

THE POLITICS OF MERIT SELECTION, 74 Mo. L. Rev. 675

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Retention Elections in a Merit-Selection System: Balancing the Will of the Public with the Need for Judicial Independence and Accountability

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THE POLITICS OF MERIT SELECTION

I. Introduction

In this Article, I undertake an evaluation of a method of judicial selection in use in many states that is known as “merit selection.” The merit system is distinctive from the other systems of judicial selection in use today in the powerful role it accords lawyers and, in particular, state bar associations.¹ Proponents of the merit system contend that it is superior to the other forms of judicial selection - elections or appointment by elected officials - because state bar associations are more likely to select judges on the basis of “merit” and less likely to select judges on the basis of “politics” than are voters or elected officials.² In this Article, I explain why I believe these claims are overstated.

***676** Although it is not always clear what proponents of merit selection mean when they use the word “politics” in this context, I take their primary claim to be that state bar associations are less inclined to examine the personal ideological preferences of judicial candidates than are voters or elected officials; i.e., state bar associations are less concerned with whether a candidate is a Republican or a Democrat, a conservative or a liberal. I am skeptical of this claim. Even if bar associations are better able to identify more intelligent or more qualified judges than are voters or public officials, it does not follow that they are less inclined to consider the political beliefs of judicial candidates. In my view, state bar associations are just as likely to be concerned - if not more concerned - with the decisional propensities of judicial candidates as are voters and elected officials. Moreover, insofar as a judge's personal ideological preferences are correlated with his or her decisions, and insofar as those preferences are often more easily observed than his or her decisional propensities, it is hard for me to believe that state bar associations accord those preferences any less weight than voters or elected officials when they select judges. In short, I am skeptical that merit selection removes politics from judicial selection. Rather, merit selection may simply move the politics of judicial selection into closer alignment with the ideological preferences of the bar.

It is important to note that this movement might occur even if state bar associations do completely ignore the personal ideological preferences of judicial candidates. If the distribution of ideological preferences among lawyers differs from the distribution among the public, then a method of selection that does not select for ideology in the way that elections and political appointment do so may simply replicate the ideological distribution among the bar. This will move the politics of the judiciary into closer alignment with the ideological preferences of the bar and away from the preferences of the public in the same way it would if state bar associations were trying to find judges who shared their ideological preferences.

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But is the distribution of ideological preferences within the bar different from the distribution among the public? Many people believe - and there is some empirical evidence to support these beliefs - that lawyers as a group are, on average, more liberal (in the contemporary political sense - i.e., associated more closely with policy positions held by the Democratic Party) than are members of the general public. If this is true, then, for the reasons noted above, one would expect that bar associations would select judges who are more liberal than those who would have been selected by the public or their elected representatives. Although far from conclusive, I collected data on the *677 judicial nominations in two merit states, Tennessee and Missouri, and the data is consistent with this hypothesis.

In Part II of this Article, I explain the origins and nature of the merit systems used in the United States. In Part III, I examine the claim that merit systems remove politics from the judiciary, showing how Legal Realism casts doubt on this claim. In Part IV, I explore how the political views of the bar might differ from those of the public at large, and I ask whether the proponents of merit selection can justify a system that produces judges who reflect the ideological preferences of the bar rather than the preferences of the electorate.

II. The Origins and Nature of Merit Selection

The merit system was first conceived during the Progressive Era in the early twentieth century.³ Prior to this time, judges in America had been selected either by elected officials or by the public in elections.⁴ Like other *678 Progressive Era reforms,⁵ merit selection was designed to remove government decision-making from electoral control and place it instead in the hands of “experts.”⁶ The “experts” identified by progressives to select judges were lawyers and, in particular, state bar associations.⁷ It is therefore unsurprising that bar associations, including the largest of them all, the American Bar Association, were the primary advocates of the merit system when it was first conceived⁸ and remain the primary advocates today.⁹ The first state to adopt the merit system was Missouri in 1940.¹⁰ Since then, a large number of states have adopted the system for one or more of their courts. Indeed, with respect to the highest courts in each state, which will be the focus of this Article, twenty-four states and the District of Columbia have adopted the system, making it the most prevalent system of judicial selection in use in the United States today.¹¹

Although there are differences among the merit systems that these states have adopted for their highest courts, most of the systems are similar in at least two respects. First, with regard to initial selection, in all of the systems judges are appointed to the bench by the governor from a list of names submitted by a nominating commission.¹² Second, at some point after appointment in most of the systems, judges must come before the public in an uncontested referendum through which voters can remove the judges from the *679 bench.¹³ As explained below, relative to the other methods of selection in use today - elections and appointment by elected officials - both of these aspects of merit systems transfer power over judicial selection from the electorate to the bar.

First, with respect to initial selection, merit systems transfer power to the bar through the composition of the commission that selects the nominees from which the governor must make the appointment. In the vast majority of merit systems, lawyers are required by law to be well represented on these commissions. For example, in Tennessee (at least until recent changes to the system take effect),¹⁴ over 80% of the selection commission - fourteen of seventeen members - must be lawyers.¹⁵ Although no state requires lawyers to comprise a greater portion of its commission than does Tennessee, as Table 1 indicates, many other merit states are not far behind; the vast majority of merit states require at least half of the members of the commission to be lawyers or judges.

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It is important to note that the lawyers who serve on merit commissions are not just any lawyers; they are usually lawyers selected by bar associations. That is, they are lawyers selected by the legal profession. For example, in Tennessee (again, until recent changes take effect), twelve of the fourteen lawyer members on the commission can come only from individuals nominated by five special bar associations.¹⁶ As Professor Stephen Ware chronicled in a recent article, Tennessee is not alone in privileging the bar in this way: nearly all merit-selection states delegate to bar associations the authority to fill some or all of the lawyer seats on the commissions, either by directly selecting members for the commission or by controlling the list of names from which elected officials must select members.¹⁷ Table 2 shows the percentage of lawyer commission members in each merit state under either the direct or indirect control of state bar associations.

***680 Table 1: Minimum number of lawyers required by law on merit commissions responsible for the highest state court**

STATE	TOTAL NUMBER OF MEMBERS	NUMBER OF LAWYER MEMBERS BY LAW	NUMBER OF NON-LAWYER MEMBERS BY LAW	NUMBER OF JUDGES BY LAW	MINIMUM PERCENTAGE THAT BY LAW MUST BE LAWYERS OR JUDGES
TN	17	14	3	0	82%
NM	14	8	3	3	79%
SD	7	3	2	2	71%
FL	9	6 to 9	0 to 3	0	67%
AK	7	3	3	1	57%
DC	7	3 to 4	2 to 3	1	57%
IN	7	3	3	1	57%
MO	7	3	3	1	57%
WY	7	3	3	1	57%
DE	9	5	4	0	56%
KS	9	5	4	0	56%
NE	9	4	4	1	56%
NH	11	6	5	0	56%
CO	15	7	7	1	53%
IA	15	7	7	1	53%
CT	12	6	6	0	50%
OK	13	6	7	0	46%
VT	11	5	6	0	45%
RI	9	4 to 5	4 to 5	0	44%

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AZ	16	5	10	1	38%
UT	8	2 to 4	3 to 5	1	38%
NY	12	4 to 8	4 to 8	0	33%
MD	17	5 to 17	0 to 12	0	29%
HA	9	2 to 4	5 to 7	0	22%
MA	21	any/all			0%
The source materials for this table can be found in the footnote below. ¹⁸					

***681 Table 2: Percentage of lawyer members on merit commissions who are controlled by state bar associations**

STATE	TOTAL NUMBER OF LAWYER MEMBERS ON THE MERIT COMMISSION	NUMBER OF LAWYER MEMBERS BY LAW CONTROLLED BY BAR ASSOCIATIONS	MINIMUM PERCENTAGE OF LAWYER MEMBERS BY LAW CONTROLLED BY BAR ASSOCIATIONS
AK	3	3	100%
AZ	5	5	100%
IN	3	3	100%
IA	7	7	100%
KS	5	5	100%
MO	3	3	100%
NE	4	4	100%
OK	6	6	100%
SD	3	3	100%
WY	3	3	100%
TN	14	12	86%
VT	5	3	60%
DC	3 to 4	2	50%
HA	2 to 4	2	50%
NM	8	4	50%
FL	6 to 9	4	44%
MD	5 to 17	5	29%
DE	5	1	20%
CO	7	0	0%

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CT	6	0	0%
MA	0 to 21	0	0%
NH	6	0	0%
NY	4 to 8	0	0%
RI	4 to 5	0	0%
UT	2 to 4	0	0%
The source materials for this table can be found in the footnote below. ¹⁹			

***682** The retention device in merit systems likewise transfers power from the electorate to bar associations. Unlike states that rely on contested elections or reappointment by elected officials to decide whether judges should remain on the bench, states with merit systems usually rely on an innovation called a retention referendum.²⁰ Although proponents of merit systems often describe ***683** the retention referendum as a source of democratic accountability,²¹ scholars have questioned this claim.²² To begin with, scholars have noted that the design of retention referenda leaves voters with very little information about judicial candidates: without another candidate in the race, there is no one with an interest in providing information to the public about the incumbent.²³ Moreover, retention referenda are conducted without partisan affiliation on the ballot, and political trademarks are often the most important pieces of information relied upon by voters.²⁴ Finally, because voters have no idea ***684** who will replace an incumbent if they vote against retention, some commentators believe that risk aversion on the part of voters makes them reluctant to vote against an incumbent; in other words, “the devil you know is preferable to the devil you don’t.”²⁵

Political scientists often rely on incumbent loss rates as a measure of how successfully elections promote public control of government officials,²⁶ and, in light of the design features of retention referenda, it is not entirely surprising that, at least by this measure, they pale in comparison to contested elections. Incumbent high-court judges are returned to the bench 99% of the time across the country when they run in retention referenda.²⁷ This is in sharp contrast with the retention rates of incumbent judges in states that use contested elections. One comprehensive study of state supreme court races between 1980 and 2000 showed that justices running for reelection in states that use partisan elections were defeated nearly 23% of the time - a full thirteen times as often as justices running in retention referenda over the same period.²⁸ As the author of that study has noted, in states that use contested elections, “supreme court justices face competition that is, by two or three measures, equivalent if not higher to that for the U.S. House.”²⁹

In short, merit systems provide something approaching life tenure to the judges initially appointed by governors through the merit commissions. This transfers power over judicial selection to bar associations by insulating their initial selections from removal. As two scholars have put it, “those who maintain that retention elections serve to insulate judges from popular control seem to be correct.”³⁰

***685 III. Merit Selection and Legal Realism**

One of the primary justifications offered in favor of merit systems over other systems of selecting judges is that merit systems choose judges more on the basis of the “merits” and less on the basis of “politics.”³¹ It is often not entirely

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clear what proponents of merit selection mean when they use the words “merit” and “politics” in this context, but most proponents appear to mean that merit commissions are more inclined to select judges on the basis of some measure of their legal acumen and less inclined to consider the personal ideological preferences of judicial candidates.³²

Although scholars have yet to find much, if any, evidence to support the first half of this claim,³³ I am willing to accept it, at least vis-a-vis judicial *686 elections. Lawyers are presumably better able to assess the legal acumen of judicial candidates than are members of the general public, and, in light of the heavy influence of bar associations in merit systems, it seems perfectly plausible that merit systems would be superior to elections at identifying judges who are in some sense “better qualified.” I am less willing, however, to accept that merit systems are superior in this regard when compared to appointment by elected officials. Elected officials are often themselves lawyers, and, when they are not, they often rely on lawyers to help them assess the legal acumen of judicial candidates.

But even if we assume that merit systems do a better job of identifying judicial candidates with the greatest legal acumen, it does not follow that the bar-selected lawyers who sit on merit commissions will turn a blind eye to the ideological preferences of those candidates. One can find bright lawyers of every ideological stripe. To believe that politics is deemphasized in merit systems, one would have to believe that the commissions who nominate candidates would exhibit greater indifference to whether a smart candidate is a conservative or liberal than would elected officials or the public at large. I am skeptical of this notion.

To begin with, it is hard to believe that the lawyers who select judges in merit systems care less about the decisional propensities of judicial candidates than do voters or elected officials. Not only do lawyers have opinions about public policy they wish to vindicate as much as non-lawyers do, but the lawyers who sit on these commissions also practice in front of the judges they select. It is hard to believe that these lawyers care only about whether the judges who hear their cases issue learned and scholarly opinions; surely these lawyers also care about whether a judicial candidate will be inclined to rule in their favor. Indeed, if a lawyer on the commission is a plaintiff's lawyer who works, as many do, on contingency, his or her very livelihood will be wrapped up in how often, for example, a judicial candidate will be inclined to dismiss cases or reduce damages awards. As I have written previously, lawyers who serve on selection commissions would have to be superhuman not to care about the decisional propensities of judicial candidates who come before them,³⁴ and the other scholars who have examined the inner workings of merit systems tend to agree. For example, Professor Glick has found that *687 “[l]awyer-representatives on nominating commissions are preoccupied with the decisional propensities of potential judges.”³⁵

If we accept that the lawyers who serve on merit commissions care just as much or even more about the outcomes of judicial decisions as do voters and elected officials - that is, they do not care simply about how well the opinions in these cases are written and researched - then it is but a short leap to the conclusion that the lawyers on these commissions care just as much about the personal ideological preferences of judicial candidates. I say this because we have known for quite some time now that the decisions judges make are correlated with their personal ideological preferences. This correlation has been demonstrated over many years by both political scientists and legal scholars. It has been demonstrated for United States Supreme Court Justices,³⁶ federal courts of appeals judges,³⁷ federal district court judges,³⁸ and state supreme court justices.³⁹ It has been demonstrated across a broad *688 range of litigation areas, including administrative law,⁴⁰ sovereign immunity,⁴¹ labor law,⁴² employment law,⁴³ campaign finance,⁴⁴ piercing the corporate veil,⁴⁵ civil rights,⁴⁶ criminal law,⁴⁷ religion,⁴⁸ and free speech.⁴⁹

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It should be noted that this correlation exists not because judges are inappropriately smuggling their personal preferences into the law; it exists because, as the Legal Realists taught us nearly 100 years ago, language is often ambiguous.⁵⁰ The Legal Realists famously demonstrated this in the early twentieth century by showing that precedents,⁵¹ statutes,⁵² and constitutional provisions⁵³ can often be read in more than one way. Consequently, judges often cannot render decisions based solely on legal texts; they must incorporate - whether consciously or subconsciously - other considerations in order to resolve ambiguities.⁵⁴ This is especially true of state court judges. Not only do state court judges have the power to shape the vague commands of *689 statutes and constitutions, but, much more so than their federal counterparts, they also have the power to make common law.⁵⁵

This correlation is important because it is often more difficult to observe directly the decisional propensities of judicial candidates at the selection stage - e.g., whether a candidate is inclined to dismiss cases or reduce damages awards - than it is to observe proxies for the ideological preferences of judicial candidates. Judges can be asked specific questions about dismissing cases, reducing damages awards, etc., and they can be asked to state their general judicial philosophies. But there is no assurance that the candidates will answer these questions honestly, and, as the federal judicial confirmation process shows, candidates basically utter the same platitudes about judicial decision-making regardless of their judicial philosophy.⁵⁶ On the other hand, it is often easy to get a sense of a candidate's ideological preferences by observing whether he or she has been more involved in the Republican or Democratic Party. Although involvement with one political party or the other is only a proxy for the ideological preferences of a judicial candidate, the proxy is strong enough that scholars have found correlations between the party affiliation of a judge and his or her decisions, including, to continue the example, findings that Republican judges are more likely to side with corporate defendants and dismiss certain types of cases than are Democratic judges.⁵⁷

Although the studies demonstrating these correlations are not without their limitations,⁵⁸ and it is always difficult to infer causation from correlation, it is important to note that it should be unimportant to the lawyers who sit on merit commissions whether judicial decisions are actually influenced by the personal ideological preferences of judges or whether those decisions are instead influenced by something that is simply correlated with those preferences. To the extent the correlation between ideological preferences and outcomes exists, the correlation is useful to anyone who wishes to predict the decisions a judge will render; it is irrelevant for such purposes why the correlation exists.

Thus, if we are willing to accept the notions that lawyers care about the outcomes of judicial decisions and that these outcomes are correlated with judges' ideological preferences, then we might expect merit commissions to select judges who share the ideological preferences of the bar rather than *690 those of the public. Whether the bar's ideological preferences are different from those of the public is a question I take up in the next Part.

Before turning to the next Part, however, it is important to note that, if it is indeed true that lawyers as a group have different ideological preferences than the public at large, then merit selection may produce this same shift in the ideological direction of the judiciary even if the lawyers who sit on merit commissions completely ignore the personal ideological preferences of the judicial candidates who come before them. That is, because the public and its elected representatives can - and by the hypothesis of merit-selection proponents do - screen candidates to find judges who share their ideological preferences,⁵⁹ a method of selection that does not select for ideology may simply replicate the distribution of ideological preferences within the bar. If the distribution of preferences among lawyers differs from the distribution among the public, then we would still expect to see the same shift in the ideological direction of the judiciary toward the preferences of lawyers and away from the preferences of the public.

IV. The Politics of the “Lawyer Class”

Are the ideological preferences of lawyers different from those of the public at large? As with any group of people of a significant size, there is a diversity of ideological views among individual lawyers. There are lawyers who associate with the Democratic Party and lawyers who associate with the Republican Party. There are lawyers who identify themselves as conservative, lawyers who identify themselves as liberal, and lawyers who call themselves neither.

Nonetheless, many people believe that lawyers are, on average, more liberal than are the members of the general public. Justice Scalia, for example, argued in his dissent in *Romer v. Evans* that the “lawyer class” holds more liberal views on social issues than does the public.⁶⁰ More broadly, a former head of the Federal Election Commission, pointing to larger campaign contributions to Democratic candidates than Republican candidates, opined *691 that “lawyers generally tend to lean left politically.”⁶¹ Surveys of lawyers confirm that lawyers associate themselves with the Democratic Party and the “liberal” label more often than do members of the general public.⁶²

Of course, I do not mean to suggest that lawyers are more liberal than the public on every issue. It is not entirely obvious, for example, why lawyers would be more liberal than the general public on economic issues: lawyers make more money on average than most other people and, as such, are likely to feel the brunt of redistributive economic policies. On the other hand, on at least some economic issues - government regulation of businesses, tort reform, etc. - most lawyers, no matter what their personal beliefs, have a selfish interest in liberal policies. The greater the number of lawsuits against businesses, for example, the more work there is for lawyers on both sides of those suits. Hence, even lawyers who are socially conservative might prefer judges who support many liberal economic and regulatory policies.

Although none of this evidence is conclusive, I tend to share the view of many people that, on average, lawyers are more liberal than the rest of the public. If lawyers are in fact more liberal, then, as I explained in the previous Part, we might expect merit systems to select judiciaries that are more liberal than those selected by the public or their elected representatives.

I am unaware of any effort to test this hypothesis empirically, but it is interesting to note that three scholars recently came to a similar conclusion in *692 a study of the lawyers' commission that evaluates federal judicial nominations: the ABA Standing Committee on the Federal Judiciary.⁶³ After controlling for other variables, these scholars found evidence of “systematic bias toward Democratic nominees in the ABA's ratings,”⁶⁴ and they hypothesized that the bias might have been caused by a “skew toward the left” among members of the ABA's Standing Committee.⁶⁵

It is beyond the scope of this Article to make the same sort of rigorous assessment of merit systems. Nonetheless, in order to shed at least a bit of light on the matter, I collected data on the ideological preferences of the appellate nominees recommended since 1995 by the merit commissions in two states. The two states I selected were Tennessee, where during this time the bar controlled twelve of the seventeen members of the merit commission (71%), and Missouri, where the bar controlled three of the seven commission members (43%). Although far from conclusive, the data I collected on the nominees from these commissions is consistent with the hypothesis that the ideological preferences of judges in merit systems are to the left of those who would have been selected by the electorate or their representatives.

In order to obtain data on the ideological preferences of the appellate nominees in Tennessee and Missouri, I first obtained a list of all such nominees from the Tennessee Administrative Office of Courts and the Missouri Appellate Judicial Commission.⁶⁶ In Tennessee, there have been 90 appellate nominations since 1995, and in Missouri there have been 108 during that time. The lists of nominees are set forth in Appendices A and B.

It is impossible to observe directly the ideological preferences of each of these nominees; as with all studies in this area, preferences can only be ascertained through proxies. A common proxy for the personal ideological preferences of a judge is the political party with which the judge is affiliated,⁶⁷ but even this proxy was not directly observable here because both Tennessee and Missouri hold open primaries and do not require registration with a political party.⁶⁸

Tennessee does record, however, whether an individual has voted in a Democratic or Republican primary; thus, it is possible to get an indication of a nominee's partisan affiliation by examining whether the nominee voted *693 more often in Democratic primaries or Republican primaries.⁶⁹ Consequently, I sought from each of the county election offices in Tennessee the primary voting history for all of the individuals nominated for appellate judgeships by Tennessee's merit commission. The primary voting histories I received were not over a uniform time period; I was able to obtain data on some nominees back to the 1980s, whereas I was able to obtain data on others only back to 2000.⁷⁰ Nonetheless, I received several years of primary voting records for eighty-eight of ninety appellate nominations.⁷¹ In eighty-seven of those nominations, the nominee voted more often in one of the two parties' primaries; one nominee voted an equal number of times in each party's primaries. With respect to the eighty-seven nominees for which I could assign a partisan affiliation, 67% voted more often in Democratic primaries, and 33% voted more often in Republican primaries. In order to get a sense of how this ratio of Democrats to Republicans compared to the ratio in the Tennessee electorate as a whole, I collected data on the percentage of votes received by Democratic candidates since 1995 in general elections for the Tennessee House of Representatives and for Tennessee's seats in the U.S. House of Representatives.⁷² Figure 1 shows this comparison: although 67% of the merit nominees in Tennessee *694 since 1995 voted more often in Democratic Party primaries, only 51% of the votes for the state House and only 49% of the votes for Tennessee's federal House seats were for Democratic candidates over the same time.

Figure 1: Percentage of Tennessee merit-plan nominees since 1995 who voted more often in Democratic primaries versus percentage of votes received by Democratic candidates in Tennessee's state and federal House races⁷³

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*695 Figure 2 shows the same comparison as Figure 1 but in increments of two-year election cycles. In all but one election cycle, the Tennessee merit system nominated a greater percentage of judges more affiliated with the Democratic Party than the percentage of votes Democratic candidates received in Tennessee's state and federal House races. The one exception was during 1995-96, where the percentage of Democratic merit nominees was 50%, slightly lower than the 50.1% and 53.2% of votes that went to Democratic candidates in state and federal House races, respectively, in the November 1994 election (which was the election that selected state and federal House members who served during 1995-96).

Figure 2: Percentage of Tennessee merit-plan nominees who voted more often in Democratic primaries versus percentage of votes received by Democratic candidates in Tennessee's state and federal House races⁷⁴

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Unfortunately, Missouri does not similarly record whether voters cast *696 ballots in Republican or Democratic primary elections. Thus, I used a different proxy for partisan affiliation: campaign contributions. Although campaign contributions are also used by scholars as a proxy for partisan affiliation,⁷⁵ they are, at least in my view, a less useful proxy than party registration or primary voting because many people do not make any campaign contributions at all, and lawyers may contribute to candidates for professional reasons as opposed to personal ones. Nonetheless, as this

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was the only indication of partisan affiliation readily ascertainable in Missouri, it was the one I used. I gathered data on federal and state campaign contributions from the electronic databases maintained by the Federal Elections Commission (FEC),⁷⁶ OpenSecrets,⁷⁷ and the Missouri Ethics Commission (MEC).⁷⁸ The FEC database included contributions from 1997, OpenSecrets from 1995, and the MEC from 2002.⁷⁹ I recorded any contribution to a Republican or Democratic candidate or to the Republican or Democratic Parties. Of the 108 nominations in Missouri, the nominee made campaign contributions in only half of the cases (fifty four). Nonetheless, these fifty-four nominees can be examined to provide some sort of indication of the political balance of the Missouri merit commission. Of the fifty-four nominees in Missouri since 1995 who made any campaign contributions, 87% gave more to Democrats than Republicans, and only 13% gave more to Republicans than Democrats. Over the same time period, Democratic candidates in Missouri only received roughly 50% of the general election votes in state and federal House races.⁸⁰ Figure 3 shows *697 these comparisons. It should be noted that the disparity in the amount of money these nominees contributed is even more stark than the disparity in the number of nominees who contributed: nearly 93% (\$316,010) of all of the money contributed went to Democratic candidates, whereas only 7% (\$24,615) went to Republicans.

***698 Figure 3: Percentage of Missouri merit-plan nominees since 1995 who contributed more money to Democratic candidates versus percentage of votes received by Democratic candidates in Missouri's state and federal House races**⁸¹

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Figure 4 shows the same comparison as Figure 3 but in increments of two-year election cycles. In every election cycle, the Missouri merit system nominated a greater percentage of individuals evidencing more affiliation with the Democratic Party than the percentage of votes Democratic candidates received in state and federal House races.

***699 Figure 4: Percentage of Missouri merit-plan nominees who contributed more money to Democratic candidates versus percentage of votes received by Democratic candidates in Missouri's state and federal House races**⁸²

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Figures 1-4 are consistent with the hypothesis that merit systems select judiciaries with ideological preferences to the left of those that would have been selected by the public or its elected representatives. At the same time, it is important not to read too much into these graphs. Again, in Missouri, half the data is missing. If all of the missing nominees were Republicans, Figures 3 and 4 would look much different. Of course, there is little reason to believe that the missing data would look any different than the data that was uncovered. But even apart from this particular limitation, there are several other reasons to treat Figures 1-4 cautiously.

***700** First, these graphs are for only two states, and, in particular, they are for the two states where the merit system may be the most controversial.⁸³ It is possible that the merit system has become controversial in these two states precisely because these are the only two states in which the systems have resulted in judiciaries skewed to the left.

Second, for much of the time covered by the graphs, both Tennessee and Missouri had Democratic governors. Tennessee had Democratic governors in six of the fourteen years since 1995,⁸⁴ and Missouri had Democratic governors in ten of fourteen years.⁸⁵ Some commentators believe that merit commissions alter the partisan affiliation of the judges they nominate in deference to the political party of the governor;⁸⁶ moreover, in Missouri, the governor has the power to select some of the merit commission members.⁸⁷ The data from Tennessee and Missouri is consistent with this belief but not in a way that undermines the hypothesis of liberal skew. Table 3 compares the percentage of merit nominees who were more affiliated with the Democratic Party in primary voting or campaign contributions in Figures 1-4 in years in

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which the governors in Tennessee and Missouri were Democrats to the percentage when the governors were Republicans. Table 3 shows that merit commissions sent overwhelmingly Democratic slates to Democratic governors (82% and 94%) and only less overwhelmingly Democratic slates to Republican governors (54% and 72%).

***701 Table 3: Percentage of merit nominees who were Democrats in Tennessee and Missouri by political party of the Governor**

	Percentage of merit nominees who were Democrats	
	Years with Democratic Governors	Years with Republican Governors
Tennessee	82% (n = 39)	54% (n = 48)
Missouri	94% (n = 36)	72% (n = 18)

Third, in Tennessee, all of the members of the merit commission during this time were selected by the speakers of the two houses of the state legislature (again, mostly from lists of nominees provided by several special bar associations).⁸⁸ Over almost the entire period since 1995, the speakers of both Tennessee houses were Democrats.⁸⁹ It is possible, then, that the partisan skew of the nominees in Tennessee may be more a function of who the speakers of the Tennessee legislature were, as opposed to the ideological preferences of the bar associations that submitted the names for membership on the commission.

Finally, it should be noted that the data presented in Figures 1-4 reflect the judges who were nominated to the governor by the lawyers' commissions, not the judges who were ultimately selected by the governor. It is possible that any skew in nominations was not reflected in the ultimate selections.⁹⁰ Moreover, even if the governors did not correct the skew in nominations, it does not necessarily follow that the judiciaries selected by voters or their elected representatives would have looked much different than the judiciaries selected by the merit systems. Although, again, the hypothesis of merit-selection proponents is that voters and elected officials will select judges who ***702** share their ideological preferences, the reality of electoral politics can dramatically undermine the theory.⁹¹

For all these reasons, much more empirical research is needed before any sort of conclusions can be drawn regarding the ideological shift in the judiciary, if any, that might accompany merit selection.

I wish to close this Article by making the obvious point that simply because merit selection might produce a leftward shift in the judiciary does not necessarily mean that merit selection is an inferior method of choosing judges. Many people believe that the judiciary (at least when interpreting a constitution) should act in a counter-majoritarian manner, and, therefore, by design, the judiciary should not reflect the ideological preferences of the public.⁹² Not everyone believes this, of course,⁹³ but even if one does believe this, it is still not clear why the judiciary's divergence from public opinion should be a leftward divergence. Judges can perform a counter-majoritarian function from the right of public opinion just as well as they can from the left; judges can strike down laws because they violate the right to bear arms, the right to freely exercise religion, and the right not to have property taken (all constitutional rights affiliated today with the right side of the political spectrum), just as easily as they can strike down laws because they violate the ***703** right to abortion, the right to same-sex marriage, and the right to be free from unreasonable searches (all constitutional rights affiliated today with the left side of the political spectrum). In short, I do not believe any leftward skew in the judiciary that may be associated with merit selection can be justified simply by invoking the principle of counter-majoritarianism. Whether the

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proponents of merit systems can justify any such skew on other grounds remains to be seen; I am unaware of any effort by proponents to address this matter. But if future empirical research confirms that merit systems are associated with a leftward shift in the ideological direction of the judiciary, then proponents may need to do so sooner rather than later.

V. Conclusion

We do not know if merit systems produce judiciaries more liberal than those that would be produced by the other methods of judicial selection. I think there are reasons, however, to believe that they might. No system of judicial selection delegates as much of its power to bar associations as merit systems do, and many people believe that lawyers as a group are more liberal than the public at large. Moreover, it is hard to believe that any differences in the ideological preferences of lawyers and the public will not end up reflected in the judiciaries that each group selects, and, although far from conclusive, data from two merit states is consistent with this hypothesis. If future empirical research confirms this hypothesis, then proponents of merit selection may need to change the focus of their energies away from the notion that merit selection takes the politics out of judicial selection and towards an explanation as to why the judiciary should reflect the political beliefs of lawyers rather than the public.

***704 Appendix A: Tennessee Nominees, January 1995 - July 2008**

Ash, Don R. 2000, Tennessee Court of Criminal Appeals

Bailey, D'Army 2006, Tennessee Supreme Court; 2007, Tennessee Supreme Court

Barker, William M. 1995, Tennessee Court of Criminal Appeals; 1996, Tennessee Supreme Court; 1998, Tennessee Supreme Court

Bennett, Andy D. 2007, Tennessee Court of Appeals

Brown, Mark A. 2004, Tennessee Court of Appeals

Brown, George H., Jr. 1996, Tennessee Supreme Court

Cain, William B. 1998, Tennessee Court of Appeals

Capparella, Donald 2003, Tennessee Court of Appeals; 2007, Tennessee Court of Appeals

Clark, Cornelia A. 1995, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Appeals; 2003, Tennessee Court of Appeals; 2005, Tennessee Supreme Court

Clement, Frank G., Jr. 2003, Tennessee Court of Appeals

Corlew, Robert E. III 1995, Tennessee Court of Criminal Appeals

Cottrell, Patricia J. 1998, Tennessee Court of Appeals; 1998, Tennessee Court of Appeals

Crossley, Robert L. 1998, Tennessee Supreme Court

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Daniel, Joseph S. 1996, Tennessee Court of Criminal Appeals

DeVasher, Jeffrey A. 2000, Tennessee Court of Criminal Appeals

Dinkins, Richard H. 2006, Tennessee Supreme Court; 2006, Tennessee Supreme Court; 2007, Tennessee Court of Appeals

Duncan, Christine H. 2007, Tennessee Court of Appeals

Glenn, Alan E. 1998, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals; 1999, Tennessee Court of Criminal Appeals

Gordon, J. Houston 2006, Tennessee Supreme Court; 2006, Tennessee Supreme Court; 2006, Tennessee Supreme Court

Haltom, William H., Jr. 2008, Tennessee Court of Appeals

Higgs, W. Otis, Jr. 1998, Tennessee Court of Criminal Appeals

Holder, Janice M. 1996, Tennessee Supreme Court

Hollars, Amy V. 2007, Tennessee Court of Appeals; 2007, Tennessee Court of Appeals

*705 Irvine, Kenneth F., Jr. 1998, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals

Johnson, G. Richard 2004, Tennessee Court of Appeals

Jones, Robert L. 1996, Tennessee Court of Criminal Appeals

Knowles, E. Clifton 1998, Tennessee Court of Appeals

Koch, William C., Jr. 2005, Tennessee Supreme Court; 2006, Tennessee Supreme Court; 2007, Tennessee Supreme Court

Lafferty, Leonard T. 1996, Tennessee Court of Criminal Appeals

Lanier, Robert A. 1995, Tennessee Court of Appeals

Lee, Sharon G. 2004, Tennessee Court of Appeals

Lewis, George T. 2006, Tennessee Supreme Court

Lillard (Kirby), Holly K. 1995, Tennessee Court of Appeals

McGinley, C. Creed 2007, Tennessee Supreme Court

McLin, J. C. 2004, Tennessee Court of Criminal Appeals

McMullen, Camille R. 2008, Tennessee Court of Criminal Appeals

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Moore, Hugh J., Jr. 2006, Tennessee Court of Criminal Appeals

Mowles, Linda J.H. 1999, Tennessee Court of Appeals

Ogle, Norma M. 1998, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals

Page, Roger A. 2008, Tennessee Court of Criminal Appeals

Redding, Robert V. 1995, Tennessee Court of Appeals

Riley, Joe G. 1996, Tennessee Court of Criminal Appeals

Rose, Todd A. 2008, Tennessee Court of Appeals

Schaffner, Mary M. 1998, Tennessee Court of Appeals

Shipman, Janet L. 1999, Tennessee Court of Criminal Appeals

Smith, Jerry L. 1995, Tennessee Court of Criminal Appeals

Stafford, James S. 2008, Tennessee Court of Appeals

Swiney, David M. 1998, Tennessee Supreme Court; 1999, Tennessee Court of Appeals

Thomas, Dea K., Jr. 2006, Tennessee Court of Criminal Appeals

Turnbull, John A. 2005, Tennessee Supreme Court

Voss, Paula R. 1995, Tennessee Court of Criminal Appeals; 1996, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals; 2006, Tennessee Court of Criminal Appeals

*706 Wade, Gary R. 2006, Tennessee Supreme Court

Walker, Joe H. 2004, Tennessee Court of Criminal Appeals; 2008, Tennessee Court of Criminal Appeals

Ward, William M. 1996, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals; 1999, Tennessee Court of Criminal Appeals; 2004, Tennessee Court of Criminal Appeals

Wedemeyer, Robert W. 2000, Tennessee Court of Criminal Appeals

Williams, Frank V., III 1999, Tennessee Court of Appeals

Williams, John E. 1998, Tennessee Court of Criminal Appeals

Witt, James C., Jr. 1996, Tennessee Court of Criminal Appeals

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Woodall, Thomas T. 1996, Tennessee Court of Criminal Appeals

Wright, Thomas J. 1995, Tennessee Court of Criminal Appeals; 1996, Tennessee Court of Criminal Appeals

***707 Appendix B: Missouri Nominees, January 1995 - December 2008**

Ahuja, Alok 2007, Missouri Court of Appeals; 2007, Missouri Court of Appeals; 2007, Missouri Court of Appeals

Appelquist, Susan 2006, Missouri Court of Appeals; 2007, Missouri Court of Appeals

Baker, Nannette A. 2004, Supreme Court of Missouri; 2004, Missouri Court of Appeals; 2007, Supreme Court of Missouri

Barney, Robert S. 1995, Missouri Court of Appeals

Bates, Jeffrey 2003, Missouri Court of Appeals Brechkenridge, Patricia A. 2007, Supreme Court of Missouri

Burger, Joan M. 1999, Missouri Court of Appeals; 2000, Missouri Court of Appeals

Burrell, Don E., Jr. 2007, Missouri Court of Appeals

Callahan, Richard G. 1998, Supreme Court of Missouri

Chapel, Nimrod T., Jr. 2007, Missouri Court of Appeals

Cohen, Patricia L. 2003, Missouri Court of Appeals

Curless, Charles D. 2005, Missouri Court of Appeals

Dandurand, Joseph P. 1999, Missouri Court of Appeals; 1999, Missouri Court of Appeals; 2007, Missouri Court of Appeals

Day, Arnold R. 1999, Missouri Court of Appeals

Doerhoff, Dale 1995, Supreme Court of Missouri

Dowd, James R. 1995, Missouri Court of Appeals; 1997, Missouri Court of Appeals

Draper, George W., III 1997, Missouri Court of Appeals; 2000, Missouri Court of Appeals

Farragut-Hemphill, Sandra 2003, Missouri Court of Appeals

Fischer, Zel M. 2007, Missouri Court of Appeals; 2008, Supreme Court of Missouri

Friedman, Lawrence C. 2004, Missouri Court of Appeals

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Gaertner, Gary M., Jr. 2007, Missouri Court of Appeals

Gunn, Michael 2002, Missouri Court of Appeals

Hamilton, Gene 1995, Missouri Court of Appeals; 1995, Supreme Court of Missouri; 1996, Missouri Court of Appeals; 1997, Missouri Court of Appeals

***708** Hardwick, Lisa W. 2001, Missouri Court of Appeals; 2008, Supreme Court of Missouri

Hoff, Mary K. 1995, Missouri Court of Appeals

Holliger, Ronald R. 1999, Missouri Court of Appeals; 1999, Missouri Court of Appeals; 2007, Supreme Court of Missouri; 2008, Supreme Court of Missouri

Howard, Victor C. 1996, Missouri Court of Appeals

Lynch, Gary W. 2005, Missouri Court of Appeals

Manners, Michael W. 1998, Supreme Court of Missouri; 2002, Supreme Court of Missouri

Martin, Cynthia L.R. 2001, Missouri Court of Appeals; 2007, Missouri Court of Appeals; 2007, Missouri Court of Appeals

Moody, John G. 2005, Missouri Court of Appeals

Mooney, Lawrence E. 1995, Missouri Court of Appeals; 1997, Missouri Court of Appeals; 1998, Missouri Court of Appeals

Neill, Margaret M. 1995, Missouri Court of Appeals

Newberry, James W. 2001, Missouri Court of Appeals

Newton, Thomas H. 1999, Missouri Court of Appeals

Norton, Glenn A. 1998, Missouri Court of Appeals; 1999, Missouri Court of Appeals; 2002, Missouri Court of Appeals

Odenwald, Kurt S. 2007, Missouri Court of Appeals

O'Malley, John R. 1997, Missouri Court of Appeals

Payne, James M. 2000, Missouri Court of Appeals

Rahmeyer, Nancy S. 2001, Missouri Court of Appeals

Reeves, W. Edward 2006, Missouri Court of Appeals; 2007, Missouri Court of Appeals

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Richter, Roy L. 2005, Missouri Court of Appeals; 2005, Missouri Court of Appeals

Riederer, Albert A. 1997, Missouri Court of Appeals

Romines, Kenneth M. 2005, Missouri Court of Appeals

Russell, Mary R. (Rhodes) 1995, Missouri Court of Appeals; 2001, Supreme Court of Missouri; 2004, Supreme Court of Missouri

Sanderson, Martha M.S. 2005, Missouri Court of Appeals

Schnake, Richard 2003, Missouri Court of Appeals

Scott, Daniel E. 2006, Missouri Court of Appeals

Shaw, Booker T. 2002, Missouri Court of Appeals

*709 Sheffield, Mary W. 1995, Missouri Court of Appeals; 2003, Missouri Court of Appeals

Smart, Clifton M., III 2002, Supreme Court of Missouri; 2004, Supreme Court of Missouri

Smith, Edwin H. 1995, Missouri Court of Appeals

Stemmons, Randee 2001, Missouri Court of Appeals

Stith, Rebecca S. 2002, Missouri Court of Appeals; 2003, Missouri Court of Appeals

Stith, Laura D. 2001, Supreme Court of Missouri

Sullivan, Sherri B. 1997, Missouri Court of Appeals; 1998, Missouri Court of Appeals; 1999, Missouri Court of Appeals

Switzer, Erwin O., III 2002, Missouri Court of Appeals; 2002, Missouri Court of Appeals; 2004, Missouri Court of Appeals

Teitelman, Richard B. 1997, Missouri Court of Appeals; 1997, Missouri Court of Appeals; 2001, Supreme Court of Missouri; 2002, Supreme Court of Missouri

Tucker, Laurence R. 1996, Missouri Court of Appeals

Weaver, Thomas B. 2005, Missouri Court of Appeals; 2005, Missouri Court of Appeals; 2007, Missouri Court of Appeals

Welsh, James E. 2007, Missouri Court of Appeals

Westbrooke, Henry W., Jr. 1995, Missouri Court of Appeals

White, Ronnie L. 1995, Supreme Court of Missouri

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Wilkins, Frederick J. 1995, Missouri Court of Appeals

Williams, Michael S. 1995, Missouri Court of Appeals

Winn, Karen A. 2001, Missouri Court of Appeals

Wolff, Michael A. 1998, Supreme Court of Missouri

Footnotes

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¹ See F. Andrew Hanssen, *On the Politics of Judicial Selection: Lawyers and State Campaigns for the Merit Plan*, 110 PUB. CHOICE 79, 87 (2002) (“[T]he merit plan gives state bar associations a degree of influence in the choice of judicial candidate unmatched under any other selection procedure. Lawyers support it, accordingly.”). I use the term “state bar association” throughout this Article in the broad sense to mean members of a state’s bar. Some merit systems rely on the entire bar to select judges, and other systems rely only on those bar members who have joined voluntary bar organizations.

² See, e.g., Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 513 (1978) (noting that proponents assert that merit systems “will shift emphasis away from partisan to professional qualifications for the judicial office”); TENN. CODE ANN. § 17-4-101(a) (2008) (“It is the declared purpose and intent of the general assembly by the passage of this [merit system] to make the courts ‘nonpolitical.’”); J. Andrew Crompton, *Commentary: Pennsylvanians Should Adopt a Merit Selection System*, 106 DICK. L. REV. 755, 765 (2002) (suggesting that merit selection limits the role of politics in the judicial selection process); Mark I. Harrison et al., *On the Validity and Vitality of Arizona’s Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L.J. 239, 256 (2007) (arguing that merit selection “is almost entirely transparent, exacting, and virtually devoid of political influence”); Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 ALB. L. REV. 713, 720 (2005) (asserting that merit systems are “for sure less political”).

³ See SUSAN B. CARBON & LARRY C. BERKSON, *JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES* 2-4 (1980) (describing the various merit plans considered during the early twentieth century).

⁴ At the time of the founding, every state selected its judges through executive or legislative appointment. See EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 98 (1944) (“[I]n eight of the thirteen states, the judges were elected by the legislature. In the remaining five, they were appointed by the governor”). Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176 (1980) (“After the Revolution, the states continued to select judges by appointment”). By the time of the Civil War, however, the vast majority of states had changed their method of judicial selection to direct election by the people. See Berkson, *supra*, at 176 (“By the time of the Civil War, 24 of 34 states had established an elected judiciary with seven states adopting the system in 1850 alone.”). According to historians, the reason so many states switched from appointment to election during the first half of the nineteenth century was a change in the country’s attitude about democracy - a change that grew out of the populism of Andrew Jackson’s presidency. See *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002) (“Starting with Georgia in 1812, States began

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to provide for judicial election, a development rapidly accelerated by Jacksonian democracy.”); CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 4 (1997) (noting that “the Jacksonian movement encouraged more popular control of judges”); Berkson, *supra*, at 176 (noting that people “were determined to end [the] privilege of the upper class and to ensure the popular sovereignty we describe as Jacksonian Democracy”); Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 167 (2007) (“States began to move away from appointive selection methods in the mid-1800s with the rise of Jacksonian democracy and its emphasis on democratic accountability, individual equality, and direct voter participation in governmental decision-making.”).

5 See, e.g., RICHARD C. BOX, DEMOCRACY AND PUBLIC ADMINISTRATION 69 (2006) (“[T]he proper role of citizens was to rally round [sic] the quest for expert[s]”); James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 953, 961 (1998) (noting the “Progressive fondness for reliance on experts”).

6 See, e.g., Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 854 (2002) (noting that the reform movement in the Progressive Era was based on the hope that “experts, rather than voters, would be responsible for selecting judges”).

7 See *id.* at 854.

8 See *id.* at 855 (“Merit selection was endorsed by the American Bar Association in 1937, prompting several bar associations to investigate merit selection as a possibility in their own jurisdictions.”).

9 Hanssen, *supra* note 1, at 83 (“National efforts to implement the merit plan in state courts have been conducted by national lawyers’ groups, while state bar associations and individual lawyers have conducted state-specific campaigns.”).

10 CARBON & BERKSON, *supra* note 3, at 11.

11 See AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2007), available at [http:// www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf](http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf) (listing the states that use merit selection to select judges to their highest courts). Fewer states have adopted merit systems to select lower court judges. *Id.*

12 See AM. JUDICATURE SOC’Y, JUDICIAL NOMINATING COMMISSIONS, [http:// www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=) (last visited Feb. 21, 2009) (describing how each state’s nominating commission must provide a list of nominees to the governor or, in the District of Columbia, to the President).

13 See *id.*

14 See Monica Mercer, *Judicial Nominating Commission to Meet for First Time*, CHATTANOOGA TIMES FREE PRESS (Sept. 8, 2009) (“[T]he Legislature voted to keep the plan but reinvent the way in which the nominating committee is selected. The new commission takes away mandated appointments to the commission by various legal and special-interest groups such as the state bar association.”).

15 See TENN. CODE ANN. § 17-4-102(a)(5) (noting that “[t]hree (3) members shall not be lawyers”).

16 See TENN. CODE ANN. § 17-4-102(a)(1)-(4) (2008) (requiring commissioners to come from nominations made by the Tennessee Bar Association, the Tennessee Defense Lawyers Association, the Tennessee Trial Lawyers Association, the Tennessee District Attorneys General Conference, and the Tennessee Association of Criminal Defense Lawyers).

17 See Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL’Y 386, 387-88 (2008) (comparing the bar’s influence over a variety of states’ judicial nominating commissions).

18 This table is drawn from information gathered by the American Judicature Society, *supra* note 12, from the following state legal materials: ALASKA CONST. art. IV, § 8; ARIZ. CONST. art. VI, § 36; COLO. CONST. art. VI, § 24; HAW. CONST.

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art. VI, § 4; IOWA CONST. art. V, § 16; MO. CONST. art. V, § 25(d); NEB. CONST. art. V, § 21(4); N.M. CONST. art. VI, §§ 35-36; OKLA. CONST. art. 7-B, § 3; WYO. CONST. art. V, § 4(c); CONN. GEN. STAT. § 51-44a; D.C. CODE § 1-204.34; FLA. STAT. § 43.291; IND. CODE §§ 33-27-2-1 to -2; KAN. STAT. ANN. § 20-120; R.I. GEN. LAWS § 8-16.1-2; S.D. CODIFIED LAWS § 16-1A-2; TENN. CODE ANN. § 17-4-102; UTAH CODE ANN. § 78A-10-202; VT. STAT. ANN. tit. 4, § 601; Md. Exec. Order No. 01.01.2008.04 (Mar. 13, 2008); Mass. Exec. Order No. 500 (Mar. 13, 2008); N.H. Exec. Order No. 2005-02 (Feb. 25, 2005); N.Y. Exec. Order No. 4 (Jan. 1, 2007).

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This table is drawn from information gathered by the American Judicature Society, *supra* note 12, from the following state legal materials: ALASKA CONST. art. IV, § 8 (the three lawyer members are appointed by the board of governors of the Alaska Bar Association); ARIZ. CONST. art. VI, § 36; IND. CODE § 33-27-2-1 to -2 (one lawyer member is selected from each district by the members of the bar in that district); IOWA CONST. art. V, § 16 (one lawyer member is selected from each district by the members of the bar in that district); KAN. STAT. ANN. § 20-120 (one lawyer member is selected from each of the four congressional districts by the members of the bar in that district, and one chairperson is selected by the state bar); MO. CONST. art. V, § 25(d) (lawyer members are elected by the state bar); NEB. CONST. art. V, § 21(4) (lawyer members are elected by the state bar); OKLA. CONST. art. 7-B, § 3 (lawyer members are elected by the state bar); S.D. CODIFIED LAWS § 16-1A-2 (lawyer members are appointed by the president of the South Dakota Bar Association); WYO. CONST. art. V, § 4(c) (lawyer members are elected by the state bar); TENN. CODE ANN. § 17-4-102 (six lawyer members are appointed by the Speaker of the Senate from a list of nominees provided by the Tennessee Bar Association and other lawyer associations, and six lawyer members are appointed by the Speaker of the House from the same list; the Speakers also select two lawyer members who were not otherwise nominated); VT. STAT. ANN. tit. 4, § 601 (the three lawyer members are elected by “[a]ttorneys admitted to practice before the supreme court of Vermont”); D.C. CODE § 1-204.34 (two lawyer members are appointed by the D.C. Bar Association, one lawyer member is appointed by the mayor of D.C., and one member - either lawyer or nonlawyer - is appointed by the President of the United States); HAW. CONST. art. VI, § 4; N.M. CONST. art. VI, §§ 35-36 (four lawyer members are appointed jointly by the president of the New Mexico Bar Association and the judge members of the commission); FLA. STAT. § 43.291 (four lawyer members are nominated by the state bar and appointed by the governor); Md. Exec. Order No. 01.01.2008.04 (Mar. 13, 2008) (five lawyer members are submitted to the governor for appointment by the president of the Maryland Bar Association); AM. JUDICATURE SOC’Y, *supra* note 12 (one lawyer member is appointed by the Delaware Bar Association president with the governor’s consent, and four lawyer members are appointed by the governor); COLO. CONST. art. VI, § 24 (the seven lawyer members are selected by a majority vote of the governor, chief justice, and state attorney general); CONN. GEN. STAT. § 51-44(a) (the six lawyer members are appointed by the governor); Mass. Exec. Order No. 500 (Mar. 13, 2008) (all twenty-one members of the commission are appointed by the governor); N.H. Exec. Order No. 2005-02 (Feb. 25, 2005) (the six lawyer members are appointed by the governor); N.Y. Exec. Order No. 4 (Jan. 1, 2007) (two lawyer members are chosen by governor, and two are chosen by the chief judge of the court of appeals; the president pro tempore, speaker of the assembly, minority leader of the assembly, and minority leader of the senate each select one member, either a lawyer or nonlawyer); R.I. GEN. LAWS § 8-16.1-2 (the governor appoints three lawyer members and selects one additional lawyer member from a list of three lawyers submitted by the speaker of the house; the governor appoints an additional member (either a lawyer or nonlawyer) from a list submitted by the senate majority leader); UTAH CODE ANN. § 78A-10-202 (lawyer members are appointed by the governor).

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Even in the several merit states that do not rely on uncontested referenda to retain judges, the retention mechanisms they do use likewise appear to facilitate the transfer of power from the electorate to the bar. These mechanisms do so either by drawing on the bar-selected commission during reappointment or by enhancing the importance of the bar’s role in the initial selection by permitting judges to serve only one term. For example, in Hawaii, the merit commission alone decides whether to retain an incumbent, and, in three other merit states - Connecticut, Delaware, and New York - judges must be re-nominated to the governor by the merit commission. See AM. JUDICATURE SOC’Y, *supra* note 12. In three other merit states - Massachusetts, New Hampshire, and Rhode Island - judges are permitted to serve only one term. See *id.* The two non-referenda states with mechanisms that do not appear to facilitate the transfer of power from the electorate to the bar are Vermont, where the legislature decides whether to retain judges, and New Mexico, where judges run the first time they are up for retention in a partisan election (but thereafter they are subject only to uncontested referenda). See *id.*

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- 21 See, e.g., 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, 133 (2007) (arguing that retention elections provide accountability).
- 22 Indeed, some scholars have suggested that retention referenda may have actually been designed to insulate judges from democratic accountability. These scholars have noted that the architects of the merit system actually favored life tenure for judges, but they suspected the public would balk at being entirely excluded from a role in choosing such important public officials. See *id.* (acknowledging that, although the ABA preferred good behavior tenure, it believed that retention elections might be necessary for maintaining public confidence); G. Alan Tarr, *Do Retention Elections Work?*, 74 *MO. L. REV.* 605, 609 (2009) (noting that the retention referendum “was not a fundamental feature” of the merit plan, but, rather, “was originally offered only to quiet the fears of devotees of the elective method”). These scholars believe that the architects of merit selection devised the retention referendum to approximate life tenure without the appearance of life tenure. See CARBON & BERKSON, *supra* note 3, at 6-8 (noting that “many proponents of the commission plan would have preferred good behavior tenure in lieu of retention elections,” and “[t]hey perceived retention as a ‘sop’ to those committed to electoral control over the judiciary”); Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 *ALB. L. REV.* 803, 806 (2004) (“Merit selection uses the public as participants in what is predetermined to be a useless exercise designed to ensure the retention of the incumbent.”).
- 23 See, e.g., Dimino, *supra* note 22, at 805 (“By removing challengers from the ballot, retention races eliminate the public figures most likely to motivate and organize opposition to the incumbent.”).
- 24 Political scientists believe “that the most important cue for voters is political party affiliation. Party labels are signals and voters rely heavily on them.” Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 *DEPAUL L. REV.* 423, 433 (2007) (footnote omitted).
- 25 See HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 170 (1988) (“You can’t beat somebody with nobody.”).
- 26 See generally, e.g., Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 *AM. J. OF POL. SCI.* 20 (2006) (using incumbent loss rates as a measure of “popular control over the bench”).
- 27 See Larry Aspin, *Trends in Judicial Retention Elections, 1964 - 1998*, at 83 *JUDICATURE* 79, 79 & n.1 (1999) (finding that in 4,588 retention referenda in a sample of ten states over thirty-four years, only fifty-two judges were not retained).
- 28 See Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE* 165, 177 (Matthew Streb ed., 2007) (finding that 22.9% of state supreme court incumbents were defeated in partisan elections while only 1.8% of incumbents were defeated in retention referenda between 1980 and 2000).
- 29 Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 *AM. POL. SCI. REV.* 315, 319 (2001).
- 30 William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 *JUDICATURE* 340, 347 (1987).
- 31 See, e.g., sources cited *supra* note 2 (arguing *inter alia* that merit selection leads to less emphasis on politics and more emphasis on merit); see also Marilyn S. Kite, *Wyoming’s Judicial Selection System: Is it Getting the Job Done?*, 34 *FORDHAM URB. L.J.* 203, 204 (2007) (contending that merit selection focuses on merit and objective qualifications of judges and ignores judges’ political and personal connections); James E. Lozier, *The Missouri Plan a/k/a Merit Selection Is the Best Solution for Selecting Michigan’s Judges?*, 75 *MICH. B.J.* 918, 921 (1996) (writing that merit selection “ensures that the most qualified individuals are appointed to the bench without owing any political favors”); Tim Dallas Tucker & Christina L. Fischer, *Merit Selection: A Better Method to Select South Dakota’s Circuit Court Judges*, 49 *S.D. L. REV.* 182, 204 (2004) (“Merit selection provides for a system where merit [and] not money and politics, determine[s] who will be South Dakota’s judges.”); Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 *FLA. ST. U. L. REV.* 1, 33 n.223 (1995) (reporting the results from a study of New York City judges that found that merit selection produces a “highly qualified and more politically diverse judiciary”).

- 32 See *id.* Another possible meaning of “politics” besides the ideological preferences of judicial candidates is “politicking”: proponents might mean only that judicial candidates need not campaign - raise money, advertise, deliver speeches, shake hands, etc. - in order to win a spot on the bench. I consider this a weaker form of the argument for merit selection because, although merit selection requires judges to engage in less politicking than required in elections, it requires no less than systems where judges are appointed by elected officials.
- 33 The most comprehensive study found that for a number of objective measures of “merit,” “merit selection judges do not possess greater judicial credentials than judges in other states.” Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 233 (1987) (considering type of undergraduate and law school attended, government, judicial and private practice experience, and number of years of legal experience). A more recent study found that merit system judges author opinions that are more often cited in other jurisdictions but that judges in other systems are more productive than merit system judges. As a result, judges in merit systems are actually cited less frequently overall in other jurisdictions than judges in other systems. See Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* 17 (Univ. of Chi. Sch. of Law, John M. Olin Law & Econ. Working Paper No. 357, 2007), available at <http://ssrn.com/abstract=1008989>; RICHARD POSNER, *HOW JUDGES THINK* 138 & n.18 (2008) (describing the Choi-Gulati-Posner study to find that “state supreme court justices receive more citations in judicial opinions from judges in other states the less secure their tenure is” because, although “[t]he appointed judges receive more citations per opinion, [t]he elected judges write more opinions, and the relative number of opinions is greater than the relative number of citations per opinion”); see also Glick, *supra* note 2, at 523-31 (surveying some of the earlier studies).
- 34 See Brian T. Fitzpatrick, *Errors, Omissions, and the Tennessee Plan*, 39 U. MEM. L. REV. 85, 120 (2008).
- 35 See Glick, *supra* note 2, at 528 (emphasis added).
- 36 See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 245-55 (1993) (analyzing the ideological voting patterns of Justices on the Warren, Burger, and Rehnquist courts); David Adamany, *The Supreme Court*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 5, 11 (John B. Gates & Charles A. Johnson eds., 1991) (finding “highly consistent ideological voting and clear ideological divisions on freedom, equality, and economic issues” on the Supreme Court in the 1980s); John B. Gates, *Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court, 1837-1964*, 31 AM. J. POL. SCI. 259, 270-71 (1987) (finding that the Court most often struck down statutes from states in which the political majority was contrary to the Justices’ political majority); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 562 (1989) (finding a correlation between ideological values and civil liberties decisions by the U.S. Supreme Court); Thomas J. Miles & Cass R. Sunstein, *Depoliticizing Administrative Law* 2 (Univ. of Harvard Pub. Law Working Paper Group, Paper No. 08-16, 2008), available at <http://ssrn.com/abstract=1150404> (describing the “highly ideological voting patterns” on the Supreme Court).
- 37 See, e.g., FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 38 (2007) (concluding in a study of voting patterns of court of appeals judges that ideology is associated with judicial decision-making); CASS SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 45 (2006) (concluding in a study of federal appellate judges that “[i]n numerous areas of the law, there is a substantial difference between the voting patterns of Republican and Democratic appointees”).
- 38 See, e.g., C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 40 (1996) (noting strong partisan divisions among district judges in several areas of litigation).
- 39 See, e.g., Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 66-67 (1990) (finding in a study of state supreme court death penalty decisions that justices respond differently to case facts depending both on their individual partisan preferences and on the political climates in which they operate).

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- 40 See SUNSTEIN ET AL., *supra* note 37, at 25-28, 34, 37-38 (finding evidence of ideological voting patterns among court of appeals judges in cases challenging environmental regulations); Miles & Sunstein, *supra* note 36, at 2 (describing the Supreme Court's ideological voting patterns in administrative law cases).
- 41 See SUNSTEIN ET AL., *supra* note 37, at 28-29.
- 42 See *id.* at 29-30; ROWLAND & CARP, *supra* note 38, at 40.
- 43 See SUNSTEIN ET AL., *supra* note 37, at 30-32, 35-36; ROWLAND & CARP, *supra* note 38, at 40.
- 44 See SUNSTEIN ET AL., *supra* note 37, at 32-33.
- 45 See *id.* at 33-34.
- 46 See *id.* at 24-25, 36-37.
- 47 See *id.* at 54-57; ROWLAND & CARP, *supra* note 38, at 40.
- 48 See ROWLAND & CARP, *supra* note 38, at 40 (noting strong partisan divisions among district judges in the areas of freedom of religion and freedom of expression).
- 49 See SUNSTEIN ET AL., *supra* note 37, at 32-33; ROWLAND & CARP, *supra* note 38, at 40.
- 50 See generally Kenneth Kress, [Legal Indeterminacy](#), 77 CAL. L. REV. 283 (1989).
- 51 See Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 VAND. L. REV. 395, 395-96 (1949) (suggesting that judicial opinions usually can be interpreted in a variety of ways).
- 52 See *id.* at 399 (setting forth his famous dueling canons of statutory interpretation).
- 53 See, e.g., ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 110 (1988) ("The search for determinacy is inherently futile. [A]t least since the time of the legal realists at the beginning of this century, formalism has been regarded, almost universally, as impossible.").
- 54 See generally Frank B. Cross, [Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance](#), 92 NW. U. L. REV. 251 (1997).
- 55 See [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.").
- 56 See Brian T. Fitzpatrick, Confirmation Kubuki Does No Justice, POLITICO (July 20, 2009).
- 57 See SUNSTEIN ET AL., *supra* note 37, at 30-36 (finding that Democratic court of appeals judges vote with plaintiffs more often than Republican judges in cases involving sex discrimination, disability, sexual harassment, corporate veil-piercing, and Title VII claims).
- 58 See Cross, *supra* note 54, at 279-309.
- 59 See, e.g., Joanna M. Shepherd, [Are Appointed Judges Strategic Too?](#), 58 DUKE L.J. 1589, 1593 (2009) ("As elected judges' primary constituents are the voters, judges facing reelection are more likely to vote consistently with the voters' preferences in cases that the voters care strongly about. Similarly, as appointed judges' constituents are governors or legislatures, judges facing reappointment should vote consistently with the preferences of the other governmental branches in cases in which those branches have a stake.").

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- 60 *Romer v. Evans*, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting) (“When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins - and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.”).
- 61 Amy Miller, Top Corporate Lawyers are Split Between McCain and Obama, CORPORATE COUNSEL, Oct. 7, 2008, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202425064139>.
- 62 It should be noted that none of these surveys is very comprehensive. See Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL’Y 835, 842-44 (1998) (surveying 234 partners from the “100 most prestigious law firms in the United States,” and finding them more likely to describe themselves as Democrats, 42%, than Republicans, 33%, and that “large majorities favor[] more ‘liberal’ social policies,” including, for example, that 83% “agreed that women have a right to choose an abortion”); Frederick D. Herzon, Ideology, Constraint, and Public Opinion: The Case for Lawyers, 24 AM. J. POL. SCI. 233, 244 (1980) (interviewing 226 randomly selected, Philadelphia-area lawyers in 1975, and finding 52.9% were to “some degree liberal, [while] 39.0 % [were] conservative”); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 509-10 (1985) (studying 224 lawyers drawn from four Chicago law firms, and finding that 38.5% were Democrats, 23.5% Republicans, and 38.0% Independent); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 19, 181-82 (University of Chicago Press 2005) (reviewing surveys of random samples of 800 Chicago lawyers in 1975 and 1995, and finding that Democrats outnumbered Republicans by approximately 56% to 29% in both years); ROBERT LERNER ET AL., AMERICAN ELITES 50, 142 (Yale University Press 1996) (interviewing a “random sample of elite corporate lawyers consist[ing] of partners from New York and Washington, DC, law firms with more than fifty partners” in 1982, and finding 32% identified themselves as conservative, 22% as moderate, and 47% as liberal).
- 63 See Richard L. Vining, Jr., et al., Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees (SSRN, Working Paper No. 1368891, 2009), available at <http://ssrn.com/abstract=1368891>.
- 64 *Id.* at 19.
- 65 *Id.* at 10.
- 66 These lists were current as of July 2008 in Tennessee and December 2008 in Missouri.
- 67 See e.g., SUNSTEIN ET AL., *supra* note 37 (using the political party of the president who appointed the judge as a proxy for the judge's ideological preferences).
- 68 See MO. REV. STAT. § 115.397; TENN. CODE ANN. § 2-7-115 (2008).
- 69 Like any proxy, primary voting records will not always perfectly reflect the ideological preferences of a judicial nominee. For example, a nominee may vote in one party's primary not because the nominee favors that party, but because the other party's primary is not contested.
- 70 The numbers reflected below are based on all of the data available for each nominee. Although in theory the lack of uniformity in time periods might not capture changes in partisan affiliation for some nominees that it captures in others, in this case, even if only the data back to 2000 are used for each nominee, the percentage of nominees who voted more often in Democratic primaries (67%) is no different than the percentage when all of the available data is used for each nominee.
- 71 Data could not be obtained for one nominee who was nominated twice.
- 72 State and federal House races were used because these races occur every two years, and, as such, they offered a more precise reflection of the partisan affiliation of the Tennessee electorate over time. If races for candidates elected statewide were used instead, it would suggest the same or even greater divergence between the Tennessee merit-plan nominees and the Tennessee electorate. While votes for Democratic and Republican candidates were split in roughly the same way in statewide gubernatorial elections as they were in state and federal House races over the same time period (with Democrats receiving

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52% of the gubernatorial votes), Republican candidates won all but one statewide federal race in Tennessee in that time (and often by very large margins). See TENN. DEPT OF STATE, NOVEMBER 4, 2008 GENERAL ELECTION OFFICIAL RESULTS (2008), <http://www.state.tn.us/sos/election/results/2008-11/index.htm>; TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2007-2008, at 564-65, 578-79 (2008); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2005-2006, at 560-61 (2006); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2001-2004, at 560-61, 565-66, 617-18, 626-627 (2004); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1999-2000, at 542-43 (2000); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1997-1998, at 526-27, 531-32 (1998); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1995-1996, at 516-17 (1996).

73 The state and federal House vote percentage is based on the sum of votes in biennial November elections from 1994 to 2006 exclusive of any votes received by independent or third-party candidates. The voting data was gathered from the Tennessee Blue Books in 1996, 1998, 2000, 2004, 2006, 2008, and the Tennessee Department of State's website in 2008. See TENN. DEPT OF STATE, NOVEMBER 4, 2008 GENERAL ELECTION OFFICIAL RESULTS (2008), <http://www.state.tn.us/sos/election/results/2008-11/index.htm>; TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2007-2008, at 570-73, 620-37 (2008); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2005-2006, at 566-69, 597-613 (2006); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2001-2004, at 570-72, 598-612, 633-36, 659-73 (2004); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1999-2000, at 563-64, 595-606 (2000); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1997-1998, at 539-41, 572-84 (1998); TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1995-1996, at 531-32, 558-67 (1996).

74 There were no appellate nominations during 2001-2002. The state and federal House vote percentage for each two-year period is based on the percentage of votes Democratic candidates received in the November election of the year before each period began, exclusive of any votes received by independent or third-party candidates. The voting data was taken from the Tennessee Blue Books in 1996, 1998, 2000, 2004, 2006, 2008, and the Tennessee Department of State's website in 2008. See *supra* note 73.

75 See, e.g., John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167 (2005) (using campaign contributions as proxies for partisan affiliation).

76 Federal Elections Commission, Advanced Transaction Query by Individual, <http://www.fec.gov/finance/disclosure/advindsea.shtml> (last visited Feb. 25, 2009).

77 OpenSecrets, Donor Lookup: Find Individual and Soft Money Contributors, <http://www.opensecrets.org/indivs/index.php> (last visited Feb. 25, 2009).

78 Missouri Ethics Commission, Contributions & Expenditures: Statewide & Legislative Candidate Committees, http://www.mec.mo.gov/EthicsWeb/Campaign_Finance/CF_SearchContr.aspx (last visited Feb. 25, 2009).

79 The name of each nominee was input into all three databases, and every year of available contribution data was examined. Searches were conducted as broadly as possible, typically by omitting the middle initial, in order to catch contributions made under just a first and last name. Careful attention was paid, however, to the name, city, and ZIP code, to avoid including data of a different person with the same name.

80 State and federal House races were used because these races occur every two years, and, as such, they offered a more precise reflection of the political affiliation of the Missouri electorate over time. If races for candidates elected statewide were used instead, it would suggest the same divergence between the Missouri merit-plan nominees and the Missouri electorate. For example, the votes for Democratic and Republican candidates were split in roughly the same way in statewide gubernatorial elections as they were in state and federal House races over the same time period (with Democrats receiving only 53% of the gubernatorial votes); in statewide federal races, Republican candidates did even better, winning a large majority of votes over that time (67%). See BOARD OF STATE CANVASSERS, OFFICIAL ELECTION RETURNS (2008), <http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=256>; ROBIN CARNAHAN, MO. SEC'Y OF STATE, 2007-2008 OFFICIAL MANUAL 644-63 (2008); ROBIN CARNAHAN, MO. SEC'Y OF STATE, 2005-2006 OFFICIAL MANUAL 632-61 (2006); BOARD OF STATE CANVASSERS, OFFICIAL ELECTION RETURNS (2002), <http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=87>; BOARD OF STATE CANVASSERS, OFFICIAL ELECTION

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RETURNS (2000), <http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=14>; BOARD OF STATE CANVASSERS, OFFICIAL ELECTION RETURNS (1998), <http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=6>; BOARD OF STATE CANVASSERS, OFFICIAL ELECTION RETURNS (1996), <http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=4>.

81 The state and federal House vote percentage is based on the sum of votes in biennial November elections from 1994 to 2006 exclusive of any votes received by independent or third-party candidates. The voting data was gathered from the Missouri Official Manuals in 1996, 1998, 2000, 2002, 2004 and the Missouri Secretary of State's website in 2006 and 2008. See MO. SEC'Y OF STATE, OFFICIAL ELECTION RETURNS, <http://www.sos.mo.gov/enrweb/allresults.asp?eid=256> (last visited Feb. 25, 2009); MO. SEC'Y OF STATE, OFFICIAL ELECTION RETURNS, <http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=189> (last visited Feb. 25, 2009); OFFICIAL MANUAL, STATE OF MISSOURI, 2005-06, at 650-61 (Krista S. Myer ed.); OFFICIAL MANUAL, STATE OF MISSOURI, 2003-04, at 630-41 (Rob Davis ed.); OFFICIAL MANUAL, STATE OF MISSOURI, 2001-02, at 634-44 (Rob Davis ed.); OFFICIAL MANUAL, STATE OF MISSOURI, 1999-2000, at 565-76 (Julius Johnson ed.); OFFICIAL MANUAL, STATE OF MISSOURI, 1997-98, at 567-80 (Jim Grebing ed.).

82 The state and federal House vote percentage for each election cycle is based on the percentage of votes Democratic candidates received in the general election in November of the year before each cycle, exclusive of any votes received by independent or third-party candidates. The voting data was gathered from the Missouri Official Manuals in 1996, 1998, 2000, 2002, 2004 and the Missouri Secretary of State's website in 2006 and 2008. See *supra* note 81.

83 See Fitzpatrick, *supra* note 34, at 88 (describing the controversy surrounding the Tennessee legislature's decision "in May of 2008, after a high-profile debate, not to reauthorize the Tennessee plan" and instead "sen[d] the Plan into a one-year wind down period"); Kelly Wiese, Proposed Changes to Missouri Plan Gather Steam at Capitol, KAN. CITY DAILY REC., Mar. 12, 2008 (describing a proposed constitutional amendment to Missouri's judicial selection process); Amanda Bronstad, State's Judicial Nomination Process Threatened, NAT'L L.J., Aug. 20, 2007, at 6 ("The political feud between opponents of 'judicial activism' and proponents of 'impartial courts' that inundated last year's judicial elections has landed in Missouri . . ."); Henry J. Walters III, Opinion, Extraordinary Exchange: Blunt v. the Missouri Plan, COLUMBIA DAILY TRIB., Aug. 12, 2007 (describing former Governor Matt Blunt's "attack on the Missouri Plan").

84 See TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2007-2008, at 111, 489-505 (2008), available at <http://www.state.tn.us/sos/bluebook/>.

85 See Missouri election sources cited *supra* note 81.

86 See Charles B. Blackmar, *Missouri's Nonpartisan Court Plan from 1942 to 2005*, 72 MO. L. REV. 199, 205 (2007) (describing how "[s]ome judicial commissions adopted the practice of naming two members of the governor's party and one member of the opposing party to each panel").

87 See MO. CONST. art. V, § 25(d) ("[T]he governor shall appoint one citizen from among the residents of each court of appeals district, to serve as a member of said [judicial] commission . . .").

88 See TENN. CODE ANN. § 17-4-102.

89 See Andy Sher, Tennessee: General Assembly Landscape Changes as GOP Takes Over, CHATTANOOGA TIMES, Nov. 6, 2008 (describing Republicans' take-over of the House as the first since Reconstruction); Andy Sher, Nashville: Parties Fight for Control of Assembly, CHATTANOOGA TIMES, June 29, 2008 (noting that in 2007 Senate Republicans made history by electing "the first Republican speaker since post-Civil War Reconstruction.").

90 In both Tennessee and Missouri, the merit commissions submit three nominees to the governor for every vacancy. Thus, for example, so long as at least one of these three nominees was conservative for every vacancy, conservative governors would have been able to fill the judiciary with conservatives.

91 For example, although the state House votes in both Tennessee and Missouri were almost exactly balanced between the two political parties, it does not necessarily follow that judicial elections would have resulted in a fifty-fifty split in the judiciary.

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As a consequence of winner-take-all election systems, the barest of majorities in the electorate can, in theory, produce public officials uniformly from one political party. This is especially the case if appellate judges would have been elected statewide as opposed to in geographic districts. In both Missouri and Tennessee over this time period, the two parties alternated in collecting majorities of state House votes, with ten of fourteen years resulting in Democratic candidates receiving more House votes overall in Tennessee and Democratic candidates receiving more House votes overall in eight of fourteen years in Missouri. See Tennessee and Missouri election sources *supra* notes 73, 81. If one presumes that whichever political party won more House votes overall would have won all statewide judicial elections in those years, then direct election of judges would have produced a Tennessee judiciary that was 71% Democratic over this time period and a Missouri judiciary that was 57% Democratic. If judges were not elected statewide, but instead in districts, then we would expect the political balance of the elected judiciaries to more closely track the balance in the House vote in each election cycle. Much the same might be true if judges were appointed by elected officials. For example, if the governor would have appointed all appellate judges in Tennessee and Missouri, and if one assumes that the governor would appoint judges entirely from his or her own political party, then, because Tennessee had Democratic governors only six of fourteen years, one might have expected a judiciary that was 43% Democratic over the same time frame and, in Missouri, with ten years of Democratic governors, a judiciary that was 71% Democratic.

92 See, e.g., Suzanna Sherry, [Politics and Judgment](#), 70 MO. L. REV. 973, 979-82 (2005).

93 See, e.g., LARRY D. KRAMER, [THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW](#) 248 (2004).

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