

Judicial Selection in the State of Missouri: Continuing Controversies

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Introduction

Since its admission to the union in 1821, Missouri has been a microcosm of the national developments and debates that surround the issue of judicial selection. Missouri was the first state to use all three of the most common methods of judicial selection—political appointments, contested elections, and merit selection.¹ Because of the state's experience, the history of judicial selection and the controversies surrounding judicial selection in Missouri provide insight into broader national trends. This article explores the history of judicial selection and the controversies over the various selection methods in the state of Missouri, with an emphasis on the debate that has taken place in the state over the past decade. The article also explains why this issue is relevant to public policy in Missouri. Finally, it provides a snapshot of current opinions on the various judicial selection methods through a survey of community college students.

The History of Judicial Selection in Missouri

The progression of judicial selection in the state shows that Missouri has both followed and led national patterns at different points in history. During the state's early history, it largely followed national trends. In 1940, however, Missouri became a leader in a

pivotal national reform movement in judicial selection, which still has a pervasive influence on the selection methods used by states today.

In 1820, Missouri's first constitution was adopted and it called for the governor to appoint judges with the advice and consent of the Senate.² The state's approach to selecting judges through appointment was congruent with the methods used by many other states in the post-Revolutionary period.³ It also followed the model of judicial appointment outlined in the U.S. Constitution which grants power to the executive to appoint Supreme Court justices with the advice and consent of the Senate.

Shortly after Missouri began implementing its initial system of judicial selection, the practice of judicial appointments fell into disfavor. President Andrew Jackson "swept into office in 1828 on a tide of public support,"⁴ and Jacksonian Democracy took hold throughout the country. Larry C. Berkson explains that citizens began to resent the control that property owners had over the courts, and wanted to "end this privilege of the upper class" and "ensure the popular sovereignty."⁵ As a result, many states shifted from a system of judicial appointments to judicial elections. In 1848 Missourians followed the lead of other states, and the constitution was amended to provide for judicial elections, including the election of judges on the Supreme Court.⁶

² Missouri Constitution of 1820, Article V, Section 13, accessed June 6, 2014, <http://digital.library.umsystem.edu/cgi/t/text/text-idx?sid=52b21dc41e456c2226ca6c30658f3bbe;g=c:mocon;idno=mocon000027>.

³ Stith and Root explain that most states during the same era allowed the governor to appoint judges [Stith and Root, 720].

⁴ Thomas E. Patterson, *The American Democracy*, 5th ed. (New York: McGraw Hill, 2001), 378.

⁵ Larry C. Berkson, updated by Rachel Caufield and Malia Reddick, "Judicial selection in the United States: a special report," accessed June 6, 2014, http://judicialselection.com/uploads/documents/berkson_1196091951709.pdf.

⁶ Charles B. Blackmar, "Missouri's Nonpartisan Court Plan From 1942 to 2005," *Missouri Law Review* 72 (2007): 199-

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¹ Laura Denvir Stith and Jeremy Root, "The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges," *Missouri Law Review* 74, no. 3 (Summer 2009): 712, accessed February 6, 2014, <http://law.missouri.edu/lawreview/2012/11/07/summer-2009-volume-74-issue-3/>.

Judicial elections, both partisan and nonpartisan, continued to be a popular method of selecting judges for several years. Contested partisan elections were used to select most state judges by the latter part of the 19th century.⁷ Problems, however, soon began to emerge, and “the practice of electing judges, while representing a democratic ideal, often degraded into the selection of machine sponsored judicial ‘hacks.’”⁸ Missouri was no exception—judicial elections were captured by political machines in the state.

As Laura Denvir Stith and Jeremy Root recount, the Democratic political machine had a “stranglehold on the state’s politics” in the early 1900s.⁹ This “stranglehold” was largely the result of “party boss” Thomas Pendergast, who controlled the significant elections in Missouri.¹⁰ Judges were beholden to the party bosses, and judges often found themselves at risk of losing their jobs. The precarious nature of judgeships in Missouri in the early 20th century is demonstrated by the fact that between 1918 to 1941 there were only two times when a state Supreme Court judge was re-elected.¹¹

Problems with partisan elections began to surface in Missouri in the 1920s and the 1930s¹², but the legal profession’s concern about the influence of politics on judicial election had been longstanding. Years earlier in 1906, Roscoe Pound’s speech to the American Bar Association titled “The Causes of Popular Dissatisfaction with the Administration of Justice” was a harbinger of the growing discontent with judicial elections.¹³ Pound argued that “putting courts into politics and compelling judges to become politicians,

in many jurisdictions has almost destroyed the traditional respect for the Bench.”¹⁴

By 1940 a majority of Missourians appeared to agree with Pound’s assessment regarding the danger of mixing partisan politics and judicial elections. Concerned citizens, lawyers, and civic leaders joined together to reform judicial selection in the Missouri.¹⁵ The reformers first attempted to create a “commission plan” for judicial selection through the legislative means, but when legislative attempts failed, reformers successfully placed the Missouri Nonpartisan Court Plan on the ballot through an initiative petition.¹⁶ In November 1940, voters adopted the Missouri Nonpartisan Court Plan with almost 55 percent of the vote.¹⁷ Missouri was the first state to adopt this plan which is now utilized more than 30 other states.¹⁸

Essential Features of the Missouri Nonpartisan Court Plan

The Nonpartisan Court Plan adopted in 1940 has been expanded and amended, but the key components have been essentially unchanged, in spite of the numerous attempts to repeal or modify the plan. The basic features of the plan today are explained in Article V of the Missouri Constitution, and include:

- Nonpartisan Judicial Commissions: The nonpartisan judicial commissions screen and nominate candidates for judicial vacancies.

200, accessed April 29, 2014,

<http://law.missouri.edu/lawreview/files/2012/11/Blackmar.pdf>.

⁷Jay A. Daugherty, “The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment” *Missouri Law Review* 62, no. 2 (Spring 1997): 316-317, accessed June 6, 2014,

<http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3323&context=mlr>.

⁸Ibid, 317.

⁹Stith and Root, 722.

¹⁰Daugherty, 318.

¹¹Ibid.

¹²Michael A. Wolff, “Law Matters: How We Choose Missouri Judges,” November 2005, 1, accessed May 30, 2014,

<http://www.courts.mo.gov/page.jsp?id=1083>.

¹³Berkson.

¹⁴Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” Presented at the Annual Convention of the American Bar Association in 1906, Reprinted from 29 ABA Rep, pt. I, 395-417, 14, accessed June 6, 2014, https://law.unl.edu/splash/Roscoe_Pound-Causes_of_Popular.pdf; Blackmar credits the origins of the Plan to Pound, Albert Kales, William Howard Taft, Herbert Harley and Harold J. Laski [Blackmar, 199-219].

¹⁵Wolff, 2; Blackmar explains that lawyers were originally divided on the Plan, but politicians were typically opposed since it cut off one avenue for them to do favors for their supporters. He also notes that the “strong anti-boss sentiment” that resulted from the conviction of Tom Pendergast and his “henchmen” helped the Plan gain support [Blackmar, 201].

¹⁶Daugherty, 318; Wolff, 2.

¹⁷Wolff, 2; Blackmar clarifies that the amendment was originally placed on the ballot in 1940, but took effect in 1942 [Blackmar, 200].

¹⁸“Missouri Nonpartisan Court Plan,” 1, accessed May 30, 2014, <http://www.courts.mo.gov/page.jsp?id=297>.

- The Appellate Judicial Commission oversees this process for the Supreme Court and Court of Appeals. The seven-member Appellate Judicial Commission includes a judge, three lawyers (one from each court of appeals district) who are elected by The Missouri Bar, and three citizens (one from each court of appeals district) who are appointed by the governor.
- The circuit courts in Clay County, Green County, Jackson County, Platte County, and St. Louis County, and the city of St. Louis have their own circuit judicial commissions. The five member circuit judicial commissions are composed of a judge, two lawyers from the relevant circuit elected by The Missouri Bar, and two citizens from the circuit who are selected by the governor.¹⁹
- **Judicial Vacancies:** When a judicial vacancy arises, the nonpartisan commission reviews applications and interviews applicants. The commission then submits three qualified candidates to the governor for consideration. The governor selects one of the candidates to fill the vacancy. If the governor does not nominate any of the nominees within 60 days after the list of nominees is submitted, the nonpartisan commission appoints one of the nominees to fill the vacancy.²⁰
- **Retention Elections:** Once a judge has been in office for at least one year, the judge will be placed on the ballot for a retention election in the next general election. The judge must receive a majority of votes to be retained.²¹ Judges are not elected for life; the terms vary depending on the level of court; and all state judges must retire at 70 years old.²²

The Missouri Nonpartisan Court Plan originally applied to the Supreme Court, the court of appeals; the circuit, criminal correction and probate courts of the city of St. Louis; and the circuit and probate courts of Jackson County.²³ It was later extended to judges in St. Louis, Clay, and Platte counties, and most recently Greene County.²⁴ The plan is now used to select circuit and associate circuit judges in five counties and the urban areas of Kansas City and St. Louis as well as all appellate judges, including the judges on the Supreme Court.²⁵

Although the Missouri Nonpartisan Court Plan does encompass much of the state, partisan judicial elections are still used to select trial judges in over 100 counties in Missouri.²⁶ As explained by Michael Wolff, partisan elections seem “well-suited for the rural areas of Missouri, which are small enough so that campaigns are not especially expensive and the voters can get to know the judges and judicial candidates before they cast their votes.”²⁷ In effect, Missouri has a dual system of judicial selection with different courts using different methods. The method depends largely upon the level of court and whether the jurisdiction is more rural or urban.

The Ideological Debate: Independence and Accountability

As with Missouri’s history of judicial selection, the ideological debates over merit systems and elections reflect broader national trends. The controversies regarding judicial selection methods center on the values of judicial independence and accountability.²⁸

²³“Missouri Nonpartisan Court Plan,” 1, accessed May 30, 2014, <http://www.courts.mo.gov/page.jsp?id=297>.

²⁴Ibid.

²⁵“Meet Your Missouri Judges,” 1, accessed April 12, 2014, <http://www.courts.mo.gov/page.jsp?id=630>.

²⁶“Judicial Vacancies,” 1, accessed May 30, 2014, <http://www.courts.mo.gov/page.jsp?id=603>.

²⁷Wolff, 1.

²⁸Daugherty, 316; Supreme Court Justice Sandra Day O’Connor argues that the dichotomy between accountability and independence is a false one, and merit selection systems promote both accountability and independence as well as competency and fairness [Sandra Day O’Connor and Ronnell Andersen Jones, “Reflections on Arizona’s Judicial Selection Process,” *Arizona Law Review* 50: 23, accessed June 6, 2014, <http://www.arizonalawreview.org/pdf/50-1/50arizrev15.pdf>].

¹⁹All information under the “Nonpartisan Judicial Commissions” bullet point is derived from “Missouri Nonpartisan Court Plan,” 1-2, accessed May 30, 2014, <http://www.courts.mo.gov/page.jsp?id=297>.

²⁰Ibid, 2.

²¹Ibid.

²²Wolff, 2.

The notions of judicial independence and democratic accountability are grounded in the nation's history. State constitutions and governing institutions do not necessarily mirror their federal counterparts, but the arguments made during the nation's founding help explain the conceptual roots of the debate. The founders' perspective on judicial independence in a system of "separated institutions sharing power"²⁹ is detailed in the Federalist Papers. As Alexander Hamilton argued in Federalist No.78, judicial independence is needed to guard the Constitution and individual rights.³⁰

Judicial independence, however, cannot be left unrestrained. As James Madison asserted in Federalist No. 51, "ambition must be made to counteract ambition."³¹ This was to be realized by a system of checks and balances to ensure that no one branch of government accrued too much power, including the judiciary. During his journey through America in the 1830s Alexis de Tocqueville observed the complexity of the judiciary's role when he explained that "courts help to correct the excesses of democracy and . . . manage to slow down and control the movements of the majority without ever being able to stop them altogether."³²

Inherent in the independence versus accountability debate is also a discussion of the proper role of judges. On one hand, judges may be viewed as "legal technician[s]" who are selected based upon their qualifications.³³ If this characterization accurately reflects reality, then concerns about excessive judicial independence are minimized since judges are simply following precedent, and objectively applying the law.

²⁹Patterson, 44 citing Richard Neustadt, *Presidential Power* (New York: Macmillan, 1986), 33.

³⁰Alexander Hamilton, Federalist No.78, *The Federalist Papers in Modern Language Indexed for Today's Political Issues*, ed. Mary E. Webster (Bellevue, Washington: Merril Press), 316.

³¹James Madison, Federalist No. 51, *The Federalist Papers in Modern language Indexed for Today's Political Issues*, ed. Mary E. Webster (Bellevue, Washington: Merril Press), 211.

³²Alexis de Tocqueville, *Democracy in America and Two Essays on America*, trans. Gerald E. Bevan (London: Penguin , 2003), 335.

³³ The term "legal technician" is from Stephen Ware [Stephen J. Ware, "The Missouri Plan in National Perspective," *Missouri Law Review* 74, no. 3 (Summer 2009): 766, accessed February 6, 2014, <http://law.missouri.edu/lawreview/2012/11/07/summer-2009-volume-74-issue-3/>.

On the other hand, judges may also be perceived as having discretion which implies that they may take part in making the law.³⁴ If this depiction more accurately describes reality, then concerns about the democratic legitimacy of judicial selection processes arise.³⁵

The advantages and disadvantages of judicial appointments, merit systems and elections are articulated by legal scholars along competing lines of argument regarding independence and accountability, and the appropriate role of judges. Since Missouri uses both the merit system and partisan judicial elections, a few of the arguments made or explained by legal scholars for and against each approach are outlined in Tables 1 and 2 (which can be found at the end of this article on pages 19 and 20).

Controversies in Missouri

Attempts to modify or eliminate the Nonpartisan Court Plan in Missouri reflect a number of these ideological differences as well as point to attempts at political maneuvering. Challenges to the Nonpartisan Court Plan have been numerous, and they began shortly after the plan was initially approved by voters. For example, an early challenge occurred in 1942 when the General Assembly placed the "Lauf Amendment" on the ballot to abolish the plan and reinstate partisan election of judges.³⁶ The amendment was defeated.³⁷

Opponents of the Nonpartisan Court Plan, however, have continued to press forward, using both legislative means and initiative petitions to repeal or modify the plan. Legislatively, there have been numerous attempts to repeal or modify the Nonpartisan Court Plan by members of the Missouri General Assembly over the past decade. The period from 2004-2012 was especially active with bills introduced to repeal or modify the Nonpartisan Court Plan in every year but 2006. The various legislative proposals from 2004-2014 include efforts to:

³⁴Ware, 766-767.

³⁵Ibid., 766.

³⁶Blackmar, 202.

³⁷Ibid.

- Repeal the plan and move to a system of judicial elections (2004, 2012)³⁸
- Repeal the plan and move to a system of gubernatorial appointments with Senate confirmation or with Judicial Confirmation Commission approval (2007, 2008, 2012)
- Require appointments under the current plan to be made with the advice and consent of the Senate (2007)
- Require judges to receive more than a simple majority to be retained in judicial elections (2005)
- Repeal retention elections completely and give the General Assembly power to vote on judicial retention (2007)
- Increase the number of candidates submitted to the governor by the Commission (2009, 2010, 2011, 2012)
- Allow the governor to veto the first list of nominees (2009, 2010)
- Change the composition of the Judicial Commission to include more non-attorneys than attorneys or to allow for other changes to the composition (2011, 2012)³⁹

Most of the legislative proposals died in committee, but one measure was placed on the ballot. In 2012 a measure was passed by the General Assembly to change the composition of the Appellate Judicial Commission to give the governor four appointees, instead of three; replace the chief justice with a retired nonvoting judge; and to change the staggered terms of the gubernatorial appointees to four-year terms during the governor's term.⁴⁰ The measure, Amendment 3, was defeated with only 24 percent of voters supporting the measure in November 2012.⁴¹

³⁸A 2012 measure submitted by Jim Lembke, SJR 41, actually called for almost all judges to be elected, but one at-large Supreme Court judge would be appointed by the governor with the consent of the Senate.

³⁹Bullet points derived from "Missouri House of Representatives," accessed April 8, 2014 and June 5, 2014, www.house.mo.gov.

⁴⁰Dale Singer and Jo Mannies, "Supporters of amendment to change Missouri court plan drop their campaign," *St. Louis Beacon*, October 2, 2012, 1, accessed April 9, 2014, <https://www.stlbeacon.org>.

⁴¹Scott Lauck, "Top stories of 2012, No. 1: Move to change the Missouri court plan suffers big defeat" Missouri Lawyers Media, January 2, 2013, 1, accessed February 6, 2014, <http://www.lexisnexis.com.pegleg.park.edu>.

In addition to sustaining legislative challenges, the plan has also withstood attempts to modify or repeal it over the past decade. Initiative petitions to either modify or repeal the Nonpartisan Court Plan were approved for circulation in Missouri in 2008, 2010, and 2014, but none received enough signatures to be placed before voters on the ballot.⁴²

The various proposals to change or repeal the Nonpartisan Court Plan in Missouri mirror many of the claims made more broadly by critics of merit systems. For example, the role afforded to lawyers has been challenged by attempts to change the composition of the Judicial Selection Commissions in Missouri; efforts have been made to reduce the alleged "elitism" of the plan by proposing Senate confirmation; and reformers have attempted to tinker with retention elections by requiring more than a simple majority vote. Supporters of the plan, however, have thwarted attempts to significantly alter or repeal it. Charles B. Blackmar's observation in 2007 that the Missouri plan is "alive, well, and resilient" in the state of Missouri still appears relevant today.⁴³

An additional overarching criticism of the plan is that politics cannot be removed from the commission and appointments. The history of judicial selection in Missouri lends some credence to this complaint. At least one observer of the system has claimed that it is "political without being partisan."⁴⁴ There is evidence, however, that the nonpartisan ideal of the plan has not always been reflected in the reality of implementing the plan.

The evolution of the Nonpartisan Court Plan in the state is well documented by Blackmar in his article "Missouri's Nonpartisan Court Plan From 1942 to 2005."⁴⁵ Blackmar explains that many governors during the first forty years of the plan's operation, with some noteworthy exceptions, appointed members of their own party as judges, which buttresses claims that

⁴²Information derived from "Missouri Secretary of State," accessed February 6, and June 3, 2014, http://www.sos.mo.gov/elections/s_default.asp?id=petitions.

⁴³Blackmar, 216.

⁴⁴Scott Lauck, "House Commission in Missouri awaits scrutiny over next pick," *Missouri Lawyers Weekly*, July 16, 2007, 2, accessed June 3, 2014, <http://www.lexisnexis.com.pegleg.park.edu> quoting Judge Glenn Norton.

⁴⁵Blackmar, 199-219.

the plan was not “truly nonpartisan.”⁴⁶ Blackmar suggests that some commissions may have even stopped submitting names of candidates who were not from the governor’s party since they did not have a chance of appointment.⁴⁷ Additionally, Blackmar provides accounts of the nonpartisan judicial commissions deferring to partisan influence and manipulation in the early 1950s and the 1980s. He explains that in 1953 Gov. Phil Donnelly and the Judicial Commission reached a stalemate over panels submitted which the governor believed “demonstrated inappropriate attention to both inter- and intra-party political influence.”⁴⁸

Additional charges of political mischief in the judicial selection process arose thirty years later in the 1980s, and the controversies are reported by both Blackmar and Jay A. Daugherty from different perspectives.⁴⁹ According to Daugherty, in 1982 there were three vacancies on the Supreme Court and “one sitting judge allegedly manipulated the merit plan to ‘hand-pick’ three new members of the court.”⁵⁰ Only a few years later, in 1985, a panel was submitted to Gov. John Ashcroft which included “the governor’s thirty-three year old gubernatorial chief of staff, who had no judicial experience,” and the aid was appointed to the seat.⁵¹

Attempts to infuse partisan influence into the selection process were not limited to the 20th century; they continued well into the 21st century. As reported by Lora Cohn, “controversy exploded” in the summer of 2007 when the nonpartisan judicial commission began considering the replacement of Supreme Court Judge Ronnie White.⁵² This was Gov. Matt Blunt’s first appointment to the Supreme Court and Blunt allegedly

“demanded a conservative candidate.”⁵³ The commission sent the top three candidates to Blunt for White’s replacement, but upon receiving the slate, the governor requested information on all thirty candidates; the commission refused to turn over this information.⁵⁴ Blunt and the commission, headed by Chief Justice Laura Denvir Stith, were at an impasse.⁵⁵ Cohn explains that “Blunt went into attack mode, threatening to sue for the materials and proposing that all three candidates had to answer a 110 question survey that covered even behavior in elementary school. He eventually selected the single Republican on the slate. . . .”⁵⁶

Cases of political positioning have helped fuel arguments that the Missouri Plan “has not delivered on its promises,” which include being less political than other forms of selection.⁵⁷ Proponents of the plan concede that merit selection has flaws, but it is still preferable to the alternative of elections.⁵⁸

The Implications of Judicial Selection for Policymaking in the State of Missouri

The method of judicial selection used by a state has clear implications for the distribution of power within a state among political institutions and interest groups. The method chosen can influence the power held by the governor, legislature, or organizations such as bar associations. One central question, however, is why should judicial selection be of concern to the citizens of the state of Missouri?

The issue of judicial selection is important beyond the legal community because state judges have the opportunity to influence policy and the lives of citizens. The degree to which judges influence policy and exercise discretion is debatable, but opportunities

⁴⁶Blackmar, 205. Blackmar explains that there are some notable exceptions, such as the appointment of Walter Bennick by Forrest Smith, Governor Phil Donnelly’s appointment of two Republicans, Governor John Dalton’s appointment of a Republican, and Governor Hearn’s appointment of a Republican [Ibid, 205-207.]

⁴⁷Ibid, 205, 208.

⁴⁸Ibid, 206.

⁴⁹Blackmar, 199-219; Daugherty 315-343.

⁵⁰Daugherty, 328; Blackmar takes exception to Daugherty’s claim that there was a scandal during the 1982 appointments [Blackmar, 209-210].

⁵¹Daugherty, 328.

⁵²Lora Cohn, “Strategic Maneuvering in the Fight over the Missouri Judicial Selection Process,” Central States Communication Association Conference, April 14-18, 2010, 7.

⁵³Lauck, House Commission in Missouri awaits scrutiny over next pick, 1.

⁵⁴Cohn, 7.

⁵⁵Ibid.

⁵⁶Ibid.

⁵⁷G. Alan Tarr and Brian T. Fitzpatrick, “Judicial selection should return to its roots: Column,” 1, accessed May 20, 2014, <http://www.usatoday.com/story/opinion/2013/03/29/judges-state-missouri/2028705/>.

⁵⁸O’Connor and Jones, 24; Blackmar states that “the burden is on those who challenge the Plan to come up with a method which is both better and practicable” [Blackmar, 217].

for influence exist. As Daugherty notes, “precedent is usually followed, and decisions are commonly reached objectively and dispassionately.

However, at times, judges must act subjectively and more like legislators.”⁵⁹ Paul Brace, Melinda Gann Hall and Laura Langer contend that state supreme courts have “extraordinary discretion in rendering decisions” and they can have a significant impact on the lives of citizens.⁶⁰ They argue that “as the courts of last resort, state supreme courts have the final authority on many issues that are critical to citizens’ daily lives and to the overall nature of state politics and policy.”⁶¹

Moreover, the method used to select judges may affect judicial decision-making. Richard Caldarone, Brandice Canes-Wrone, and Tom S. Clark explain that “a wealth of scholarship suggests that institutions pertaining to judicial selection influence judges’ decisions.”⁶² They point to research which shows that elected judges are more likely to be attentive to public opinion, overturn statutes, and uphold decisions in favor of the death penalty.⁶³

The line from judicial selection to policymaking is attenuated, but it arguably exists. Research suggests that judicial selection is one factor that influences judicial decision making; and state judges potentially exercise discretion in decisions that are relevant to the citizens of Missouri.

⁵⁹Daugherty, 317.

⁶⁰Paul Brace, Melinda Gann Hall, and Laura Langer, “Placing State Supreme Courts in State Politics,” *State Politics and Policy Quarterly* 1, no. 1 (Spring 2001): 86, accessed May 6, 2014, <http://www.jstor.org/stable/40421416>.

⁶¹Ibid.

⁶²Richard P. Caldarone, Brandice Canes-Wrone, Tom S. Clark, “Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions,” *The Journal of Politics* 71, no. 2 (April 2009): 561, accessed June 6, 2014, <http://www.jstor.org/stable/30218971>.

⁶³Ibid, 561. Caldarone, Canes-Wrone, and Clark specifically cite the following research: Paul Brace and Brent D. Boyea, “Judicial Impartiality and the Practice of Electing Judges: The Case of State Supreme Court,” Presented at annual meeting of the American Political Science Association, 2004; Laura Langer, *Judicial Review in State Supreme Courts: A Comparative Study* (Albany, NY: State University of New York Press, 2002); Paul Brace and Melinda Gann Hall, “The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice,” *Journal of Politics* 59, no. 4 (1997): 1206-31.

The degree of judicial discretion is debatable, but the opportunity to exercise discretion indicates that factors which influence judicial decision making, such as judicial selection, should be of concern to citizens. Judicial selection is relevant to citizens since it is one factor that may influence state judges who have the opportunity to make decisions that can impact state policy and citizens’ lives. Judicial selection is not simply a matter for esoteric legal debates; it is a practical matter for citizens.

A Snapshot of Current Trends and Opinions in Missouri

In 2013 newspapers began reporting on a new “wave” of initiatives nationwide to change judicial selection processes.⁶⁴ Opponents of merit systems claim that dissatisfaction is growing, and they cite recent efforts in Tennessee, Kansas, Arizona, Oklahoma, and Missouri as evidence of this dissatisfaction.⁶⁵

In light of the resurgence of interest in reforming judicial selection processes in 2013, a survey of Missouri community college students was conducted in June 2014 to obtain a snapshot of current knowledge and opinions on judicial selection by young adults in the state. The methodology and findings from the student questionnaires are discussed below.

This study also originally involved interviews with government officials, representatives of interest groups and citizen groups, and people who have publicly voiced either support or criticism of Missouri’s system of selecting judges in order to assess the core arguments for and against the Nonpartisan Court Plan. The methodology and the findings for the interviews with government officials and interest/citizen group representatives have not been reported due to the low response rate for the interviews.

Most of the individuals contacted for interviews were either nonresponsive or indicated that they did not want to participate. Only one individual from a group in favor of the Nonpartisan Court Plan agreed to be interviewed, and this person was interviewed.

⁶⁴John Milburn, “Kansas rides a wave of judicial selection changes,” *The Kansas City Star*, May 11, 2013, accessed May 22, 2014, www.kansascity.com.

⁶⁵Tarr and Fitzpatrick, 1.

However, the findings from this interview have not been reported since both sides of the issue cannot be presented and a balanced assessment of the arguments for and against the Nonpartisan Court Plan cannot be made.

Student Questionnaire

Methodology

The tool used for this study was a 19-question questionnaire. The questions were adapted from open-ended questions in “Road Maps: A ‘How-to’ Series to Help the Community, the Bench and the Bar Implement Change in the Justice System.” The questions were adapted and reprinted with permission from the American Bar Association.⁶⁶ The response categories for each question were also derived partially, but not fully, from this source.

The response categories for each question were limited in most cases, but the participants had an opportunity to select “other” for six of the questions and “do not know” for nine of the questions. The questionnaire took approximately fifteen minutes for participants to complete. It asked participants questions in five areas: qualities of judges, knowledge and preferences regarding judicial selection, opinion on judicial elections, opinions on merit selection, and safeguards against bad judges.

⁶⁶The survey questions on the questionnaire and discussed in the “Student Questionnaire” section of this article were adapted from “Road Maps: A ‘How-to’ Series to Help the Community, the Bench and the Bar Implement Change in the Justice System.” ©2008 by the American Bar Association. Adapted and reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in any electronic database or retrieval system without the express written consent of the American Bar Association. The response categories for each question were derived partially, but not fully, from this source: American Bar Association Coalition for Justice [Updated by the American Judicature Society and Malia Reddick], “Road Maps: A ‘How-to’ Series to Help the Community, the Bench and the Bar Implement Change in the Justice System. Judicial Selection: The Process of Choosing Judges,” accessed March 28, 2014, http://www.americanbar.org/content/dam/aba/migrated/Justice_Center/Justice/PublicDocuments/judicial_selection_roadmap.a_uthcheckdam.pdf.

Students at two-year institutions in the state of Missouri were targeted for the questionnaire to obtain a cross-section of the young adult population since community colleges attract both traditional and nontraditional students. The students were recruited to participate through their instructors who were contacted by the investigator. The investigator targeted nine classes throughout the state of Missouri, but only four instructors agreed to participate, and three classes ultimately participated since one course was cancelled.

Consent forms, explaining the study and acknowledging risks, were completed by all participants. Questionnaires were completed by fifty-two students in Missouri.⁶⁷ All of the students who participated are residents of the state of Missouri. At the time of the survey, 73 percent (thirty-eight) of the students were between the ages of 18-24, 19 percent (ten) were between 25-34, and 8 percent (four) were between 35-44. None of the students were over 44 years old.

Findings

The findings from the survey are broken down into the five substantive categories of the survey: Qualities of Judges, Judicial Selection Methods, Judicial Elections, and Merit Selection of Judges.

Qualities of Judges. In order to provide context for the survey results, all of the participants were asked if they had ever had any direct interaction with judges. Forty-two percent (twenty-two) of the students indicated that they have had direct interaction with a judge. Of the students who indicated that they have had direct interaction with a judge, an overwhelming 91 percent (twenty) indicated that their overall impression of the judge was positive.

Respondents were also asked about the personal qualities and objective criteria judges should possess. First, they were asked to select the two most important personal qualities they would like to see in a judge, and were given the option of selecting independence, intelligence, fairness, impartiality, or another quality of their choice. The respondents indicated that the most important personal quality is fairness (forty-four students marked this as one of the top two), with

⁶⁷Note that not all of the students answered all of the questions. Typically between forty-nine to fifty-two students answered a given question.

intelligence coming in second (thirty-three students marked this as one of the top two).

With regard to the specific objective criteria judicial candidates should possess, respondents were given the option of selecting age, years of practicing law, type of law practiced, community involvement, or other. They were again asked to pick the top two qualities. The number of years of practicing law was the most important objective criterion to the students (forty-four students marked this as one of the top two); the type of law practiced was a distant second (twenty-nine students marked this as one of the top two).

Judicial Selections Methods. Questions regarding both participant knowledge of judicial selection and participant preferences regarding selection methods were asked. Respondents were asked to identify how judges (Supreme Court, Appellate, Circuit, and Associate Circuit) are selected in the state, and were given the option of selecting elections; gubernatorial and/or legislative appointment; merit selection; or a combination of merit selection and other methods, depending on the level of court and/or location. Respondents were also given the option of selecting “do not know.” Forty-five percent (twenty-three) indicated that they do not know how judges are selected; 27 percent (fourteen) indicated that Missouri only uses elections; 24 percent (twelve) knew that Missouri uses a combination of merit selection and other methods, depending on the level of court and/or location; and 4 percent (two) indicated that Missouri only uses a system of gubernatorial and/or legislative appointments.

Respondents were then asked what they believe is the best method of selecting judges. Fifty percent (twenty-six) stated that a combination of methods is the best. Moreover, 53 percent (twenty-seven) responded that the method for selecting judges should be different at different levels of the court.⁶⁸

Judicial Elections. Since circuit and associate circuit judges are elected in most counties in Missouri, respondents were asked their opinion about elections. Ninety percent (forty-seven) indicated that the election of judges is good for the justice system, while only 10

percent (five) indicated that they are bad.

In judicial elections, 10 percent (five) indicated that they believe the public is given enough information about candidates to make informed election decisions, 45 percent (twenty-three) said they are not, and 45 percent (twenty-three) did not know. Additionally, 53 percent (twenty-seven) responded that a candidate’s party affiliation (Democrat, Republican, etc.) should be known to voters.⁶⁹ With regard to soliciting campaign funds, 55 percent (twenty-eight) stated that they should not be able to solicit campaign funds, 24 percent (twelve) said that they should, and 21 percent (eleven) stated that they “do not know.”

Merit Selection of Judges. As outlined previously, the state of Missouri also has more than 70 years of experience with merit selection of judges, thus the respondents were asked to weigh in on their opinion regarding some of the operational details of merit systems.

The participants were advised that in most merit selection systems, a nominating commission screens judicial candidates, and they were asked to indicate who should sit on such a commission. They were given the options of gubernatorial and/or legislative appointees, lawyers, judges, citizens who are not lawyers, and other. Respondents were asked to mark all categories that apply. The support for the groups listed was relatively equal. Judges were selected by thirty-five students, citizens who are not lawyers by thirty-three students, gubernatorial and/or legislative appointees by twenty-six students, and lawyers by twenty-five students. Three indicated “other.”

The respondents were also asked how members of the nominating commission should be selected. They were given the following categories: by elected officials, by lawyers, by judges, by voters, or other. Respondents were again asked to mark all that apply. The two categories selected most often were elected officials (thirty-one students marked) and voters (twenty-nine students marked). Judges were selected by twenty students and lawyers by fourteen students. Three students again indicated “other.”

⁶⁸Students were able to mark “Do Not Know” in response to these questions.

⁶⁹Students were able to mark “Do Not Know” in response to this question.

Respondents were asked if there should be mandatory requirements for the composition of the nominating commission in merit selection systems.⁷⁰ Seventy-six percent (thirty-nine) answered affirmatively. Those who answered in the affirmative were also asked what requirements should be taken into consideration regarding the composition of the nominating commission. They were given the options of the balance of lawyers and non-lawyers, party affiliation, ethnic diversity, gender diversity, geographic diversity, and other. The balance of lawyers and non-lawyers was selected most often (twenty-seven students marked), gender diversity came in a close second (twenty-five students marked), party affiliation third (twenty-three students marked), ethnic diversity fourth (twenty-two students marked), and geographic diversity fifth (nineteen students marked). Two students marked “other.”

Other. The final question asked respondents was if there are sufficient safeguards against bad judges in the state of Missouri. Seventy percent (thirty-four) stated that they do not know, 20 percent (ten) indicated that there are not, and 10 percent (five) responded that there are sufficient safeguards.

Analysis

For consistency and simplicity, the analysis section is also broken down into the five substantive categories of the survey: Qualities of Judges, Judicial Selection Methods, Judicial Elections, and Merit Selection of Judges.

Qualities of Judges. The requirements to be a judge in the state of Missouri are somewhat minimal. Article V, Section 21 of the Missouri Constitution requires associate circuit judges to be at least 25 years old; and supreme court, court of appeals and circuit judges to be at least 30 years old. The judges must have also been citizens of the U.S. and qualified voters in the state for varying periods of time. Additionally, they must be licensed to practice law in Missouri. Based on the survey results, one of the few objective criteria listed in the Missouri Constitution, age, was of little importance to this group of respondents. However, a criterion which is related to age, the number of years of practicing law, was the most important objective

criterion to the students. In other words, a specific age was not important, but experience practicing law was.

Judicial Selections Methods. The survey results indicate that 45 percent of respondents did not know how judges are selected in the state. Based on the complicated system that Missouri has in place, this finding is not surprising. The more encouraging news for the level of civic knowledge in the state is that 24 percent knew that Missouri uses a combination of merit selection and other methods, depending on the level of court and/or location.

Additionally, although many of the respondents stated that they do not know the system used in Missouri, their opinions appear to support the present structure, which is a combination of merit selection and elections, depending on the level of court and/or location. When asked their opinion, half of the respondents stated that a combination of methods is the best, and more than half of the respondents stated that the method for selection judges should be different at different court levels.

Judicial Elections. As stated previously, since circuit and associate circuit judges are elected in most counties in Missouri, respondents were asked their opinion regarding elections. The respondents overwhelmingly believe that the election of judges is good for the justice system.

It should be noted, however, that the question asked about elections in general and did not specify competitive or retention elections. Although 90 percent believed that elections are good for the justice system, many (45 percent) do not believe that the public is given enough information to make informed election decisions. Their perception that the public lacks sufficient information may be related to more than half of the respondents indicating a candidate’s party affiliation (Democrat, Republican, etc.) should be known to voters. In other words, in the absence of sufficient information, voters may need party affiliation as a cue. The respondents’ perceptions that elections are good for the justice system also appears to have the caveat that elections are good for the system if candidates are not allowed to solicit campaign funds since 55 percent of the respondents stated that judges should not be able to ask for campaign monies.

⁷⁰Students were able to mark “Do Not Know” in response to this question.

Merit Selection of Judges. The questionnaire did not ask the participants questions about their knowledge of the details of the Nonpartisan Court Plan, but the respondents' opinions again demonstrated support for the current structure. Under the Nonpartisan Court Plan, the merit system is made up of gubernatorial appointees who are not members of the bar, lawyers and a judge. The respondents indicated that all these groups should be represented on the nominating commission, with judges, appointees, and citizens receiving more support than lawyers.

The respondents were also asked who should select the members of the nominating commission. This is one area in which the respondents' opinions do not align with the current system. The plan calls for the governor to appoint three members, and the Missouri Bar to select three members. The respondents agreed that elected officials should play a part in selection; however, lawyers came in last among the possible choices of elected officials, judges, voters, and lawyers.

Finally, a solid majority of respondents agree that there should be mandatory requirements for the composition of the nominating commission. The Missouri Nonpartisan Court Plan presently takes into consideration the balance of lawyers and non-lawyers as well as geographic diversity on the nominating commission.

The respondents agreed that the balance of lawyers and non-lawyers should be taken into consideration, but indicated that gender diversity, party affiliation, and ethnic diversity are more important than geography when making decisions about the composition of the nominating body.

Limitations and Recommendations for Future Research

There were a number of limitations to this study which include a small sample size for both the student questionnaires and interviews. Generalizability to similar populations both within and outside of Missouri cannot be assumed for the student questionnaire because of the small number of respondents, and the interview findings cannot be reported due to the small sample. In order to increase

participation, it is recommended that the student questionnaires be administered during the school year as opposed to the summer months since this may help increase participation by instructors and consequently students in the survey. Additionally, more individuals may agree to be interviewed regarding the Nonpartisan Court Plan during periods that the plan is a more salient issue for the legislature or voters.

There are also limitations with the design of the student questionnaire. The questions used for the questionnaire were adapted from open-ended questions, and there is a need for further refinement of the response categories for the survey. For example, it is recommended for future research that the questionnaire instrument be refined to clarify if the questions regarding elections pertain to competitive elections or retention elections since this was not clearly stated.

Analysis of the results was also complicated since respondents were allowed to select more than one response for some of the questions. The questionnaire may need to be modified to allow respondents to select only one answer to each question.

Conclusion

The State of Missouri's history of judicial selection and the ideological battles around the issue have reflected national trends since Missouri became a state in the early 1820s. The state's experience with the plan has been uneventful at times, but has also been punctuated with periods of political turmoil. Challenges to the plan have continued to escalate over the past decade with renewed interest of reformers who seek to repeal and modify the plan.

The survey results from a small sample of Missouri community college students show that almost a quarter of the students who participated are knowledgeable of the current system that is in place.

Additionally, a majority of the students surveyed are supportive of a hybrid system of judicial selection which uses a combination of methods, and varies based on different court levels, which is similar to the system of judicial selection in the state. Although not generalizable, this pilot study provides insight into the

knowledge and opinions of one group of community college students regarding judicial selection in Missouri.

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Table 1. Merit Systems: Arguments Regarding Advantages and Disadvantages

Arguments Regarding Advantages	Arguments Regarding Disadvantages
<p>Arguments regarding merit systems related to independence</p> <ul style="list-style-type: none"> • Merit selection minimizes politics and promotes stability in the judicial selection process.⁷¹ • Merit selection is in line with the founders’ desire to “project judicial independence from the whims and impulses of a majority.”⁷² • Merit selection emphasizes “professional qualifications,” and “pre-appointment merit screening.”⁷³ An emphasis on professional qualifications is in line with the characterization of judges as technicians. • Merit selection reduces the risk of capture by external groups.⁷⁴ <p>Argument regarding merit systems related to democratic legitimacy</p> <ul style="list-style-type: none"> • In Missouri, the Nonpartisan Court Plan has public support with nearly three-quarters of Missourians supporting it, regardless of their political party affiliation.⁷⁵ 	<p>Argument that merit systems do not actually provide independence</p> <ul style="list-style-type: none"> • Politics may still play a part in the commission and appointments.⁷⁶ <p>Arguments that merit systems jeopardize accountability</p> <ul style="list-style-type: none"> • The merit system gives lawyers and state bar associations a powerful role. Merit selection may not remove politics from judicial selection, but “may simply <i>move</i> the politics of judicial selection into closer alignment with the ideological preferences of the bar” which may differ from the ideological preferences of the public.⁷⁷ • Interest groups influence judicial selection regardless of the method used, and attempts to control the influence of special interests may actually advantage one group.⁷⁸ • The process can be secretive.⁷⁹ • Judges are rarely voted out by the public through retention elections, and are not accountable.⁸⁰ A study of judicial retention trends from 1964-2006 in ten states reported that “in only 56 of the 6,306 judicial retention elections were judges not retained.”⁸¹ Retention elections do not provide the purported accountability since little information is provided to voters about the candidates; partisan affiliations, an important voter cue, are not listed on the ballot; and voters may be risk averse since they do not know who will replace the incumbent.⁸²

⁷¹Stith and Root, 725.

⁷²Sandra Day O’Connor, “The Essentials and Expendables of the Missouri Plan,” The 2009 Earl F. Nelson Lecture, *Missouri Law Review* 74, no. 3 (Summer 2009): 482, accessed February 6, 2014, <http://law.missouri.edu/lawreview/2012/11/07/summer-2009-volume-74-issue-3/>.

⁷³Daugherty, 339.

⁷⁴Stith and Root, 713, 727.

⁷⁵Ibid, 749.

⁷⁶Daugherty, 339.

⁷⁷Brian T. Fitzpatrick, “The Politics of Merit Selection,” *Missouri Law Review* 74, no. 3 (Summer 2009): 676, accessed February 6, 2014, <http://law.missouri.edu/lawreview/2012/11/07/summer-2009-volume-74-issue-3/>.

⁷⁸Michael R. Dimino, Sr., “We Have Met the Special Interests, and We Are They,” *Missouri Law Review* 74, no. 3 (Summer 2009): 495, accessed February 6, 2014, <http://law.missouri.edu/lawreview/2012/11/07/summer-2009-volume-74-issue-3/>.

⁷⁹Daugherty, 339.

⁸⁰Ibid.

⁸¹Larry Aspin, “Judicial Retention Election Trends 1964-2006,” *Judicature* 90, no. 5 (March-April 2007): 210, accessed July 16, 2014, http://216.36.221.170/ajs/publications/Judicature_PDFs/aspin_905.pdf.

⁸²Fitzpatrick, 683-684.

Table 2. Judicial Elections: Arguments Regarding Advantages and Disadvantages

Arguments Regarding Advantages	Arguments Regarding Disadvantages
<p>Arguments regarding elections related to accountability</p> <ul style="list-style-type: none"> • Elections are populist since elections put power “in the hands of the people.”⁸³ <p>Arguments regarding elections related to democratic legitimacy</p> <ul style="list-style-type: none"> • Elections are favored by the public, with 64 percent indicating that they favor direct elections.⁸⁴ 	<p>Argument that elections do not actually provide accountability</p> <ul style="list-style-type: none"> • Voters are uninformed about judicial candidates, and do not vote in judicial races. They also believe that judges who are elected are influenced by campaign contributions.⁸⁵ The public may not have the “tools” needed to ensure that judges are applying the law fairly and competently.⁸⁶ <p>Arguments that elections jeopardize independence</p> <ul style="list-style-type: none"> • Partisan elections “infuse politics into the law.”⁸⁷ • Judicial campaigns have become “high-stakes contests, bringing in large sums of money and attack-driven advertising campaigns.”⁸⁸ The large sums of money in judicial elections give the appearance of bias, and bring into question the impartiality of judges.⁸⁹ • Judicial elections receive considerable attention from special interest groups that are seeking influence, and interest groups invest heavily in judicial elections.⁹⁰ • Campaigns may “blur the distinction between the job of a judge and the job of a legislator,” which may diminish public confidence in fairness and impartiality of the judiciary.⁹¹ The public may view judges as “politicians in robes.”⁹²

⁸³Ware, 753.

⁸⁴The Annenberg Public Policy Center of the University of Pennsylvania, “Public Understanding of and Support for the Courts: 2007 Annenberg Public Policy Center Judicial Survey Results,” October 17, 2007, 2; Kathleen Hall Jamieson and Bruce W. Hardy, “Will Ignorance & Partisan Election of Judges Undermine Public Trust in the Judiciary? *Daedalus* (Fall 2008): 14, accessed June 5, 2012, http://repository.upenn.edu/asc_papers/277/.

⁸⁵Charles G. Geyh, “Why Judicial Elections Stink,” (2003). *Faculty Publications*, Paper 338, 52, accessed June 6, 2014, http://www.repository.law.indiana.edu/facpub/338_. Geyh claims that there is an “Axiom of 80” with regard to judicial elections. Eighty percent represents the approximate percentage of: 1) the public that prefers to select judges through elections, 2) the electorate that does not vote in judicial elections, 3) the electorate that cannot identify judicial candidates, and 4) the public that believes that the decisions of judges who are elected are influenced by campaign contributions [Ibid.]

⁸⁶O’Connor and Jones, 23.

⁸⁷O’Connor, 486.

⁸⁸Jamieson and Hardy, 13.

⁸⁹O’Connor, 488.

⁹⁰Rachel Paine Caufield, “Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections,” *Missouri Law Review* 74, no. 3 (Summer 2009): 579-580, accessed February 6, 2014, <http://law.missouri.edu/lawreview/2012/11/07/summer-2009-volume-74-issue-3/>.

⁹¹Ibid., 582-583.

⁹²Jamieson and Hardy, 15.