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Gubernatorial Influence in Merit-Based Judicial Selection: Kansas, Missouri, and Colorado, 2012–2021

Zachary Reger*

ABSTRACT

Many states use systems of merit-based judicial selection for supreme court appointments. Under “merit selection,” an independent commission screens judicial candidates before the governor makes a final appointment. Proponents of these systems claim that by limiting gubernatorial influence over the selection process, merit selection protects judicial independence from partisan intrusion.

This study evaluates such claims by comparing the recent ideological voting behavior of judges appointed by Republican and Democratic governors in three states. Those states, Kansas, Missouri, and Colorado, use three different types of merit selection—bar-controlled, hybrid, and governor-controlled, respectively—that grant the governor varying degrees of influence over the judicial selection process.

This study finds the largest gap between the voting behavior of Republican- and Democratic-appointed judges in Colorado and the smallest gap in Kansas, with Missouri falling in between. These results show how increased gubernatorial influence over the judicial selection process translates into a judiciary that is more ideologically polarized. This ideological polarization limits judicial independence but is indicative of greater democratic control, as exercised by the popularly elected governor, over the state judiciary. In relative terms, Colorado maximizes political accountability, Kansas maximizes political independence, and Missouri strikes a balance between the two goals.

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I. INTRODUCTION

Writing in the early nineteenth century, political observer Alexis de Tocqueville noted the moderating effects of lawyers on the “impetuosity” of the American public in the arena of public affairs.¹ “When the American people is intoxicated by passion,” he wrote, “it is checked and stopped by the almost invisible influence of its legal counsellors, who secretly oppose their aristocratic propensities to its democratic instincts.”² In this role, lawyers serve as a hidden “American aristocracy,” Tocqueville believed, and they do so in a country that eschews any outward pretensions of establishing an aristocratic class.³ Lawyerly professionalism may protect American democracy from itself, thought Tocqueville, and it may do so without drawing undue attention to its own anti-democratic character.

Merit-based judicial selection applies this Tocquevillian vision to modern state governance. Under a merit-selection scheme, a commission containing a set number of attorneys and nonattorneys screens candidates for an open judgeship. The governor may select a final appointee only from the slate of finalists approved by the commission. As the proportion of attorneys on the screening commission is always greater than the proportion of attorneys in the general population, such a system hands attorneys enhanced power over who becomes a judge. By granting attorneys this power, merit selection aims to depoliticize the selection process, thereby producing a more professional and unbiased judiciary.⁴ First adopted in Missouri in 1940 to thwart the influence of political bosses on elected judges,⁵ merit selection is now the most popular method of

¹ See ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 259 (New York, Adlard and Saunders 1838).

² *Id.*

³ *See id.*

⁴ *See generally* Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711 (2009).

⁵ Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 484–86 (2009). Some mark California as the first merit-selection state, as in 1934 it adopted a constitutional amendment that moved the state from nonpartisan judicial elections to a system of assisted judicial appointment. JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 180–92 (2012). However, the California system gave the appointment initiative to the governor, whose initial selection would be subject to confirmation by a commission composed of the chief justice, the presiding justice of the court of appeals, and the attorney general. *Id.* at 186. The Missouri Plan reversed this process, having the nominating commission as first mover, and it was the Missouri Plan and its variants that spread to many other states and are still in wide use today. *See infra* Section II.A (defining merit selection for the purposes of this study as congruent with the Missouri Plan and its variants).

state-level judicial selection.⁶ But the empirical effects of merit selection on judicial behavior are under-studied.⁷ Merit selection neither “eliminate[s] political forces from the selection of judges” nor hands “lawyers representing the affluent and prestigious institutions in society” the sole ability to “decide who will sit on the bench.”⁸ By affording both political and legal actors a seat at the table, merit selection arrives at some middle point between an absolutely apolitical but unaccountable judiciary and one that is completely beholden to the popular will.

This study examines how well the Tocquevillian vision succeeds as applied to one aspect of merit selection: the degree of influence exercised by the popularly elected governor. Specifically, the study examines how three different types of merit selection—bar-controlled, hybrid, and governor-controlled—affect the ability of the governor to appoint judges who engage in partisan-aligned ideological voting behavior.

Political scientists have developed two primary models of judicial voting behavior: the legal model and the attitudinal model. Under the legal model, “judges make decisions based on legal factors,” which may be the intent of the drafters of a legal provision or application of the principle of *stare decisis* to adhere to prior judicial decisions.⁹ Under the attitudinal model, “judges make decisions based on their own attitudes and values.”¹⁰ Such attitudes and values may include the political ideology of the judge on a standard left-right, or liberal-to-conservative, spectrum, which roughly aligns with contemporary divides between the Democratic and Republican parties.

By examining the judicial voting behavior of merit-selection judges within this spectrum, this study analyzes the extent to which an appointing governor is able to screen for judges who match the overarching political ideology most aligned with the governor’s respective political party. In other words, this study looks at the extent to which Republican-appointed judges engage in conservative voting behavior, and the extent to which Democratic-appointed judges engage in liberal voting behavior, to see if the judicial behavior of these groups differs to a greater extent in some merit-selection systems than in others.

⁶ Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 678 (2009).

⁷ *But see id.* at 690–703 (using primary voting behavior of judges in Missouri and Tennessee to study how merit selection may result in a leftward shift in the judiciary).

⁸ *See* RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 6* (1969) (studying the first few decades of Missouri’s method of merit selection).

⁹ *See* Jeffrey A. Segal et al., *Decision Making on the U.S. Courts of Appeals*, in *CONTEMPLATING COURTS* 227, 227 (Lee Epstein ed. 1995).

¹⁰ *Id.*

This partisan differential is crucial, as gubernatorial influence lies at the heart of what merit-selection systems aim to achieve. On the one hand, ours is a democratic society, and government officials who exercise public power should have some degree of popular legitimacy. In a merit-selection system, the popularly elected governor serves as a stand-in for the mass public and its democratic desires, ensuring that attorney influence of the process does not go unchecked. On the other hand, courts are not like the political branches of government. Judicial processes should be impartial, with litigants receiving a fair hearing and a judgment based on the law. Overly partisan judges may frustrate this goal, and attorney influence over judicial selection can have a moderating effect on who becomes a judge. Thus, a properly calibrated merit-selection system would balance these two concerns, promoting just the right mix of political accountability and independence in the state judiciary. This study measures gubernatorial influence, a proxy for political accountability, to see how three different methods of merit selection strike this delicate balance.

Section II starts with an overview of the research design and the data collection process. Section III details the results of the study. Section IV then discusses these results and what they say about the three different formats of merit selection. Section V concludes.

II. RESEARCH DESIGN

This study measures the degree of gubernatorial influence over the ideological voting behavior of state supreme court judges appointed under three systems of merit-based judicial selection. This Section explains the design of the study, including the attributes of the systems being studied, the independent and dependent variables, and how the data were gathered and coded. This Section then addresses a potential issue with the study's chosen method of measurement and explains why such issue is not as problematic as it may appear.

A. Three Methods of Merit Selection

For the purposes of this study, I define merit selection as a system in which a standing commission, independently established by state statute or constitutional provision, screens candidates for any open judgeship on the state supreme court. From among these candidates, the commission sends a slate of finalists to the governor, who is empowered to make the ultimate appointment. In a true merit-selection system, the commission's recommendations are binding, meaning the governor may only appoint a candidate from the commission's approved slate. If the governor fails to

act in the allotted time frame,¹¹ the commission—or some other decisionmaker as assigned by law¹²—makes the final appointment.¹³ These commissions are composed of some combination of nonattorneys appointed by the governor and attorneys who are either elected by members of the state bar association, appointed by the bar association leadership, or appointed by some public official or officials.¹⁴ Additionally, the commission often contains one sitting judge who serves as chair, but some states forego this feature.¹⁵

Another commonality is the mandatory retention election, which lends merit selection a greater democratic legitimacy. After a brief “probationary period,”¹⁶ a newly appointed judge must face the electorate in an uncontested election, where voters are asked whether they would like the judge to remain in office.¹⁷ If a majority of voters cast their ballots to retain the judge, the judge assumes a full term, at the end of which comes another retention election, a process repeated until the seat is vacated.¹⁸ These retention elections are “uncontested” in the sense that the judge never runs against an opponent. The question posed to voters is merely one of up-or-down approval.¹⁹ In the rare case where the judge is not retained, the selection process begins anew.

¹¹ See, e.g., KAN. CONST. art. III, § 5 (sixty days); MO. CONST. art. V, § 25(a) (sixty days); COLO. CONST. art. VI, § 20(1) (fifteen days).

¹² For example, when the Kansas or Colorado governor fails to make a timely appointment to the supreme court, it is the chief justice, not the commission, who makes the appointment. KAN. CONST. art. III, § 5(b); COLO. CONST. art. VI, § 20(1).

¹³ In practice, the governor virtually never fails to make the final appointment. Even where a governor is displeased with the commission’s slate of approved candidates, the governor is incentivized to pick her favorite from among those options. Otherwise, the governor hands such authority to another official or body—in many cases, the very commission with which the governor is displeased. See, e.g., Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 760 n.37 (2009) (explaining how a Missouri governor publicly considered refusing to appoint a nominee but ultimately made the appointment to prevent the choice from reverting to the commission). Every judge whose judicial behavior is measured in this study received their ultimate appointment from the governor.

¹⁴ See, e.g., MO. CONST. art. V, § 25(d); COLO. CONST. art. VI, § 24(2), (4); ALASKA CONST. art IV, § 8; KAN. CONST. art. III, § 5(e).

¹⁵ See, e.g., *State Judicial Nominating Commission*, IOWA JUD. NOMINATING COMM’NS, <https://www.iowajnc.gov/state-commission> [https://perma.cc/Z9JH-VBRU] (last visited Mar. 7, 2023).

¹⁶ See Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQ. L. REV. 61, 65–66 (1968) (referring to the time between a merit-selected judge’s initial appointment and first retention election as a “probationary period”).

¹⁷ See, e.g., MO. CONST. art. V, § 25(c)(1).

¹⁸ See, e.g., *id.*

¹⁹ See, e.g., *id.*

This study measures gubernatorial influence over the appointment of state supreme court judges in three merit-selection states: Kansas, Missouri, and Colorado. Each state uses a distinct variation of merit-based judicial selection at the supreme court level, with the following shared characteristics: (1) an independent commission screens candidates, sending three finalists to the governor; (2) the governor must appoint one of those finalists; and (3) each newly appointed judge must thereafter stand for retention in a statewide, uncontested election.²⁰ But the three states differ in the composition of their respective selection commissions, specifically in the proportion of the commission membership that is selected by the governor.²¹

Kansas has a “bar-controlled” commission, in which five of nine commissioners are attorneys elected by members of the Kansas bar association, and the other four commissioners are nonattorneys appointed by the governor.²² Missouri has a “hybrid” commission, in which three commissioners are attorneys elected by members of the bar, three are nonattorneys appointed by the governor, and the remaining commissioner is the chief justice of the state supreme court, who serves as chair.²³ The position of chief justice rotates to a new member of the Supreme Court of Missouri every two years, ensuring no single judge remains on the commission for long.²⁴ Colorado has a “governor-controlled” commission, in which eight nonattorney commissioners are appointed by the governor, and seven attorney commissioners are appointed by majority action of the governor, the attorney general, and the chief justice.²⁵ The

²⁰ See MO. CONST. art. V, § 25(a), (c); KAN. CONST. art. III, § 5; COLO. CONST. art. VI, §§ 20, 25.

²¹ See MO. CONST. art. V, § 25(d); KAN. CONST. art. III, § 5(e); COLO. CONST. art. VI, § 24(2), (4).

²² KAN. CONST. art. III, § 5(e). The governor appoints one nonattorney from each of the state’s four congressional districts. *Id.* Likewise, four of the attorneys are elected by members of the bar residing in each congressional district. *Id.* The fifth attorney, who chairs the commission, is elected at large by all members of the state bar. *Id.*

²³ MO. CONST. art. V, § 25(d). The three attorney commissioners are elected by the members of the bar residing in each of the state’s three appellate court districts. *Id.*

²⁴ See Stith & Root, *supra* note 4, at 726.

²⁵ COLO. CONST. art. VI, § 24(2), (4). One nonattorney and one attorney commissioner must reside in each of the state’s seven congressional districts, while the remaining nonattorney commissioner may hail from anywhere in the state. *Id.* art. VI, § 24(2). In the recent decennial apportionment, Colorado gained an eighth congressional district, but the state’s updated eight-district congressional map did not go into effect until the 2022 midterm elections, which occurred after the years covered in this study. Samantha Hager, *New Congressional District for Colorado*, COLO. VIRTUAL LIBR. (Nov. 5, 2021), <https://www.coloradovirtuallibrary.org/resource-sharing/state-pubs-blog/new-congressional-district-for-colorado/> [https://perma.cc/4VQW-Z5A8].

chief justice chairs the Colorado commission, but cannot vote on appointments.²⁶ Missouri's hybrid and Colorado's governor-controlled formats are fairly typical, used with some variations in eleven and ten states respectively.²⁷ Kansas's bar-controlled format, however, is unique. No other state has a merit-selection commission whose majority is selected by the state bar association.²⁸

Kansas, Missouri, and Colorado are appropriate states for this study for three primary reasons. First, as detailed above, they represent the three primary methods of merit selection: bar-controlled, hybrid, and governor-controlled. The three formats vary in the degree that the office of governor is able to exert its influence on the membership of the commission. Apart from this key difference, the three formats operate similarly in all other relevant aspects. This helps isolate the study's independent variable: the governor's influence over who becomes judge. Second, Kansas, Missouri, and Colorado are in relative geographic proximity, and they maintain similar geopolitical atmospheres. Each state has one or two large metropolitan areas and is more racially homogenous than the United States as a whole.²⁹ The economy of each state maintains a large agricultural component,³⁰ each state has a temperate climate, and the age distribution of state residents is nearly identical.³¹ Again, these similarities help isolate the independent variable. And third, Kansas, Missouri, and Colorado have similar recent partisan histories. Today, Kansas and Missouri lean conservative in their political voting behavior, tending to favor the Republican Party in both state and federal elections, while Colorado leans liberal and tends to favor the Democratic Party. However, each state has seen a mix of Democratic and Republican governors in the last few

²⁶ COLO. CONST. art. VI, § 24(2).

²⁷ See *Assisted Appointment (Judicial Selection)*, BALLOTPEDIA, [https://ballotpedia.org/Assisted_appointment_\(judicial_selection\)#States_using_this_method](https://ballotpedia.org/Assisted_appointment_(judicial_selection)#States_using_this_method) [<https://perma.cc/5QVX-GD6C>] (last visited Mar. 7, 2023) (scroll to "States using this method" for the type of merit selection each state uses for its supreme court). The Ballotpedia map is much easier to understand at a glance, but for further verification of the Ballotpedia data, see *Methods of Judicial Selection*, NAT'L CTR. FOR STATE CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= [<https://perma.cc/MX5A-6UCU>] (last visited Mar. 7, 2023).

²⁸ See *Assisted Appointment (Judicial Selection)*, *supra* note 27.

²⁹ See *QuickFacts: Kansas; Missouri; Colorado; United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/KS,MO,CO,US/PST045221> [<https://perma.cc/LLG4-CDQW>] (last visited Mar. 7, 2023).

³⁰ When every state is ordinally ranked in terms of cash receipts by all agricultural commodities for the year 2020, Kansas comes in fifth, Missouri in twelfth, and Colorado in twenty-first. *Cash Receipts by Commodity State Ranking*, U.S. DEPT. OF AGRICULTURE, ECONOMIC RSCH. SERV., <https://data.ers.usda.gov/reports.aspx?ID=17844> [<https://perma.cc/6C5N-PAFR>] (last visited Mar. 7, 2023).

³¹ See *QuickFacts: Kansas; Missouri; Colorado; United States*, *supra* note 29.

decades.³² This creates ample data on both sides of this study's dependent variable: the partisan affiliation of the governor who appointed a given judge.

B. The Data Collection Process

To measure the effect of gubernatorial influence on who becomes a judge, this study compares the judicial voting behavior of judges appointed by governors of opposing political parties. The following logical argument explains how these data will allow measurement of the extent of a governor's influence:

Premise I. Republican governors generally seek to appoint judges who will engage in conservative voting behavior, and Democratic governors generally seek to appoint judges who will engage in liberal voting behavior.

Premise II. Generally, governors can reliably determine whether a judicial candidate will, if appointed to the bench, engage in mostly liberal voting behavior or mostly conservative voting behavior.

Conclusion. The greater the influence a Republican governor has over judicial selection, the more a judge appointed by that governor will engage in conservative voting behavior. Likewise, the greater the influence a Democratic governor has over judicial selection, the more a judge appointed by that governor will engage in liberal voting behavior.

Because merit selection purports to limit, but not eliminate, gubernatorial influence over judicial selection, I expect to find in merit-selected judges voting behavior that is somewhat influenced by the partisan affiliation of their respective appointing governors. That is, merit-selected judges appointed by Republican governors should engage in comparatively more conservative voting behavior, and merit-selection judges appointed by Democratic governors should engage in comparatively more liberal voting behavior, despite the moderating influence of the merit-selection process. For simplicity, this study refers to such behavior as "appointive

³² From 1990 to 2021, Kansas had four Republican and four Democratic governors; Missouri four Republican and four Democratic governors; and Colorado one Republican and four Democratic governors. *See Former Governors*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/former-governors/> [<https://perma.cc/NVJ8-2Y24>] (last visited Mar. 7, 2023) (use map to navigate to pages for Kansas, Missouri, and Colorado). Of the three states, Colorado had the most lopsided partisan control of the governor's office, with Democrats controlling the office for all but eight years between 1990 and 2021. *See id.*

alignment.” The greater the difference in voting behavior between Democratic and Republican appointees, the greater the degree of appointive alignment.

I expect to find that the specific type of merit selection has a small but measurable effect on judicial voting behavior. This study has two main hypotheses concerning this effect. First, because a governor has the most influence over the composition of the commission in a governor-controlled format, I expect that format to produce the greatest amount of appointive alignment. Second, I expect the hybrid format to have a degree of appointive alignment that is close to that of the bar-controlled format, given the proportion of governor-appointed commissioners is nearly identical.³³ But the stature of the chief justice, who chairs Missouri’s hybrid commission but has no analogue on Kansas’s bar-controlled commission, grants the chief justice the capacity to exert great influence on the voting behavior of the governor-appointed commissioners, lessening the governor’s ability to influence the commission.³⁴ Thus, the second hypothesis holds that the amount of appointive alignment in a hybrid format should be slightly *less* than that in a bar-controlled format.

The two hypotheses, briefly stated:

Hypothesis I. Of the three formats of merit selection, judges selected via a governor-controlled format will have the highest degree of “appointive alignment.” That is, their judicial voting behavior will be most aligned with the partisan affiliation of their respective appointing governors.

³³ In Missouri’s hybrid format, not counting the chief justice herself, the governor appoints three of seven commissioners (or 43%), and in Kansas’s bar-controlled format, the governor appoints four of nine commissioners (or 44%)—not a very substantial difference. At first, one might wonder whether the relative cohesiveness of the remaining commissioners in the Kansas system (five bar-elected attorneys) as compared to the Missouri system (three bar-elected attorneys and the current chief justice of the state supreme court) means the governor-appointed commissioners in Kansas have comparatively less influence, as they face a more united “opposition” on the commission. But my past research into the Kansas system tended to show that the bar-appointed attorneys do not vote “as a block” to approve or deny specific candidates, though the publicly available data represent only a small sample size of the commissioners’ voting behavior. See Zachary Reger, Comment, *The Power of Attorneys: Addressing the Equal Protection Challenge to Merit-Based Judicial Selection*, 89 U. CHI. L. REV. 253, 289 n.252 (2022).

³⁴ See Kenyon D. Bunch & Gregory Casey, *Political Controversy on Missouri’s Supreme Court: The Case of Merit vs. Politics*, 22 STATE & LOC. GOV’T REV. 5, 6 (1990) (the chief justice “can exert great influence over the lay commissioners through the dignity of his high office”). Undoubtedly, the attorney commissioners have some ability to sway the nonattorney commissioners, as well, but this influence is unlikely to be as substantial as that of the chief justice, the highest-ranking member of the state judiciary.

Hypothesis II. The bar-controlled format will have a degree of appointive alignment close to, but slightly greater than, that of the hybrid format.

Specifically, this study looks at the judicial voting behavior of all judges on the supreme courts of Kansas, Missouri, and Colorado between the years of 2012 and 2021—ten years of cases for each court. During this period, each court maintained a mix of judges appointed by governors belonging to each of the two major political parties.³⁵ This study measures voting behavior in five specific areas of high ideological disagreement: (1) business vs. natural person; (2) labor;³⁶ (3) products liability; (4) torts;³⁷ and (5) medical malpractice.³⁸ I have chosen these case types because they represent areas of relatively clear ideological disagreement between

³⁵ Specifically, from January 2012 through December 2021, nine Democratic and three Republican appointees served on the Supreme Court of Kansas; five Democratic and five Republican appointees served on the Supreme Court of Missouri; and ten Democratic and two Republican appointees served on the Supreme Court of Colorado. *Kansas Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Kansas_Supreme_Court [<https://perma.cc/VKL7-GJWE>] (last visited Mar. 7, 2023); *Historical Listing of Supreme Court Justices*, KAN. JUD. BRANCH, <https://www.kscourts.org/About-the-Courts/Supreme-Court/Historical-Listing-of-Supreme-Court-Justices> [<https://perma.cc/LHT6-AVT5>] (last visited Mar. 7, 2023); *Former Governors - Kansas*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/former-governors/kansas/> [<https://perma.cc/42UH-VA7B>] (last visited Mar. 7, 2023); *Missouri Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Missouri_Supreme_Court [<https://perma.cc/GY6H-YS4R>] (last visited Mar. 7, 2023); *Former Judges of the Supreme Court*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=299> (last visited Mar. 7, 2023); *Former Governors - Missouri*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/former-governors/missouri/> [<https://perma.cc/EA3Y-3CP8>] (last visited Mar. 7, 2023); *Colorado Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Supreme_Court#Justices [<https://perma.cc/G73U-AUYX>] (last visited Mar. 7, 2023); *Colorado: State Supreme Court*, THE POLITICAL GRAVEYARD, <https://politicalgraveyard.com/geo/CO/ofc/spju.html> [<https://perma.cc/X39X-UA2L>] (last visited Mar. 7, 2023); *Former Governors - Colorado*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/former-governors/colorado/> [<https://perma.cc/T9UW-8M9S>] (last visited Mar. 7, 2023).

³⁶ That is, labor cases that represent some type of legal dispute between one or more employees and their employer.

³⁷ That is, any torts case that does not already fall within another category.

³⁸ I borrow these areas from Michael S. Kang & Joanna M. Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship Between Party Campaign Contributions and Judicial Decision Making*, 44 J. LEGAL STUD. S161, S170–71, S175 (2015). Professors Kang and Shepherd used a sixth category, criminal appeals. *Id.* at S171. I have excluded this category from my sample due both to the sheer number of criminal appeals cases heard by state supreme courts, an amount dwarfing that of the other five categories combined, and the natural skew of these cases toward the “conservative” outcome (affirming the conviction), which may make judicial voting behavior appear more right-leaning than is actually the case. *Id.* at S175.

conservatives and liberals, and because cases in these areas are commonly heard by state supreme courts. For each case type, there is a “conservative” litigant: the business, the employer, the manufacturer or business, the original defendant, and the doctor or hospital, respectively. Where a judge voted in favor of the conservative litigant, that vote is coded as “0.” Where the judge voted for the litigant in direct opposition to the conservative litigant, that vote is coded as “1.” The sample excludes cases with mixed judgments, where the outcome was not clearly to the benefit or harm of the conservative litigant. The sample also excludes any companion case decided on the same day as a primary case, where the legal issue in the companion case was identical to the legal issue in the primary case.

The data collection process proceeded as follows. Cases were reviewed in reverse-chronological order, using the opinion archives on each court’s website.³⁹ I started with the Supreme Court of Kansas. I reviewed every case of the court that had a published opinion, starting on December 31, 2021, and ending on January 1, 2012. When a case did not fall into one of the five case categories, it was discarded, and I moved on to the next case with a published opinion. When a case did fall into one of those categories, I gave the published opinion (or opinions) a closer look to determine how to code the votes of each judge. For a small number of cases, this closer look revealed that the case did not have a clear judgment for or against the conservative litigant—these cases were also discarded. After collecting ten full years of data for the Supreme Court of Kansas, I repeated the process with the Supreme Court of Missouri and then the Supreme Court of Colorado.

C. Partisan Noise and the “Holdover” Problem

Before detailing the results of the study, I address at the outset what might be its most apparent flaw. Although this study uses the degree of gubernatorial influence over a commission as its dependent variable, such influence is based on the proportion of commissioners selected by the *office* of the governor, yet the study measures such influence by the partisan affiliation of the *specific* governor who appointed a given judge. This has the potential to be problematic due to the staggered terms of the governor-appointed commissioners and their ability to hold over from one

³⁹ *Search Opinions*, KAN. JUD. BRANCH, <https://www.kscourts.org/cases-opinions/opinions.html> [<https://perma.cc/7NZU-GYW4>] (last visited Mar. 7, 2023); *Opinions for Supreme Court*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=12086&dist=Opinions%20Supreme> (last visited Mar. 7, 2023); *Supreme Court Case Announcements*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/Supreme_Court/Case_Announcements/Index.cfm?year=2022&month=&Submit=Go [<https://perma.cc/WCG4-GXUJ>] (last visited Mar. 7, 2023).

gubernatorial administration to the next. I refer to this as the “holdover” problem.

A real-life example will help illustrate the problem. In November 2016, Missouri elected a new Republican governor following eight years of Democratic control of the governor’s office.⁴⁰ Later that same month, a judge on the Supreme Court of Missouri died in office.⁴¹ The merit-selection commission began its work in vetting candidates for the open seat. The seven-member commission has three seats dedicated to nonattorneys appointed by the governor; at the time, all three nonattorney commissioners were appointees of the outgoing Democratic governor.⁴² The new Republican governor was then inaugurated in January 2017.⁴³ In March 2017, the commission sent a slate of three finalists to the new Republican governor.⁴⁴ In April 2017, the Republican governor appointed one of those finalists, W. Brent Powell, to become judge.⁴⁵ Despite the new Republican governor having appointed *no members* of the commission, and the prior Democratic governor having appointed three-sevenths of the commission membership, the new judge is coded by this study as a “Republican” appointee.

This introduces a bit of noise into the measurement of the independent variable. However, the introduction of at least some noise is unavoidable, and the noise that is introduced does not corrupt the study. First, the real-life case described in the paragraph above is not typical. When a governor appoints a judge, the commission is not usually stocked

⁴⁰ Jason Hancock, *Political Newcomer Eric Greitens Defeats Democrat Chris Koster in Missouri Governor Race*, KAN. CITY STAR (Nov. 9, 2016), <https://www.kansascity.com/news/politics-government/election/article113266403.html> [https://perma.cc/8GE4-C66J].

⁴¹ Rachel Lippmann & Jo Mannies, *Judge Richard Teitelmann, Liberal Lion of Missouri Supreme Court, Dies at 69*, ST. LOUIS PUB. RADIO (Nov. 29, 2016), <https://news.stlpublicradio.org/government-politics-issues/2016-11-29/judge-richard-teitelman-liberal-lion-of-missouri-supreme-court-dies-at-69> [https://perma.cc/7ZCP-KHHR].

⁴² The three nonattorney commissioners serve staggered six-year terms. *See* MO. SUP. CT. R. 10.03.

⁴³ Jason Taylor, *Greitens Inaugural Speech Warmly Embraced by Supporters*, MISSOURINET (Jan. 9, 2017), <https://www.missourinet.com/2017/01/09/greitens-inaugural-speech-warmly-embraced-by-supporters/> [https://perma.cc/HE4H-FZZH].

⁴⁴ Travis Zimpfer, *Lipman, Hardwick, Powell Selected by Commission in First Round of Supreme Court Process*, MO. TIMES (Mar. 1, 2017), <https://themissouritimes.com/lipman-hardwick-powell-selected-commission-first-round-supreme-court-process/> [https://perma.cc/5G9V-DATU].

⁴⁵ Summer Ballentine & David A. Lieb, *Judge W. Brent Powell Appointed to Missouri Supreme Court*, JOPLIN GLOBE (Apr. 25, 2017), https://www.joplinglobe.com/news/judge-w-brent-powell-appointed-to-missouri-supreme-court/article_8b4ef146-29e0-11e7-99ea-336e3939c698.html [https://perma.cc/Y9PZ-U5SD].

with the maximum number of commissioners appointed by a governor of the opposite political party, as occurred to the new Republican governor. The prior governor is often of the same political party as the appointing governor, and the appointing governor ordinarily has had time to select at least some members of the commission. Second, the holdover problem applies to governors of both political parties, and its effects are not biased in a specific ideological direction. We might conceive of the governor-appointed holdovers as just another part of the system that operates to constrain gubernatorial influence at semi-random intervals. Third, even in the most egregious example of the above paragraph, the new Republican governor still had a substantial amount of discretion *in making the final appointment*.⁴⁶ This type of discretion is just as important for the purposes of this study as the governor's discretion in selecting her office's allotted members of the commission. Indeed, making the final appointment is the most direct exercise of gubernatorial influence over who becomes a judge, even if it is bounded by the commission's screening function.

III. RESULTS

This Section details the results of the three-state study. First, this Section looks at the top-line numbers for each state; how did the Democratic- and Republican-appointed judges vote as separate blocks within each state? Second, this Section breaks the judges' voting behavior down into subcategories based on the five case types, then does another state-by-state comparison. Last, this Section examines the holdover problem in the context of a Missouri judge appointed by a Republican governor from a list curated by a commission with no Republican-appointed members. How does the voting behavior of this "holdover judge" compare to that of other Republican-appointed judges in the same time period?

⁴⁶ Measuring Judge W. Brent Powell's voting record since his 2017 appointment shows that he tends to vote in a right-of-center fashion, similar to his fellow Republican-appointed judges. *See infra* Section III.C. Indeed, the popular wisdom at the time of his appointment was that he was the most conservative jurist of the three-candidate slate that was sent to the governor. *See* Kurt Erickson, *Missouri Senate Leader Seeks Overhaul of Judge Selection Process*, ST. LOUIS POST-DISPATCH (Mar. 2, 2017), https://www.stltoday.com/news/local/govt-and-politics/missouri-senate-leader-seeks-overhaul-of-judge-selection-process/article_cd3322bb-de15-57b6-b314-17411a0265e1.html [<https://perma.cc/4ELT-5SBM>]. Despite the odd circumstances, the new Republican governor was still able to exert substantial influence on this particular judicial appointment.

A. The Top-Line Results

This subsection first compares the voting behavior of all Democratic and all Republican appointees within each state. In the study, votes for the conservative litigant were given a value of “0” and votes for the nonconservative litigant were given a value of “1.” Starting with the Supreme Court of Kansas in Table 1.1, the top-line numbers were collected by taking the average of every vote by a judge appointed by a Democratic governor, then taking the average of every vote by a judge appointed by a Republican governor. These averages are recorded as the “Average Vote.” The difference between the Average Vote amounts for each appointing party constitutes the “Difference Score.” The same calculations were then completed for Missouri and Colorado, as seen in Tables 1.2 and 1.3.

TABLE 1.1⁴⁷

Supreme Court of Kansas (2012–2022)	<i>Average Vote*</i>	<i>Total Judges</i>	<i>Total Votes</i>
Democratic-appointed judges	0.5818	9	274
Republican-appointed judges	0.5161	3	155
Difference Score	0.0657		

TABLE 1.2

Supreme Court of Missouri (2012–2022)	<i>Average Vote*</i>	<i>Total Judges</i>	<i>Total Votes</i>
Democratic-appointed judges	0.4351	5	548

⁴⁷ Values in these and all other tables in this study were calculated to nine digits after the decimal point but rounded here to four digits after the decimal point. As such, some of the Difference Scores may not reflect the exact difference between these values as rounded.

Republican-appointed judges	0.3062	5	306
Difference Score	0.1289		

TABLE 1.3

Supreme Court of Colorado (2012–2022)	<i>Average Vote*</i>	<i>Total Judges</i>	<i>Total Votes</i>
Democratic-appointed judges	0.4822	10	394
Republican-appointed judges	0.2294	2	109
Difference Score	0.2529		

*Average Votes across all votes cast in cases of the five collected case types: (1) business v. person; (2) labor; (3) products liability; (4) torts; and (5) medical malpractice.

The Difference Score was smallest in Kansas and largest in Colorado, with Missouri falling in between. This shows that Kansas judges had the least amount of appointive alignment, followed by Missouri judges, with Colorado judges showing the greatest amount of appointive alignment.

B. Breakdowns by Case Type

Tables 2.1 through 2.3 then break down the voting behavior of Democratic- and Republican-appointed judges for each of the five collected case types. Generally, the number of products liability cases was too low to calculate reliable Average Vote scores for that category. For every state, the first two case types, business v. person and labor, tended to have relatively large Difference Scores as compared to the Difference Scores of other categories in the same state. One case type, torts, had a relatively low Difference Score in Kansas and Missouri but not in Colorado, where the Difference Score was quite high. The final case type, medical malpractice, also varied by state. In this category, Missouri had a relatively high Difference Score, Colorado had a moderate-sized Difference Score, and Kansas had a relatively small Difference Score.

TABLE 2.1

Supreme Court of Kansas Case Type Breakdowns: Democratic-appointed Judges (2012–2022)	<i>Average Vote</i>	<i>Total Cases</i>	<i>Total Votes</i>
Business v. person	0.5957	12	47
Labor (employee v. employer)	0.6768	24	99
Products liability*	n/a	0	0
Torts	0.5313	16	66
Medical malpractice	0.4516	15	62
Supreme Court of Kansas Case Type Breakdowns: Republican-appointed Judges (2012–2022)	<i>Average Vote</i>	<i>Total Cases</i>	<i>Total Votes</i>
Business v. person	0.5172	12	29
Labor (employee v. employer)	0.5926	24	54
Products liability*	n/a	0	0
Torts	0.4865	16	37
Medical malpractice	0.4286	15	35
Supreme Court of Kansas Case Type Breakdowns: Difference Scores (2012– 2022)	<i>Average D Vote</i>	<i>Average R Vote</i>	<i>Difference Score</i>
Business v. person	0.5957	0.5172	0.0785
Labor (employee v. employer)	0.6768	0.5926	0.0842
Products liability*	n/a	n/a	n/a

Torts	0.5313	0.4865	0.0448
Medical malpractice	0.4516	0.4286	0.023

TABLE 2.2

Supreme Court of Missouri Case Type Breakdowns: Democratic-appointed Judges (2012–2022)	<i>Average Vote</i>	<i>Total Cases</i>	<i>Total Votes</i>
Business v. person	0.5085	54	236
Labor (employee v. employer)	0.4088	38	159
Products liability*	0.625	4	16
Torts	0.2388	16	67
Medical malpractice	0.4	16	70
Supreme Court of Missouri Case Type Breakdowns: Republican-appointed Judges (2012–2022)	<i>Average Vote</i>	<i>Total Cases</i>	<i>Total Votes</i>
Business v. person	0.395	54	119
Labor (employee v. employer)	0.25	38	100
Products liability*	0.5556	4	9
Torts	0.2368	16	38
Medical malpractice	0.2	16	40
Supreme Court of Missouri Case Type Breakdowns: Difference Scores (2012– 2022)	<i>Average D Vote</i>	<i>Average R Vote</i>	<i>Difference Score</i>

Business v. person	0.5085	0.395	0.1135
Labor (employee v. employer)	0.4088	0.25	0.1588
Products liability*	0.625	0.5556	0.0694
Torts	0.2388	0.2368	0.002
Medical malpractice	0.4	0.2	0.2

TABLE 2.3

Supreme Court of Colorado Case Type Breakdowns: Democratic-appointed Judges (2012–2022)	<i>Average Vote</i>	<i>Total Cases</i>	<i>Total Votes</i>
Business v. person	0.4044	34	183
Labor (employee v. employer)	0.602	18	98
Products liability*	n/a	1	5
Torts	0.6	12	60
Medical malpractice	0.4375	9	48
Supreme Court of Colorado Case Type Breakdowns: Republican-appointed Judges (2012–2022)	<i>Average Vote</i>	<i>Total Cases</i>	<i>Total Votes</i>
Business v. person	0.2308	34	52
Labor (employee v. employer)	0.3478	18	23
Products liability*	n/a	1	1
Torts	0.0909	12	22
Medical malpractice	0.2727	9	11

Supreme Court of Colorado Case Type Breakdowns: Difference Scores (2012– 2022)	<i>Average D Vote</i>	<i>Average R Vote</i>	<i>Difference Score</i>
Business v. person	0.4044	0.2308	0.1736
Labor (employee v. employer)	0.602	0.3478	0.2542
Products liability*	n/a	n/a	n/a
Torts	0.6	0.0909	0.5091
Medical malpractice	0.4375	0.2727	0.1648

*Due to the small number of products liability cases, Average Vote and Differences Scores in this category should not be treated as reliable.

C. Holdover Judges: The Case of Judge Powell

The holdover problem, discussed above in Section II.C, is difficult to study, as it is unusual for a governor in a merit-selection state to appoint a judge before the governor (or another governor of the same party) has had the time to appoint at least one commissioner to the selection commission. This subsection evaluates the judicial voting of Judge W. Brent Powell, who is a recent example of such a “holdover judge.”⁴⁸ Table 3.1 compares Judge Powell’s voting behavior to that of his Republican-appointed colleagues, beginning with Judge Powell’s first recorded vote in August 2017 and ending with his last recorded vote in December 2021. For the purposes of this comparison, any case in which Judge Powell did not cast a vote is discarded, meaning it is not used to calculate his voting behavior or the voting behavior of his colleagues. The three other Republican-appointed judges who have served with Judge Powell on the Supreme Court of Missouri are Judge Robin Ransom (appointed in 2021), Judge Zel Fischer (appointed in 2008), and Judge Patricia Breckenridge (appointed in 2007).

⁴⁸ Judge Powell appears to be the only such “holdover judge” appointed to the Supreme Court of Kansas, the Supreme Court of Missouri, or the Supreme Court of Colorado during the ten years of this study.

TABLE 3.1

Judge W. Brent Powell vs. Other Republican Appointees (August 2017 to December 2021)	<i>Average Vote</i>	<i>Total Cases</i>	<i>Total Votes</i>
Judge W. Brent Powell	0.2609	46	46
All other Republican appointees on the Supreme Court of Missouri	0.2857	46	91
Difference Score	-0.0248		

In Judge Powell’s case, it appears that the holdover problem is overblown. The three holdover Democratic appointees present on the selection commission in 2017 did not cause the appointment of a judge significantly less conservative than those appointed by a Republican governor who had already appointed at least one lay commissioner. Indeed, the voting behavior of Judge Powell measured in this study is slightly *more* conservative than that of his three Republican-appointed colleagues. Although it is unclear how representative the case of Judge Powell may be to other “holdover” cases, there is no indication that the holdover problem constitutes a significant barrier to gubernatorial influence over judicial appointment.

IV. DISCUSSION

This Section discusses the results of the study. First, this Section discusses how the data for Missouri and Colorado support Hypothesis I. As expected, the governor-controlled system of Colorado affords the governor greater influence over the judicial voting behavior of judges appointed to the state high court, as compared to the hybrid system of Missouri, which has a relative moderating effect on judges’ voting behavior. Second, this Section analyzes the data for Kansas, which run counter to Hypothesis II. The Section looks to public commentary for reasons why the bar-controlled method affords the governor the least influence over judges’ voting behavior as compared to other methods of merit selection.

A. Appointive Alignment in Governor-Controlled and Hybrid Systems

The Difference Scores for the Supreme Court of Colorado and the Supreme Court of Missouri provide support for Hypothesis I. As expected, Colorado's governor-controlled system had the highest Difference Score and the largest degree of appointive alignment of all three states, indicating that governors in Colorado have substantially more influence over judicial voting behavior than their counterparts in Missouri and Kansas. Because the Colorado governor appoints a majority of commissioners to the selection commission and has a substantial role in appointing the remaining commissioners,⁴⁹ the governor is able to indirectly influence the three-candidate slate that is curated by the commission. In other words, the commission is less stable between administrations than the Missouri or Kansas systems, which include fewer governor-appointed commissioners. In contrast, the commission in Colorado sees more substantial change when partisan control of the governor's office switches.⁵⁰

When the Difference Scores are broken down by case type, the appointive-alignment differential becomes even more apparent. This study focuses on five case types. One type, products liability, returned too few cases to draw any useful conclusions. Of the remaining four types, three—business v. person, labor, and torts—had higher Difference Scores in Colorado than in Missouri. Indeed, the torts category returned Difference Scores that were much higher in Colorado (0.5091) than in Missouri (0.002), primarily stemming, it seems, from the staunch conservatism of Colorado's Republican-appointed judges in this category.⁵¹ In only one category, medical malpractice, did Missouri (0.2) have a higher Difference Score than Colorado (0.1648), but the differential was not very large, and could possibly be attributed to a lack of precision from the low number of medical malpractice cases heard by the Supreme Court of Colorado and the low number of Republican appointees voting on those cases. Overall, both the macro and micro data support the confirmation of Hypothesis I.

One concern about the Colorado data, however, should be noted. Unlike the Supreme Court of Missouri and the Supreme Court of Kansas—whose membership included, respectively, seven and three Republican-

⁴⁹ See *supra* Section II.A.

⁵⁰ Such a shift, however, is mitigated by the requirement that “[n]o more than one-half of the commission members plus one, shall be members of the same political party.” *Judicial Nominating Commissions*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/Supreme_Court/Nominating.cfm#:~:text=In%20contrast%2C%20there%20is%20a,voting%20member%20of%20the%20commission [<https://perma.cc/AZH2-JBUS>] (last visited Mar. 7, 2023).

⁵¹ See *supra* Table 2.3. Of the twenty-two total votes by the Republican-appointed judges in Colorado in the “torts” category, only two were coded as “liberal.”

appointed judges—the Supreme Court of Colorado’s membership was more lopsided. In the years studied, the Colorado high court’s membership included ten Democratic-appointed judges and two Republican-appointed judges, meaning there were comparatively fewer data points available for the judicial voting behavior of Republican-appointed judges on that court. This was an unavoidable problem. Only ten states use governor-controlled methods of merit selection for appointing high court judges.⁵² Of those states, most have lopsided partisan control of the governor’s office, resulting in a similar issue of a state high court with many more appointees from one political party than the other. Other governor-controlled merit-selection states, such as Maryland and Connecticut, have recent histories of electing moderate Republican governors, which may have complicated the measurement of appointive alignment. Other states, like Iowa and Florida, have recent histories of tinkering with the components of their selection systems, making them ill-suited for long-term study.⁵³ Despite the low number of Republican-appointed judges on the Supreme Court of Colorado, Colorado still appeared to be the best state in which to test the degree of appointive alignment produced by a governor-controlled merit-selection system. This study limits the small *n* problem of having only two Republican-appointed judges on the Supreme Court of Colorado by collecting many years of case data.

B. What’s the Matter With Kansas?

Hypothesis II fared more poorly than Hypothesis I. The Kansas data returned a Difference Score that was *lower* than Missouri’s rather than, as Hypothesis II predicted, one that was slightly higher. This indicates that the Kansas governor has less influence over the appointment of judges with partisan-aligned ideological voting behavior than does the Missouri governor, even though both governors directly appoint a nearly equal share of commission members (four of nine in Kansas, or forty-four percent; three of seven in Missouri, or forty-three percent). Why might this be the case? Below, I explore two areas that provide plausible explanations: historical purpose and conventional wisdom.

First, the history of merit selection in Kansas offers some clues about the specific purpose of the bar-controlled format: constraining the governor. Unlike in Missouri, where the hybrid method of merit selection

⁵² See *Assisted Appointment (Judicial Selection)*, *supra* note 27; see also *Methods of Judicial Selection*, *supra* note 27.

⁵³ For example, in 2019 Iowa enacted a law converting its previous hybrid system of merit selection into a governor-controlled system. Caroline Cummings, *Gov. Kim Reynolds Signs Bill Making Changes to Judicial Selection Process*, KGAN (May 9, 2019), <https://cbs2iowa.com/news/local/gov-kim-reynolds-signs-bill-making-changes-to-judicial-selection-process> [<https://perma.cc/UYJ6-UY8J>].

was adopted primarily to prevent the abuses of the contested judicial elections that it replaced,⁵⁴ Kansas adopted a bar-controlled method of merit selection with an eye toward limiting the abuse of interim gubernatorial appointments.⁵⁵ In the mid-1950s, Kansas Governor Fred Hall committed what would become known as the infamous “triple switch” (or “triple play”). Governor Hall, running for re-election, was defeated in the 1956 Republican primary.⁵⁶ The Republican nominee would then go on to lose to the Democratic nominee in the November general election.⁵⁷ Nearly two months later, Chief Justice William Smith suffered a medical emergency.⁵⁸ Unable to finish his term, he retired on December 31, 1956, leaving a vacancy on the Supreme Court of Kansas.⁵⁹ At the time, Kansas judges were elected, but governors maintained the power to make interim appointments.⁶⁰ Governor Hall, now a lame duck, retired on January 3, 1957.⁶¹ Lieutenant Governor John McCush then became governor for a brief eleven-day window, which he used to appoint Hall as the new chief justice.⁶² The Kansas political community was outraged.⁶³ During the 1957 legislative session, the Kansas Legislature approved a ballot measure to amend the state constitution and establish a bar-controlled method of merit selection for appointing all state court appellate judges.⁶⁴ Voters ratified the amendment in 1958, and ever since, the system has operated without change.⁶⁵ This history shows what the bar-controlled system was principally designed to do: prevent the governor from exercising too much control over state judicial appointments. It stands to reason that a system with such a focus may limit gubernatorial influence to a greater degree than would other selection mechanisms.

Second, conventional wisdom in legal and academic circles comports with the idea that a bar-controlled system of merit selection is more insulated from political influences on judicial appointment than is a hybrid

⁵⁴ Reger, *supra* note 33, at 257–59.

⁵⁵ See generally R. Alton Lee, *The Triple Switch: How the Missouri Plan Came to Kansas*, 73 J. KAN. BAR. ASSOC. 28 (2004). *But see* SHUGERMAN, *supra* note 5, at 227 (arguing that the popular story of the “triple switch” leading to Kansas’s turn to merit selection “has some holes”).

⁵⁶ *Id.* at 31.

⁵⁷ *Id.*

⁵⁸ *Id.* at 29.

⁵⁹ Richard E. Levy, *The War of Judicial Independence: Letters from the Kansas Front*, 65 U. KAN. L. REV. 725, 733 n.31 (2017).

⁶⁰ See Lee, *supra* note 55, at 37.

⁶¹ Levy, *supra* note 59, at 733 n.31.

⁶² Lee, *supra* note 55, at 33.

⁶³ *Id.* at 35.

⁶⁴ *Id.* at 35–36.

⁶⁵ *Id.* at 36.

system. For example, Professor Stephen Ware argues that merit-selection plans lack “democratic legitimacy” when they “allow[] the bar to select some of the commission and then declin[e] to offset that bar power with confirmation by the senate or other popularly-elected body.”⁶⁶ Of these merit-selection plans, Professor Ware says, “Kansas stands alone at one extreme on the continuum from more to less bar control of supreme court selection,” as it is the only state where a majority of the commission is selected by the state bar association.⁶⁷ “Kansas is not Colorado (or even Missouri),” Professor Ware concludes, because in Colorado, the governor herself helps select the lawyer members of the commission, while in Missouri, the chief justice owes her own post on the high court to *previous gubernatorial appointment*.⁶⁸

Professor Ware’s last point is especially interesting, and it may hold the key to this study’s observed differences between Missouri and Kansas. Although the Missouri system has the governor directly appoint three of seven commissioners, the governor in fact gets substantial say over a fourth spot—that of the chief justice, who chairs the commission and receives her appointment via the same merit-selection process.⁶⁹ In Missouri, the governor really has direct appointment power over a *majority* of the commission, even if the appointment power over the pivotal role of the chief justice is encumbered by the merit-selection process itself. The Missouri chief justice may not always act as an ideologically neutral party, and perhaps may exhibit some of the same partisan biases as the governor who first appointed her—just as she does when deciding cases before the court.⁷⁰ In Kansas, however, the commission has no chief justice as chair. The Kansas governor has direct

⁶⁶ Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL’Y 392, 403 (2009). Professor Ware, however, avoids using the term “merit selection,” which he views as “propagandistic,” instead opting for the more neutral term “Missouri Plan.” *Id.* at 401.

⁶⁷ *Id.* at 405 (internal quotations omitted).

⁶⁸ *See id.* at 406–09.

⁶⁹ Recall that the position of chief justice rotates to a new member of the Supreme Court of Missouri every two years, meaning appointees of both political parties alternate in and out of the position. *See supra* Section II.A.

⁷⁰ For example, I previously noted that Judge W. Brent Powell, the “holdover” judge discussed in Sections II.C and III.C, had a voting record that was slightly more conservative than that of his Republican-appointed colleagues on the bench, none of whom was subject to the “holdover” problem. However, when the selection commission in March 2017 approved the three-candidate slate that included Judge Powell, the commission was chaired by one of those Republican-appointed colleagues: then-Chief Justice Patricia Breckenridge. *See Judge Patricia Breckenridge*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=499> (last visited Mar. 7, 2023). Without more insight into the internal deliberations of the commission, it is hard to say whether Judge Breckenridge swayed the commission in a more conservative direction. But such a possibility should not be overlooked.

appointment power over only a minority of the commission, with the bar controlling a majority of the seats. In hindsight, it makes sense that the Missouri governor has more influence over judicial appointments than does the Kansas governor.

V. CONCLUSION

Tocqueville's observations about the "American aristocracy" may predate merit selection by more than a century, yet it is hard to find a more fitting example of lawyers' power to directly moderate American political impulses. This study finds that systems of merit selection vary greatly in this regard. The more control the bar is given over the composition of the selection commission, the less discretion the governor has in appointing judges who will engage in partisan-aligned ideological voting behavior. For good or ill, lawyers are, indeed, a moderating influence.

For states choosing to adopt a system of merit-based judicial selection, the degree of attorney influence should, ideally, be neither too strong nor too weak. Completely political courts will never be truly independent arbiters of legal disputes, and wholly apolitical courts lose democratic legitimacy and the ability to be held to account. Different systems of merit selection represent various attempts by states to find a "Goldilocks zone" between full judicial independence and full political accountability.⁷¹ Granting limited power to attorneys in selecting judges may safeguard judicial decisionmaking against undue partisan influence, ensuring that litigants' cases are decided on the merits, not on a judge's partisan biases. On the other hand, delegating too much power to the bar may create an unchecked and undemocratic third branch, one whose rulings are at odds with the political desires of the public it serves.

The three merit-selection systems analyzed in this study fall on a continuum between the poles of complete independence and complete political accountability. Kansas's bar-controlled method promotes the greatest degree of judicial independence but the lowest degree of political accountability, as the governor has comparatively little control over shaping the judicial ideology of the Supreme Court of Kansas. Colorado's governor-controlled method is the opposite. Because of the governor's greater influence over the selection process, the Supreme Court of Colorado is more politically accountable in the sense that the appointment of new judges is more attuned to the public's changing political desires. This comes at the cost of judicial independence, however, as a more partisan selection process results in more polarized judicial

⁷¹ *But see* Reger, *supra* note 33, at 298–300 (arguing that while judicial independence and *political* accountability may often be at odds, there are other forms of accountability—such as "meritocratic accountability"—to keep courts in check).

decisionmaking, which undercuts the ability of litigants to receive a fair and objective legal hearing.

Missouri's hybrid method, which falls in between the relative extremes of Kansas and Colorado, settles in the middle of the sliding scale between judicial independence and political accountability. As shown by this study, judges on the Supreme Court of Missouri hold measurable ideological disagreements across several case types, a divide roughly aligning with the partisan affiliation of a judge's respective appointing governor. This allows shifting political winds to produce changes in court rulings, affecting the legal rules that govern the state in an indirectly democratic fashion. However, judges on the Supreme Court of Missouri also show a willingness to cross ideological lines, indicating that the merits of a particular litigant's claim can overcome a judge's partisan bias. This protects the impartiality of judicial procedures.

Thus, Missouri's hybrid system sacrifices neither independence nor political accountability in the judicial selection process. This sets Missouri apart from Kansas and Colorado, whose merit-selection systems tend to promote one of those objectives at the expense of the other. For merit-selection states that wish to strike a balance between judicial independence and political accountability, the Missouri Plan, more than eighty years after its inception, remains a suitable model.