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## Justice Not for Sale: A Constitutional Defense of the Missouri Plan for Judicial Selection

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# Justice Not for Sale: A Constitutional Defense of the Missouri Plan for Judicial Selection

Cort A. VanOstran\*

## INTRODUCTION

Judicial selection for state courts in the United States has become a controversial subject in American jurisprudence. In the past several decades, a debate has emerged over the proper balance between independence and accountability in the judicial selection process. Professor Nelson Lund entered this debate by arguing that merit-based judicial selection plans—those plans that utilize nonpartisan commissions in judicial appointments (and therefore fall outside either a traditional appointment or electoral scheme)—violate the Equal Protection Clause of the Constitution because of the enhanced role attorneys play in the process, resulting in what Professor Lund describes as the disenfranchisement of non-attorney voters.<sup>1</sup> Specifically, Professor Lund takes issue with the structural provision in many such plans that allows state bar members to elect individuals for service on the nonpolitical nominating commission, which in turn submits nominees to the state's governor for final selection.<sup>2</sup> The widely-emulated Missouri Plan is the prime example of such a scheme for judicial selection. This Note argues that Lund's

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\* J.D. (2014), Washington University School of Law; A.B. (2011), Harvard University. Many thanks to two mentors who influenced my decision to choose law as a profession: my uncle, Keith Wilkes, and Ed Hershewe, a great friend and role model. I am also particularly grateful to Professors Charles Burson and Karen Tokarz for their guidance, wisdom, and support throughout law school. Finally, this Note deals with the merits of the Missouri Plan for judicial selection. My positive impressions of the Plan have undoubtedly been shaped by two great former Chief Justices of the Missouri Supreme Court: Richard Teitelman and Ronnie White. I am grateful to count both as mentors and friends.

1. 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, 1046–47 (2011).

2. *Id.*

criticism is erroneous; rather, merit-based judicial selection plans do not violate the Equal Protection Clause because they promote, rather than discourage, equal participation in democracy. Furthermore, merit-based plans fit well within a tradition of non-electoral schemes that have been accepted by the United States Supreme Court for certain bureaucratic offices. Moreover, efforts to challenge the constitutionality of such plans seem driven more by moneyed political interests than legitimate constitutional concerns about the true will of the electorate.

In Part I, this Note briefly summarizes the history of judicial selection in the United States, including the rise and spread of merit-based selection as an attempt to balance the need for both independence and accountability in the judiciary. Part I also explores Supreme Court jurisprudence as it pertains to judicial selection plans like the Missouri Plan. In doing so, it considers *Dool v. Burke*, a Tenth Circuit decision that recently confirmed the constitutionality of such merit-based selection plans, and which was recently denied *certiorari* by the United States Supreme Court.<sup>3</sup> In Part II, this Note considers the application of existing jurisprudence on merit-based plans. Finally, Part III argues for the constitutionality of merit-based plans based on both their consistence with previously legitimated non-electoral processes and their promotion of democratic participation.

## I. HISTORY

The debate over the “best” method for selecting judges is a longstanding one<sup>4</sup> that has roots in “a much more fundamental philosophical and political disagreement regarding the role of judges in our political system.”<sup>5</sup> This brief account addresses the history and status of elective, appointive, and merit-based judicial selection plans in the United States. It then considers the history of constitutional

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3. *Dool v. Burke*, 497 F. App'x 782 (10th Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 992 (2013).

4. Peter D. Webster, *Selection and Retention of Judges: Is There One 'Best' Method?*, 23 FLA. ST. U. L. REV. 1, 2 (1995) (noting “[t]he debate over selection and tenure of judges has been ongoing since shortly after the founding of our nation”).

5. *Id.*

challenges to merit-based selection plans, and reviews *Dool v. Burke*,<sup>6</sup> a recent Tenth Circuit Court of Appeals case that ruled on the constitutionality of merit-based judicial selection plans.

A. *Judicial Selection in the Early United States*

Appointment of judges can be traced to seventeenth-century England, where “the chancellor, acting for the king, appointed judges to dispense justice on the king’s behalf.”<sup>7</sup> The king continued to exercise this power in the American colonies, and this exercise was one of the complaints cited by the drafters of the Declaration of Independence.<sup>8</sup> While various states placed limits on the appointment power upon gaining independence, and the federal government tempered that power by requiring senatorial confirmation for federal judges appointed by the president, no state adopted popular election of judges for half a century.<sup>9</sup>

Popular election of judges nonetheless has deep roots in American history. Webster writes that “partisan election of judges came into vogue as a part of the wave of popular democracy that engulfed the nation during the era of Andrew Jackson’s presidency.”<sup>10</sup> Despite the subsequent rise of merit-based selection plans, popular election of judges remains a common method of selection in many states.<sup>11</sup> In large part, the same basic tensions that framed the debate over elected

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6. 497 F. App’x 782 (10th Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 992 (2013).

7. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 4 (1994).

8. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (“He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”).

9. Again, Goldschmidt provides a succinct and useful history:

Eight of the thirteen original states adopted the appointive process, but placed it in the hands of one or both houses of the legislature; three states provided for joint appointment by the governor and a council; and two states provided for gubernatorial appointment subject to confirmation by a council.

Goldschmidt, *supra* note 7, at 5 (internal citations omitted).

10. See Webster, *supra* note 4, at 16.

11. Charles Gardner Geyh, *Judicial Selection Reconsidered: A Plea for Radical Moderation*, 35 HARV. J.L. & PUB. POL’Y 623, 626 (2012) (arguing “most people favor judicial elections, presumably as a way to guard against judges running amok”).

versus appointed judges during the time of Jackson still persist today.<sup>12</sup>

There are a number of policy arguments in favor of popular election of judges. Certainly, it is the most democratic means of controlling the judiciary.<sup>13</sup> But popular election of judges has also come under great fire,<sup>14</sup> and from a wide variety of sources.<sup>15</sup> Goldschmidt, for example, criticizes popular election, arguing, “Elections . . . discourage many well-qualified people from seeking judicial office . . . . Elections also compromise the independence of the judiciary . . . . No less significant are the problems associated with judges who must campaign and seek campaign contributions and with getting court business accomplished during reelection time.”<sup>16</sup>

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12. *Id.* at 624 (“[T]he argument against an appointed judiciary and for an elected one follows naturally . . . unelected judges are unaccountable policymakers; unaccountable policymakers flout the rule of law and the will of the people; therefore, unelected judges flout the rule of the law and the will of the people.”). See also Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2004) (explaining “[a] basic tradeoff exists between independence, accountability, and quality. To preserve independence, it is necessary to insulate judges from external controls over their behavior. If judges are protected from external controls, however, they have fewer incentives to provide quality services.”).

13. Webster, *supra* note 4, at 6 (“[I]f one believes that the process of judging involves unbridled discretion—that it is based upon nothing more than the personal or political proclivities of each individual judge—direct accountability to the electorate becomes much more important, indeed, perhaps paramount.”).

14. Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 839 (1994) (“[T]his nation’s ability to put independent, fair, and competent jurists on the benches of our courts disappears when the United States permits the popular election of judges. While such elective systems enable the people to hold their government employees accountable, the resulting product is far removed from the American concepts of justice . . . .”).

15. Goldschmidt, *supra* note 7, at 13–14 (“In fact, it is common knowledge that the public is uninformed about judicial candidates, and, worse still, some believe that that ethnic name recognition is the basis for many voting decisions. Election contests are usually issueless and have low voter turnout. Most incumbents are easily reelected and often run unopposed.”). See also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (“When those charged with checking the majority are themselves answerable to, and thus influenced by, the majority, the question arises how individual and minority protection is secured.”).

16. Goldschmidt, *supra* note 7, at 14.

### *B. The Rise and Role of Merit-Based Selection*

Merit-based selection of judges has a somewhat shorter history, arising primarily out of the progressive movement of the early 1900s.<sup>17</sup> Merit-based selection emerged as a new attempt to balance the competing interests of independence and accountability in the judiciary.<sup>18</sup> Merit selection as it is known today was largely formulated in 1914, when Northwestern University Professor Albert Kales proposed comprehensive reforms to systems of judicial election.<sup>19</sup> Under the revolutionary Kales Plan, a nonpolitical commission would identify and select the most qualified candidates for vacant judgeships.<sup>20</sup> “A popularly-elected chief justice would then make an appointment from the list of the commission’s nominees. After a specified initial term of office, and for subsequent terms, judges would run in an unopposed retention election.”<sup>21</sup>

British academic Harold Laski, who proposed that the executive be given the appointment power, later modified the Kales Plan,<sup>22</sup> and a New York group further altered the idea by suggesting citizens comprise part of the nonpartisan selection committee.<sup>23</sup> It was in this modified form that the Plan was adopted by Missouri voters in 1940 “for its appellate courts, the circuit and probate courts of St. Louis City and Jackson County (Kansas City), and the St. Louis courts of

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17. Goldschmidt, *supra* note 7, at 8. See also 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, 317 (1997) (“Unfortunately, by the late 1800s and early 1900s, the practice of electing judges, while representing a democratic ideal, often degraded into the selection of machine sponsored judicial ‘hacks.’”).

18. Daugherty, *supra* note 17, at 317.

19. *Id.*

20. Goldschmidt, *supra* note 7, at 21. In modern merit-selection plans, “[t]he size of nominating commissions also varies widely nationwide . . . . The attorney members of nominating commissions are either appointed by the governor, or elected or appointed by the state or local bars.” *Id.* at 21–22.

21. *Id.* at 8. See also Andrea McArdle, *The Increasingly Fractious Politics of Nonpartisan Judicial Selection: Accountability Challenges to Merit-Based Reform*, 75 ALB. L. REV. 1799, 1800 (2012) (“Historically, judicial retention elections rarely garner much attention, as they involve no contest or competition between candidates but rather are a procedure in which the judicial incumbent competes against herself in terms of her performance on the bench. Typically, judges prevail in these low-visibility, low-engagement elections and are returned to office.”).

22. Goldschmidt, *supra* note 7, at 9.

23. *Id.*

criminal correction.”<sup>24</sup> Specifically, under the adopted Plan, a commission of seven members (three appointed by the governor, three elected by the state bar association, and the sitting chief justice) select three candidates for any open judgeship, and those names are then submitted to the governor for final selection. Because the Plan was first adopted by Missouri, it “has since also come to be known as the ‘Missouri Plan.’”<sup>25</sup> The Plan still exists in the state today, and is largely unchanged.<sup>26</sup>

Numerous states followed suit by adopting their own versions of the Plan,<sup>27</sup> and many of these states utilized the Missouri Plan directly.<sup>28</sup> A plethora of policy reasons have been proffered in

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24. *Id.* at 10.

25. *Id.* at 20.

26. The relevant provisions of the Missouri Constitution are as follows:

Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the court of appeals, or in the office of circuit or associate circuit judge within the city of St. Louis and Jackson County, the governor shall fill such vacancy by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided. If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy.

MO. CONST. art. V, § 25(a).

Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 25(a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself . . . . If such declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the state if his office is that of judge of the supreme court . . . . If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in section 25(a); otherwise, said judge shall, unless removed for cause, remain in office for the number of years after December thirty-first following such election as is provided for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed.

MO. CONST. art. V, § 25(c)(1) [hereinafter Missouri Plan].

27. McArdle, *supra* note 21, at 1800 (“Embracing the Missouri Plan, as the state’s nonpartisan, commission-based method for selecting judges came to be known, thirty-six states in addition to the District of Columbia have adopted a form of the judicial nominating commission feature and, of these jurisdictions, sixteen also use retention elections.”).

28. These states are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Nebraska, Oklahoma, South Dakota, Tennessee, Wyoming, and, of course, Missouri itself. ST. CTS. GUIDE, <http://www.statecourtsguide.com> (last visited Jan. 27, 2013).

support of merit-based selection plans.<sup>29</sup> While the Plan is widely celebrated, it has also been attacked for being “elitist”<sup>30</sup> or otherwise undemocratic.<sup>31</sup> These criticisms have almost exclusively focused on policy arguments, rather than potential constitutional conflicts.

### *C. Merit-Based Selection as a Constitutional Issue*

While the history surrounding nonpartisan, merit-based judicial selection is easily elucidated, the jurisprudence surrounding its constitutionality is largely undeveloped. At least four federal cases have dealt directly with the constitutionality of merit-based selection systems: three federal district court cases and one case in the Ninth Circuit Court of Appeals.<sup>32</sup> Each of these cases upheld the constitutionality of merit-based judicial selection plans,<sup>33</sup> but none dealt with the constitutional issues currently being raised in cases such as the Tenth Circuit’s *Dool v. Burke* (which, as mentioned earlier, centers around the permissibility of the enhanced role of lawyers—who are allowed to elect members of the nonpartisan nominating commission—in the most common merit-based structure).

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29. Daugherty, *supra* note 17, at 339 (“Advocates stress the Plan’s emphasis on professional qualifications rather than political influence, pre-appointment merit screening, little need to campaign or raise funds, and promotion of judicial stability.”).

30. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 759 (2009) (“The Missouri Plan gives disproportionate power to the bar in selecting the nominating commission, while eliminating the requirement that the governor’s pick be confirmed by the senate or similar popularly elected body.”).

31. *Id.* at 765 (“This, of course, is the core of the Missouri Plan—allowing the bar to select some of the commission and then declining to offset that bar power with confirmation by the senate or other popularly elected body.”). See also Brian Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 676 (2009) (“In short, I am skeptical that merit selection removes politics from judicial selection. Rather, merit selection may simply *move* the politics of judicial selection into closer alignment with the ideological preferences of the bar.”) (emphasis added).

32. *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010); *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996); *African-American Voting Rights Legal Def. Fund v. Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997); *Carlson v. Wiggins*, 760 F. Supp. 2d 811 (S.D. Iowa 2011) (finding a system constitutional in which the governor appoints one of three nominees provided by a commission composed of seven members elected by the state bar, seven members appointed by the governor, and the state’s senior supreme court justice).

33. See *supra* note 32.

Another line of cases, in which a subgroup of the voting population challenges a scheme that limits their voting rights, bears relevance.<sup>34</sup> In the landmark case *Kramer v. Union Free School District No. 15*,<sup>35</sup> the Supreme Court invalidated on Equal Protection grounds “a state law under which local school boards were elected solely by voters who either (a) owned or leased taxable property within the school district or (b) had children who were enrolled in the local schools.”<sup>36</sup> Professor Lund argues *Kramer* would also serve to disallow merit-based selection plans that grant voting attorneys any specialized role in the selection process.<sup>37</sup> Specifically, merit-based selection plans often contain provisions that allow bar members—and therefore attorneys—to elect a certain portion of the commission responsible for interviewing judicial candidates and submitting nominations, from which the state’s governor often chooses his or her appointee.<sup>38</sup> In the Missouri Plan, for example, three members of the seven-person panel charged with submitting nominees to the governor are attorneys elected by the state bar association.<sup>39</sup> According to Professor Lund, this structure improperly enhances the role attorneys play in the selection scheme, giving them increased (and therefore unconstitutional) power in the selection process over regular, non-attorney voters.<sup>40</sup> In this light, the constitutional viability of selection plans seems to hinge on whether these plans fall within the purview of *Kramer* and are therefore invalid, or whether they are otherwise exempt from an application of *Kramer*.

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34. This line of cases stems from *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

35. 395 U.S. 621 (1969).

36. Lund, *supra* note 1, at 1047.

37. *Id.* at 1049.

38. The arguably controversial provision is set forth in the Missouri Constitution as follows:

The members of the bar of this state . . . shall elect one of their number to serve as a member of said commission, and the governor shall appoint one citizen, not a member of the bar, from among the residents of each court of appeals district, to serve as a member of said commission . . . .

MO. CONST. art. V, § 25(d).

39. *Id.*

40. Lund, *supra* note 1, at 1050.

#### D. Exceptions to Kramer

The *Kramer* principle—further elucidated in *Reynolds v. Sims*—suggests that all voters are entitled to participate in the elections that affect their daily lives.<sup>41</sup> The first and only directly relevant recognized exception to the *Kramer* principle is known as the *Salyer/Ball* exception.<sup>42</sup> The exception is derived from two Supreme Court decisions. The former, *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, dealt with elections for the board of a governmental agricultural unit that received funding solely from landowners in a certain region, and limited voting rights to those same landowners.<sup>43</sup> In *Salyer*, the Court “carved out an exception to *Reynolds* [and, by extension, *Kramer*] for limited-purpose bodies exercising narrow government functions and operating to the burden or benefit of one group of constituents more than others.”<sup>44</sup> The latter case, *Ball v. James*, applied this same exception to “water and power districts in which the administration is financially independent of local government and the franchise is restricted to farmers.”<sup>45</sup> Otherwise, “[t]he exception is seldom applied . . . .”<sup>46</sup>

Other exceptions to the *Kramer* rule are more difficult to apply in the context of judicial selection plans. In *Sailors v. Board of Education of County of Kent*,<sup>47</sup> the Supreme Court allowed local

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41. *Kramer*, 395 U.S. at 626–27.

42. *Ball v. James*, 451 U.S. 355, 371 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 729–30 (1973).

43. *Salyer*, 410 U.S. at 729–30 (“[I]t is quite understandable that the statutory framework for election of directors of the appellee focuses on the land benefitted, rather [than] on the land as such. California has not opened the franchise to all residents . . . . We hold, therefore, that the popular election requirements enunciated by *Reynolds*, *supra*, and succeeding cases are inapplicable to elections such as the general election of appellee Water Storage District.”).

44. *Dool v. Burke*, 497 F. App’x 782, 787 (10th Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 992 (2013) (O’Brien, J., concurring).

45. *Id.* at 787–88.

46. *Id.* at 787.

47. 387 U.S. 105, 108 (1967) (“We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election.”). *See also id.* at 110–11 (“Viable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At 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.”).

school boards to elect the members of county school boards, an arguably analogous scheme to merit-based selection plans where lawyers take on a somewhat increased role in the nominating process. However, in most judicial selection plans, the nominating commissions in question are not elected by officeholders but are merely attorneys.<sup>48</sup> *Rodriguez v. Popular Democratic Party*<sup>49</sup> is relevant but even less applicable, dealing with legislators appointed to fill interim terms.<sup>50</sup> Finally, in *Wells v. Edwards*,<sup>51</sup> “the Supreme Court summarily affirmed a district court decision holding that the vote-dilution principle of *Reynolds* [*v. Sims*, mandating the ‘one person, one vote’ principle] was inapplicable to elections to judicial office.”<sup>52</sup>

There is one other case that limits the applicability of the *Kramer* principle by requiring a threshold inquiry into the application of *Kramer*. In *Avery v. Midland County, Texas*,<sup>53</sup> the Supreme Court determined the ‘one person, one vote’ ruling in *Reynolds v. Sims*<sup>54</sup> “applies with equal force to officials of a county government who exercise ‘general governmental powers over the entire geographic area served by the body.’”<sup>55</sup> In *Avery*, “[c]entral to the Court’s holding was the idea that citizens should have a voice in the selection of the public officials charged with their well-being.”<sup>56</sup>

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48. See Missouri Plan, *supra* note 26.

49. 457 U.S. 1, 14 (1982) (holding valid Puerto Rico’s system for filling commonwealth legislative vacancies by an election in which only members of the previous incumbent’s party may vote); see also *id.* at 8 (“The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth’s electoral system are entitled to substantial deference.”).

50. *Id.* at 12 (“The Puerto Rico Legislature could reasonably conclude that appointment by the previous incumbent’s political party would more fairly reflect the will of the voters than appointment by the Governor or some other elected official.”).

51. 409 U.S. 1095, 1096–97 (1973) (White, J., dissenting) (“Judges are not private citizens who are sought out by litigious neighbors to pass upon their disputes. They are state officials, vested with state powers and elected (or appointed) to carry out the state government’s judicial functions. As such, they most certainly ‘perform governmental functions.’”).

52. Lund, *supra* note 1, at 1058. The precedential value of that decision is minimal, however, based on the fact that it merely affirmed the decision of the lower court.

53. 390 U.S. 474 (1968).

54. 377 U.S. 533 (1964).

55. *Dool v. Burke*, 497 F. App’x 782, 786 (10th Cir. 2012) (per curiam), cert. denied, 133 S. Ct. 992 (2013) (O’Brien, J., concurring) (internal citation omitted).

56. *Id.*

In short, *Avery* suggests that not every elective office, merely by being elective in nature, requires an application of *Kramer*. Indeed, the *Avery* principle was fleshed out in *Hadley v. Junior College Dist. of Metropolitan Kansas City*.<sup>57</sup> “As in *Avery* [and *Hadley*], the inquiry hinged on whether the elected trustees performed ‘general governmental functions,’ with a focus on the scope of the official power and its impact on the electorate.”<sup>58</sup>

Applying these principles to merit-based selection requires a consideration of whether the special role lawyers sometimes play in the appointment process is a violation of *Kramer*. Under *Avery* and *Hadley*, it would seem that rather than attempt to fit the nominating commissions into a *Kramer* exception, the proper first inquiry is whether the nominating commissions even exercise the type of general government function that would mandate compliance with *Kramer* at all.

This constitutional background—what relatively little of it there is—sets the stage for the Tenth Circuit’s recent decision regarding a direct challenge to the constitutionality of merit-based selection plans.

#### *E. Constitutional Consideration: 2012’s Dool v. Burke*

In 2012, the Tenth Circuit in *Dool v. Burke* issued a *per curiam* opinion affirming the District Court’s decision to uphold Kansas’s merit-based judicial selection plan.<sup>59</sup> The plan was challenged by a

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57. 397 U.S. 50, 54 (1970) (“While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions.”). The *Hadley* Court further noted that “[i]f there is any way of determining the importance of choosing a particular governmental official, we think the decision of the State to select that official by popular vote is a strong enough indication that the choice is an important one.” *Id.* at 55. The Court further writes that in those cases where members of a given body are selected through appointment rather than election, “the fact that each official does not ‘represent’ the same number of people does not deny those people equal protection of the laws . . . . And a State may, in certain cases, limit the right to vote to a particular group or class of people.” *Id.* at 58–59.

58. *Dool*, 497 F. App’x at 787 (O’Brien, J., concurring).

59. *Id.* at 782–84 (“Kansas fills appellate court vacancies using a merit-selection system under which the governor picks from a shortlist of candidates tendered by a nomination commission. The commission is comprised of five attorneys and four non-attorneys. Non-attorney members are appointed to the commission by the governor, while attorney

group of non-attorney voters alleging disenfranchisement because of the enhanced role state bar members played by electing certain members of the nonpolitical nominating commission.<sup>60</sup> It is not surprising that of the three impaneled judges, the two in the majority arrived at their decision to affirm the merit-based plan based on completely differing rationales. This divergence in opinion represents more than a mere disagreement on the merits; rather, the difference likely stems from the lack of precedent on the constitutionality of merit-based selection plans.

Because the Tenth Circuit did not share its rationale in the *per curiam* opinion, the only glimpse we have into the court's reasoning is found in the concurring and dissenting opinions.<sup>61</sup> Judge O'Brien argued in his concurring opinion that *Reynolds* does not apply to all state elective offices,<sup>62</sup> noting that deference to the state of Kansas is proper in matters of governmental structure.<sup>63</sup> Specifically, O'Brien cited the *Avery* inquiry, "whether the elected trustees performed 'general governmental functions,' with a focus on the scope of the official power and its impact on the electorate."<sup>64</sup> O'Brien expressly rejected the *Salyer/Ball* exception, arguing, "The strict demands of [*Kramer*] cannot reasonably apply to every election unable to be wedged in the fact-bound and exceedingly narrow exception established in *Salyer* and *Ball*."<sup>65</sup> Instead, O'Brien wrote that "one person, one vote has boundaries; some elective offices . . . do not exercise the type of governmental power" constrained by the Court's ruling in *Kramer*.<sup>66</sup>

On the other hand, Judge Matheson, in his concurrence, argued that the selection plan should be upheld, but only under the narrow

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members are elected by resident attorneys."). In short, this system serves to give attorneys greater impact than non-attorneys in choosing judges.

60. *Id.* at 782.

61. *Id.*

62. "[S]imply making an office elective does not trigger the strict demands of *Reynolds*. Those demands apply only when the elective office exercises the kind of general government functions described in *Avery* and its progeny." *Id.* at 790 (internal citation omitted).

63. *Id.* at 792 ("In the end, this court must defer to Kansas in decisions relating to the structure of its government.").

64. *Id.* at 787 (internal citation omitted).

65. *Id.* at 788.

66. *Id.*

*Salyer/Ball* exception.<sup>67</sup> Judge McKay dissented, and would have found the merit-selection system “unconstitutional under the Supreme Court’s equal protection jurisprudence.”<sup>68</sup>

## II. ANALYSIS

Judicial selection is a controversial and arguably increasingly partisan problem in modern political discourse. Its rancorous and partisan undertones have not completely escaped the purview of popular analysis.<sup>69</sup> For example, in Missouri, the namesake for merit-based selection plans around the nation, voters were asked in November of 2012 whether the nominating commission—an essential component of the merit-based structure—should be altered from the nonpartisan form it has taken since its inception.<sup>70</sup> The ballot issue was initiated and promoted by a small group of activists, and some commentators saw a larger political aim in such efforts.<sup>71</sup>

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67. *Id.* at 793 (Matheson, J., concurring) (“[W]e can employ the *Salyer/Ball* standard here to determine whether rational basis scrutiny applies to restricting the voting franchise for the Commission’s attorney members to licensed Kansas attorneys. We need only decide whether the Commission performs a limited purpose and whether it has a disproportionate effect on the voting population of attorneys. It does both.”).

68. *Id.* at 795 (McKay, J., dissenting). Judge McKay further dissents that “[t]he election at issue, like a primary election, is one step in the process of determining who will exercise one of the three most critical governmental functions: here, the judicial function. This election is not shielded from constitutional challenge simply because its role in this process is indirect.” *Id.*

69. In his recent book *The Oath*, written for a popular audience, Jeffrey Toobin writes:

[T]he history of judicial selection has tracked larger themes in American history . . . . The politics of judicial elections changed in the 1980s. Business interests began lining up behind Republican candidates who promised to limit tort awards; plaintiffs’ trial lawyers, with fewer resources, began subsidizing Democrats. Elections, especially for state supreme courts, started to cost millions of dollars . . . the partisan battle lines were clearly drawn on the issue. Republicans supported judicial elections; Democrats wanted appointive systems.

JEFFREY TOOBIN, *THE OATH* 211–12 (2012).

70. *November 6, 2012 General Election: Constitutional Amendment 3*, MO. SEC’Y ST., enr.sos.mo.gov/ENR/Views/TabularData.aspx?TabView=StateRaces^Federal/Statewide^011656688155 (last visited Feb. 2, 2013) [hereinafter *Nov. 6, 2012 General Election*].

71. The possible political motivations of those initiating these referenda efforts were covered even in local newspapers, for example. “There’s no question that big money is being spent to try to influence judges. [Former Judge William Ray] Price said that from 1990 to 1999, \$83.3 million was spent on judicial elections nationwide. That number more than doubled from the year 2000 to 2009.” *Our View: Amendment would damage courts*, JOPLIN GLOBE, Oct. 20,

Attacks on the constitutionality of merit-based systems may be an alternate route by which opponents of merit-based selection seek to dismantle those systems.<sup>72</sup> Undoubtedly, there is a desire by moneyed interests to impact judicial decision-making; where non-partisan selection plans interfere with an ability to influence the judiciary, it is easy to see why they come under frequent attack.<sup>73</sup> However, these attempts to alter merit-based selection plans through campaigns and referenda have generally failed.<sup>74</sup> Therefore, it seems quite likely that attacks on such plans' constitutionality is the new route by which activists hope to end merit-selection plans. Professor Nelson Lund attempts to undermine the constitutionality of merit-based selection plans by suggesting the enhanced role given to attorneys is unconstitutional<sup>75</sup>—the same grounds on which the plans were challenged in *Dool v. Burke*.<sup>76</sup>

As Professor Lund notes, and as noted in Part I.C, *supra*, there have been relatively few inquiries into the constitutionality of merit-based judicial selection plans.<sup>77</sup> Lund argues that the plans are most amenable to attack, as in *Dool v. Burke*, based on structures in many states' plans that allow attorneys to elect members of the commissions, who in turn select a given number of names to the executive for final selection. Because non-attorney citizens are not

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2012, available at <http://www.joplinglobe.com/editorial/x1400188687/Our-View-Amendment-would-damage-courts>.

72. Former Missouri Supreme Court Judge William Ray Price defended the Plan during the 2012 referendum that sought to alter it. In an editorial, he wrote that “[s]adly, [political control] is exactly what the big contributors and special interests don’t want. They are used to making big contributions, to influence politicians, to get their way. They want to do that with judges too! The evidence is clear and shocking.” William Ray Price, *Protect Our Nonpartisan Courts*, EMISSOURIAN.COM (Oct. 24, 2012), [http://www.emissourian.com/opinion/letters\\_to\\_the\\_editor/article\\_c51b31cf-3f41-5a22-b22a-77787d55a701.html](http://www.emissourian.com/opinion/letters_to_the_editor/article_c51b31cf-3f41-5a22-b22a-77787d55a701.html); see also TOOBIN, *supra* note 69, at 211–12.

73. “Judicial campaign contributions surged from \$83.3 million in the period from 1990–1999, to \$206.9 million from 2000–2009 . . . . A study of 29 elections in the nation’s 10 most costly states showed that the top five spenders in each race contributed an average of \$473,000, while the remaining 116,000 contributors averaged just \$850 each.” Price, *supra* note 72.

74. For example, the referendum altering the Missouri Plan in Missouri failed by a huge margin (76 percent to 24 percent) in November of 2012. *Nov. 6, 2012 General Election*, *supra* note 70.

75. Lund, *supra* note 1.

76. *Dool*, 497 F. App’x at 786.

77. Lund, *supra* note 1, at 1060.

allowed to vote for these commission members, Lund argues, the plans essentially allow for disenfranchisement of non-attorney citizens and are barred by the Equal Protection Clause of the Fourteenth Amendment.<sup>78</sup> Despite the relatively minor role these commissions play in the process of judicial selection,<sup>79</sup> Lund argues that if elected by attorneys, they are unconstitutional.<sup>80</sup>

In Lund's view, the *Kramer* ruling suggests that the limited franchise afforded attorneys violates the Equal Protection Clause,<sup>81</sup> unless it is "'necessary to promote a compelling state interest' and 'sufficiently tailored' to serve that interest."<sup>82</sup> Lund elaborates that, of the Court's recognized exceptions to the principle endorsed in *Kramer*, none would allow the Court to reach a decision affirming the constitutionality of merit-based selection plans.<sup>83</sup>

Lund even argues that the "statute struck down in *Kramer* resembles the Kansas law [in *Dool v. Burke*] under which candidates for the state supreme court are selected. If anything, the Kansas law is far less narrowly tailored to serve the State's interest in restricting the franchise to those 'primarily interested' in the outcome."<sup>84</sup> Because strict scrutiny has been described by the Supreme Court as "strict in theory, but fatal in fact,"<sup>85</sup> the application of either strict scrutiny or rational basis review ultimately determines the constitutionality of merit-based selection plans—or at least, all those that take advantage of a commission elected, at least in part, by attorneys. Lund writes, "Invoking the 'one person, one vote' equal protection decision in *Reynolds v. Sims*, the *Kramer* Court applied strict scrutiny. Noting that this case involved a complete denial of the franchise to certain

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78. U.S. CONST. amend. XIV, §1.

79. As noted in note 38, *supra*, and using the Missouri Plan as an example, attorneys elect a minority of members of a commission that is responsible for screening candidates and then submitting three names to the governor, who chooses the judge from among these submissions.

80. See Lund, *supra* note 1, at 1050.

81. Lund, *supra* note 1, at 1048–49 ("If *Kramer* can be distinguished, it would have to be on the ground that the Kansas nominating commission does not select the supreme court justices, but only selects the three finalists from among whom the governor must choose. To characterize this as a gubernatorial appointment, however, would elevate form over substance and leave the *Kramer* principle an empty, easily-evaded shell.")

82. *Id.* at 1048.

83. *Id.* at 1050–1060.

84. *Id.* at 1049.

85. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989).

otherwise qualified voters . . . the Court held that the challenged statute could not be upheld.”<sup>86</sup>

Professor Lund further argues that the narrow exceptions to *Kramer* applied in *Salyer* and *Ball* should not apply in the context of judicial selection.<sup>87</sup> He notes that in *Salyer*, “the effects on different groups were extremely disproportionate, and the effects on the disenfranchised residents were extremely remote or speculative. The election of this type of body is hardly comparable to an election involving a State’s supreme court, a tribunal that has enormous effects on every citizen.”<sup>88</sup>

### III. ARGUMENT

Merit-based judicial selection plans, like the Missouri Plan, are in use in some thirty states.<sup>89</sup> Merit-based selection plans have been voted on repeatedly, and often enjoy overwhelming support from both voters and attorneys.<sup>90</sup> Therefore, it is difficult to imagine that scholars such as Lund are truly worried about protecting the ability of the electorate to make their voice heard in the judicial selection process. Certainly, limitations on the franchise in one minor, indirect step in the judicial selection process—which in the federal context, of course, is oriented to direct appointment of judges—do not seem to bother the vast majority of voters asked to weigh in on merit-selection plans. Regardless of the true motive behind efforts to undermine the constitutionality of merit-based selection plans, those efforts should fail on the merits because of the limited function nonpartisan nominating commissions provide, and because of their purpose of promoting judicial accountability and independence.

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86. Lund, *supra* note 1, at 1048.

87. *Id.* at 1052–53. Lund argues that the principle differences are threefold: lawyers do not finance the judiciary, as the landowners in *Salyer* did; additionally, “the Kansas nominating commission virtually controls the selection of officials who have broad and powerful effects on the general public. Finally, Kansas lawyers have a strong incentive to externalize the costs of an excessively lawyer friendly judiciary onto the public at large.” *Id.* at 1052. It is unclear what Lund means by a lawyer-friendly judiciary; I am unaware of any court, for example, that happily allows non-lawyers full privileges accorded to practicing attorneys.

88. *Id.* at 1052.

89. McArdle, *supra* note 21, at 1800.

90. *Nov. 6, 2012 General Election*, *supra* note 70.

### A. An Exception to *Kramer*

It is unnecessary to force the limited franchise in judicial selection plans into the narrow *Salyer/Ball* exception. Instead, Judge O'Brien's opinion in *Dool v. Burke* finds the proper constitutional posturing of merit-based selection plans. He notes that "[t]he strict demands of [*Kramer*] cannot reasonably apply to every election unable to be wedged into the fact-bound and exceedingly narrow exception established in *Salyer* and *Ball*."<sup>91</sup> Judge O'Brien's argument that "simply making an office elective does not trigger the strict demands of *Reynolds* [and, by extension, *Kramer*]"<sup>92</sup> is in keeping with both sound constitutional interpretation and good governance. Moreover, the nominating commissions at issue do not exercise the type of general government function found to trigger the requirements of *Kramer*.<sup>93</sup>

Thus, under *Avery* and *Hadley*, these nominating commissions should be considered for what they are: very limited bodies, more bureaucratic than legislative in nature, and unable to perform functions that might be described as general governance.<sup>94</sup> *Kramer* is therefore inapplicable, and the Court should recognize a new exception arising out of the unique circumstances of merit-based judicial selection.

Professor Lund's contrary argument fails to acknowledge the recognized exceptions to *Kramer*. Still, it is unnecessary to classify merit-based selection plans under the *Salyer/Ball* exception to *Kramer*; the fit is an awkward one, as it is difficult to argue that the work of the highest state courts affects only attorneys, for example. Professor Lund is correct in arguing that that exception does not

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91. *Dool v. Burke*, 497 F. App'x 782, 788 (10th Cir. 2012) (per curiam), cert. denied, 133 S. Ct. 992 (2013) (O'Brien, J., concurring).

92. "[S]imply making an office elective does not trigger the strict demands of *Reynolds*. Those demands apply only when the elective office exercises the kind of general government functions described in *Avery* and its progeny." *Id.* at 790 (internal citations omitted).

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

94. In the author's opinion, the nominating commissions in judicial selection are relatively powerless bureaucratic arms, lacking in real power. Unable to effectuate change in the government on their own, they merely serve as a filter for the ultimate exercise of power by a chief executive who will make a final nominating decision. Therefore, they lack the type of power that requires regulation under *Kramer*.

properly apply here with any force, given the obvious distinctions between that exception and the issue in judicial selection plans.<sup>95</sup> Judge Matheson's opinion attempting to apply the *Salyer/Ball* exception fails to make a strong case for these commissions' lack of impact, however attenuated, on the citizenry of the states.

A strict application of *Kramer* in the context of judicial selection nominating commissions fails to appreciate the limited role of these bodies. Their members are not salaried and generally not staffed.<sup>96</sup> Their decisions, while indirectly meaningful to the citizenry of the state, have little power in themselves; and importantly, their function is quite far from governmental in nature.

### B. Promoting Participation

Perhaps most crucial to this debate, however, is the aim of *Kramer* and the role of judicial selection plans like the Missouri Plan. *Kramer* and *Reynolds* sought to promote participation and protect democracy by ensuring disenfranchisement could not prevent representation. In their own way, merit-based selection plans do the same; by prohibiting the influence of moneyed interests from controlling the judicial selection process, they ensure at least one branch of government is insulated from the campaign spending that is increasingly detrimental to the ideas underlying cases like *Kramer* and *Reynolds*. Furthermore, because these plans require the governor to choose his or her appointees from a list generated by the nominating commission, merit-based selection merely provides an additional check on appointment power. Ultimately, this adds an additional layer of democracy to the typical appointment process, serving to increase, not decrease, political participation.<sup>97</sup>

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95. Lund, *supra* note 1, at 1053–54 (“The Kansas procedure for selecting supreme court justices . . . obviously performs quintessentially governmental functions, and it bears no resemblance at all to the nominally public business enterprises at issue in *Ball*.”). Lund therefore argues that “[t]his nominating power has to be regarded as a government function, and subjected to strict scrutiny, for the same reason that the Supreme Court applies strict scrutiny to primary elections conducted by political parties and elections to the electoral college.” *Id.* (footnote omitted).

96. *Missouri Nonpartisan Court Plan*, YOUR MO. CTS., <http://www.courts.mo.gov/page.jsp?id=297> (last visited Feb. 10, 2013).

97. *See supra* note 38.

Additionally, the public nature of the interview process increases transparency and participation in the judicial selection process. In Missouri, for example, the nominating commission interviews candidates who apply for a judgeship.<sup>98</sup> These interviews are made available to the public, along with candidates' applications.<sup>99</sup> The public is then invited to comment on the potential appointees by directly contacting members of the nominating commission.<sup>100</sup> This process serves only to bolster accountability and political participation in the nominating process—not to diminish it. Additionally, retention votes,<sup>101</sup> in which the franchise is shared by all voters, add yet another layer of voter participation to the process.

While any verdict on the fate of merit-based judicial selection plans must respect the Constitution, it is also vital to reject the schemes of moneyed interest groups eager to change judicial selection and to exert more influence over those elevated to the bench. Rejected by voters, these interests have turned to the courts, asking them to upend nearly a century of balanced, merit-based judicial selection adopted in the vast majority of states and retained by virtually all that have tried it. Wading into this matter would represent the worst form of activism by the judiciary, made all the worse because the policy affected is that of the courts, themselves. Little is more important to the integrity of the judicial system than the independence of judges; an attempt to infringe upon popular merit-based plans is merely the first step in the nefarious goals of some to exert influence over judges.

#### CONCLUSION

While merit-based selection plans are far from perfect, they are not unconstitutional. Merit-based selection plans are added to state

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98. *Missouri Nonpartisan Court Plan*, *supra* note 96.

99. *Id.*

100. *Id.*

101. Even opponents of merit-based selection seem to concede that retention votes grant the plan legitimacy; Stephen Ware, after criticizing the retention process, writes that “retention elections are not always toothless. On rare occasions, a judge loses one. So retention elections do provide some (however small) measure of democratic legitimacy.” Ware, *supra* note 30, at 771.

constitutions through democratic processes, retain the franchise in almost all aspects for non-attorney voters, serve a highly limited function, and serve a vital purpose by seeking to check judicial corruption. Moreover, judicial selection is a matter of policy better left to the discretion of the people and their representatives—and not to judges themselves. The federal courts should not limit the power of the citizenry to choose the approach it sees fit for selecting judges, especially when doing so can undermine the very principles Equal Protection jurisprudence endeavors to protect. As Judge O’Brien of the Tenth Circuit noted in his concurrence in *Dool v. Burke*, “Kansas voters adopted merit selection as a middle ground between an appointment process scarred by abuse and an elective process susceptible to politicization. . . . [And] deference to democratic process . . . requires upholding the challenged law if we can imagine a conceivable justification for it.”<sup>102</sup>

Here, that justification is crystal clear. If the United States Supreme Court chooses to wade into the dispute over merit-based selection plans, it should affirm the decision of voters in dozens of states to embrace a system that effectively battles corruption and balances the competing interests of judicial independence and accountability to the electorate.

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102. *Dool v. Burke*, 497 F. App’x 782, 792 (10th Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 992 (2013) (O’Brien, J., concurring).