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THE INCREASINGLY FRACTIOUS POLITICS OF
NONPARTISAN JUDICIAL SELECTION: ACCOUNTABILITY
CHALLENGES TO MERIT-BASED REFORM

Andrea McArdle*

I. INTRODUCTION

In 1940 the state of Missouri reformed its method of selecting judges in its supreme court and other designated courts in an effort to insulate the judiciary from partisan politics and to assure judicial independence.\textsuperscript{1} Missouri’s system proved to be an influential innovation that spearheaded a broader mid-twentieth century court reform movement.\textsuperscript{2} Among its key features, Missouri’s approach entrusts to a nominating commission the authority to recommend a slate of qualified judicial candidates, from which the state’s governor makes a selection.\textsuperscript{3} Other than one judicial member, no commission member is permitted to hold public office, and no member may hold an “official position in a political party.”\textsuperscript{4} The chosen judge later runs against herself in an uncontested retention

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2 See id.

3 MO. CONST. art. V, § 25(a) (nonpartisan selection of judges—courts subject to plan—appointments to fill vacancies). Section 25(a). 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 (adopted August 3, 1976).


4 MO. CONST. art. V, § 25(d).
election in which the electorate registers its views concerning judicial performance; unless a majority of voters vote against retention, the judge continues to serve a full term of office.\(^5\) In a practice recently formalized by Missouri Supreme Court rule, the public’s decision on retention is aided by published data, including surveys of lawyers and other indicia of competent performance.\(^6\) Such evidence-based data, it is assumed, insulate members of the judiciary from the excesses of contested, partisan elections.\(^7\)

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,\(^8\) sixteen also use retention elections.\(^9\) The Plan drew inspiration, in turn, from Progressive-era good government campaigns and their technocratic, expert-driven solutions to problems of public policy and administration.\(^10\) By removing the courts from the potentially corrosive effects of electoral politics, this court reform initiative rejected the anti-professional, anti-hierarchical ideology of the era of Jacksonian

\(^{5}\) Id. at art. V, § 25(o)(1).

\(^{7}\) See generally McDowell, supra note 6, at 18 (“The purpose of the evaluations is to provide Missouri voters with extensive unbiased information about each judge’s performance.”).


\(^{10}\) See Ware, supra note 9, at 768.
democracy that, in the mid-nineteenth century, had advocated for popular election of judges. In the steps taken to insulate the judiciary from partisan politics, both in the initial designation and retention determination, the Plan is frequently referred to as “merit-based” selection.

In the 2010 U.S. election cycle, a campaign that identified judicial accountability as a key concern altered the tenor of nonpartisan judicial selection. Supporters of this burgeoning campaign spent generously on heated retention election advertising to unseat incumbent judges on the basis of rulings considered to be activist (in a politically liberal valence). A notable example resulted in the removal of three Iowa Supreme Court justices who joined in the unanimous 2009 ruling that declared unconstitutional under Iowa’s equal protection clause a statute restricting civil marriage to opposite-sex couples. These retention election expenditures, and the intensity of the anti-incumbent messages they have underwritten, are generally regarded to be unusual in the states

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that have adopted Missouri Plan systems: they expose the judiciary to the very dynamics surrounding political processes that Missouri and other reform states had determined were a threat to judicial independence.

Underpinning the anti-retention advertising that targets specific judges is a broader challenge to the method of selecting state judges. Judicial accountability advocates favor a return to judicial selection by popular ballot, or at least a modification of current methods of selecting members of judicial nominating commissions that accord lawyers a structural role. They argue that these changes would make the judges nominated through this process more responsive to a broader swath of the state's population. To this end, they have launched ballot petition drives, commenced litigation, and proposed legislation to challenge nonpartisan


Although disavowing that the advocacy group was questioning the judge's "integrity or his performance on the bench," the group's director nevertheless described him as "one of the worst judges out there" given his putatively anti-business rulings, which advocates of the medical malpractice damages-cap legislation vowed to raise against the judge in the retention process. Id. This use of the process to urge against retention in response to substantive judicial outcomes with which voters disagree is, according to one of the delegates to the 1970 state constitution convention, incompatible with its purpose to remove judges who are evidently unfit to discharge the responsibilities of office: "Nobody ever dreamed that retention would be used in this way. The idea was to give voters a chance to get rid of bad judges—ones who made sloppy decisions or were rude to lawyers or who behaved in an erratic way," said [lawyer and 1970 Illinois Constitution Convention delegate Mary Ann] Leahy, "It was never intended to be used to punish judges for voting a particular way. The judiciary has to remain independent and act without fear of retaliation of an interest group." Id.


judicial selection methods allegedly dominated by members of the legal profession and that reduce the input of the general electorate.

This article describes these recent developments and offers preliminary assessments of their implications. It does not argue for the superiority of merit-based, electoral, or other methods of judicial selection but rather focuses attention on one of the assumptions underpinning the merit-based plan: that its features remove judicial selection from the often bruising dynamics of partisan electoral systems. Specifically, it analyzes the framing of accountability challenges that seek to alter both specific outcomes of a merit selection process and the structure of the process itself.

It begins in Part II by sketching out key arguments in the debate among judges and scholars on the contours of judicial accountability. It then documents strategies of advocacy, legal and popular, that have challenged the signature features of the Missouri Plan on accountability grounds. Part III considers the specific rhetorical framing of accountability advocacy in its various forms and contexts and broaches questions about the implications of these challenges for further study: (1) Should the judicial accountability campaign be assimilated to earlier democratizing initiatives for selecting members of the judiciary? (2) How has the campaign used critiques of liberal judicial activism and anti-lawyer skepticism as frames for its challenges to nonpartisan judicial selection methods? (3) Is the advocacy to restore democratic accountability to the choice of nominating commission members an organic expression of grassroots or populist sentiment, or is it more complexly aligned with elite-based efforts at conservative mobilization, and if so, which elites? Further analysis of these questions may yield insights into the future direction and prospects for success of accountability challenges to the structural role of lawyers in merit-based judicial

Under a proposal recently passed by the Arizona State Senate to alter the judicial nominating procedure, the governor would continue appointing attorneys to the commissions, but the State bar would be eliminated from nominating people to serve on the panels. Republican Sen. Ron Gould, the bill’s sponsor, “said his proposal is aimed at breaking up the clique of insiders who have a voice in picking judges. “Why should they decide who will judge me?” Gould said.” Associated Press, Arizona Senate OKs Proposed Judicial Selection Changes, AZCENTRAL.COM (Mar. 21, 2011), http://www.azcentral.com/news/election/azelections/articles/2011/03/21/20110321arizona-lawmakers-approve-judicial-selection-change.html#. Under another development, Arizona’s Senate and House have approved placing on the 2012 ballot a referendum for voters to decide whether to lengthen the terms of judges and remove the role of the state bar in selecting members of the judicial nominating commissions. Associated Press, Arizona Voters to Get Ballot Measure on Picking Judges, AZCAPITOLTIMES.COM (Apr. 18, 2011), http://azcapitoltimes.com/news/2011/04/18/arizona-voters-get-ballot-measure-on-picking-judges/.
II. The Current Landscape of Judicial Accountability Advocacy

This section describes developments in selected Missouri Plan states that adopted both nonpartisan nominating commissions and retention elections as a judicial reform measure and now are facing strategies by accountability advocates either to (1) dismantle or otherwise reconfigure the nonpartisan model to make it more responsive to the electorate or (2) oppose retention through methods that resemble partisan electioneering. In analyzing this spectrum of developments, I address variations in the use of the term "accountability" in scholarly discussions of the Missouri Plan and then turn to recent evidence of accountability advocacy. First, I consider recent examples of retention election campaigns that foreground accountability concerns. Next, I consider challenges to accountability that target a prior phase of the selection process, specifically, how, and by whom, the nominating commissions are constituted that, in turn, propose a slate of judges. Here I document the asserted rationale of ballot initiatives and the theory of litigation challenging lawyers' alleged domination of the judicial nominating process and the concomitant dilution of the general electorate's input into the selection of commission members who, in turn, will select a slate of nominees.

A. Deconstructing Accountability—Accountability to Whom?

Some analysts of nonpartisan judicial selection highlight the "mismatch" that exists between the ideal of judicial independence and an understanding of accountability linked to a "democratic impulse."16 Under this view, judges who issue rulings with a gesture toward the popular will must manage that impulse while recognizing the risk such a gesture presents to the independence needed to carry out the judiciary's "unique role" in interpreting law, including law that is unclear or ill-defined.17 Other commentators see complementarities rather than conflict between these imperatives, and identify forms of accountability—accountability to other government institutions, for judicial decisions, and for individual ethical conduct—that do not require that judges conform

16 See, e.g., Caufield, supra note 12, at 574.
17 Id. at 584.
to popular will at the expense of fidelity to law.\textsuperscript{18} Another cohort of scholars link accountability more closely with the goal of ensuring some genuine public input into judicial performance and tenure.\textsuperscript{19} These commentators cite features of Missouri Plan retention elections—the lack of direct head-to-head contests between opponents and the absence of political party labels—as depriving the electorate of meaningful information by which to evaluate an incumbent's performance.\textsuperscript{20} Under this analysis, the lack of a challenger contesting the seat contributes to low visibility, and low levels of engagement and knowledgeable participation in such elections.\textsuperscript{21} This lack of engagement in turn results in "false positive[\!]" election outcomes that return some undeserving incumbents to judicial office.\textsuperscript{22}

These understandings of accountability tend to emphasize, or respond to critiques concerning, the features of retention elections that arguably limit the public's opportunity to register its views about judicial performance. Yet, with respect to the most commonly advanced critiques of retention elections—that they are low-salience events that are actually intended to protect incumbents\textsuperscript{23}—the experience of the 2009–2010 election cycle in a number of respects challenges that claim.

\textbf{B. Campaigns to Oust Incumbent Judges in Retention Elections}

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.\textsuperscript{24} Typically, judges prevail in these low-visibility, low-engagement elections and are returned to office.\textsuperscript{25} Although a

\textsuperscript{18} Stith & Root, supra note 12, at 717–19.
\textsuperscript{19} See, e.g., Dimino, supra note 12, at 810–11 (discussing how merit-based retention elections lower voter turnout and increase the likelihood that the judge is reelected without criticism for unpopular opinions).
\textsuperscript{20} Id. at 804–05, 807–08; see also Tarr, supra note 11, at 626, 627–28.
\textsuperscript{21} Dimino, supra note 12, at 804–05, 811; Tarr, supra note 11, at 626.
\textsuperscript{22} Tarr, supra note 11, at 628.
\textsuperscript{23} Id. at 629; Dimino, supra note 12, at 807–08, 811.
\textsuperscript{24} Dimino, supra note 12, at 804; Tarr, supra note 11, at 628–29 (discussing the lack of news coverage and that retention elections ask voters to decide whether a judge has performed well).
\textsuperscript{25} See, e.g., Tarr, supra note 11, at 627 (referring to a survey of retention elections for state supreme court justices for the period 1980–2000 that indicated that fewer than two percent of candidates did not retain their seats) (citing Melinda Gann Hall, Competition as Accountability in State Supreme Court Elections, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 177 tbl.9.4 (Matthew
number of retention elections in the past resulted in votes unseating incumbent judges—notably Chief Justice Rose Bird and two associate justices on the California Supreme Court in 1986 and, in 1996, Justices Penny White of the Tennessee Supreme Court and David Lanphier of the high court in Nebraska\textsuperscript{26}—anti-incumbent advocacy was more prevalent, and certainly highly strident, in the 2010 elections.\textsuperscript{27} A number of special-interest groups mainly aligned with conservative causes used the retention election to draw attention to state court rulings considered to be activist, and to advocate for the non-retention of the justices who participated in those decisions.\textsuperscript{28} The charged election campaign rhetoric increased the salience of the elections precisely when, and because, the campaigns began to resemble in levels of spending and rhetorical intensity the character of contested races.\textsuperscript{29}

1. Successful Campaign to Oust Three Sitting Justices of the Iowa Supreme Court

Perhaps the most heated campaign of the 2010 election season embroiled the state of Iowa in the effort of a conservative interest group, Iowa for Freedom, to oust three incumbent Supreme Court justices.\textsuperscript{30} Principally, the criticism directed against the justices stemmed from the court’s 2009 ruling, \textit{Varnum v. Brien},\textsuperscript{31} which in effect permitted same-sex marriage. The state chair of that effort, Bob Vander Plaats, who had made an unsuccessful run for the Republican gubernatorial nomination, referred to the Iowa retention election as “the most important election in our country.”\textsuperscript{32} The Iowa for Freedom organization disavowed an anti-gay marriage impetus, arguing instead that the effort to remove the three justices, Chief Justice Marsha Ternus and Associate Justices David Baker and Michael Streit, sought to preserve the electorate’s

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\textsuperscript{26} Tarr, supra note 11, at 613.
\textsuperscript{29} See, e.g., SKAGGS AT EL., supra note 15, at 7–9 (describing over $1,000,000 in campaign spending in the 2009–2010 Iowa retention elections).
\textsuperscript{30} Pettys, supra note 27, at 716.
\textsuperscript{31} Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).
“liberty” from judicial legislation. However, the campaign received financial backing from several openly anti-gay organizations, the American Family Association and the New Jersey-based National Organization for Marriage group, which spent $235,000 on television advertising advocating that the electorate vote against retaining the judges.

In response, the bipartisan group Iowans for Fair and Impartial Courts formed, giving the impending retention vote the earmarks—including heightened campaign spending—of a contested judicial election. Of note here is the Iowa State Bar Association’s publishing of a pre-election “report card” for all judges facing a retention election. In most settings, that practice might have helped to communicate the view that the election was about overall fitness to serve, rather than a referendum on particular rulings, which, in Iowa, was a focus of anti-retention advocacy. Moreover, the survey was based on responses from member lawyers. This limitation of the survey to members of the bar is itself a possible basis for criticism along the lines of challenges brought in other nonpartisan “merit selection” states to systems allegedly controlled by the legal profession rather than the broader public.

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33 Vander Plaats stated:
This is not about gay marriage . . . . The effort for Iowa For Freedom is about liberty.
Seven unelected (justices on the Iowa Supreme Court) decided we are a gay marriage state. This court legislated from the bench. If they will do this for marriage, all your liberties are up for grabs.


36 Susan Liss & Adam Skaggs, Is Justice for Sale? This Year, as Special Interests Mobilize, They are Targeting Previously Sedate Judicial Retention Elections in Addition to Contested Races, NAT'L L.J. (Sept. 6, 2010), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202471560436&Isjusticeforsale&slreturn=1&hbxlogin=1.


38 Boshart, supra note 37.

39 See discussion of Kansas lawsuit, infra notes Section II.D.1. An example of a more broadly based performance evaluation of judges, which solicits the views of jurors, witnesses, litigants, administrative staff, and attorneys who have observed judges on the bench is the system in place in Arizona, a process that includes written comments from the public and public hearings. See Grant Shulte, Former Justice O'Connor Backs Iowa Judge Selection,
dramatic outcome of the Iowa campaign, the ouster of all three justices, has fueled concerns that other state court justices will be similarly vulnerable to removal and thus will shrink from issuing rulings likely to be unpopular.40

2. Grassroots Accountability Campaign in Colorado Opposed Retention Elections of Supreme Court Justices

The action organization Clear the Bench Colorado, on its web site, in the news media at public rallies, and in campaign finance challenges engaged in an aggressive campaign to defeat reelection of sitting justices of the Colorado Supreme Court in the 2010 elections.41 Its director, Matthew Arnold, has drawn attention to his organization by speaking at rallies sponsored by the Tea Party, and characterized the group as promoting a “grassroots revival.”42 The organization’s targets are court rulings involving issues of taxation, eminent domain, and redistricting.43 In particular, the organization objects to “activist” and “out of control” rulings that have, it claims, expanded government power.44 Ultimately, the campaign to oust the incumbents seeking retention failed.45 Independent of this effort, a proposed 2012 ballot measure would alter the method of selecting judges (dispensing with the requirement that the governor choose from among candidates


43 Colorado’s Supreme Court is Still Out of Control, CLEAR THE BENCH COLO., http://www.clearthebenchcolorado.org/ (last visited May 18, 2012).


selected by the nominating commission but requiring confirmation by the senate) and would also impose term limits for appellate judges.\textsuperscript{46}

3. Campaign Led by Anti-Abortion Advocates to Vote Against Retention of an Incumbent Kansas Supreme Court Justice

Judicial accountability advocates launched a campaign against retention of a Supreme Court justice selected under Kansas' nonpartisan system.\textsuperscript{47} The justice, Carol Beier, was targeted by an anti-abortion group, Kansans for Life, that called into question her impartiality in rulings on reproductive rights issues, which the group claimed resembled advocacy in favor of the "abortion industry."\textsuperscript{48} That effort also failed and Judge Beier was returned to office by sixty-three percent of the vote.\textsuperscript{49}

Although most of the anti-retention advocacy was unsuccessful, the results in the Iowa elections and the intensity of the efforts in other states suggest that proponents of nonpartisan selection can no longer assume that structural features of retention elections will shield incumbents from hard-fought campaigns and intense public scrutiny.\textsuperscript{50} A number of factors have contributed to the shift in tenor and in the extent of spending in these elections. A Supreme Court ruling that lifted restrictions on judges' and judicial candidates' ability to state their positions on legal issues during election campaigns is credited with paving the way for more robust campaigning and spending in partisan and retention elections.\textsuperscript{51} State court involvement in cases that implicate public policy making, particularly where the law is not settled and interpretation is required, also embroils these courts in controversy.\textsuperscript{52}

Notwithstanding the new climate for anti-retention election


\textsuperscript{48} Liss & Skaggs, supra note 36, at 83.


\textsuperscript{50} See, e.g., Post-Election Media Review, supra note 45.

\textsuperscript{51} See, e.g., Martin H. Belsky, Electing Our Judges and Judicial Independence: The Supreme Court's "Triple Whammy," 2 A KRON J. CONST. L. & POL'Y 147, 154 (2011); Tarr, supra note 11, at 613 (discussing the impact of Republican Party of Minnesota v. White, 536 U.S. 765 (2002)). As discussed further in Part III, infra, this successful legal advocacy may reflect the rising influence, and institutionalization of, legal initiatives connected to conservative-identified issues.

\textsuperscript{52} Tarr, supra note 11, at 613.
initiatives, the public rhetoric associated with accountability advocacy is not limited to election campaigns. Rather, it appears in ballot drives, proposed legislation, and litigation documents that challenge the make-up of nonpartisan nominating commissions, specifically, the ways in which such commissions lack accountability to the electorate. The following sections discuss these developments.

C. Ballot Measures Seeking to Increase the Influence of the Electorate in the Nominating Process

States that have placed initiatives on the ballot relating to judicial selection generally are one of two types: either they seek to abolish the nonpartisan system completely and return to popular election of judges or, less radically, they would alter the method by which judges are nominated by reducing the role of lawyers in vetting judicial candidates and requiring that popularly elected officials participate in the nomination process.

1. Attempted Ballot Measure to Challenge Missouri’s Nonpartisan Plan for Selecting Judges

In the state that began nonpartisan selection, advocates of an abortive ballot initiative in 2010 aimed to return Missouri to a system of popular elections. The group Show Me Better Courts sought to topple the state’s sixty-year-old system for selecting judges. The measure it advocated would have substituted partisan elections for the current method of selection. However, in August 2010 Missouri’s Secretary of State determined that the proposal failed to collect sufficient valid signatures. Vowing to re-submit the initiative in 2012, James Harris, the unsuccessful organizer of the initiative effort, and who has been described as a Republican activist, suggested the way in which the battle lines had been drawn in this campaign:

Why are trial attorneys so afraid to see this measure make it

to the ballot? Quite simply, they don't want to give up control of our courts. They don't want to give the power to the people because they know that the people are tired of activist courts controlled by special interests.\textsuperscript{58}

Presumably in response to the ballot measure and perhaps an effort to blunt a renewed challenge, the Missouri Supreme Court recently adopted changes in the nominating process that would open the process up to greater scrutiny, including making candidates’ interviews with the commission public, disclosing the number of votes received by each candidate whom the commission refers to the governor, and seeking recommendations of qualified judicial candidates from members of the public.\textsuperscript{59}

2. Successful Oklahoma Ballot Measure to Limit the Influence of Lawyers, Directly or Indirectly, in the Nominating Process

By contrast, Oklahoma's State Question 752, proposed as a constitutional amendment on the ballot for the 2010 election, was a successful effort to alter the lawyer/non-lawyer balance in that state's nominating commission.\textsuperscript{60} The measure requires all members of the state's judicial nominating commission appointed by

\textsuperscript{58} Jo Mannies, Proposal to Change Missouri's Judicial-Selection System Won't be on Nov. 2 Ballot, ST. LOUIS BEACON, Aug. 3, 2010, https://www.stlbeacon.org/#/content/18328/proposal_to_change_missouris_judicial_selection_system_wont_be_on_nov_2_ballot. A post by Better Courts of Missouri, the organization that Harris heads, reported that in February 2011 Missouri Representative Stanley Cox filed a bill to place a constitutional amendment on the ballot relating to judicial selection. Among other things, the amendment would increase the number of judicial nominees from three to five, increase the number of non-lawyer commission members from three to four, empower the state governor to reject all nominees presented by the nominating commission and thereby prevent any of them from being seated, and require that each commission member be confirmed by the senate. In Rebuke to Activist Court, Judicial Selection Reform Legislation Filed on Day of State of the Judiciary Address, BETTER COURTS FOR MO. (Feb. 9, 2011), http://www.newmoplan.com/posts.aspx; Supreme Court Rules, YOUR MO. COURTS, http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffaa99df4993f86256ba50057dc8/f17cc30b8a6987ba86256ca600521281?OpenDocument (last visited May 18, 2012) (requiring that interviews of applicants be conducted publicly, that the names of the interviewees and the time and place of the public interviews shall be made public, and the release of information about the number and attributes of all applicants prior to the public interviews); Jason Hancock, Missouri Opens Its Supreme Court Nomination Process, STLTODAY.COM (Aug. 31, 2011), http://www.stltoday.com/news/local/govt-and-politics/article_b00cc2da-0c0c-596e-bdd7-d3d1426f849d.html.


the state's governor to be non-Oklahoma lawyers. Moreover, non-lawyer members must not have relatives who are members of the legal profession in any state. The provision also adds two at-large members to the commission, who can neither be lawyers nor have a lawyer in their immediate family. The ballot question did not alter the provisions for selecting the lawyer members of the commission, who are currently chosen by the state bar. As with Missouri's failed ballot measure, the Oklahoma measure reflected a desire to contain the influence of lawyers in the process for selecting judges. Sixty-three percent of voters in that state endorsed the measure.

D. Lawsuits Challenging Features of Nonpartisan Nominating Systems

The Indiana-based James Madison Center for Free Speech brought a series of lawsuits on an equal protection theory challenging the role of lawyers in the selection of members of the nominating commissions. The Center locates a "threat to free political speech" in the efforts of "powerful forces in government, both state and federal" as well as elites—wealthy individuals and the institutional media—to limit the rights of the people to express their views on issues, current officeholders, and candidates.

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61 Okla. S. Res. 27, supra note 60.
62 Id.
63 Id.
64 Id.
65 Id.
68 Id. The Center goes on to describe in more detail the threats posed to political speech: There are powerful forces in government, both state and federal, who view the First Amendment's protection of political expression as a loophole in our election laws that they must close. Some, therefore, are seeking to use government to suppress the right of citizens and citizen groups to participate in our democratic process by limiting their right to speak out about the actions of public officeholders and the position of candidates on issues and by limiting the right of citizens to join together to make their voices heard on issues of public concern. Federal efforts to suppress the free speech and free association rights of citizens and citizen groups include the twenty year war on the First Amendment conducted by the Federal Election Commission in its unsuccessful effort to suppress issue advocacy, the push for McCain-Feingold "campaign reform" legislation, and the recently inaugurated effort by the Brennan Center for Justice to overturn the speech protective rulings of the Supreme Court in Buckley v. Valeo. State efforts to suppress First Amendment rights also abound, including passage of state laws outlawing voter guides, reducing political party activities, penalizing independent expenditures and limiting contributions to candidates and political committees. This assault to the First Amendment is supported by wealthy individuals and foundations and by the
Although none of these lawsuits survived a motion to dismiss, Center-affiliated attorney James Bopp, Jr., who brought suits on behalf of voters in Kansas and Iowa,\(^68\) has had a string of successes challenging federal and state law impediments to election campaign speech and spending. He is also known for arguing *Republican Party of Minnesota v. White*,\(^69\) in which the Supreme Court eliminated state ethics bans on judicial candidates stating positions on issues,\(^70\) and for starting the litigation in the *Citizens United*\(^71\) case, where the Court loosened restrictions on corporate and union spending to promote or attack candidates.\(^72\) Bopp is a former co-chair of the Election Law subcommittee of the Federalist Society.\(^73\)


   As the state prepared to fill a vacancy occasioned by the retirement of State Supreme Court Chief Justice Robert Davis, four voters brought suit challenging the fact that only lawyers are permitted to vote for five of the nine members of the Supreme Court nominating commission.\(^74\) The Kansas complaint argued that the ability of non-lawyer members of the electorate to participate in the selection of state judges is diminished, resulting in a claimed denial of equal protection of the law.\(^75\) Although lacking specifics, the constitutional challenge raised in the lawsuit was echoed in political campaign discourse by Kansas Senator Sam Brownback, then a Republican gubernatorial candidate and since elected the state’s

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*Id.*

\(^68\) Another Center Attorney, Joseph Vandehulst, litigated a similar challenge to Alaska’s nonpartisan nominating system.


\(^70\) *Id.* at 773.


\(^73\) Press Release, WRTL Urges Injunction of Law Funding State Supreme Court Races (Mar. 4, 2011), available at www.jamesmadisoncenter.org/Main/Test/content.html.


\(^75\) *Id.*
governor. 76

The case challenged the provisions of Kansas's constitution and statutes that established its system for selecting the state judiciary. 77 The verified complaint asked for a declaration that portions of these provisions were unconstitutional on their face and for an injunction against their enforcement on the ground that they “violate the Equal Protection Clause because they deny Plaintiff's and all non-bar member Kansas citizens their right to vote in an election that affects them.” 78 Alternatively, plaintiffs asked that the Court declare these provisions unconstitutional as applied to them. 79

The pleadings recited that under the current system, the Kansas Supreme Court Nominating Commission selects Kansas Supreme Court justices, alleging that the Commission members are accorded the “traditional government function” of nominating candidates to fill judicial vacancies, 80 a function that applies to all Kansans rather than to the members of the state bar. 81 However, the complaint stated that only attorneys in the state are permitted to vote for five of the nine members of the Commission, resulting, plaintiffs claimed, in a dilution of the voters' ability vis-a-vis the state's attorneys to participate in elections for state judges. 82

Plaintiffs moved for a preliminary injunction, which district court Judge Monti Belot denied on September 14, 2010, ruling that plaintiffs had not met their burden of demonstrating any of the preliminary injunction factors (likelihood of success on the merits, irreparable harm, balance of interests in their favor, and no harm to the public interest). 83 In ruling on the last factor, the court agreed that the constitutionality of the selection process was a public concern, but that it “[d[id] not outweigh the public interest in preventing indefinite vacancies on the Kansas appellate courts.” 84 The district court subsequently granted defendants' motion to dismiss. 85

77 See generally KAN. CONST. art. III, § 5(e); KAN. STAT. ANN. §§ 20, 119-23 (West 2011).
78 Verified Complaint for Declaratory and Injunctive Relief, supra note 74, at 1-2, 14-15.
79 Id.
80 Id. at 10-11, 13.
81 Id. at 10-13.
82 Id. at 2, 5-6.
84 Id.

Since its admission as a state in 1959, Alaska has followed a non-partisan model of judicial selection in which a seven-member judicial council assesses qualifications and nominates candidates for the state court.\(^8\) The state's governor then appoints one of the nominees from this field.\(^7\) Three of the seven Council members are lawyers, appointed by the Board of Governors of the state's bar association, who, in turn, are chosen by the all-lawyer membership of the association.\(^8\) Plaintiffs challenged this arrangement in federal district court in Alaska on equal protection grounds.\(^9\) The challenge asserted that the lawyer members should have been appointed by an elected official, and that, because Alaska lawyers have a greater voice than the state's non-lawyers in the choice of these three Judicial Council members, non-lawyers are deprived of an "equal voice" in selecting state court judges.\(^9\) The district court rejected the argument, and, on appeal to the Ninth Circuit, the ruling was affirmed.\(^9\) As the court there noted, Alaska's system of judicial selection and the involvement of attorneys in it were considered at the state's constitutional convention. Recognizing that the plaintiffs ultimately were seeking to bring about popular election of the judiciary, the court found no equal protection violation:

Alaska's founders, when considering the selection of the members of the Judicial Council at the Constitutional Convention, discussed these tensions and resolved the debate in favor of the expertise that attorneys could bring to the process. The Equal Protection Clause, as long interpreted by the federal courts, does not preclude Alaska from making that choice.\(^9\)

The court further noted the rationale of the state constitution's framers for the role of attorneys in the selection process:

The whole theory of the Missouri Plan is that in substance, a select and professional group, licensed by the state, can best determine the qualifications of their brothers. The intent of

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\(^8\) Kirk v. Carpeneti, 623 F.3d 889, 891 (9th Cir. 2010).
\(^7\) Id.
\(^8\) Id.
\(^8\) Id.
\(^9\) Id.
\(^9\) Id.
\(^9\) Id. at 891, 900.
\(^9\) Id. at 900.
the Missouri Plan was in substance to give a predominance of the vote to professional men who knew the foibles, the defects and the qualifications of their brothers. It is unquestionably true that in every trade and every profession the men who know their brother careerists the best are the men engaged in the same type of occupation. That was the theory of the Missouri Plan. The theory was that the bar association would attempt to select the best men possible for the bench because they had to work under them.93

Like the ballot initiative in Oklahoma and the failed effort to place a measure on the ballot in Missouri to dismantle its eponymous plan, here plaintiffs questioned the state’s reliance on the authority and knowledge of the lawyer members of the nominating council at the expense of popular election. Such a critique, at least at first blush, resembles the anti-elitism that fueled the Jacksonian revolution.94

3. Carlson v. Wiggins: Challenging the Composition of Iowa’s Nominating Commission

After the election that ousted three Iowa Supreme Court justices in November 2010,95 James Bopp, as counsel to the James Madison Center for Free Speech, also brought a lawsuit challenging the make-up of the Iowa nominating commission, specifically the influence of lawyers in selecting commission members.96 Bopp argued on behalf of plaintiffs (named Iowa voters) that this influence denies ordinary Iowa voters a “right to equal participation” in selecting justices for the Iowa Supreme Court.97 The lawsuit was dismissed by Iowa District Judge Robert Pratt, who rejected the asserted “entirely new Fourteenth Amendment ‘right’ to greater influence in the selection of judges.”98

Terry Branstad, recently elected governor of Iowa, contributed to the political discourse on judicial selection while a gubernatorial

94 See Ware, supra note 9, at 758–64, for an explicit critique that the Missouri Plan is predicated on elitism in privileging the role of lawyers in selecting members of the nominating commission; infra notes 115–16 and accompanying text, for a discussion of some differences between these initiatives and the Jacksonian period.
95 See supra Section II.B.1 and accompanying text (describing the controversial chain of events that led to the ousting of the judges).
97 Id.
98 Id. at 832.
candidate by proposing elimination of a feature modeled after the Missouri Plan that limits a governor's choice to one of the candidates forwarded by the nonpartisan nominating commission.\textsuperscript{99} Branstad favors adopting a state analogue to the federal system, which would entail nominating a judicial candidate by the chief executive and confirmation by the state senate.\textsuperscript{100} Branstad averred that such a change would be needed to ensure the selection of judges "who have a commitment to protect the constitution and to judicial restraint."\textsuperscript{101}

III. THE IMPORTANCE OF FRAMING: REVISITING THE RHETORIC OF JUDICIAL ACCOUNTABILITY

A closer examination of the range of strategies used in the judicial accountability campaign suggests the resonance of a set of related frames\textsuperscript{102} that have in common anti-lawyer, anti-elite, and anti-liberal activism\textsuperscript{103} themes: the nonpartisan method of selecting


\textsuperscript{100} Id.

\textsuperscript{101} Id.

\textsuperscript{102} A core concept in social movement theory is that a frame is essential to "meaning-making"—it is both a cognitive resource that affords us a way of understanding experience and a rhetorical tool for communicating it. Sociologists David Snow and Robert Benford highlight the "signifying" work of frames used to mobilize collective action, and describe their "punctuation, attribution, and articulation" functions: movement activists highlight particular social problems or occurrences, assign blame for them, and identify connections among, and give coherence to, occurrences to facilitate future recognition and obviate the need for new interpretation. David A. Snow & Robert D. Benford, \textit{Master Frames and Cycle of Protest}, in \textit{FRONTIERS IN SOCIAL MOVEMENT THEORY} 137–38 (Aldon D. Morris & Carol McClurg Mueller eds., 1992). A frame is a way of seeing that helps determine the significance of facts. Charlotte Ryan & William A. Gamson, \textit{Are Frames Enough?}, in \textit{THE SOCIAL MOVEMENTS READER: CASES AND CONCEPTS} 167–68 (Jeff Goodwin & James A. Jasper eds., 2d ed. 2009). As Charlotte Ryan and William Gamson have put it, an issue frame has the characteristics of a picture frame, which sets off and outlines what we see, and also of a building frame, which gives stability to a structure, preventing it from falling apart. \textit{Id.} Characteristically, frames have a moral dimension. \textit{Id.} at 169.

Framing is equally central and familiar to the work that lawyers do: in advocacy papers lawyers frame issues and frame facts, offering a decision-maker a particular lens through which to view and understand those decisions and facts. \textit{See} ANTHONY G. AMSTERDAM & JEROME BRUNER, \textit{MINDING THE LAW} 165–66 (2000) (analyzing the rhetorical work in law as contests over interpretive frames). Lawyers and judges frame the holdings of earlier judicial decisions broadly or narrowly, either sweeping in a range of situations or events, or confining a case to its particular facts. In the work of creating and communicating meaning, lawyers and other advocates share common ground in their resort to frames and framing.

\textsuperscript{103} See Neil S. Siegel, \textit{Interring the Rhetoric of Judicial Activism}, \textit{59 DePaul L. Rev.} 555, 571 (2010) (identifying two uses of the term "judicial activism" in Republican Party discourse—failure to defer to legislative or popular will, on the one hand, and lack of fidelity to the law, on the other).
judges rejects democracy-enhancing electoral politics and instead accords a professional elite, representatives of an assuredly liberal and politically unaccountable state bar, disproportionate weight in choosing judicial candidates. Not surprisingly, the challenge goes, these elites replicate themselves, producing a judiciary that is not reflective of, or responsive to, the electorate, nor respectful of the limits of the positive law that binds them.  

The ubiquity and salience of these frames, both in the formal discourse of pleadings, legislation, and ballot petitions and in the less restrained rhetoric of blog and media campaign, are striking. But the judicial accountability discourse is not monolithic. Nor is it clear that the appeals to popular democracy necessarily spring from grassroots origins. On particular issues, for example, the Iowa Supreme Court’s ruling on same-sex marriage, socially conservative movement organizations such as Iowa for Freedom and the National Organization for Marriage apparently succeeded in mobilizing voters. Similarly, Clear the Bench Colorado, with its apparent ties to the Tea Party and its anti-tax, anti-government ideology, may have reached more deeply into grassroots constituencies. Further, the website for the James Madison Center suggests some grassroots affinity, referring to elites such as “wealthy individuals and foundations and . . . the institutional media” as the enemies of free speech.  

However, if the judicial accountability rhetoric is disaggregated from its various manifestations and contexts, it becomes clearer that its origins are complex and hybrid, that its adherents are loosely, apparently opportunistically connected, and to a notable extent elite-based, economically or intellectually. In addition to

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104 See Brian T. Fitzpatrick, The Politics of Merit Selection, 74 Mo. L. Rev. 675, 690–702 (2009) (discussing data that purportedly shows that lawyer-dominated nominating commissions in Missouri and Tennessee choose judges who are more politically liberal than the general electorate and show more affinity with the Democratic Party). But see Stith & Root, supra note 12, at 731–33, 736–37 (discussing how the system in place in Missouri operates to reflect professional, geographic, social, and political diversity among lawyer members of nominating commission).


business interests that make the connection between accountability reform and tort reform,\textsuperscript{108} lawyers such as those attached to the James Madison Center for Free Speech, and law professors associated with the conservative Federalist Society, play a prominent part in these movements.\textsuperscript{109} There is irony in the key role that those who are steeped in professional legal knowledge have assumed in advancing the anti-lawyer frame. Yet, as political scientist Steven Teles has documented, it is also useful to understand their involvement as part of a broader conservative counter-mobilization in the law as reflected in the institutionalization in the last twenty-five years of the Federalist Society, the rise of libertarian public interest firms such as the Center for Individual Rights and the Institute for Justice, and the funding of market-oriented law and economics research.\textsuperscript{110}

That the advocates for judicial accountability are proceeding on multiple fronts, and with some evidence of persistence and coordination (certainly with respect to the litigation brought by the James Madison Center for Free Speech),\textsuperscript{111} prompts a number of questions. Are these initiatives comparable to earlier judicial reform movements? Are they driven principally by a motivation to reform the judiciary or to restrain (some) lawyers? Do they manifest a desire to improve judicial process, as has been suggested,\textsuperscript{112} or to change judicial outcomes?

To the extent that the judicial accountability campaigns have focused on disproportionate lawyer influence over the selection of

\textsuperscript{108} See, e.g., Maher, supra note 14 (explaining the ultimately unsuccessful business-led campaign against incumbent Illinois Supreme Court Justice Thomas Kilbride after he and a majority of the court ruled unconstitutional a state statute limiting the amount of damages that medical malpractice plaintiffs could be awarded).


\textsuperscript{111} Curious Logic, supra note 109, at 268 n.69.

judicial nominees and the jurisprudence that these nominees produce as judges, the accountability advocacy seems unlike a mid-twentieth century good government initiative and more in the nature of political-ideological opposition. It has been posited that this opposition has been less outcome-focused and more a response to matters of process (for example, concerns about “legislating from the bench” in Iowa). However, what suggests otherwise is that the interest organizations directing (and arguably raising the salience of) the anti-retention campaigns in Iowa and other states, were avowedly issue-based. Moreover, couching one’s opposition in terms of “judicial legislation” avoids naming the underlying issue that has prompted the campaign’s negative response. This suggests that charges of activism and legislating from the bench may function here as a form of code for outcome-based concerns.

One might be tempted to assimilate the popular-democracy and lawyer-restraining rhetoric of the current campaign to the anti-professionalism bias of the Jacksonian era, but the landscape today is more difficult to map and does not readily support a direct analogy to that era’s shift to the contested elections of judges. In fact, as political scientist G. Allen Tarr points out, the complaints of conservative advocacy organizations about judicial activism (whether in the sense of overreaching beyond the judicial role or in substituting one’s personal views for adherence to law) bear a family resemblance to the concerns voiced by Progressive-era advocates about court rulings that advanced particular economic and social theories, in that instance tending to favor the corporate class.

The presence of business interests among the present-day accountability advocates further complicates the picture, because the business sector’s critique of lawyers is not centered on social or class hierarchy but rather on the proclivity of plaintiffs’ lawyers to represent their clients aggressively in lawsuits against business and industry. Moreover, that it is lawyers who have crafted arguments against the influence of the professional bar in the judicial nomination process casts the advocacy in a different, more nuanced light, and further challenges whether such arguments are properly

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113 See, e.g., Singer, supra note 112.
114 Caufield, supra note 12, at 598–99 (noting how discourse from pro-family organizations links terms such as judicial restraint (or rather its absence) with specific policies such as “life, marriage, and parental rights”).
115 Siegel, supra note 103, at 571.
characterized as "grass roots."

The convergence of law, lawyers, and political advocacy in these framing moves concerning judicial accountability certainly merits further study, and calls to mind political scientist John Brigham's argument in The Constitution of Interests, that the "discursive practices" of law—most notably law's claiming and framing—also animate political discourse.  

He argues "that rules and commands permeate the social consciousness and structure social action. Rather than simply existing as orders, as if law were like the instructions promulgated by an imperious drill sergeant, law is presented as a part of society, a part of the way we think and act."  

That reminder highlights that legal and political discourse are implicated with one another and that it is challenging to deconstruct, or seek to derive the origins of, language that partakes of both.

For these reasons, the judicial accountability campaign, in its multifarious manifestations, resists easy analysis. The initiatives rather require continued close examination to give a more textured understanding of whether judicial accountability advocacy in this context is at its core a self-sustaining campaign challenging the structural role of lawyers in commission-based selection plans or part of a more pervasive critique, legal and popular, directed against an assertedly expansive notion of the reach of law and of the courts' interpretive role.

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118 Id. at 26-27.