WHY MERIT SELECTION OF STATE COURT JUDGES LACKS MERIT

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I. INTRODUCTION

On Monday, May 14, 1787, the first delegates assigned to the task of revising the American federal system of government began to assemble in Philadelphia.[1] Over the course of the following weeks, delegates from across the colonies arrived and took their seats in assembly. An intense debate ensued over whether, and how, to scrap the Articles of Confederation and replace them with a new guiding document. The delegates were divided over multiple issues, such as how to fund the federal government,[2] what legal weight to give to treaties,[3] and, notably, how to handle the question of slavery.[4] Yet, however varied their views

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1. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, REPORTED BY JAMES MADISON (Chicago: Ohio Univ. 1966) 23 (recording the first arrival of delegates to the Constitutional Convention on May 14, 1787).

2. *Id.* at 113-14, 238-39, 249-53, 412-14, 416-18, 436, 442-50, 460-61, 606-07 (recording the debate over money bills, their origins, and their impact on the bicameral chambers of Congress and the Executive). The Founders eventually compromised by determining that appropriations bills could only originate in the House. *See* U.S. CONST. art. I, § 7 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments on other Bills.").

3. *See* MADISON, *supra* note 1, at 138, 461, 519-21, 575, 597-99, 602-04, 623 (recording debate over what weight and legal force to give to treaties, and the impact of treaties on the ability of the Executive to govern as a co-equal among the branches). Ultimately, treaties made under the authority of the United States would become "the supreme Law of the Land." U.S. CONST. art VI.

4. *See* MADISON, *supra* note 1, at 103, 225, 248, 256, 259-61, 268-69, 274-76, 278, 281-82, 285-86, 309, 327, 409-13 (debate over slavery as property and as a factor in representation in Congress). So intense and divided was the debate over the question of slavery that the Founders eventually decided to delay answering the question altogether. U.S. CONST. art. 1, § 9, cl. 1 allowed for the continued importation of slaves until at least 1808, and authorized states to tax each slave admitted into the United States at the rate of ten dollars per slave. ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."). Slavery was the only issue singled out for special protection from the constitutional amendment process. Article V provides that the Constitution may be amended following a proposed amendment submitted by two thirds of both the U.S. House and Senate, or by two-thirds of the state legislatures, except that the provision in Article I, Section 9, Clause 1 concerning constitutional protection for the importation of slaves was not subject to amendment for approximately twenty years after the Constitution was ratified. U.S. CONST. art. V ("[N]o Amendment which may be made prior to the Year One thousand eight hundred and eight

on the intricate details, the delegates ultimately determined that they were bound by one common principle: America should be a place where the people govern.

When it came to the selection of judges, the Founding Fathers embraced the concept that the people, through their elected representatives, would have a critical and necessary role in choosing the judiciary. On the federal level, the debate was generally in unison that judges be appointed, with the disagreement being primarily limited to whether the Senate or the president should appoint.[5] On the state level, judges were either appointed by the governor or the state legislature.[6] Thus, at the time of the founding, the people chose judges through their democratically elected representatives for both our state and federal systems of government.

Since those early days of the Republic, the methods by which the people select judges in the states has evolved in two significant ways. First, in the years surrounding the 1820s, the Populist movement ushered in an era where many believed that the best way to select a state court judge was through the direct election by the people.[7] As states entered

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shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article.").

5. *See* MADISON, *supra* note 1, at 314-17, 343-46. The Founders eventually compromised by adopting Massachusetts delegate Nathaniel Ghorum's proposal that the president appoint judges with the advice and consent of the Senate. Though Ghorum preferred that the executive, rather than the Congress, appoint judges, he believed that the president was "too little personally responsible, to ensure a good choice" of a judge. *Id.* at 314. He therefore proposed that the executive appoint "with the advice & consent" of Congress (not necessarily of the Senate) in the same manner as proscribed in the Massachusetts constitution. *Id.* at 371. Ghorum offered his compromise proposal on July 17, 1787, but his amendment resulted in a tie vote and was tabled. *Id.* It was revisited on July 21, when it passed. *Id. at* 346. For a more colloquial discussion summarizing the debate, see RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 236-39 (2009).

6. Five of the thirteen original states (Maryland, Massachusetts, New Hampshire, New York and Pennsylvania) chose judges through appointment by the governor. *See* Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. TOL. L. REV. 551, 554 n. 17 (2008) (explaining that in the above-named states, the governor appointed judges, subject to a ratification process by the legislature). In the remaining eight states (Connecticut, Delaware, Georgia, New Jersey, North Carolina, South Carolina, Rhode Island, and Virginia) the citizenry elected the members of the legislature, who then appointed the judiciary. *See id; see also* Thomas R. Phillips, *The Merits of Merit Selection,* 32 HARV. J.L. & PUB. POL'Y 67, 71 (2009) (describing the gubernatorial and legislative appointment models in the original states).

7. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 785 (2002) ("Starting with Georgia in 1812, States began to provide for judicial election, a development rapidly accelerated by Jacksonian democracy."); Rachel Paine Caulfield, *How the Pickers Pick:*

the Union during and after this era, their constitutions began to require that judges be chosen by direct election.[8] Some states that had previously selected judges through gubernatorial appointment amended their constitutions to provide for direct election of the judiciary through popular vote.[9] Second, approximately 100 years later, a much different judicial selection method, now popularly known as "merit selection," began to take shape. Under a typical merit selection procedure, a judicial nominating commission interviews, screens, and selects potential state court judges.[10] The nominating commission then recommends a list of candidates to the governor, and the governor appoints one of the people on the list to the bench.[11] In most circumstances, if the governor declines to accept the choices on the list, the nominating commission or another official (e.g., the chief justice of the state supreme court) appoints the judge.

Today, America is a potpourri of judicial selection methods. No two states choose their judges in quite the same way. Some of the original states continue to use appointment while others, adhering to the Populist movement, have stuck with judicial elections. About two-thirds of the states employ some form of merit selection.[12]

This article examines merit selection in light of the country's original judicial selection methods, as well as under the historical development of judicial selection, and leads one to ask whether merit selection is consistent with the principle inherent in both election and appointment—that is, that judges are chosen by the people. In other words, is merit selection compatible with the type of representative democracy upon which the United States is founded? Or, if we employ an unelected judicial nominating commission instead of the direct (or indirect) vote of the people to select judges, do we engage in a process that has moved far away from the principles of the Founders?

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.").

8. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 716 (1995).

9. *See id.*

10. *See e.g.*, the website of the Alaska Judicial Council, which is a typical merit selection commission. ALASKA JUDICIAL COUNCIL, http://www.ajc.state.ak.us (last visited Jan. 10, 2011).

11. *See id.*

12. *See* AM. JUDICATURE SOC'Y, www.judicialselection.us (last visited Jan. 10, 2011).

This article examines whether merit selection of state court judges is consistent with the traditional principles of representative democracy. First, this article explores the origins of representative democracy in America and the commonly held belief at the time of the founding, as well as today, that at its most basic principle, ours is a country where the people govern. Second, this article examines the methods of judicial selection in our representative democracy. Third, this article discusses the evolution of, and some of the justifications for, merit selection. The fourth part of this article explains the several ways in which it can be argued that merit selection conflicts with traditional notions of representative democracy. Finally, this article concludes that the state judicial selection methods that appear to be most consistent with representative democracy are either direct appointment by the governor or direct election by the people.

II. IN AMERICA, THE PEOPLE GOVERN

Any attempt to determine whether certain judicial selection methods are consistent with our American system of government must first explore the first principles on which American government rests. At its basic root, America is a place where the people govern. Ours is a Republic, where the people speak through their elected representatives.[13]

The origins of this first principle of government—representative democracy, also known as government by the people—predate the founding of our Republic. When toiling over the quandary of whether to secede from the British crown under King George III, the colonial leadership recognized that the basis of liberty, and all of free government, was the right of the people themselves to participate in the

13. America is a republic, to be sure, but our governance can perhaps be more appropriately framed in terms of a *modern* republic, where people speak *primarily* though their elected representatives. In some instances, the people speak through direct democracy mechanisms rather than purely representative democracy modes when they vote on statewide ballot initiatives and referenda. For the purposes of this article, I use the term representative democracy to define a system where the people speak through their elected representatives. However, our government is more precisely defined as a "constitutional republic."

It goes without saying that certain aspects of representative democracy are beyond the scope of this article. This article is not intended to provide a comprehensive, detailed analysis of every facet of representative democracy or more nuanced discussions of the majority-minority conflicts or the problems of faction. For an extremely well-researched and fine discussion of representative democracy in the context of majoritarianism, see Croley, *supra* note 8. Croley references another fine text on this topic, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

affairs of their government. This was not a new idea.[14] Ancient philosophers (e.g., Aristotle and Cicero) as well pre-Revolutionary thinkers (Thomas Paine, John Locke, and Jean-Jacques Rousseau, for example) had all opined on this view.[15] The chief frustration in the colonies with crown rule was that the colonists had no way to exercise self-governance, because they were governed by (and accountable to) a separate sovereign that resided an ocean away.[16]

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14. *See* Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* THE SPIRIT OF 'SEVENTY-SIX 315 (Henry Steele Commager & Richard B. Morris eds., 1967) (explaining that "the object of the Declaration of Independence [was] [n]ot to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before.").

15. *See, e.g., id.* at 316 (explaining: "[a]ll [the Declaration of Independence's] authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letter, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc."; *see also, e.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 136 (1762) (discussing how the sovereign authority maintains itself: "The sovereign, having no other force than the legislative power, acts only through the laws, and since the laws are nothing other than authentic acts of the general will, the sovereign can act only when the people is assembled."); THOMAS PAINE, THE RIGHTS OF MAN: FOR THE USE AND BENEFIT OF ALL MANKIND 13 (1795) (explaining that government based on the consent of the governed means that "individuals themselves, each in his own personal and sovereign right, entered into a compact with each other to produce a government: and this is the only mode in which Governments have a right to arise, and the only principle on which they have a right to exist"); Letter from Thomas Jefferson to James Madison, (Aug. 30, 1823), *in* THE SPIRIT OF 'SEVENTY-SIX, *supra* note 14, at 314-15 (writing to Madison regarding the views of Richard Henry Lee, who believed that the American sentiment of government was copied from John Locke's *Two Treatises of Government).* For later examples of this first principle, see ALEXIS DETOCQUEVILLE, DEMOCRACY IN AMERICA 58 (1835) ("The people reign in the American political world as the Deity does in the universe. They are the cause and the aim of all things; everything comes from them, and everything is absorbed in them."); Abraham Lincoln, First Inaugural Address (March 4, 1861), *in* SELECTED WRITINGS OF ABRAHAM LINCOLN 153 (Herbert Mitgang, ed., 1992) ("This country, with its institutions, belongs to the people who inhabit it."); Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *in* SELECTED WRITINGS OF ABRAHAM LINCOLN 280 (Herbert Mitgang, ed., 1992) (referencing America's "government of the people, by the people, and for the people"); THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 22 (1891) ("In America the leading principle of constitutional liberty has from the first been, that the sovereignty reposed in the people.").

16. *See The Declaration and Resolves of the First Congress* (Oct. 14, 1774), *in* THE SPIRIT OF 'SEVENTY-SIX, *supra* note 14, at 57. The declaration spelled out the frustration of the lack of representation in the colonies:

> That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and

Those early rebels created a document on paper—a declaration—to announce that the colonies were now free and independent states, wholly separate from the crown.[17] They also wanted to justify why secession was necessary. Their reasons for separating from Great Britain were extensive: King George had inflicted upon the colonies "a long train of abuses and usurpations"[18] and a "[h]istory of repeated [i]njuries,"[19] including refusing to allow colonists to pass local laws they deemed essential,[20] suspending or dissolving the colonists' legislatures,[21] and imposing taxes without the colonists' consent.[22] In other words, King George (with the assistance of a willing Parliament) had forbidden the colonists from governing themselves. The system under King George was government by the king, and not by the people.[23]

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internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed.

Id.

17. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

18. *Id.* at para. 2.

19. *Id.*

20. *Id.* at paras. 3-5 ("He has refused his Assent to Laws, the most wholesome and necessary for the public Good; He has forbidden his Governors to pass Laws of immediate and pressing importance . . . [and] has refused to pass other Laws for the accommodation for large districts of people[.]"). One such example is King George's vetoes of Jefferson's colonial laws attempting to abolish the slave trade. *See generally* research and analysis performed by the CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY, FOUNDING.COM, http://www.founding.com (last visited Jan. 10, 2011).

21. THE DECLARATION OF INDEPENDENCE, *supra* note 17, at para. 7 ("He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People."). A more well-known example of a threat to dissolve followed the issuance of the "Massachusetts Circular Letter" of February 11, 1768, drafted by Samuel Adams, which was sent from the Massachusetts House of Representatives to the other colonies' Houses. *See generally* ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 161 (1982). The letter criticized King George and Parliament on a number of fronts. *Id.* King George ordered that the letter be rescinded, and when the Massachusetts House refused, the king ordered the House dissolved. *Id.*; *see generally* JOSEPH C. MORTON, THE AMERICAN REVOLUTION (2003).

22. THE DECLARATION OF INDEPENDENCE, supra note 17, at para. 19 ("For imposing Taxes on us without our Consent."). This complaint is perhaps the most modernly well-known, preserved today in our vernacular with the phrase, "no taxation without representation."

23. Although hindsight is 20-20, it is difficult to see how the crown failed to realize that the burdens it imposed upon the colonists were so severe that they would eventually lead the Americans to the tipping point. The crown made all laws for the colonies in London, and in doing so it regularly imposed regulations and taxes upon the colonists without their consent. The division of the Atlantic Ocean between the colonists and England made effective protests impossible, which added fuel to the fire of the colonists' desires to become free and independent states. The colonists' angst led to local hostilities, which was no secret in London. For instance, during debate in the House of Commons on

In place of crown fiat, the Founders aimed to create a country that was not simply responsive to the people; they wanted a system where the people themselves operated the government.[24] This aim formed the basis of the language in the Declaration of Independence, which explains: "Governments are instituted among Men, deriving their powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the Right of the People to alter or abolish it . . . ."[25] The plain meaning of the Declaration reveals that the people fully control our government through their power to choose who governs them. The authors of the Declaration, in fact, explained they could only act based on the will of the people; they declared their independence from the Crown "in the Name, and by Authority of the good People of these Colonies."[26]

Eleven years later, in 1787, America was ready to "more perfectly" implement the idea of government by the people. At what we now refer to as the Constitutional Convention, representatives from each of the thirteen colonies, collectively known as the Second Continental Congress, met in Philadelphia to draft a governing charter.[27] This new

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May 2, 1774, over the bill for regulating the government of Massachusetts Bay, Member of Parliament Edmund Burke argued for repeal of the governing act:

> Repeal, Sir, the Act which gave rise to this disturbance; this will be the remedy to bring peace and quietness and restore authority; but a great black book and a great many red coats will never be able to govern it. It is true, the Americans cannot resist the force of this country, but it will cause wrangling, scuffling and discontent. Such remedies as the foregoing will create disturbances that can never be quieted.

Edmund Burke, *Debate in the House of Commons* (May 2, 1774), *in* THE SPIRIT OF 'SEVENTY-SIX, *supra* note 14, at 15.

24. Thomas Jefferson explained it this way in 1820:

> I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.

15 THE WRITINGS OF THOMAS JEFFERSON 278 (Albert Ellery Bergh ed., 1907), *reprinted in* ANDREW M. ALLISON ET AL., THE REAL THOMAS JEFFERSON 578 (2d ed. 2008) (covering the year 1820); *see also* 6 THE WRITINGS OF THOMAS JEFFERSON 220 (Paul Leicester Ford ed., 1892-1999 (covering the year 1783) (quoting Jefferson, "I consider the people who constitute society or nation as the source of all authority in that nation"); 15 THE WRITINGS OF THOMAS JEFFERSON 66 (Albert Ellery Bergh ed., 1907), *reprinted in* ALLISON, *supra*, at 577 (covering the year 1816) (quoting Jefferson, "Leave no authority existing not responsible to the people.").

25. THE DECLARATION OF INDEPENDENCE, *supra* note 17, at para. 2.

26. *Id.* at para. 32.

27. The number of representatives eventually signing and approving the Constitution varied by state. For example, a single representative from New York, Alexander

document would be more than a "declaration" as had been made in 1776. Rather, the delegates aimed to create a blueprint to implement representative democracy in a new nation, which would eventually become the Constitution of the United States.[28]

During the 127 days that the delegates debated what language to place in the Constitution, the theme of government of the people was a consistent drumbeat.[29] James Madison, delegate from Virginia, and James Wilson, delegate from Pennsylvania, constantly reiterated a theme of representative democracy during the debates.[30] As Gouverneur Morris, delegate from Pennsylvania, explained, "This magistrate is not the King, but the Prime Minister. The people are the King."[31] Almost all of the delegates agreed with that proposition.[32]

Hamilton, provided his signature for approval (New York being the state with the fewest signatories), while eight Pennsylvanians signed—Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas FitzSimons, Jared Ingersoll, James Wilson, and Gouverneur Morris (Pennsylvania being the state with the greatest number of signatories). *The Signers of the U.S. Constitution*, CONSTITUTIONFACTS.COM, http://www.constitutionfacts.com/content/constitution/files/Constitution_AboutTheSigners.pdf (last visited Feb. 1, 2011).

28. Of course, the Founders did not invent the concept of representative democracy out of whole cloth. They drew upon examples from the Greeks, *see* MADISON, *supra* note 1, at 73, 76, 185, 194, 206, 256, and 504-06; the Romans, *id.* at 76, 83, 85, 127, 137, 145, 152, 182, 185, 194, 196, 464, and 571; the Carthaginians, *id.* at 76, 206; as well as then-modern Europe, *id.* at 194, 214-15 (Europe generally); *id.* at 54, 145, 206, 334, 456, 468, 505-06 (France); *id.* at 130, 132, 137, 143, 145-46, 162, 182, 185, 206-207, 223, 241, 255-56, 364 (Germany); *id.* at 145, 286 (Spain); *id.* at 136 (Sweden). When debating whether to ratify the Constitution, the Founders likewise relied on ancient philosophers and legal theorists. *See, e.g.*, THE FEDERALIST NO. 69, at 418, 419, 512 (Alexander Hamilton) (referencing Blackstone), No. 20, at 135 (James Madison) (referencing Grotius), No. 47, at 301-03 (James Madison) (relying upon Montesquieu) (Clinton Rossiter ed., 1961).

29. My understanding that there were 127 days of debate comes from James Madison's record of the convention, in which he marks the first meeting of delegates taking place on May 14, 1787, and the last meeting taking place on September 17, 1787, when the Constitution was signed and the Convention dissolved itself by adjourning sine die. *See* MADISON, *supra* note 1, at 23, 652-59. Formal discussion did not begin until May 25, 1787, when Robert Morris nominated George Washington as convention president and John Rutledge seconded the motion (assuming you can really call that "debate," considering that Washington was unanimously elected after limited discussion.) *See id.* at 23.

30. *See, e.g.*, MADISON, *supra* note 1, at xix, 41-42.

31. Remarks of Gouverneur Morris (July 20, 1787), *in* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 65-69 (Max Farrand, ed., 1966), *partially reprinted in* BEEMAN, *supra* note 5, at 242. Morris' remarks came during debate over how the executive should be removed from office.

32. BEEMAN, *supra* note 5, at 242.

The Founders completed their work on September 17, 1787. In the final version of Constitution, they enshrined, quite clearly and succinctly, the concept of government of the people with the words we all now know: "We the People...do ordain and establish this Constitution for the United States of America."[33] A more clear expression of government by the people had yet to be made anywhere in the world.

However, the battle to permanently accept the blueprint was just beginning. Because the Constitution could only become binding on the United States if nine of the thirteen states ratified it, the debate over whether to accept the proposed Constitution shifted to the states.[34] James Madison, Alexander Hamilton and John Jay published a series of articles under the pen name Publius in newspapers across the country, urging the state legislatures to ratify the Constitution. It is through these articles, collectively now known as the Federalist Papers, that we can readily see that representative democracy is firmly embedded as the basis of our governmental system. For example, as Madison explained in Federalist Paper No. 49, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."[35] Hamilton concurred in Federalist Paper No. 22: "The fabric of the American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original foundation of all legitimate authority" (emphasis in original).[36]

Today, the concept of traditional representative democracy is as much alive as it was at the time of the founding. No serious American politician has since publically wavered from embracing government by consent of the governed. In addition, America's modern, premier legal advocacy organizations, regardless of ideological or political stripe—

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33. U.S. CONST. pmbl.

34. *See* U.S. CONST. art. VII, cl. 1 ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

35. THE FEDERALIST NO. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961).

36. THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961) ("The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands."). This belief is also consistent with our general notions of liberty. As Michigan Supreme Court Chief Justice Thomas M. Cooley explained in 1891, "[i]n America the leading principle of constitutional liberty has from the first been, that the sovereignty reposed in the people[.]" COOLEY, *supra* note 15, at 22.

including the American Civil Liberties Union, the American Bar Association, the League of Women Voters, the Federalist Society and the American Constitution Society, to name only a few—are self-proclaimed advocates for the principle of government of the people.[37]

There simply is no legitimate challenge to the fact that American government is grounded in representative democracy.

III. METHODS OF SELECTING A JUDGE IN A GOVERNMENT OF THE PEOPLE

It should be no surprise that early Americans wanted to employ a method of selecting state court judges that was consistent with representative democracy. At the time of America's founding, state court judges were commonly appointed by a popularly elected governor, by an elected legislature, or by some combination of the two (usually the legislature serving an advice and consent role to ratify the governor's appointment). Since that time, state judicial selection methods have evolved and now include not just appointment, but also popular election of judges, as well as selection of judges by a nominating commission.

A. Appointment

Appointment is the original method of state judicial selection. In all of the original thirteen states, judges were appointed by either the governor (the majority method) or the state legislature (the minority method.)[38] The first twenty-nine states utilized appointment methods that

37. *See The Bill of Rights: A Brief History*, AM. CIVIL LIBERTIES UNION (Mar. 4, 2002), http://www.aclu.org/about-aclu-0 (calling the Constitution "a remarkable blueprint for self-government" and praising the addition of the Bill of Rights as a supplement to the Constitution in order to enhance "the consent of the governed"); *ABA Mission and Goals, August 2008*, AM. BAR ASS'N (Aug. 2008), http://www.abanet.org/about/goals.html?gnav=global_about_mission (identifying its role as one of "defending liberty" and protecting the rule of law); *About Us*, LEAGUE OF WOMEN VOTERS, http://www.lwv.org/AM/Template.cfm?Section=About_Us (last visited Jan. 10, 2011) (stating that the League "remains true to its basic purpose: to make democracy work for all citizens"); *Our Background*, FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, http://www.fed-soc.org/aboutus/id.28/default.asp (last visited Jan. 10, 2011) (emphasizing the importance of "limited, constitutional government, and the rule of law in protecting individual freedom"); *Mission*, AM. CONSTITUTION SOC'Y FOR LAW & PUB. POLICY STUDIES, http://www.acslaw.org/about/mission (last visited Jan. 10, 2011) (describing itself as in interested in promoting " the vitality of the U.S. Constitution and the fundamental values it expresses [as] reflected in the vision of the Constitution's framers" and others).

38. *See* Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 677 n.4 ("At the time of the founding, every state selected its judges through executive or

were similar to the federal practice of appointment by the executive branch and confirmation by the legislative branch.[39]

Some have argued that appointment was chosen in response to the lessons learned from the harsh treatment of the colonists by King George III.[40] The Declaration of Independence charged that "He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries"— meaning that the king could dismiss judges at will or cut off their pay if they made rulings with which the king disagreed.[41] The early Americans favored appointment, but differed from the English system in several ways, including by requiring an appointive rather than an "at will" system, as well as by placing the appointment power in the hands of an elected governor or an elected legislature, rather than an unelected monarch.

The early favoritism toward popular representation in the appointment process was evident in the selection of both state and federal judges. As James Madison explained, federal judges, being appointed by a democratically elected president, are the choice "of the people themselves."[42] Madison explained that the people directly elected members of the House of Representatives and indirectly elected members of the Senate, as well as the president.[43] Therefore, both the federal and state governments were both beholden to the people, and all of the government's powers were ultimately derived from the citizens.[44] "Even the judges," Madison contended, "will, as in the several States, be the choice, though a remote choice, of the people themselves."[45] Madison warned against the dangers of any other system:

> It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might

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legislative appointment."); Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom*, 41 S. TEX. L. REV. 1197, 1203 (2000); *see also* Peter D. Webster, *Selection and Retention of Judges: Is there One "Best" Method?*", 23 FLA. ST. U. L. REV. 1, 12-13 (1995).

39. *See* Maute, *supra* note 38, at 1203; Croley, *supra* note 8, at 716.

40. *See, e.g.*, Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 853 (2002).

41. THE DECLARATION OF INDEPENDENCE, *supra* note 17, at para. 11.

42. THE FEDERALIST NO. 39, at 242 (James Madison) (Clinton Rossiter ed., 1961).

43. *Id.*

44. THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961).

45. THE FEDERALIST NO. 39, *supra* note 42, at 313-14 (James Madison).

aspire to the rank of republicans and claim for their government the honorable title of republic.[46]

The states established judicial systems that mirrored the federal plan. The people democratically elected governors (as they had done with the president) as well as state legislatures (as they had done with the Congress) with the intent that their state officials be representative of themselves. Establishing a method of appointment for state court judges, therefore, satisfied the same interests in representative democracy, and alleviated the same dangers, that Madison had detailed in Federalist 39.[47]

B. Election

The preference for appointed state judiciaries changed near the time when Andrew Jackson was elected to the presidency and his Populist Movement swept through the country.[48] Populism, also known as Jacksonian Democracy, was based on the belief that government officials at all levels—including judges—should be directly elected by the people. The impact of the Populist viewpoint was that states joining the Union during and after this time provided for judicial selection by election in their constitutions.[49] Several states even amended their constitutions to change from appointive to elective systems.[50]

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46. *Id.* at 241.

47. Attempts to distinguish the appointment of federal judges with the selection of state court judges on the grounds that state court judges are less representative of the people is misplaced. As Madison explained in Federalist No. 46:

> The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other.

THE FEDERALIST No. 46, *supra* note 44, at 294 (James Madison).

48. *See* sources cited *supra*, note 7.

49. *See* Croley, *supra* note 8, at 716. Professor Croley cites a variety of possible reasons—not just Populism—that motivated states to switch from elective to appointive judicial selection methods:

> The factors that precipitated the adoption of elective systems of judicial selection are difficult to identify with precision. *Marbury* [*v. Madison*], Jacksonianism, participation in politics by settlers of the western frontier, judicial ruling favorable to creditors, resistance to English common law, and

The purpose behind the Jacksonian movement toward judicial elections was to move judicial selection closer to the people. Popularly electing judges had broad appeal to those who believed that elected judges would be more accountable to the citizens.[51] Judicial elections, many believed, were an optimal way for the citizens to govern themselves.[52] In fact, Jackson himself believed in popular election at all levels of government, and by the completion of his presidency he had even advocated popular election of federal judges.[53]

The Populist era was a boon for those who believed that the people themselves, speaking at the ballot box, should choose their judiciary. Elections, being a true enactment of government by the people, are emblematic of representative democracy.[54] The movement away from judicial appointment and toward judicial elections, therefore, did not materially change the type of governance envisioned by the Founders.

C. Merit Selection

By the turn of the twentieth century, political campaigning for judicial elections had adopted some of the same negative traits that were inherent in other elections. That is, campaigns for judicial office had become more and more nasty. Legal and political leaders began to criticize the use of popular election for judges. Those in the legal world

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judicial corruption are all overlapping factors frequently mentioned by scholars (Jacksonianism most of all) as contributing to the adoption of elective judiciaries.

Id. at 717. Other scholars contend that the Populist Movement's impact on the movement toward judicial elections is overstated. *See, e.g.,* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1093-94 (2007) ("The choice of elections was *not* (as myth holds) 'an un-thinking "emotional response" rooted in...Jacksonian Democracy' that somehow 'assumed that popular election of judges constituted a radical measure intended to break judicial power through an infusion of popular will and majority control.' On the contrary, the history of constitutional conventions shows that the move to judicial elections was led by moderate lawyer-delegates to increase judicial independence and stature."). By and large, however, scholars credit Jacksonianism/Populism as the prime culprit.

50. *See* Croley, *supra* note 8, at 716.

51. *See* Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339, 342 (1996).

52. *See* Peter Paul Olszewski, Sr., *Who's Judging Whom: Why Popular Elections Are Preferable to Merit Selection Systems*, 109 PENN ST. L. REV. 1, 4 (2004).

53. *See* SEAN WILENTZ, ANDREW JACKSON 156 (2005).

54. One may argue that Jackson's view of elections for virtually all offices is more akin to direct democracy, rather than representative democracy. Jackson, after all, advocated for the direct election of the president through elimination of the Electoral College. *Id.* He also believed in the direct election of U.S. senators, who at the time were appointed by the state legislatures. *Id.*

began to opine that requiring judges to campaign for office like common politicians was beneath the dignity of the judicial office.[55] In a now-famous 1913 speech before the Cincinnati Bar Association, for example, former President William Howard Taft, future chief justice of the United States, called judicial elections "disgraceful" and said that they were "so shocking . . . that we ought to condemn them."[56]

With this backdrop, support for the popular election of state court judges began to fade. In 1913, lawyer and newspaperman Herbert Harvey, Northwestern Law School Professor Albert Kales, Harvard Law School's Roscoe Pound and Northwestern Law School Dean John Wigmore helped create the American Judicature Society (AJS), an organization designed to reform judicial selection in the states.[57] AJS and its backers generally believed that judicial selection should be a more mechanical choice grounded in his qualifications and not in his politics.[58] AJS received broad support in the legal and political communities. The American Bar Association, for example, endorsed AJS's goals.[59] As a result of the judicial reform efforts AJS led—and its accompanying harsh rhetoric against judicial elections—support for a new way to select state court judges, now popularly known as "merit selection," began to grow.[60]

Under a typical merit selection system, a judicial nominating commission interviews, screens and selects potential state court judges. The nominating commission then recommends a list of candidates to the governor, and the governor appoints one of the individuals on the list to the bench. In most circumstances, if the governor declines to accept the choices on the list, the nominating commission or another official (e.g., the chief justice of the state supreme court) appoints the judge. Typically, the appointed judge later appears before the voters in a "retention election" where the voters can vote to keep the judge in office or have

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55. *See* Croley, *supra* note 8, at 723-24; *see also* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1, 23 (1956) (republishing Pound's comments) ("Putting courts into politics and compelling judges to become politicians . . . has almost destroyed the traditional respect for the Bench.").

56. William Howard Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418, 422-23 (1913).

57. *See* Croley, *supra* note 8, at 723-24; *see also* Strategic Plan Overview, AM. JUDICATURE SOC'Y (May 18, 2007), *available at* http://www.ajs.org/pdfs/AJS%20Strategic%20Plan%20-%20web%20version.pdf.

58. *See* Strategic Plan, AM. JUDICATURE SOC'Y, *supra* note 57.

59. *See* Seth S. Andersen, Exec. Dir. of the Am. Judicature Soc'y, Public Remarks at Wayne State University Symposium: Options for an Independent Judiciary in Michigan (Feb. 9, 2010), *available at* http://wdettv.org/video/1286/options-for-an-independent-jud.

60. *See id.* As Anderson explains, "merit selection" is also referred to as the "Non-Partisan Court Plan," the "Missouri Plan," and "Appointive-Elective Systems."

him replaced by an unknown — an individual the nominating commission will *later* choose.[61]

The theory behind merit selection is that "experts," rather than the people themselves, are more qualified to select judges.[62] The theory goes that a nominating commission chooses judges based on their "merits," instead of under other considerations—such as whether or not they can win an election—whereas people do not make such critical distinctions at the ballot box.[63] Today, about two-thirds of the states utilize some form of merit selection. The main backers of the merit selection movement are organized legal reform groups, as well as the American Bar Association.[64]

In terms of traditional representative democracy, merit selection is vastly different from selection by appointment and election. Appointment is the original method of selection and, as earlier stated, clearly embodies representative democracy. Elections, though a post-founding development, nevertheless hold the same characteristics of self-government that are achieved through appointment. Merit selection presents us with a third option in which the vote of the people is a step removed; or, more accurately, is replaced, by a nominating commission member that was never elected. In most instances, because nominating commission members are chosen by, for example, the organized bar of lawyers in the state, the eligible voters in a state have no ability to "select" the "judge selector" on a nominating commission. This arrangement leads us to the ultimate question: How can a merit selection

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61. *See* Fitzpatrick, *supra* note 38, at 678-79.

62. *See id.* at 678 ("Like other Progressive Era reforms, merit selection was designed to remove government decision-making from electoral control and place it instead in the hands of 'experts.' The 'experts' identified by progressives to select judges were lawyers and, in particular, state bar associations."); Bierman, *supra* note 40, at 854 (finding that the American Judicature Society's early proposals were designed to ensure that "experts, rather than voters, would be responsible for selecting judges.").

63. *See* Rick DeBruhl, *Response to The Use and Abuse of America's Founders in Wisconsin*, AM. COURTHOUSE (May 7, 2010), *available at* http://americancourthouse.com/2010/05/06/the-use-and-abuse-of-americas-founders-in-wisconsin.html (arguing that merit selection is superior to judicial elections because in judicial elections, people are "voting for a name they only know because they drove past a sign.").

64. The American Bar Association House of Delegates, at its 2003 annual meeting in San Francisco, adopted a report of the ABA Standing Committee on Judicial Independence that found "the preferred system of state court judicial selection is a commission-based appointive system." Am. Bar Ass'n, *Justice in Jeopardy: Report of the American Bar Association Commission on the Twenty-First Century Judiciary*, 2003 A.B.A. REP., v. (2003), *available at* http://www.abanet.org/judind/jeopardy/conclusions.htm (last visited Jan. 10, 2011).

system possibly be consistent with traditional notions of representative democracy?

IV. THE JUSTIFICATION FOR MERIT SELECTION

A. The Views of the Proponents of Merit Selection

Proponents of merit selection believe judicial nominating commissions are a superior method for selecting judges for at least four primary reasons:

First, merit selection supporters argue that their favored system removes the "politics" from the selection of judges.[65] They argue that judges who must campaign for election are beholden to those who elected them, and those same judges thus tend to be deprived of their independent role.[66] Additionally, they explain that judicial elections have devolved to an exchange of increasingly nasty, negative advertising in judicial contests that political parties and special interest groups fund.[67]

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65. *See* 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) (concluding 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) ("[T]he merit selection process is less political and therefore more independent that elections. Again, it is not a perfect system, but it is for sure less political."). Professor Zeidman also contends that, at least in New York City, the elected judiciary commits far more infractions involving judicial misconduct than do the city's appointed judges. *Id.* at 721.

66. *See Senate Judiciary Comm. Pub. Hearing on Merit Selection: Senate Bills 1324 and 1325*, 2007-08 Session (Pa. 2008) (written testimony of American Judicature Society) *available at* http://judgesonmerit.org/wp-content/uploads/2008/09/ajs-testimony.pdf (last visited Jan. 10, 2011) (positing that in the last ten years, "judicial elections have seen unprecedented campaign fund-raising and spending, [and judges] find themselves trying cases brought by attorneys who contributed to their election campaigns.").

67. *See* Schotland, *supra* note 49, at 1081 (noting that in recent years, "[j]udicial elections have become nastier, nosier, and costlier"); *see also* Dan Eggen, *Special-Interest Spending Surges in State Supreme Court Campaigns*, WASH. POST (Aug. 16, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/15/AR2010081503277.html; Chris Mondics, *Study: Pennsylvania Judicial Elections Big on Special-Interest Donations*, PHIL. ENQUIRER, Aug. 16, 2010, at E01, *available at* http://www.philly.com/inquirer/business/20100816_Study_Pa_judicial_elections_big_on_special-inerest_donations.html. Indeed, the television and radio airways are replete with recent examples of negative advertising against judges and justices. The 2008 Supreme Court election in Michigan is a fitting example. In that race, the Michigan Democratic Party created and paid for television ads against incumbent Chief Justice Clifford W. Taylor that depicted Taylor as asleep on the bench. The ads were powerful, and Taylor lost reelection. Also seemingly lost by the voters was the fact that the judge in the ad was

Harsh rhetoric in campaign ads, they believe, is unbecoming of the judiciary.[68] By replacing judicial elections with a merit-based approach, merit selection supporters argue that judges can devote their time to deciding the cases before them instead of spending countless hours engaging in retail politics, mudslinging, and political paybacks.[69]

Second, directly related to the first point, merit selection proponents argue that a nominating commission-based system reduces the influence of money in political campaigns for judgeships. Over the past two decades, and certainly since 2000, campaign spending on judicial elections has consistently increased. One study indicates that from 2000 to 2009, national spending on state supreme court races more than doubled when compared with the spending from the previous decade.[70] This recent increase in judicial election spending has created a class of people outwardly hostile to state judicial elections. These advocates believe money spent on electing judges "could be better spent," and they lament that "[m]ore judicial elections would also mean more spending on both sides" of judicial campaigns.[71] Included among this group of merit selection advocates is retired Justice Sandra Day O'Connor of the U.S. Supreme Court, who recently proclaimed that "the single greatest threat to judicial independence now is fairly modern, and it's uniquely

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not actually Taylor; rather, it was an actor, and the word "dramatization" was in difficult-to-read print at the bottom of the screen. *See "The Case of the Sleeping Justice...And Other Late-Breaking Tales from 2008's Judicial Campaigns,"* http://www.factcheck.org/elections-2008/the_case_of_the_sleeping_justice.htm (last visited Jan. 10, 2011). It would be easy to assume that Chief Justice Taylor, having lost his own reelection, would be critical of judicial elections. However, quite the opposite is true: Chief Justice Taylor, even after his defeat at the polls, continues to be an outspoken advocate for judicial elections. He has also published engaging criticisms of merit selection. *See, e.g.*, Clifford W. Taylor, *Merit Selection: Choosing Judges Based on Their Politics Under the Veil of a Disarming Name*, 32 HARV. J.L. & PUB. POL'Y 97, 99 (2009).

68. *See* Zeidman, *supra* note 65, at 715 ("[T]he vitriolic name-calling, the attack ads, the million-dollar fund-raising, the influence of special interest groups—all are rapidly making judicial elections indistinguishable from other campaigns. Hardly anyone thinks this is a good thing.").

69. *See* James E. Lozier, *Is The Missouri Plan, a/k/a/ Merit Selection the Best Solution for Michigan's Judges?*, 75 MICH. B.J. 918, 921 (1996) (arguing that merit selection allows for judges who ascend to the bench without owing any "political favors").

70. *See* JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE, 1, (2010), *available at* http://www.justiceatstake.org/file.cfm/media/cms/JASNPJEDecadeONLINE_8580859AA28D1.pdf; Bert Brandenburg, *Is Justice for Sale?*, EXPERIENCE, Vol. 19, No. 3, Summer 2009.

71. Bert Brandenburg, *What's the Best Way to Pack a Court?—The attack on merit selection for judges*, SLATE (Nov. 14, 2008), *available at* http://www.slate.com/id/2204445/.

American. It's the flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial election campaigns."[72]

Third, merit selection backers argue that their system produces better-quality judges. They contend that nominating commissions give more time and attention to the professional qualifications of a potential judge—such as judicial temperament, experience, education, and collegiality—than do voters or governors.[73] Proponents argue that voters pay little attention to the necessary qualifications of judicial candidates, and instead vote on other factors, such as name recognition or which judicial campaign proffered the most convincing advertisement. The theory behind this position is that voters make ill-informed choices and nominating commissions make better choices than the populace.[74]

Fourth, merit selection supporters believe that nominating commissions create more public confidence in the judiciary than other forms of judicial selection.[75] They argue that a fair and impartial

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72. Sandra Day O'Connor, Keynote Address, *State Judicial Independence—A National Concern,* 33 SEATTLE U. L. REV. 559, 563 (2010). O'Connor made these remarks as part of a symposium at Seattle University Law School in the Spring of 2010. She has been a regular advocate for merit selection, and she seems to be on an advocacy tour of late to curry support for merit selection in the states that have yet to adopt such a platform. "I firmly believe," she stated, "that states ought to steer away from judicial elections and implement some form of selection system for choosing judges that relies on a commission selection with retention elections." *Id.* at 565. Justice O'Connor further explained:

> [W]ell-organized interest groups are now mobilized to help opposition candidates run effective campaigns in states that have election of judges. These groups—from plaintiff's attorneys, to corporations, to cultural warriors—have strong preferences about the outcome of certain types of cases, and they've mobilized to finance the judges whom they think will be sympathetic to their causes. The result has been an arms race in funding, making it so that campaigning for state judge is often as expensive, or more so, as campaigning for a U.S. Senate seat.

Id. at 563. *See also* Sandra Day O'Connor, *Justice for Sale,* WALL ST. J., Nov. 15, 2007, at A25 (asserting that judicial campaign contributions "threaten the integrity of judicial selection and compromise the public perception of judicial decisions").

73. *See Senate Judiciary Comm. Pub. Hearing on Merit Selection: Senate Bills 1324 and 1325,* 2007-08 Session (Pa. 2008) (Written testimony of American Judicature Society), *available at* http://judgesonmerit.org/wp-content/uploads/2008/09/ajs-testimony.pdf ("The independent nominating commission nominates individuals for appointment on the basis of their professional qualifications rather than their political credentials."); *see also* Bierman, *supra* note 40, at 856 ("Another advantage of merit selection is its capacity to improve the quality of judges.").

74. *See* Zeidman, *supra* note 65, at 717 (contending that voters "throughout the country know virtually nothing about their judicial candidates").

75. *See* Bierman, *supra* note 40, at 855 (arguing that merit selection creates "enhanced public trust and confidence").

judiciary is less likely to be obtained with a judicial election system than a commission-based approach.[76]

Opponents to merit selection, on the other hand, including scholars who have comparatively analyzed merit commission systems with elective or appointive systems, argue that merit selection systems do not remove political thorns from judicial selection, but instead simply shift the politics of choosing a judge from the public arena to the nominating commission.[77] They also contend that merit selection systems do not necessarily produce judges of any better quality than can be achieved through elective or appointive systems.[78] Opponents further argue that nominating commissions do not necessarily improve the public's confidence in the court systems.[79] Others, even including the major supporters of merit selection, concede there is a lack of reliable evidence that campaign contributions have an influence on elected judges.[80] A

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76. *Id.*

77. *See, e.g.*, Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1198 (2000) (concluding that "[m]erit selection has its own problems, moving the politics to the backroom, with nomination and selection made by highly partisan actors, with the resulting appointments reflecting tradeoffs, paybacks for past support, and a myriad of considerations other than genuine merit"); Bierman, *supra* note 51, at 339-40 (finding that "there appears to be general agreement that merit selection does not remove partisan political considerations from the decision making process about who will become a judge"); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 33 (1986) (noting that merit selection may not necessarily remove political considerations from judicial selection).

78. *See, e.g.*, Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 233 (1987) (finding that "merit selection judges do not possess greater judicial credentials than judges in other states"); Carl Swidorski, *Judicial Selection Reform and the New York Court of Appeals: Illusion or Realty?*, 55 N.Y. ST. B.J. 10, 14 (July 1983) (finding that candidates for judge in a merit selection system were not necessarily superior in quality to candidates for election); Olszewski, *supra* note 52, at 11-12 (analyzing historical studies and noting that "[m]erit selection proponents cannot show that nominating commissions appoint more qualified judges than those elected by the people"); Bierman, *supra* note 40, at 859-60 (discussing "a comparison of Iowa's selection system with that of California," which found ". . . little support for the proposition that merit selection produces more highly qualified judges." The comparison study can be found in Larry L. Berg et al., *The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Court Systems*, 28 W. POL. Q. 263 (1975)).

79. *See, e.g.*, Taylor, *supra* note 67, at 100 ("I am not persuaded that the reputation...of state courts suffers because the people have [the] choice [to elect judges.]").

80. *See* Jack Brubaker, *Judging Effects of Campaign Donations: There's No Evidence the Money Influences Decisions of State Supreme Court Justices. But the Immense Sums Fuel Perception; Merit Selection Pushed*, LANCASTER SUNDAY NEWS (July 31, 2010), *available at* http://articles.lancasteronline.com/local/4/271919 (quoting Rachel Caufield

variety of scholars have even noted that the country's original merit selection system, adopted in Missouri in 1940 and since then popularly known as the "Missouri Plan," has failed in its mission to create judicial independence and to take politics out of the selection of judges.[81]

B. Justification for Merit Selection in the Context of Representative Democracy

Let us assume that merit selection systems have the positive attributes that its supporters subscribe to them. Assume that judicial nominating commissions remove the political wrangling from picking judges, reduce the influence of campaign donations, produce better judges, and improve public confidence in our courts. Let us further assume that judicial elections bring with them some terrible consequences. After all, no one can seriously dispute the fact that judicial elections have become more competitive and contentious.[82] The tone and tenor of judicial campaign commercials has become more hostile, and

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of the American Judicature Society on the lack of evidence that campaign contributions affect judicial actions: "I haven't yet seen any successful effort to link contributions to decision-making." Caufield continued, "All studies of contributions and voting behavior, including legislative studies, have a problem determining which came first . . . . Voting behavior may be driving donations . . . but it looks exactly the same as donations driving voting behavior.") Other scholars contend that increased spending in judicial races is a net benefit to voters. *See* Shannon Bream, *Buying the Bench*, FOXNEWS.COM (Aug. 26, 2010), *available at* http://politics.blogs.foxnews.com/2010/08/26/buying-bench (quoting former Federal Election Commission member Hans von Spakovsky: "[T]he more spending there is in campaigns—particularly in a judicial election—the greater the knowledge base of voters. They have more information that they can use to make decisions, and that is a good thing.").

81. *See, e.g.*, RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN (1969). Watson and Downing formulated a seminal study of the Missouri Plan, twenty-five years after its inception, which found that the plan simply did not remove politics from the system as it had been alleged. *Id.* at 325. Among other things, they concluded that "political influences were present in the selection of both lawyer and lay commissioners" to the Missouri nominating commission. *Id.*; *see also* Kevin M. Mulcahy, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 895-96 (2000) ("Adoption of the Missouri Plan, however, has failed to provide the desired judicial independence and de-politicization of the judiciary."); Bierman, *supra* note 51, at 340-41 (1996) ("[T]he Missouri Nonpartisan Court Plan did not remove political considerations from the selection process; rather, partisan concerns were redirected from local decisions about judicial candidates to gubernatorial and bar determinations about nominating commissioners.").

82. *See* sources cited *supra*, note 70; JUSTICE AT STAKE CAMPAIGN 1, 3-4 (Jesse Rutledge ed., Apr. 2008), *available at* www.justiceatstake.org.

interest groups have increased their involvement in judicial elections.[83] Rarely is merit selection ever mentioned without, in the same breath, someone saying judicial elections have gotten out of hand.

All of these points can be assumed. But even if all of this is true, how do any of these contentions help us in answering the question before us, which is: "Is merit selection consistent with traditional concept of representative democracy?" In a nutshell, the justifications for merit selection fail to answer this question. The proponents of merit selection regularly argue *why* merit selection is a good thing—but they fail to address *whether* it is a valid selection method in the first place. The backers focus primarily on the ends, while largely failing to address the means.

In fact, the leading proponents of merit selection concede that they are unable to overcome the argument that merit selection removes the people's right to vote.[84] Both proponents and opponents of merit selection acknowledge that when an unelected nominating commission replaces the direct vote of the people or the indirect vote of the appointing authority, it removes the right of the people to choose their judges, and therefore calls into question whether the members of the nominating commission are truly fulfilling the goals of representative democracy.[85]

It must also be noted that one of the more revealing facts about merit selection is that its backers largely do not advocate for judicial

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83. *See* JUSTICE AT STAKE CAMPAIGN, *supra* note 82, at 9.

84. *See* Anderson, *supra* note 59 (acknowledging that the merit selection movement is unable to answer the charge of "don't let the elites take away your right to vote"); Schotland, *supra* note 49, at 1090 (citing an unpublished "Call to Action" of the Conference of Chief Justices circulated at the National Judicial College in February 2005 that stated, "The fact—which becomes constantly clearer and more widespread—is that whatever may be the view of a State's courts and lawyers, 'Don't let them take away your vote' (to use the phrasing of ads in more than one State) has been an insuperable hurdle."); Phillips, *supra* note 6, at 77 (describing how merit selection is "vulnerable to populist appeals like, 'Don't let them take away your vote.'").

85. *See* Sandra Day O'Connor, *Take Justice Off the Ballot*, N.Y. TIMES, May 21, 2010 (acknowledging, but later discrediting, that "another argument against this system is that it deprives voters of the chance to choose their judges"). The irony of the headline of O'Connor's article—which can be interpreted as meaning that merit selection is unjust—is not lost on the author. *See also* Zeidman, *supra* note 65, at 717 (arguing that people prefer to elect judges because "it goes to the heart of democracy and accountability: the input of the citizenry"); Bierman, *supra* note 40, at 855 ("One powerful argument against merit selection is that it deprives the public of the right to vote for public officials"); Olszweski, *supra* note 52, at 2 ("Popular elections provide the most democratic form of judicial election because they give citizens a direct role in choosing the judges that represent them. When judges are appointed by a selection committee or by a governor, however, the citizenry is deprived of its fundamental right to vote and select judges.").

appointments by a governor. Consider what gubernatorial appointment would do in states that are plagued by difficult judicial elections: direct appointment would do away with aggressive judicial campaigns, totally eliminate the arms race in judicial fund-raising, knock out the influence of state political parties in judicial races, and void the need for special interest groups to run campaign commercials. In other words, most—if not all—of the concerns leveled by merit selection supporters can be alleviated by gubernatorial appointment.

Yet, instead of favoring direct gubernatorial appointment or elections, some merit selection advocates continue to press for a commission-based approach and simultaneously contend that the right of the people to choose their judge can be preserved if a nominating commission selection is followed by a retention election. The argument is that by requiring a merit-selected judge to stand before the voters in an election sometime after assuming office, during which the voters give an up-or-down vote on the nominating commission's selection, the people's right to vote is preserved.[86] This argument, however, ignores the fact that where the nominating commission is composed of unelected members, no representative of the people selected the judge in the first place. Additionally, a retention election is no contest—it simply allows the voters to choose whether or not the judge should continue in office. Retention elections offer no opponent; they simply offer one judge on the ballot, and there is no mechanism for an opposing candidate to run against that judge. Such an "election" is not a democratically contested contest. Voters are not given the opportunity to know who will replace the incumbent if he is defeated; therefore, the voters are naturally reluctant to vote the incumbent out and risk the possibility of having an even less desirable judge or justice appointed in the incumbent's place.[87]

It appears that judicial reformers could achieve the same result of cleaning up unpleasant judicial elections by switching to a gubernatorial appointment system. Or, they could retain judicial elections, but apply reforms such as public disclosure of campaign contributions, or voluntary public election financing, to make elections more palatable. Either option would retain the inherent nature of elections or appointments as consistent with traditional representative democracy. Yet merit selection advocates tend to reject the option of replacing

86. *See* O'Connor, *supra* note 72, at 565.

87. *See* Fitzpatrick, *supra* note 38, at 683-84 (2009) (noting some commentators are of the view that in judicial retention elections, "the devil you know is preferable to the devil you don't.").

elections with straight gubernatorial appointment.[88] It appears that merit selection proponents are unwelcoming of those reforms if it means abandoning their ability to place unelected persons on a nominating commission to select judges.

V. WHY MERIT SELECTION CONFLICTS WITH TRADITIONAL NOTIONS OF REPRESENTATIVE DEMOCRACY

A detailed analysis of the actual structure of merit selection plans, as well as a reasonable reading of the scholarship, reveals that while merit selection may be justified on a number of fronts, it cannot be justified on the grounds that it advances traditional representative democracy. Below are five examples.

A. Merit Selection Eliminates the People's Right to Vote

States that use merit selection commissions that force governors to choose from the commissions' judicial candidates share a common characteristic: in these systems, the citizens do not select their judges. Instead, unelected people—typically lawyers chosen by state bar associations—ultimately chose which judges ascend to the bench. In other words, the traditional and well-established norm of representative democracy is replaced by a system in which a select few unelected individuals chose which judges govern.

The chart below describes the form of merit selection in the twenty-five states that have "pure" merit selection systems along with the District of Columbia. In these systems, the state constitution provides for the creation of a judicial nominating commission. The commission is typically composed of a mix of lawyers and non-lawyers chosen by the state bar, the governor or the legislature. The nominating commission sends a list of potential judicial nominees to the governor, who must appoint from the list; thus, the governor is then bound by the recommendations of the nominating commission. That is, if a governor is unsatisfied with the choices of nominees that the panel has sent him, the governor is out of luck—he is stuck with the options that the commission has sent and must select from the slate.

In Missouri, for example, if the governor fails to appoint from the list, the nominating commission appoints the judge.[89] In Kansas, if the governor fails to make an appointment within sixty days of receiving the

88. *See, e.g.*, PENNSYLVANIANS FOR MODERN COURTS, www.judgesonmerit.org (last visited Jan. 10, 2011) (a notable merit-selection advocacy organization).

89. MO. CONST. art. V, § 25(a).

recommendations, the chief justice (who was chosen to that post by other justices, not the voters) chooses the judge.[90] I define these systems as "pure" merit selection mechanisms, meaning that the governor *must* appoint from the panel's recommendations. This stands in contrast to an arrangement where a panel provides a merely advisory recommendation to the governor that the governor could, at least conceivably, ignore.[91] Thus, in these pure merit selection states, nominating commissions—which are composed, at least in part, of unelected people who are wholly unaccountable to the voters—have the ultimate control over the selection of judges.

FORM OF MERIT SELECTION	IMPACT ON REPRESENTATIVE DEMOCRACY
Alabama: Individual counties may use separate nominating commissions and submit potential lower court judges to the governor for appointment.[92] A typical example is the Jefferson County Judicial Commission, which consists of two members of the Alabama State Bar elected by the members	The vote of the people is displaced by unelected members of the Alabama State Bar.

90. KAN. CONST. art III, § 5, cl. 5.

91. Delaware, Georgia, Maine, Massachusetts, Minnesota, North Dakota and West Virginia employ the use of advisory panels who recommend potential judges to the governor. *See* Methods of Judicial Selection: Judicial Nominating Commissions, *available at* http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state (last visited Jan. 10, 2011). The governor retains the ultimate authority as to whether or not to appoint a person whom the advisory panel has recommended. These advisory panels cannot be classified as "pure" merit selection nominating commissions, because they simply make nonbinding recommendations to the governor. Such advisory panels may provide a significant benefit to governor, and as long as their recommendations are nonbinding, they do not run afoul of traditional representative democracy. To be sure, I see nothing wrong with selecting judges (and other public officials) on the basis of their merits; in fact, the people or governors *should* select the most talented, intelligent and meritorious judges. I only mean to say that unelected elites should not displace the choices of the people. For an explanation of the methods of judicial selection, see the website of the American Judicature Society, http://www.judicialselection.us (last visited Jan. 10, 2011).

92. ALA. CONST. amend. LXXXIII.

of the bar, two non-members of the Alabama State Bar chosen by the state senator and state representatives from Jefferson County, and one judge of the Birmingham Circuit Court elected by the other judges of that circuit court.[93] The Commission submits a list of three judges, and the governor "shall appoint" from the list.[94] If the governor fails to appoint, the chief justice appoints.[95]	
Alaska: The seven-member Alaska Judicial Council[96] sends a list of two or more supreme court or superior court nominees to the governor, who must appoint from the list.[97] The council consists of three lawyers appointed by the Alaska State Bar; three non-lawyers appointed by the governor and confirmed by a majority of the legislature in joint session; and the chief justice, who serves as chair, ex officio.[98]	The vote of the people is displaced by unelected members of the Alaska State Bar.
Arizona: Three separate sixteen-member commissions, one for the supreme court and court of appeals,[99] and one each for the Maricopa County	Because the chief justice is elevated to his or her post by the other members of the supreme court,[105] rather than the voters,

93. ALA. CONST. amend. LXXXIII, para. 7.
94. *Id.* at para. 11.
95. *See* ALA. CONST. amend. CX.
96. ALASKA CONST. art. IV, § 8.
97. ALASKA CONST. art. IV, § 5.
98. ALASKA CONST. art. IV, § 8.
99. ARIZ. CONST. art. VI, § 31(A).

and Pima County superior courts,[100] submit at least three nominees to the governor,[101] who "shall appoint" from the list.[102] The commissions comprise five lawyers nominated by the Arizona State Bar Board of Governors appointed by the governor with the advice and consent of the senate; ten non-lawyers appointed by the governor with the advice and consent of the Senate and the chief justice.[103] If the governor does not appoint within sixty days, the chief justice appoints from the list.[104]	the vote of the people is displaced by the chief justice.
Colorado: A fourteen-member Supreme Court Nominating Commission[106] sends a list of potential supreme court and appellate court judges to the governor, who "shall" appoint from the list.[107] The commission consists of six lawyers appointed by the majority vote of the governor, attorney general, and chief justice from each congressional district; seven non-lawyers appointed by the governor; and the chief justice, who serves as chair, ex officio.[108] If the governor does not appoint	Because the chief justice is elevated to his post by the other members of the supreme court,[110] rather than the voters, the vote of the people is displaced by the chief justice.

105. ARIZ. CONST. art. VI, § 3.

100. *See* ARIZ. CONST. art. VI, § 41(B) (a commission is established for every county with a population over two hundred fifty thousand).

101. ARIZ. CONST. art. VI, §§ 37(B), 41(I).

102. *Id.* § 37(C).

103. ARIZ. CONST. art. VI, §§ 36(A), 41(B)(1)-(3).

104. ARIZ. CONST. art. VI, § 37(C).

106. *See* COLO. CONST. art. VI, § 24(1)-(2) (a judicial nominating commission is established for each judicial district in the state).

107. COLO. CONST. art. VI, § 20(1).

108. COLO. CONST. art. VI, § 24(1)-(3).

within fifteen days, the chief justice appoints from the list.[109]	
Connecticut: The twelve-member Judicial Selection Commission[111] sends a list of supreme court, court of appeals, and superior court nominees to the governor, who "shall" select a nominee from the list.[112] The commission is composed of three lawyers and three non-lawyers appointed by the governor; as well as one non-lawyer appointed by each of the speaker of the House of Representatives, the president *pro tempore* of the Senate, the Senate majority leader, the Senate minority leader, the House majority leader, and the House minority leader.[113]	Citizens residing in the same district as the speaker of the House, Senate president *pro tempore*, Senate majority leader, senate minority leader, House majority leader or House minority leader have voting power to select six commission members, but citizens residing in any other district do not.
District of Columbia: The seven-member Judicial Nomination Commission[114] sends a list of nominees for the District of Columbia Court of Appeals and Superior Court to the president of the United States, who "shall nominate" and appoint from the list, with the consent of the U.S. Senate. The commission consists of two persons[115] (one lawyer, one non-lawyer) appointed by the mayor, two lawyers appointed by the board of governors of the	Although the District of Columbia Judicial Nomination Commission purports to displace the vote of the people by the unelected members of the board of governors of the District of Columbia Bar, this attempt to bind the president's appointment power would violate the Appointments Clause of article II, section 2, clause 2, of the U.S. Constitution.

110. COLO. CONST. art. VI, § 5(2).
109. COLO. CONST. art. VI, § 20(1).
111. CONN. GEN. STAT. § 51-44a(f) (2010).
112. *Id.* at § 51-44a(h).
113. *Id.* at § 51-44a(b).
114. D.C. CODE § 1-204.34(d)(1) (2010).
115. D.C. CODE § 1-204.33(a) (2010).

District of Columbia Bar, one non-lawyer appointed by the District of Columbia Council, one judge appointed by the chief judge of the U.S. District Court for the District of Columbia; and one person appointed by the president.[116]	
Florida: Twenty-six separate nine-member judicial nominating commissions[117] for the supreme court, the district courts, and the circuit courts send a list of not fewer than three nor more than six judicial nominees to the governor, who "shall" fill the vacancy from the list.[118] Each nominating commission consists of three lawyers appointed by the board of governors of the Florida State Bar, three non-Florida State Bar member electors who reside in the territorial jurisdiction of the court appointed by the governor, and three electors who reside in the territorial jurisdiction of the court appointed by a majority vote of the other six members of the nominating commission.[119]	The vote of the people is displaced by unelected members of the Florida State Bar.
Hawaii: The nine-member Hawaii Judicial Selection Commission[120] sends a list of no fewer than four, nor more than six, nominees to the supreme court, intermediate	The vote of the people is displaced by unelected members of the Hawaii State Bar. Citizens residing in the same district as the speaker of the

116. *Id.* at § 1-204.33(b)(4)(A)-(E).
117. FLA. CONST. art. V, § 20(C)(5)(a)-(c).
118. FLA. CONST. art. V, § 11(a).
119. FLA. CONST. art. V, § 20(C)(5)(a)-(c).
120. HAW. CONST. art. VI, § 4.

appellate courts, and circuit courts to the governor.[121] The commission is composed of two members appointed by the governor, two members appointed by the speaker of the state house of representatives, two members of the state senate, two members chosen by the members in good standing of the Hawaii State Bar, and one member appointed by the chief justice.[122] If the governor fails to appoint from the list within thirty days, the Judicial Selection Commission appoints from the list with the consent of the Senate.[123]	house have voting power to select commission members, but citizens residing in any other state house district do not. Citizens residing in the same district as the senate president have voting power to select commission members, but citizens residing in any other Senate district do not. Because the chief justice is nominated to his or her post by the Judicial Selection Commission,[124] rather than the voters, the vote of the people is displaced by the Judicial Selection Commission itself.
Idaho: The seven-member Idaho Judicial Council[125] submits a list of at least two but not more than four supreme court, court of appeals, or district court nominees to the governor, who "shall appoint" from the list.[126] The council consists of three lawyers appointed by the Board of Commissioners of the Idaho State Bar with the consent of the senate, one of whom must be a district court judge; three non-lawyers appointed by the governor with the consent of the Senate; and the chief justice, who serves as chair, ex officio.[127]	The vote of the people is displaced by the unelected members of the Idaho State Bar.

121. HAW. CONST. art. VI, § 3.
122. HAW. CONST. art. VI, § 4.
123. HAW. CONST. art. VI, § 3.
124. *Id.*
125. IDAHO CODE § 1-2101(1) (2010).
126. *Id.* § 1-2101(3).
127. *Id.* § 1-2101(1).

Indiana: The seven-member Judicial Nominating Commission[128] sends a list of three supreme court and court of appeals nominees to the governor, who "shall" appoint from the list.[129] The Judicial Nominating Commission is composed of three lawyers elected by others admitted to the practice of law; three non-lawyers appointed by the governor; and the chief justice or his or her designated associate justice, who serves as chair.[130] If the governor fails to appoint from the list within sixty days, the chief justice appoints from the same list.[131]	The vote of the people is displaced by unelected lawyers who are admitted to practice law in Indiana. Because the chief justice is elevated to his or her post by the Judicial Nominating Commission,[132] rather than the voters, the vote of the people is displaced by the Nominating Commission itself.
Iowa: The Iowa Judicial Nominating Commission[133] sends a list of three supreme court nominees or two district court nominees to the governor, who "shall" appoint from the list.[134] The commission is composed of not less than three nor more than eight appointed members, and an equal number of elected members.[135] The	The vote of the people is displaced by the unelected members of the Iowa State Bar.

128. IND. CONST. art. VII, § 9.

129. IND. CONST. art. VII, § 10.

130. IND. CONST. art. VII, § 9. Slightly different commission systems exist for local judges in Allen County (for the Allen County Superior Court), Lake County (for the Lake County Superior Court and County Court) and St. Joseph County (for the St. Joseph County Superior Court). In each county, the lawyers residing in that county select the lawyer members of the commission. *See* AM. JUDICATURE SOC'Y, JUDICIAL MERIT SELECTION: CURRENT STATES (2010), *available at* http://www.judicialselection.us/uploads/Documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf.

131. IND. CONST. art. VII, § 10.

132. IND. CONST. art. VII, § 3.

133. IOWA CONST. art. V, § 16.

134. IOWA CONST. art. V, § 15.

135. IOWA CONST. art. V, § 16.

appointed members are appointed by the governor subject to confirmation by the senate.[136] The elected members are elected by resident lawyers who are members of the Iowa State Bar.[137] The justice of the supreme court who is senior in length of service on the court, other than the chief justice, is a member and chair of the commission.[138]	
Kansas: The nine-member Supreme Court Nominating Commission[139] sends a list of potential supreme court justices to the governor, who "shall" appoint from the list.[140] The commission consists of one chair elected by the members of the State Bar of Kansas who are residents of and licensed to practice in Kansas, four lawyers elected by the State Bar from each of Kansas's four congressional districts and four non-lawyers appointed by the governor from each congressional district.[141] If the governor fails to make the appointment within sixty days after receiving the list of nominees,[142] the chief justice (the	The vote of the people is displaced by unelected members of the Kansas State Bar.

136. *Id.*
137. *Id.*
138. *Id.*
139. KAN. CONST. art. III, § 5(d)-(e).
140. *Id.* § 5(a).
141. *Id.* § 5(d). The constitution also allows for a method of "nonpartisan" selection to Kansas's District Court that may include a nominating commission. *Id.* § 6.
142. KAN. CONST. art. III, § 5(b).

most senior justice in terms of years or service)[143] makes the appointment from the list.[144]	
Kentucky: Separate seven-member Judicial Nominating Commissions[145] send a list of three nominees for the supreme court, court of appeals, circuit courts, and district courts to the governor, who "shall" appoint from the list.[146] Each commission consists of two lawyers chosen by the Kentucky State bar; four non-lawyers appointed by the governor; and the chief justice, who serves as chair.[147] If the governor fails to appoint from the list within sixty days, the chief justice appoints from the list.[148]	The vote of the people is displaced by the unelected members of the Kentucky State Bar. Because the chief justice is elevated to his or her post by his or her colleagues,[149] rather than the voters, the vote of the people is displaced by the chief justice.
Missouri: The seven-member Appellate Judicial Commission[150] sends a list of supreme court or court of appeals nominees to the governor, who "shall" appoint from the list.[151] The commission consists of one supreme court justice chosen by his or her peers; three lawyers, one selected from each court of appeals district by members of the Missouri State Bar; and one non-	The vote of the people is displaced by the unelected members of the Missouri State Bar.

143. KAN. CONST. art. III, § 2. The justice who has the longest continuous term of service becomes chief justice. *Id.*
144. KAN. CONST. art. III, § 5(b).
145. KY. CONST. § 118(2).
146. *Id.* §118(1).
147. *Id.* § 118(2)
148. *Id.* § 118(1)
149. KY. CONST. § 110(5)(a).
150. MO. CONST. art. V, § 25(d).
151. *Id.* § 25(a).

lawyer from each district appointed by the governor.[152] If the governor fails to appoint from the list within sixty days, the commission appoints.[153]	
Montana: The seven-member Judicial Nomination Commission[154] sends a list of supreme court nominees to the governor, who "shall" appoint from the list.[155] The commission is composed of four non-lawyers appointed by the governor, two lawyers appointed by the supreme court from different judicial districts and one district judge chosen by other district judges.[156] If the governor fails to appoint from the list within thirty days, the chief justice appoints.[157]	Citizens residing in the same district as the appointed district judge and the other appointed members may have more voting power to select commission members if the other nominees are from different districts.
Nebraska: Separate nine-member judicial nominating commissions[158] send a list of at least two nominees for the supreme court, courts of appeals, and district courts to the governor, who "shall" appoint from the list.[159] The commissions consist of four lawyers selected by the members of the Nebraska State Bar, four non-lawyers appointed by the governor, and	The vote of the people is displaced by the unelected members of the Nebraska State Bar.

152. *Id.* § 25(d).
153. *Id.* § 25(a).
154. MONT. CODE ANN. § 3-1-1001(1) (2010).
155. MONT. CONST. art. V, § 8(2).
156. MONT. CODE ANN. § 3-1-1001(1)(a)-(c) (2010).
157. MONT. CONST. art. VII, § 8(2); MONT. CODE ANN. § 3-1-1012 (2010).
158. NEB. CONST. art. V, § 20(3)(a)-(c).
159. *Id.* § 21(1).

one supreme court justice who serves as non-voting chair.[160] If the governor fails to appoint from the list within sixty days, the chief justice appoints.[161]	
Nevada: The seven-member Commission on Judicial Selection[162] sends a list of three supreme court nominees to the governor, who "shall appoint" from the list.[163] The commission consists of three lawyers chosen by the Nevada State Bar, three non-lawyers appointed by the governor and the chief justice or an associate justice that he or she designates.[164] If the governor does not appoint from the list within thirty days, the governor is prohibited from making any appointment to public office until he has appointed a judge or justice from the list.[165]	The vote of the people is displaced by the unelected members of the Nevada State Bar.
New Mexico: The fourteen-member Appellate Judges Nominating Commission sends a list of appellate court nominees to the governor, who "shall" appoint from the list.[166] The commission consists of the chief justice or the chief justice's designee from the supreme court; two court of appeals judges selected by the chief judge of the court of appeals; two persons (one	The vote of the people is displaced by unelected members of the New Mexico State Bar. Citizens residing in the same district as the speaker of the House or Senate president *pro tempore* have voting power to select commission members, but citizens residing in any other district do not. Because the chief justice is elevated to his or her

160. *Id.* § 21(4).
161. *Id.* § 21(1).
162. NEV. CONST. art VI, § 20(3)(a)-(c).
163. *Id.* § 20(1).
164. *Id.* § 20(3)(a)-(c).
165. *Id.* § 20(8).
166. N.M. CONST. art. VI, § 35.

lawyer, one non-lawyer) chosen by the governor, the speaker of the House of Representatives, the president *pro tempore* of the Senate; four lawyers representing civil and criminal prosecution and defense appointed by the president of the New Mexico State Bar and the judges on the Nominating Commission; and the dean of the New Mexico School of Law, who serves as chair and votes in event of a tie.[167] If the governor fails to appoint from the list within sixty days, the chief justice appoints.[168]	post by his or her peers, rather than the voters, the vote of the people is displaced by the chief justice. In the event of a tie, the vote of the people is displaced by the unelected dean of the New Mexico School of Law.[169]
New York: The twelve-member Commission on Judicial Nomination[170] sends a list of court of appeals[171] nominees to the governor, who "shall appoint," with the advice and consent of the senate, from the list.[172] The commission consists of four people (two lawyers and two non-lawyers) appointed by the governor and four people (two lawyers and two non-lawyers) appointed by the chief judge of the court of appeals, the speaker of the assembly, the Senate president *pro tempore*, the Senate minority leader and the Assembly minority leader.[173]	The vote of the people is displaced by New York legislative leaders. Citizens residing in the same district as the speaker of the Assembly, Senate president pro tempore, Senate minority leader, or Assembly minority leader have voting power to select commission members, but citizens residing outside legislative districts do not.

167. *Id.*
168. *Id.*
169. *Id.*
170. N.Y. CONST. art. VI, § 2(d)(1).
171. The court of last resort in New York is the Court of Appeals.
172. N.Y. CONST. art. VI, § 2(e).
173. *Id.* § 2(d)(1).

Oklahoma: The thirteen-member Judicial Nominating Commission[174] sends a list of three supreme court or court of appeals nominees to the governor, who "shall" appoint from the list.[175] The commission consists of six non-lawyers appointed by the governor from each congressional district, one lawyer elected from each of Oklahoma's six congressional districts by the Oklahoma State Bar members of that district, and one non-lawyer resident selected by eight or more of the commission members.[176] If the governor fails to appoint from the list within sixty days, the chief justice appoints.[177]	The vote of the people is displaced by the unelected members of the Oklahoma State Bar.
Rhode Island: The nine-member Judicial Nominating Commission[178] sends a list of judicial nominees to the governor, who "shall" appoint, by and with the advice and consent of both the house and the senate, from the list.[179] The commission is composed of four persons (three lawyers, one non-lawyer) appointed by the governor; and one person (lawyer or non-lawyer) appointed by the governor from a list provided by the speaker of the house, the president of the senate, the senate minority leader, the	Citizens residing in the same district as the speaker of the house, the senate president, and the house and senate minority leaders have voting power to select commission members, but citizens residing outside of those legislative districts do not.

174. OKLA. CONST. art. VII-B, § 3(a).
175. OKLA. CONST. art. VII-B, § 4.
176. OKLA. CONST. art. VII-B, § 3(a)(1)-(3).
177. OKLA. CONST. art. VII-B, § 4.
178. R.I. GEN. LAWS § 8-16.1-2(a) (2010).
179. R.I. CONST. art. X, § 4.

house minority leader, as well as a joint list from the speaker of the house and the president of the senate.[180]	
South Dakota: The seven-member Judicial Qualifications Commission[181] sends a list of at least two supreme court and circuit court nominees to the governor, who "shall" appoint from the list.[182] The commission is composed of three lawyers appointed by the president of the South Dakota State Bar, two non-lawyers appointed by the governor and two circuit judges elected by other judges.[183]	The vote of the people is displaced by the unelected members of the South Dakota State Bar. Citizens residing in the same district as the two circuit judges who are members of the commission have voting power to select commission members, but citizens residing outside of those judicial districts do not.
Tennessee: The seventeen-member Judicial Nominating Commission[184] sends a list of supreme court or court of appeals nominees to the governor, who "shall" appoint from the list.[185] The commission consists of eight members (at least five of which must be lawyers) appointed by the speaker of the House of Representatives, eight members (at least five of which must be lawyers) appointed by the speaker of the Senate[186] and one non-lawyer appointed jointly by the speaker of the House and the speaker of the Senate.[187]	Citizens residing in the same district as the speaker of the House or speaker of the Senate have voting power to select commission members, but citizens residing outside of those legislative districts do not.

180. R.I. GEN. LAWS § 8-16.1-2(a)(1)(i)-(v) (2010).
181. S.D. CODIFIED LAWS § 16-1A-2 (2010).
182. S.D. CONST. art. V, § 7.
183. S.D. CODIFIED LAWS § 16-1A-2(1)-(3) (2010).
184. TENN. CODE ANN. § 17-4-102(a) (2010).
185. *Id.* § 17-4-102(a)(2).
186. *Id.* § 17-4-102(a)(1).
187. *Id.* § 17-4-102(a)(3).

Utah: A seven-member Appellate Court Nominating Commission[188] sends a list of supreme court, court of appeals, district court, and juvenile court nominees to the governor, who must appoint from the list.[189] Each commission is composed of seven people (at least two but not more than four must be lawyers)[190] appointed by the governor, two lawyers nominated from lists submitted by the Utah State Bar[191] and one ex officio member chosen by the chief justice.[192] If the governor fails to appoint from the list within thirty days, the chief justice appoints.[193]	The vote of the people is displaced by the unelected members of the Utah State Bar. Because the chief justice is elevated to his or her post by his or her peers,[194] rather than the voters, the vote of the people is displaced by the chief justice.
Vermont: The eleven-member Judicial Nominating Board[195] sends a list of supreme court, superior court, and district court nominees to the governor, who "shall" appoint from the list.[196] The board consists of two non-lawyers appointed by the governor,[197] three senators (at most one lawyer) selected by the Senate,[198] three state	The vote of the people is displaced by the unelected members of the Vermont State Bar.

188. UTAH CODE ANN. § 78A-10-201 (2010); UTAH CODE ANN. § 78A-10-301 (2010).
189. UTAH CONST. art. VIII, § 8(1).
190. UTAH CODE ANN. § 78A-10-202(4)(b), (5) (2010); UTAH CODE ANN. § 78A-10-302(4), (7) (2010).
191. UTAH CODE ANN. § 78A-10-202(4)(b) (2010); UTAH CODE ANN. § 78A-10-302(4) (2010).
192. UTAH CODE ANN. § 78A-10-202(6); UTAH CODE ANN. § 78A-10-302(8) (2010).
193. UTAH CONST. art. VIII, § 8(1).
194. UTAH CODE ANN. § 78A-3-101(3) (2010).
195. VT. STAT. ANN. tit. 4, § 601(b) (2010).
196. VT. CONST. ch. II, § 32; VT. STAT. ANN. tit. 4, § 603 (2010).
197. VT. STAT. ANN. tit. 4, § 601(b)(1) (2010).
198. *Id.* § 601(b)(2).

representatives (at most one lawyer) selected by the House[199] and three lawyers chosen by the members of the Vermont State Bar.[200]	
Wyoming: The seven-member Judicial Nominating Commission[201] sends a list of supreme court, district court, and circuit court nominees to the governor, who "shall" appoint from the list.[202] The commission is composed of three lawyers selected by the Wyoming State Bar; three non-lawyers appointed by the governor; and the chief justice, or a supreme court justice designated by the chief justice, who serves as chair and who votes in case of a tie.[203]	The vote of the people is displaced by the unelected members of the Wyoming State Bar. Because the chief justice is elevated to his or her post by his or her peers,[204] rather than the voters, in the event of a tie, the vote of the people is displaced by the chief justice.

What the above merit selection systems have in common is they bring to life James Madison's warnings of the serious dangers that can result if the people's authority to govern is usurped by a small group. Madison warned that unless the judiciary was accountable to the people, a handful of elites could take over the whole system.[205] Madison also said it was "*essential*" that our government be composed of "the great body of the society," and not be directed by "an inconsiderable proportion, or a favored class of it," because "otherwise, a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic."[206] It seems apparent that merit selection nominating commissions consisting of members of the state bar association or legislative leaders are composed of anything

199. *Id.* § 601(b)(3).
200. *Id.* § 601(b)(4).
201. WYO. CONST. art. V, § 4(c).
202. *Id.* § 4(b).
203. *Id.* § 4(c), (e).
204. *Id.* § 4(a).
205. THE FEDERALIST NO. 39, *supra* note 42, at 241 (James Madison).
206. *Id.*

except "the great body of the society."[207] Rather, these small panels of interested persons are select people "from an inconsiderable proportion or a favored class."[208] These favored classes include lawyers (who are distinguished from the other typical voters by having expended a great deal of personal wealth and time to go to law school and become a member of the state bar) and political leaders (who have managed to climb the internal ranks of legislative leadership) that have the right under a merit selection system to have more say in who governs them than do other voting citizens.

Perhaps no better example of Madison's bad dream come true comes from Missouri, which is, ironically, the state with the oldest merit selection system.[209] In 2004, then-Missouri Secretary of State Matt Blunt ran for governor and campaigned, in part, on a platform of judicial reform.[210] Blunt explained to the voters that the Missouri Supreme Court was out of control, and he wanted to be governor in order to appoint a judge who would exercise restraint.[211] The reaction was evidentially well-received, and Blunt won.

In 2007, during Governor Blunt's first term, Missouri Supreme Court Justice Ronnie White retired. The ensuing vacancy on the supreme court gave Blunt the opportunity to satisfy his promise to the voters and appoint a justice who represented his judicial philosophy. Unfortunately for Governor Blunt and the majority who elected him, the Missouri merit selection system had outfoxed both Blunt and the people. The Missouri Appellate Judicial Commission recommended three replacements for Justice White, and none of them fit the description of what Governor Blunt had advocated for in his campaign.[212] The Missouri merit selection

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207. *Id.*

208. *Id.*

209. *See* YOUR MISSOURI COURTS, http://www.courts.mo.gov (last visited Jan. 10, 2011).

210. *See* Kit Wagar, *McCaskill, Blunt Trade Barbs: Governor Candidates' Debate Turns Volatile*, KAN. CITY STAR, Oct. 23, 2004, at B1 (describing a heated debate between gubernatorial candidates Matt Blunt and Claire McCaskill in which Blunt vowed to rein in Missouri's "renegade judges" if he were elected).

211. *See id.; see also* Virginia Young, *Blunt Pushes Panel on Judge Pick*, ST. LOUIS POST-DISPATCH, July 2, 2007, at A1 ("Blunt has said he wants to appoint a judge who will refrain from being an 'activist' and will strictly interpret the laws.").

212. *See* Kelly Wiese, *Gov. Blunt's Office Led Court Plan Opposition*, MO. LAWYERS WEEKLY, Feb. 9, 2009, at 1; *see also* Kit Wagar, *Search for Next Missouri Supreme Court Judge Exposes Tensions*, KAN. CITY STAR, August 9, 2007, at A1 ("Blunt has repeatedly expressed his distaste for the state's selection method and lamented his inability to appoint the person he wants."); *Blunt Pushes Panel on Judge Pick*, ST. LOUIS POST-DISPATCH, July 2, 2007, at A1 (noting Gov. Blunt's concerns that the Nominating Commission "won't deliver the type of candidate he wants").

system had given Governor Blunt a Hobson's Choice: He had to either appoint a justice who did not represent the views of the people, or, if he failed to appoint, then the Appellate Judicial Commission would appoint a justice who did not represent the views of the people. Blunt was irate; he rebuked the Appellate Judicial Commission for forcing him to appoint someone he did not want to appoint.[213]

Governor Blunt caved in to the Missouri merit selection plan. Being unable to appoint a judge who most reflected the views of the people, he was forced to appoint the person with whom he disagreed least among the three choices. The alternative would have been a possible appointment by the Appellate Judicial Commission of a person who represented the people's views even less. Governor Blunt made his displeasure at the blindsiding by the merit selection panel clear by introducing his selection for the supreme court not as a stellar choice, but in a lukewarm fashion, as "the best candidate of the three candidates submitted to me."[214] He also again criticized the Missouri merit selection system.[215] But Governor Blunt's words were not enough to save him from the wrath of his base of supporters, who excoriated him for failing to live up to his word and reform the Missouri courts, and then "declared war" on him for his judicial pick.[216] Governor Blunt, also facing criticisms on other fronts, declined to run for a second term.[217]

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213. *See Gov. Blunt's Office Led Court Plan Opposition,* MISSOURI LAWYERS WEEKLY, February 9, 2009, at 1 (quoting Gov. Blunt's Chief of Staff, in an e-mail to a judicial applicant that the nominating commission has failed to recommend to the governor: "The commission has clearly decided to plain screw the governor. What a shame"); *see also* Kit Wagar, *supra* note 212, at A1.

214. *See* Scott Lauck, *Patricia Breckenridge Tapped for Missouri Supreme Court*, ST. LOUIS DAILY RECORD & ST. LOUIS COUNTIAN, Sept. 10, 2007; *see also* Curt Levey, *Supreme Showdown in the Show Me State*, HUMAN EVENTS (Sept. 12, 2007), *available at* http://www.humanevents.com/article.php?id=22335 (noting that "[f]aced with choosing from among three unacceptable candidates, [Blunt] criticized the Commission's highly politicized, backroom selection process and left open the possibility of lodging a protest by declining to select any of the three").

215. *See* Levey, *supra* note 214.

216. *See, e.g.,* Kathryn Jean Lopez, *Conservatives Declare War on Gov. Blunt*, NAT'L REV. (Sept. 7, 2007), *available at* http://www.nationalreview.com/blogs/print/148344; Kit Wagar, *Conservatives Denounce Governor's Pick for the Missouri Supreme Court*, KAN. CITY STAR, Sept. 8, 2007, at A1.

217. *See* Rachael Heaton et al., *Gov. Matt Blunt Won't Run for Reelection*, THE MISSOURIAN, Jan. 22, 2008, *available at* http://www.columbiamissourian.com/stories/2008/01/22/gov-matt-blunt-wont-run-re-election/; *Missouri Gov. Matt Blunt Abruptly Decides Not to Seek 2nd Term*, FOXNEW.COM (Jan. 23, 2008), *available at* http://www.foxnews.com/story/0,2933,324848,00.html.

As the chart above illustrates, and as the example of Governor Blunt emphasizes, "pure" merit selection tends to cast aside the view of the general voting population and replace it with the views of the people lucky enough to have achieved a seat on the nominating commission.[218] The fortunate few on the nominating commission have all of the votes for the judges, while the people whose views are unrepresented have none.[219] While the "merit selection" moniker is pleasant sounding enough, because it implies that judges are selected based on merit alone, in application a far different result occurs: "the great body of the society" takes a backseat to the "inconsiderable proportion or a favored class."[220]

B. Merit Selection Relies on the Theory that Elites are Smarter than the People

One goal of a merit selection approach is to create a nominating commission composed of sophisticated, elite lawyers who are schooled in the law, as well as non-lawyers who are well-educated (and without doubt, well-connected) and to delegate to this special group the responsibility of selecting judges. Implied in this goal is the contention that commission members are better able to select a judge than are "regular" people.[221] In fact, merit selection supporters unabashedly claim that the people are not smart enough to select the best judge. For example, Missouri Supreme Court Justice Laura Denvir Stith, while

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218. *Our Constitutional Right to Vote: Hearing on Merit Selection: Senate Bills 1324 and 1325 Before the S. Judiciary Comm.* (Pa. 2008) (written testimony of Prof. Marina Angel, Temple Univ. Sch. of Law). The hearing was in response to a bill package that would have instituted a merit selection system in Pennsylvania. Professor Angel contended that "[t]he bills you are considering are not 'merit selection' bills. They are selection by a small, elite group bills." Professor Angel continued:

> So called "merit selection" is no such thing. It takes away my right to vote and gives my power to select judges to a committee of appointees selected by a small group of Harrisburg politicians and special interest groups, which committee will operate in secret behind closed doors and without accountability.

Our Constitutional Right to Vote, *supra*.

219. *See* Fitzpatrick, *supra* note 38, at 679 (contending that "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").

220. THE FEDERALIST NO. 39, *supra* note 42, at 241 (James Madison).

221. *See* Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL'Y. 392, 396 (2009) (Because "the bar is an elite segment of society, 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 judge—is openly elitist.").

serving as chief justice and the chair of Missouri's merit-based Appellate Judicial Commission, defended merit selection on the grounds that "[l]awyers are in the best position to judge the legal abilities of those who want to be a judge and to determine whether an applicant understands the proper role of a judge in our democracy."[222] Or, as an officer of the Arizona State Bar wrote while defending Arizona's merit selection systems, "[W]e could argue that the process of selection and oversight goes much farther than someone walking into a ballot box and voting for a name they only know because they drove past a sign."[223] In other words, the people cannot be trusted to vote because they pick judges based only on name identification and based on no other reason.

To put this into context, imagine that an American state amends its constitution to end popular elections for governor.[224] Instead, a fifteen-member gubernatorial nominating commission is created. The commission's goal is to select the best and most qualified governor. The commission is composed of five people from Group A, all of whom are richly skilled in drafting legislation and effectuating its passage. Some of the members of Group A have law degrees, while others have decades of experience in public policy. Still others have a mastery of public relations and human interaction. The commission also includes five people from Group B, all of whom have extensive knowledge of constituent relations and serving the public. Group B's members are responsive to the people and regularly solve problems on behalf of regular citizens. They have also received numerous awards and

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222. Hon. Laura Denvir Stith, Chairwoman, App. Jud. Comm'n, Remarks Concerning Missouri's Nonpartisan Merit Selection Plan for Judges Before the S. Rules Comm. (Sept. 11, 2007) *available at* http://www.courts.mo.gov/pressrel.nsf/bb9fda2a04f10ca8862565ec0067d206/9b49069fb49bbf298625735300772d69?OpenDocument.

223. DeBruhl, *supra* note 63.

224. It should be noted that one argument in defense of merit selection on the basis of representative democracy is that nominating commissions are typically established by a state constitutional amendment, meaning that the people themselves ratified the constitutional change and ushered in the merit selection system. *See* Nelson Lund, *May Lawyers Be Given the Power to Elect Those Who Choose Our Judges? "Merit Selection" and Constitutional Law*, George Mason University Law and Economics Research Paper Series, No. 10-59, Nov. 3, 2010 (noting that because "the Kansas constitution was adopted by the people of that state, who are free to amend it, the [merit selection provision] may technically be in accord with Madison's description of republican government"). In other words, the people themselves have chosen to refine their representative democracy by voluntarily choosing a merit selection plan. However, even though the people have chosen to bind themselves today, that does not mean that the bind is somehow magically consistent with representative democracy as envisioned at our country's founding, nor does it erase the fact that the right of the people to representation through their elected officials may have been diminished.

commendations from civic groups for their public and community outreach. Finally, the commission includes five people from Group C, who are dedicated, humble public servants. They are experts in managing the day-to-day operations of large governments. Some of the members of Group C have technical or doctorate degrees, and decades of experience in public policy. Some are adjunct professors of government at the state's colleges and universities.

In the hypothetical gubernatorial nominating commission, the voters have been replaced by Group A (lobbyists), Group B (politicians), and Group C (bureaucrats). Imagine further that the lobbyists in Group A are appointed to the commission by an association of lobbyists. Some of their partners in the same lobbying firm regularly lobby the governor and his or her staff. The politicians in Group B are appointed by other politicians and work intensely with the governor on a regular basis to pass legislation. The bureaucrats in Group C are chosen by a union of concerned state employees. In this hypothetical, lobbying firms, politicians and bureaucrats are ultimately choosing the governor.

How much different is the imaginary gubernatorial nominating commission from a judicial nominating commission? Is it substantively different from a judicial merit selection commission composed in part, for example, of rich personal injury lawyers, who belong to law firms in which their partners regularly litigate before the state courts in extravagant personal injury lawsuits? Is it consistent with traditional representative democracy when the people cede their vote to a collective group of seemingly skilled people? It appears that the imaginary gubernatorial nominating commission, though perhaps having some of the same benefits of a judicial merit selection plan, would have the same warts. As one merit selection opponent precisely addressed the issue, merit selection can be a "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."[225]

To use another example, imagine that Michigan, a state that selects its Supreme Court justices by a combination of judicial elections and judicial appointments, adopts a "pure" nominating commission system composed of members of the State Bar of Michigan to choose its Supreme Court justices. Under the present system, Michigan Supreme Court justices serve eight-year terms. When a vacancy occurs on the Supreme Court, the governor appoints a new justice to the vacant seat. If

225. Julius Uehlein & David H. Wilderman, *Why Merit Selection Is Inconsistent with Democracy*, 106 DICK. L. REV. 769, 769 (2002).

the justice wishes to remain on the court, he or she must appear on the ballot at the next statewide general election and be popularly elected to serve out the remainder of the term of office. If the justice is elected and serves out the remainder of the term, and then wishes to continue to serve on the court, he or she must stand before the voters again for election to the full eight-year term.

The estimated Michigan state population is approximately 9,970,000 persons, approximately 7,276,237 of whom are registered voters eligible to cast a ballot in Supreme Court elections.[226] The Michigan State Bar, however, has approximately 38,636 active lawyer members.[227] If the right of the people to vote for justices is displaced with a nominating commission in this fashion, the voters would sacrifice their voting rights to a disproportionate minority of lawyers (elites) who make up about half of one percent (0.53 percent) of the registered voting population, which is slightly over a third of a percent (0.39 percent) of the entire population.

Moreover, it must be noted that in many merit selection states, the lawyers who serve on nominating commissions are typically chosen by the state bar association; thus, they are not simple, disinterested lawyers, but rather are lawyers chosen by the organized bar (which is dedicated to serving the interests of the organized bar).[228] These "disinterested" lawyers may very well practice law in front of the very judges they are to select.[229]

Under traditional representative democracy, we elect our presidents, senators, representatives, state legislators, mayors, county commissioners, city council members, and, in some states, even our drain commissioners. We vote for candidates based on what we know, feel, and learn about them. We do not create a commission of people "smarter" and more "sophisticated" than us to choose those office holders. This is because, ultimately, we trust the people more than we

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226. *See Michigan 2009 Population Estimate*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/26000.html (last visited Jan. 10, 2011); *October 2010 Voter Registration Totals*, MICH. DEP'T OF STATE, http://www.michigan.gov/documents/sos/Voter_Regis_Total_by_County_316983_7.pdf (last visited Jan. 10, 2011).

227. *See Michigan Lawyer Distribution By Counties and Cities: Active Members as of January 2010*, STATE BAR OF MICH., http://www.michbar.org/resources/distribution.pdf (last visited Jan. 10, 2011).

228. *See* Fitzpatrick, *supra* note 38, at 679; *see also* Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 492 (2009) (acknowledging "the accusation that attorney or bar politics dominate the selection process" in merit selection states).

229. *See* Fitzpatrick, *supra* note 38, at 686.

trust elites.[230] While one could easily say that voters know little of their candidates in elections to the state house or state senate, or for that matter, the U.S. House or U.S. Senate, no one seriously advocates delegating the citizenry's right to elect officials to a nominating commission in those cases.

C. Merit Selection is Grounded in the Premise that Judges are Corrupt, Whereas Representative Democracy Assumes that the People Choose Officeholders Who Represent their Interests

Practically every argument in support of merit selection is entwined with the accusation that elected state court judges are susceptible to corruption. Merit selection supporters often insinuate that judges who campaign to win their seats take money from litigants in the form of campaign cash and then commit misconduct in office by deciding in favor of the campaign contributor.[231] In other words, elected judges are likely to engage in illegal quid pro quo bribery.[232] This attack on the

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230. As William F. Buckley, Jr. famously explained, he "would rather be governed by the first 2,000 names in the Boston telephone directory than by the 2,000 members of the Harvard faculty." William F. Buckley, Jr., *Mighty Mindedness*, NAT'L REV., May 3, 2004, at 58 (recounting the statement, which he had made 40 years prior in a televised debate).

231. *See, e.g.*, Bryant Furlow, *Sandra Day O'Connor Calls for Judicial Reform*, N.M. INDEP. (Aug. 18, 2010) *available at* http://newmexicoindependent.com/61807/sandra-day-oconnor-calls-for-judicial-reform ("In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution."); Stith, *supra* note 222 ("No one wants to worry that the case will be decided against them because the other side, or the other side's lawyer, gave a large contribution to the judge's election campaign, or to those politicians who appointed or nominated the judge for office. Missourians learned long ago, before they adopted the nonpartisan plan, that is exactly what can and does happen when politics becomes a key factor in determining who will be a judge."); Robert Barnes, *Sandra Day O'Connor Defends Work on Nev. Judicial Issue, Despite Robo-Calls*, WASH. POST (Oct. 27, 2010) (quoting Justice Sandra Day O'Connor: "[w]hen you enter a court, the last thing Nevadans want to worry about is whether the judge is more accountable to a campaign contributor or to a special interest group than to the law").

232. *See, e.g.*, Barnes, *supra* note 231 (quoting Sandra Day O' Connor); Bert Brandenburg & Rachel Paine Caufield, *Ardent Advocates*, 93 JUDICATURE 78, 79-80 (reviewing CHRIS BONNEAU & MELINDA E. HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009)) ("[T]he receipt of campaign contributions can indeed threaten legitimacy. For many citizens, contributions to candidates for judicial office imply a conflict of interest, even a quid pro quo relationship between the donor and the judge, which undermines the perceived impartiality and legitimacy." (quoting Professors James L. Gibson and Gregory A. Caldeira)). In general, the crime of bribery of a public official consists of three elements: First, that the defendant gave, offered, or promised something of value to the official; second, that the bribee was a government official or acting on behalf of the

integrity of judges is fueled by the primary sympathizers of merit selection.[233] In some cases, judicial officials who are trying to sway public opinion in support of merit selection in their own states charge that states lacking merit selection are rife with "corruption, influence-peddling, and overreaching."[234]

The evidence in support of the accusation of judicial corruption, however, appears to be scant. By all accounts, instances of judicial corruption in America are rare. Of course, judicial corruption is not nonexistent; judges, like all public officials, are merely mortal and sometimes commit crimes related to their official offices.[235] But, in order to take the proponents of merit selection seriously, one must adopt their view, however unsupported or insulting, that American state courts are

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government; and third, that the defendant made the gift, offer, or promise corruptly with the intent to influence an official act. *See* JAY E. GRENIG, WILLIAM C. LEE, & KEVIN F. O'MALLEY, 2 FED. JURY PRAC. & INSTR. § 27:03 (6th ed.). When viewing bribery charges in the context of conspiracy and aiding and abetting charges, a variety of state and federal laws ultimately criminalize both the act of giving the bribe, as well as the bribe receipt. For examples in the federal criminal code, which closely resemble the structure of bribery and related offenses codified in several states, *see* 18 U.S.C. § 201 (2006) (bribery of public officials and witnesses); 18 U.S.C. § 666 (2006) (bribery concerning programs receiving federal funds); 18 U.S.C § 371 (2006) (conspiracy); and 18 U.S.C. § 2 (2006) (aiding and abetting).

233. *See, e.g.*, Furlow, *supra* note 234 (discussing Sandra Day O'Connor); JUSTICE AT STAKE CAMPAIGN, www.justiceatstake.org (last visited Jan. 10, 2011). Justice at Stake's position is to take no official view on a particular judicial selection system. However, in arguing passionately against an elected judiciary, and in favor of merit selection, the organization has made the following statements: "A saint would be hard-pressed to disregard the fact that one litigant gave them a huge donation while the other gave nothing. Most of our judges are not saints"; "Bluntly, special interests hope to buy favorable treatment, by electing who they hope will serve their agenda"; "Many in the public believe that justice is for sale, because skyrocketing election costs have forced judges to raise money from those who appear before them in court"; and "The threat to impartial elected courts [has been] raised to an unprecedented level." JUSTICE AT STAKE CAMPAIGN_http://www.justiceatstake.org/issues/states_court_issues/money_elections.cfm (last visited Jan. 10, 2011).

234. *See* Stith, *supra* note 222 ("The Missouri Plan also has kept Missouri's appeals courts free from the corruption, influence-peddling, and overreaching that can be so destructive to the law and public confidence in courts and that have occurred in other states."). It bears asking, what other states? What type of corruption? What influence-peddling and overreaching? What prosecutions have been brought with a basis that merit selection was a cause of the corruption?

235. *See, e.g.*, Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22 (detailing the egregious case of Pennsylvania state court judges Mark A. Ciavarella, Jr. and Michael T. Conahan, who pled guilty to federal charges of wire fraud and income tax evasion for their role in taking over $2.6 million in kickbacks in exchange for unjustly sentencing children to incarceration in a youth detention facility).

awash in corruption and that a vast number of judges are ready to decide cases in exchange for campaign cash on a regular basis.

A notable example of an unsupported charge of judicial corruption as a result of judicial elections (a state's failure to enact a merit system approach) is Tulane University Law School Professor Vernon Valentine Palmer's 2008 analysis of the Louisiana Supreme Court.[236] Professor Palmer considered whether elected Louisiana justices change their votes in response to campaign contributions.[237] One viewpoint is that judges do not change their votes for money; rather, judges vote on cases as they see fit, and in response, campaign contributors who benefit from the rulings donate to the judges to keep them in office. Professor Palmer, however, concluded that the opposite is true.[238] He found that campaign donations to a Louisiana Supreme Court justice have a direct influence on how the justices vote on particular cases.[239] "[T]he court has been significantly influenced...by the campaign contributions from litigants and lawyers appearing before it," Professor Palmer asserted.[240] "In a statistical sense, campaign donors enjoy a favored status among parties before the court ... The statistical correlations indicate that the higher the donation, the higher the odds that the contributor's position will prevail."[241]

Not surprisingly, Professor Palmer's study was hailed by the leaders in the merit selection movement as evidence that "money can buy verdicts."[242] It was covered and promoted by the national media.[243] It was cited in briefs of amici curiae before the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co.*[244] And, of course, because the study singled out

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236. Vernon V. Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008). Professor Palmer, of Tulane Law School, was joined in the article by John Levendis, Assistant Professor of Economics at Loyola, New Orleans. The article was published in a law review for a legal audience; I therefore cite Professor Palmer (the first author listed) as the article's primary author.

237. *Id.* at 1292.

238. *Id.* at 1314.

239. *Id.*

240. *Id.* at 1291.

241. *Id.*

242. K. O. Myers, *Louisiana Study Confirms that Money Can Buy Verdicts*, JUDGES ON MERIT (Feb. 1, 2008) http://judgesonmerit.org/2008/02/01/louisiana-study-confirms-that-money-can-buy-verdicts.

243. Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14.

244. 129 S. Ct. 1186 (2009). *See* Brief of Amici Curia, the Brennan Center for Justice at NYU School of Law, the Campaign Legal Center, and the Reform Institute, in Support of Petitioners, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 1186 (2009), (No. 08-22), 2008 WL 3165831, *13; Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 1186 (2009), (No. 08-22), 2008 WL

specific justices by name and charged that they were more likely to vote for a party who had contributed to their campaign, it did deep and significant damage to the reputation and integrity of the Louisiana Supreme Court.[245]

Unfortunately, Palmer's study was based on severely flawed data and "astonishing errors."[246] Subsequent studies refuted the Palmer study based on its "flawed methodology, error-laden data selection, and faulty analysis."[247] As a result, the dean of Tulane Law School issued a written apology to the justices of the Louisiana Supreme Court.[248] The *Tulane Law Review* issued an erratum that regretted the errors in the study.[249]

3199726, *10; Brief of Amicus Curiae, James Madison Center for Free Speech, Supporting Respondents, *Caperton*, 129 S. Ct. 1186 (2009), (No. 08-22), 2008 WL 298469, *18.

245. As Louisiana Supreme Court Justice John Weimer, who was a subject of the study, lamented: "What is so disappointing about this is the damage that has been done to the State of Louisiana unjustifiably. This irresponsible article becomes a tool for those who benefit from such unwarranted attacks on our state's reputation." *See* Dan Pero, *Oops...Will 'Merit' Selection Supporters Apologize for Smearing Louisiana Judges?*, AM. COURTHOUSE (Sept. 25, 2008), http://www.americancourthouse.com/2008/09/25/oopswill-merit-selection-supporters-apologize-for-smearing-louisiana-judges.html.

246. Brief of Amicus Curiae, the Supreme Court of Louisiana, in Support of Neither Party, *Capterton*, 129 S. Ct. 1186 (2009), (No. 08-22), 2009 WL 434720 at *2.

247. *Id.* at iii; *see* Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281, 282 (2009); Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 307 (2009).

248. Letter from Lawrence Ponoroff, Dean and Mitchell Franklin Professor of Private & Commercial Law, Tulane University, to the Justices of the Louisiana Supreme Court, *available at* http://www.lasc.org/press_room/press_releases/2008/ARTU_APOLOGY_LETTER.pdf (last visited Jan. 6, 2011). The letter stated, in part:

> I write on behalf of the Tulane Law School to express our sincere regret for the errors that we now know appeared in the above-referenced study written by Professors Vernon Palmer and John Levendis and published in the Tulane Law Review.
>
> As you are aware, Professors Palmer and Levendis reviewed their underlying data in light of the critique of their article prepared by attorneys Phelps Gay and Kevin Tully. Following that review, the professors advised the *Tulane Law Review* that there were numerous errors in the recording of the data that formed the basis of their study, some identified in the Gay and Tully critique and some not.

249. *The Erratum*, TULANE UNIV. LAW SCH., http://www.law.tulane.edu/lawreview, no longer lists the apology. At the time of the faulty study, the Erratum read:

> The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, published in

The Louisiana Supreme Court even took the extraordinary step of filing an amicus brief in the U.S. Supreme Court to detail the errors.[250] So, at the end of the day, a flawed charge of judicial corruption severely damaged the court and did nothing to further the merit selection movement in Louisiana.

The general view of opinions such as those in the Palmer analysis, which hold the demeaning view that judges are corrupt, is inconsistent with the notion that the people themselves are the best "judges" when it comes to selecting their elected officials. As Alexander Hamilton explained, "It is a just observation, that the people commonly *intend* the Public Good" even when they may be incorrect about who is corrupt and who is not.[251] Indeed, the understanding that citizens are able to make wise choices "is unquestionably at the very heart of our system of government."[252] Thus, we must hesitate to assume our fellow citizens are unable to make choices in judicial elections, because Americans have shown time and again that they are quite capable of making difficult choices at the ballot box.[253] To paraphrase Edmund Burke, a Member of the British Parliament at the time of the American Revolution (and somewhat a sympathizer of the American cause), although particular voters may occasionally make bad choices at the ballot box, over time, the people as a whole do not.[254] So, too, is it with the American voters, who ultimately choose judges who represent their interests, and who are smart enough to know the difference between the judges who are most representative of their views, and the judges who are not.

Volume 82 of the Tulane Law Review at 1291 (2008) was based on empirical data coded by the authors, but the data contained numerous coding errors. Tulane Law Review learned of the coding errors after the publication. Necessarily, these errors call into question some or all of the conclusion in the study as published. The Law Review deeply regrets the errors.

See Jonathan Turley, *Tulane Law School Issues Apology for Errors in Study of Louisiana Supreme Court*, JONATHAN TURLEY, http://jonathanturley.org/2008/09/16/tulane-law-school-issues-apologies-for-errors-in-study-of-louisiana-supreme-court/ (last visited Jan. 6, 2010).

250. *See* sources cited *supra* note 246.

251. THE FEDERALIST NO. 71 (Alexander Hamilton).

252. Taylor, *supra* note 67, at 99.

253. *Id.* at 100.

254. *See Id.* at 99, n.12; EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 185 (Printed for J. Dodsley, 2d ed., 1790).

D. The Constitutionality of Merit Selection, when Assessed Under an Equal Protection Clause Analysis, is Questionable

Scholars have questioned whether some merit selection approaches violate the "one-person, one-vote" doctrine contained in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[255] The one-person, one-vote doctrine requires that one person's vote cast in an election must have the same value as every other person's vote cast in the same election.[256] In the 1963 case of *Gray v. Sanders*,[257] which preceded by one year the more well-known voting rights case *Reynolds v. Sims*,[258] the Supreme Court explained the one-person, one-vote constitutional requirement as follows:

> Once the geographic unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.
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> . . .
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> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.[259]

A potential conflict between merit selection systems and the one-person, one-vote requirement may arise because every vote cast in an election must carry the same weight of every other vote, "whatever [the] occupation" of the voter.[260] In a system of gubernatorial appointment, for example, a voting population consisting of both the employed and unemployed, without regard for any occupation type or socio-economic background, votes for a governor who appoints a judge or justice. Similarly, in a judicial election, each eligible voter is invited to attend the polls and cast a vote, regardless of the voter's occupation or employment

255. U.S. CONST. amend. XIV, § 1.
256. Reynolds v. Sims, 377 U.S. 533, 562-63 (1964).
257. 372 U.S. 368, 379 (1963).
258. *Reynolds*, 377 U.S. 533.
259. *Gray*, 372 U.S. at 379, 381 (1963). *See also Reynolds*, 377 U.S. 533 (applying the one-person, one-vote doctrine to reapportionment plans for legislative elections).
260. *Gray*, 372 U.S. at 379.

status. In typical merit selection systems, however, judges are selected by nominating commissions composed of lawyers, which means that the power to vote for a judge is reserved for lawyers; citizens who have different occupations are wholly ineligible to vote for a judge of their choice, and the value of the vote of a lawyer is given greater weight than the value of a vote of a non-lawyer. Members of the bar, who are members of a particular "occupation," are empowered with greater voting power than their fellow citizens. Because the right to vote is a fundamental one, it appears likely that such merit selections systems would have to satisfy strict scrutiny in order to survive judicial review.[261] That is, the enabling law for the program could only be upheld if it was both "necessary to promote a compelling state interest" and "sufficiently tailored" in order to serve that interest."[262]

A similar one-person, one-vote problem may exist in states in which judicial nominating commissions consist of members who are public officials who hold leadership positions within their own offices. For example, the fourteen-member New Mexico judicial nominating commission is composed of eight lawyers appointed by the state bar, the governor, the speaker of the House, and the Senate president *pro tempore*.[263] There are seventy House districts in New Mexico, only one of which is the speaker's.[264] The voters who happen to live in the one house district from which the speaker is chosen have a voice on the nominating commission because their representative appoints the commissioners. The voters in each of the sixty-nine other house districts have no similar voice. Likewise, there are forty-two members of the New Mexico Senate,[265] but of the Senate membership, only the president *pro tempore* may participate in selecting members of the nominating commission.[266] If one is fortunate enough to live in the same district as both the speaker of the House and the Senate president *pro tempore*, one's voting power to select judges vastly outweighs the power of citizens who live elsewhere. And, if one is a member of the New Mexico

261. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627, 633 (1969) (applying strict scrutiny analysis to voting rights cases that implicate the "one person, one vote" requirement). "[B]ecause the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 626.

262. *Id.* at 627, 633.

263. N.M. CONST. art. VI, § 35.

264. *See* N.M. LEGISLATURE, http://legis.state.nm.us/lcs/default.aspx (last visited Jan. 10, 2010).

265. *See Id.*

266. *Id.*

State Bar as well, one's voting power to choose judges tremendously outweighs that of the typical New Mexico citizen. What is the state's compelling interest to cause such a disenfranchisement? And if one is established, how could these procedures be found to be narrowly or sufficiently tailored to support such interests?

Recently, at least three scholars have provided detailed analyses of the constitutional problems of one-person, one-vote in merit selection systems. Professor Steven J. Ware, analyzing the role of lawyers on judicial nominating commissions, has argued that judges chosen by lawyer members of merit selection commissions "are not selected by officials elected under the democratic principle of one-person-one-vote."[267] He continues: "When this sort of favoritism for an occupational group other than lawyers has been attempted, it has, in at least one instance, been found unconstitutional."[268] Joshua Ney, in a similar analysis, has concluded that "any system which grants the bar exclusive or disproportionate power to elect, appoint, or nominate the members of [a judicial nominating commission] likely stands in violation of the one person, one vote doctrine."[269] Professor Nelson Lund has found that "it is almost impossible to imagine how the Kansas [merit selection] procedure could be regarded as narrowly or sufficiently tailored" to satisfy strict scrutiny under a one-person, one-vote analysis.[270]

Each of these views call into question whether merit selection is consistent with the Equal Protection Clause's one-person, one-vote requirement. In an unsettling emphasis of his point, Ney prefaces his analysis with a quote from the infamous William "Boss" Tweed of

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267. Ware, *supra* note 221, at 402.

268. *Id.* at 398, n.34. Ware provides an analogy to state bar associations in a discussion of *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994) (holding that Kansas's process for electing members to the State Board of Agriculture violated the one-person, one-vote requirement because the power to elect the board was ceded to private agricultural associations).

269. Joshua Ney, *Does the Kansas Supreme Court Selection Process Violate the One Person, One Vote Doctrine?*, 49 WASHBURN L.J. 143, 170 (2009).

270. *See* Lund, *supra* note 224, at 37-38. Lund explains, regarding the Kansas merit selection system:

> What Kansas may not do is delegate to a private interest group the authority to hold elections that virtually determine who will exercise the significant and wide-ranging power of its supreme court. Such a delegation sits very uneasy with basic principles of republican government and with common sense principles of political economy.

Id. at 38.

Tammany Hall: "I don't care who does the electing so long as I do the nominating."[271] How telling.

E. On Whether the Merit Selection Movement Seeks Support From a Limited Portion of the People and Leaves out Others: A Note on the "Nonpartisan" Symposium Regarding Merit Selection at Wayne State University

On February 9, 2010, Wayne State University Law School and the Michigan chapter of the American Board of Trial Advocates hosted an invitation-only symposium on the campus of Wayne State University titled, "Options for an Independent Judiciary in Michigan."[272] The symposium's sponsors and promoters advertised the event as a "nonpartisan" discussion for lawyers, judges, and others to "learn more about available options that encourage judicial independence; to study what other states have done to address the issue; and to consider what reforms Michigan may wish to enact in order to promote the independence of the supreme court in 2020 and beyond."[273] The symposium featured a number of prominent speakers knowledgeable about merit selection, including retired Justice Sandra Day O'Connor of the U.S. Supreme Court.[274] The symposium was moderated by Bert Brandenburg, the outspoken advocate for merit selection who serves as the executive director of the legal reform group Justice at Stake.[275] The

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271. *Id.* at 143 (citing J. JACKSON BARLOW ET AL., THE NEW FEDERALIST PAPERS 338 (1988)).

272. WAYNE STATE UNIV. EVENT CALENDAR, http://events.wayne.edu/2010/02/09/options-for-an-independent-judiciary-for-michigan-20461/ (last visited Jan. 10, 2011).

273. Promotional flier of Wayne State University Law School, titled, *Options for an Independent Judiciary in Michigan* (on file with Wayne State University).

274. Additional speakers included retired Colorado Supreme Court Justice Rebecca Love Kourlis; Seth S. Andersen, Executive Director of the American Judicature Society; Professor James J. Sample, Associate Professor of Law at Hofstra University; Rich Robinson, Executive Director of the Michigan Campaign Finance Network; Jesse Rutledge, Vice President of External Affairs at the National Center for State Courts; and Robert A. Sedler, Distinguished Professor of Law at Wayne State University Law School.

275. *See generally* Bert Brandenburg, *Justice for Sale?*, ACS BLOG (Aug. 19, 2010), http://www.acslaw.org/node/16749; Brandenburg, *supra* note 71; Brandenburg & Caufield, *supra* note 232, at 79-80. For a comprehensive analysis of Justice at Stake, its political nature, and its campaign to replace judicial elections with merit selection commissions, see COLLEEN PERO, JUSTICE HIJACKED: YOUR RIGHT TO VOTE IS AT STAKE—THE $45 MILLION (AND COUNTING) CAMPAIGN TO ABOLISH JUDICIAL ELECTIONS AND RESHAPE AMERICA'S COURTS, Am. Justice P'ship (Sept. 2010).

symposium was financed by Wayne State University and the Joyce Foundation.[276]

By its own description, the mission of the Wayne State symposium was to discuss options for how Michigan might want to change its current system of judicial elections. According to the promotional flier for the event, the symposium was a "nonpartisan," but "invitation only," gathering, and the input for the agenda was developed "from representatives of professional organizations, political parties, academia and the business community."[277] By that standard, one would naturally assume that the symposium was wholly nonpartisan, in that it neither intended to promote one single judicial reform over the other, nor did it intend to gain input from one single political side or interest group over another.

The symposium was highly informative, professional, and well organized. It provided a detailed analysis of the different methods of judicial selection in the states. The symposium shed great light on the various trends in judicial selection across the country, including public financing and related election reforms, recent campaign advertising, the use of nominating commissions, and the use of judicial performance evaluations. But aside from what was discussed in public, electronic mail messages between symposium planners, obtained pursuant to the Michigan Freedom of Information Act ("FOIA"),[278] shed some additional light on the symposium that has escaped the public eye.

While the outward appearance was one of inclusion, the symposium's organizers convened a private, "VIP" dinner on the evening of the symposium that primarily was limited to a select group of individuals with a similar political background. On February 1, 2010, about one week prior to the symposium, symposium organizers had the following exchange:

> Adam and Katina from WCMS should be added to symposium only. The State bar will have 2 attend sym and 3 dinner. Democratic party, Brewer,[279] both and may add 1 to dinner. I

276. *See* sources cited *supra* note 273.

277. *Id.*

278. MICH. COMP. LAWS ANN. § 15.231 et seq. (2010). Wayne State University, a state-funded public university, is subject to FOIA.

279. Believed to be Mark Brewer, Chairman of the Michigan Democratic Party. *See* MICHIGAN DEMS, http://www.michigandems.com/content/brewer.php (last visited Aug. 27, 2010).

> have not heard back from MAJ[280] but assume attendance of 2+ a sum and 2 for dinner; AFL,[281] Mark Gaffney[282] will attend sym but not dinner. I told his staff that if he wanted someone else to represent AFL at dinner let us know. I suggested Tina Abbott who is also a WSU trustee.[283] I think we have satisfied requests fro ACS,[284] Mary Ellen.[285] I will continue to up date.[286]

Another e-mail, passed between symposium organizers on January 27, 2010, appears to indicate that the symposium leaders sensed with some anxiety that a news reporter who was to "the right" was "possibly going to write a negative piece about the conference."[287] Yet another e-mail on February 3, 2010, discussed whether the organizers of the symposium would be "frightened off" by a group of conservatives and libertarians.[288] Additional e-mails revealed that national leaders of the merit selection movement were intimately involved in setting the agenda for the symposium.[289] The FOIA results provided by Wayne State University did not reveal similar messages for the symposium regarding leaders of the movement for judicial elections, direct appointment, Republican Party or conservative interests.

Based on the above electronic mail messages, and many others, as well as on publicly available campaign finance records of the VIP dinner

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280. Believed to be the Michigan Association of Justice, formerly known as the Michigan Trial Lawyers Association. *See* MICH. ASS'N FOR JUSTICE, http://www.michiganjustice.org/MI (last visited Jan. 6, 2011).

281. Believed to be the American Federation of Labor-Congress of Industrial Organizations, also known as AFL-CIO.

282. Believed to be Mark Gaffney, President of the Michigan AFL-CIO. *See* MICH. STATE AFL-CIO, http://www.miaflcio.org.contact-us/michigan-state-afl-cio-officers-and-staff.html (last visited Jan. 6, 2011).

283. Believed to be Tina Abbott, Secretary-Treasurer of the Michigan AFL-CIO and First Vice Chair of the Michigan Democratic Party. *See* MICH. STATE AFL-CIO, http://www.miaflcio.org.contact-us/michigan-state-afl-cio-officers-and-staff.html and MICH. DEMOCRATIC PARTY, http://www.michigandems.com/index.php?q=page/mdp-leadership-team (last visited Jan. 6, 2011).

284. Believed to be the American Constitution Society for Law & Public Policy. *See* AM. CONSTITUTION SOC'Y FOR LAW AND POLICY, http://www.acslaw.org/ (last visited Jan. 6, 2011).

285. Believed to be Mary Ellen Gurewitz, labor union lawyer and legal counsel to the Michigan Democratic Party. *See* SACHS WALDMAN, http://www.sachswaldman.com/attorneys/gurewitz.html (last visited Jan. 6, 2011).

286. E-mail between symposium organizers (Feb. 1, 2010, 15:50 EST).

287. *Id.* at (Jan. 27, 2010, 11:25 EST).

288. *Id.* at (Feb. 3, 2010, 15:38 EST).

289. *See, e.g.*, E-mail messages between symposium organizers (Dec. 22, 2009, at 17:35 EST); (Dec. 31, 2009, 11:47 EST); (Jan. 3, 2010, 22:23 EST); (Jan. 4, 2010, 17:23 EST); (Jan. 6, 2010, 11:55 EST); (Jan. 26, 2010, 11:05 EST); (Jan. 27, 2010, 8:52 EST).

attendees, it appears that the symposium's organizers, with limited exceptions, sought their primary support from the leaders of the Democratic Party, the organized personal injury/trial bar, the organized liberal lawyers bar, the merit selection movement and one of the nation's largest unions, the AFL-CIO.

These facts might lead one to ask whether the Wayne State symposium had the markings of a truly "nonpartisan" discussion.

VI. CONCLUSION

Only two methods of state judicial selection are consistent with traditional notions of representative democracy: appointment and election. Merit selection, on the other hand, removes the power to select judges away from the American people and places that power in the hands of unaccountable elites. If the influence of money, campaigning, and special interests have made judicial elections as horrible as merit selection advocates contend, and if (as no one disputes) our country is based squarely on the principle of government by the consent of the governed, then merit selection advocates should not concentrate on establishing a system that is less accountable to the people. Instead, they should work to make state judiciaries more accountable by reforming and improving the existing system of judicial elections or by returning to the time-honored, representative system of gubernatorial appointment.