

The Missouri Plan in National Perspective

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The *Missouri Law Review*'s title for this symposium rightly recognizes the distinction between judicial selection and judicial retention.¹ We should distinguish the process that initially *selects* a judge from the process that determines whether to *retain* that judge on the court. Judicial selection and judicial retention raise different issues.² In this paper, I primarily focus on selection. I summarize the fifty states' methods of supreme court selection and place them on a continuum from the most populist to the most elitist.³

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1. The symposium title is "Mulling over the Missouri Plan: A Review of State Judicial Selection and Retention Systems."

2. While differing views about judicial independence are central to the debate over judicial retention, they are at most peripheral to the issues involved in judicial selection. Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL'Y 386, 406-07 & n.83 (2008). See also ALFRED P. CARLTON, JR., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 72 (2003), available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> ("Discussions of judicial selection often overlook a distinction that the Commission regards as absolutely critical, between initial selection and reselection. . . . In the Commission's view, the worst selection-related judicial independence problems arise in the context of judicial reselection."); Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 460 (2008) ("Initial selections – whether by election or appointment – present quite different, and less substantial, hazards to judicial independence than do reelections and reappointments."); *id.* at 453-54 ("[T]he threat to judicial independence in the thirty-nine states that elect some of their judges comes primarily not from the system of initial judicial selection, but from the reelections that those judges are forced to contemplate and endure if they are to remain in office."); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1276 (2008) ("[T]he primary threat to independence arises at the point of re-selection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made."); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 285 (2008) ("Prejudging judges may raise any number of problems, but it is the postjudging of them that systematically threatens individual and minority rights and the rule of law."); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009) ("[U]nlike judges facing retention decisions, judges who do not need to appeal to voters shape their rulings to voters' preferences less. For example, voters' politics has little effect on the rulings of judges with permanent tenure or who plan to retire before the next election.").

3. See Tbl.1 *infra*, at 775. I am not the first to use the concepts of populism and elitism to describe debate over judicial selection. See, e.g., Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 796-97 (2004) (referring to a "populist retort" and "charges of elitism"); Paul D. Carrington,

Doing so reveals that the Missouri Plan is the most elitist (and least democratic) of the three common methods of selecting judges in the United States. After highlighting this troubling characteristic of the Missouri Plan's process of *selecting* judges, I turn briefly to the *retention* of judges and caution against the dangers posed by subjecting sitting judges to elections, including the retention elections of the Missouri Plan. I conclude with support for a system that, in initially selecting judges, avoids the undemocratic elitism of the Missouri Plan and, in retaining judges, avoids the dangers (populist and otherwise) of judicial elections.

I. SUPREME COURT SELECTION IN THE FIFTY STATES

A. Democratic Selection Methods

While some states have individual quirks, three basic methods of supreme court selection prevail around the country: contestable elections, senate confirmation and the Missouri Plan.⁴ The most common method, used by twenty-two states, is the contestable election.⁵ Allowing two or more candi-

Judicial Independence and Democratic Accountability in Highest State Courts, 61 LAW & CONTEMP. PROBS. 79, 106 (1998) (“‘Merit selection’ is seen by many as a masquerade to put political power in the hands of the organized bar and other members of the elite.”); Julius Uehlein & David H. Wilderman, *Opinion: Why Merit Selection Is Inconsistent with Democracy*, 106 DICK. L. REV. 769 (2002) (“Organized labor views the merit selection (political appointment) process as a wonderful public relations gimmick for disguising a power shift from the people to an elite crew – a completely undemocratic process that empowers non-elected lawyers and others to select judges with little or no accountability to the people.”); Marie A. Failing, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 439 (2005) (“[M]ost traditional opponents of judicial merit selection . . . have argued that the process is elitist, secretive, unaccountable to and unreflective of the interests of citizens, and highly political.”); John Copeland Nagle, *Choosing the Judges Who Choose the President*, 30 CAP. U. L. REV. 499, 512-13 (2002) (“Merit selection systems are even worse from the perspective of accountability – they are elitist.”); THE JUDICIAL SELECTION TASK FORCE OF THE ASS’N OF THE BAR OF THE CITY OF N.Y., RECOMMENDATIONS ON THE SELECTION OF JUDGES AND THE IMPROVEMENT OF THE JUDICIAL SYSTEM IN NEW YORK 35 (2003), available at <http://www.abcnyc.org/pdf/Judicial%20selection%20task%20force.pdf> (“A recurring criticism of merit selection is that it is elitist.”).

4. See *infra* text accompanying notes 5, 10 & 34. In two states, Virginia and South Carolina, supreme court justices are appointed by the legislature. Ware, *supra* note 2, at 388 & n.9.

5. Ware, *supra* note 2, at 389 & n.13. In some states, interim vacancies (that occur during a justice's uncompleted term) are filled in a different manner from initial vacancies. See AM. JUDICATURE SOC'Y, METHODS OF JUDICIAL SELECTION, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Apr. 20, 2009). Several states that use elections to fill initial vacancies use nominating commissions to fill interim vacancies. *Id.*

dates to run for a seat on the supreme court is the most populist of the three methods because it puts power directly in the hands of the people, the voters.⁶ Importantly, members of the bar get no special powers. “[A] lawyer’s vote is worth no more than any other citizen’s vote.”⁷

The second common method of selecting state supreme court justices⁸ is the one used to select federal judges: executive nomination followed by senate confirmation.⁹ In twelve states, the governor nominates state supreme court justices, but the governor’s nominee does not join the court unless confirmed by the state senate or similar popularly elected body.¹⁰

Senate confirmation is a less populist method of judicial selection than contestable elections because senate confirmation is less directly dependent on the “wisdom . . . of the common people.”¹¹ While contestable judicial elections “embody the passion for direct democracy prevalent in the Jacksonian era[,] . . . senate confirmation exemplifies the republicanism of our Nation’s Founders.”¹² Senate confirmation is part of the Founders’ “system of

6. A populist is “a believer in the rights, wisdom, or virtues of the common people.” Merriam-Webster OnLine Dictionary: Populism, <http://www.merriam-webster.com/dictionary/populism> (last visited Apr. 16, 2009).

7. Ware, *supra* note 2, at 390.

8. The judges on some states’ highest courts are not called “justices,” and in some states the highest court is not called the “supreme court.” Nevertheless, I use the common term “supreme court justices” to speak generally about high court judges and avoid terminology variations from state to state.

9. U.S. CONST. art. II, § 2, cl. 2.

10. Ware, *supra* note 2, at 388, 389 & nn.11-12. Confirmation is done by the state senate in Delaware, Hawaii, Maine, Maryland, New Jersey, New York, Utah and Vermont; by the entire legislature in Connecticut and Rhode Island; and by the governor’s council in Massachusetts and New Hampshire. A thirteenth state, California, can be added. Its confirmation body is a three-person commission made up of the chief justice, attorney general and most senior presiding justice of the court of appeals in California. *Id.*

The previous paragraph’s categorization of states is similar to that found in an article by Joshua C. Hall & Russell S. Sobel, *Is the ‘Missouri Plan’ Good for Missouri? The Economics of Judicial Selection*, SHOW-ME INST. POL’Y STUDY NO. 15, May 21, 2008, at 10-11, http://showmeinstitute.org/docLib/20080515_smi_study_15.pdf. However, Hall and Sobel distinguish the “executive council[s]” used for confirmation in California, Massachusetts and New Hampshire from the legislatures used for confirmation in other states on the ground that those three councils are “usually governor-appointed.” *Id.* at 11. In fact, however, Massachusetts and New Hampshire elect their councils. See MASS. CONST. pt. 2, ch. 2, § 1, art. 9; *id.* amend. art. XVI; N.H. CONST. pt. 2, arts. 46, 60-61. And California elects its attorney general. CAL. CONST. art. 5, § 11.

11. Merriam-Webster OnLine Dictionary: Populism, *supra* note 6.

12. Ware, *supra* note 2, at 406. On Nineteenth Century debates about contestable elections versus senate confirmation and legislative appointment of judges, see Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993); Kermit L. Hall,

indirect democracy in which the structure of government mediates and cools the momentary passions of popular majorities.”¹³

Although not as populist as the direct democracy of contestable judicial elections, senate confirmation does make judicial selection indirectly accountable to the people because, at the federal level, the people elect their senators¹⁴ and, through the Electoral College, the President.¹⁵ Similarly, in states that use this method of judicial selection, the people elect their governors and state senators.

In other words, senate confirmation is – like contestable elections – fundamentally *democratic*,¹⁶ although it is less populist than contestable elections. Senate confirmation is democratic because it facilitates the “rule of the majority”¹⁷ by adhering to the principle of one-person-one-vote. At the federal level, one-person-one-vote is tempered by federalism, as both the U.S. Senate and Electoral College give disproportionate weight to voters in low-population states.¹⁸ But at the state level nothing similarly tempers the democratic nature of senate confirmation. In those states in which the governor may appoint to the court whomever he or she wants,¹⁹ subject only to confirmation by a popularly elected body such as the state senate, judicial selection

Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920, 1984 AM. B. FOUND. RES. J. 345 (1984); F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 445-48 (2004); Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 661-62 (2002).

13. Ware, *supra* note 2, at 406. Prior to the direct election of senators, they were chosen by the state legislatures, U.S. CONST. art. 1, § 3, cl. 1, so popular accountability was even more indirect.

14. U.S. CONST. amend. XVII.

15. U.S. CONST. art. 2, §1, cl. 2.

16. Democracy is “government by the people; *especially*: rule of the majority [; or] a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections.” Merriam-Webster OnLine Dictionary: Democracy, § 1.a.-b., <http://www.merriam-webster.com/dictionary/democracy> (last visited Apr. 16, 2009) (emphasis added). As Professor Jeffrey Jackson puts it,

Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public. Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.

Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 146 (2007).

17. Merriam-Webster OnLine Dictionary: Democracy, *supra* note 16, at § 1.a.

18. U.S. CONST. art. 1, § 3, cl. 1 (Senate); *id.* art. 2, § 1, cl. 2 (Electoral College).

19. See *infra* note 32.

is laudably democratic because governors and state senators are elected under the principle of one-person-one-vote. In these elections, members of the bar get no special powers. Again, a lawyer's vote is worth no more than any other citizen's vote.

*B. Departures from Democracy:
Varying Levels of Elitism in Judicial Selection*

Some senate-confirmation states, however, have supreme court selection processes that do give special powers to members of the bar. As the bar is an elite segment of society,²⁰ states that give lawyers more power than their fellow citizens are rightly described as *elitist*. Indeed the rationale for giving lawyers special powers over judicial selection – lawyers are better than their fellow citizens at identifying who will be a good judge²¹ – is openly elitist.²² A mixture of this elitism (special powers for lawyers) and democracy (senate confirmation of gubernatorial nominees) characterizes the states discussed in the following four paragraphs.

While the President may nominate anyone to the U.S. Supreme Court, in some senate-confirmation states the governor is restricted in whom he or she may nominate to the state supreme court. For example, New York restricts whom the governor may nominate to its highest court, the court of appeals.²³

20. Among the dictionary definitions of “elite” is “a group of persons who by virtue of position or education exercise much power or influence.” Merriam-Webster OnLine Dictionary: Elite, § 1.d., <http://www.merriam-webster.com/dictionary/elite> (last visited Apr. 16, 2009). In the United States, of course, lawyers tend to have above-average levels of education and income. According to the Bureau of Labor Statistics, the average lawyer in the United States earns \$118,280, while the average person earns \$40,690. Bureau of Labor Statistics, Occupational Employment Statistics, May 2007 National Occupational Employment and Wage Estimates, United States, http://www.bls.gov/oes/2007/may/oes_nat.htm#b00-0000 (last visited Apr. 16, 2009). Nearly all lawyers have a post-graduate degree, while only 10% of Americans do. SARAH R. CRISSEY, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2007, at 3 (U.S. Census Bureau 2009), available at <http://www.census.gov/prod/2009pubs/p20-560.pdf>. Lawyers tend to be powerful and influential. (Is it just a coincidence that every Democratic nominee for President or Vice President since 1984 has had a law degree?)

21. See, e.g., Linda S. Parks, *No Reform is Needed*, J. KAN. B. ASS'N, Feb. 2008, at 4 (“Lawyers, because of their professional expertise and interest in the judiciary, are well suited to recognize which candidates for judgeship are especially knowledgeable and skilled lawyers.’ That’s exactly why lawyers serve on the [Judicial Nominating] Commission. If you have a serious medical condition, you don’t turn to a neighbor or a politician to find a specialist.”) (quoting Ware, *supra* note 2, at 396).

22. Among the definitions of “elite” is “the best of a class.” Merriam-Webster OnLine Dictionary: Elite, *supra* note 20, § 1.b. The argument is that lawyers are the best (among the class of citizens) at assessing potential judges.

23. N.Y. CONST. art. VI, § 2(e).

The New York Constitution provides that “[t]he governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission.”²⁴ The judicial nominating commission in New York consists of twelve members: four appointed by the governor, four by the chief judge of the court of appeals, and four by leaders of the legislature.²⁵ Of these twelve members, at least four must be members of the New York bar.²⁶ This special quota for lawyers is the only one in New York; no other occupational group (or other group) is guaranteed representation on the state’s judicial nominating commission.²⁷ The “lawyers’ quota” guarantees that lawyers, compared to their percentage of the state’s population, will be over-represented on the commission.²⁸ As a result, New York gives the members of its bar disproportionate power in the selection of the state’s high court judges. In judicial selection, New York gives its lawyers a special power not given to other citizens.

New York is not alone. Three other states with senate confirmation of supreme court justices also (1) require their governors to nominate only someone recommended by a nominating commission and (2) give lawyers a quota on that commission.²⁹ By introducing these two factors, these states make judicial selection less democratic and more elitist than it would otherwise be.³⁰ In these states (including New York), however, the movement from democracy to elitism is relatively small because all members of the commission are appointed by popularly elected officials or by judges who

24. *Id.*

25. N.Y. CONST. art. VI, § 2(d)(1).

26. *Id.* (“Of the four members appointed by the governor, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state. Of the four members appointed by the chief judge of the court of appeals, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state.”). No such restrictions are placed on the members appointed by leaders of the legislature. *Id.*

27. *Id.*

28. As of the end of calendar year 2008, there were a total of 244,418 registered New York attorneys, and, of that total, 153,552 reported an address within New York State. E-mail from Sam Younger, Deputy Director, New York State Office of Court Administration, to Professor Stephen J. Ware (Apr. 21, 2009) (on file with author). New York State has over nineteen million people. POPULATION DIVISION, U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2008 (2008), <http://www.census.gov/popest/states/NST-ann-est.html> (follow “Excel” or “CSV” hyperlink).

29. *See* Ware, *supra* note 2, at 388-89 & nn.10-11. These states are Connecticut, Rhode Island and Utah. *Id.* As noted above, Connecticut and Rhode Island require confirmation by the entire legislature, not just the senate. *See supra* note 10.

30. Some states have one, but not the other, of these two factors. *See infra* note 32.

have been nominated and confirmed by popularly elected officials. In other words, the populace retains ultimate control over appointments to the judicial nominating commission. The democratic principle of one-person-one-vote is followed, albeit indirectly.

By contrast, two other senate-confirmation states go further down the road from democracy to elitism by allowing the bar to *select* some members of the nominating commission.³¹ In these states, not all of the commissioners – who exercise the important governmental power of restricting the governor’s choice of judicial nominees – are selected under the democratic principle of one-person-one-vote. Rather, some of the commissioners are selected by a small, elite group: the bar.³²

This is really quite startling. Where else in our federal or state governments are public officials selected in such an undemocratic way? Where else do members of a particular occupation have, by law, greater power than their fellow citizens to select public officials? When this sort of favoritism for an

31. See Ware, *supra* note 2, at 388-89 & nn.10-11. These states are Hawaii and Vermont. *Id.*

32. More democratic, and less elitist, are states that give lawyers a quota on the nominating commission or allow the bar to select some of the commission but do not require their governors to nominate someone recommended by the nominating commission. In these states, the bar’s disproportionate influence over the commission may give lawyers greater power than other citizens, but the greater power of lawyers is clearly subordinate to the power of the popularly elected governor. The governor is not required to nominate someone recommended by the commission because the commission’s existence derives not from the state constitution, but merely from an executive order which the governor may rescind. See Del. Exec. Order No. 4 (Mar. 27, 2009), *available at* http://governor.delaware.gov/orders/exec_order_4.shtml (commission consists of nine members: eight appointed by governor – four lawyers and four nonlawyers – and one appointed by president of bar association, with consent of governor); Me. Exec. Order No. 9 FY 94/95 (Feb. 10, 1995) (five members, all appointed by the governor); Mass. Exec. Order 500 (March 13, 2008), *available at* http://www.mass.gov/?pageID=gov3terminal&L=3&L0=Home&L1=Legislation+%26+Executive+Orders&L2=Executive+Orders&sid=Agov3&b=terminalcontent&f=Executive+Orders_executive_order_500&csid=Agov3 (twenty-one members, all appointed by governor); Md. Exec. Order No. 01.01.2007.08 (Apr. 27, 2007) *available at* <http://www.gov.state.md.us/executiveorders/01.07.08JudicialNominatingCommissions.pdf> (seventeen members, twelve appointed by governor, five by president of bar association); N.H. Exec. Order, 2005-2, *available at* http://www.nh.gov/governor/orders/documents/Exec_Order_Judicial_Selection_Com2.pdf (eleven members, all appointed by governor, consisting of six lawyers and five nonlawyers); N.J. Exec. Order No. 36 (Sept. 22, 2006), *available at* <http://www.state.nj.us/infobank/circular/eojsc36.htm> (seven members, all appointed by governor, including five retired judges). Also, California probably belongs in this category of states that do not require their governors to nominate someone recommended by the commission. See Ware, *supra* note 2, at 388-89 nn.10 & 12.

occupational group other than lawyers has been attempted, it has, in at least one instance, been found unconstitutional.³³

C. *The Most Elitism: The Missouri Plan*

While the states discussed in the previous section have departed from the democratic principle of one-person-one-vote (and from the U.S. Constitution's model) to give special powers to the bar, they have nevertheless retained senate confirmation of the governor's nominees for the supreme court. In other words, they have introduced an element of elitism to the early part of the judicial selection process (whom can the governor pick?), while keeping the later part of the process (will the governor's pick be confirmed?) in the hands of democratically elected officials. By contrast, the third common

33. See *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994). In *Hellebust*, the Tenth Circuit found that Kansas's statutory procedure for electing members to the Kansas State Board of Agriculture (Board) violated the Fourteenth Amendment of the U.S. Constitution. *Id.* at 1332. That Amendment's Equal Protection Clause requires states to follow the principle of "one person, one vote" in most elections. *Id.* at 1333 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). Kansas violated this principle by giving the power to elect the Board to delegates from private agricultural associations including

county agricultural societies, each state fair, each county farmer's institute, each livestock association having a statewide character, and each of the following with at least 100 members: county farm bureau associations, county granges, county national farmer's organizations, and agricultural trade associations having a statewide character.

Id. at 1332 n.1. As the Tenth Circuit explained, "In the line of cases stemming from *Reynolds*, '[t]he consistent theme . . . is that the right to vote in an election is protected by the United States Constitution against dilution or debasement.'" *Id.* at 1333 (quoting *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54 (1970)). After the Kansas statute was declared unconstitutional,

much attention . . . focused on the possibility that agricultural groups might be given the power to provide the Governor a list of nominees from which the Board must be selected. Such an option appeared attractive to many legislators as a means of preserving the essence of the former system. A similar method of selection is used for various professional organizations and, most prominently, the Kansas Supreme Court.

Richard E. Levy, *Written Testimony of Richard E. Levy Before the House Agriculture Committee, State of Kansas*, 42 U. KAN. L. REV. 265, 282 (1994) (footnotes omitted). Professor Levy opines that "this approach might pass equal protection scrutiny on the grounds that 'appointment' rather than 'election' is involved," because "[m]any cases suggest that the 'one person, one vote' principle does not apply to appointments." *Id.* at 282 & n.118. However, he notes that "these cases involve appointments by elected officials who themselves are chosen in compliance with that principle." *Id.* at 282 n.118. As explained below, the core problem of the Missouri Plan is that not all members of the nominating commission are appointed by such officials. See *infra* Part II.A.

method of supreme court selection, the “Missouri Plan,”³⁴ has the early-stage elitism without the later-stage democracy.³⁵ The Missouri Plan gives disproportionate power to the bar in selecting the nominating commission, while eliminating the requirement that the governor’s pick be confirmed by the senate or similar popularly elected body.³⁶

34. The “Missouri Plan” states are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Oklahoma, Nebraska, South Dakota, Tennessee and Wyoming. See *infra* note 36. The “Missouri Plan” was named after the first state to adopt it, in 1940. Unfortunately, some people call this method of selecting judges “merit selection.” See *infra* note 38 and accompanying text.

35. Some readers may wonder if the Missouri Plan’s retention elections provide later-stage democracy. Here, then, we can remind ourselves of the crucial distinction between judicial selection and judicial retention. See *supra* note 2. The “later stage” discussed here is the later stage of judicial selection. Judicial retention is a separate topic, and retention elections are discussed below. See *infra* Part II.C.

36. See ALASKA CONST. art. IV, §§ 5, 8 (nominating commission consists of seven members: chief justice, three lawyers appointed by governing body of the organized bar, three non-lawyers appointed by governor subject to confirmation by legislature); ARIZ. CONST. art. VI, § 36.A (sixteen members: chief justice, five lawyers nominated by governing body of bar and appointed by governor with advice and consent of senate, ten nonlawyers appointed by governor with advice and consent of senate); COLO. CONST. art. VI, § 24 (fifteen voting members: eight nonlawyers appointed by governor, seven lawyers appointed through majority action of governor, attorney general and chief justice); FLA. CONST. art. V, § 11(d) (1998); FLA. STAT. ANN. § 43.291.1(a)-(b) (nine members: four lawyers appointed by governor from lists of nominees submitted by board of governors of bar association, five other members appointed by governor with at least two being lawyers or members of state bar); IND. CONST. of 1851, art. VII, §§ 9–10 (1970); IND. CODE ANN. §§ 33-27-2-2, -2-1 (LexisNexis 2007) (seven members: chief justice, three lawyers elected by members of bar, three nonlawyers appointed by governor); IOWA CONST. of 1857, art. V, § 16 (1962); IOWA CODE §§ 46.1–.2, .15 (2006) (fifteen members: chief justice, seven lawyers elected by members of bar, seven nonlawyers appointed by governor and confirmed by senate); KAN. CONST. art. 3 § 5(e) (nine members: five lawyers elected by bar, four nonlawyers appointed by the governor); MO. CONST. of 1945, art. V, § 25(a)-(d) (1976); MO. SUP. CT. R. 10.03 (seven members: one supreme court judge chosen by members of court, three lawyers elected by members of bar, three nonlawyers appointed by governor); NEB. CONST. of 1875, art. V, § 21 (1972); NEB. REV. STAT. ANN. §§ 24-801 to 24-812 (LexisNexis 2007) (nine members: chief judge, four lawyers elected by members of bar, four nonlawyers appointed by governor); OKLA. CONST. art. VII-B, § 3 (thirteen members: six lawyers elected by members of bar, six nonlawyers appointed by governor and one nonlawyer elected by other members); S.D. CODIFIED LAWS § 16-1A-2 (2007) (seven members: three lawyers appointed by president of bar, two circuit judges elected by judicial conference, and two nonlawyers appointed by governor); TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (seventeen members: speakers of senate and house each appoint six lawyers, twelve total, from lists submitted by Tennessee Bar Association (two), Tennessee Defense Lawyers Association (one), Tennessee Trial Lawyers Association (three), Tennessee District Attorneys General Conference (three), and Tennessee Association for Criminal

The Missouri Plan states' lack of confirmation by the senate (or other popularly elected body) is significant. In senate-confirmation states, if the senate refuses to confirm any of the nominating commission's first group of nominees then the commission must propose one or more additional nominees to get someone appointed to the court. By contrast, in Missouri Plan states, if the governor refuses to appoint any of the commission's first group of nominees then one of those nominees joins the court anyhow.³⁷ So the Missouri Plan gives the commission more power to force one of its favorites on the democratically elected officials. The commission is weaker, relative to democratically elected officials, in senate-confirmation states. Thus, Missouri Plan states are less democratic (and more elitist) than senate-confirmation states.

This important distinction between Missouri Plan states and senate-confirmation states is obscured when all judicial selection methods are reduced to two types: elective and appointive. In fact, the choice is not just between electing judges and appointing them. As this article has shown, many appointive systems exist, and they vary widely in the extent to which they depart from democratic principles to give special powers to the bar. Clarity requires distinguishing Missouri Plan states from senate-confirmation states. Unfortunately, prominent bar groups use the term "merit selection" to describe all of these states, so long as they use a nominating commission of

Defense Lawyers (three); the speakers also each appoint one lawyer not nominated by an organization and each appoint one nonlawyer and jointly appoint a third nonlawyer); WYO. CONST. art. V, § 4; WYO. STAT. ANN. § 5-1-102 (2007) (seven members: chief justice, three lawyers elected by members of bar, three nonlawyers appointed by governor).

37. See, e.g., MO. CONST. art. V, § 25(a) ("If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy."); KAN. CONST. art. 3 § 5(b) ("In event of the failure of the governor to make the appointment within sixty days from the time the names of the nominees are submitted to him, the chief justice of the supreme court shall make the appointment from such nominees."); OKLA. CONST. art. VII-B, § 4 ("The Governor shall appoint one (1) of the nominees to fill the vacancy, but if he fails to do so within sixty (60) days the Chief Justice of the Supreme Court shall appoint one (1) of the nominees.").

The importance of this power was demonstrated in Missouri where the governor publicly considered the possibility of refusing to appoint any of the three nominees submitted to him by the supreme court nominating commission. See Editorial, *Blunt Trauma*, WALL ST. J., Sept. 17, 2007, at A16. The governor ultimately did appoint one of the nominees, and his capitulation to the commission has been explained by the fact that if he did not appoint one of those three then the commission would exercise its power to appoint one of the three. *Id.* By contrast, the commission lacks this power to ensure that one of its nominees becomes a justice where appointment requires confirmation by the senate or other publicly elected officials. The body with the power to withhold confirmation has the power to send the commission "back to the drawing board" to identify additional nominees if none of the original nominees wins confirmation.

any sort.³⁸ This term, “merit selection,” is “propagandistic”³⁹ and obscures important distinctions among appointive systems. Accordingly, I suggest that people reject the term “merit selection” in favor of the more-neutral “Mis-

38. The leader in this regard seems to be the American Judicature Society (AJS). Under the heading “Judicial Selection in the States . . . ‘Initial Selection: Courts of Last Resort,’” AJS claims that at the supreme court level, three states select judges by gubernatorial appointment, two by legislative appointment, eight by partisan election, thirteen by non-partisan election and twenty-five (including the District of Columbia) by merit selection. AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS 6 (2007), <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf>. Among the twenty-four states AJS claims for “merit selection” are ten states with confirmation by the senate or similar popularly elected body: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Utah and Vermont. *Id.*

While today AJS conducts a wide variety of programs, the advocacy of and education about the merit selection of judges as an alternative to the elective system has, since its formation, been the cornerstone of its activities. AJS was formed in 1913 with the general progressive mission of improving the ‘efficiency’ of the administration of justice.

The founders of AJS shared the commonplace Progressive belief that the solution to most of the country’s problems lay in more efficient public administration. The Society’s negative attitude toward the election of judges, for example, was part of a widespread denigration of partisan politics. Progressives tended to view partisanship as productive of inefficiency in governance and to believe that government should be run like a business corporation.

Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 7-8 (1994) (footnotes omitted). In 1928, AJS endorsed a process in which nominations presented to the governor would come from a committee of the bar. *Id.* at 9.

Then, in 1937, the [American Bar Association] adopted the merit plan. It proposed:

(a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.

(b) *If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.*

(c) The appointee shall after a period of service be eligible for reappointment periodically thereafter or go before the people upon his record with no opposing candidate, the people voting upon the question, Shall Judge Blank be retained in office?

Id. at 9-10 (emphasis added) (footnotes omitted).

39. See Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803 (2004) (“Merit selection – purely, so far as I can tell, [is] a propagandistic misnomer.”).

souri Plan” and that people reserve the term “Missouri Plan” for states that lack confirmation by the senate or similar popularly elected body.

With this terminology established, we can then make a further distinction, a distinction among Missouri Plan states. These states can be placed into two categories, which I call “soft” Missouri Plan and “hard” Missouri Plan. (See Table 1 *infra* page 775.) The four soft Missouri Plan states have a lawyers’ quota on the nominating commission, but *all* members of the commission are selected by a process that includes popularly elected officials.⁴⁰ In these states – Arizona, Colorado, Florida and Tennessee – the bar’s role in selecting members of the commission is either non-existent or limited to “merely suggesting names for . . . the commission and those suggested do not become commissioners unless approved by the governor and/or legislature.”⁴¹ So the elitism of the lawyers’ quota on the commission is balanced to some extent by the role of popularly elected officials in appointing the commission.

Even that balance is lacking in the “hard” Missouri Plan states. These nine states go further than any others in maximizing the power of the bar. Not only do these states have a lawyers’ quota on the commission, but the quota is also a majority of the commission. Each of these states’ constitutions requires that a majority of the commissioners be lawyers or judges.⁴² More importantly, popularly elected officials play no role in selecting *which lawyers* fill the lawyers’ quota on the commission. Instead, the bar selects the lawyers on the commission.⁴³ To reiterate, the lawyer-commissioners (who

40. See COLO. CONST. art. VI, § 24 (commission consists of fifteen voting members: seven lawyers appointed through majority action of governor, attorney general, and chief justice, eight nonlawyers appointed by governor); ARIZ. CONST. art. VI, § 36.A (sixteen members: chief justice, five lawyers nominated by governing body of bar and appointed by governor with advice and consent of senate, ten nonlawyers appointed by governor with advice and consent of senate); FLA. CONST. art. V, § 11(d) (1998); FLA. STAT. ANN. § 43.291.1(a)-(b) (West 2008) (nine members: four lawyers appointed by governor from lists of nominees submitted by board of governors of bar association, five other members appointed by governor with at least two being lawyers or members of state bar); TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (seventeen members: speakers of senate and house each appoint six lawyers, twelve total, from lists submitted by Tennessee Bar Association (two), Tennessee Defense Lawyers Association (one), Tennessee Trial Lawyers Association (three), Tennessee District Attorneys General Conference (three), and Tennessee Association for Criminal Defense Lawyers (three); the speakers also each appoint one lawyer not nominated by an organization, each appoint one nonlawyer, and jointly appoint a third nonlawyer). Tennessee is the “hardest” of the soft Missouri Plan states because popularly elected officials have the least power (relative to the bar) in selecting commissioners.

41. Ware, *supra* note 2, at 388 & n.8.

42. These states are Alaska, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota and Wyoming. See *supra* note 36.

43. *Id.* My state of Kansas is the “hardest” Missouri Plan state of all because it gives the bar more power than even the other hard Missouri Plan states. The Kansas

exercise the important governmental power of restricting the governor's choice of judicial nominees) are not selected in accordance with democratic

bar selects five of the nine members of the Kansas Supreme Court Nominating Commission. *Id.* Kansas is the only state that allows the bar to select a majority of "a nominating commission that has the power to ensure that one of its initial nominees becomes a justice." Ware, *supra* note 2, at 391. This differs from some other Missouri Plan states, in which bar-selected lawyers, plus a supreme court justice, constitute a majority of the commission. What is the difference between having a justice on the commission and (the Kansas system) having another bar-selected member on the commission? There is some difference because supreme court justices are different from other members of the bar. Even in "hard" Missouri Plan states, to become a justice one must be chosen (over other nominees) by the popularly elected governor, and to remain a justice one must win a retention election open to all registered voters. See ALASKA. CONST. art. IV, § 5 (governor shall fill any vacancy on supreme court "by appointing one of two or more persons nominated by the judicial council"); see also *id.* § 6 (justice "subject to approval or rejection . . . at the first general election held more than three years after his appointment," and thereafter every ten years); IND. CONST. art. VII, § 10 (governor shall fill vacancy on supreme court "from a list of three nominees presented to him by the judicial nominating commission"); see also *id.* § 11 (justice subject to approval or rejection at general election two years after appointment, and thereafter every ten years); IOWA CONST. art. V, § 15 (governor fills vacancies on the supreme court from list of three nominees submitted by judicial nominating commission); see also *id.* § 17 (justice subject to retention or rejection at first judicial election held more than one year after appointment, and thereafter every eight years); MO. CONST. art. V, § 25(a) (governor shall fill vacancy in supreme court by appointing one of three persons nominated by judicial commission); see also *id.* §§ 19, 25(c)(1) (justice subject to approval or rejection at first general election held more than twelve months after appointment, and thereafter every twelve years); NEB. CONST. art. V, § 21(1) (governor shall fill any vacancy in the supreme court "from a list of at least two nominees presented to him by the . . . judicial nominating commission"); see also *id.* § 21(3) (justice subject to approval or rejection at next general election more than three years from the date of appointment, and thereafter every six years); OKLA. CONST. art. VII-B, § 4 (governor shall fill vacancy on supreme court with one of three nominees chosen by Judicial Nominating Commission); see also *id.* § 5 (justice subject to approval or rejection at first general election more than one year after appointment, and thereafter every six years); S.D. CONST. art. V, § 7 (governor shall fill vacancy on supreme court from list of nominees chosen by the judicial qualifications commission); see also *id.* (justice subject to approval or rejection at "first general election following the expiration of three years from the date of his appointment," and thereafter every eight years); WYO. CONST. art. 5, § 4(b) (governor shall fill vacancy on supreme court from list of three nominees submitted by judicial nominating commission); see also *id.* § 4(f), (g) (justice subject to approval or rejection at next general election more than one year after his appointment, and thereafter every eight years). So although these factors do not confer upon justices as much democratic legitimacy as advocates of the Missouri Plan sometimes claim, see *infra* Part II.C, they do confer some degree of democratic legitimacy. Thus, the states whose nominating commissions include a justice (rather than another bar-selected commissioner, as in Kansas) do have a supreme court selection process with a bit more democratic legitimacy than Kansas.

principles of equality. These commissioners are not selected by officials elected under the democratic principle of one-person-one-vote. Rather, they are selected by a small, elite group: the bar.⁴⁴

For this reason, judicial selection under the Missouri Plan lacks democratic legitimacy.

II. THE MISSOURI PLAN'S LACK OF DEMOCRATIC LEGITIMACY

A. *The Core Problem of the Missouri Plan*

The Missouri Plan's lack of democratic legitimacy is explained by Professor Jeffrey Jackson:

A commission system [of judicial selection] carries an even greater burden to demonstrate legitimacy than other systems, such as elections or appointments. Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public. Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.

Commission systems, on the other hand, do not fit so neatly within this democratic framework. While judges in a commission system are appointed by a popularly-elected official, the official's choice is not unfettered. Rather, the choice is made from a pool selected by an unelected commission. Further, although some members of the commission are generally appointed by an elected official, others are not. In particular, many commissions have lawyer members that gain their seats, either through election by a minority of the persons, i.e. lawyers in their area, or through nomination by special interest groups. The composition of nominating commissions thus raises some serious concerns with regard to legitimacy.⁴⁵

As Professor Jackson says, contestable elections and senate confirmation (at least of the sort found in the U.S. Constitution) have democratic legi-

44. Mary L. Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not*, in *THE ANALYSIS OF JUDICIAL REFORM* 79, 86-87 (Philip L. Dubois ed., 1982) ("Officials of state bar associations have been the first to admit that the merit selection system provides them with the most effective means of influencing the choice of who will serve on the bench."). Perhaps they have admitted this less readily in recent years as bar control over judicial selection has become more controversial.

45. Jackson, *supra* note 16, at 146 (footnotes omitted).

timacy. And even commission systems have democratic legitimacy insofar as members of the nominating commission are appointed by popularly elected officials. Democratic principles are violated, however, when members of the commission are selected by “a minority of the persons, i.e. lawyers in their area.”⁴⁶ This, of course, is the core of the Missouri Plan – allowing the bar to select some of the commission and then declining to offset that bar power with confirmation by the senate or other popularly elected body.⁴⁷ And it is this core that deprives the Missouri Plan of democratic legitimacy.

Professor Jackson continues:

The idea of mandating lawyer participation in the selection of judges is unique to the commission system and also unique in the democratic system. As a result, it requires special justification if it is to be considered legitimate.⁴⁸

Most of the commission systems in the United States use the state bar, either through its board of governors or through direct election of its members, to select the lawyer members. From a legitimacy standpoint, this is a questionable system. Membership in the state bar does not have a connection to the democratic function, and judges selected through the use of this system are open to charges that they are simply tools of the lawyers running the state bar.⁴⁹

Moreover, this problem is not entirely solved by placing the final selection in the hands of the governor, an elected official, or by juxtaposing the non-lawyer members with lay members who are appointed through some other process. Rather, because the governor’s choices are generally limited to the slate given to her by the commission, the system can be perceived as vulnerable to “panel stacking,” wherein the commission submits a combination of nominees that offers the governor little real choice. Even if lay members are added to the process, there is the problem that a large part of the selection system is being delegated to persons who are not subject to the democratic process.⁵⁰

So the Missouri Plan’s lack of democratic legitimacy is not cured by the fact that the governor gets to choose among the commission’s nominees and gets to appoint some members of the commission. The Missouri Plan nevertheless violates basic democratic principles of equality because some members of the commission are selected by the bar. The problem is not that there

46. *Id.*

47. *See supra* notes 34-38 and accompanying text.

48. Jackson, *supra* note 16, at 148.

49. *Id.* at 153 (footnotes omitted).

50. *Id.* at 153-54 (footnote omitted).

is a nominating commission nor even so much that lawyers get a quota of seats on that commission. The core problem of the Missouri Plan is how those lawyers are selected.

Professor Jackson rightly concludes that democratic legitimacy

would appear to favor a reduction in the influence of the state bar and its members over the nominating commission because they do not fit within the democratic process. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission's members selected through means more consistent with the concept of representative government.⁵¹

To ensure the democratic legitimacy of a nominating commission, none of its members should be selected by the bar. All members should be selected by popularly elected officials or by judges nominated and confirmed by such officials. The democratic legitimacy of a nominating commission is especially important in Missouri Plan states because these states fail to offset the commission's power with confirmation of judges by the senate or other popularly elected body.

B. Judges Are Lawmakers, Not Just Technicians

So what if the Missouri Plan lacks democratic legitimacy? While the politicians in the legislative and executive branches should be democratically elected, judges are not supposed to be politicians, are they? Judges, advocates of the Missouri Plan argue, should be selected on their professional merit, not their political popularity.⁵²

The problem with this view is that it rests on a one-sided view of the role of a judge. It emphasizes the judge's role as legal technician at the expense of the judge's role as lawmaker. Of course, judging does involve the narrow, lawyerly task of applying to the facts of a case the law made by someone other than the judge (e.g., a legislature). But judging also involves the exercise of discretion. Within the bounds of this discretion, the judge makes law.

This point is not new or controversial. Our common law system – going back centuries to England – rests on judge-made law.⁵³ And judges do not

51. *Id.* at 154.

52. *See, e.g.*, Honorable Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 318-19 (1997) (“The Plan seeks to improve the selection process and promote superior decision making from the bench by emphasizing professional qualifications rather than political influence.”).

53. *See, e.g.*, Maimon Schwarzschild, *Keeping It Private*, 44 SAN DIEGO L. REV. 677, 680 (2007) (“For many centuries in England, and well into the twentieth century there and in other English-speaking jurisdictions, the law of tort and contract – the

always *find* the law; sometimes they *make* the law and make it in accord with their own political views. This, of course, is the basic reality exposed by Legal Realism nearly a hundred years ago.⁵⁴ And it is virtually impossible to find anybody who disputes it today. That “we are all realists now” is so thoroughly accepted as to be a cliché.⁵⁵ “It is a commonplace that law is ‘political.’”⁵⁶

So honesty requires defenders of the Missouri Plan to acknowledge frankly that judges are not merely technicians; they are also lawmakers. Just as it is one-sided to denigrate the technical, lawyerly side of judging by claiming that judges are simply “politicians in robes,”⁵⁷ it is also one-sided to denigrate the lawmaking side of judging by claiming that the political views of a judge are irrelevant to his or her job as a judge.

heart of private law – was mostly judge-made common law, with statutes few and far between. Even today, much of the law of tort is common law, and although contract law in the United States is substantially governed by the Uniform Commercial Code, the UCC itself is largely a codification or restatement of common law doctrines and rules.”); James E. Herget, *Unearthing The Origins of a Radical Idea: The Case of Legal Indeterminacy*, 39 AM. J. LEGAL HIST. 59, 64 (1995) (“unlike the continental legal tradition, the common law tradition recognized and accepted as authoritative, the proposition that judges make law”).

54. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 169-212 (1992) (legal realism’s most important legacy was its challenge to the notion that law has an autonomous role separate from politics); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 274 (1998) (“[T]he program of unmasking law as politics [was] central to American Legal Realism . . .”); Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 88 (1998) (“We live in a post-Legal Realist Age, when most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decisionmaker.”); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 886 (2006) (“Now, having for generations bathed in the teachings of Holmes and the Realists, we heed their lessons. We no longer deny the creative and forward-looking aspect of common law decisionmaking, and we routinely brand those who do as ‘formalists.’ It is thus no longer especially controversial to insist that common law judges make law.”).

55. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997).

56. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985).

57. See, e.g., David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1871 (2008) (describing “two popular narratives about the way Supreme Court Justices decide cases: one that treats Justices as neutral and nonpolitical ‘umpires,’ and another that views Justices as pervasively ideological ‘politicians’ in robes.”); Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1419 (2003) (referring “to the cynical view that judges are merely ‘Politicians in Judges’ Robes”).

Furthermore, the political/lawmaking side of judging is especially important for state supreme court justices because they are the final word on their state constitutions and common law.⁵⁸ Accordingly, the case for democracy in judicial selection is at its strongest (and the case for elitism at its weakest) when the judges in question are supreme court justices because justices' lawmaking powers far exceed those of the "professional technicians who sit on lower courts."⁵⁹ As Professor Paul Carrington explains, so-called "merit selection" of judges

was popular in numerous states in the twentieth century, but *in its application to courts of last resort* it is linked to a vision of judicial office that is technocratic and apolitical. Although there was a time in the late nineteenth and early twentieth centuries when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political consequences, there is virtually no one who thinks that today.⁶⁰

Similarly, Professor Michael Dimino concludes,

Public involvement in the staffing of high courts is beneficial from a democratic perspective because of the greater discretion and policy-making authority exercised by high courts. Lower courts, by contrast, are more often bound by settled law, and the judges on such courts do not make policy to the extent that other courts do. As a result, there is less need for public involvement in the selection of lower-court judges, and such involvement may well be a negative influence if it encourages those judges to depart from the application of settled law.⁶¹

58. *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well.").

59. Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 469 (2002).

60. *Id.* (emphasis added) (footnote omitted).

61. Dimino, *supra* note 2, at 451-52. See also Nagle, *supra* note 3 at 511 ("Perhaps, then, different judges should be chosen in different ways. Judges who decide cases that lack interest to the People could be chosen by simple executive appointment or merit selection; judges who rule on the most controversial questions affecting social policy could be elected or appointed by the executive with legislative confirmation designed to probe judicial philosophy."); G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 299 & n.42 (2007) ("In most civil law countries in Europe, the judiciary is a career service, akin to the American civil service system. . . . Competitive examinations are used to banish political con-

So the case for democracy is strongest (and the case for elitism weakest) with respect to supreme court justices because the political/lawmaking side of judging is especially important at the supreme court level.

For this reason, the Missouri Plan should not be used to select a state's highest court. In Missouri Plan states, the nominating commission is crucial, and, in selecting that commission, a member of the bar has more power than a fellow citizen who is not a lawyer. This elitism of the Missouri Plan may be somewhat defensible in the context of trial courts. But at the supreme court level, the Missouri Plan's unequal power between a member of the bar and one of her fellow citizens is not acceptable in a democracy. With respect to judges who have the political power of a state supreme court justice, a system that counts a lawyer's vote significantly more than her neighbor's vote simply lacks democratic legitimacy.

C. Retention Elections and Democratic Legitimacy

When confronted with the Missouri Plan's lack of democratic legitimacy, lawyers defending this elitist selection system often assert that it is offset by the popular elections used to retain sitting judges.⁶² In other words, advo-

siderations and personal favoritism from the selection process . . . Yet even these countries use an overtly political process in selecting the members of their constitutional courts.”). While research has not revealed anyone contending that high court judges have less policymaking discretion than lower court judges, some people do minimize the policymaking discretion of judges generally. See Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1233 (2008) (“Judges, except in a very limited sense, do not establish policy.” (quoting James G. Exum, *Judicial Selection in North Carolina*, 35 N.C. ST. B.Q. 4, 8 (1988))). However, one of these authors, Bert Brandenburg, wrote elsewhere:

America's courts are under fire. At both the federal and state levels, the influence of tort “reformers” and other special interests threatens the courts' independence. Groups like the U.S. Chamber of Commerce and the American Tort Reform Association are targeting the judges who uphold our laws and protect our rights.

Bert Brandenburg, *Keep the Courts Free and Fair*, TRIAL, July 2004, at 32, 32. Are these two views endorsed by Brandenburg consistent? If judges “do not establish policy” in, say, the common-law field of torts, then why are these interest groups “targeting” them?

62. See, e.g., Daugherty, *supra* note 52, at 319 (“advocates maintain that the merit selection process provides the following benefits: . . . judges are removed from politics, emphasizing professional qualifications rather than political influence . . . retention elections provide for democratic participation”); Robert C. Casad, *A Comment on “Selection to the Kansas Supreme Court,”* 17 KAN. J.L. & PUB. POL'Y 424, 427 (2008) (“In Kansas, our judges have fixed terms of office. The judges of the supreme court and courts of appeals must face retention elections periodically. Their ‘accountability’ is thus publicly tested directly before the people. Since we cannot provide the kind of independence protections that federal judges enjoy, we have to

cates of the Missouri Plan portray it as a mix of elitism (which they would call “professional merit”) at the initial selection stage and democratic legitimacy at the retention stage.⁶³ This argument, however, vastly overstates the degree of democratic legitimacy provided by retention elections. In fact, retention elections are largely toothless and thus rarely provide significant democratic legitimacy.

The retention elections used in Missouri Plan states are unusual in that the sitting judge does not face an opposing candidate; instead, the voters choose simply to retain or reject that particular judge.⁶⁴ For this and other reasons, retention elections are nearly always rubber stamps.

Data on retention elections around the country (as summarized by Professor Brian Fitzpatrick) indicate that sitting judges win retention 98.9% of the time,⁶⁵ while – in stark contrast – incumbent supreme court justices running for reelection in states that use partisan elections win only 78% of the time.⁶⁶ This rubber-stamp aspect of retention elections is intentional. As Professor Charles Geyh puts it, “[I]t is somewhat disingenuous to say that merit selection systems preserve the right to vote. Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents.”⁶⁷ Professor Michael Dimino explains:

[R]etention elections protect incumbency in multiple, related ways: They minimize the incentives for opposing forces to wage antiretention campaigns by preventing any individual from opposing the incumbent directly; they eliminate indications of partisanship that allow voters to translate their policy preferences cost-effectively into votes; and they increase voter fears of uncertainty by forcing a choice of retaining or rejecting the incumbent before the voter knows the names of potential replacements.⁶⁸

take steps to provide some measure of independence from partisan politics at the nomination level.”).

63. See sources cited *supra* note 62.

64. See *supra* note 43. See also Ware, *supra* note 2, at 407.

65. See Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 495 (2008) (“Even that incredibly high number is misleading, however, because over half of the defeats were from Illinois, a state that requires judges to win 60% of the vote rather than a mere majority (as do Tennessee and most other states) in order to stay on the bench. Removing the Illinois defeats from the data where the judges won more than 50% but less than 60% of the vote yields a retention rate of 99.5%.”) (footnotes omitted).

66. *Id.* at 496 & n.192.

67. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 55 (2003).

68. Dimino, *supra* note 39, at 807-08.

Dimino concludes that “retention elections seek to have the benefit of appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy.”⁶⁹ In other words, retention elections are something of a fraud.⁷⁰ They create a false veneer of democracy at the judicial retention stage that the bar can use to distract the populace from the elitism of bar power at the initial selection stage, which is where the real action is.⁷¹

That said, retention elections are not always toothless. On rare occasions, a judge loses one. So retention elections do provide some (however small) measure of democratic legitimacy. Unfortunately, they do this at the judicial retention stage, when it does the most harm to judicial independence. A wide array of scholars and other commentators agree that “the primary threat to [judicial] independence arises at the point of re-selection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made.”⁷² This problem is especially acute when a few of the judge’s decisions, although well-reasoned in a technical, lawyerly sense, are easy to caricature in a “sound bite” television ad.⁷³ Accordingly, as Professor Dimino says,

69. *Id.* at 811.

70. See Fitzpatrick, *supra* note 65, at 495 (“[T]he architects of merit selection came up with what some scholars have concluded was a ‘sop’ to the public: the retention referendum. That is, the retention referendum was designed to make the public feel as though they had a role in selecting their judges but make it unlikely they would exercise that role by voting a judge off the bench.”) (footnotes omitted).

71. For example, an op-ed by former Kansas Bar Association President Linda Parks refers to my mention of the federal system of judicial selection and retention as follows: “Ware mentions the option of changing the system by taking the retention vote away from the citizens and instead giving the power to decide the qualifications of the justices to politicians. More power to politicians? That’s not what most Kansas citizens support.” Linda Parks, Op-Ed, *Keep Selecting Justices on Merit, Not Politics*, THE WICHITA EAGLE, Dec. 6, 2007, at 7A.

72. See Geyh, *supra* note 2, at 1276.

73. See Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 650 (1999) (“[In retention elections,] voters have removed from the bench several judges after high-profile campaigns focusing on the judge’s votes on a single issue, often the death penalty.”); Shepherd, *supra* note 2, at 644 (citing examples); Jackson, *supra* note 16, at 133-34 (“Justice White’s experience shows a danger of the commission system that should be addressed: the possibility that one decision, because of unfortunate timing or a highly coordinated special interest attack, could cause a judge to lose her position.”); Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1099 (2007) (“California’s Justice Kaus memorably described the dilemma of deciding controversial cases while facing a retention election, comparing it to ‘finding a crocodile in your bathtub when you go in to shave in the morning. You know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving.’”) (quoting Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the*

[J]udicial terms of office should be long and non-renewable, such that there are neither reelections nor reappointments. Where judges know that their ability to stay in office depends on how politicians or voters view their decisions, there is the potential for decisions to be made on the basis of those political calculations rather than on the merits.⁷⁴

In sum, retention elections, like other forms of judicial re-selection, do not protect judicial independence.

The Missouri Plan and its retention elections may be the worst of both worlds. While contestable elections threaten judicial independence (especially at the retention stage),⁷⁵ contestable elections at least have the virtue of conferring significant democratic legitimacy on the judiciary.⁷⁶ By contrast, retention elections also threaten judicial independence but do so without the upside of conferring significant democratic legitimacy on the judiciary. So the Missouri Plan initially selects judges in a manner more elitist than democratic and then brings in a sliver of democratic legitimacy at the retention stage, precisely when it does the most harm to judicial independence. By contrast, the best of both worlds can be attained with a more democratic (less elitist) method of initially selecting judges followed by terms of office that are long and non-renewable. Such a system avoids the elitism of the Missouri Plan while best preserving judicial independence.

III. CONCLUSION

Thoughtful scholars like Professors Carrington and Dimino agree that the case for elitism is stronger with respect to the selection of lower-court judges than supreme court justices, and, conversely, the case for democratic accountability is stronger with respect to the selection of supreme court justices than lower-court judges. So far, so good.

But does democratic accountability of supreme court justices have to mean contestable judicial elections? The arguments against using elections for the initial selection of judges are strong.⁷⁷ The arguments against subject-

Independence of State Supreme Courts in an Era of Judicial Politicization, 72 NOTRE DAME L. REV. 1133, 1133 (1997)).

74. Dimino, *supra* note 2, at 451.

75. *Id.* at 457.

76. *Id.* at 459-60.

77. They begin with the arguments against direct democracy, generally, in favor of a system of indirect democracy – such as that adopted by the Framers of the U.S. Constitution – in which the structure of government mediates and cools the momentary passions of popular majorities. See THE FEDERALIST NO. 10, at 49-52 (James Madison) (Clinton Rossiter ed. 1999) (for Madison's classic distinction between republics and democracies). The arguments against direct democracy are especially strong with respect to the judicial branch because

ing sitting judges to any sort of re-election – including the retention elections used by the Missouri Plan – are even stronger.⁷⁸ So we ought to seek a way to achieve democratic accountability of supreme court justices without judicial elections. Fortunately, the U.S. Constitution does exactly that.⁷⁹ Executive nomination followed by senate confirmation makes judicial selection indirectly accountable to the people without using judicial elections. And giving judges life tenure (or a single, nonrenewable term) preserves this indirect accountability over time without the need for retention (or other) elections.

While Professor Carrington concludes that “judicial elections are here to stay,”⁸⁰ and Professor Dimino advocates contestable elections to select (but not retain) state supreme court justices,⁸¹ I encourage reformers of all stripes to reconsider the U.S. Constitution as a model for the selection and retention of state supreme court justices.⁸² A state can select its justices through a se-

[j]udicial candidates receive [campaign] money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits. A fundamental difference exists between judicial and legislative offices in this respect because judges decide the rights and duties of individuals even when they are making policy; hence any connection between a judge and a person appearing in his or her court is a potential source of mistrust.

Carrington, *supra* note 3, at 91-92. See also Ware, *supra* note 2 (“The possibility of contributors ‘buying justice’ in individual cases is the primary concern about judicial elections.”). Other concerns about judicial elections include “the reduced perception of impartiality caused by statements of judicial candidates on political or social issues, the elimination of qualified lawyers who would otherwise be willing to serve as jurists, and the loss of public confidence caused by the vile rhetoric of judicial campaigns.” Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 276 (2002). Each of these concerns is reduced, if not eliminated, by a senate confirmation system.

78. See *supra* notes 72-76 and accompanying text.

79. See U.S. CONST. art. II, § 2, cl. 2.

80. Carrington, *supra* note 3, at 107. Accord Geyh, *supra* note 67, at 55 (“The presence of retention elections in merit selection systems can only be explained as a concession to the entrenched political necessity of preserving judicial elections in some form, so that merit selection proponents have an answer for detractors who oppose plans that ‘take away our right to vote.’”).

81. Dimino, *supra* note 2.


82. I am not the first to make this suggestion. See Carrington, *supra* note 3, at 114 (“The best of the various unsatisfactory ways of selecting high court judges is probably that prescribed in the Constitution of the United States.”); Tarr, *supra* note 61, at 306 (“[I]t is hard to see why only a few states have embraced the federal model. The sterling reputation of judges selected for the federal courts, taken as a whole, and the national reputations of the California and New Jersey judiciaries indicate that it is

nate-confirmation system and thus follow, albeit indirectly, the democratic principle of one-person-one-vote. Several senate-confirmation states even use a nominating commission without moving much, if at all, from this democratic principle toward elitism.⁸³ These states manage to be democratic without being populist. They are examples for reformers who seek to avoid both the populism of contestable judicial elections and the elitism of the Missouri Plan.

certainly possible to recruit highly qualified jurists using the federal model. The model of a governor-senate appointment process, with or without the participation of a nominating commission, deserves serious consideration.”).

83. See *infra* notes 26-29 (New York, Connecticut, Rhode Island, Utah) & 32 (Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey).

Table 1
Bar Control of Supreme Court Selection



More Elitist, High Bar Control								More Popu- list, Low Bar Control
"Hard" MO Plan, majority of comm'n selected by bar	"Hard" MO Plan, near majority of comm'n selected by bar	"Soft" MO Plan, subordinate role for bar in selecting comm'n	"Senate" Confirm., bar selects some of comm'n	"Senate" Confirm., "lawyers" quota" on comm'n	"Senate" Confirm., comm'n does not restrict Gov.	"Senate" Confirm., comm'n w/o special power for bar	Legis. Appl.	Contest-able Elections
KS	AK IN IA MO OK NE SD WY	AZ CO FL TN	HI VT	NY CT RI UT	CA DE ME MD NH NJ	MA	SC VA	22 states