

COMMENT

The Power of Attorneys: Addressing the Equal Protection Challenge to Merit-Based Judicial Selection

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Many states use merit-based judicial selection to limit political influence on state courts. Under merit selection, an independent, nonpartisan commission screens candidates for any open judgeship, sending a slate of finalists to the governor. Because the governor may appoint only from these approved finalists, merit selection constrains the ability of political officials to stack the courts with partisan judges.

Yet not all are convinced of merit selection’s merit. Critics of merit selection have assailed the role attorneys play in selecting some of the commission’s members. Though the details vary by state, ordinarily a minority of commissioners must be attorneys, and these attorney commissioners are elected by their fellow members of the state bar. Some argue that, by denying nonattorneys the ability to participate in these closed elections, merit selection violates the Equal Protection Clause of the Fourteenth Amendment. In particular, critics point to the vote-denial aspect of the Supreme Court’s “one person, one vote” principle, which holds that whenever a state charters an election of a public official who exercises general governmental power, all qualified voters must be allowed to participate.

This Comment responds to the equal protection challenge to merit selection. It argues that merit selection is constitutional by way of multiple exceptions, both recognized and implicit, to the “one person, one vote” principle. And though critics of merit selection often couch their arguments in prodemocratic terms, this Comment argues that merit selection—like the “one person, one vote” principle—promotes rather than thwarts the will of the people.

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INTRODUCTION

In the United States, judges are generally selected in one of three ways: (1) at the federal level—and in some states—the executive selects a nominee subject to confirmation by the upper house of the legislature; (2) in some other states, judges run for office in contested elections, which may be partisan or nonpartisan;¹ (3) most of the remaining states use an alternative system called merit-based judicial selection. In these merit selection states, an independent commission accepts applications for any open judgeship, curating a slate of well-qualified nominees from which the governor makes the final selection.² The commission is

¹ These elections are contested in the sense that they are open to multiple candidates. They do not include retention elections, in which an incumbent judge runs unopposed.

² Two states, Virginia and South Carolina, select judges via legislative election following some form of merit review. See Carl W. Tobias, *Reconsidering Virginia Judicial Selection*, 43 U. RICH. L. REV. 37, 42 (2008); Kimberly C. Petillo, Note, *The Untouchables: The Impact of South Carolina's New Judicial Selection System on the South Carolina Supreme Court, 1997–2003*, 67 ALB. L. REV. 937, 939–40 (2004). However, the bodies conducting such merit review in Virginia and South Carolina hold less formal power than many of their analogues in other states. In Virginia, merit-based recommendations are made by legislative committees that do not winnow the number of candidates to a specific number. Rather, the committees merely determine whether each candidate nominated by a state lawmaker is “qualified” for the judgeship sought. See *Judicial Selection Overview*,

composed of some combination of sitting judges, attorneys, and nonattorneys. While nonattorneys are usually appointed to the commission by the governor, attorneys are often selected in closed elections in which only members of the state bar association—that is, other attorneys—may vote.

The constitutionality of appointment-confirmation and judicial election is well settled. But merit selection stands on more precarious legal footing. Opponents argue that handing attorneys an enhanced role in the selection of state judges violates the Equal Protection Clause of the Fourteenth Amendment.³ In particular, they point to the vote-denial aspect of the Supreme Court’s “one person, one vote” principle. That principle is violated when a specific subset of voters is denied the ability to vote for a public official who exercises general governmental power. By barring nonattorneys from participating in the election of attorney commissioners, merit selection arguably runs afoul of this rule. Bolstering the critics’ legal challenge is a political one. Given the liberal bent of the U.S. legal profession, some commentators suggest that merit selection—an ostensibly nonpartisan process—may promote left-of-center jurists at a disproportionate rate.⁴ In recent decades, the movement against merit selection has gained support. The result has been not only a halt in the expansion of merit selection to new states but also the modification of merit-selection systems in some states that had previously adopted them.⁵

In this Comment, I explain why merit selection survives this constitutional challenge. I use the oldest merit-selection system, the Missouri Nonpartisan Court Plan,⁶ as a representative model. Although merit-selection systems differ from state to state, most retain the basic structure of the Missouri Plan. If the Missouri

COMMONWEALTH OF VA., DIV. OF LEGIS. SERVS., <https://perma.cc/X69C-F7FZ>. In South Carolina, the merit commission has the sole power to nominate judicial candidates, but the legislature may reject the nominees and begin the process anew. Petillo, *supra*, at 940–41.

³ See, e.g., Nelson Lund, *May Lawyers Be Given the Power to Elect Those Who Choose Our Judges? “Merit Selection” and Constitutional Law*, 34 HARV. J.L. & PUB. POL’Y 1043, 1050 (2011).

⁴ See, e.g., Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 690–703 (2009).

⁵ See, e.g., David Ferrara, *Clark County’s Long Ballot Raises Concerns About Electing Judges*, LAS VEGAS REV.-J. (Nov. 29, 2020), <https://perma.cc/KZAG-NYMU>; Dave Boucher, *Amendment 2 to Change Judicial Selection Passes*, TENNESSEAN (Nov. 4, 2014), <https://perma.cc/ZHL7-SEKY>.

⁶ Sandra Day O’Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 485 (2009).

Plan is constitutional, most merit-selection systems are constitutional as well.

Merit selection satisfies three recognized exceptions to the “one person, one vote” principle—what I refer to as the “special-purpose,” “appointment,” and “judicial” exceptions. It also satisfies an implicit exception on purposive grounds. The “one person, one vote” principle was designed to foster fair democratic processes in the selection of members to the political branches of government. Applied to merit selection in a judicial context, the “one person, one vote” principle is just as likely to hinder democratic goals as to promote them.

But the constitutionality of merit selection is far from settled. Although every federal court to consider the issue has declared merit selection constitutional, only three federal circuits have weighed in, and the Supreme Court has never decided a merit-selection case. The courts that have upheld merit selection have also differed in their reasoning. The resulting doctrine is conceptually muddled. And in the academic sphere, no author has yet put forth a comprehensive defense of merit selection that scrutinizes all three recognized exceptions to the “one person, one vote” principle. This Comment aims to fill that gap and bring certainty to a cluttered doctrine.

For this issue in particular, certainty is vital. As Alexander Hamilton opined, courts have “neither Force nor Will, but merely judgment.”⁷ They depend on political actors, influenced by the judiciary’s perceived legitimacy, to enforce their decrees. In an era of declining trust in government institutions, the equal protection challenge is a loaded weapon. The chance of misfiring may be slight, but the consequences could be disastrous. This Comment will help avoid such a result by presenting, for the first time in the academic literature, a detailed analysis and affirmation of the various grounds for merit selection’s constitutionality.

This Comment begins in Part I with an overview of the relevant background, including the history and structure of merit selection; the concerns of the anti-merit-selection movement; the origins and subsequent development of the “one person, one vote” principle; and the federal case law applying the “one person, one vote” principle to merit selection. Part II analyzes the constitutional questions, concluding that merit selection is subject to a deferential standard of review and is constitutional by way of both

⁷ THE FEDERALIST NO. 78, at 378 (Alexander Hamilton) (Terence Ball ed., 2003).

recognized and implicit exceptions to the “one person, one vote” principle. Part III contextualizes the debate over merit selection as part of a larger dispute about long-term versus short-term democratic goals. It then explains how merit selection promotes both judicial independence and accountability. The Comment concludes by explaining the importance of the enduring institution of merit selection in state courts.

I. BACKGROUND

In this Part, I explain the history and structure of merit selection in the United States. I also examine the movement against merit selection and provide an overview of the relevant federal case law.

A. Merit Selection in the United States

Merit selection arose in the mid-twentieth century as an alternative to the then-prevalent systems of appointment-confirmation and contested judicial elections.⁸ Since its inception, merit selection has proven successful in limiting partisan influence and promoting more ethical judges,⁹ but the system has drawn controversy for its unconventional structure.¹⁰ Over the decades its luster has slowly waned, opening the system to rising political and legal challenges.¹¹ Nevertheless, merit selection remains the most widely used system for state-level judicial selection.¹²

1. Progressive reformers and the birth of merit selection.

Missouri was the first state to enact a merit system for selecting state judges.¹³ In the early twentieth century, progressive activists grew frustrated with the rampant corruption of state courts.¹⁴ At the time, Missouri judges were elected, not appointed.¹⁵ This allowed political bosses, such as the notorious

⁸ See Rachel Paine Caufield, *What Makes Merit Selection Different?*, 15 ROGER WILLIAMS U. L. REV. 765, 767–68 (2010).

⁹ See *id.* at 789.

¹⁰ See *infra* Part I.A.3.

¹¹ See, e.g., Jay A. Daugherty, *The Missouri Non-partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-legal Environment?*, 62 MO. L. REV. 315, 320–22, 327–39 (1997).

¹² Fitzpatrick, *supra* note 4, at 678.

¹³ *Id.*

¹⁴ See O'Connor, *supra* note 6, at 484.

¹⁵ *Id.*

Tom Pendergast of Kansas City, to exert their will on judges facing reelection.¹⁶ Judges who delivered rulings favorable to the Pendergast Machine would receive generous contributions to their campaigns, while judges with a more independent streak would often be confronted with well-financed opponents.¹⁷

Many viewed merit selection as a way to establish an independent judiciary un beholden to organized political forces.¹⁸ Professor Albert Kales became one of the first academics to propose such an alternative method of judicial selection.¹⁹ The Kales Plan called for an independent commission to select new judges.²⁰ Inspired by this plan, a group of Missourians developed a system in which a nonpartisan commission of legal experts and laypeople evaluates judicial applicants, narrowing the list of candidates that the governor is allowed to appoint.²¹ The Missouri Nonpartisan Court Plan (or Missouri Plan, as it would come to be known) ushered in a new era of judicial selection.

While the merit-selection movement in Missouri grew more popular among legal professionals and members of the public, it encountered initial resistance from state lawmakers. Rather than proceeding through the Missouri General Assembly, proponents of the Missouri Plan resorted to the initiative-petition process.²² In 1940, Missouri voters approved the Plan in a statewide referendum, thereby enshrining it in the state constitution.²³ In response, the General Assembly placed the Plan's repeal on the ballot for the next general election.²⁴ In 1942, voters chose to retain the Plan.²⁵ Voters also called for a state constitutional convention, which convened from 1943 to 1944.²⁶ The convention incorporated the merit system into its final constitution, which Missourians ratified in 1945.²⁷ Since then, the Plan has continued to control

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *See id.* at 485.

¹⁹ *See* ALBERT KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES 225–51 (1914).

²⁰ *Id.* at 249–51.

²¹ James M. Douglas, *Judicial Selection and Tenure: "Missouri Plan" Works Well in Actual Results*, 33 A.B.A. J. 1169, 1170–72 (1947).

²² *Id.* at 1171.

²³ O'Connor, *supra* note 6, at 485.

²⁴ Charles B. Blackmar, *Missouri's Nonpartisan Court Plan from 1942 to 2005*, 72 MO. L. REV. 199, 202–03 (2007).

²⁵ *Id.*

²⁶ *Calling Constitutional Conventions—"Missouri's Best Kept Secret"*, MO. SEC'Y OF STATE (Sept. 1, 2002), <https://perma.cc/D3KQ-KDML>.

²⁷ Blackmar, *supra* note 24, at 203.

the state's process of judicial selection. It remains popular among the electorate despite continued skepticism from political leaders.²⁸

Following its initial adoption in Missouri, merit selection spread to other states.²⁹ Dissemination was slow at first, with no other states adopting merit selection until the late 1950s.³⁰ Then, from 1958 to 1976, merit selection spread quickly to nineteen other states.³¹ Though it is difficult to determine precisely how many states use merit selection today,³² merit selection appears to be the most widely used method for selecting state judges.³³

2. An overview of the Missouri Plan.

As the first merit-selection system, the Missouri Plan serves as a national model.³⁴ Although some states have tinkered with the Plan's various components—such as increasing the number of commissioners and altering the ratio of attorneys to nonattorneys³⁵—most states with merit systems have adopted the Plan's central framework.³⁶

Under the Missouri Plan, a seven-member Appellate Judicial Commission accepts applications for any open seat on the Missouri Supreme Court or the Missouri Court of Appeals.³⁷ The Commission deliberates in private and interviews candidates in an open

²⁸ See *infra* Part I.A.3.

²⁹ Karen L. Tokarz, *Women Judges and Merit Selection Under the Missouri Plan*, 64 WASH. U. L.Q. 903, 909 n.18 (1986) (showing how, by 1968, 72.2% of states had adopted a merit-selection plan).

³⁰ Diane S. Sykes, *Independence v. Accountability: Finding a Balance Amidst the Changing Politics of State-Court Judicial Selection*, 92 MARQUETTE L. REV. 341, 346–47 (2008).

³¹ *Id.*

³² The difficulty arises from the use of hybrid forms of judicial selection that incorporate merit-like elements. Some states have a commission that is merely advisory, and others subject commission-selected nominees to legislative confirmation. See *How Many States Elect Judges? With More than 20 Different Selection Systems, That's a Very Complicated Question.*, NAT'L CTR. FOR STATE CTS. (Nov. 2, 2020), <https://perma.cc/TM2N-GX3D>.

³³ Fitzpatrick, *supra* note 4, at 678.

³⁴ See MissouriBar, *The Missouri Plan - A Model for the Nation*, YOUTUBE (Aug. 27, 2014), <https://perma.cc/FJL8-85CV>.

³⁵ For example, the Arizona Commission on Appellate Court Appointments is composed of sixteen members, only five of whom are attorneys (not including the chief justice of the Arizona Supreme Court, who serves as chair). ARIZ. CONST. art. VI, § 36(A).

³⁶ See *Indiana Merit Selection and the "Missouri Plan"*, IND. CT. TIMES (May 2, 2012) (citing *Methods of Judicial Selection*, NAT'L CTR. FOR STATE CTS., <https://perma.cc/MX5A-6UCU>), <https://perma.cc/HQT7-DHD6> ("Currently, thirteen states including Indiana employ 'Missouri Plan' merit selection processes for choosing appellate judges. Nine other states employ merit selection systems with some variations.")

³⁷ MO. CONST. art. V, § 25(d).

venue.³⁸ It must choose “the three best qualified nominees” to send to the governor.³⁹ The governor must then appoint one of those nominees to fill the vacancy within sixty days or else the Commission is empowered to act in the governor’s stead.⁴⁰ Once a newly appointed judge has served for at least one year, the judge must stand for retention at the next general election, in which a simple majority of votes grants them a full twelve-year term.⁴¹ Judges must stand for retention upon conclusion of each term⁴² and retire by the age of seventy.⁴³

The Appellate Judicial Commission consists of (1) three nonattorney citizens appointed by the governor, one from each of the state’s three appellate court districts; (2) three attorneys elected by the members of the state bar association in each of the three appellate court districts; and (3) the sitting chief justice of the Missouri Supreme Court, who serves as chair.⁴⁴ No commission member, other than the chief justice, may hold public office, and no commission member may hold “any official position in a political party.”⁴⁵ The six attorney and nonattorney members serve staggered six-year terms.⁴⁶ By tradition, the position of chief justice rotates every two years to a different judge on the seven-member Missouri Supreme Court, granting each chief justice a two-year term on the Commission.⁴⁷

³⁸ MO. SUP. CT. R. 10.28.

³⁹ MO. SUP. CT. R. 10.27.

⁴⁰ MO. CONST. art. V, § 25(a). In practice, the governor virtually always makes the final appointment to avoid surrendering such power to the Commission—even when the governor is displeased by the Commission’s nominees. *See, e.g.*, Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 760 n.37 (2009) (explaining how a Missouri governor publicly considered refusing to appoint a nominee but ultimately made the appointment to prevent the choice from reverting to the Commission).

⁴¹ MO. CONST. art. V, §§ 19, 25(c)(1). Judges are nearly always retained. In Missouri, no appellate judge has ever lost a retention election, and voters have denied retention to only four trial judges. *Nonpartisan Court Plan*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=297>.

⁴² MO. CONST. art. V, § 25(c)(1).

⁴³ MO. CONST. art. V, § 26.

⁴⁴ MO. CONST. art. V, § 25(d).

⁴⁵ MO. CONST. art. V, § 25(d).

⁴⁶ *See* MO. SUP. CT. R. 10.03.

⁴⁷ *See* Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 726 (2009).

3. The movement against merit selection.

Many conservative critics of the Missouri Plan object to the power that attorneys wield in the merit-selection process.⁴⁸ Their arguments go like this: Lawyers are not so different from the rest of us. When members of the bar elect the attorney commissioners, they do not hang their political ideology at the door; they bring it with them into the voting booth. Judicial decision-making is infused with political considerations—particularly on appellate courts, where merit selection is most often used to appoint judges. Lawyers—intentionally or not—tend to vote for politically like-minded attorney commissioners, who in turn tend to vote for politically like-minded judicial candidates to forward to the governor.⁴⁹ Because attorneys are more liberal than the general population,⁵⁰ this naturally establishes a liberal bias in the merit-selection process.⁵¹ Nothing prevents the Commission from sending an entire slate of liberal judges to the governor, who would be powerless to prevent such an abuse of the system.⁵² Thus, the supposedly nonpartisan merit-selection process does not eliminate the politics of judicial selection. It simply moves the politics to a different level.⁵³

This conservative objection drives many of the efforts against merit selection. For decades, conservative interest groups and political leaders attacked merit selection primarily through political means.⁵⁴ In Missouri, the conservative nonprofit Better Courts for

⁴⁸ See Clifford Taylor, *Without Merit: Why “Merit” Selection is the Wrong Way for States to Choose Judges*, HERITAGE FOUND. (Oct. 6, 2010), <https://perma.cc/SME8-HEP5>; *Judges, Politics and George Soros*, WALL ST. J. (Mar. 31, 2013), <https://perma.cc/8WWK-Q7TK>; Jonathan Keim, *Our New Trial-Lawyer Overlords*, NAT’L REV. (Sept. 15, 2014), <https://perma.cc/Z9AJ-Z3TF>.

⁴⁹ See Fitzpatrick, *supra* note 4, at 676.

⁵⁰ See Adam Bonica, Adam S. Chilton & Maya Sen, *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 292 (2016).

⁵¹ Professor Brian Fitzpatrick notes that state judges’ voting patterns in primary elections in Tennessee and Missouri are consistent with the hypothesis that merit selection promotes politically left-leaning judges at a higher rate than other methods of judicial selection. Fitzpatrick, *supra* note 4, at 692.

⁵² See Lund, *supra* note 3, at 1050.

⁵³ See Fitzpatrick, *supra* note 4, at 676.

⁵⁴ See, e.g., Kenyon D. Bunch & Gregory Casey, *Political Controversy on Missouri’s Supreme Court: The Case of Merit vs. Politics*, 22 STATE & LOC. GOV’T REV. 5, 6 (1990); Kurt Erickson, *Missouri Senate Leader Seeks Overhaul of Judge Selection Process*, ST. LOUIS POST-DISPATCH (Mar. 2, 2017), <https://perma.cc/4ELT-5SBM>. For a complete overview of successful changes to state systems of judicial selection, see *History of Reform Efforts: Formal Changes Since Inception*, NAT’L CTR. FOR STATE CTS., <https://perma.cc/44CJ-YZXT>.

Missouri sponsored a 2010 initiative to scrap merit selection,⁵⁵ but the proposal failed to collect enough signatures to make the November ballot.⁵⁶ In 2012, Missouri Plan opponents made a bit more headway. A coalition of Republican lawmakers approved Senate Joint Resolution 51, which put modest alterations to the merit system up for a statewide referendum.⁵⁷ These changes would have granted the governor greater control over the selection process.⁵⁸ The coalition's success was short-lived, however, as voters overwhelmingly rejected the measure.⁵⁹

Republican officials in Missouri have long voiced doubts about the Missouri Plan. In 2009, a spokesman for Kenny Hulshof, a former Republican congressman and gubernatorial candidate, said of merit selection: "A plan that was intended to be nonpartisan has become very partisan."⁶⁰ During the 2016 gubernatorial campaign, a policy director for future Republican governor Eric Greitens declared: "Eric is opposed to our current system of judicial selection that gives trial lawyers too much control over the appointment of the very judges they argue their cases in front of."⁶¹ The next spring, the president pro tempore of the Missouri Senate, Ron Richard, echoed the governor's skepticism. He expressed particular concern over a three-candidate slate recently approved by the Appellate Judicial Commission.⁶² Though the sitting governor was himself conservative, the slate contained only a single candidate with a conservative record, which, in Richard's view, effectively diminished the governor's discretion.⁶³ Though opposition to merit selection is not always couched in explicitly

For an overview of unsuccessful efforts, see *History of Reform Efforts: Unsuccessful Reform Efforts*, NAT'L CTR. FOR STATE CTS., <https://perma.cc/GXK8-B3HM>.

⁵⁵ Jo Mannies, *Missouri Bar Lays Out Plans for Defending the State's Judicial-Selection Process*, ST. LOUIS PUB. RADIO (Sept. 24, 2009), <https://perma.cc/G3H7-K7TH>.

⁵⁶ Marshall Griffin, *Mo. Judicial Ballot Question Has Failed, Opponents Say*, ST. LOUIS PUB. RADIO (May 26, 2010), <https://perma.cc/WHF2-4RTJ>.

⁵⁷ S.J. Res. 51, 96th Gen. Assemb., Reg. Sess. (Mo. 2012).

⁵⁸ *Id.*

⁵⁹ *Official Results—General Election, Nov. 6, 2012*, MO. SEC'Y OF STATE, <https://enrarchives.sos.mo.gov/enrnet/Default.aspx?eid=750002497> (follow "Submit" hyperlink; then scroll to the bottom of the page to view results for Constitutional Amendment 3).

⁶⁰ Chris Dunn, *Hulshof Proposes Change in Missouri Judicial Appointments*, COLUMBIA MISSOURIAN (Jan. 22, 2009), <https://perma.cc/U89E-L55R>.

⁶¹ Kurt Erickson, *Greitens Wants Changes to How Missouri Picks Its Judges*, ST. LOUIS POST-DISPATCH (Oct. 25, 2016), <https://perma.cc/9ULJ-QF79>.

⁶² Erickson, *supra* note 54.

⁶³ *See id.*

conservative terms,⁶⁴ the bulk of the criticism, in Missouri and elsewhere, comes from right-of-center groups.

Other states have seen similar movements against merit selection, but merit-selection systems have proven difficult to completely overhaul. For merit-selection opponents, success has usually come from either modifying an existing merit-selection plan or preventing the adoption of such a plan in the first place. For example, in 2001, Florida weakened its merit system by granting the governor the power to select every commission member.⁶⁵ In 2010, Nevada voters rejected a ballot measure to switch to a merit-selection system.⁶⁶ In 2014, Tennessee diluted its merit system by incorporating more traditional appointment-confirmation elements.⁶⁷ Although merit selection faces continued attacks, political realities have constrained the wildest ambitions of some of its opponents.

Having enjoyed only limited success in the political arena, conservative opponents have turned to the federal courts for relief. The last twenty-six years have seen at least five federal lawsuits claiming that merit selection violates equal protection.⁶⁸ Although none proved successful, the most recent of the five challenges came within a single vote of invalidating Kansas's method of merit selection.⁶⁹ In that case, the dissent was heavily influenced by the burgeoning academic literature in support of the equal protection challenge. For merit-selection defenders, the trendline in both law and academia is worrying.

B. The Supreme Court's Equal Protection Jurisprudence

Developing alongside the merit-selection debate is the federal judiciary's own attempt at preserving and enhancing the proper functioning of certain governmental bodies. Since the 1960s, the

⁶⁴ Cf. ALICIA BANNON, RETHINKING JUDICIAL SELECTION IN STATE COURTS 17 (2016) (expressing the liberal-leaning Brennan Center for Justice's concerns about merit selection, including high-cost and politicized retention elections, "capture" of selection commissions, and failures to create a diverse bench).

⁶⁵ Rebecca Mae Salokar, D. Jason Berggren & Kathryn A. DePalo, *The New Politics of Judicial Selection in Florida: Merit Selection Redefined*, 27 JUST. SYS. J. 123, 125–26 (2006).

⁶⁶ *Official Results—2010 General Election*, NEV. SECY OF STATE, <https://perma.cc/BH74-RLLF> (follow "STATEWIDE BALLOT RESULTS" hyperlink; then view results for State Question No. 1); see also Ashley Powers, *Nevada to Vote on Appointment of Top Judges*, L.A. TIMES (Oct. 29, 2010), <https://perma.cc/FB9R-TWAA>.

⁶⁷ Boucher, *supra* note 5.

⁶⁸ See *infra* Part I.C.

⁶⁹ See *infra* Part I.C.3.

Supreme Court has slowly developed an equal protection case law that has expanded the country's conception of constitutionally protected voting rights. In particular, the Court derived from the Equal Protection Clause a "one person, one vote" principle, which contains both vote-denial and vote-dilution aspects.⁷⁰ Under the principle, when the government charters an election of general interest, it must allow all qualified voters to participate,⁷¹ and it cannot draw malapportioned electoral districts, because doing so would make some votes worth more than others.⁷²

The Court has wrestled with how to apply this "one person, one vote" principle to the various democratic mechanisms developed by state and local governments. A jurisprudence has emerged that balances reasonable governmental experimentation with a federal floor of constitutionally mandated voting protection.

1. The advent and expansion of "one person, one vote."

In *Baker v. Carr*,⁷³ the Supreme Court first developed the vote-dilution aspect of the "one person, one vote" principle, holding that federal courts have the power to adjudicate electoral malapportionment claims through the Fourteenth Amendment's Equal Protection Clause.⁷⁴ The combination of Tennessee's antiquated apportionment law, a boom in urban population, and the failure of the state legislature to redistrict resulted in wide disparities in the number of qualified voters residing in each electoral district.⁷⁵ Prior federal courts had held that legislative apportionment was a nonjusticiable political question.⁷⁶ However, the *Baker* Court, adopting what would come to be known as the "one person, one vote" principle,⁷⁷ departed from precedent in holding the controversy justiciable.⁷⁸ In a series of subsequent cases, the Court concluded that different types of electoral districts must be roughly equivalent in population so as not to dilute a voter's power. The

⁷⁰ See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

⁷¹ See, e.g., *id.* at 632–33.

⁷² See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

⁷³ 369 U.S. 186 (1962).

⁷⁴ *Id.* at 209–10.

⁷⁵ See *id.* at 192–95.

⁷⁶ *Id.* at 208–09.

⁷⁷ See, e.g., *Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The conception of political equality . . . can mean only one thing—one person, one vote.").

⁷⁸ *Baker*, 369 U.S. at 209–10.

Court has applied this principle to primary elections,⁷⁹ congressional districts,⁸⁰ state legislative districts,⁸¹ and local government districts.⁸²

The Supreme Court expanded the “one person, one vote” principle’s vote-denial aspect in *Kramer v. Union Free School District No. 15*.⁸³ A New York state law provided that some school-board elections could be limited to voters who (1) owned or leased taxable property within the school district, (2) were married to someone who owned or leased qualifying property, or (3) had children enrolled in the district.⁸⁴ The Court applied strict scrutiny, holding this scheme unconstitutional.⁸⁵ The Court reasoned that the school boards’ limited jurisdiction was inconsequential. Under the *Kramer* principle, strict scrutiny is applicable where “some resident citizens are permitted to participate and some are not” in an election for a governmental body that exercises “legislative” as opposed to “administrative” power.⁸⁶

The question, then, is what governmental bodies exercise “legislative” power, thereby triggering the *Kramer* rule (and the “one person, one vote” principle more generally). Two cases attempt to clarify this inquiry. In *Avery v. Midland County*,⁸⁷ a case that preceded *Kramer*, the Court struck down a Texas county’s use of single-member districts of disproportionate population in elections of county commissioners.⁸⁸ At issue was whether the commissioners exercised “legislative” power, which would place them within the bounds of the “one person, one vote” principle.⁸⁹ The Court found that the commissioners indeed exercised legislative power because they were empowered to make “a large number of decisions having a broad range of impacts on all the citizens of the county,” including setting a tax rate, equalizing assessments, issuing bonds, and preparing and adopting a county budget.⁹⁰ The Court thus held that equal protection requires electoral districts be of roughly equal population whenever a local

⁷⁹ *Gray*, 372 U.S. at 381.

⁸⁰ *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

⁸¹ *Reynolds*, 377 U.S. at 562–63.

⁸² *Avery v. Midland County*, 390 U.S. 474, 485–86 (1968).

⁸³ 395 U.S. 621 (1969).

⁸⁴ *Id.* at 623.

⁸⁵ *Id.* at 626.

⁸⁶ *Id.* at 629–30.

⁸⁷ 390 U.S. 474 (1968).

⁸⁸ *Id.* at 475–76.

⁸⁹ *Id.* at 482–83.

⁹⁰ *Id.* at 483.

body exercises “general governmental powers over the entire geographic area served by the body.”⁹¹ The Court, however, refrained from answering whether the “one person, one vote” principle extends to “special-purpose” governmental units, where the units’ functions primarily affect a definable group of constituents.⁹²

The Supreme Court further explained the “general governmental powers” test in *Hadley v. Junior College District of Metropolitan Kansas City*.⁹³ In every case in which the Court has applied the “one person, one vote” principle, the *Hadley* Court explained, the “constant factor” has been the decision by government to charter an election.⁹⁴ The “purpose[]” of the election is immaterial; the determinative question is whether “a state or local government [has] decide[d] to select persons by popular election to perform governmental functions.”⁹⁵ However, the *Hadley* Court also recognized that “a State may, in certain cases, limit the right to vote to a particular group or class of people.”⁹⁶ Thus, the *Kramer* principle does not automatically apply to every state-authorized election. “But once a State has decided to use the process of popular election and ‘once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.’”⁹⁷

Thus, *Kramer*, *Avery*, and *Hadley* together stand for the principle that where the government charters an election of an official who exercises general governmental power, all qualified voters must be able to participate on equal terms. However, applying the *Kramer* rule to the myriad local and state governmental bodies has not been easy. The Court has found that some elections are of a substantially different type than the relatively straightforward contests of *Kramer*, *Avery*, and *Hadley*. The diversity of U.S. electoral systems has necessitated the recognition of a few exceptions to the *Kramer* principle.

⁹¹ *Id.* at 484–85.

⁹² *Avery*, 390 U.S. at 483–84.

⁹³ 397 U.S. 50 (1970).

⁹⁴ *Id.* at 54.

⁹⁵ *Id.* at 55–56.

⁹⁶ *Id.* at 58–59.

⁹⁷ *Id.* at 59 (quoting *Gray*, 372 U.S. at 381).

2. Three recognized exceptions to the *Kramer* principle.

The Supreme Court has recognized three exceptions to the *Kramer* principle. I refer to these as the special-purpose, appointment, and judicial exceptions.

a) *The special-purpose exception.* The first exception, arising from *Salyer Land Co. v. Tulare Lake Basin Water Storage District*⁹⁸ and *Ball v. James*,⁹⁹ allows “special limited purpose” governmental units to limit the franchise to those who are primarily interested in or affected by the units’ activities.¹⁰⁰ Thus, the special-purpose exception has two prongs: (1) the governmental body must be a “special unit with narrow functions,” and (2) the restricted voting population must bear a “special relationship” to the function of the governmental body.¹⁰¹

Both cases dealt with water storage districts. In *Salyer*, the water storage district existed to acquire, store, and distribute irrigated water to farms within the district.¹⁰² The district provided no other general public services, and it assessed operating costs against land in proportion to benefits received.¹⁰³ The district was governed by an elected board of directors.¹⁰⁴ By state statute, only district landowners, regardless of whether they resided in the district, were eligible to participate in elections of board members.¹⁰⁵

In holding this scheme constitutional, the Court concluded that the *Kramer* principle was inapplicable for two primary reasons. First, although the district exercised “some typical governmental powers,”¹⁰⁶ it had the “special limited purpose” of facilitating irrigation, a primary objective that did not meet *Avery*’s “general governmental powers” threshold.¹⁰⁷ Second, the district’s activities had a “disproportionate effect” on the enfranchised

⁹⁸ 410 U.S. 719 (1973).

⁹⁹ 451 U.S. 355 (1981).

¹⁰⁰ *Id.* at 361; *Salyer*, 410 U.S. at 728.

¹⁰¹ *Bradley v. Work*, 916 F. Supp. 1446, 1456–57 (S.D. Ind. 1996) (citing *Ball*, 451 U.S. at 361–62).

¹⁰² *Salyer*, 410 U.S. at 723–24.

¹⁰³ *Id.* at 724.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 724–25. The landowners’ votes were “apportioned according to the assessed valuation of the land” owned by each. *Id.* at 725.

¹⁰⁶ *Id.* at 728.

¹⁰⁷ *Salyer*, 410 U.S. at 728.

landowners but not the disenfranchised nonlandowners.¹⁰⁸ Because *Kramer* did not apply, the scheme was subject to rational basis review rather than strict scrutiny.¹⁰⁹

In *Ball*, the Court considered a similar challenge to a water district that exercised broader power than the one in *Salyer*.¹¹⁰ As in *Salyer*, the district in *Ball* stored and delivered water to various landowners.¹¹¹ The district likewise limited voting eligibility to landowners and apportioned voting power by the amount of land owned by each.¹¹² But the district also subsidized its water operations by selling electricity to hundreds of thousands of customers.¹¹³ Additionally, the district had the power to condemn land, sell tax-exempt bonds, and levy taxes on real property.¹¹⁴

Nevertheless, the Court held that this, too, fell short of the “general governmental powers” threshold.¹¹⁵ The Court reasoned that—despite its electricity-selling activities, broad geographic footprint, and wide-ranging influence on the large number of people living within its boundaries—the primary purpose of the district remained the same as that of the district in *Salyer*.¹¹⁶ The district simply lacked too many traditional governing capacities to be considered an exerciser of general governmental powers.¹¹⁷ And, as in *Salyer*, the district’s primary water-distribution function bore a disproportionate relationship to the specific class of people whom the system made eligible to vote.¹¹⁸ In sum, because *Ball* applied the special-purpose exception to an entity with quite substantial economic and legal power, it represents a notable expansion of the reasoning in *Salyer*.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 730–31.

¹¹⁰ *See Ball*, 451 U.S. at 357–60.

¹¹¹ *Id.* at 357.

¹¹² *Id.* at 359.

¹¹³ *Id.* at 357.

¹¹⁴ *Id.* at 359–60.

¹¹⁵ *Ball*, 451 U.S. at 362–69.

¹¹⁶ *Id.* at 369–70.

¹¹⁷ *Id.* at 366.

[T]he District simply does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*. The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.

¹¹⁸ *Id.* at 370.

b) *The appointment exception.* The second exception allows appointment of some government officials, even by a private body, in lieu of an election that complies with the *Kramer* principle.¹¹⁹ The exception arises from *Sailors v. Board of Education*¹²⁰ and *Rodriguez v. Popular Democratic Party*.¹²¹

Sailors stands for the proposition that not all electoral contests are elections in the *Kramer* sense; they may be appointments by elected officials, which are automatically exempt from the *Kramer* rule. In *Sailors*, voters elected members of their local school boards but did not directly elect members of their county school boards.¹²² Instead, state law provided that members of county school boards were chosen by delegates from the local school boards.¹²³ Each local school board, regardless of the size of its student population, was apportioned a single delegate to a biennial meeting at which the county school board would be selected.¹²⁴

In holding this scheme constitutional, the Supreme Court rejected the argument that the county school board selection was legally indistinguishable from other instances of electoral malapportionment that the Court had invalidated.¹²⁵ First, the county school boards were local bodies that performed “administrative” as opposed to “legislative” functions, and the “one person, one vote” principle traditionally had been applied to offices that were either legislative or that existed at the state level.¹²⁶ Second, the Court reasoned that the system in *Sailors* was not properly construed as an election in the constitutional sense but rather as a system of appointment.¹²⁷ The “one person, one vote” principle had only been applied to elections, and those cases “cast no light on when a State must provide for the election of local officials.”¹²⁸ The Court ultimately held that, “[a]t least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here.”¹²⁹

¹¹⁹ See *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967).

¹²⁰ 387 U.S. 105 (1967).

¹²¹ 457 U.S. 1 (1982).

¹²² *Sailors*, 387 U.S. at 106–07.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 108.

¹²⁶ *Id.* at 108, 110.

¹²⁷ See *Sailors*, 387 U.S. at 111.

¹²⁸ *Id.* at 108.

¹²⁹ *Id.* at 111.

In *Rodriguez*, the Court established that the selection process of an appointing body of a government official does not necessarily have to comply with the *Kramer* principle—even if the appointing body is a private organization.¹³⁰ The Court upheld a specific Puerto Rican law that allowed the political party of a deceased lawmaker to fill the lawmaker’s seat on an interim basis until the next general election.¹³¹ The appointing body was a political party, which was legally authorized to hold a closed election for the deceased lawmaker’s replacement.¹³² The election was akin to a closed party primary in that only registered party members were allowed to participate.¹³³

In holding that this system did not violate the “one person, one vote” principle, the Court focused on the interim nature of the appointment and the law’s party-neutral application.¹³⁴ All qualified voters had an equal opportunity to participate in the general election of candidates to the state legislature,¹³⁵ and the law applied uniformly to all legislative vacancies, whenever they arose.¹³⁶ The Court noted that the interim-appointment mechanism allowed vacancies to be filled promptly without the expense and inconvenience of a special election¹³⁷ and that the state legislature could have rationally concluded that appointment by the political party of the incumbent lawmaker would more accurately reflect the will of the voters than appointment by the governor.¹³⁸ The Court also concluded that the law was reasonable in light of Puerto Rico’s special interest in ensuring minority representation in its legislature.¹³⁹ In sum, *Rodriguez* represents the flexibility of the *Kramer* principle, which permits reasonable experimentation by state governments trying to solve particular problems of administering a representative government.

c) *The judicial exception.* The third exception, arising from *Wells v. Edwards*,¹⁴⁰ explicitly exempts judicial elections from equal protection principles. The exception presumably extends to

¹³⁰ *Rodriguez*, 457 U.S. at 14.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *See id.* at 10.

¹³⁵ *Rodriguez*, 457 U.S. at 10.

¹³⁶ *Id.*

¹³⁷ *Id.* at 12.

¹³⁸ *Id.*

¹³⁹ *Id.* at 13.

¹⁴⁰ 409 U.S. 1095 (1973), *aff’g* 347 F. Supp. 453 (M.D. La. 1972).

other methods of judicial selection, such as merit selection, but its precedential value is limited.

In *Wells*, the Supreme Court summarily affirmed a district court opinion that held that the vote-dilution aspect of the “one person, one vote” principle was inapplicable to judicial elections.¹⁴¹ That case concerned a challenge to Louisiana’s method of electing members of the state supreme court. Under the judicial districting provisions of the Louisiana Constitution, members of the state supreme court were elected from judicial districts that were not equal in population.¹⁴² The district court reasoned that the duties of courts were “so far removed from normal governmental activities” that a popular election in compliance with the equal protection case law was not constitutionally necessary.¹⁴³ As opposed to legislators and executive officials—to whom the vote-dilution aspect of the “one person, one vote” principle has been exclusively applied¹⁴⁴—judges “are not representatives in the same sense” because “[t]heir function is to administer the law, not to espouse the cause of a particular constituency.”¹⁴⁵

The Court revisited this issue in *Chisom v. Roemer*,¹⁴⁶ in which a class of registered voters challenged Louisiana’s judicial districting scheme under the Voting Rights Act of 1965. The Court recognized *Wells* as holding “the one-person, one-vote rule inapplicable to judicial elections,”¹⁴⁷ but it clarified that this did not insulate judicial elections from vote-dilution claims brought under the Voting Rights Act.¹⁴⁸ The Voting Rights Act was “enacted to protect voting rights that are not adequately protected by the Constitution itself.”¹⁴⁹

Thus, the judicial exception does not have binding precedential force, and the Court has held that elected judges are representatives under the Voting Rights Act, though not necessarily in

¹⁴¹ *Wells v. Edwards*, 347 F. Supp. 453, 454 (1972) (“[T]he concept of one-man, one-vote apportionment does not apply to the judicial branch of the government.”), *aff’d mem.* 409 U.S. 1096 (1973).

¹⁴² *Id.* at 454, 456.

¹⁴³ *Id.* at 454–55 (quoting *Hadley*, 397 U.S. at 56).

¹⁴⁴ *Id.* at 455.

¹⁴⁵ *Id.* (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964)); *see also id.* at 456 (“The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government.” (quoting *N.Y. State Ass’n of Trial Laws v. Rockefeller*, 267 F. Supp. 148, 153 (S.D.N.Y. 1967))).

¹⁴⁶ 501 U.S. 380 (1991).

¹⁴⁷ *Id.* at 402.

¹⁴⁸ *Id.* at 403.

¹⁴⁹ *Id.*

the equal protection sense.¹⁵⁰ However, the scope of the judicial exception, as presented by the district court in *Wells*, is quite broad. The exception seems to categorically exclude *all* judges from the “one person, one vote” principle by virtue of their unique governmental role.

C. How Federal Courts Have Addressed Challenges to Merit Selection

The Supreme Court has never decided a merit-selection case, and only three appellate circuits have considered the validity of merit-selection schemes under the Supreme Court’s equal protection jurisprudence.¹⁵¹ In each case, the court held that merit selection does not violate the Equal Protection Clause. In doing so, however, the courts employed a panoply of justifications, and their decisions were not always unanimous. Some relied on one or more of the three recognized *Kramer* exceptions, and at least one judge invoked the idea of an implicit exception.¹⁵² But a dissenter on the Tenth Circuit made a compelling case against Kansas’s method of merit selection, employing arguments formed in the academic literature.¹⁵³ Courts have not settled on a single justification for merit selection’s constitutionality, and the majority of federal appellate courts have yet to weigh in. Consequently, the scant federal case law—although currently one-sided—stands on less-than-solid conceptual foundations. This Comment will address that issue in Part II.

1. The Ninth Circuit: *Kirk v. Carpeneti*.

The Ninth Circuit was the first federal appellate court to consider the equal protection challenge to merit selection. In *Kirk v. Carpeneti*,¹⁵⁴ the Ninth Circuit upheld Alaska’s system of merit selection under the appointment exception, but it did not apply

¹⁵⁰ *Id.* at 399.

¹⁵¹ At least one district court has considered the equal protection challenge to merit selection without review by a higher court. In *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996), the U.S. District Court for the Southern District of Indiana concluded that Indiana’s merit-selection system did not violate the Equal Protection Clause or the Voting Rights Act. On appeal, the equal protection challenge was waived, and the Seventh Circuit affirmed the district court’s holding regarding the Voting Rights Act. *Bradley v. Work*, 154 F.3d 704, 711 (7th Cir. 1998).

¹⁵² See *infra* Part I.C.3.

¹⁵³ See *infra* Part I.C.3.

¹⁵⁴ 623 F.3d 889 (9th Cir. 2010).

the special-purpose or judicial exceptions.¹⁵⁵ However, the Ninth Circuit's analysis of the appointment exception is incomplete. Relying on *Rodriguez*, the court rejected the challengers' contention that all appointments must be made by an elected official.¹⁵⁶ But the Ninth Circuit failed to determine what types of appointments do satisfy the appointment exception; indeed, it did not explain why merit selection is one of those types.

Kirk is particularly interesting due to the peculiarities of the Alaska merit system. Under the Alaska system, the composition of the selection commission is identical to Missouri's: three attorneys, three nonattorneys, and the chief justice of the state supreme court, who serves as chair.¹⁵⁷ However, the attorney commissioners are not elected by members of the state bar. Rather, they are selected by the Alaska Bar Association's Board of Governors, a twelve-member body that is itself selected in a hybrid fashion.¹⁵⁸ Nine members of the Board are elected by active members of the bar association, and three members are nominated by the governor and confirmed by the legislature.¹⁵⁹ Therefore, individual members of the bar association still participate in closed elections that shape the composition of the merit-selection commission, but their influence is merely indirect and diluted by the governor-appointed members of the Board. This weakening of attorney power may make the Alaska system less constitutionally problematic than the Missouri Plan.¹⁶⁰

In *Kirk*, a group of Alaska voters sought to enjoin the attorney commissioners from participating in the selection process on the ground that their presence on the commission violated the principle of "one person, one vote."¹⁶¹ The challengers argued that all participants in the judicial selection process must either be popularly elected or appointed by a popularly elected official.¹⁶²

The Ninth Circuit rejected this argument. The court dismissed the judicial exception, relying instead on the appointment

¹⁵⁵ See *id.* at 900.

¹⁵⁶ *Id.* at 898–900.

¹⁵⁷ *Id.* at 891. The governor appoints the nonattorneys (as in Missouri), but the appointments are subject to legislative confirmation (in a departure from the Missouri Plan). *Id.* at 893 (citing ALASKA CONST. art. IV, § 8).

¹⁵⁸ *Id.* at 893.

¹⁵⁹ *Kirk*, 623 F.3d at 893.

¹⁶⁰ See *infra* note 225.

¹⁶¹ See *Kirk*, 623 F.3d at 891.

¹⁶² *Id.*

exception.¹⁶³ First, the court interpreted the judicial exception as standing only for the vote-*dilution* aspect of the “one person, one vote” principle; the exception says only that “the Equal Protection Clause does not require states to distribute judicial election districts according to population.”¹⁶⁴ Therefore, it cannot be applied to merit selection, which is an appointive process with no electoral districts to apportion.¹⁶⁵

Second, the Ninth Circuit addressed the appointment exception. The court emphasized the professional—rather than personal—role of the attorney commissioners as representatives of the bar,¹⁶⁶ concluding that “the right to equal voting participation has no application to the Judicial Council because the members of the [selection commission] are appointed, rather than elected.”¹⁶⁷ The court then considered the plaintiffs’ argument that “all participants in Alaska’s judicial selection process must either be elected themselves, or be appointed by a popularly elected official.”¹⁶⁸ The court rejected this argument based on *Rodriguez*, which declared valid an interim appointment of a state legislator by a political party.¹⁶⁹ The court concluded that even if the plaintiffs’ principle were correct, there would be no violation of it here because the “ultimate power to appoint judges is in the Governor, who is popularly elected by the people of Alaska” and “the people have the opportunity to reject the appointment in subsequent retention elections.”¹⁷⁰

In this analysis, the Ninth Circuit failed to assess the scope of the appointment exception, including whether it applies to any type of appointment or only to certain types of appointments. The Ninth Circuit correctly concluded that *Rodriguez* stands for the proposition that not every appointment under the appointment exception must be made by an elected official, but that does not necessarily mean an appointment under the exception may be made by any group or individual.¹⁷¹ Because of the limited scope of the Ninth Circuit’s opinion, the court failed to make a full defense of merit selection.

¹⁶³ *Id.* at 898.

¹⁶⁴ *Id.* at 897.

¹⁶⁵ *See id.*

¹⁶⁶ *Kirk*, 623 F.3d at 894.

¹⁶⁷ *Id.* at 898.

¹⁶⁸ *Id.* at 898.

¹⁶⁹ *Id.* at 899–900.

¹⁷⁰ *Id.* at 900.

¹⁷¹ *See Lund, supra* note 3, at 1057.

2. The Eighth Circuit: *Carlson v. Wiggins*.

The Eighth Circuit first addressed the equal protection challenge in *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*,¹⁷² in which it affirmed, without opinion, a district court's decision to uphold Missouri's system of merit selection.¹⁷³ The Eighth Circuit did not fully address the equal protection challenge until fourteen years later. In *Carlson v. Wiggins*,¹⁷⁴ the Eighth Circuit affirmed a district court's validation of Iowa's method of merit selection.¹⁷⁵ Iowa's system is similar to Missouri's but with a larger commission. The Iowa commission is composed of fifteen members: seven nonattorneys appointed by the governor and confirmed by the state senate, seven attorneys elected by members of the bar, and a judge of the state supreme court, who serves as chair.¹⁷⁶

As opposed to the Ninth Circuit, which relied on the appointment exception, the Eighth Circuit relied on the special-purpose exception. It concluded that the selection commission does not exercise general governmental power because the governor makes the final judicial appointment.¹⁷⁷ The court also concluded that the commission's work in winnowing the field of judicial candidates has a special effect on members of the state bar, a definable group of constituents.¹⁷⁸ Therefore, the election of attorney commission members was considered an election of special interest, subject only to rational basis review.¹⁷⁹

3. The Tenth Circuit: *Dool v. Burke*.

The Tenth Circuit is the most recent federal circuit to address the constitutionality of merit selection. In *Dool v. Burke*,¹⁸⁰ the Tenth Circuit affirmed the district court's dismissal of an equal protection challenge to Kansas's method of merit selection.¹⁸¹ The court, however, was split in its reasoning. Each member of the three-judge panel filed a separate opinion, including one dissent.

¹⁷² 133 F.3d 921 (8th Cir. 1998).

¹⁷³ *Id.* at 1128.

¹⁷⁴ 675 F.3d 1134 (8th Cir. 2012).

¹⁷⁵ *Id.* at 1136.

¹⁷⁶ *Id.* at 1137.

¹⁷⁷ *Id.* at 1140.

¹⁷⁸ *Id.* at 1141.

¹⁷⁹ *Carlson*, 675 F.3d at 1141–42.

¹⁸⁰ 497 F. App'x 782 (10th Cir. 2012).

¹⁸¹ *Id.* at 784.

Dool represents the federal judiciary's inability to settle on a singular justification for merit selection's constitutionality.

The Kansas commission operates more like those of Missouri and Iowa than that of Alaska, as the attorney members are elected by the members of the state bar association, not appointed by the state bar's governing body.¹⁸² One small difference is the makeup of the commission. The Kansas commission has nine members: four nonattorneys selected by the governor and five attorneys elected by members of the Kansas bar.¹⁸³ Unlike in most merit-selection states, bar-elected attorneys are a majority on the Kansas commission. This potentially makes the Kansas system more constitutionally suspect.¹⁸⁴

In his concurring opinion, Judge Terrence O'Brien eschewed all three recognized *Kramer* exceptions,¹⁸⁵ concluding instead that the "one person, one vote" principle does not apply to merit selection by way of an implicit exception. Judge O'Brien reasoned that the "strict demands" of the "one person, one vote" principle "cannot reasonably apply to every election unable to be wedged into the fact-bound and exceedingly narrow exception established in *Salyer* and *Ball*."¹⁸⁶ The "general governmental powers" qualifying language of *Avery*, *Hadley*, and other cases implies there are bodies—beyond those that satisfy both prongs of the special-purpose exception—to which "one person, one vote" would not apply by virtue of their limited or nongovernmental function.¹⁸⁷ To Judge O'Brien, this implicit exception is a threshold inquiry. Before applying any exceptions to the "one person, one vote" principle, a court must ask whether the body in question exercises general governmental functions.¹⁸⁸

A merit-selection commission does not pass this threshold, Judge O'Brien concluded. A body that exercises general governmental functions must, by its actions, "have a direct and immediate effect on voters."¹⁸⁹ It must also have "*general*" governmental power and exercise it "*over*" the geographic area served by the

¹⁸² *Dool v. Burke*, No. 10-1286, 2010 WL 3724660, at *1 (D. Kan. Sept. 14, 2010).

¹⁸³ *Id.* (quoting KAN. CONST. art. III, § 5).

¹⁸⁴ *See infra* note 225.

¹⁸⁵ Judge O'Brien rejected the special-purpose exception for the reasons mentioned above, and he failed to fully analyze the appointment and judicial exceptions.

¹⁸⁶ *Dool*, 497 F. App'x at 788 (O'Brien, J., concurring).

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *Id.* at 790.

body so that its activities have a “sufficient impact” on the electorate.¹⁹⁰ The commission, “which can neither make law nor administer it, plainly has no such general power.”¹⁹¹ Its sole function—winnowing the list of judicial candidates sent to the governor—“is not a traditional government function.” If anything, the commission serves as a structural check on such government functions, as it is designed to ensure the executive cannot use the appointment power to threaten the integrity of the judicial branch.¹⁹² Further, the democratic principles that compelled the “one person, one vote” line of cases do not apply to a merit-selection commission because the legitimacy of the commission’s work is not contingent upon the popular election of its members.¹⁹³

In his concurring opinion, Judge Scott Matheson concluded that the Kansas system of merit selection falls within the special-purpose exception to *Kramer*.¹⁹⁴ Judge Matheson employed both prongs of the special-purpose exception. He reasoned that the selection commission performs the special, limited purpose of screening judicial candidates, and that its work disproportionately affects attorneys because only attorneys are eligible to serve as judges on a Kansas appellate court.¹⁹⁵ Judge Matheson considered Judge O’Brien’s notion of an implicit exception—the idea that the “one person, one vote” framework does not apply at all.¹⁹⁶ He concluded, however, that the “one person, one vote” framework and the special-purpose exception were perfectly administrable in this case without resorting to an implicit exception.¹⁹⁷

In his dissenting opinion, Judge Monroe McKay concluded that because the special-purpose exception does not apply to merit selection, merit selection must be subject to strict scrutiny, which it cannot survive.¹⁹⁸ Judge McKay reasoned that judicial selection impacts the general population, so the selection process’s specific impact on attorneys cannot trigger the special-purpose exception.¹⁹⁹ This takes merit selection out of the reasoning of

¹⁹⁰ *Id.* (emphasis in original) (quoting *Hadley*, 397 U.S. at 53–54).

¹⁹¹ *Dool*, 497 F. App’x at 790 (O’Brien, J., concurring).

¹⁹² *Id.* at 791.

¹⁹³ *Id.* at 790–91.

¹⁹⁴ *Id.* at 792–93 (Matheson, J., concurring). Like Judge O’Brien, Judge Matheson did not fully analyze the appointment and judicial exceptions.

¹⁹⁵ *Id.* at 793–94.

¹⁹⁶ *Dool*, 497 F. App’x at 793.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 794–95 (McKay, J., dissenting).

¹⁹⁹ *Id.* at 794–95.

Salyer and *Ball*, he argued, where the “end impact was on discrete groups” and the “general public was only nominally impacted.”²⁰⁰ By eliminating all but a few candidates from consideration, the commission exerts significant power over who becomes a judge. This makes its nominations functionally equivalent to the winnowing mechanism of a political party primary or election of presidential electors—processes to which the Supreme Court has held that strict scrutiny applies.²⁰¹

Judge McKay reasoned that the governor’s role in making the final appointment does not save merit selection’s constitutionality because the governor’s choice is severely constrained and subject to manipulation by the commission.²⁰² The governor must still select one of the commission’s approved candidates, even if the governor finds all three unacceptable.²⁰³ Judge McKay concluded that “[b]y delegating to the state’s lawyers the authority to elect a controlling majority of a body that exercises almost all of the discretion involved in appointing supreme court justices, Kansas has virtually given the state bar the authority to elect those who choose the justices.”²⁰⁴ As such, Judge McKay would have found that strict scrutiny applied and that the system was unconstitutional.²⁰⁵

The main takeaway from *Dool* is how little it truly resolved. The Tenth Circuit upheld merit selection’s constitutionality, but the exact reason why merit selection is constitutional remains unclear. *Dool*, and the federal cases that preceded it, represent a growing dissension in the federal judiciary’s handling of merit-selection cases.

II. MERIT SELECTION IS CONSTITUTIONAL BY MANY ROUTES

Although many scholars have discussed the history and policy implications of merit selection, only a few pieces of legal scholarship focus on the equal protection challenge. Nearly all of these pieces argue that merit-selection processes potentially violate the Equal Protection Clause.²⁰⁶ In particular, an essay by Professor

²⁰⁰ *Id.* at 794.

²⁰¹ *Dool*, 497 F. App’x at 795 (quoting Lund, *supra* note 3, at 1053–54).

²⁰² *Id.*

²⁰³ *Id.* at 795.

²⁰⁴ *Id.* (quoting Lund, *supra* note 3, at 1055).

²⁰⁵ *Id.*

²⁰⁶ See, e.g., Matthew Schneider, *Why Merit Selection of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609, 660–63 (2010) (explaining that the constitutionality of merit selection, assessed under an equal protection analysis, is questionable); Stephen J. Ware, *The Bar’s Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN.

Nelson Lund presents what is perhaps the most comprehensive argument in favor of the equal protection challenge.²⁰⁷ Only one piece, a student note by Cort VanOstran, defends merit selection against these critiques.²⁰⁸

Part II of this Comment serves as a reply to Lund and an expansion of the arguments formed by VanOstran. Lund argues that merit selection's closed elections are analogous to the restricted school board elections in *Kramer* because they disenfranchise otherwise qualified voters.²⁰⁹ They cannot be distinguished by their indirect effect on judicial selection due to the substantial power the bar wields in the process.²¹⁰ Merit selection is thus subject to strict scrutiny, which it cannot survive.²¹¹ Lund then analyzes each of the recognized exceptions to the "one person, one vote" principle, concluding that none apply to merit selection.²¹² VanOstran, however, adopts the reasoning of Judge O'Brien's concurrence in *Dool*, arguing in favor of an implicit exception.²¹³ Because VanOstran avoids any analysis of the three recognized exceptions, he leaves many of Lund's arguments unchallenged.

In continuing the conversation between these two pieces, Part II.A first addresses the overarching question of whether merit selection infringes a fundamental right, which would trigger strict scrutiny. It also addresses the related question of whether the indirect effect of the attorney elections on judicial selection takes them outside of the *Kramer* rule. Part II.B then analyzes each of the recognized exceptions, concluding that all three apply to merit selection. Finally, Part II.C explores the idea of an implicit exception, bolstering VanOstran's arguments with additional support.

J.L. & PUB. POL'Y 392, 398 n.34 (2009) (explaining that the sort of favoritism merit selection affords attorneys was found to violate equal protection in the context of a different occupation). See generally Joshua Ney, Note, *Does the Kansas Supreme Court Selection Process Violate the One Person, One Vote Doctrine?*, 49 WASHBURN L.J. 143 (2009) (explaining that a strong argument exists for the invalidity of the Kansas system of merit selection under an equal protection analysis).

²⁰⁷ See generally Lund, *supra* note 3.

²⁰⁸ See generally Cort A. VanOstran, Note, *Justice Not for Sale: A Constitutional Defense of the Missouri Plan for Judicial Selection*, 44 WASH. U. J.L. & POL'Y 159 (2014).

²⁰⁹ See Lund, *supra* note 3, at 1049.

²¹⁰ *Id.* at 1049–50.

²¹¹ *Id.* at 1050, 1067–68.

²¹² *Id.* at 1050–60.

²¹³ VanOstran, *supra* note 208, at 175.

A. Merit Selection Does Not Infringe a Fundamental Right

One of the first issues in any equal protection claim is the applicable standard of review. With some exceptions, courts apply either rational basis review or strict scrutiny.²¹⁴ This Comment assumes that merit selection satisfies rational basis review but falls short under strict scrutiny. Strict scrutiny is applied whenever a law infringes a fundamental right or involves a suspect classification.²¹⁵ In the case of merit selection, the issue is whether nonattorneys are unconstitutionally disenfranchised by their inability to participate in elections of attorney commissioners. Nonattorneys are not a suspect class,²¹⁶ so the question of whether merit selection should be subject to strict scrutiny hinges on whether these closed elections infringe a fundamental right. The three recognized exceptions involve cases where the Supreme Court has concluded that no fundamental right is infringed and thus that strict scrutiny does not apply. This Section addresses the abstract question of whether merit selection infringes a fundamental right, while Part II.B addresses whether the recognized exceptions apply to merit selection.

The Constitution does not protect a per se right to vote.²¹⁷ Rather, through the Fourteenth Amendment, it establishes the right to equal protection.²¹⁸ Voters have “the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State’s population.”²¹⁹ The Supreme Court has recognized as a “fundamental” right the ability to have one’s vote

²¹⁴ Aside from gender-discrimination cases, intermediate scrutiny is uncommon in the equal protection context. Amanda Mayo, Comment, *Nonresident Vote Dilution Claims: Rational Basis or Strict Scrutiny Review?*, 83 U. CHI. L. REV. 2213, 2214 n.7 (2016). Courts will sometimes use a term other than “strict scrutiny” to refer to the same concept. See, e.g., *Kramer*, 395 U.S. at 626 (“close scrutiny”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (“the most exacting judicial examination”).

²¹⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973).

²¹⁶ See *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512 (Mo. 1991); cf. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28 (stating that a suspect class is traditionally defined as one being “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”).

²¹⁷ *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35 n.78.

²¹⁸ “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

²¹⁹ *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35 n.78.

be counted on equal grounds with those of other citizens.²²⁰ Such equal suffrage, the Court has said, is fundamental because it “is preservative of other basic civil and political rights.”²²¹

But this raises the following question: For which elections is the equal protection of one’s vote a fundamental right? The Court has held that equal protection principles apply to a wide range of elections for legislative and executive offices.²²² But unlike a legislator or governor, an attorney elected to a merit-selection commission does not directly exercise general governmental power of the type at issue in the *Kramer* line of cases. The attorney commissioner merely plays a limited role in the selection of an official who herself exercises general governmental power. It is not at all clear that denying nonattorneys the right to vote for attorney members of merit-selection commissions infringes a fundamental right.

Lund argues that the Court has applied strict scrutiny to electoral mediating institutions, such as political party primaries and presidential elections, and so strict scrutiny should also be applied to merit selection.²²³ Political primaries determine which candidate a party will run as its nominee in a general election, while presidential elections determine the slate of electors a state sends to the Electoral College. Lund argues that a merit-selection commission is a similar mediating institution because it effectively controls the selection of judges and can even abuse the process to ensure the governor selects its preferred candidate.²²⁴

However, elections of attorney members to merit-selection commissions are different than elections to those other mediating institutions in three relevant respects. The attorney commissioners are constrained on all sides by processes whose constitutionality is not in question. First, the attorney commissioners do not compose the entirety of the commission. In Missouri, as in most merit-selection states, they form a sizeable minority—three-sevenths of the commission.²²⁵ Their exercise of power is thus constrained by

²²⁰ *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

²²¹ *Id.*

²²² *See supra* Part I.B.1.

²²³ Lund, *supra* note 3, at 1053–54.

²²⁴ *Id.* at 1049–50.

²²⁵ The diluted power of the attorney commissioners’ votes may itself hold constitutional significance. The attorney commissioners’ role could be analogized to that of automatic delegates (also known as superdelegates) to the Democratic National Convention. Superdelegates are party dignitaries automatically seated as delegates to the party convention, thereby giving each superdelegate an outsize influence (as compared to each individual primary voter) on the ultimate selection of the Democratic Party’s presidential nominee. In the past, superdelegates have comprised about 15% of the total delegates to

the other commissioners, whose positions on the commission raise no clear equal protection concerns because they are either appointed by an elected official or are an official themselves. Second, states employing the Missouri Plan require each newly appointed judge to stand for retention shortly after taking office. The attorney commissioners' exercise of power is thus also directly checked by voters who must (following a brief probationary period) either formally approve or disapprove of each judge appointed by the governor from the commission's approved slate. As these retention elections are open to all qualified voters, there is, again, no equal protection violation. And third, merit-selection commissions are called upon to evaluate the candidates' judicial acumen independent of policy preferences,²²⁶ whereas voters in party primaries and presidential elections are unconstrained by this legal and professional duty.

Additionally, while it is true that federal courts have applied the "one person, one vote" principle to primary elections, federal courts generally recognize the constitutionality of closed primaries, in which only registered party members may vote.²²⁷ Therefore, political parties—perhaps the most consequential electoral mediating institutions in the U.S. political system—are not obligated to extend the right to vote in a primary election to all eligible voters. The "one person, one vote" principle allows a mediating institution to, in at least some circumstances, impose voter qualifications at an incipient stage in the larger selection process. The

the Democratic National Convention. See Drew DeSilver, *Who are the Democratic Superdelegates?*, PEW RSCH. CTR. (May 5, 2016), <https://perma.cc/D526-PJGJ>. Although the federal courts have held that the "one person, one vote" principle is applicable to primary elections, it appears no federal court has ever declared that the Democratic Party's use of superdelegates is unconstitutional. See, e.g., *Kurzon v. Democratic Nat'l Comm.*, 197 F. Supp. 3d 638, 644 (S.D.N.Y. 2016) (declining to issue preliminary injunction against the use of superdelegates).

²²⁶ See MO. SUP. CT. R. 10.27 ("Each commission shall select the three best qualified nominees."). Some are skeptical "that state bar associations are less inclined to examine the personal ideological preferences of judicial candidates than are voters or elected officials." Fitzpatrick, *supra* note 4, at 676. But a process that ostensibly values its nonpartisan character provides an informal safeguard against political intrusion. While the strength of this safeguard is debatable, it should not be completely ignored. There is general agreement that merit-selection commissions should not act in an overtly partisan form. Even if commissioners do not take this mandate seriously, the legitimacy of their work depends on maintaining a perception of nonpartisanship. The same cannot be said for political leaders, political parties, and voters in partisan elections.

²²⁷ Cf. *Rodriguez*, 457 U.S. at 14 ("The Party . . . was not required to include nonmembers in what can be analogized to a party primary election.").

right to an equally protected vote, therefore, is not always fundamental at such an early phase—even if the process goes on to select a general government official. Even in the abstract, it is clear that merit selection does not infringe a fundamental right and therefore does not trigger strict scrutiny.

B. All Three Recognized *Kramer* Exceptions Apply to Merit Selection

Determining the proper standard of review is an abstract question, but explicit doctrinal exceptions aid the analysis. The Supreme Court has, to date, recognized three exceptions to the *Kramer* principle. In these cases, the Court determined that rational basis review, rather than strict scrutiny, applied. Although none is a perfect fit, each exception covers merit selection.

1. The special-purpose exception.

Merit-selection commissions represent “special limited purpose” governmental units of the type at issue in *Salyer* and *Ball* due to their narrow, technical duties, which hold specific implications for attorneys. The commissions have little power beyond their function as screeners of judicial candidates. The commissions generally have no support staff, and their members are not salaried,²²⁸ indicating a lack of general governmental power. They cannot act until a court vacancy arises, and, even then, their authority is narrowly constrained. The commissions exist only to assess the merit of would-be judges—a task that, by their carefully crafted membership structure, they are well situated to complete. Lay citizens, sitting judges, and licensed attorneys each bring useful knowledge and perspective to the judicial-selection process. And although the decisions of appellate courts may affect the daily lives of people living under those courts’ jurisdictions, those are judicial decisions, not decisions of the selection commission.

A merit-selection commission satisfies the first prong of the special-purpose exception because it has the limited duty of evaluating judicial candidates using merit-based criteria. This is apparent from the structure of the commission’s membership, which is carefully designed to facilitate such evaluation. Using the Missouri Plan as an example, we see that the commission is constructed as

²²⁸ VanOstran, *supra* note 208, at 176.

a middle ground between the legal and the political—a sort of arbitration-like system that balances, at least at this initial stage of the selection process, the expertise of the legal profession and the interests of the populace writ large. The three lay citizens (selected by the popularly elected governor) represent the people, while the attorney members (selected by the bar association through closed elections) represent the expertise of the legal profession. The chief justice, who serves as chair, represents the institutional expertise of the judiciary itself. The commission is designed to balance legal expertise with political interests, not to make general public policy.

The driving idea behind this structure is that a small body composed of legal professionals and lay citizens will be better able to assess the juridical merit of the candidates that come before it than would a popular electorate or a chief executive. By court rule, the commissioners are obligated to “select the three best qualified nominees.”²²⁹ Underlying this idea is the premise that legal reasoning and judicial capacity are professional skills that, like those of other professions, can be developed through intensive educational and vocational training and where a minimum level of acceptable competency is evidenced through a formal licensing procedure. The task of assessing legal merit is best performed by those with a particular understanding of the practice of law, which is wisely counterbalanced by the political perspectives of the lay commissioners. One level down, legal knowledge is also an asset in the selection of the attorney commission members. A closed election of licensed attorneys is a reasonable way to facilitate legal merit within the process of selecting members to a merit-selection commission—and the selection of which attorneys represent the legal profession is of greater concern to attorneys than to nonattorneys.

These fine-tuned commissions do not exercise the type of general governmental power that would mandate application of the “one person, one vote” principle.²³⁰ Even to the extent that the commission does influence judicial selection, the courts do not recognize that such indirect and partial influence over the selection of an official is itself an exercise of that official’s power. The water district in *Ball* had a substantial effect on the hundreds of thousands of Arizonans to whom it sold electricity.²³¹ Yet because this

²²⁹ MO. SUP. CT. R. 10.27.

²³⁰ *Bradley v. Work*, 916 F. Supp. 1446, 1456–57 (S.D. Ind. 1996).

²³¹ *Ball*, 451 U.S. at 357.

effect was only incidental to the water district's primary function—maintaining and distributing water within the district—it did not constitute an exercise of general governmental power.²³²

The question, then, is whether the merit-selection commissions themselves exercise general governmental power. In applying the standard articulated in *Ball*, *Avery*, and *Hadley*, merit-selection commissions fall short of this threshold. The commissions do not exercise any of the prototypical government functions listed by the *Ball* Court:²³³ They cannot levy taxes or enact laws that govern citizens' conduct. Nor do they maintain streets, operate schools, or administer sanitation, health, or welfare services. Their power is less substantial than that of the water district in *Ball*, which could condemn land, sell tax-exempt bonds, and levy taxes on real property.²³⁴ The commissions do not “serve” any geographic area, let alone exercise “general governmental powers over the entire geographic area” that they serve, thereby falling outside the language of *Avery*.²³⁵ Even if the power of the commissions can be said to have “sufficient impact” throughout the state, *Hadley* says that the commissions' power must also be “general”²³⁶—a descriptor that does not fit the narrow duty of vetting judicial candidates. Therefore, the commissions meet the first prong of the special-purpose exception.

A merit-selection commission satisfies the second prong of the special-purpose exception because the commission's work has a disproportionate impact on, or special relationship to, attorneys throughout the state. Here, the correct framing is not whether the work of judges has a disproportionate impact on attorneys,²³⁷ but whether the work of winnowing the pool of judicial candidates has such an impact. That is the work conducted by a merit-selection

²³² See *id.* at 368–69.

²³³ See *id.* at 366.

²³⁴ *Id.* at 360.

²³⁵ See *Avery*, 390 U.S. at 485.

²³⁶ See *Hadley*, 397 U.S. at 53–54.

²³⁷ The work of judges arguably does have a disproportionate impact on attorneys, even though such a conclusion is not required for merit selection to satisfy the second prong of the special-purpose exception. All citizens, attorneys and nonattorneys alike, are equal before the law. But judges are also authority figures within the legal profession itself. State courts possess rulemaking and disciplinary powers that directly bear on an attorney's professional livelihood. See, e.g., *The Attorney Discipline Process in Missouri*, MO. BAR (Jan. 1, 2020), <https://news.mobar.org/the-attorney-discipline-process-in-missouri>. Attorneys are affected by both the judicial and professional powers of courts, whereas nonattorneys are only affected by the former.

commission. With the inquiry properly stated, it is clear that attorneys have a “special relationship” to the commission’s work.²³⁸ As legal practitioners, attorneys are uniquely suited to assess the qualifications of aspiring judges, whose job it will be to hear legal disputes and apply the law in a specific jurisdiction. And who better to select the best reviewers of legal merit than an attorney’s own peers?

Additionally, in Missouri, as in most states, only licensed attorneys may become state judges.²³⁹ Even where this is not a formal requirement, attorneys are disproportionately selected to serve as state judges. Merit-selection commissions either exclusively or predominantly evaluate attorneys. Attorney commissioners evaluate would-be judges and, in doing so, engage in self-policing—a quasi-professional function—by determining who they believe is best among them to assume an open spot on the bench. This role is not so different from that of the Alaska Bar Association’s Board of Governors, which evaluated and policed attorneys through “admission, discipline, licensing, continuing legal education, specialization, and defining the practice of law.”²⁴⁰ From these limited powers that disproportionately affect attorneys, the *Kirk* district court correctly concluded that the Board was a special, limited-purpose entity.²⁴¹ Because attorney members of a merit-selection commission perform similar work in policing and evaluating their fellow attorneys, their work also satisfies the special-impact prong of the special-purpose exception.

2. The appointment exception.

Merit-selection commissions fall within the appointment exception because each stage of the selection process is an appointment, not an election, and these appointments are all valid under *Sailors* and *Rodriguez*.²⁴² Under these cases, some appointments are exempted from equal protection concerns: all appointments by an elected official and, as demonstrated by *Rodriguez*, at least some appointments not by an elected official.²⁴³ *Rodriguez* allowed

²³⁸ See *Ball*, 451 U.S. at 357.

²³⁹ MO. CONST. art. V, § 21.

²⁴⁰ *Miller v. Carpeneti*, No. 00136, 2009 WL 10695976, at *9 (D. Alaska Sept. 15, 2009).

²⁴¹ *Id.*

²⁴² Some scholars divide the appointment exception into two separate exceptions: one derived from *Sailors*, the other derived from *Rodriguez*. See, e.g., Lund, *supra* note 3, at 1050, 1054–58. I think it is more useful to treat these cases as two applications of the same appointments-based exception.

²⁴³ See *Rodriguez*, 457 U.S. at 14.

a political party to appoint a replacement lawmaker for a vacant legislative seat. The appointments within the merit-selection process are either by an elected official or fall within the *Rodriguez* rule because they serve similar democratic interests. Specifically, both the appointment in *Rodriguez* and the appointment of attorney commissioners on a merit-selection commission facilitate the general will of the voters on an exclusively interim basis.

a) *Each stage of the merit-selection process is an appointment, not an election.* In upholding a system of appointment of county school boards by delegates from local school boards, the *Sailors* Court recognized that systems having the outward appearance of an election are not necessarily elections of the type regulated by the “one person, one vote” principle.²⁴⁴

Merit selection falls within this category. It may at certain steps appear electoral, but it is not in substance. In assessing the applicability of the appointment exception, it is useful to break merit selection into its component parts. In merit selection, there are three steps that are appointments in the *Sailors* sense: (1) the selection of attorney commission members, (2) the selection of the three candidates sent to the governor, and (3) the governor’s final selection. There is no electoral step—it is appointments all the way down.

The selection of attorney commissioners is not a general election in the doctrinal sense. It is an appointive process of the state bar membership with a state constitutional mandate that the appointment be decided by way of a closed election. Tellingly, some merit-selection states, like Alaska,²⁴⁵ assign the selection of attorney commissioners to the state bar association but do not mandate that the state bar hold a closed election. There is no reason why there should be a constitutional difference between an appointment made by the leadership of the bar and an appointment made by the membership of the bar, even where a state constitutional provision dictates which of the two processes must be conducted. Both serve the same function—declaring the will of the bar association (or the subset of its membership in each appellate district). As with the internal election in *Rodriguez*, if a multi-member entity is authorized to make an appointment, an internal process that is electoral does not render the collective decision of the entity nonappointive.²⁴⁶

²⁴⁴ *Sailors*, 387 U.S. at 108.

²⁴⁵ See *supra* Part I.C.1.

²⁴⁶ See *Rodriguez*, 457 U.S. at 14.

That leaves the commission's selection of the three-candidate slate—obviously an appointment, not an election—and the governor's final selection. Lund argues that the governor's role in the selection process is too tightly constrained to count as a valid exercise of appointment by an elected official:

The *Sailors* Court was careful to note that a “State cannot of course manipulate its political subdivisions so as to defeat a federally protected right Nor can the restraints imposed by the Constitution on the States be circumvented by local bodies to whom the State delegates authority.” That is exactly what Kansas appears to have done. By delegating to the state's lawyers the authority to elect a controlling majority of a body that exercises almost all of the discretion involved in appointing supreme court justices, Kansas has virtually given the state bar the authority to elect those who choose the justices. The State's choice of a complex procedure that obscures that effect cannot alter the reality of the effect.²⁴⁷

It is important to contextualize Lund's argument—which focuses on the Kansas system, an outlier in terms of the higher proportion of attorneys on its commission. Unlike a commission that follows the more common Missouri Plan, the Kansas Supreme Court Nominating Commission gives attorneys a majority of the commission seats. Five of the nine members of the Kansas commission are elected by the bar.²⁴⁸ The Missouri attorneys, therefore, exercise less power as a voting block than their counterparts in Kansas. Lund's central point, however, still applies to the Missouri Plan: the attorney commissioners, to at least some extent, constrain the governor's appointive discretion. But this feature is not as constitutionally problematic as Lund makes it appear. And it does not defeat the essential appointive nature of the governor's selection.

Regardless of the exact composition of the commission, Lund severely undervalues the governor's role. The governor not only has the final power of appointment but also exercises significant power over the commission itself by appointing a sizeable minority of its members. The governor's influence over the selection process is thus far greater than that of the attorney commissioners. By exerting authority at multiple points, the governor is in the

²⁴⁷ Lund, *supra* note 3, at 1055 (emphasis in original).

²⁴⁸ *Supreme Court Nominating Commission*, KAN. JUD. BRANCH, <https://perma.cc/9TNP-6F6J>.

driver's seat. In contrast, the attorney commissioners—and certainly the individual attorneys who elect them—play a relatively diminished role. That role is certainly less powerful than that of an entire primary or presidential electorate, which are the exclusionary systems Lund compares with merit selection.²⁴⁹ The governor's final appointment may be constrained by preliminary appointive steps, but, contrary to Lund's assertions of the governor's relative powerlessness,²⁵⁰ the state's chief executive is still the most powerful force in a merit-selection system.

That is not necessarily less true in Kansas than it is in Missouri. The governor appoints three of seven commissioners under the Missouri Plan, while the governor appoints four of nine under the Kansas system.²⁵¹ In Kansas, commission-approved nominees need only a single attorney's support for submission to the governor. Lund's contention that the bar controls the entire selection process relies on the unstated premise that the bar-selected commissioners will tend to vote in concert—something Lund gives no evidence to support. Indeed, the available evidence is to the contrary.²⁵² Regardless, the functional differences between the Missouri and Kansas systems do not seem substantial.

Even if it were the case that the governor had very little discretion, merit selection's constitutionality would probably be unaffected. There was no final appointment by an elected official in *Rodriguez*, and yet the Court still upheld the interim-appointments law in that case. If the entire process is not electoral but appointive, the question then becomes whether the appointive process falls within the *Rodriguez* rule.

b) Merit-selection appointments fall within the Rodriguez rule. Lund reads the *Rodriguez* holding narrowly. Although the

²⁴⁹ See *supra* Part II.A for a discussion of merit selection's dissimilarities to those electoral mediating institutions to which the Supreme Court has traditionally applied strict scrutiny.

²⁵⁰ See Lund, *supra* note 3, at 1050.

²⁵¹ Compare MO. CONST. art. V, §§ 25–27 (explaining Missouri's model), with *Dool*, 2010 WL 3724660, at *1 (explaining Kansas's model).

²⁵² My request under the Kansas Open Records Act returned information showing that attorneys of the state's Supreme Court Nominating Commission do not tend to vote in unison. Voting records of the individual commissioners date back to 2016, when the commission became a public body under Kansas statute. Since 2016, the commission has approved nine judicial candidates, all of whom received at least two votes from nonattorney commissioners. Only one candidate received unanimous approval from all five attorney commissioners, but that candidate was also unanimously approved by the four non-attorney commissioners. Letter from the Clerk of the App. Cts. of the Kan. Jud. Branch to Zachary Reger, (Aug. 24, 2021), <https://perma.cc/XXJ8-2VXN>.

case established that appointments are not automatically invalid if made by an unelected person or body, he says it “does not stand for the [] general proposition that appointments to public office can be delegated to any group that seems reasonably (or even exceptionally) well qualified to make good appointments.”²⁵³ Rather, Lund argues that *Rodriguez* represents an unusual departure from the *Sailors* norm, under which appointments are made by ordinary elected officials. In *Rodriguez*, Lund says, the Court engaged in a “fact-intensive analysis” in which the interim nature of the appointment, its party-neutral application, and the specific concern for maintaining balance in the Puerto Rican legislature were adequate to ensure the law’s constitutionality.²⁵⁴ However, these factors do not apply in the case of merit selection, Lund argues, where appointments are not interim in nature and “do not fill an office to which the departed incumbent had been elected in a one person, one vote election.”²⁵⁵ And perhaps most importantly, Lund says, merit selection is far from neutral in application. Rather, it “entrenches the power of a discrete special interest group, namely the state’s lawyers.”²⁵⁶

First, merit selection does involve interim (or “probationary”) appointments, contrary to Lund’s assertions.²⁵⁷ As the judges are the ones exercising “general governmental power”—and the commissioners themselves can only be said, if at all, to exercise such power indirectly—the proper frame of review is not whether the commissioners are selected on an interim basis but whether the judges are. Merit-selection systems do not select judges for full terms but rather appoint judges for relatively brief, interim vacancies whenever a sitting judge happens to retire, die in office, lose a retention election, or be removed via the impeachment process. These terms are therefore far from uniform; their lengths, like the interim term in *Rodriguez*, depend upon the random chance of vacancy.

As in *Rodriguez*, the interim appointments facilitate the voters’ will. Under the Missouri Plan, after a newly appointed judge’s first year in office, the judge must stand for retention in the next

²⁵³ Lund, *supra* note 3, at 1057.

²⁵⁴ *Id.* at 1056–57.

²⁵⁵ *Id.* at 1058.

²⁵⁶ *Id.*

²⁵⁷ See Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQ. L. REV. 61, 65–66 (1968) (referring to the time between a merit-selection judge’s initial appointment and first retention election as a “probationary period”).

general election.²⁵⁸ Appellate judges then stand for retention every twelve years thereafter.²⁵⁹ This establishes a sort of trial period for new judges before they receive the approval of the electorate. Because *Rodriguez* was based in large part on the legislature's reasonable belief that its chosen method of interim selection would more accurately reflect the will of the people until a new general election could be held,²⁶⁰ merit selection, too, can be justified under this same rationale. In merit-selection states, it is reasonable to believe that voters have an expectation that judicial vacancies will be filled by meritorious and qualified interim appointees until voters have the opportunity to weigh in. After all, in most of these states, it is voters who initially enacted the merit-selection plan. When the voters directly weigh in through a retention vote, they have at least one year's worth of judicial experience with which they can assess the newly appointed judge. The merit-selection process, like the interim-appointments law in *Rodriguez*, facilitates rather than thwarts the voters' will. And the commission only has a hand in determining the appointee for a brief interim term; voters get the final say about whether that judge is allowed a full twelve-year term.

Second, Lund misconstrues the neutral-application principle of the *Rodriguez* Court. The law at issue in that case had a party-neutral application, which the Court pointed to in upholding it.²⁶¹ The law applied to any vacancy in the state legislature. The law still served to entrench the institutional interests of the state's political parties as exclusionary organizations that influenced the selection of government officials; it allowed them to hold internal elections for a replacement legislator rather than resorting to a general election open to any qualified voter. Likewise, merit selection applies to any judicial vacancy, whenever one happens to arise. Incumbent judges receive direct voter approval via retention elections. When a voter-approved judge leaves the bench, an interim appointment provides a qualified replacement via the same process until the judge can be fully approved by voters. The system may entrench the institutional interests of the legal profession, but not to any greater extent than the *Rodriguez* law entrenched the institutional interests of political parties.

²⁵⁸ MO. CONST. art. V, § 25(c)(1).

²⁵⁹ MO. CONST. art. V, § 19.

²⁶⁰ *Rodriguez*, 457 U.S. at 13.

²⁶¹ *Id.* at 10.

Indeed, the supposed entrenchment is less substantial. Attorneys in Missouri Plan states may only vote for a small number of commissioners who themselves exercise only a minority of votes for a slate of judicial candidates from which the governor makes the final selection. A state party in Puerto Rico, on the other hand, exercises complete control over the election of a replacement legislator.²⁶² It may completely exclude nonparty members from the selection process without constitutional issue. Merit selection is more democratically responsive, as it guarantees *Kramer*-adherent political input at multiple steps.

Regardless, merit selection does not violate the *Kramer* principle for the same general reason that the Puerto Rican law does not: it is a political innovation, fitting within the republican tradition, that is designed to enhance democratic values. Specifically, merit selection takes aim at judicial corruption, ensures the promotion of only meritorious judges, and depoliticizes the state judiciary. The *Rodriguez* Court held that, “[a]bsent some clear constitutional limitation, Puerto Rico is free to structure its political system to meet its ‘special concerns and political circumstances.’”²⁶³ So are merit-selection states.

3. The judicial exception.

The exact scope of the judicial exception is unclear, but it probably encompasses merit selection of state judges. In *Wells*, the Supreme Court summarily affirmed a district court opinion that held that the “one person, one vote” principle was inapplicable to judicial elections.²⁶⁴ However, as Lund notes, “[s]ummary affirmances merely ‘prevent lower courts from coming to opposite conclusions on the *precise issues* presented and *necessarily* decided by those actions.’”²⁶⁵ The precise issue decided in *Wells*, Lund says, “was whether direct elections to multi-member courts must comply with the vote-dilution rulings in the *Reynolds* line of cases.”²⁶⁶ But just because the judicial exception does not encompass merit selection by binding precedential force does not mean it cannot include merit selection under a logical purposive extension.

²⁶² See *id.* at 3–4.

²⁶³ *Id.* at 13–14 (quoting *Garcia v. Barcelo*, 671 F.2d 1, 7 (1st Cir. 1982)).

²⁶⁴ *Wells*, 347 F. Supp. at 454 (“[T]he concept of one-man, one-vote apportionment does not apply to the judicial branch of the government.”).

²⁶⁵ Lund, *supra* note 3, at 1058 (emphasis in original) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176–77 (1977) (per curiam)).

²⁶⁶ *Id.* (citing *Wells*, 347 F. Supp. at 454).

The Court recognized the *Wells* holding in *Chisom*, a case concerning a claim under the Voting Rights Act of 1965,²⁶⁷ but it declined to adopt the specific reasoning of the *Wells* district court.²⁶⁸ Section 2(a) of the Voting Rights Act prohibits any voting procedure that “results in a denial or abridgement of the right . . . to vote on account of race or color,” while Section 2(b) describes the test as whether, “based on the totality of the circumstances,” minority voters “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”²⁶⁹ Five judges of the Louisiana Supreme Court were elected from single-member districts, while the remaining two judges were elected at-large from a multimember district.²⁷⁰ The *Chisom* plaintiffs, Black voters in the multimember district, claimed this scheme violated Section 2 of the Voting Rights Act.²⁷¹

The *Chisom* Court first had to decide whether Section 2 applied at all. The Court looked to *Wells*, in which the district court reasoned that “judges and prosecutors are not representatives in the same sense as are legislators or the executive” because “[t]heir function is to administer the law, not to espouse the cause of a particular constituency.”²⁷² The *Chisom* Court, however, concluded that the use of the word “representatives” in Section 2 of the Voting Rights Act did not make the section inapplicable to elected judges absent further evidence of such an intent by Congress.²⁷³ The *Chisom* Court thus applied Section 2 to the Louisiana judicial districting scheme even though the *Wells* Court thought that same scheme did not violate the “one person, one vote” principle.²⁷⁴

Lund errs in concluding that *Chisom* constitutes a “rejection of the reasoning in the *Wells* district court opinion.”²⁷⁵ The two cases employed distinct interpretive schemas, one textual and the other purposive, to answer two entirely different questions. The term “representative” is not found in the Equal Protection Clause

²⁶⁷ 52 U.S.C. §§ 10101–10702.

²⁶⁸ *Chisom*, 501 U.S. at 403.

²⁶⁹ *Id.* at 394–95 (quoting Voting Rights Act Amendments of 1982, 96 Stat. 134 (codified as amended at 52 U.S.C. § 10301)).

²⁷⁰ *Id.* at 384.

²⁷¹ *Id.* at 384–85.

²⁷² *Wells*, 347 F. Supp. at 455 (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964)).

²⁷³ *Chisom*, 501 U.S. at 396.

²⁷⁴ *Id.* at 404.

²⁷⁵ Lund, *supra* note 3, at 1059.

itself, but is derived from case law, where it appears alongside the type of purposivist evidence that the Court found lacking in Section 2 of the Voting Rights Act.²⁷⁶ It is more accurate to say that the *Chisom* Court—realizing interpretation of the Voting Rights Act required a substantially different inquiry than interpretation of the Court’s own equal protection jurisprudence—determined that the *Wells* reasoning was inapplicable to the case before it.

Yet even the *Chisom* Court seemed to think it decisive that the judges at issue were selected via contested popular elections on a district level, just as other representatives are.²⁷⁷ Merit-selection judges are of an entirely different breed. Unlike elected judges, merit-selection judges are quite purposely insulated from public pressures in ways traditional “representatives” are not. And although some members of a merit-selection commission could be said to represent specific districts within a state, the judges they select generally have no specific electoral or appointive connection to any subset of the area that falls under their jurisdiction. In creating such an insulated judiciary, a merit-selection state establishes judgeships that are supposed to be nonrepresentative. Even if elected judges of the type scrutinized in *Wells* and *Chisom* are representatives in the equal protection sense, merit-selection judges still would not be. The use of retention elections in merit selection does not alter this crucial difference because retention deals only with absolute voter approval of a candidate running unopposed, not voter selection of a preferred representative. In other words, the judicial exception is an even better fit for merit selection than it is for the very case from which it initially arose.

C. *Kramer* Is Inapplicable Under an Implicit Exception

The *Kramer* line of cases was never meant to prohibit reasonable alternatives to traditional methods of judicial selection.²⁷⁸ Rather, these cases were intended to ensure the equal protection of voters in selecting their elected representatives in the political branches of government. The language of the “one person, one

²⁷⁶ See, e.g., *Kramer*, 395 U.S. at 626 (“Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”).

²⁷⁷ See *Chisom*, 501 U.S. at 401.

²⁷⁸ See *Sailors*, 387 U.S. at 110–11 (“Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.”).

vote” line of cases bears this foundational understanding,²⁷⁹ which was recognized by the *Wells* district court in a case specifically pertaining to judicial selection.²⁸⁰ Regardless of *Wells*’s limited precedential value, the purpose of these cases—to ensure fair and equal participation of voters in political, as opposed to administrative and judicial, governmental processes—should weigh heavily on the future jurisprudence of federal courts. Equal protection should not become a constitutional “straitjacket” on state sovereignty and experimentation.²⁸¹

As VanOstran²⁸² and Judge O’Brien²⁸³ note, the recognized exceptions to *Kramer* cannot be exhaustive.²⁸⁴ Even if merit selection does not fall within a recognized exception, it is still constitutional by way of an implicit exception—meaning that a merit-selection process does not trigger application of the “one person, one vote” framework at all. As a result, it should only be subject to rational basis review. The bounds of *Kramer* are a poor fit for merit selection, a unique mechanism substantially dissimilar to the electoral systems to which “one person, one vote” has traditionally been applied. And as VanOstran argues, both *Kramer* and merit selection foster stronger democratic systems by promoting political participation.²⁸⁵

Regardless, the state legislatures, executives, and—in many states—the initiative-petition process serve as political checks on any potential “impermissible delegation of [] governmental powers that generally affect all of the people to a body with a selective electorate.”²⁸⁶ If the people become dissatisfied with merit selection, they maintain the power, either directly or through their elected representatives, to adopt an alternative system. The corruption of such a political check was one of the reasons the Court established the “one person, one vote” principle for representative bodies in the first place.²⁸⁷ With legislative malapportionment, the

²⁷⁹ See *Kramer*, 395 U.S. at 629 (holding that strict scrutiny is applicable where, in an election for a governmental body exercising “legislative” power, “some resident citizens are permitted to participate and some are not”).

²⁸⁰ *Wells*, 347 F. Supp. at 454–56.

²⁸¹ See *Ball*, 451 U.S. at 363 n.5 (quoting *Avery*, 390 U.S. at 485); see also *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (holding that Missouri’s mandatory retirement age for state judges does not violate the Equal Protection Clause).

²⁸² See VanOstran, *supra* note 208, at 175.

²⁸³ See *Dool*, 497 F. App’x at 788 (O’Brien, J., concurring).

²⁸⁴ See *Hadley*, 397 U.S. at 56.

²⁸⁵ VanOstran, *supra* note 208, at 176–77.

²⁸⁶ *Ball*, 451 U.S. at 373 (Powell, J., concurring).

²⁸⁷ *Id.* (citing *Baker*, 369 U.S. at 258–59 (Clark, J., concurring)).

legislators themselves design the system that perpetuates their power, necessitating judicial intervention. But when it comes to merit selection, there is no such worry. Attorney power in merit selection extends to the vetting of judicial candidates, not to the perpetuation of merit selection itself. The henhouse is not guarded by foxes.

III. MERIT SELECTION IS AN INVALUABLE INNOVATION

Merit selection is not simply constitutional. It is a crucial tool for constructing superior judicial systems. This Part examines the policy implications of the Missouri Plan. Part III.A begins with a discussion of the bigger picture and contextualizes the debate over merit selection as part of a larger dispute about long-term versus short-term democratic values. Part III.B then explains why merit selection promotes judicial values in a way that other selection methods do not, specifically through its focus on meritocratic—as opposed to political—accountability.

A. Merit Selection Promotes Long-Term Democratic Values

The movement against merit selection is often framed in pro-democratic terms.²⁸⁸ Yet sometimes the best way to promote the will of the people is to allow voters to constrain their own future discretion or the discretion of their elected leaders.²⁸⁹ This is the key principle of constitution making, the process through which most merit-selection systems arose.²⁹⁰ Constitutions are not antithetical to democracy but a vital part of a long-term democratic strategy. A focus on rank democracy above all else can lead to subversion of the public will, as occurred with the corruption of judicial elections in early-1900s Missouri.²⁹¹ Contested judicial elections allow the people to voice their opinion on specific candidates, but they may subvert the broader will of the people by pre-

²⁸⁸ See Taylor, *supra* note 48 (describing the choice between merit selection and judicial election as a choice between selection by the “best people” and selection by “we the people”).

²⁸⁹ Cf. JOHN RAWLS, A THEORY OF JUSTICE 10–15 (1971) (explaining the concept of the “veil of ignorance”). When Missouri voters first ratified the Missouri Plan in 1940, they stood behind a sort of veil of ignorance. They did not know the specific judges that the Plan would produce, but they collectively determined that a merit system would better promote a “just” judiciary than would contested elections of known candidates.

²⁹⁰ See Philip L. Dubois, *The Politics of Innovation in State Courts: The Merit Plan of Judicial Selection*, 20 PUBLIUS 23, 28 (1990).

²⁹¹ See *supra* Part I.A.1.

venting the judiciary from being the type of institution the electorate desires it to be. An appointment-confirmation system does not always fare much better. The voters' derivative control over gubernatorial appointments is often illusory,²⁹² and if the voters desire a nonpartisan judiciary (as they continually say they do),²⁹³ handing partisan officials complete control over judicial selection is a poor way to achieve it.

For this reason, opponents of merit selection err in classifying it as elitist and undemocratic. By preventing a single political faction from gaining unfettered control over judicial selection, merit selection bolsters long-term democratic legitimacy. By balancing political accountability with insulated legal expertise, the Missouri Plan ensures that courts can remain largely independent arbiters of legal disputes—something the alternative methods of contested judicial election and appointment-confirmation, which feature more simplistic political input, cannot adequately accomplish. The public has expressed its desire for a meritorious, noncorrupt, and apolitical judiciary. Merit selection is the tool voters have chosen to best implement this higher vision.

The Missouri Plan is not perfect. No process can truly eliminate partisan and interest-group influence while retaining meaningful democratic accountability.²⁹⁴ But merit selection—with its multilayered deliberative process; dispersal of power among commissioners, the governor, and voters; and atmosphere of legal professionalism—is the least political method of judicial selection.²⁹⁵

²⁹² *Rodriguez*, 457 U.S. at 12.

²⁹³ For example, consider responses from the 2019 Annenberg Civics Knowledge Survey, which asked 1,104 U.S. adults what factors they considered important in electing a state or local judge. Of those, 89% said that it was essential or very important that the candidate will “make rulings based on the facts of the case, the law, and the Constitution.” Further, 87% said that it was essential or very important that the candidate is “fair and impartial.” In contrast, only 35% said that it was essential or very important that the candidate “[s]hare[s] their political beliefs.” *Most Americans Trust the Supreme Court, but Think It Is ‘Too Mixed Up in Politics’*, ANNENBERG PUB. POLY CTR. (Oct. 16, 2019), <https://perma.cc/JYR6-8Z2V>.

²⁹⁴ See generally Bunch & Casey, *supra* note 54 (explaining how, from 1972 to 1990, the process of judicial selection in Missouri became more overtly political than in the early days of the Missouri Plan). See also RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 6 (1969) (studying the operation of the first few decades of the Missouri Plan and concluding that it has neither “eliminated political forces from the selection of judges” nor handed “lawyers representing the affluent and prestigious institutions in society” the ability to “decide who will sit on the bench”).

²⁹⁵ See generally Stith & Root, *supra* note 47.

B. Merit Selection Promotes Judicial Independence and Accountability

Commentators often frame the choice of a selection mechanism in light of the seemingly competing goals of judicial independence and judicial accountability.²⁹⁶ A judge is independent when she is un beholden to outside forces. A truly independent judge can exercise her best legal judgment without fear of the political, social, and economic consequences. An accountable judge, on the other hand, is held responsible for improper use of her judicial authority. Accountability can occur both *ex ante* and *ex post*. The former encompasses the vetting that occurs during the selection process itself, while the latter includes retention and recall elections as well as impeachment proceedings. These two values are generally viewed as conflicting—the more independent the judiciary, the less accountable, and vice versa.

Opponents of merit selection generally concede that it produces an independent judiciary, but they argue that this only occurs at the cost of a suitable level of judicial accountability. However, merit-selection opponents fixate on political accountability, even though this is not all that merit selection is designed to protect. A judge chosen through merit selection, they argue, is not carefully vetted by political actors because her appointment is not subject to a general election or legislative confirmation and because the governor is severely constrained in exercising his appointive judgment.²⁹⁷ This results in courts that are unaccountable to the people and their elected representatives, they conclude.²⁹⁸

But these critics ignore the meritocratic accountability that merit selection introduces, both *ex ante* and *ex post*. The selection process itself uses the judgment of legal experts to carefully vet a candidate's legal acumen. By court rule, the entire process must focus on meritocratic concerns. In Missouri, candidate interviews are conducted in open meetings, providing a public check on the

²⁹⁶ See O'Connor, *supra* note 6, at 483 (“[T]hose who would offer you the false choice between an independent and an accountable judiciary shoulder the burden of rebutting . . . the long-held ideal that a judge’s sole concern must be the law.”).

²⁹⁷ See Schneider, *supra* note 206, at 632–60.

²⁹⁸ See Owen L. Hegg, *Merit Selection of the Ohio Judiciary: An Analysis of S.J.R. 6 and a Proposal for Implementation*, 28 CASE W. RES. L. REV. 628, 637–41 (1978) (summarizing and collecting arguments of merit-selection opponents).

process.²⁹⁹ But this evaluative process does not end once the candidate assumes a seat on the bench. In this regard, Missouri is again a representative model. In its current state, the Missouri Plan includes an independent committee that conducts a judicial-performance review of all judges who will face retention. These evaluations—which are freely available online³⁰⁰—review a judge’s courtroom conduct, the clarity of her written opinions, and her “impartiality/fairness” according to attorneys, among other metrics.³⁰¹ Voters take these performance reviews seriously. In 2020, the chairman of the committee noted that hundreds of thousands of Missourians had viewed the evaluations over the previous four years.³⁰² Additionally, judges who received more negative reviews were more likely to fail retention or receive fewer retention votes.³⁰³ Because judges in these retention elections run unopposed and with no partisan affiliation, voters are freed from their usual political allegiances to evaluate incumbent judges primarily on judicial performance. The result is not only a depoliticized judiciary, but a system that actively rewards more capable judges.³⁰⁴

The judiciary is and ought to be an apolitical branch. As the *Wells* district court noted, judges are not representatives of the people but neutral arbiters of the law.³⁰⁵ U.S. Supreme Court Justices, at the pinnacle of the legal profession, claim to be apolitical

²⁹⁹ Even if we are hesitant to entrust unelected experts with decision-making power, the ability to review their work creates a safeguard against abuse. This principle undergirds much of federal administrative law, in which procedural requirements for agency action allow nonexpert political officials to engage in meaningful oversight. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 704 (3d ed. 2017) (describing the concept of “fire alarm” oversight, which allows political actors to respond to a public signal that something is wrong). Likewise, an open process within a merit-selection system allows nonexpert voters and the governor to engage in meaningful oversight through their respective roles in the selection process.

³⁰⁰ See *Reviews*, YOURMISSOURIJUDGES, <https://perma.cc/XP6J-79JF>.

³⁰¹ See, e.g., *2020 Appellate Court Evaluation—Lawyer Survey, Judge: Kurt S. Odenwald*, MO. BAR ASSOC., <https://perma.cc/3NMZ-563L>.

³⁰² Alisa Nelson, *On the Election Ballot: 53 Missouri Judges Who Want to Keep Their Jobs*, MISSOURINET (Oct. 8, 2020), <https://perma.cc/Y5JB-W75H>.

³⁰³ See *Missouri Local Trial Court Judicial Elections, 2016*, BALLOTPEdia, https://ballotpedia.org/Missouri_local_trial_court_judicial_elections_2016#Judicial_evaluations (follow the hyperlink for each judge’s name; then compare evaluations and election results).

³⁰⁴ The promotion of meritocratic judges is particularly vital at the state and local levels, where talent pools are smaller than at the federal level.

³⁰⁵ See *Wells*, 347 F. Supp. at 454; see also O’Connor, *supra* note 6, at 483 (explaining that “a judge’s sole concern must be the law”).

actors.³⁰⁶ Even if such claims are false, they demonstrate the existence of a pervasive notion that judges should be above politics. As such, it is inappropriate for judicial accountability to depend too heavily on political as opposed to meritocratic forces. The Missouri Plan eases the tension between independence and accountability. It prioritizes meritocratic accountability, a specific type of accountability that is both more suitable for judicial selection and that does not come at the expense of judicial independence. Consequently, when compared to alternative systems of judicial selection, merit selection best achieves the most important structural values of a judicial system.

CONCLUSION

Although the Missouri Plan primarily arose as a counter to the detrimental effects of contested judicial elections, supporters and critics have noted that its continued operation has many laudable goals, including promoting meritorious jurists,³⁰⁷ reducing judicial corruption,³⁰⁸ depoliticizing the judiciary and the judicial-selection process,³⁰⁹ increasing judicial legitimacy,³¹⁰ and ensuring judicial independence.³¹¹ Since its inception in 1940, merit selection has become an entrenched aspect of many states' constitutional structures—one that is valid under the U.S. Constitution by many different routes. Not only does the Missouri Plan satisfy each of the three recognized exceptions to the *Kramer* principle, but it also clearly falls within an implicit exception as well.

Yet merit selection is far from safe. In short order, the equal protection challenge to merit selection has found a foothold in both legal academia and the federal judiciary. The trendline is worrying. Despite its continued success, merit selection faces increasing attacks—both political and legal—from those who view it as antithetical to the idea of self-government.

³⁰⁶ See, e.g., STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 62 (2021) (“[I]t is wrong to think of the Court as a political institution,” but “to suggest a total and clean divorce between the Court and politics is not quite right either.”); Adam Liptak, *Supreme Court Says Judges Are Above Politics. It May Hear a Case Testing That View.*, N.Y. TIMES (Sept. 16, 2019), <https://perma.cc/N3CP-5NWU>.

³⁰⁷ See Daugherty, *supra* note 11, at 339.

³⁰⁸ See *id.*

³⁰⁹ See O'Connor, *supra* note 6, at 486.

³¹⁰ *Id.* at 486, 489.

³¹¹ Stith & Root, *supra* note 47, at 725–50.

The opponents of merit selection, however, have it backward. Merit selection is neither elitist nor undemocratic. By counterbalancing political influence over judicial selection with the staid judgment of legal experts, the Missouri Plan ensures that state courts remain independent of partisan and interest-group capture. This good-government reform increases rather than stymies democratic legitimacy; it restores rather than subverts public faith in the institutions of government. In an era of democratic backsliding, partisan polarization, and increasing distrust of public institutions, merit selection is more important than ever before.