and hence from pre-modern forms of social formation, characterized by relationships of authority based on ties of affinity and irrational beliefs, to rational capitalist modernity.


impression—I can’t say that it is more than an impression but it is based on a fair amount of experience—is that the quality of BME candidates entering the legal profession now has continuously increased over a number of years, just as the quality and number of women entering the legal profession continuously increased over a substantial period a generation ago.\footnote{JUSTICE COMMITTEE, THE WORK OF THE JUDICIAL APPOINTMENTS COMMISSION—ORAL EVIDENCE, 2010, H.C. 449-I (U.K.), available at http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/449-i/10090702.htm (responding to question 24). The acronym BME stands for Black and Minority Ethnic and is deployed by both UK policy makers and academic researchers to denote non-white groups. Clearly, it is a crude taxonomic device that cannot capture the hierarchies of ethnicities and other intersecting forms of identity.}

A few months later, the then Lord Chancellor, Kenneth Clarke, completely ruled out the possibility of any bias on the part of selectors in his response to questioning by a House of Lords Select Committee inquiry, stating that “[t]he legal world at the level we are talking about is free of people with prejudice . . . .”\footnote{SELECT COMMITTEE ON THE CONSTITUTION, MEETINGS WITH THE LORD CHIEF JUSTICE AND THE LORD CHANCELLOR, 2010-11, H.L. 89, at 56 (U.K.) [hereinafter SELECT COMMITTEE, MEETINGS], available at http://www.parliament.uk/documents/lords-committees/constitution/LordChancellor/FinalLCandLCJEvidence.pdf; see also SELECT COMMITTEE ON THE CONSTITUTION, JUDICIAL APPOINTMENTS PROCESS ORAL AND WRITTEN EVIDENCE, 2010-12, H.L., at 425-27 (U.K.) [hereinafter SELECT COMMITTEE, ORAL AND WRITTEN EVIDENCE], available at http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPProcessedEvidence28032012.pdf (discussing and largely dismissing the potential of diversity targets or other affirmative methods for ensuring a diverse judiciary).} He then proceeded to describe the judicial selection process as carried out by “competent upper middle class professionals who are utterly beyond all that.”\footnote{See generally Loren Falkenberg, Improving the Accuracy of Stereotypes Within the Workplace, 16 J. MGMT. 107, 107-09 (1990) (describing the sources and general perception of stereotypes in society).}

The work of organizational theorists clarifies how this narrative of progress is sustained in the face of both a commitment to diversity, and the failure to achieve it. For Schein, it is the product of the patterning of organizations by basic assumptions about human nature and the “reality” of the world in which we live and work.\footnote{See Edgar H. Schein, ORGANIZATIONAL CULTURE AND LEADERSHIP 171-88 (3d ed. 2004).} Such assumptions form the basis for understandings of merit, behavior and experience, and are often so tacit and ingrained that they tend to be difficult to identify, contest, or change. This is likely to be especially
true in the legal profession because, as Jonathan Sumption’s comment quoted above suggests, many of its characteristics are implicitly viewed as “naturally” male. As a result, the candidate deemed “good” or merit-worthy is highly likely either to be drawn from the same category and background as current judges, or, if an “outsider,” to be clearly unlike the cultural stereotype of their particular non-normative categories. At the same time, the practice of evaluating people according to attributes and performances currently displayed in the judicial arena reinforces heuristic biases in favor of the familiar and the similar, and legitimates existing hierarchies. Similarly, work on professional elites has found that merit is conceptualized as innate rather than partially stemming from social advantage, producing a sense of entitlement amongst incumbents.

Recommendations by the Advisory Panel on Judicial Diversity implicitly support the view that the traditional, de-contextualized conceptualization of merit is fallacious. The Recommendations argue that the understanding of merit should reflect the varied nature of a judge’s work, including the diverse communities a judge may deal with, and the attributes and experiences that can enhance the capacity

33. See generally Margaret Thornton, ‘Otherness’ on the Bench: How Merit is Gendered, 29 SYDNEY L. REV. 391 (2007) (challenging the objectivity of merit regarding the selection and appointment of women judgment).

34. See Deborah L. Rhode, From Platitudes to Priorities: Diversity and Gender Equity in Law Firms, 24 GEO. J. LEGAL ETHICS 1041, 1050-56 (2011) (noting the “well-documented, often unconscious role” played by stereotypes in the profession).

35. The JAC identified five groups of qualities and abilities as representing merit (e.g., Authority and Communication Skills), which are then broken down further. See Qualities and Abilities, JUD. APPOINTMENTS COMMISSION, http://jac.judiciary.gov.uk/application-process/qualities-and-abilities.htm (last visited Oct. 7, 2013). Their definition in practice, however, is highly subjective, and the attempt to “objectivize” it through a narrow competency-based system has been criticized on the basis that it ignores many significant life experiences. See, e.g., SELECT COMMITTEE ON THE CONSTITUTION, JUDICIAL APPOINTMENTS, 2010-12, H.L. 272, at 26, 30-31 (U.K.), available at http://www.publications.parliament.uk/pa/ld201012/ldselect/ldeconst/272/272.pdf.

36. These have been termed “conventions of warrant.” KENNETH J. GERGEN, WARRANTING VOICE AND THE ELABORATION OF SELF, IN TEXTS OF IDENTITY 70, 74 (John Shotter & Kenneth J. Gergen eds., 1989). Some argue that the current conceptualization of merit encourages selectors to choose people in their own image, generally, white males with similar educational backgrounds. See generally Alan Paterson & Chris Paterson, Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary, CENTREFORUM, 4451 (2012), http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf.

37. See Schleef, supra note 27, at 45-46.
to undertake this work. It is questionable whether Professor Jackson’s point that “lawyers are better than the general public at identifying good judicial candidates” because they are afforded a “better opportunity to gain information through their day-to-day immersion in the processes of the legal profession[,]” extends to evaluating such qualities since they “are not easily susceptible to quantitative measurement and comparative ranking.”

Any analysis of the English legal profession also needs to emphasize its history as an elite, white male profession that resembles a pre-modern society structured by patron-client relationships. Bagehot’s phrase “club government” encapsulates this characteristic and is particularly relevant to the higher levels of the judiciary. Yet, as mentioned above, the CRA established separate, ad hoc appointing commissions for the Court of Appeal and Supreme Court that are largely comprised of judges, thereby leaving the judicial elite relatively immune to the reforms. For instance, twenty of the twenty-six individuals involved in the appointment of a Supreme Court Justice are members of the senior judiciary and one is a more junior judge, leading one commentator to warn of the “potential danger for this branch of government to become a ‘self-perpetuating oligarchy.’” The opacity surrounding appointments for the role of

41. See Hilary Sommerlad et al., Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices 7 (2010), http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lsb_diversity_in_the_legal_profession_final_rev.pdf (noting the importance of patronage in the form of informal mentoring in the legal profession and the difficulties this poses for the advancement of minorities).
Deputy High Court Judge compounds this danger. A key stepping-stone to obtaining a salaried appointment to the senior judiciary, selection to this position was described by the Association of Women Barristers as dependent on patronage. At the same time, it appears that the lower, more diverse courts are ring-fenced. Thus, Lady Hale referred to “the unspoken officer-class mentality about who gets what sort of job” and argued that “[t]ribunal and district judges should have much better opportunities to progress to the ‘uniform’ branch[.]” Baroness Neuberger echoed this point when speaking of lower level judges describing themselves as “‘below the salt.’ They feel as if they are a junior branch where it is normal to be diverse . . . but that does not apply further up.”

So, how can the system be improved? Some commentators engage directly with the barrier posed by current constructions of merit. For instance, Lady Hale suggested that the insistence on merit could be seen as a defense against change: “It goes without saying—but is often said—that appointments must be made on merit. But it is strange how this word ‘merit’ only pops up when there is talk of changing or expanding the pool from which the judiciary are appointed.” More recently, she underlined the Supreme Court’s collective character, and suggested that the most merit-worthy candidate is the person “who can best contribute to the collective mix[,]” including the person “who would enhance both our diversity and . . . the public’s confidence[.]” It may be that the “tie-breaker” provision, which makes specific provision for a diversity preference.
where candidates are of equal merit, will lead to a more nuanced understanding of merit. Even if this occurs, however, the progress on diversity is likely to be slow so long as the legal profession retains its strong influence over these appointments, especially at the crucial higher levels of the judiciary. The Equal Justices Initiative identified this influence and the related stress placed on the importance of judicial experience as the primary causes of the current tendency towards self-replication. They have proposed a number of measures to address this influence, such as limiting reliance on judicial references, greater openness as to the profile and appointment of Deputy High Court Judges, and the use of quotas.

I would argue, however, that while such changes would almost certainly increase the diversity of the judiciary, this might not necessarily move us much beyond progress in “nose-counts.” In making this comment, I am reflecting on the wider socio-economic and political context to the reforms. Professor Maute states that the CRA formed part of a modernization project, designed to enhance the legitimacy of the English judiciary. The pursuit of this aim extended to other key institutions, which the CRA also reformed in order to promote a closer relationship between government and citizen, and included the move to an elected House of Lords, the expansion of Higher Education, and measures that aimed to make the

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54. See Rackley, supra note 7, 95-105.

55. See Kate Malleson, Gender Quotas for the Judiciary in England and Wales, in GENDER AND JUDGING, supra note 23, at 481.

56. See generally Kenney, supra note 9 (discussing the significance of socio-economic and political context).

57. See Maute, supra note 6, at 86.
professions more accessible in general.\textsuperscript{58} This attempted shift from an aristocratic form of government and society to a democratic one has three inherent problems: first, it is based on the narrow interpretation of democracy as representativeness; second, as the preceding discussion suggests, it was very uneven, leaving key power structures relatively untouched; and third, it was accompanied by spiraling socio-economic inequalities.\textsuperscript{59} So, while the recent U.K. reform program was concerned with modernization, the concomitant diminution in social rights has resulted in a form of democratic citizenship that prioritizes civil and political rights while reducing economic rights to mere entitlements. Yet increased representativeness is merely gestural without access to resources. For instance, the possibility of accessing the courts in order to realize one’s rights has dramatically decreased as a result of drastic cuts to the legal aid budget.\textsuperscript{60} At the same time, access to the legal profession, and especially its upper echelons, has become increasingly restricted as a result of a deepening of the stratification of higher education and the (related) strengthening of the significance of archaic signifiers of class, such as having attended a fee-paying school.
and an elite university. 61 As a result, it seems likely that the higher-level judiciary will continue to be restricted to the “officer class.”

Changes in the approach to diversity offer another example of the neo-liberal character of contemporary U.K. democracy. Gender mainstreaming, which conceives equal access as a matter of social justice and principle, was an important component of the modernization that was taking place up until the late 1980s. Today, however, the arguments in favor of diversity are essentially market based. They are framed not as an issue of equity, but as a business case, which stresses the importance of ‘clients’ and social legitimacy. 62 Yet, the key function of a representative judiciary is surely not to be more attractive to clients, or to provide a legitimizing cloak to an otherwise unequally accessible profession. Instead, it should provide a counterweight to executive decisions. Earlier contributors to this debate have underscored that there is no guarantee a judge from an outsider community will empathize with the views of that community, but a judiciary drawn from the most privileged sectors of society, 63 representing only approximately 4% of the population at large, appears likely to drastically reduce the potential of alternative adjudicative voices.

61. See SUTTON TRUST, supra note 60; Adams, supra note 60.
62. See SELECT COMMITTEE, ORAL AND WRITTEN EVIDENCE, supra note 29, at 269.
63. See, e.g., Lord Falconer of Thoroton, supra note 22. Endorsement of the “business case” for diversity has not been confined to business, but has, since at least the mid to late 1990s, displaced the discourses and policies of equality opportunities in government and the public sector. See, e.g., CENTRE FOR STRATEGY & EVALUATION SERVICES, METHODS AND INDICATORS TO MEASURE THE COST-EFFECTIVENESS OF DIVERSITY POLICIES IN ENTERPRISES (2003), http://www.cses.co.uk/upl/File/CostsBenefFullRepEN.pdf; DEPARTMENT OF TRADE AND INDUSTRY, THE BUSINESS CASE FOR DIVERSITY AND EQUALITY 3 (n.d.), http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/bestpractice/assets/bcdiv.pdf (discussing the business benefits of implementing principles of equality and diversity).
In summary, Professor Maute’s prediction that the new judicial appointment system in the U.K. would be successful in increasing diversity on the bench has only been realized at the lowest levels of the judiciary. Meanwhile, the demographic profile of the judiciary’s most powerful levels is more monolithic than before the CRA. In the 10 years since Baroness Hale’s appointment to the Supreme Court, none of the 13 subsequent appointments have been female. 2013 saw the new high level appointment of three Supreme Court judges, the Lord Chief Justice and the President of the Queen’s Bench Division, all of whom were white males. There are now no BME women judges in the senior judiciary following the retirement of Dame Linda Dobbs from the High Court in 2013. Even the targets for diversity are being lowered.

CONCLUSION

This situation has led Lady Hale once again to question the supposed neutrality of merit. She wondered “whether the fact that the appointments process is dominated by men has anything to do with the choice of people. It would not be impossible to speculate that it is always much easier to perceive merit in people who are like you than it is to discern the merit of those who are a bit different.” Therefore, it appears that if the U.S. wishes to diversify its judiciary, the only lesson it should draw from the U.K. selection process would be to do something entirely different.


68. Dominic Casciani, Lady Hale ‘Disappointed’ at Lack of Female Judges, BBC News (Oct. 2, 2013, 11:52 AM), http://www.bbc.co.uk/news/uk-24370177 (“Of the six Supreme Court selection commissions to date, five had a majority of men and one included no women at all.”)