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# **The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges**

*Laura Denvir Stith\**  
*Jeremy Root\*\**

## **I. AN OVERVIEW OF THE THREE PRIMARY METHODS OF JUDICIAL SELECTION IN THE UNITED STATES**

According to Justice Steven Breyer, “the reputation and the reality of the fairness and effectiveness of the American judicial system are in the hands of the states.”<sup>1</sup> In the laboratory of American democracy, each sovereign state has the freedom to design the method by which members of its judiciary are chosen. The unique history, culture and experiences of each state have led to the adoption of a variety of systems to select judges. These methods general-

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1. Steven Breyer, U.S. Supreme Court Assoc. Justice, Keynote Remarks at the 2007 Conference of the Sandra Day O’Connor Project on the State of the Judiciary: The Debate Over Judicial Elections and State Court Judicial Selection (Oct. 17, 2007), in 21 GEO. J. LEGAL ETHICS 1347, 1349 (2008).

ly fall into one of three categories: contested election, political appointment, or merit selection.

As discussed in Section III of this Article, Missouri was the first state to have direct experience with all three of these methods of judicial selection. When Missouri first became a state it adopted the gubernatorial appointive system. Political influence and cronyism soon led Missouri to amend its constitution to provide for popular election of judges. After several decades, Missourians found the electoral system, too, easily could become “captured by” moneyed, partisan interests. Tales of scandal began to abound, particularly in elections in the urban areas and for statewide office, where party bosses held sway.<sup>2</sup>

In 1940, the citizens of Missouri adopted, by initiative petition, the Missouri Nonpartisan Court Plan for selecting judges. This was the first merit-selection system in the country, and it has been described as Missouri’s “gift to the art of government.”<sup>3</sup> It initially applied to all appellate courts, the supreme court, and circuit courts in St. Louis City and Jackson County (home to Kansas City). It since has been expanded to include the circuit courts of four of Missouri’s other large counties.<sup>4</sup>

In evaluating the Missouri Nonpartisan Court Plan – indeed, when evaluating any form of judicial selection – it is crucial to keep in mind the role of the judicial branch in our system of government. In this Article, we begin by describing in Section II the unique role that the judicial branch plays in American democracy. Next, Section III discusses the history of judicial selection in Missouri to illuminate the road by which the state came to merit selection. Finally, Section IV discusses how the Missouri Nonpartisan Court Plan, in its present structure and operation, is well suited to further the inherently impartial nature of the judicial branch. The plan draws the best ele-

2. See *infra* Section III.B; see also Gerald T. Dunne, *THE MISSOURI SUPREME COURT: FROM DRED SCOTT TO NANCY CRUZAN* 59 (1993) (“Missouri throughout its history has struggled with the seemingly insoluble issue of who shall judge as well as appoint and remove its judges. Beginning with a federal model of executive appointment and life tenure, it has moved by stages (really by convulsions) to its own Missouri Plan, which undertakes to harmonize the appointive principle with the democratic process.”). See also Jack W. Peltason, *Missouri Plan for the Selection of Judges* (1944) (unpublished M.A. Thesis, University of Missouri-Columbia).

3. See also Rick Hardy, Professor, Univ. of Mo.-Columbia, Political Sci. Dep’t, *Missouri’s Gift to the Art of the Government – the Non-Partisan Court Plan* (Feb. 25, 2005) (transcript available at <http://www.mobar.org/4b4cce3f-892b-4b94-b921-bc972f869206.aspx>).

4. MO. CONST. art. V, § 25(a). Over the years, voters in four of Missouri’s other large counties have exercised the option given them under Missouri’s constitution to also adopt nonpartisan judicial selection. See *Your Missouri Courts, Circuit Judicial Commissions: Composition of Commissions*, <http://www.courts.mo.gov/page.asp?id=1786> (last visited July 6, 2009) (providing links to information on the circuit judicial commissions for Platte County, Clay County, St. Louis County and Greene County).

ments from systems of judicial appointments and judicial elections: It provides the executive with the ability to choose from among three highly qualified candidates to fill judicial vacancies – candidates first screened for merit by a selection commission and then voted up or down by the voters before they serve their terms as judges. This approach precludes the control by interest groups, and the millions of dollars in campaign contributions, that have characterized contested statewide judicial elections over the last decades. At the same time, because it selects judges based principally on merit for a limited term, it largely avoids the overt political and interest-group influence (or attempted influence) that seems to dominate the federal method of selecting judges, particularly for openings on the United States Supreme Court, while providing greater accountability.

Nonetheless, a small but vocal group of critics has argued that there are problems with selecting judges based on merit. Some suggest that judges should be popularly elected. Others suggest that judges should be selected by using a federal type of appointment by gubernatorial choice, but without the essential protection from political influence provided by life tenure. Many would choose judges because they reflect particular viewpoints – some suggest the view of the majority, while others suggest the judges should reflect the view of whatever political party happens to be in power. As will become evident, as levied against the Missouri Nonpartisan Court Plan, these critiques lack any foundation in the actual judicial selection system in place in Missouri.

This Article also should allay the concerns expressed by my symposium co-panelists, Brian Fitzpatrick and Stephen Ware, in their articles published in this issue. Professor Ware believes an element of populism should be retained as a part of judicial selection but at the same time concludes that gubernatorial appointment is to be preferred over popular election because of the latter's flaws.<sup>5</sup> He rejects merit selection as an alternative because, he fears, it has no populist elements. He derives this conclusion only after making a concededly conscious choice to ignore that the people of Missouri get to vote whether a nominated judge is to serve a full term on the court or later to be retained in office. Instead, he contends that this populism inherent in the retention election must be separated from the rest of the selection process. He then says that if one were to consider only the other parts of the process, then the nonpartisan plan is insufficiently connected to popular sentiment.<sup>6</sup>

The elective component of Missouri's selection process cannot be separated out from the rest of the process, though, for it is an essential element of the nonpartisan plan. Indeed, although merit systems vary by state, the majority have retention elections for judges selected under the merit system,

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5. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 772-74 (2009).

6. *Id.* at 751, 759 n.35.

thereby retaining populist elements.<sup>7</sup> In Missouri, such populist principles purposely are included in each aspect of the process, while at the same time protecting the impartiality of judges by removing them from the shifting political winds of a pure gubernatorial-appointment system. For example, Professor Ware acknowledges that a Missouri judge must be retained by a vote of Missouri's citizens before serving a second or third term in office, but he misses the fact that the person nominated by the commission and selected by the governor serves only what is, in effect, a one or two-year probationary term as judge until the voters have an opportunity to determine whether they agree with the work of the commission and the governor in selecting the judge.<sup>8</sup> It is only after new judges are retained (or not) by the people that Missouri's constitution provides they begin to serve their first full term as judge.<sup>9</sup>

Professor Fitzpatrick, on the other hand, acknowledges that by utilizing a system that allows a mix of lay and law-trained commissioners to proffer a panel of qualified applicants the merit-selection system limits the ability of moneyed interests to influence the results of cases.<sup>10</sup> Professor Fitzpatrick nonetheless argues that because the organized bar is part of the selection system, it is subject to the politics of the bar. He further suggests (a suggestion for which he concedes he has no evidence) that lawyers are generally more

7. Of the twenty-five states that use merit selection for their trial or appellate judges or both, fifteen require judges chosen in such a manner to be approved by the people through retention elections. See AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2008), [http://www.judicialselection.us/uploads/documents/Judicial\\_Selection\\_Charts\\_1196376173077.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf).

8. Professor Ware posits that a federal appointive system is indirectly populist because the President and Senate, who select judges at the federal level, are elected to represent the people's interests. Ware, *supra* note 5, at 754. Of course, if this were the test of populism, then the Missouri plan is far more populist. Its governor, who selects the judge from a group of meritorious nominees, is popularly elected in Missouri, and that elected representative of the people selects the three lay persons on the commission. The judge member of all Missouri merit-selection commissions will have been retained in office by the voters before ever serving in that role, and the lawyer members are popularly elected by their fellow rank and file lawyers, not by the organized bar. Professor Ware also elides the degree to which partisanship and special interest politics influence the supposed "populism" of our elected representatives as they perform their tasks in an appointive system. See, e.g., David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 428 (2002) ("[B]ecause electoral risk varies among legislators and policy choices, there are opportunities for well-meaning and not-so-well-meaning legislators alike to vote in ways that deviate from the wishes of their median constituents. When that happens, legislative policymaking can result in unrepresentative policy choices.").

9. MO. CONST. art. V, § 25(c)(1).

10. See generally Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009).

liberal than others, and, therefore, this must create a liberal bias on the part of selection commissions.<sup>11</sup> As this Article's discussion of the Missouri plan makes clear, however, the organized bar has *no role* in the selection of judges in Missouri. Lawyers are among the commission members, for, as discussed below, their input is essential to identifying whether the applicants possess the competence and experience necessary to assume a judicial position, just as the lay members provide invaluable input as to the applicants' character and personal qualifications. But these lawyers are popularly elected by their peers, and Missouri's constitution ensures that they are chosen from each geographic region of Missouri and so reflect the broad range of its people's political views.<sup>12</sup> There is no internal capture of the process.<sup>13</sup>

Perhaps this is why attempts to make the nonpartisan plan more political or to diminish the role of lawyers have met with no success in either Missouri's legislature – which defeated a proposal to substitute a bipartisan, politically selected commission for the nonpartisan system that has worked so well – or among its electorate, where a recently proposed initiative petition was filed with the Secretary of State but was abandoned before the signature-collecting process. In fact, Missouri's voters are moving toward a broader embrace of the nonpartisan court plan. In November 2008, the voters of Greene County – which contains Springfield, Missouri's third-largest city – voted to adopt the nonpartisan plan for selection of their local judges.<sup>14</sup> Although Greene County is located in one of the most conservative areas of the state, it found that the popular-election system it previously had used did not work as well now that the county's population had become larger and campaigns had become more expensive.<sup>15</sup>

## II. ROLE OF THE JUDICIAL BRANCH

Regardless of how their judges are chosen, American courts are designed to fulfill a very specific role. As Alexander Hamilton said in Federalist Paper No. 78, “[I]t is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”<sup>16</sup>

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11. *See id.* at 686-87, 690-91.

12. *See* MO. CONST. art. V, § 25(d).

13. MO. CONST. art V, § 5; MO. SUP. CT. R. 10.

14. *See* Press Summary, Official Results, Nov. 4, 2008, General Election, Greene County, Missouri, [http://www.greencountymo.org/election/Nov\\_2008/Press\\_sum.html](http://www.greencountymo.org/election/Nov_2008/Press_sum.html) [hereinafter Official Results] (last visited April 6, 2009). *See also* Editorial, *Greene County Knows How to Pick Judges*, ST. LOUIS POST-DISPATCH, Nov. 21, 2008, at C10.

15. *Greene County Knows How to Pick Judges*, *supra* note 14.

16. THE FEDERALIST NO. 78 (Alexander Hamilton).

### *A. Courts Must Be Independent to Deliver Justice*

As representatives of the third and co-equal judicial branch of government, judges play a unique role in our democracy, a role that is different in significant ways from the role of judges' constitutional partners in the legislative and executive branches of government. Elected officials in these political branches run for office on platforms, promising to propose legislation and carry out their official duties consistent with their perception of the public's will and their own personal views of what is good for their state or nation and what is not – and properly so.

But judges, to serve their role in our democracy, are different. This is because “[e]very citizen benefits from a judicial system that accurately and effectively addresses conflicts in a neutral forum.”<sup>17</sup> Judges are not supposed to make promises about how they will decide cases before they hear the facts and research the law, and their decisions must not be influenced by their own or another's perception of what is popular or politically expedient.<sup>18</sup>

Rather, the only promises judges should make are, first, to decide cases fairly and impartially, free of political influence or intimidation; and, second, regardless of their own personal views or the views of voters, to follow the law as set out in the constitution the citizens have adopted, in the statutes the legislature has enacted, and as reflected in the common law principles on which our nation was founded. It is these principles – not the political or popular winds of the moment – that must guide courts as they resolve the disputes brought before them. In every case, from a marital dissolution that only affects the couple and their children to an issue of constitutional proportions, the role of the judicial branch is to provide a fair and unbiased forum that gives equal access to justice to each of our citizens and that resolves disputes neutrally and fairly based on the facts that are presented in court.

It was in recognition of this unique role of the judicial branch that the judiciary was carved out as a separate and co-equal branch of government, so that it could be free from the political pressures the other branches of government must consider. As Alexander Hamilton wrote in Federalist Paper

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17. Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 164 (2007).

18. See, e.g., MODEL CODE OF JUDICIAL CONDUCT, Canon 3(B)(2) (1990) (“A judge shall be faithful to the law . . . and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.”); Brief for the Brennan Center for Justice at NYU School of Law et al. as Amici Curiae Supporting Petitioners, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), available at 2009 WL 45972 (“Judges are responsible for the fundamental promise of fair, impartially-decided cases. Judges function properly when they are ‘lobbied’ only within the structured adversarial process and solely on the basis of law – not on the basis of personal, financial or electoral interests.”).

No. 78, “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>19</sup>

*B. The Courts’ Independence Is Balanced by Their Accountability*

Judicial independence has been a hallmark of American democracy since the founding days of the republic. The term is sometimes misunderstood to suggest that judges believe they can or should be independent of the law or of the strictures placed on them by their state’s statutes or constitution. The opposite is true. Judicial independence refers to the essential requirement that judges be impartial and free – independent – of political or sectarian influence. Such independence is not inconsistent with accountability, as some have suggested,<sup>20</sup> but rather it *requires* accountability, for judges who fail to be impartial – who intentionally impose their own views rather than their good faith beliefs in what the law requires – should be held to account for their failures. Together, an independent and accountable judiciary can instill greater faith in our system of government; it “promote[s] the rule of law, institutional responsibility, and public confidence in the courts.”<sup>21</sup>

Judicial accountability comes in three general forms: institutional accountability to the other branches of government; decisional accountability; and individual accountability of judges for misconduct.<sup>22</sup> As one of the three branches of government, the judiciary is subject to various forms of institutional accountability from the other branches. It has no power to legislate or to appropriate funds, and it cannot execute the laws as can the executive branch. Missouri’s constitution provides that the supreme court shall supervise the lower courts and shall have plenary authority over matters “relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law.”<sup>23</sup> It also states that the court’s rules “shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal” and that “[a]ny rule may be annulled or amended in whole or in part by a law limited to the purpose.”<sup>24</sup>

What happens when a judge steps outside this role or when a judge decides a case in a way inconsistent with Missouri’s statutes or constitution? When commentators urge that they want judges to be “more accountable,” they are most often suggesting that judges should be accountable for deci-

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19. THE FEDERALIST NO. 78, *supra* note 16.

20. See, e.g., Caufield, *supra* note 17, at 163-64 (describing these two goals as “competing” and “conflicting”).

21. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1260 (2008).

22. *Id.*

23. MO. CONST. art. V, §§ 4.1, 5.

24. MO. CONST. art. V, § 5.



sions that fall outside these bounds. They want a way to “rein in” judges whom they believe are deciding cases based on their own personal beliefs rather than on the basis of law. The laws of Missouri and every other state do make judges accountable for their legal errors by a very effective mechanism: appeal. Missouri’s citizens adopted this approach by providing that “[t]he judicial power of the state shall be vested in a supreme court” and lower courts and that the supreme court shall have exclusive jurisdiction of appeals involving key issues such as taxes, the death penalty and claims that statutes are unconstitutional. It also is given supervisory authority over the lower courts.<sup>25</sup>

As a result, if, for instance, a judge has rendered a decision that is inconsistent with the law as applied to the facts before the court – whether due to an incorrect analysis, deficient advocacy or any other reason – the judge’s final decision can be appealed. It is through the appeal process that judges are made accountable for legal errors in their decision-making. This form of accountability is largely, and properly, internal to the judicial branch. If external actors could regularly impose decisional accountability on judges, either through attempting impeachment of judges they dislike or by trying to control the substance of their opinions by reducing budgets or directly attempting to influence the court’s decisions, judicial independence would be compromised beyond repair.<sup>26</sup>

Of course, if the legislature believes that the appellate courts, too, have erred when attempting to interpret a statute or constitutional provision, they have a further remedy. If a court’s understanding of the constitution is believed to be incorrect or to no longer accord with the will of the people, the legislature can adopt a referendum to be submitted to the voters, or the voters can adopt a new provision by initiative petition, which will change the law from that point forward. Where a court simply has misunderstood the mean-

25. MO. CONST. art. V, §§ 1-4.

26. In 2008, a Missouri legislator who was unhappy with a decision of an associate circuit judge (from a legislative district other than his own) in a hotly contested dissolution case openly suggested that the judge should be impeached and even prepared impeachment proceedings, although they never were filed, and then suggested that because he had done so, and although he was not a party to the case, the judge should disqualify herself from the case. The basis of the impeachment and disqualification would have been that the judge got the custody issue wrong. See, e.g., Katie Hilton, *Lawmaker Wants Hutson Impeached*, LEBANON DAILY NEWS (Jan. 25, 2008); Virginia Young, *Who Is Abusing Power?*, ST. LOUIS POST-DISPATCH, Jan. 27, 2008, at C1, available at 2008 WLNR 1570673; Joyce L. Miller, *Move to Impeach Judge Fizzles; House Speaker Rod Jetton Tosses Move by St. Louis Rep to Remove Laclede County Judge*, LAKE SUN LEADER (March 28, 2008). At the time the legislator explored impeachment, the decision was not yet final or appealed, the latter being the appropriate procedure to use when an issue arises as to whether a decision is correct on the law and the facts. The appeal was argued March 10, 2009, in the Missouri Court of Appeals, Southern District. *Noland-Vance v. Vance*, No. SD28699 (Mo. App. S.D. filed Aug. 30, 2007).

ing of the legislature in a statute, or where the current legislature does not agree with the law as set out by a prior legislature and interpreted by a court, then the legislature has plenary authority to change the statute, thereby abrogating the judicial decision as to all future actors, limited only by the requirements of the state and federal constitutions.<sup>27</sup> There are a few examples of this type of external accountability in Missouri's history, most notably dealing with sovereign immunity.<sup>28</sup>

In addition, individual members of the judiciary are accountable for their conduct in two ways. First, most judges – excluding, of course, those in the federal judiciary, but including those chosen under the Missouri Nonpartisan Court Plan – can be voted out of office by the people. Second, for a judge who has engaged in ethical misconduct, most states have a commission to investigate and review complaints. In Missouri, the constitution requires the Commission on Retirement, Removal and Discipline – comprised of two lawyers, two non-lawyers, one appellate judge and one trial judge – to investigate complaints of judicial misconduct as well as requests for disability-related retirement. Judges who commit misconduct can have their licenses sanctioned or can be disbarred by the supreme court.<sup>29</sup> Finally, in very exceptional circumstances, judges are subject to impeachment.<sup>30</sup>

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27. An example of this type of decisional accountability was in the news recently, as President Obama signed into law the Lilly Ledbetter Fair Pay Act to correct what the legislative and executive branches believed was the mistaken interpretation of federal anti-discrimination law by the U. S. Supreme Court. See Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, available at <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?sci>; see also *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

28. See, e.g., *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977) (en banc) (abrogating state sovereign immunity), abrogated by C.L. 1978, H.B. No. 1650 (1978). For a full discussion of the back and forth between the judiciary and the legislature in Missouri on the subject of sovereign immunity, see James A. Burt, *The Tortured Trail of Sovereign Immunity in Missouri*, 54 J. MO. B. 189 (1998).

29. MO. CONST. art. V, § 24. See also MO. SUP. CT. R. 2 (Code of Judicial Conduct); MO. SUP. CT. R. 5 (Complaints and Proceedings Thereon).

30. MO. CONST. art. VII, § 1 provides: "All elective executive officials of the state, and judges of the supreme court, courts of appeal and circuit courts shall be liable to impeachment for crimes, misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency, or any offense involving moral turpitude or oppression in office." See also MO. REV. STAT. § 106.020 (2000).

### III. MISSOURI'S HISTORY HAS LED TO CHANGES IN JUDICIAL SELECTION TO ENSURE THAT COURTS ARE INDEPENDENT, ACCOUNTABLE AND ABLE TO INSTILL FAITH IN THE RULE OF LAW

An understanding of the background and workings of the Missouri Nonpartisan Court Plan is helpful in considering why Missourians believe merit selection is the best method of ensuring an impartial and accountable judiciary that is faithful to the rule of law. As set out below, the form of judicial selection in Missouri developed in response to improper political influence and corruption that Missouri experienced under appointment and contested statewide election models. When the legislature rejected attempts to adopt a nonpartisan selection system through referendum, the people established the Missouri Nonpartisan Court Plan by initiative petition. The petition adopts a procedure through which the people purposely excluded the legislature from the process of judicial selection.

#### *A. Missourians Have Rejected the Federal System of Lifetime Judicial Appointments*

The first constitution of Missouri, like that of most states in that era, provided that the governor appoint judges to the bench for life.<sup>31</sup> Just a few decades later, the people of Missouri decided that they did not want the executive branch of government choosing who would rule on the laws the executive signed. Instead, the people wanted popular involvement in deciding who would be a judge. This may have been based on the Jacksonian democracy movement that was sweeping the nation during the 1830s. During this time, "legislatures were seen as being too powerful and beholden to special interests," and there was "dissatisfaction with legislative performance and recognition that additional checks were needed on state power."<sup>32</sup>

"Beginning with Mississippi in 1832, [many] states amended their . . . constitutions" to provide for "judicial election [rather than] appointment."<sup>33</sup> "[T]he movement was based on emotion rather than on a deliberate evaluation of experience under the appointive system . . . [I]t was the result of . . . imitation and sentiment" and "a *feeling* that judges were being appointed too

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31. MO. CONST. of 1820, art. V, § 13.

32. JOSHUA C. HALL & RUSSELL S. SOBEL, SHOW-ME INST., POL'Y STUDY NO. 15, IS THE 'MISSOURI PLAN' GOOD FOR MISSOURI? THE ECONOMICS OF JUDICIAL SELECTION 4-5 (2008), [http://showmeinstitute.org/docLib/20080515\\_smi\\_study\\_15.pdf](http://showmeinstitute.org/docLib/20080515_smi_study_15.pdf) (citing F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 445-46 (2004)).

33. HALL & SOBEL, *supra* note 32, at 4 (citing Matthew J. Streb, *The Study of Judicial Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS 1, 9 (Matthew J. Streb ed., 2007)).

frequently from the ranks of the wealthy and the privileged.”<sup>34</sup> Missouri followed suit in 1850.<sup>35</sup> “While it is true that partisan elections made judges directly accountable to voters, reformers at the time were more interested in making judges more independent of legislative influence.”<sup>36</sup>

### *B. Missourians Have Rejected Partisan Judicial Elections*

The problem with the adoption of judicial election was that the elections did not achieve the desired result of keeping politics out of choosing judges. Rather, the judiciary was “viewed as having been captured by political parties,”<sup>37</sup> and partisan elections of judges were “proving to be antithetical to the administration of justice.”<sup>38</sup> For example, one factor that may have contributed to a “surprising number of judicial reversals” in higher-profile cases in the early 1900s was “partisanship.”<sup>39</sup> At the time, Supreme Court of Missouri Judge James B. Gantt was openly critical of then-Governor Joseph Folk and “eventually became the machine-backed candidate for the Democratic nomination for governor against Folk in 1904.”<sup>40</sup> He lost his bid for governor, and, in 1910, he lost his bid for reelection to the supreme court.<sup>41</sup> He blamed his loss on ballot fraud.<sup>42</sup> When the suit he filed over his loss went to the supreme court, two other former supreme court judges represented Gantt before their former colleagues, who ultimately ruled against Gantt.<sup>43</sup> Over the years, Gantt had “earned . . . a reputation for strongly catering to the Democratic machine in St. Louis. He was also said to be on confidential terms with

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34. Ronnie L. White, then-chief justice of the Supreme Court of Missouri, Expanding the Missouri Nonpartisan Court Plan to Large Outstate Judicial Circuits: When Former Rural Circuits Grow Into Urban Centers, Address at the 2004 Policy History Conference, Sponsored by the Saint Louis University Institute for Political History and Journal of Policy History (May 22, 2004) (transcript available in the Supreme Court of Missouri Library) (quoting Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 5 & n.9 (1994)).

35. See Ratification of art. VI at the 1850-51 Session, MO. REV. STAT. 1855, vol. 1, 93-4.

36. HALL & SOBEL, *supra* note 32, at 5 (citing Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337 (1983)).

37. HALL & SOBEL, *supra* note 32, at 5 (citing Hanssen, *supra* note 28, at 450).

38. White, *supra* note 34.

39. STEVEN L. PIOTT, HOLY JOE: JOSEPH W. FOLK AND THE MISSOURI IDEA 58 (1997).

40. *Id.* at 58.

41. White, *supra* note 34 (citing *Gantt v. Brown*, 149 S.W. 644 (Mo. 1912) (en banc)).

42. *Id.*

43. *Id.*

the current Democratic state administration and very much in sympathy with their administrative policies.”<sup>44</sup>

Throughout the early 1900s, the Democratic political machine continued its stranglehold on the state’s politics.<sup>45</sup> Too often, political party machines decided who would be mayor, senator, and even judge or governor.<sup>46</sup> And frequently, the judiciary swayed with the whims of the electorate. Only twice between 1920 and 1940 was a judge who had served one full term on the Supreme Court of Missouri reelected to a second term.<sup>47</sup> The most notorious political machine was controlled by a Democrat from Kansas City, “Boss” Tom Pendergast, who literally decided things in a smoke-filled room. Pendergast wanted what all great political bosses want – control, in this case over judicial elections. This would allow him to exert pressure over the judiciary itself, and so give him the ability to influence the courts to decide cases as he wished rather than as the law prescribed.<sup>48</sup> In 1937, a judge whom Pendergast had supported in his election to the supreme court dared to vote against Pendergast’s interests in an insurance case.<sup>49</sup> As political punishment, Pendergast vowed to oppose him in the 1938 election.<sup>50</sup> He wanted to show the other judges and office-holders that, if they did not decide things his way, he could take them out of office.<sup>51</sup> By all reports, the 1938 supreme court primary campaign was ugly, negative and corrupt, with patronage politics used on both sides.<sup>52</sup> Disgusted by politicians’ attempts to control how the supreme court decided cases, the people of Missouri defeated Pendergast’s candidate.

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44. PIOTT, *supra* note 39 at 77.

45. See, e.g., Kenneth H. Winn, *It All Adds Up: Reform and the Erosion of Representative Government in Missouri, 1900-2000*, in OFFICIAL MANUAL, STATE OF MISSOURI, 36-39 (Krista S. Myer ed. 1999-2000).

46. See, e.g., Charles B. Blackmar, *Missouri’s Nonpartisan Court Plan from 1942-2005*, 72 MO. L. REV. 199, 200 (2007).

47. Judge Robert S. Cohen, *The St. Louis County Judicial Election of 1966: Looking Back Forty Years*, ST. LOUIS B.J., Fall 2006, at 38, 38-39 (citing Harry A. Hall, *The Missouri Nonpartisan Court Plan: A Quarter Century Review*, 33 UMKC L. REV. 163, 164 (1965)).

48. This and other information about the history of Missouri’s nonpartisan court plan can be found in a variety of sources, including the writings cited herein by Blackmar, *supra* note 46; White, *supra* note 34; HALL & SOBEL, *supra* note 32; Cohen, *supra* note 47; and Peltason, *supra* note 2.

49. See Winn, *supra* note 45, at 39.

50. *Id.*

51. See, e.g., *id.*

52. Hall, *supra* note 47, at 165.

*C. Missourians Adopted a New, Blended Method for Selecting Judges*

Against this vulgar political backdrop, it is no wonder that Missourians became tired of politicians picking their judges.<sup>53</sup> Instead, the people of Missouri wanted judges to be picked based on their merit, and a group of citizens, politicians and lawyers – principally members of Missouri's Republican Party – proposed the Missouri Nonpartisan Court Plan<sup>54</sup> to do just that.<sup>55</sup> One of the plan's key supporters was Rush Limbaugh Sr.,<sup>56</sup> the grandfather of former Supreme Court of Missouri Judge Stephen N. Limbaugh Jr., as well as his cousin, political commentator Rush Limbaugh.<sup>57</sup>

When the legislature failed to put a nonpartisan selection system on the ballot through the referendum process, the people decided to go around the legislature.<sup>58</sup> They collected signatures throughout the state and put the Missouri Nonpartisan Court Plan on the ballot by initiative petition.<sup>59</sup>

The voters adopted the plan in November 1940, but the legislature did not like it. After the initiative petition had passed and become part of the Missouri Constitution, the legislature actually attempted to undo the citizens' work through the referendum process, placing a constitutional amendment on the ballot that was designed to revert the state's method of judicial selection back to elections just two years later.<sup>60</sup> Undaunted, the people of Missouri overwhelmingly rejected that amendment, voting more strongly in favor of the nonpartisan plan than they had when they initially adopted it in 1940.<sup>61</sup>

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53. See, e.g., Winn, *supra* note 45, at 39-40.

54. The origins of the plan can be traced to several distinguished scholars and jurists, including Roscoe Pound (who later became dean of Harvard Law School); Professor Albert Kales, who taught law at Harvard, Northwestern University and the University of Chicago and helped found the American Judicature Society; and Chief Justice and former President William Howard Taft. See, e.g., Blackmar, *supra* note 46, at 200 (citing Richard A. Watson & Rondal C. Downing, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* 8-9 (1969)).

55. See, e.g., Peltason, *supra* note 2, at 52-56.

56. See, e.g., Peltason, *supra* note 2, at 58.

57. See Stephen N. Limbaugh Jr., then-chief justice of the Supreme Court of Missouri, 2002 State of the Judiciary, Address Before the Joint Session of the Missouri General Assembly (Jan. 15, 2002) (transcript available at <http://www.courts.mo.gov/page.asp?id=1779>); see also Rudi Keller, *After Many Delays, New Federal Courthouse Opens*, SOUTHEAST MISSOURIAN, Oct. 7, 2008, available at <http://www.semissourian.com/story/1467656.html>.

58. Blackmar, *supra* note 46, at 201; see also Peltason, *supra* note 2, at 51; see also Winn *supra* note 45, at 40.

59. Blackmar, *supra* note 46, at 201.

60. Hall, *supra* note 47, at 166; Blackmar, *supra* note 46, at 202-03.

61. See sources cited *supra* note 60.

When Missourians adopted a new constitution in 1945, the nonpartisan plan was a central feature of it and has been ever since.<sup>62</sup>

In light of this history, it makes sense that Missouri's nonpartisan court plan always has excluded the legislature. The governor is the only politician the people included in their nonpartisan court plan, through the executive's appointment of citizens to the nominating commissions and through the executive's ultimate appointment of a new judge from a commission's panel of nominees. But even the authority of the governor is limited by the people's right to retain (or not retain) the appointed judge.

#### *D. Missourians Have Adopted the Nonpartisan Court Plan for Additional Local Courts*

Originally, the nonpartisan plan applied to the Supreme Court of Missouri, the three regional courts of appeal, and the trial courts in Jackson County (which includes Kansas City) and the city of St. Louis. The voters in other counties were given the local option to adopt the plan. They generally have done so when their counties have grown so large that the voters no longer know the candidates on the kind of personal level that they still can in small communities; such lack of personal familiarity with judicial candidates makes advertising and the resulting glut of campaign contributions an unwanted part of election to what are supposed to be impartial judicial positions.

The first county to exercise its local option<sup>63</sup> to adopt the nonpartisan plan was St. Louis County. During the November 1966 general election, all the sitting judges who faced opponents were swept out of office, without regard to their merit, by an electorate caught up in a Republican sweep as voters expressed discontent with then-Democratic President Lyndon B. Johnson.<sup>64</sup> In 1970, county voters adopted the nonpartisan plan.<sup>65</sup> In 1973, voters

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62. MO. CONST. art. V § 25(a); Blackmar, *supra* note 46, at 203; Hall, *supra* note 47, at 166.

63. The local option language was changed in 1976 to make this provision self-enforcing, so counties do not have to obtain legislative approval to put the question of whether to adopt the plan before their local voters. See Blackmar, *supra* note 46, at 202, 208.

64. Cohen, *supra* note 47, at 38-39. This was part of a national trend that, two years earlier, had resulted in a Democratic sweep by voters who rallied behind President Johnson. In 1964 in Indiana, for example, "no Republican judge was elected and many good judges were lost, not because they were incompetent but solely because of the landslide for President Johnson." *Id.* at 39 (quoting Hall, *supra* note 43, at 170). A similar wholesale defeat of all Republican judges running in contested elections, without regard to their individual merit, occurred in 2006 and 2008 in Dallas County, Texas, and Harris County, Texas, respectively. See, e.g., Brenda Sapino Jeffreys, *The Courthouse Shuffle: Straight-Ticket Voting, Changing Demographics*

in Clay and Platte counties (in the northern part of metropolitan Kansas City) exercised their local options to opt into the nonpartisan plan.<sup>66</sup> In November 2008, voters in Greene County (which includes Missouri's third-largest city, Springfield) adopted the nonpartisan plan as well.<sup>67</sup>

#### IV. THE MISSOURI PLAN CONTINUES TO BE THE BEST METHOD OF JUDICIAL SELECTION FOR BALANCING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Missourians learned long ago, before they adopted the nonpartisan plan, what can and does happen when politics becomes a key factor in determining who will be a judge. That is why they adopted the Missouri Nonpartisan Court Plan – the least-political method for selecting judges. They adopted the nonpartisan plan because they sought to minimize – not maximize – politics in judicial selection. They also wanted stability in the judicial system. Businesses, families and all Missourians depend on justice being even, fair, just, deliberate and consistent, no matter who holds the other offices in the state.

To make this vision a reality, the people of Missouri established a process that combines elements of the appointive and elective processes. First, a judicial commission<sup>68</sup> solicits and considers applications for a judicial vacancy and, from the applicant pool, nominates three highly qualified individuals for the governor's consideration. Then the governor has the responsibility to select which of the three nominees will serve the people of Missouri as a judge. Finally, the people reserve for themselves the final say as to whether a judge can stay in office – by providing for a retention election to be held following a short "probationary" period of between one and two years before the judge begins his or her first full term of office.<sup>69</sup> A retention elec-

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*Help Dems Gain Most Harris County Trial Benches on Ballot*, TEXAS LAWYER, Nov. 10, 2008, available at <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202425867986&slreturn=1>.

65. Cohen, *supra* note 47, at 39.

66. See, e.g., Your Missouri Courts, Missouri Nonpartisan Court Plan: Scope of the Nonpartisan Court Plan, <http://www.courts.mo.gov/page.asp?id=297> (last visited on July 6, 2009).

67. See Official Results, *supra* note 14 (31st Circuit Question 1); *Greene County Knows How to Pick Judges*, *supra* note 14.

68. Missouri actually has seven judicial nominating commissions, all of which are similar both in composition and in operation. Each of the six trial courts that use the nonpartisan plan has its own judicial nominating commission. See MO. CONST. art. V, § 25(d). This article will focus on the Appellate Judicial Commission, which handles judicial vacancies on the Supreme Court of Missouri and the three geographic districts of the Missouri Court of Appeals. See *id.*

69. Under article V, section 25(c)(1) of the Missouri Constitution, a new judge appointed under the nonpartisan plan must stand for a retention vote at the first general election after serving in office for one year. If approved by the voters, the judge



tion also is held before a judge can be retained in office for a subsequent term.<sup>70</sup>

Missouri's Appellate Judicial Commission has seven members: a judge of the supreme court; a lawyer elected in competitive elections by his or her fellow lawyers in each of the eastern, southern and western districts of Missouri; and a non-lawyer appointed by the governor from each of the same three districts.<sup>71</sup> The lawyer and non-lawyer members serve staggered terms of six years each, and the judge member serves only during the time he or she is chief justice, a term of two years.<sup>72</sup>

Other states use similar merit-selection systems. Although the number of commissioners, the constituencies they represent and their manner of selection vary from state to state,<sup>73</sup> Missouri's mode of merit selection works as well as or better than any other.<sup>74</sup> The sections below set forth why the non-

may serve his or her first term in office. For a discussion of the populist aspects of this system, see *supra* Part I of this article.

70. The term in office varies depending on the level at which a judge serves: twelve years for supreme court and court of appeals judges; six years for circuit judges; and four years for associate circuit judges. MO. CONST. art. V, § 19.

71. MO. CONST. art. V, § 25(d); MO. SUP. CT. R. 10.03; Your Missouri Courts, Appellate Judicial Commission: Composition of the Commission, <http://www.courts.mo.gov/page.asp?id=158> (last visited July 6, 2009).

72. See sources cited *supra* note 71. The circuit judicial commissions similarly are comprised of the chief judge of the local district of the court of appeals, plus two lawyers from the circuit elected by other lawyers in the circuit and two non-lawyers who live in the circuit appointed by the governor. MO. SUP. CT. R. 10.02. As with the Appellate Judicial Commission, the lawyer and non-lawyer members serve staggered terms of six years each, and the judge member serves only during the time he or she is chief judge of the court of appeals. MO. CONST. art. V, § 25(d); MO. SUP. CT. R. 10.03. The chief judge of the Missouri Court of Appeals, Eastern District – who serves on the circuit judicial commissions for St. Louis County and the city of St. Louis – traditionally serves one year as chief judge. Circuit Judicial Commissions: Composition of the Commissions, *supra* note 4. The chief judges of the other two districts – the Southern District (who serves on the circuit judicial commission for Greene County) and the Western District (who serves on the circuit judicial commissions for Clay, Jackson and Platte counties) – traditionally serve two years as chief judge. *Id.*

73. See STEPHEN J. WARE, SELECTION TO THE KANSAS SUPREME COURT 3-5 (2007), [http://www.fed-soc.org/doclib/20071126\\_KansasPaper.pdf](http://www.fed-soc.org/doclib/20071126_KansasPaper.pdf) (describing the various methods of selection).

74. See, e.g., HALL & SOBEL, *supra* note 32, at 1, 18 (“The data show that states using Missouri’s current system, on average, rank significantly higher than states using partisan elections, nonpartisan elections, and gubernatorial appointment with council approval alone. We also find no other method of selection resulting in average scores or rankings that are statistically higher than Missouri’s current system. Based on our analysis, Missouri’s current system is far superior to several of the alternatives.”).

partisan court plan is well suited to serve the goals of an impartial and qualified bench.

*A. The Commission's Composition Eliminates the Risk of Capture by Any Single Constituency*

In *Rethinking Judicial Nominating Commissions*, Joseph Colquitt emphasizes that “[i]n the interest of promoting accountability, independence, and public confidence, any system establishing or maintaining a judicial nominating commission must include safeguards against both external or internal capture”<sup>75</sup> – that is, control of the selection process by an internal or external group or constituency.

As set out below, the design and composition of Missouri’s Appellate Judicial Commission minimizes the risk of external capture in several ways. The staggered and timed nature of the non-lawyers’ terms minimizes the risk of control by the governor of the nomination process. The shorter term of the judge member of the commission reduces the risk of internal capture by the judge member, while retaining the benefits of having a judge among the members of the commission. Finally, the lawyer members are elected in free and fair elections by all lawyers in the portion of the state in which they live and practice, for a single term, and so are not likely to be beholden to any particular constituency.

**1. Terms of Non-lawyer Commissioners Are Designed to Minimize Risk of Capture by Any Particular Governor**

The role of the lay commissioners is to judge the applicants as people, to see if they reflect the qualities that Missourians deem important for judges and to determine whether the applicants understand the role of a judge in our society. In Missouri, the governor selects these three lay members,<sup>76</sup> as he or she does with many other important boards and commissions that serve the state.<sup>77</sup>

With respect to the lay commissioners, the primary fear of external capture is that each will be beholden to the governor that appointed him or her. The Missouri Nonpartisan Court Plan minimizes that risk in two principal ways. First, the commissioners are appointed to serve six-year terms.<sup>78</sup> Making a commissioner’s term longer than a single term of office for the governor diminishes the risk that the appointed commissioners would be or remain beholden to the governor. Indeed, when Missouri first adopted its nonparti-

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75. 34 FORDHAM URB. L.J. 73, 86 (2007).

76. MO. CONST. art. V, § 25(d).

77. See Office of the Missouri Governor, Jay Nixon, Office of Boards and Commissions, <http://governor.mo.gov/boards/> (last visited Feb. 18, 2009).

78. See *supra* notes 71-72 and accompanying text.

san court plan, the constitution only permitted a governor to serve for a single term. As originally envisioned, it would have been impossible for a single governor to appoint all the lay members of the commission. Even now, it is up to the public whether to elect a governor to a second term.<sup>79</sup> Only if elected to a second term would it be possible for a governor to select more than two of the three commissioners.

A second way the Missouri Nonpartisan Court Plan reduces the risk of external capture by the governor is to have the terms of lay commissioners expire on December 31 in even-numbered years.<sup>80</sup> Missouri's governors are sworn in on the second Monday in January in the odd-numbered year following their election. The December 31 expiration date means, as a practical matter, that no newly elected governor has the power to appoint a lay member to the Appellate Judicial Commission until he or she has been in office for at least a year and that a newly elected governor inherits a commissioner appointed just weeks before being sworn in.

This makes it all but impossible for a newly elected governor to control the commission. Similarly, it reduces the likelihood that controlling judicial selection will be an effective campaign goal for partisans campaigning for the office of governor. During the initial two years of a governor's first term, all of the lay members of the commission will have been appointed by either his immediate predecessor or, if his predecessor only served one term, his predecessor's predecessor. At the present time, for example, one lay member was appointed by Governor Bob Holden in December 2004, just before his term as governor ended at the beginning of 2005. A second lay member was appointed by Governor Matt Blunt in late 2006. The third lay member was appointed by Governor Blunt in December 2008, just a few weeks before Governor Jay Nixon was sworn into office, so the commission now has one Holden and two Blunt lay appointees.<sup>81</sup> Unless a commissioner resigns before the end of his or her term, Governor Nixon's first opportunity to appoint a lay member will come in two years, in December 2010.

In recent years, a small group of individuals has proposed various modifications to the plan, most of which would alter the staggered nature of the

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79. Since Missouri's constitution was changed to allow a governor to serve consecutive terms, only three individuals have been elected to consecutive second terms as governor: Governor Warren E. Hearnes, first elected in 1964 and the first governor to reap the benefit of the constitutional amendment when he was elected to his second term in 1968; Governor John Ashcroft, elected in 1984 and 1988; and Governor Mel Carnahan, elected in 1992 and 1996. Though he served two terms as governor, Christopher "Kit" Bond's terms were not consecutive; he first was elected in 1972, lost his reelection bid in 1976 and was elected to his second term in 1980. *See* OFFICIAL MANUAL, STATE OF MISSOURI, 61-62 (Krista S. Myer ed. 2007-08).

80. MO. SUP. CT. R. 10.03.

81. *See, e.g.*, Appellate Judicial Commission: Composition of the Commission, *supra* note 71 (listing each commissioner and, for the non-lawyer commissioners, listing which governor made the appointment).

commissioners' terms so that they would coincide directly with the governor's term. This is what Colquitt describes as "[t]he most blatant . . . example of external capture[:] . . . the governor appoints commissioners to the judicial nominating commission, the commission nominates applicants for judicial positions, and the governor appoints the judges. This scheme reeks of redundancy and inefficiency."<sup>82</sup> Under the current system, the terms of lay commissioners are staggered and timed to minimize these risks.

Some other proposed modifications to the plan would remove the selection of lay commissioners from the office of the governor to one or both houses of the general assembly. These proposed reforms would inherently increase the partisanship associated with the selection of lay members, as the two parties that engage in a biannual struggle for control of the Missouri legislature inevitably would take their partisan war to the newly created front: selection of non-lawyer commissioners to the Appellate Judicial Commission. Such partisan bickering around judicial selection can delegitimize the selection process in the eyes of the electorate, resulting in a system that is perceived to be dominated more by politics than by judicial merit. In the current system, the governor's selection of a lay commissioner cannot be the subject of a partisan fight because the choice is entirely within the discretion of the executive. As a result, this selection – though it may be a political one – never has been highly politicized. This inures to the goal of reducing politics to the greatest extent possible, a principle that lies at the core of the merit-selection process.

## 2. The Judge Term Is Shortened Appropriately to Avoid Internal Capture

The presence of a judge on Missouri's merit-selection commissions is an added benefit of the plan. A judge knows firsthand which qualities are required to be a good judge – qualities like impartiality, judicial temperament, collegiality and fairness – and knows what experience and expertise are needed. The judge member understands the nature of the judicial task better than the other commissioners, who never have served in that capacity. The judge can use that understanding to aid the commission in its evaluation of candidate qualifications.<sup>83</sup>

Second, a sitting judge of the supreme court is attuned to the dynamics that are in play among the members of the appellate courts. A judge is more

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82. Colquitt, *supra* note 75, at 87.

83. In recognition of the value that a judge brings to this process, some states have elected to have a judge serve as an ex officio member of the nominating commission, rather than as a voting member. While this would accomplish the institutional role of the judge member, it risks losing the administrative advantages that accompany the Missouri system, where the judge's staff coordinates the logistics of the commission's meetings.

likely to know what specific experience the outgoing judge provided to the court – or what specific attributes the court seems to lack – which again can be useful to the commission’s consideration. A supreme court judge also provides impartial leadership, which adds a stabilizing and unifying effect on the commission. Additionally, the judge member’s staff can handle the many administrative details that are necessary to solicit and process applications and schedule interviews when vacancies occur.

The staggered and rather short length of any particular chief justice’s tenure on the commission mitigates any risk that he or she will dominate the commission. Unlike the lay and lawyer members, who each serve six-year terms, the judge member of the Appellate Judicial Commission only serves a two-year term. The longstanding practice at the Supreme Court of Missouri has been for its chief justice to serve on the Appellate Judicial Commission during his or her two-year term as chief. Having this term be relatively short, and tied to the administrative role of the chief justice, minimizes the risk of internal capture in several ways. First, the court elects its chief justice for a two-year term that begins with the start of Missouri’s fiscal year, July 1, rather than on December 31. What this means for the Appellate Judicial Commission is that the judge member always will enter a commission whose members *all* have been serving together for at least six months; five of the six members would have already been serving together for at least eighteen months. This lessens the risk, suggested by some opponents of having a judge on the commission, that the judge will control it, for he or she will join a group whose members already are familiar with each other and the policies and practices of the commission. And, in two years, a different judge, who may have been appointed by a different governor, will fill the chief justice’s place on the commission, again lessening any risk of judicial control.<sup>84</sup>

The practice of having the chief justice serve as the judge member of the commission also reduces the risk that the commission will be beholden to the governor, because it is unlikely that the governor who first appointed a judge will still be governor when, some seven to ten years later, that judge becomes chief justice. The manner in which the chief justice’s role is rotated all but prevents this from occurring.

Additionally, the Missouri plan’s requirement that a judge be retained before beginning his or her formal term of office renders it an absolute certainty that she or he will have been on the ballot for retention at least once

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84. See *infra* note 85 (noting that Chief Justice Stith, appointed by a Democratic governor, was succeeded by Chief Justice Price, appointed by a Republican governor). The concern about judicial control also assumes – incorrectly – that the lawyers elected by their peers or the non-lawyers appointed by the chief executive are the type to be swayed easily by the opinions of others, when, in reality, those elected or appointed to the commission tend to be leaders in their respective communities and not wallflowers. It also presumes that lawyers all tend to agree with one another, when in fact the system of law unique to the United States is designed to seek “truth” through the arguments of lawyers as adversaries.

prior to participation in the commission. Indeed, the incoming chief justice has been retained twice by Missouri's electorate.<sup>85</sup> This enhances the legitimacy of the commission's meetings, both in fact and in the eyes of the public.

### 3. The Lawyer-Commissioner Terms Historically Provide Balance Among Various Sectors of the Practice of Law

The lawyer members of the Appellate Judicial Commission are elected to six-year terms by all the lawyers in their appellate district. Because Missouri has a unified bar with compulsory membership of all lawyers licensed to practice in this state, it is relatively easy to conduct the election of these members.<sup>86</sup> Because these lawyers are elected democratically, they reflect the views of the average lawyer practicing in the region from which they are elected to serve, not that of the organized bar. Contrary to what some commentators suggest, the organized bar has no role of any kind in the selection of lawyer members of the commissions, and seldom does a bar leader run for, or is he or she selected to, such a position. The elections of lawyer members are conducted by the clerk of the relevant district of the court of appeals for lawyer members of the Appellate Judicial Commission and of the relevant local circuit court for the circuit court elections.<sup>87</sup> Elected lawyer members, therefore, can serve as a representative voice as to what qualities lawyers believe make a good judge.

The suggestion that subgroups of lawyers, such as the plaintiffs' bar or the defense bar, could "capture" the judicial-selection commissions is also not well founded. Over the years, the commission members have come from a wide cross-section of the bar – sometimes members of large firms, other times members of small firms; sometimes from urban centers, other times from more rural areas. To run for election, a lawyer need only get the signatures of twenty other lawyers in good standing in the geographic district.<sup>88</sup> They seek the support of all parts of the bar, including corporate, plaintiffs' and defense groups, as well as groups representing women or minority law-

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85. Although Missouri rotates the role of chief justice among the members of its supreme court, it is relatively uncommon for a single judge to serve on that court for a sufficient length of time so that he or she becomes chief justice more than once. It happened, though, when Chief Justice Stith's successor, the Hon. William Ray Price Jr., became chief justice for a two-year term beginning July 1, 2009. Judge Price previously served a term as chief justice from July 1999 through June 2001. Appointed in April 1992 by then-Governor John Ashcroft, he was retained in November 1994 for his first term in office and again in November 2006 for his second term in office.

86. See Colquitt, *supra* note 75, at 94 (comparing unified bar selection systems with states without unified bars, where "the selection process is more problematic").

87. See, e.g., MO. SUP. CT. R. 10.08 to 10.09.

88. MO. SUP. CT. R. 10.11.

yers.<sup>89</sup> It is not unusual for run-off elections to be necessary to determine which lawyer will represent a particular geographic area on the Appellate Judicial Commission.

In the fall of 2005, for example, Nancy Mogab, who specializes in workers' compensation law, became the first woman lawyer to be elected to the Appellate Judicial Commission.<sup>90</sup> She was chosen in a run-off election with a defense-oriented male lawyer from a large firm. The two lawyer members elected most recently, Richard E. McLeod from western Missouri and John Wooddell from southern Missouri,<sup>91</sup> widely were supported by a cross-section of the lawyers in their geographic region, including those working on both the defense and plaintiffs' sides.<sup>92</sup> Chief Justice Stith and Chief Justice Price both worked at large, defense-oriented civil-practice firms before their appointments to the bench. In fact, a review of the background of lawyers who previously have served on the commission shows no unduly disproportionate influence of any group on the selection of judges.<sup>93</sup>

89. MO. SUP. CT. R. 10. See also Robert H. Dierker, *The Missouri Nonpartisan Court Plan – Still a Good Model*, JUDGES' J., Summer 2002, at 24, 25.

90. See Appellate Judicial Commission: Composition of the Commission, *supra* note 71.

91. See *id.*

92. Mr. McLeod is principally a mediator now but in his career has been a member of the Missouri Association of Trial Attorneys, which is Missouri's plaintiffs' bar organization. Yet, for most of his practice, he was a member of a large defense firm or defended corporate clients. The defense bar supported him, as did many plaintiffs' lawyers, although the plaintiffs' bar organization ran a candidate against him who lost. The plaintiffs' and defense bars both supported Mr. Wooddell. And the election of the first two lawyers who will serve on the newest circuit judicial commission, in the 31st Judicial Circuit (Greene County, whose voters opted into the nonpartisan plan in November 2008), has come down to a run-off election for both seats. See, e.g., Greene County Circuit Clerk, Greene County Non-partisan Court Plan, [http://www.greenecountymo.org/circuit\\_clerk/np\\_court\\_plan.php](http://www.greenecountymo.org/circuit_clerk/np_court_plan.php) (last visited Feb. 14, 2009).

93. See Gerard R. Carmody, Letter to the Editor, *Standing up for Missouri Plan*, ST. LOUIS BUS. J., Oct. 31, 2008, available at <http://stlouis.bizjournals.com/stlouis/stories/2008/11/03/editorial5.html> ("Of the three lawyer members currently serving on the commission, two were supported by the organization [MODL]. Historically, the lawyer members of the commission have been pretty evenly split between plaintiff's lawyers and defense lawyers."). For instance, the three lawyer-commissioners from the St. Louis area prior to Ms. Mogab were, respectively, Gerald T. Carmody, who then practiced at the largest firm in Missouri in a largely defense-oriented civil practice; James Holloran, who then and now has a small, plaintiff-oriented practice; and Robert S. Allen, who was with a large, defense-oriented civil practice firm. In the Kansas City area the three prior lawyer-commissioners were Fred Wilkins, who primarily represented plaintiffs; R. Lawrence Ward, who primarily represented defendants in a large civil-practice firm; and Max Foust, who came from a firm that represented both plaintiffs and defendants. In the Southern District, the prior lawyer-commissioners were Steve Garner, who represented mostly plaintiffs; James Newber-

The lawyer members do reflect a constituency of a sort, though, just as do the lay members – one set by the constitution. They are elected based on geographic considerations, so that no one part of the state dominates another, and each area has balanced representation. Second, lawyers understand what qualities they and the businesses and individuals they represent expect in the judges who preside over their cases. As one former lawyer commissioner observed,

[T]he fact that trial lawyers – those representing plaintiffs as well as those representing defendants – want to take an active role in helping to select finalists for judicial vacancies should come as no surprise, as we spend our time in courtrooms in front of judges. It also is not surprising that tax lawyers or bankruptcy attorneys who practice before federal tribunals, or real estate attorneys or transactional lawyers who tend not to practice in court at all, would not be as interested in the selection of state judges. . . . I . . . don't know when the concept of being a trial attorney became a bad thing, but it certainly makes more sense to have the nonlawyer members of the commission joined by practicing attorneys than by those who are simply politically connected.<sup>94</sup>

Another observer noted,

Notwithstanding . . . concerns, the role of the trial bar generally has been positive. The competition between the plaintiffs' and defense bars has ensured that lawyer candidates for the judicial commissions are generally experienced practitioners who tend to downplay raw partisan politics. The competition also ensures that the nominating commission candidates' backgrounds receive far more scrutiny from the entire bar, than otherwise would be the case. Perhaps most importantly, the lawyer members of the nominating commissions – regardless of their plaintiffs' or defense leanings – have a strong interest in preventing manifestly unqualified persons from being included on panels sent to the governor, in spite of partisan political pressure to do otherwise.<sup>95</sup>

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ry, who represented a mix of plaintiffs and defendants; and Tom Strong, who represented mostly plaintiffs. A similar mix of practice would be found if the lawyer-commissioners were examined further back in time, or if the lay commissioners' backgrounds were examined. See Scott Lauck, *Best-Laid Plan, The Partisan History Of The Nonpartisan Process*, MO. LAW. WKLY. Sept. 3, 2007, 21 M.O.L.W. 777, 789 (*republished at* 2007 WLNR 26831647).

94. Carmody, *supra* note 93.

95. Dierker, *supra* note 89, at 25-26.



Some critics of the nonpartisan plan assert that direct election of judges is preferable, arguing, in part, that lawyers exert too much control over the commission process. There is no evidence that the commission is subject to internal capture by the lawyer members. “[L]aypersons who serve on judicial nominating commissions report that they do not feel as though lawyer members dominate the discussion.”<sup>96</sup> The available social science research confirms Missouri’s own experience, which is that the lay members do not feel pressured by the lawyer members.<sup>97</sup>

A strong lawyer presence on the commission is essential to its effective operation, however, and is almost universal in judicial-selection processes.<sup>98</sup> No one argues that physicians should be evaluated and selected by a commission that would not include the input of a number of doctors; nor is it appropriate for lawyers to be divorced from the practice of nominating applicants for judgeships. In fact, Missouri law provides that other kinds of professionals – such as accountants, architects, chiropractors, dentists, engineers and pharmacists – are governed by boards that have only one lay member while the rest of the board is made up of members of the professions they are judging.<sup>99</sup> Furthermore, in the federal system, the qualifications of a judicial nominee are reviewed by the Senate Judiciary Committee, which is made up of lawyers, because they understand whether the nominee is well-qualified to be a federal judge.

Equally importantly, the argument that lawyers have disproportionate influence in merit-selection systems fails to recognize that, in most states that elect judges, contributions from lawyers and litigants comprise the vast majority of all money judges raise. For example, in Texas – where judges at all levels are elected in partisan elections,

[L]awyers complain of the “lawyers’ tax” – the contributions that lawyers (and even some lawyer-legislators!) are expected to make to judicial campaigns, contributions that they perceive are necessary to maintain their goodwill with the judiciary and ensure access to the judges. Although the amount of the “lawyers’ tax” varies widely, anecdotally, the prominent and successful members of the

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96. Caufield, *supra* note 17, at 179.

97. *Id.* at 180 (“Nonetheless, there is no evidence that the bar or lawyer members of judicial nominating commissions have inappropriate control over commission procedures or decisions.”).

98. See AM. JUDICATURE SOC’Y, METHODS OF JUDICIAL SELECTION: JUDICIAL NOMINATING COMMISSIONS, available at [http://www.judicialselection.us/judicial\\_selection/methods/judicial\\_nominating\\_commissions.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=), and related links from that site. See also Carmody, *supra* note 93 (lawyers have the most direct knowledge of what makes a good judge and the greatest stake in having an unbiased judiciary).

99. For statutes governing membership on professional boards, see, for example, MO. REV. STAT. §§ 338.110 (pharmacists), 326.259 (accountants), 327.031 (architects and engineers), 331.090 (chiropractors), 332.021 (dental professionals) (2000).

plaintiff's bar contribute a whopping \$100,000 on average at each election cycle.<sup>100</sup>

Even in Texas, a poll conducted in January 2003 showed that sixty-two percent of those who responded favored a system of appointing judges who then would be subject to a yes or no retention vote, and eighty-four percent favored submitting this issue to a statewide vote.<sup>101</sup> Despite such poll results – coupled with the efforts of former Texas Chief Justice Thomas R. Phillips<sup>102</sup> – the legislature there has yet to put the option of moving to a nonpartisan plan before the Texas voters. But the movement continues: In February 2009, Texas Chief Justice Wallace Jefferson asked the Texas legislature to abolish judicial elections,<sup>103</sup> telling them that “[a] merit system, in which voters later vote the judge up or down, is the best remedy.”<sup>104</sup>

Finally, of course, the argument against having an equal ratio of lawyers and lay persons on Missouri's commission simply ignores the fact that Missouri voters chose by initiative to have a commission composed of three attorney members, three lay members and a judge when they approved the constitutional provision establishing that procedure. This is populism of the very sort espoused by some of merit selection's critics.

### *B. The Nonpartisan Nature of the Process Helps Insulate the Rule of Law from the Whims of Partisan Politics*

Missouri's constitution designates its judicial-selection method as the Missouri Nonpartisan Court Plan. It is not, and never has claimed to be, apolitical, for no system involving humans can be; rather, it recognizes that all of the humans who would be a part of the process bring to that process their experiences in the world, partisan or otherwise. Neither is the plan designed to be bipartisan, i.e., comprised of an equal number of members from each of two political parties. Rather, it is *nonpartisan* and has been since its begin-

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100. Stephen Limbaugh, Jr., *A Missouri Non-Partisan Court Plan for Texas?*, ST. LOUIS DAILY REC., May 1, 2003.

101. *Id.*

102. See, e.g., Mike Tolson, *Sweep Revives Debate on Election of Judges; Straight Ticket Ballots Contributed to Multiple Defeats at the Courthouse*, HOUSTON CHRON., Nov. 9, 2008, at B1.

103. Chuck Lindell, *Chief Justice Seeks to Abolish Judicial Elections*, AUSTIN AM. STATESMAN, Feb. 12, 2009, at B01, available at [http://www.statesman.com/blogs/content/shared-gen/blogs/austin/courts/entries/2009/02/11/chief\\_justice\\_seeks\\_to\\_abolish\\_1.html](http://www.statesman.com/blogs/content/shared-gen/blogs/austin/courts/entries/2009/02/11/chief_justice_seeks_to_abolish_1.html).

104. Chief Justice Wallace B. Jefferson, *The State of the Judiciary in Texas* (Feb. 11, 2009), available at <http://www.supreme.courts.state.tx.us/pdf/2009StateOfTheJudiciary.pdf>.

nings, when it was adopted by the people by initiative petition after a proposed referendum was defeated by partisan bickering in the legislature.<sup>105</sup>

The nonpartisan nature of the Missouri plan has helped shield the courts from being subject to the constantly shifting nature of Missouri's, and America's, political landscape, which has become increasingly partisan in the last twenty years.<sup>106</sup> The difference between a nonpartisan system and a bipartisan system is that the commissioners are not required to be representative of one political party or another. This results in a commission, and a court, that is less likely to fracture along strict party lines, as those party lines simply do not exist in the commission in any meaningful way. Any effort to adopt a bipartisan, rather than a nonpartisan, system would lose this and the other advantages of Missouri's plan just described.

As a result of this nonpartisan foundation, there are no partisan politics directly associated with the nomination of judicial candidates under the nonpartisan plan. The panel of nominees can and has varied from the governor's party, as the commission's charge is simply to select highly qualified persons for nomination from those who applied. Governors, of course, can and typically do choose judges whom they believe to be of their own party,<sup>107</sup> as do U.S. Presidents.<sup>108</sup> Whether this is necessary or appropriate always has been a matter for debate.

But it is not true that this, and the presence of lawyers on the commission, has created a Democratic bias under the plan. In fact, Missouri's plan was proposed by Missouri's Republicans to wrest control from the Democratic stranglehold that previously had prevailed and to take politics out of judicial selection. Because governors are intended to pick which of the three qualified nominees to select, and governors do tend to select from their own party more often, although not always, repeated election of a governor from the same party can lead to a slow shift in the background of those selected for the bench. Because of the shifting nature of Missouri politics, however, a single governor or party seldom would have the opportunity to appoint all of the Supreme Court of Missouri's judges. Only if the governor's mansion remains in the hands of a single party for two or three consecutive terms will all the lay members have been appointed by a governor that has the same

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105. It is not surprising that some other merit-selection states include the legislature in some aspects of their process, making it more bipartisan than nonpartisan in some respects, for in those states the legislatures were involved in the adoption of the plan and, naturally enough, included themselves as a component. Missouri's plan is truly nonpartisan because, as discussed above, the plan was adopted by the people despite the hostility of the legislature.

106. Geyh, *supra* note 21, at 1263-67 (describing increasing partisanship in judicial races).

107. Lauck, *supra* note 93, at 786.

108. These efforts are not always successful, as President Gerald Ford, a Republican, appointed Justice John Paul Stevens to the U.S. Supreme Court. Justice Stevens is widely regarded as the most liberal member of the court today.

political party affiliation, and lawyers, a naturally conservative, professional group, have not been shown by critics to be more liberal on average than the general population.<sup>109</sup>

This information is not reflected in the graphs relied on by those who suggest that Missouri's plan slants in a Democratic direction, because those graphs only display information for the period beginning in 1992 when, for a twelve-year period, Missouri's governors were Democrats.<sup>110</sup> A more complete story unfolds if one examines the makeup of the court and the nature of the appointments to it during the prior twenty years, for sixteen years of which Missouri elected Republican governors. This shows that the norm is for the Supreme Court of Missouri to be made up of judges appointed by governors of both parties. In fact, the appointment of all members of the supreme court by a governor of one political party occurred only once – under then-Governor, and later U.S. Attorney General, John Ashcroft, a Republican.

In all other instances, and as is true today, Missouri's supreme court judges reflect a wide variety of both political and social backgrounds and experiences that in turn reflects the varied backgrounds of Missouri's citizens: some come from rural practices, others from urban areas; they worked variously for firms big and small, for individuals and corporations, for the state, and for criminal defendants; some are women and others are men, all are of varying ethnic and cultural backgrounds. This mix of experience, as applied to the particular facts and law of the case before the court, and considered in light of the legal arguments made, is what determines the court's decisions, not partisan or personal leanings of individual judges. For this reason, the members of Missouri's appellate courts actually try to convince each other of the rightness of legal positions and are successful as often as

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109. See OFFICIAL MANUAL, STATE OF MISSOURI (2007-2008), *supra* note 79, at 337; MO. CONST. art. V, § 25(a).

110. Professor Fitzpatrick's assertions about the supposedly "liberal" bias in Missouri's appellate judge nominees based on their contributions to Democratic candidates are freighted with so many caveats and disclaimers regarding the insufficiency and unreliability of the data as to render his conclusions based on them effectively meaningless. See Fitzpatrick, *supra* note 10, at 695-702. Moreover, if we were to manipulate the same data in a different way, i.e., by including all thirty-eight nominees to appellate courts in Missouri since 2002 in the baseline rather than *only* those who made recorded political contributions prior to their nomination, we could conclude that only twenty-eight percent of the nominees donated money to Democratic candidates. Based on this, we could then argue that Missouri's judicial candidates are *more* conservative than the state's citizens as a whole (as Democrats tend to receive between forty and sixty percent of the vote in statewide elections). A similar point might be able to be made if contributions were available to be analyzed during the years prior to 1994 when Missouri had mostly Republican governors. In the end, these data are so unreliable – as Professor Fitzpatrick concedes – that we are not comfortable making any conclusion based thereon, and we will engage with them no further.

not. Missouri's courts usually find a common ground, a center, which frankly is better than the more extreme positions to which partisan politics might draw people, and Missouri's judges work together in a respectful and collegial manner. This shows in the opinions they write.<sup>111</sup>

Another way the nonpartisan plan prevents the judiciary from being too subject to political whims is in the way it operates to balance the authority of the governor and the nominating commission. Since 1976,<sup>112</sup> the Missouri Constitution has provided that if a governor did not make an appointment within sixty days of receiving a panel from the nominating commission, then the commission would make the appointment.<sup>113</sup> This change was motivated in part by a standoff in the 1950s between then-Governor Phil Donnelly and the Sixteenth Judicial Circuit Commission in Jackson County.<sup>114</sup> During its 1953 legislative session, the Missouri General Assembly authorized three new judgeships in Jackson County.<sup>115</sup> The commission met and considered more than fifty applicants for the three positions and, in October 1953, submitted three panels of three names each to the governor.<sup>116</sup> The governor, however, rejected the panels.<sup>117</sup> The commission twice more submitted the same panels to the governor, who twice more rejected them.<sup>118</sup> The deadlock continued until a new lawyer member was elected in November 1955 on a platform of breaking the standoff.<sup>119</sup> The newly constituted commission rearranged the nine names on three new panels, and the governor, though expressing regret that no new names had been submitted, appointed three new judges.<sup>120</sup> Since the 1976 amendment, no governor has failed to make an appointment within the allotted time,<sup>121</sup> despite occasional criticism to the

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111. One recent study of the opinions of the Supreme Court of Missouri determined that approximately eighty-three percent of all opinions – despite the differences in the judges on the court at the time – were unanimous. See Scott Lauck, *Supreme Splits: Sliced and Diced; A Look At How And Where Blunt Could Shake Up The Court*, MO. LAW. WKLY, June 4, 2007, 21 M.O.L.W. 509, 518 (republished at 2007 WLNR 26616307 as *Missouri Lawyers Weekly Analyzes Missouri Supreme Court Split Decisions*).

112. Also in 1976, as discussed in *supra* note 63, the constitution's local option provision of the nonpartisan plan was changed to become self-enforcing so that legislative action was not needed.

113. MO. CONST. art. IV, § 25(a).

114. See, e.g., Blackmar *supra* note 46, at 206.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 207.

media that those nominated were too friendly to the governor or not friendly enough.<sup>122</sup>

### *C. The Nonpartisan Plan Better Isolates Judicial Selection from Money and Special Interests*

Dean Aleinikoff of the Georgetown University Law Center has said, “I fear that we may have reached a point in our process of selecting and electing state judges where that perception of impartiality – which is so crucial to a rule of law and to an independent judiciary – is under threat.”<sup>123</sup> Overall, the process used in the Missouri Nonpartisan Court Plan guarantees that the nominees, once appointed, will not be – or be perceived as being – captive to the partisan or moneyed interests that can play a strong role in judges’ selection through the two alternative modes of selection. This is reflected in the voting patterns of the judges, which do not follow party lines. For instance, after analyzing more than 250 opinions of the Supreme Court of Missouri for a June 2007 article, a *Missouri Lawyers Weekly* reporter determined that at least two of the court’s members appointed by Democratic governors voted as often with judges appointed by Republicans as they did with other Democratic appointees.<sup>124</sup>

#### 1. Judicial Elections Are Dominated by Moneyed Interests

In the way that merit-selection plans operate in Missouri and elsewhere, there is virtually no place for moneyed interests to participate. This creates a stark contrast with popular election of judges. The 2004 judicial elections in

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122. Former Supreme Court of Missouri Judge Edward D. “Chip” Robertson said, “[Governor Blunt] said what he wanted, and I don’t think there’s any evidence that he didn’t get what he wanted. He just didn’t get who he wanted . . . [a]nd there’s a big difference.” Scott Lauck, *Nonpartisan Plan Criticism Widens After Announcement*, MO. LAW. WKLY., Aug. 6, 2007, 21 M.O.L.W. 694 (republished at 2007 WLNR 26746802).

123. Dean T. Alexander Aleinikoff, Georgetown Univ. Law Ctr., Keynote Remarks at the 2007 Conference of the Sandra Day O’Connor Project on the State of the Judiciary: The Debate Over Judicial Elections and State Court Judicial Selection, (Oct. 17, 2007), in 21 GEO. J. LEGAL ETHICS 1347, Fall 2008, at 1348.

124. Lauck, *supra* note 111 (“[S]ome findings may seem counterintuitive. For instance, Judge Mary Rhodes Russell, the most recent addition to the court and Democratic Gov. Bob Holden’s last appointee, has voted in about three-quarters of dissents alongside the court’s two Republican appointees. Meanwhile, the court’s other female member, Judge Laura Denvir Stith, may be the closest thing the current court has to a ‘swing’ vote. Although her voting pattern most closely matches that of Chief Justice Michael Wolff, she tends to vote with the two Republican appointees about half the time and with the court’s most liberal members, [J]udges [Richard B.] Teitelman and Ronnie L. White, the other half the time.”).

Illinois are a prime example of the negative influence of high-dollar contributions on the appearance of justice. In that campaign, there were two lawyers running for a single position on the Illinois Supreme Court.<sup>125</sup> One candidate principally was supported by plaintiffs' lawyers, while the other principally was supported by defendants' organizations.<sup>126</sup> Their campaign was extremely partisan, extremely nasty and extremely expensive; they spent more than \$9.3 million between them, shattering the previous record for spending on a single judicial campaign.<sup>127</sup>

In the end, the corporate-defense-oriented candidate won. While there is no evidence that this support in fact has affected the candidate's vote in any case, and while no one wants to believe that any judge would decide cases based on such concerns, the very fact of the large campaign contributions arguably has created an appearance of bias in the process. This is reflected in the fact that now, when an opinion in a controversial civil lawsuit is handed down that is favorable to the defendant, newspapers often suggest the vote reflects the views of the corporate interests that supported that candidate's election campaign.<sup>128</sup> A concern about such an appearance of impropriety is what most concerns the public and judges themselves.<sup>129</sup>

And as judicial campaigns become more expensive, and people and organizations that have a regular stake in court outcomes – like large law firms or parties that are commonly sued – make significant financial contributions to those campaigns, it will become even easier to find – or to fund – such an “appearance of impropriety.” The latest example comes from a state supreme court race in West Virginia. There, the justice who cast the deciding vote in favor of reversing a multimillion-dollar jury verdict against an energy company<sup>130</sup> benefited from more than \$3 million in expenditures from the head of

125. See Paul Hampel, *Big-money Race Sets Record for a U.S. Judicial Contest*, ST. LOUIS POST-DISPATCH, Nov. 1, 2004, at A1; see also Paul Hampel, *Karmeier Gets Nod in Bitter Race*, ST. LOUIS POST-DISPATCH, Nov. 3, 2004, at B1.

126. See sources cited *supra* note 125.

127. See DEBORAH GOLDBERG, SARAH SAMIS, EDWIN BENDER AND RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004*, at 18 (Jesse Rutledge ed., 2005).

128. See, e.g., The Associated Press, *Supreme Court Refuses to Consider Illinois Judge Ethics in \$1 Billion Case*, FOX NEWS, Mar. 6, 2006, [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,186944,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,186944,00.html) (referring to *Avery v. State Farm Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 547 U.S. 1003 (2006)).

129. When the Joint Commission to Evaluate the Model Code of Judicial Conduct of the American Bar Association circulated its preliminary draft of canons for judicial conduct “in June 2005, it was criticized for diluting the ‘appearance of impropriety’ standard” present in existing canons. A.B.A. JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT TO THE ABA HOUSE OF DELEGATES 30 (2007), available at [http://www.abanet.org/judiciaethics/house\\_report.pdf](http://www.abanet.org/judiciaethics/house_report.pdf).

130. See *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008), *cert. granted* 129 S.Ct. 593, *rev’d* 129 S. Ct. 2252 (2009).

that same company.<sup>131</sup> The issue of whether this justice should have recused himself from the case went before the United States Supreme Court in 2009. After considering briefing and argument from the parties and briefing from a significant number of amici,<sup>132</sup> the Supreme Court determined that the Due Process Clause in the Fourteenth Amendment requires a judge's recusal "when the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable."<sup>133</sup> The Supreme Court concluded in this case that the probability of actual bias was simply too great because "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."<sup>134</sup> The limits the Due Process Clause imposes on judicial participation in cases where parties "with a personal stake in a particular case" have disproportionately supported election of that judge will ameliorate the likelihood of actual bias in the most extreme situations. It will eliminate neither the appearance of impropriety that emerges from expensive and nasty judicial election campaigns nor the resultant lack of confidence in the impartiality of the judicial system that may result.

## 2. Federal Appointment Process Embraces Secrecy, Partisanship and Special Interests and Results in Delays in Filling Judicial Vacancies

The federal appointment process – where judges are nominated by the executive and then subject to Senate confirmation and then have lifetime tenure – embraces secrecy and partisanship in equal measure. Under a nominate-and-confirm system, the executive has unbridled discretion in the selection of the nominee. As a result, the process by which a nominee is selected under this system is far more secretive than under any other mode of judicial selection. In elections, the candidates must declare for office, and in merit-selection systems, all finalists for the position are given uniform publicity. In the pure appointive system, however, the public only learns the identity of the person who is nominated. As a result, the executive is unguided by rule or precedent, and there is no structural bar to making political deals – with pro-

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131. *Caperton*, 129 S. Ct. at 2264.

132. Amici who have filed briefs arguing the justice should have recused or that the case should be remanded with directions that the state supreme court apply the proper standard of recusal include the Conference of Chief Justices; groups such as the American Bar Association, the Brennan Center for Justice, the Committee for Economic Development, Justice At Stake and the Zicklin Center for Business Ethics Research at the Wharton School at the University of Pennsylvania; and businesses including Intel Corp., Lockheed Martin Corp., PepsiCo and Wal-Mart Stores. See the Brennan Center for Justice, [http://www.brennancenter.org/content/resource/caperton\\_v\\_massey/](http://www.brennancenter.org/content/resource/caperton_v_massey/).

133. *Caperton*, 129 S. Ct. at 2257 (2009).

134. *Id.* at 2263-64.



spective nominees, with members of the confirming body, or even with wealthy donors or interest groups – regarding appointments to the courts.

Unlike the Appellate Judicial Commission in Missouri, the executive is not required by rule or statute to select the most qualified person to be the nominee. While most nominees have excellent qualifications for the office, some are controversial because the public believes they were selected mainly for their political and social views or, in the case of nominees such as former White House Counsel Harriet Miers, because of their relationship to the President.<sup>135</sup>

This leads to the third major problem with the nominate-and-confirm model: It gives the ultimate power over judicial selection to partisan politicians. We already are seeing the results of this politicization at the highest levels of the federal judiciary, as the political nature of the appointments exacerbates the simplistic belief often espoused by court-watching pundits that the United States Supreme Court is divided into a “conservative bloc” – consisting of Justices Alito, Roberts, Scalia and Thomas – and a “liberal bloc” – consisting of Justices Breyer, Ginsburg, Souter and Stevens – with Justice Kennedy sitting as a kind of plenipotentiary who will cast the fifth and deciding vote. Such perceptions, whether or not accurate, are damaging to the institutional legitimacy – to the perceived impartiality – of the Supreme Court. And these partisan perceptions are traceable largely to increasingly partisan confirmation fights. At a lecture in Warrensburg, Missouri, Justice Scalia decried this increasing partisanship and noted bemusedly that, if he were nominated today, he would not likely be confirmed.<sup>136</sup>

Of course, the founders of our country recognized that such partisan selection could interfere with the ability of courts to act as impartial arbiters of the cases brought before them. That is why the founders provided in the

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135. See, e.g., Patrick J. Buchanan, *Miers' Qualifications Are "Non-Existent,"* (Oct. 3, 2005), <http://www.humanevents.com/article.php?print=yes&id=9444>; Emily Bazelon, *Let-Down Lady: Harriet Miers Isn't Just No John Roberts. She's No Sandra Day O'Connor*, SLATE, Oct. 3, 2005, <http://www.slate.com/id/2127361/>. Roman L. Hruska, a conservative Republican senator from Nebraska, defended President Nixon's nominee to the Supreme Court, Judge G. Harrold Carswell of Tallahassee, Florida, from complaints by liberal Democrats that Carswell was too “mediocre” to deserve a seat on the nation's highest court by saying, “Even if he were mediocre, . . . there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Frankfurters and Cardozos.” William H. Honan, *Roman L. Hruska Dies at 94; Leading Senate Conservative*, N.Y. TIMES, Apr. 27, 1999, at B8, available at <http://query.nytimes.com/gst/fullpage.html?res=9D03E6D7173DF934A15757C0A96F958260&scp=1&sq=roman%20hruska&st=cse>.

136. See Chris Blank, *Scalia Says "Living Constitution" Reduces Democracy*, JEFFERSON CITY NEWS-TRIBUNE, Mar. 6, 2008, available at [http://www.newtribune.com/articles/2008/03/05/politics\\_and\\_elections/news/301news14scalia.txt](http://www.newtribune.com/articles/2008/03/05/politics_and_elections/news/301news14scalia.txt) (“Noting that he [Scalia] was confirmed 98-0 by the Senate, he said he doubted he could get 60 votes today.”).

United States Constitution that federal judges are appointed for life and that their salaries cannot be reduced while in office.<sup>137</sup> For judges appointed under this process, this is an essential protection from the pressures they may feel when they hear cases on matters of importance to those who supported them. If those judges were required to seek reappointment from the same authority, or risk having their salaries or remunerates of office reduced when they made unpopular votes, both the appearance and reality of independence would be in serious trouble.

Yet, those who advocate for adoption of a “federal system” never actually want to include this aspect of the federal selection process in a state’s judicial-selection system. Instead, they propose that the judge be appointed only for a term after which he or she must win reapproval, usually from a legislative or executive appointing authority.<sup>138</sup> This, of course, means that the judge will know, as he or she decides a case, that the result may affect whether that judge keeps his or her job the next year. This is not conducive to judicial impartiality.

### 3. Missouri’s Nonpartisan Court Plan Gives Voters the Final Power of Holding Judges Accountable While Avoiding the High-Dollar Campaigns of Purely Elective States

While life tenure arguably provides the federal judiciary with necessary independence, it removes a key element of accountability that is present under the Missouri Nonpartisan Court Plan.<sup>139</sup> All judges selected under the plan must be retained by the voters after serving a relatively short

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137. U.S. CONST. art. III, § 1.

138. *See, e.g.*, H.R.J. Res. 15, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007), available at <http://www.house.mo.gov/content.aspx?info=/bills071/biltxt/intro/HJR00151.htm> (proposing senate confirmation for judges of the supreme court and courts of appeals and preventing such judges from holding more than one term in office); *see also* H.C.S.H.R.J. Res. 31, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007), available at <http://www.house.mo.gov/content.aspx?info=/bills071/biltxt/commit/HJR0031C.HTM> (proposing retention by concurrent resolution of both legislative chambers following gubernatorial appointment and senate confirmation); *see also* H.R.J. Res. 34, 94th Gen. Assem., 1st Reg. Sess., 2007 available at <http://www.house.mo.gov/content.aspx?info=/bills071/biltxt/intro/HJR0034L.htm> (proposing retention by majority vote of each legislative chamber for judges appointed pursuant to the Missouri Nonpartisan Court Plan).

139. Appointive systems in sixteen states use the “Missouri Plan” and require appointed judges to stand for a retention election. In a retention election, judges do not have to run against an opponent. Rather, the only question on a ballot in a retention election is whether the judge will keep his or her seat. *See* GOLDBERG, SAMIS, BENDER & WEISS, *supra* note 127, at 37.

“probationary” period before they can serve their first full term in office.<sup>140</sup> Critics argue that, while retention elections are fine in theory, in practice they do not work, for few judges have been voted out of office.<sup>141</sup> We suggest that, to the contrary, the fact that few judges lose their positions due to a retention-election outcome reaffirms the exceptional strength of the merit-selection process. This is evident upon consideration of the retention vote.

A retention election is not intended to be a vote on the individual judge’s qualifications for the position in the same way that citizens vote in a contested political election. The people purposely rejected contested elections – with their attendant fundraising, interest groups and campaign promises – in adopting the nonpartisan plan. Neither are retention elections designed to allow for knee-jerk reactions to singular rulings, although this can occur.<sup>142</sup> The relatively lengthy terms that nonpartisan judges serve between retention elections, rather, are intended to help “provide substantial insulation for judges from short-lived passions or voter caprice.”<sup>143</sup> A retention election is not to get rid of bad, unethical judges, either. Those judges are removed by a system that takes away their license and requires them to resign if they engage in any serious legal or ethical misconduct.<sup>144</sup>

No, the reason for the retention election is to make it clear that, in the last instance, the people are in charge. Judges, governors, commissioners, all of them, know that they should do their job fairly and properly, because if they do not, and a judge who shows himself or herself to be inadequate for that office is sworn in, the people can vote that person out of office. In fact, retention elections have been described as,

an excellent check on any tendency to judicial imperium. . . .  
[T]here is nothing like the specter of outraged voters to remind  
judges that they too are under . . . the law, and not knights errant  
(as Cardozo stated) with a roving commission to correct every per-

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140. At the next general election after the judge has been in office for at least one year, the people then get to vote whether the judge should be retained in office. MO. CONST. art. V, § 5.

141. See G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 627-31 (2009). There are, of course, well-known exceptions, including then-California Chief Justice Rose Bird and two other judges on the California Supreme Court who in the mid-1980s “failed to win retention because of publicity surrounding their voting record in death penalty cases.” Limbaugh, *supra* note 100.

142. Former Tennessee Supreme Court Justice Penny White, who is a contributor to this symposium, similarly lost a retention election in that state due merely to concurring in an unpopular death penalty case that happened to be handed down shortly before her retention election.

143. Dierker, *supra* note 89, at 26.

144. See MO. SUP. CT. R. 4-1.0 to -9.1 (Rules of Professional Conduct); MO. SUP. CT. R. 12 (Commission on Retirement, Removal and Discipline).

ceived wrong regardless of the bedrock constitutional plan for the separation of powers.<sup>145</sup>

The fact that few judges are not retained simply means that meritorious judges are initially selected and so are approved by voters to begin their first full term in office. These judges' retention in subsequent elections is a reconfirmation of the wisdom of their initial choice by the commission, governor and voters.

Further, a change to contested elections from merit selection would often give voters *less choice* than they get in a retention election. This is because the vast majority of incumbent Missouri trial judges chosen in counties that do not use merit selection, like the vast majority of other incumbents, are reelected year after year, often without any opposition. As one former Missouri trial judge said, this meant in his case that "if people in my county didn't like me as judge, they had a vote but no choice, because for [twenty-three] years no one ever ran against me. At least in retention elections, the voter gets a choice: to vote – yes, or no – to retain a judge."<sup>146</sup>

Another criticism is that voters do not know as much as they should about judges up for retention. This concern also applies to elected judges, however, about whom studies show the electorate knows just as little.<sup>147</sup> The solution that some pundits propose is therefore to take away the vote of the people entirely by leaving the decisional process completely in the hands of politicians. This is, of course, the process that Missouri rejected early in its statehood and the process that would make appointments most political.

The solution is not to dispense with retention elections but to make them as meaningful as possible by providing the voters with more information, in more usable form, about judges up for retention. In Missouri, information is provided to voters about the performance of nonpartisan judges, and it is in this area that most of the changes have been made to the nonpartisan plan in recent years. In 1992, The Missouri Bar began asking practicing attorneys to complete surveys in which they evaluated – anonymously, of course, to encourage complete candor – the performance of the judges with whom they had personal experience.<sup>148</sup> These surveys have been vastly expanded during the past five years, and now jurors who have participated in trials before nonpartisan judges up for retention are given separate anonymous surveys as

145. Dierker, *supra* note 89, at 26.

146. See, e.g., Hon. J. Miles Sweeney, Remarks at a meeting of the League of Women Voters of Southwest Missouri (Sept. 29, 2008).

147. See THE POLLING COMPANY, INC., TOPLINE DATA: STATEWIDE SURVEY OF 500 LIKELY VOTERS IN GEORGIA, PREPARED FOR THE FEDERALIST SOCIETY (2006), <http://www.faircourts.org/files/GA-FedSocietyPoll.pdf>.

148. See, e.g., The Missouri Bar, *Major Changes to Judicial Evaluation Survey in the Works for 2006 and Beyond*, BRIEFLY, (Dec. 2005), available at <http://newsite.mobar.org/6fdcc5f1-6942-4896-b814-2a62cc7b447c.aspx>.

well.<sup>149</sup> The results of these surveys always have been distributed to the public via the news media, the Internet and other methods.<sup>150</sup>

In addition, beginning in the 2008 election cycle, more input from non-lawyers has been added to the mix. Now there are judicial performance evaluation committees – made up of both lawyers and non-lawyers – that evaluate objective criteria, including decisions written by judges on the retention ballot.<sup>151</sup> The committees rate the judges according to judicial performance standards, including whether they administer justice impartially and uniformly; make decisions based on competent legal analysis and proper application of the law; issue rulings and decisions that can be understood clearly; effectively and efficiently manage their courtrooms and the administrative duties of their office; and act ethically and with dignity, integrity and patience.<sup>152</sup> The results of these judicial performance evaluations then are distributed to the public via the media, the League of Women Voters and the Internet. Efforts continually are made to identify additional means for making this information available to as many voters as possible.<sup>153</sup>

The voters, then, can use this “report card” in assessing whether to retain a judge. This is an aid to the public, but, of course, it is up to the public to make the ultimate decision whether to retain the judge, and the electorate has shown that it will listen but then make its own independent judgment.<sup>154</sup>

#### *D. The Nonpartisan Plan Has Increased the Diversity of Missouri’s Judiciary*

The Missouri Nonpartisan Court Plan has enabled many individuals to reach the bench who believe they could not have made it there otherwise. One observer noted, “It requires no sophisticated statistical analysis to con-

149. See, e.g., The Missouri Bar, *Judicial Evaluation in Missouri*, Aug. 29, 2008, available at <http://www.mobar.org/data/esq08/aug29/History.html>.

150. *Id.*

151. *Id.* See also, The Missouri Bar, *Judicial Performance Review Criteria*, <http://www.mobar.org/data/judges08/> (last visited Apr. 9, 2009).

152. *Id.*

153. *Judicial Evaluation in Missouri*, *supra* note 149.

154. It is ironic that those same persons and groups that attack nonpartisan systems on the basis that judicial selection is too dependent on the views of attorneys then attack retention elections on the basis that voters retain some judges despite low performance ratings from attorneys. See, e.g., *St. Louis Voters Retain All 29 Judges*, ST. LOUIS DAILY REC., Nov. 9, 2006 (discussing retention of St. Louis County Associate Circuit Judge Judy Draper with 59.8-percent support from voters despite the opposition for retention by 72.5-percent of lawyers surveyed); see also, e.g., Donna Walter, *Election 2008: Voters Retain All Missouri Judges Under Plan*, ST. LOUIS DAILY REC., Nov. 6, 2008 (“Voters retained St. Louis County Associate Circuit Judge Dale Hood on Tuesday despite a recommendation by a Missouri Bar evaluation committee that they vote him off the bench.”).

clude that the qualities that make an effective politician are not necessarily the qualities that make the best judges, and the Missouri plan gives ‘nonpoliticians’ a fighting chance to secure judicial appointment.”<sup>155</sup>

The nonpartisan appointment plan also opens opportunities for judges to be selected from diverse cultural and ethnic groups as well as from rural areas. There are far more lawyers in the cities, and if appellate judges were elected on a statewide or regional basis, there would be very few judges from outside the major cities. Instead, Missouri has excellent judges on the supreme court and courts of appeals from more rural areas of Missouri.<sup>156</sup>

And, importantly, the nonpartisan plan is a key reason why there has been an increase in the number of women and minorities on the bench. In 1994, women made up from eight to ten percent of all levels of the Missouri judiciary other than the supreme court, which had a woman as one of its seven members – the first woman ever to serve on the court, Ann K. Covington. By 2009, twenty percent of Missouri’s judiciary was female overall. Among elected judges, however, only thirteen percent are female, while women make up thirty-two percent of the judges appointed under the nonpartisan court plan to Missouri’s trial or appellate benches.<sup>157</sup> Further, outside the counties where the nonpartisan plan exists, only one African-American and one Hispanic of either gender have been elected. Under the nonpartisan plan, however, there are racially or ethnically diverse judges on all three divisions of Missouri’s appellate courts and at all levels of the trial bench in both the St. Louis and Kansas City areas.<sup>158</sup> In addition, Ronnie White is the first and only African-American to have served on the Supreme Court of Missouri, and he often has said he would not have been able to accomplish this if there had been a contested partisan election.

The diversity of Missouri’s judiciary under the nonpartisan plan is viewed positively in national studies. The Brennan Center for Justice at New York University’s School of Law recently studied ten states that use an appointive system for selecting judges. The center’s report concluded, “Attaining a diverse bench across the nation is paramount to maintaining the legitimacy and success of state courts. Therefore, states must make judicial diversity a core policy priority.”<sup>159</sup> Missouri’s judiciary fared well in the report, which noted that “[r]acial minorities and women are underrepresented on state appellate and district courts when compared with their share of the gen-

155. Dierker, *supra* note 89, at 26.

156. See the biographies of supreme court and court of appeals judges, available in the “Meet Your Missouri Judges” section of the judiciary’s website, online at <http://www.courts.mo.gov/page.asp?id=630>.

157. See OFFICIAL MANUAL, STATE OF MISSOURI (2007-2008), *supra* note 79, at 247-48.

158. *Id.* at 249-313.

159. CIARA TORRES-SPELLISCY, MONIQUE CHASE & EMMA GREENMAN, BRENNAN CTR. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY 42 (2008), available at [http://brennan.3cdn.net/96d16b62f331bb13ac\\_kfm6bplue.pdf](http://brennan.3cdn.net/96d16b62f331bb13ac_kfm6bplue.pdf).

eral population in all ten states except Missouri” and that, “[o]f the states surveyed, the racial make-up of Missouri’s state bench most closely reflects the demographics of the state’s population.”<sup>160</sup> According to the report,

Missouri is one of the few states with a specific provision directing its Commission both to recruit diverse judicial applicants and to consider the interests of a diverse judiciary when evaluating judicial applicants. The Missouri Supreme Court Rules direct that: “[t]he Commission shall actively seek out and encourage qualified individuals, including women and minorities, to apply for judicial office” and that “the Commission shall further take into consideration the desirability of the bench reflecting the racial and gender composition of the community.”<sup>161</sup>

In fact, looking just at Missouri’s high court, there is great diversity of background. Of the seven judges, three were appointed by Republican governors and four by Democratic governors; three are women and four are men; and two came from Kansas City, two came from St. Louis, two came from rural Missouri, and one maintained homes both in Kansas City and in rural Missouri.<sup>162</sup> Additionally, the judges came from diverse practice backgrounds: one was a law professor; two formerly were partners in large civil defense firms; two were rural trial judges who previously had maintained a rural practice; one was a rural practitioner; and one was a director of a legal aid organization.<sup>163</sup> In addition, four served on a court of appeals before being elevated to the supreme court.<sup>164</sup> This breadth of backgrounds is what Missouri’s nominating commissions strive to achieve on all the nonpartisan courts and especially on the appellate courts and supreme court, where judges consider cases collectively.

#### *E. Missouri’s Nonpartisan Court Plan Has Helped Its Courts Maintain a High Level of Public Confidence*

The Missouri Nonpartisan Court Plan was not a social experiment or an academic exercise. Rather, it was borne out of the state’s collective and practical experiences with judicial systems that failed to give Missourians any confidence in their courts to decide cases fairly and impartially, without regard to a litigant’s financial wherewithal or political connections. Within its

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160. *Id.* at 16.

161. *Id.* at 17 (footnotes omitted) (citing MO. SUP. CT. R. 10.32).

162. See the biographies of Supreme Court of Missouri judges, available through the “Supreme Court Judges” section of the Missouri judiciary’s website, online at <http://www.courts.mo.gov/page.asp?id=2032>.

163. *Id.*

164. *Id.*

first twenty-five years, national commentators had determined that the non-partisan court plan “‘ha[d] given Missouri a metropolitan trial bench and an appellate bench of able and upright judges, with freedom from political or other threats to their security and independence.’”<sup>165</sup>

Over the nearly three-quarters of a century since Missourians adopted the nonpartisan plan, Missouri’s courts have earned the confidence of the citizens they serve. Recent polls show that Missourians approve of their state’s method of judicial selection. Nearly three-quarters of Missourians support the nonpartisan plan itself, regardless of the respondent’s political party. Furthermore, by nearly a three-to-one margin, Missourians indicated they value a state judiciary independent of political leaders in the governor’s mansion or the legislature.<sup>166</sup> Missourians also have a high level of confidence in their courts, especially their supreme court. In one survey, more than two-thirds of Missourians indicated they had “total trust” and confidence in the Supreme Court of Missouri to make decisions based on the law and not on political beliefs.<sup>167</sup> This is even higher than the sixty-five percent who say they trust the United States Supreme Court to do so.<sup>168</sup>

The Missouri Nonpartisan Court Plan has not been without its critics, but time has shown it to be the least political way to ensure that highly qualified, diverse individuals become judges and to give Missouri voters the final determination of whether a new judge is deserving of serving a full term in office. As the evidence abundantly demonstrates, the plan is well suited to select judges who are capable of serving the broader interests and goals of the judicial branch, not the narrow interests of moneyed partisans. Even one former critic of the plan recently has noted that the current attacks against the plan use complaints over judicial philosophy as a “crowbar to get their way” and further suggests, “‘Today, you’re getting people saying it’s not political enough, the governor ought to be able to appoint everybody . . . . Well, this

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165. Cohen, *supra* note 47, at 39 (quoting Editorial, *A Silver Anniversary in the Show-Me State*, 49 J. AM. JUDICATURE SOC’Y 83, 84 (1965)).

166. See Memorandum from Patrick Lanne, Public Opinion Strategies, to Interested Parties 1 (Dec. 11, 2007), available at <http://www.gavelgrab.org/wp-content/resources/polls/MissouriMemoAndOverallResults.pdf> (regarding its survey of 600 likely voters completed in December 2007).

167. Memorandum from Kellyanne Conway, the polling company, inc., to Interested Parties 1-2 (Mar. 2007). These results were obtained in a survey of “500 high-propensity voters” conducted at the request of the Federalist Society. See original poll language and results at The Federalist Society, *Statewide Survey of 500 High-Propensity Voters in Missouri* (Feb. 2007), <http://www.faircourts.org/files/MO-FedSocietyPoll2007.pdf>.

168. This approval level is as high as eighty percent among Republicans, but is at sixty-four percent among even Democrats and sixty percent among independents. See News Release, Pew Research Ctr. for the People & the Press, *Federal Government’s Favorable Ratings Slump; State and Local Still Viewed Positively 3* (May 14, 2008), available at <http://people-press.org/reports/pdf/420.pdf>.



administration's got the wrong view of governance. If they want to do that, then they'll want to start appointing the senators and representatives, too.'"<sup>169</sup>

In the end, the Missouri plan has been shown to be "perhaps the closest thing to the Aristotelian mean in judicial selection – judges shielded from partisan politics and campaigns, but not so removed from the political process or the people themselves as to be propagators of judicial tyranny."<sup>170</sup> Indeed, it was for these very reasons that it was adopted by the citizens of Missouri nearly three-quarters of a century ago.

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169. Lauck, *supra* note 93 (quoting former Gov. Roger Wilson).

170. Dierker, *supra* note 89, at 26.