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## RECONSIDERING *BROWN V. GIANFORTE* AND THE ELIMINATION OF THE MONTANA JUDICIAL NOMINATING COMMISSION

J T Stepleton\*

### I. INTRODUCTION

In *Brown v. Gianforte*,<sup>1</sup> Montana Supreme Court (“Court”) Associate Justice James Rice authored a strongly worded concurrence admonishing the Montana Legislature (“Legislature”) and Department of Justice for “extraordinary” and “extraconstitutional” actions in the months preceding the decision.<sup>2</sup> His rebuke had nothing to do with the Court’s holding—he concurred with the majority’s decision to uphold the elimination of Montana’s Judicial Nominating Commission (“Commission”).<sup>3</sup> Instead, the conflict stemmed from the Court blocking a Republican-led legislative subpoena to disclose internal judiciary emails.<sup>4</sup> The legislators’ stated rationale for uncovering the emails was to determine whether justices had pre-judged Senate Bill 140,<sup>5</sup> the legislation at issue in *Brown*. House Minority Leader Kim Abbott described the conflict as a “constitutional crisis.”<sup>6</sup>

Unfortunately, the underlying constitutional concerns regarding SB 140<sup>7</sup> have been overshadowed by the email controversy. A bipartisan group of former Montana elected officials decried the Legislature’s willingness to allow governors to “appoint any lawyer [to judicial office] with zero regard for his or her qualifications, experience, integrity, record or judicial disposition.”<sup>8</sup> Such a system would undermine the “balancing act” undertaken by delegates to the 1972 Constitutional Convention (“1972 Convention”),

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1. *Brown v. Gianforte*, 488 P.3d 548 (Mont. 2021).

2. *Id.* at 561 (Rice, J., concurring).

3. *Id.*

4. *Id.*

5. SB 140, a bill to abolish the Commission, was introduced by Republican Sen. Keith Regier on January 1, 2021. On February 17, it was passed by a 31-to-19 vote in the Senate. On March 1, the Montana House passed the same version of the bill by a vote of 67-to-32.

6. Shaylee Ragar, *Montana Supreme Court Blocks Legislative Request for Internal Communications*, MONTANA PUBLIC RADIO (April 16, 2021), <https://perma.cc/F5KA-WHKH>.

7. The legislature also passed a bill to pack the Commission with gubernatorial appointments (SB 402) in the event SB 140 was declared unconstitutional. Although this analysis does not comprehensively examine this “Plan B” legislation, it nonetheless concludes that it too would undermine the intent of the framers and ratifiers of the state constitution for the same reasons that SB 140 does. *See infra* Part II.

8. Marc Racicot, Bob Brown & Dorothy Bradley, *Don’t destroy Montana’s judicial selection process*, MISSOULIAN (March 3, 2021), <https://perma.cc/FV9R-WTN6>.

which produced a structure designed “to bring forward qualified and honorable candidates while involving but limiting an unfettered executive.”<sup>9</sup> Former Republican Secretary of State Bob Brown, along with four other Montana political figures and the state chapter of the League of Women Voters, challenged SB 140 as a violation of Article VII, § 8 of the Montana Constitution.<sup>10</sup> In the event of “any vacancy in the office of supreme court justice or district court judge,” Art. VII, § 8 requires the governor to “nominate a replacement from nominees selected in the manner provided by law.”<sup>11</sup> Ultimately, this challenge failed—six out of seven justices voted to sustain the new law.<sup>12</sup> Only Justice Laurie McKinnon dissented, arguing that SB 140 violated the plain language of Art. VII, § 8 and the “core of the Framers’ convictions—to preserve the integrity and independence of Montana’s judiciary.”<sup>13</sup>

This analysis not only argues that Justice McKinnon’s dissent should be adopted as the majority view, but also that the Court failed to consider much needed source material to comprehend the founders’ and ratifiers’ intentions for Art. VII, § 8 to produce the Commission or a comparable merit selection committee. Part II provides a short history of judicial selection in Montana, followed by a summary of the 2021 legislative activity that disbanded the Commission. Part III relies on convention transcripts and reports, ratification-era documents, and historical documentation of the national movement for merit selection of judges to conclude the Commission was effectively enshrined in Art. VII, § 8. Part IV encourages the Court to revisit *Brown* and explore a wider array of source material in future endeavors to understand constitutional intent.

## II. BACKGROUND

Under Montana’s 1889 constitution, voters elected district court judges and supreme court justices, with vacancies filled by gubernatorial appointment for the remainder of the term.<sup>14</sup> The 1972 Convention proposed an amendment to the judicial selection process that required the governor to “appoint a replacement from nominees selected in the manner provided by law.”<sup>15</sup> On June 6, 1972, just over 50 percent of Montana voters ratified the new constitution.<sup>16</sup>

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9. *Id.*

10. *Brown*, 488 P.3d at 548, 551–52.

11. MONT. CONST. art. VII, § 8.

12. *Brown*, 488 P.3d at 561.

13. *Id.* at 571 (McKinnon, J., dissenting).

14. MONT. CONST. of 1889, art. VIII, § 34.

15. MONT. CONST. art. VII, § 8.

16. LARRY M. ELISON & FRITZ SNYDER, *THE MONTANA STATE CONSTITUTION* 18 (2011).

On the heels of ratification, the 1973 Montana Legislature fulfilled its constitutional mandate by establishing the Commission.<sup>17</sup> Until its elimination, the Commission comprised of: (1) four lay members appointed by the governor—excluding judges and attorneys—who each live in different geographical areas of the state and represent different industries and professions; (2) two attorneys appointed by the Court, each from different geographical regions; and (3) one district court judge elected by all lower court judges.<sup>18</sup> Within 90 days of a judicial vacancy, the Commission was required to submit a list of three to five nominees to the Governor.<sup>19</sup>

When Montana legislators descended on Helena in January of 2021, it was the first time in 16 years that Republicans controlled the governor’s mansion and both legislative chambers.<sup>20</sup> Within three weeks of the session convening, Republican Senator Keith Regier introduced SB 140 to eliminate the Commission and permit direct gubernatorial appointment of district court judges and supreme court justices.<sup>21</sup> Under SB 140, nominees need only meet basic requirements for judicial office and receive letters of support from three Montana adults.<sup>22</sup> Further, it requires the governor to “establish a reasonable period for reviewing applications and interviewing applicants” followed by a 30 day window for public comment.<sup>23</sup> Left unchanged were requirements for Senate confirmation, a competitive election in the subsequent general election, and retention elections thereafter.<sup>24</sup> The final version of the bill passed strictly along partisan lines in the Senate<sup>25</sup> and House<sup>26</sup> before it was signed into law by Governor Greg Gianforte on March 16, 2021.<sup>27</sup>

Within one day of SB 140’s enactment, opponents took advantage of the Court’s original jurisdiction to challenge the constitutionality of the law.<sup>28</sup> Republican Senator Cary Smith responded by introducing Senate Bill 402, which only took effect if the Court declared SB 140 unconstitutional.<sup>29</sup> SB 402 expanded the Commission to include 12 lay members, each ap-

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17. *Brown*, 488 P.3d at 552.

18. *Id.* See also MONT. CODE ANN. § 3-1-1001(1) (repealed 2021); MONT. CODE ANN. §§ 3-1-901 through 3-1-907 (2021).

19. MONT. CODE ANN. § 3-1-1001(2) (repealed 2021).

20. Shaylee Ragar & Kevin Trevellyan, *Montana Republicans in High Spirits After Conservative Wins During 2021 Session*, MONTANA PUBLIC RADIO (April 30, 2021), <https://perma.cc/C4TV-HHLH>.

21. S. 140, 67th Leg., Reg. Sess. (Mont. 2021).

22. MONT. CODE ANN. § 3-1-904(2).

23. MONT. CODE ANN. § 3-1-904(1); see also MONT. CODE ANN. §§ 3-1-904(2), 3-1-905(1).

24. MONT. CODE ANN. § 3-1-906.

25. S. J., 67th Leg., Reg. Sess. 14 (Mont. 2021).

26. H. J., 67th Leg., Reg. Sess. 13 (Mont. 2021).

27. MONT. S. J., 67th Leg., Reg. Sess. 4 (2021).

28. Rule 5.1 Notice to Attorney General of Constitutional Challenge at 2, *Brown v. Gianforte*, 488 P.3d 548 (Mont. 2021) (No. OP 21–0125).

29. S. 402, 67th Leg., Reg. Sess. (Mont. 2021).

pointed by the Governor—bringing the total to 15 seats, 80 percent of which would be filled by the governor.<sup>30</sup> SB 402 passed largely along party lines, though 13 Republican legislators voted against this measure.<sup>31</sup> Opponents unsuccessfully sought to couple their lawsuit against SB 140 with a constitutional challenge to SB 402.<sup>32</sup>

### III. RECONSIDERING *BROWN V. GIANFORTE*

In *Brown*, both the opinion of the Court and Justice McKinnon’s dissenting opinion rely on the rule from *Nelson v. City of Billings*<sup>33</sup> governing constitutional challenges:

Even in the context of clear and unambiguous language . . . we have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.<sup>34</sup>

Based on the constitutional text and 1972 Convention floor debates, the majority opinion concluded the “clear constitutional intent of Article VII, § 8(2) was a process that would result in the appointment of good judges.”<sup>35</sup> Though the Commission was formed for this very purpose, the *Brown* majority insisted that its elimination would not stand in the way of a governor’s ability to appoint “good judges.”<sup>36</sup> And though SB 140’s new “selection” process—three letters of recommendation and a public comment period—was derided as a “crude attempt” to ensure compliance with the plain language of Art. VII, § 8, the majority opinion posited that “it is not the task of this Court to assess the relative ‘crudeness’ of the process.”<sup>37</sup>

This Comment in response, questions whether it should be. How can we assume future governors will appoint “good” candidates to fill judicial vacancies? Moreover, what is a “good” candidate?

The *Nelson* rule echoes a brand of originalism endorsed by the likes of Antonin Scalia, Gary Lawson, and Steven Calabresi, which shifted the focus from “original intent” to “original public meaning.”<sup>38</sup> Scalia’s approach

30. MONT. S. 402 at 2.

31. MONT. H. J., 67th Leg., Reg. Sess. 19–20; *see also* MONT. S. J., 67th Leg., Reg. Sess. 11.

32. *See generally* Order Deny. Petitioners’ Motion to Amend Petition, *Brown v. Gianforte*, 488 P.3d 548, (Mont. 2021).

33. *Nelson v. City of Billings*, 412 P.3d 1058 (Mont. 2018).

34. *Brown v. Gianforte*, 488 P.3d 548, 557 (Mont. 2021); *see also* *Brown*, 488 P.3d at 566 (McKinnon, J., dissenting) (*quoting* *Nelson v. City of Billings*, 412 P.3d at 1064).

35. *Brown*, 488 P.3d at 559.

36. *Id.*

37. *Id.* at 560.

38. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 463 (2013).

strived to “resolve[ ] vagueness and irreducible ambiguity” of constitutional provisions through interpretations “fairly derived from text and history.”<sup>39</sup> These originalists are wary of limiting resources at their disposal in their quest for original public meaning; Akhil Reed Amar describes it as an ongoing effort to “braid arguments from text, history, and structure into an interpretive rope whose strands mutually reinforce.”<sup>40</sup>

Despite widely available source material from the 1972 Convention and ratification campaign, the Court has relied almost exclusively on one resource beyond text to establish constitutional intent: the 1972 Convention Transcripts (“Transcripts”). Tyler Stockton found that, from 1972 through 2015, the Court cited these transcripts at least 164 times, while other ratification-era sources were cited only 13 times.<sup>41</sup> Based on originalist principles, Stockton argues the Court should embrace a more robust method of constitutional analysis, including examinations of voter information literature, convention commission reports, ratification-era news articles, and private correspondence.<sup>42</sup>

Originalists argue that the public meaning of constitutional language *at the time of ratification* should be paramount if ambiguities linger beyond a plain reading of the text; as such, other public sources should be essential in some constitutional cases.<sup>43</sup> Because it was Montana voters—not the delegates—who ratified the constitution, courts and scholars should prioritize voter educational material ahead of convention transcripts and committee publications.<sup>44</sup> Specifically, Stockton’s article underscores the value of ratification-era sources<sup>45</sup> from which voters collected information—for example, the state-sponsored Voter Information Pamphlet,<sup>46</sup> Roeder Pamphlet,<sup>47</sup>

39. *Id.* at 488 (emphasis added).

40. Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 31 (2000).

41. Tyler Stockton, *Originalism and the Montana Constitution*, 77 MONT. L. REV. 117, 137 (2016).

42. *Id.* at 137–40.

43. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (acknowledging that it can be “difficult to plumb the original understanding” of constitutional text,” Justice Scalia proposed that clarification be achieved by “immersing oneself in the political and intellectual atmosphere of the time”).

44. Stockton, *supra* note 41, at 141–43.

45. *Id.* at 143–45.

46. Stockton, *supra* note 41, at 121–22. The “enabling act for the Constitutional Convention had only authorized the Secretary of State to send out a Voter Information Pamphlet,” making it the “only official explanation of the proposed constitution.” Review the pamphlet here: <https://perma.cc/4EAZ-U5RV>.

47. Stockton, *supra* note 41, at 144. The Roeder Pamphlet was a document composed by Montana State University history professor Richard Roeder and widely circulated in Montana newspapers during the campaign. Although not an official publication, it is a “very reliable source” whose “extensive distribution” establishes a level of authority and legitimacy that “pales only in comparison to the Voter Information Pamphlet.”

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and Neely Pamphlet,<sup>48</sup> in that order.<sup>49</sup> The 1972 Constitution material—the Transcripts and commission reports—are certainly valuable resources but are second to the ratification documents in establishing constitutional intent.<sup>50</sup> Although news articles are not as valuable as the aforementioned material, they remain “reliable sources” of information on how the ratifiers understood the proposed constitutional language.<sup>51</sup>

### A. *Convention Transcripts*

Like so many opinions before it,<sup>52</sup> the *Brown* majority relied solely on the Transcripts to resolve ambiguities that transcend a plain-meaning interpretation of Art. VII, § 8.<sup>53</sup> Even if methodologically flawed, an inclusive examination of these documents demonstrates that the majority opinion offered a shortsighted depiction of the 1972 Convention proceedings. The phrase “nominees selected in the manner provided by law” was not an invitation to grant the governor *carte blanche* over judicial nominations.<sup>54</sup> In fact, as discussed below, the Transcripts reveal a considerable majority of delegates sought to *limit* gubernatorial influence.

#### 1. *Minority & Majority Proposals*

Unlike the majority opinion, the *Brown* dissent addressed how the debate over judicial selection was introduced at the 1972 Convention. A split among members of the Judiciary Committee produced a “majority proposal,” supported by advocates of judicial elections, and a “minority proposal” which “envisioned creating a vetting committee.”<sup>55</sup> Importantly, *both sides* sought to limit gubernatorial discretion over appointments. The majority proposal permitted the Governor to appoint members of the judiciary to fill a vacancy until the next election. However, unlike the process outlined in the 1889 constitution, the appointee would *not* be permitted to run for that

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48. Stockton, *supra* note 41, at 145. During the 1972 Convention, Billings attorney Gerald Neely published a newsletter and worked as a reporter, after which he composed a voter information guide that is now recognized as the Neeley Pamphlet. Questions surrounding the extent of its distribution, as well as its limited coverage of the proposed constitution, render it less valuable than the Roeder Pamphlet and Voter Information Pamphlet.

49. *Id.* at 143–45.

50. *Id.* at 145–46.

51. *Id.* at 147.

52. *Id.* at 137.

53. *Brown v. Gianforte*, 488 P.3d 548, 557–61 (Mont. 2021).

54. MONT. CONST. art. VII, § 8.

55. *Brown*, 488 P.3d at 568 (McKinnon, J., dissenting). The “majority” and “minority” proposals earned their titles based on the votes of Judiciary Committee members: five members voted in support of judicial elections, while four members backed a nominating commission. See Judiciary Comm., Proposal Comm. Rep., No. V, Montana Constitutional Convention, 14, 45 (Mont. 1972).

seat until at least one year after the election of their successor.<sup>56</sup> The majority sought to undermine the “undue advantage” of incumbency in elections, often occasioned by a judge strategically retiring during a governor’s term to ensure an incumbency advantage for the successor.<sup>57</sup> In presenting the majority proposal on the convention floor, Delegate David Holland criticized what amounted to the governor’s “unfettered appointment” power, as demonstrated by the number of gubernatorial nominees still in office at the time—19 of 29 district court judges and four of five high-court justices.<sup>58</sup>

The minority proposal would require all judicial vacancies be filled by gubernatorial appointment of “nominees selected in a manner provided by law,” after which the judge and other candidates may run for the seat in a non-partisan election.<sup>59</sup> This coalition attempted to forge a compromise that addressed both the concerns of advocates for judicial independence as well as supporters of more public accountability for judicial officers.<sup>60</sup> According to staff comments, the minority proposal recommended “the legislature create a committee, bi-partisan in character, composed of both lawyers and laymen. . . who are geographically distributed throughout the state” to select a list of qualified nominees, from which the governor can appoint to office.<sup>61</sup> While introducing the minority proposal on the floor of the 1972 Convention, Delegate Ben Berg expressed a desire for a commission that could not be dominated by an individual political party or “some vested interest.”<sup>62</sup> Ultimately, delegates voted 49-37 to consider the minority proposal and build a new judicial article from that vantage point.<sup>63</sup>

The *Brown* majority referenced “drastically divergent views” and “diametrically opposed proposals” on the convention floor, but it never articulated the dueling visions that emerged from the 1972 Convention’s Judiciary Committee.<sup>64</sup> Instead, the majority opinion framed the debate as a contest between “delegates that envisioned a commission process” and “others [that] advocated for a system that would vest *even greater discretion in the*

56. JUDICIARY COMM., PROPOSAL STANDING COMM. REP., No. V, MONTANA CONSTITUTIONAL CONVENTION, 35 (Mont. 1972).

57. JUDICIARY COMM., PROPOSAL STANDING COMM. REP., No. V, MONTANA CONSTITUTIONAL CONVENTION, 36 (Mont. 1972).

58. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, Vol. IV 1016 (Mont. Feb. 26, 1972), <https://perma.cc/NM9D-3NEA> [hereinafter FEB. 26 VERBATIM TRANSCRIPT].

59. JUDICIARY COMM., PROPOSAL STANDING COMM. REP., No. V, MONTANA CONSTITUTIONAL CONVENTION, 54–55 (Mont. 1972) [hereinafter COMMITTEE REPORT, No. V].

60. *Id.* at 55–56.

61. *Id.* at 57.

62. FEB. 26 VERBATIM TRANSCRIPT, *supra* note 58, at 1023.

63. FEB. 26 VERBATIM TRANSCRIPT, *supra* note 58, at 1034–35. A vote for this motion was not a wholesale endorsement of the minority proposal; rather, delegates voted to commence judiciary article proceedings using the minority proposal, which could be amended thereafter.

64. *Brown v. Gianforte*, 488 P.3d 548, 557–59 (Mont. 2021).



*Governor.*<sup>65</sup> In fact, the two proposals presented by the Judiciary Committee suggest that reducing gubernatorial appointment authority would not be a major point of contention, and advocates for the minority proposal made it abundantly clear that a screening body would pick the potential nominees to fill vacancies. During deliberations on an unrelated section of Art. VII, Delegate Magnus Aasheim referenced the upcoming debate on judicial selection as a means to “determine whether they are going to be elected by the people or by *some body*.”<sup>66</sup>

As Justice McKinnon’s dissenting opinion in *Brown* aptly posited: “there is little doubt that all delegates understood that the proposal for selection of interim judges envisioned a commission or committee which should ‘select’ and ‘nominate’ individuals to be considered by the governor for appointment.”<sup>67</sup>

## 2. Delegate Joyce’s Amendment

Alternative proposals were hardly absent from the 1972 Convention. But in the *Brown* reply brief, Plaintiffs categorically claimed that, “with respect to filling vacancies, *all* delegates envisioned a judicial nomination commission/committee.”<sup>68</sup> The majority seized on this sweeping generalization to point out that Delegate Thomas Joyce proposed an amendment to the minority proposal that would “vest essentially unfettered power in the Governor to make judicial appointments.”<sup>69</sup> Delegate Joyce introduced the amendment on the grounds that politics within the commission would be unavoidable; rather than “beating around the bush,” gubernatorial appointments based on partisan affiliation should be interpreted as the governor “believ[ing] the best judge will be one of his own political philosophy.”<sup>70</sup> The amendment failed by a considerable margin (69-26),<sup>71</sup> but it was enough for the *Brown* majority to undermine a central pillar of Plaintiffs’ argument.

Delegate Joyce’s amendment was an anomaly. Aside from its sponsor, no delegate spoke in support of the amendment.<sup>72</sup> Two delegates spoke in opposition, each expressing confusion over the direction it would take Art.

65. *Id.* at 557 (emphasis added).

66. FEB. 26 VERBATIM TRANSCRIPT, *supra* note 58, at 1043.

67. *Brown*, 488 P.3d at 568 (McKinnon, J., dissenting).

68. Petitioners’ Reply Brief, at 10, *Brown v. Gianforte*, 488 P.3d 548, (Mont. 2021) (No. OP 21–0125) (emphasis added).

69. *Brown*, 488 P.3d at 557.

70. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, Vol. IV, 930 (Mont. Feb. 25, 1972) <https://perma.cc/NM9D-3NEA>.

71. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, Vol. IV, 1106 (Mont. Feb. 29, 1972) <https://perma.cc/NM9D-3NEA> [hereinafter FEB. 29 VERBATIM TRANSCRIPT].

72. *Id.* at 1114.

II, § 8 deliberations. Delegate Jean Bowman suggested it would bring the convention back to square one by restoring the majority proposal, and Delegate Paul Harlow complained that it was unclear why some delegates had waived on the issue of a judicial nominating commission.<sup>73</sup> Of all the recorded votes taken during the judicial selection debate, only one amendment failed by a larger margin than Delegate Joyce’s plan—Delegate Robert Kelleher’s amendment to allow governors to make lifetime appointments failed 83–13.<sup>74</sup> Throughout the entirety of the Art. II, § 8 debate, Delegate Joyce’s amendment marked the only time delegates considered a proposal to maximize gubernatorial authority over judicial selection.

The majority opinion proceeded to quote delegates skeptical of the impartiality of a nominating commission. This includes a question posed by Delegate Holland: “How can we guarantee that this commission—the ones that name the candidates—won’t be dominated by some special interest group?”<sup>75</sup> But, as Chairman of the Judiciary Committee, Delegate Holland was a proponent of the majority proposal, which expressly limited gubernatorial influence over the process. In presenting the majority proposal on the convention floor, he reminded delegates that the plan would not allow the Governor to “fill [vacancies] permanently.”<sup>76</sup> The *Brown* majority also quoted Delegate Carl Davis’s and Delegate Mike McKeon’s concerns about a nominating commission.<sup>77</sup> Again, both delegates favored the majority proposal, with Delegate McKeon objecting to merit selection as “another word for the patronage system.”<sup>78</sup> Undoubtedly, the convention included delegates opposed to a nominating commission, but the recorded votes and floor statements indicate that most realized how susceptible the judiciary was to political influence.

### 3. *The Melvin Plan*

According to the *Brown* majority, delegates unanimously supported Delegate J. Mason Melvin’s “compromise,” which “neither required the creation of a commission/committee, nor precluded it.”<sup>79</sup> Delegate Melvin’s amendment only substantively changed how elections would be held under the minority proposal.<sup>80</sup> His proposal merely retained the language in the minority proposal that required the governor to choose “nominees selected

73. *Id.* at 1105.

74. *Id.* at 1101–02.

75. *Brown v. Gianforte*, 488 P.3d 548, 558 (Mont. 2021) (quoting MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, Vol. IV, 1092–93, 1096 (Mont. Feb. 29, 1972)).

76. FEB. 26 VERBATIM TRANSCRIPT, *supra* note 58, at 1016.

77. *Brown*, 488 P.3d at 558.

78. FEB. 29 VERBATIM TRANSCRIPT, *supra* note 70, at 1096.

79. *Brown*, 488 P.3d at 558–59.

80. FEB. 29 VERBATIM TRANSCRIPT, *supra* note 70, at 1108–09.

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in a manner provided by law.”<sup>81</sup> Moving forward, delegates collectively referred to it as the “Melvin Plan.”

It was clear from the ensuing debate that delegates presumed the Melvin Plan entailed a merit selection process, including some type of vetting committee. Delegate Harlow rose in support of the amendment because, under the current system, “[w]e have no control over whom the governor appoints.”<sup>82</sup> Delegate Bruce Brown also spoke in favor of the Melvin Plan by lauding a former governor who voluntarily relied on a judicial nominating commission:

Under the present system, we have one man—namely the governor—appointing judges. When Gov. Babcock was governor, he had a committee. . . he took this selection committee and used them, and I think we get better appointments than we would with the governor alone making the selection.<sup>83</sup>

In fact, delegates identified by the majority opinion as opponents of a nominating commission raised these very concerns in connection with the Melvin Plan. According to Delegate Holland:

The problem with Mr. Melvin’s plan is: initially, someone is picked by a commission. The names are submitted to the governor, and that person is then appointed to the office. . . [T]he basic objection I have is that we just feel we couldn’t get an unbiased commission, that the commission would pick the first candidate.<sup>84</sup>

Similarly, Delegate Davis responded to the Melvin Plan by insisting that “any select committee’s going to be a committee of the establishment.”<sup>85</sup>

Plaintiffs in *Brown* are criticized for making an “unsupported leap” based on “statements by individual delegates.”<sup>86</sup> This highlights the underlying problem with the majority opinion’s handling of the Transcripts: delegates critical of a vetting committee are spuriously grouped with those supporting near-unrestrained gubernatorial authority over judicial nominations, and Delegate Joyce’s fleeting proposal is depicted as one of two competing visions during the Art. II, § 8 deliberations, despite a very different debate having emerged at the outset of the proceedings. A thorough reading of the Transcripts confirms what the dissent describes as the framer’s intent to “change the 1889 Constitution and *limit* the governor’s appointment power.”<sup>87</sup> Put another way, limiting gubernatorial authority was the starting point for most delegates.

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81. *Id.* at 1109.

82. *Id.* at 1091.

83. *Id.* at 1095.

84. *Id.* at 1092.

85. FEB. 29 VERBATIM TRANSCRIPT, *supra* note 70, at 1093.

86. *Brown v. Gianforte*, 488 P.3d 548, 559 (Mont. 2021).

87. *Id.* at 568 (McKinnon, J., dissenting).

*B. Ratification-Era Documents*

Had the *Brown* majority considered key ratification-era documents, it would necessarily have to explain why its central holding was different from the information presented to voters in 1972. The voter pamphlets establish that Montanans expected Art. VII, § 8 to produce a merit selection process with limited gubernatorial influence.

Only the dissent in *Brown* opinion considered information consumed by Montana voters in the Spring and Summer of 1972. Most notably, McKinnon spotlights the Voter Information Pamphlet's explanation of Art. VII, § 8:

When there is a vacancy (such as death or resignation) the governor appoints a replacement but does not have unlimited choice of lawyers as under the 1889 constitution. He must choose his appointee from a list of nominees and the appointment must be confirmed by the senate—a new requirement.<sup>88</sup>

This alone could demonstrate the ratifiers intended for a merit selection process. However, if there were lingering doubt, the dissent missed an opportunity to invoke the Roeder Pamphlet for additional clarification:

Under the proposed Judicial Article, the Governor's choice of men to fill vacancies will be limited. He will have to designate his nominee from a *list of nominees* selected by a process to be prescribed by law. Unlike the present system, the Governor's choice is then subject to confirmation by the Senate. This method of filling vacancies is a modified type of *merit selection*.<sup>89</sup>

Meanwhile, the Neely Pamphlet did not elaborate on the phrase “nominees selected in a manner provided by law.”<sup>90</sup> This may have been the product of its main shortcoming: “Unlike both the Voter Information Packet and the Roeder Pamphlet, Neely's work only explains some provisions instead of going through each and every one.”<sup>91</sup> Still, two out of three important ratification documents indicate that voters understood that a list of judicial nominees would be one-step removed from the governor; and one pamphlet explicitly referenced merit selection.

News coverage of the ratification campaign is consistent with the language of voter education material. For example, shortly after adjournment, 1972 Convention staff prepared a short summary of each article of the new constitution for publication in major Montana newspapers. The overview of Art. VII provided to the press notes that, in the event of a judge's death or

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88. *Id.* at 569 (quoting PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION 12–13 (1972)).

89. RICHARD ROEDER, THE PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA 4 (1972).

90. GERALD NEELY, A CRITICAL LOOK: MONTANA'S NEW CONSTITUTION 27 (1972).

91. Stockton, *supra* note 41, at 145.

resignation, “the governor must select a replacement *from a list* of candidates as provided by law and confirmed by the senate.”<sup>92</sup> Newspapers expanded educational outreach with in-depth overviews of each article of the proposed constitution. According to Art. VII coverage, voters could expect a merit-based system that might eliminate political horse-trading:

Judicial appointments, occasionally succulent political plums, may be plucked permanently from the spoils system orchards under the Montana constitution. . .

Delegates came up with a system combining appointment and election that could insulate the courts more from politics. . .

An independent committee, created by the legislature, will recommend a list of several attorneys to fill mid-term vacancies on the supreme and district courts. . .

The Governors are now not required to go through any screening process but some have voluntarily. They may appoint a lawyer and sometimes reward political friends. . .

The system of selection was a compromise between opposing factions favoring appointments and those wanting elections.”<sup>93</sup>

That article was published in newspapers under the headlines: “State Judiciary: No More Plums”<sup>94</sup>; “Judicial politics may be eliminated”<sup>95</sup>; and “Constitutional Proposal Helps Insulate Courts From ‘Politics.’”<sup>96</sup> In the weeks approaching the election, another Art. VII summary stipulated the following:

The proposed new judicial article would continue election of judges but add a combination of merit selection and merit retention to give the average citizen more say in choosing his judges. . .

The new constitution would include a “merit selection” plan aimed at minimizing politics by making the governor make appointments from a list of nominees. . .

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92. *Convention Staff Summarizes New Constitution*, HELENA INDEPENDENT RECORD, Mar. 26, 1972; see also *Highlights of the proposed constitution*, MONTANA STANDARD, Mar. 26, 1972 (emphasis added).

93. Charles S. Johnson, *New Constitution Alters State Judicial Selections*, MISSOULIAN, Mar. 28, 1972.

94. Charles S. Johnson, *State Judiciary: No More Plums*, HELENA INDEPENDENT RECORD, Mar. 28, 1972.

95. Charles S. Johnson, *Judicial politics may be eliminated*, BILLINGS GAZETTE, Mar. 28, 1972.

96. Charles S. Johnson, *Constitutional Proposal Helps Insulate Courts From “Politics,”* GREAT FALLS TRIBUNE, Mar. 29, 1972.

Although details would be left to the law, merit selection backers envision an independent nominating commission which would screen potential judicial appointees and provide the governor with a list of qualified nominees.<sup>97</sup>

Assuming constitutional intent depends on the interpretation of those who ratified the document, any present or future attempt to dissolve a merit selection process is a departure from a modern originalist's conception of the Montana Constitution.

### C. History

The embrace of merit selection did not occur in a vacuum. Montana was part of a national movement to withdraw state judiciaries from the political arena. Delegates approached the 1972 Convention predisposed to ideas bolstering a merit selection process, specifically the need for a judicial nominating commission to restore principles of judicial independence and limit executive interference. Language in the materials prepared in anticipation of a constitutional convention are a manifestation of this national evolution of state judiciaries.

#### 1. National Merit Selection Movement

State-level reforms were defined by four national waves. First, fresh off colonial rule, states minimized executive power over judicial selections by transferring that authority to legislatures through direct appointments or confirmation votes.<sup>98</sup> The rise of Jacksonian Democracy during the Nineteenth Century engendered distrust of judicial power and demands for democratic accountability, which resulted in many states turning to judicial elections—by the mid-Nineteenth Century, the “partisan judicial elections movement caught fire.”<sup>99</sup> Populist-Progressive Era reformers instilled more independence in the judiciary, a branch of government then-perceived as industry friendly and unwilling to embrace post-industrial reforms.<sup>100</sup> Party bosses were considered part of this problem, motivating states to shift to nonpartisan recall elections.<sup>101</sup> Finally, reformers in the Twentieth Century grew increasingly concerned that judicial elections had overly politicized courts, compromised their independence, and produced unqualified judges; in turn, many states moved back to an appointment system, but incorporated judicial nominating commissions to ensure judicial independence, qualified

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97. Dennis E. Curran, *New document challenges judges*, MONTANA STANDARD, May 22, 1972; see also Dennis E. Curran, *Choice Allowed for Judgeships*, MISSOULIAN, May 22, 1972.

98. CHARLES GARDNER GEYH, WHO IS TO JUDGE? THE PERENNIAL DEBATE OVER WHETHER TO ELECT OR APPOINT AMERICA'S JUDGES 28–29 (2019).

99. *Id.*

100. *Id.*

101. *Id.* at 34–37.

judges, and a means to keep partisan politics at bay.<sup>102</sup> Never was there a national movement to entrust governors with greater appointment authority.

In 1940, Missouri instituted its system of judicial selection: gubernatorial nominations of candidates submitted by an impartial commission, followed by a general election in the subsequent election and retention elections at the end of each term.<sup>103</sup> It was soon known as the “Missouri Plan.” Over the course of roughly five decades, 14 other states adopted some version of the Missouri Plan that incorporated three main elements: a judicial nominating commission; gubernatorial appointment of nominees supplied by the commission; and periodic retention elections.<sup>104</sup> Along the way, another 10 states incorporated judicial nominating commissions while foregoing judicial retention elections.<sup>105</sup> Four other states opted for nominating commissions combined with subsequent competitive elections.<sup>106</sup>

The Montana Legislature ushered in its merit-based system at the peak of this national movement.<sup>107</sup> By 1965, just six states embraced some form of the Missouri Plan. When the Missouri Plan arrived in Montana in 1973, 16 states had adopted a system of merit selection for some or all judicial offices. By 1980, half of the states were relying on merit selection. An additional seven states rounded out the 1980s and 1990s. Since then, in addition to Montana, only two other states eliminated nominating commissions—all within the preceding eight years.<sup>108</sup>

## 2. *Convention Preparation Material*

Long before the 1972 Convention, the national movement for merit selection permeated Montana’s legal and political communities. The Legislature considered a judicial nominating commission requirement as early as 1945.<sup>109</sup> In 1957, a bill to establish a merit selection process was narrowly defeated in the House by a 46–44 vote.<sup>110</sup> Renewed efforts in 1963 and 1967 saw some success—including passage in the House—but it was never quite enough to reach the governor’s desk.<sup>111</sup>

102. *Id.* at 37–41.

103. HERBERT M. KRITZER, JUDICIAL SELECTION IN THE STATES: POLITICS AND THE STRUGGLE FOR REFORM 21–22 (2020).

104. *Id.* at 22–24.

105. *Id.* at 24.

106. *Id.*

107. *See* Appendix, *Infra*.

108. KRITZER, *supra* note 103, at 26.

109. JUDICIAL SUBCOMMITTEE, REPORT TO THE MONTANA CONSTITUTION REVISION COMMISSION, OCCASIONAL PAPERS, MONTANA CONSTITUTIONAL CONVENTION 11 (Mont. Nov. 20, 1969).

110. SANDRA R. MUCKELSTON, THE JUDICIARY 148 (Mont. Constitutional Convention Comm’n, Constitutional Convention Study No. 14, 1971).

111. JUDICIAL SUBCOMMITTEE, *supra* note 109, at 11.

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Committees tasked with studying judicial selection and reporting findings to 1972 Convention delegates consistently endorsed some variation of a merit system. In 1966, the Montana Citizens Conference for Court Improvement was formed, which laid out minimal requirements to improve the state's judiciary:

The nonpartisan election system of selecting the judges has not succeeded in removing the Montana judiciary from political pressures and uncertainties. To succeed in bringing the lawyers best qualified for judicial office to the bench of this state, selection of judges should be *based entirely upon merit*.<sup>112</sup>

The well-known “Montana Plan”—a proposed reorganization of the state's judiciary that included selection via nominating commission—originated at the Conference.<sup>113</sup> “At least 15 people testified in favor of the [Montana] Plan, including the president of the Montana Bar Association, the Chief Justice of the Montana Supreme Court, a Montana Federal District Court Judge, and two Montana District Court Judges.”<sup>114</sup> Similarly, in 1969, the Judicial Reform Committee reported its recommendations to the Montana Constitution Revision Commission:

The legislature would be able to provide methods of selection other than election for members of the judiciary, thus removing any constitutional road block to the legislature adopting, if it sees fit, the so-called Missouri Plan, or some variant thereof, for judicial selection. [The subcommittee does not believe the details of such a plan should be placed in the constitution, although the constitution should permit the legislature to adopt a merit system of selection, and not require election of judges].<sup>115</sup>

There does not appear to be a study presented to delegates or officials during this period that endorsed a purely executive appointment system, despite that being used at the time by the federal government, four states, and one territory.<sup>116</sup>

Other documents prepared in anticipation of the 1972 Convention indicate the Missouri Plan was rising on the agenda. In 1971, the Legislature formed the Constitutional Convention Commission to “prepare essential material for the Convention.”<sup>117</sup> *The Judiciary* report included a lengthy discussion on the advantages and disadvantages of merit-based appointment systems;<sup>118</sup> additionally, the report included a copy of the Missouri Plan in

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112. Robert Sullivan, *Many Things Unchanged in Judiciary Article*, GREAT FALLS TRIBUNE, May 7, 1972.

113. Jean M. Bowman, *The Judicial Article: What Went Wrong?*, 51 MONT. L. REV. 2, 2 (1990).

114. *Id.*

115. JUDICIAL SUBCOMMITTEE, *supra* note 109, at 16.

116. MUCKELSTON, *supra* note 110, at 141.

117. *Id.* at iii.

118. *Id.* at 149–54.



the appendix.<sup>119</sup> The report cautioned that recent failures to enact merit selection “illustrate[ ] what could occur if a constitution were to leave the method of judicial selection to legislative dictate. Partisan issues can overshadow the procedures necessary to maintain an efficient, qualified judiciary.”<sup>120</sup>

*The Judiciary* report included descriptions of other systems, including executive appointments without a screening process beyond Senate confirmation.<sup>121</sup> But, as the report showed, critics of executive-centric systems offered ominous warnings:

Far from divorcing the judiciary from politics. . . political considerations may increase under the appointive method. The appointing official is a political leader subject to the same political pressures as party officials, and he may be encouraged to enlarge his political organization by astute trading of judgeships and judicial patronage. Some critics claim that political considerations may narrow the field from which the judges are chosen if judgeship is being awarded on the basis of faithful party service.<sup>122</sup>

The report also included criticisms of the Missouri Plan, but the committee provided a response to each point of criticism. For example, in response to claims the commissions would be beholden to the governor, it suggested bipartisan representation on the commissions to “prevent the governor from ‘railroading’ his choice through the commission.”<sup>123</sup> Perhaps tellingly, *The Judiciary* report did not respond to [any] criticisms of other systems.<sup>124</sup>

The notion of merit selection occupied the minds of delegates as they prepared for the 1972 Convention. On October 5, 1971, the American Association of University Women hosted a meeting and distributed a questionnaire to delegates, asking: “How would you improve the judicial system?”<sup>125</sup> Fourteen delegates filled out the survey, of which ten contemplated a new system for selecting judges.<sup>126</sup> Seven approved some form of merit selection; four explicitly named the Missouri Plan, while the remaining three embraced a “screening,” “bipartisan,” or “filtering” committee to submit names to the governor.<sup>127</sup> Only three delegates endorsed appointments without mentioning a merit-based selection committee, of which just one explicitly entrusted the governor with that authority—another advo-

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119. *Id.* at 319–22.

120. *Id.* at 149.

121. MUCKELSTON, *supra* note 110, at 141–43.

122. *Id.* at 142.

123. *Id.* at 150.

124. *Id.* at 131–59.

125. AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, QUESTIONNAIRE FOR CON-CON CANDIDATES, LUCILE SPEER PAPERS 1 (Oct. 5, 1971).

126. *Id.*

127. *Id.*

cated for legislative appointments, while the last failed to provide any specifics beyond a system of appointments.<sup>128</sup>

The national movement for merit selection was front and center during the judicial selection deliberations at the 1972 Convention. In his presentation of the minority proposal on the convention floor, Delegate Berg provided a national overview of the five systems of judicial selection currently in use. Although judicial elections were still predominantly used by the states, Berg noted “that states [had] most recently turned” to the merit system.<sup>129</sup> The minority proposal, which served as the foundation for a new judicial article, has been described as a “modified Missouri Plan.”<sup>130</sup> And while Art. VII, § 8 did not ultimately include language explicitly creating a judicial nominating commission, the materials prepared for and by delegates supports the premise of the *Brown* dissent—the framers merely “left the details of the nomination selection process to the legislature” out of a concern that “there needed to be flexibility to address changing circumstances.”<sup>131</sup>

## V. CONCLUSION

Early in the Art. VII, § 8 deliberations of the 1972 Convention, just after Delegate Berg’s initial pitch for the minority proposal, Delegate Schiltz—another member of the Judiciary Committee—cautioned against gubernatorial encroachment on judicial independence:

[I]n this State of Montana. . . where we have strong corporate influences; where, if I can elect a governor and through that office, nominate and appoint the district and supreme court judges, I can run this state. . . I can own it.<sup>132</sup>

These words have been quoted in the *Brown* dissent<sup>133</sup> and academic scholarship<sup>134</sup> alike. Tom Judge, winner of the 1972 gubernatorial campaign and supporter of the new constitution, described a similar sentiment among voters eager to reign in corporate influence over Montana government:

Before [the 1972 Convention], it was like the corporations run the state and what could we do about it? There was a whole different attitude that came in that said, “It’s time the people took over Montana. It’s our time to decide our own destiny. We’re going to pass a modern constitution[”]. . .

128. *Id.*

129. FEB. 26 VERBATIM TRANSCRIPT, *supra* note 58, at 1022–23.

130. See Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. APP. PRAC. & PROCESS 47, 65 (2015).

131. *Brown v. Gianforte*, 488 P.3d 548, 568 (Mont. 2021) (McKinnon, J., dissenting).

132. FEB. 26 VERBATIM TRANSCRIPT, *supra* note 58, at 1026.

133. *Brown*, 488 P.3d at 567 (McKinnon, J., dissenting).

134. Johnstone, *supra* note 130, at 65.

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[T]he idea of bringing government back to the people and letting the people know they have a voice, that they count, the governor cares what they think, their voice makes a difference—that never took place before the '60s. The corporations ran the state. Boy, it was a whole change . . . .<sup>135</sup>

The Transcripts, ratification-era documents, and preliminary convention material all confirm this was hardly an unusual perspective during that pivotal period of Montana's history. From this, one could expect delegates to limit executive authority over the judicial selection process. And given the national movement for merit selection, it could reasonably be expected that some type of judicial nominating commission would take its place.

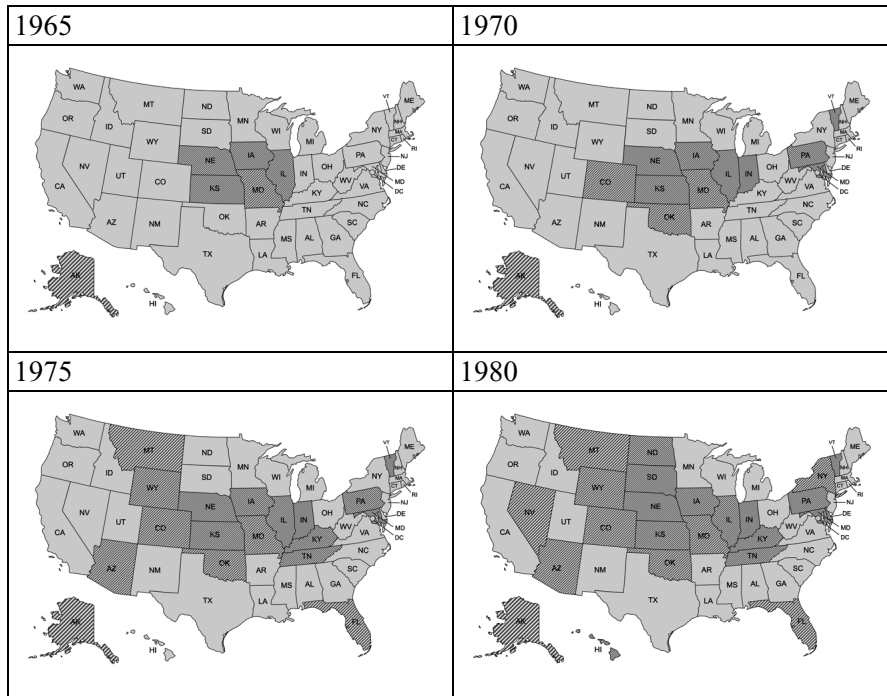
For these reasons, this Comment takes the position that SB 140 and SB 402 violate the constitutional intent of Art. VII, § 8. Although SB 140 was its focus, this analysis is still pertinent to SB 402 considering the underlying intent of that bill—*de facto* gubernatorial control of the Commission. Judicial review of SB 402 may require additional textual considerations, but the Court would confront many of the same issues it did in *Brown*. Though it is unlikely, the Court should revisit the constitutionality of this legislative activity to ensure a meaningful and independent Montana judiciary for the foreseeable future.

Unfortunately, the majority opinion is defined by some key missteps. Most notably, it provides a myopic reading of the Transcripts, particularly in its focus on the largely unimportant amendment offered by Delegate Joyce. There was a considerable, but not all-encompassing, consensus among delegates to reduce executive influence and the role of political calculations in judicial nominations. The dissent comes closer to an appreciation for what the framers and ratifiers envisioned, but it too could have added additional source material. The national movement for merit selection was closing in on Montana when a new constitutional convention was called. The Transcripts and materials prepared for delegates reveal the extent to which the Missouri Plan and similar merit selection proposals influenced their ideas going into the 1972 Convention. That is, if they ratified the constitution, Montanans would be the next state to adopt merit selection. The 1973 Legislature fulfilled that expectation. If nothing else, let this analysis serve as a call for the Court to consider key historical sources beyond the Transcripts in future, similar constitutional challenges.

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135. Written Interview by Bob Brown with Tom Judge, Former Governor of the State of Montana, Missoula, Mont. 15–16 (July 8, 2006).

FIGURE 1. STATES WITH MERIT-BASED JUDICIAL SELECTION PROCESS.<sup>136</sup>



The maps indicate all states, from 1965 through 1980, that adopted the Missouri Plan or another merit-selection process that includes a judicial nominating commission for some or all judicial vacancies.

136. Timeline of merit-based judicial selection systems derived data presented in KRITZER, *supra* note 103, at 20–24.

