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Cover Page Footnote

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JUDICIAL SELECTION THAT FAILS THE SEPARATION OF POWERS

Stephen J. Ware[*]

Executive power should be constrained by checks and balances. The United States' long and strong tradition of concerns about executive power, and its complementary tradition of Madisonian checks and balances on and to the executive, include the selection of supreme court justices. Neither the U.S. Constitution nor the constitution of any state places solely in the executive the power to appoint a justice to begin a new term on the (federal or state) supreme court. However, several states fail to constrain gubernatorial power in selecting justices to finish a term already started by another justice and these interim appointments are the norm in several such states. This Article argues that states with interim supreme court appointments should subject the governor's appointment power to a nominating commission or a confirmation vote. And this Article argues that the urgency of adopting such a constraint on the governor is highest in states—Minnesota, Georgia, and Oregon—in which the supreme court acquires most of its new members through interim appointment, and in which an interim appointment nearly always leads to a safe multi-term position on the supreme court. Supreme court appointments are simply too important to leave to the unchecked discretion of a single person.

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Executive power should be constrained by checks and balances. This familiar principle is often associated with the Founders of the United States, many of whom believed they had suffered under tyrannical executives.[1] And worries about power concentrated in the executive did not end long ago but have continued at least through the presidency of Donald Trump.[2]

While the President is more powerful, and thus potentially more dangerous, than the governor of a state, both federal and state constitutions wisely constrain executive power over important matters.[3] For instance, neither the U.S. Constitution, nor the constitution of any state, places solely in the executive the power to appoint a justice to begin a new term on the supreme court. However, several states fail to constrain gubernatorial power in selecting justices to finish a term already started by another justice.[4] And such interim supreme court appointments are common in several states that fail to constrain gubernatorial discretion over them. In fact, a few such states have made interim appointments the norm—the usual way the supreme court acquires a new member. Examples of such states include Minnesota, Georgia, and Oregon. In each of these states, the supreme court acquires most of its new members through interim appointment.[5]

The prevalence of unconstrainted interim appointments to these states' supreme courts should be distinguished from recess appointments to the federal courts, which expire at the end of the next session of the senate, and which can be prevented entirely by a senate keeping its recesses short.[6] In other words, the Senate constrains the president's power to make recess appointments and doubly constrains the president's power to make recess appointments that last more than a year or two. In contrast, interim supreme court appointments in Minnesota, Georgia, and Oregon are not legally constrained by anyone and nearly always lead to a safe multi-term position on the supreme court.[7] So, in these states unconstrained executive power is the usual method of filling tremendously important positions with individuals who then typically hold these positions for a very long time.

This failure to check the governor's power to appoint supreme court justices should be corrected. Supreme court appointments are simply too important to leave to the unchecked discretion of a single person. Accordingly, this Article argues that states with interim supreme court appointments should subject the governor's appointment power to a nominating commission or a confirmation vote.

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1. *See infra* notes 8–10 and accompanying text.
2. *See infra* notes 12–19 and accompanying text.
3. *See infra* note 11 and accompanying text.
4. *See infra* notes 78–86 and accompanying text.
5. *See infra* note 87–89 and accompanying text.
6. *See infra* notes 22–25 and accompanying text.
7. *See infra* note 90–92 and accompanying text.

This Article has three parts. Part I notes the United States' long and strong tradition of concerns about executive power, and its complementary tradition of Madisonian checks and balances on and to the executive, including in the selection of supreme court justices. Part I shows how this longstanding consensus is evidenced by the constitutions of all fifty states and of the United States, none of which places solely in the executive the power to appoint justices to begin new terms on the (state or federal) supreme court. Part I details how each state constitution's method of selecting a justice to begin a new term on the supreme court avoids the problem of unconstrained gubernatorial power.

In contrast, Part II shows that thirteen states' constitutions and statutes fail to constrain executive power in selecting justices to *finish a term* already started by another justice. That is, thirteen states fail to constrain the governor's interim appointment power with either a nominating commission or a confirmation vote. So, Part II argues that these states should adopt such a constraint. And Part II argues that the urgency of doing so is highest in states—Minnesota, Georgia, and Oregon—in which the supreme court acquires most of its new members through interim appointment, and in which an interim appointment nearly always leads to a safe multi-term position on the supreme court.

Part III briefly concludes with an example of the mischief that can arise when governors' interim supreme court appointments are unconstrained.

I. CONSTRAINING EXECUTIVE POWER IN JUDICIAL SELECTION

A. Constraining Executive Power

The evils of unconstrained executive power contributed to the American Revolution, according to the Declaration of Independence, which asserted that "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states."[8] Indeed, a "pronounced strain of 'tyrannophobia'—a fear of dictatorship—can be traced through the Founding Era."[9] And since the Founding, "constitutional design has been largely oriented to resisting tyranny," starting with the Madisonian emphasis on "separation of powers coupled with

8. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

9. Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 70 (2019) (quoting Eric A. Posner & Adrian Vermeule, *Tyrannophobia*, in COMPARATIVE CONSTITUTIONAL DESIGN 317, 317–18 (Tom Ginsburg ed., 2012) (defining tyrannophobia) and citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 134–43 (1998 ed. 1998) (detailing how colonial experience and an "unaltered Whig fear of magisterial power" informed the framing of state constitutions that imposed stringent restrictions on executive power)); *see also* Aziz Huq Tom Ginsburg, *How to Lose A Constitutional Democracy*, 65 UCLA L. REV. 78, 107 (2018) ("Eric Posner and Adrian Vermeule have diagnosed what they view as an unhealthy dose of 'tyrannophobia' in American political culture. They trace this fear of executive tyranny back to concerns about the British throne, which infused the Founding period. . . . ").

checks and balances,"[10] central to the U.S. Constitution. Both federal and state constitutions subject executive power over important matters to checks by the legislature and judiciary.[11]

Since the Founding Era, executive branches at the state and especially federal level have grown with the growth of the administrative state,[12] and some thoughtful commentators read the results of this growth as refuting longstanding fears of power concentrated in the executive, which they characterize (derisively?) as "tyrannophobia."[13] But others' worries about power concentrated in the executive continued throughout U.S. history,[14] and

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10. Tom Ginsburg et. al., *The Coming Demise of Liberal Constitutionalism?*, 85 U. CHI. L. REV. 239, 248–49 (2018).

11. *See, e.g.*, JEFFREY S. SUTTON ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE, 761, 766, (3d ed. 2020); *id.* at 761 ("[M]any state government systems bear significant similarities to the federal government's structure and organization."). Many state constitutions further constrain governors beyond analogous constraints on the president.

> The federal constitution deposits all executive authority in the President of the United States. As a result, the President nominates his cabinet members, including the Attorney General, the Secretary of State, and the Secretary of the Treasury. In a real sense, this is a "unitary" executive model, because the President retains control over the important executive breach officials.

Id. at 766. In contrast, "many states have diverged from the federal model by having other elected statewide officials, particularly an independently elected state attorney general." *Id. See also* Steven G. Calabresi, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1697 (2009) ("Many states . . . have diverged from the federal model [of a unitary executive] by having other elected statewide officials, particularly an independently elected state attorney general."); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 102 (1998) ("Executive branches of state governments often have a more diffused assignment of authority. States commonly elect several members of the executive branch, affording independence to other executive officers in addition to the governor. This dispersal acts as an internal check on the state executive power.").

12. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 184 (2010) ("The trend of presidential power over two centuries resembles a graph of GDP of the stock market—a gradual trend upward but with cyclical peaks and valleys along the way."); *id.* at 185 ("Historians usually invoke the cold war and the rise of the administrative state as the explanatory factors giving rise to the imperial presidency.").

13. *Id.* at ch. 6. "[L]iberal legalists overlook the importance of de facto constraints [on the executive] arising from politics, and thus equate a legally unconstrained executive with one that is unconstrained *tout court*. The horror of dictatorship that results from the fallacy and that animates liberal legalism is what we call 'tyrannophobia.'" *Id.* at 176.

> Modern presidents are substantially constrained, not by old statutes or even by Congress and the courts, but by the tyranny of public and (especially) elite opinion. Every action is scrutinized, leaks from executive officials come in a torrent, journalist are professionally hostile, and potential abuses are quickly brought to light. The modern presidency is a fishbowl.

Id. at 201.

14. *Id.* at 184 ("Each powerful president was accused, at one time or another, of Caesarism (as were many weak presidents)."); *id.* at 188 ("[T]yrannophobia might be a culturally specific phenomenon, unique to the United States. It is difficult to think of another country where fear of the executive is such an important part of political discourse.").

intensified through the presidency of Donald Trump,[15] including his role in the 2021 Capitol Insurrection, in which "a mob incited by Mr. Trump stormed the Capitol," delaying the transfer of power to his successor.[16] While critics of "tyrannophobia" writing before Trump's rise to power took comfort in observing that "presidents have obeyed basic constraints, such as the need to stand for election and respect the results,"[17] former President Trump continues to dispute the outcome of the 2020 election he lost in what has come to be widely known as the "Big Lie."[18] In contrast, Congress and the courts stood firm in dismissing Trump's challenge to the election results and to the peaceful transfer of power.[19]

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15. *See, e.g.*, David Landau et al., *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1188–89 (2020):

> There have been only a few moments when the threat of executive tyranny has seemed real. But according to some observers, we are now living in such a moment. They point to President Trump's populist rhetoric; his attacks on the media and governmental institutions such as the federal judiciary, FBI, and Department of Justice; and his willingness to go to great lengths to subvert an investigation into his own possible misconduct, among other warning signs. Prominent scholars have noted similarities between the rhetoric and actions of Trump and those of authoritarian leaders abroad, arguing that Trump has "clear authoritarian tendencies."

16. Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 11, 2021), https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html; *see also* United States v. Munchel, 521 F. Supp. 3d 54, 55–56 (D.D.C. 2021):

> On January 6, 2020, a large mob stormed and breached the United States Capitol. Shortly thereafter, the government charged [defendants] with offenses stemming from their alleged participation in the January 6 events . . . . [After they] traveled to Washington, D.C. on January 4, 2021, to attend a "stop the steal" rally.

17. POSNER & VERMEULE, *supra* note 12, at 186–87.

18. *See, e.g.*, Jill Colvin & Steve Peoples, *Whose 'Big Lie'? Trump's Proclamation a New GOP Litmus Test*, AP (May 3, 2021), https://apnews.com/article/politics-campaign-2016-election-2020-government-and-politics-D428d42d4d3fdfe59c560b6fadbbc70 ("Donald Trump and his supporters are intensifying efforts to shame—and potentially remove—members of their party who are seen as disloyal to the former president and his false claims that last year's election was stolen from him."); *see also* Glenn Thrush, *Prosecutors describe Trump's "Big Lie" of a stolen Election*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/live/2021/02/10/us/impeachment-trial/prosecutors-describe-trumps-big-lie-of-a-stolen-election; *see also* Zeke Miller, et al., *Trump tries to leverage power of office to subvert Biden win*, AP, (Nov. 20, 2020) https://apnews.com/article/election-2020-joe-biden-donald-trump-local-elections-arizona-7174555c2545f8afb69f0ce2ac0b2156

> [Describing] mounting criticism that Trump's futile efforts to subvert the results of the 2020 election could do long-lasting damage to democratic traditions. . . . [And] an unprecedented attempt by a sitting president to maintain his grasp on power, or in failure, to delegitimize his opponent's victory in the eyes of his army of supporters.

19. *See, e.g.*, Jeremy Herb, et al., *Congress completes electoral count, finalizing Biden's win after violent delay from pro-Trump mob*, CNN (Jan. 7, 2021, 3:41 AM), https://www.cnn.com/2021/01/06/politics/2020-election-congress-electoral-college-vote-count/index.html

> The Senate voted 93 to 6 to dismiss the objection raised by Republicans to Arizona's results, and 92 to 7 to reject the objection to Pennsylvania. In the House, a majority of

So, these recent events support and even vindicate the United States' long and strong tradition of concerns about executive power, and its complementary tradition of Madisonian checks and balances on and to the executive. Moreover, even critics of "tyrannophobia" have not, to my knowledge, called for unconstrained executive power in the selection of judges, especially supreme court justices. So, leaving the selection of supreme court justices to the unchecked discretion of a single person seems widely opposed in the United States now,[20] as it has apparently been throughout U.S. history. And this longstanding consensus, the following pages explain, is evidenced by the constitutions of all fifty states and of the United States, none of which places solely in the executive the power to appoint justices to begin new terms on the (state or federal) supreme court.

B. Constraining Executive Power in Selecting the Supreme Court of the United States

The U.S. Constitution subjects the President's power to appoint Supreme Court justices to the requirement of confirmation by the United States Senate,[21]

> Republicans voted to object to the results, but they were still soundly rejected, 303 to 121 for Arizona and 282 to 138 for Pennsylvania, with all Democrats in opposition[;]

see also Jennifer Nou, *Constraining Executive Entrenchment*, 135 HARV. L. REV. F. 20 (2021) ("By January 6, 2021, Trump and his allies had filed at least sixty-two lawsuits aiming to overturn election results in swing states that Trump had narrowly lost. No judge agreed with the claim that the election had been 'rigged' or plagued by widespread fraud."). An example is Donald J. Trump for President, Inc. v. Sec'y of Pa, 830 F. App'x 377, 381 (3d Cir. 2020) ("[C]alling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.") (Bibas, J.). This opinion was written by a judge appointed by President Trump for a three-judge panel in which the other two judges were appointed by a Republican president. *See* Tom Hals, *In fresh blow to Trump, U.S. court rejects Pennsylvania election case*, REUTERS (Nov. 27, 2020),
https://www.reuters.com/article/uk-usa-election-lawsuit-pennsylvania-idUKKBN2872BA.

20. *See Presidential Commission on the Supreme Court of the United States, Final draft report*, THE WHITE HOUSE (Dec. 2021) at 124–25, 140–41, 143, https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf (assuming continuation of Senate confirmation when discussing the implementation of term limits, and even considering a heightened requirement: a supermajority). Admittedly, the Commission does suggest that if justices are term-limited then a mechanism must exist to address the possibility of a Senate confirmation impasse to ensure that each president has the opportunity to appoint a particular number of Justices. *See id.* at 140–41:

> Some have suggested that a constitutional amendment should provide that a nominee will be deemed confirmed if the Senate does not vote to disapprove within a specified time, such as four months after nomination. (This proposal is somewhat similar to Madison's initial proposal at the Constitutional Convention that judges be deemed confirmed if they were not rejected by a two-thirds vote of the Senate by a date certain, a proposal that the Convention rejected.)

21. U.S. CONST. art II, § 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law[.]").

and thus avoids the problem of concentrating supreme court appointment power solely in the executive. While the President can make recess appointments to the federal courts without consent of the Senate,[22] these appointments expire at the end of the next session of the Senate,[23] and can be prevented entirely by a senate keeping its recesses short.[24] So, the Senate constrains the President's power to make recess appointments at all, and doubly constrains the President's power to make them last more than a year.[25] In short, presidents cannot significantly avoid the confirmation requirement.

Supreme Court nominees rarely lose confirmation votes, especially when the Senate is controlled by the President's political party.[26] So, one might acknowledge the power of the confirmation constraint on the President when the Senate is controlled by the opposing party while questioning it when the Senate is controlled by the President's party. But a Senate that chooses, even for political reasons, to vote in favor of the President's nominee is nevertheless

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22. *Id.* ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."). By the end of 1823, five recess appointments had been made to the Supreme Court while twenty had been made to the inferior federal courts. Note, *Recess Appointments to the Supreme Court-Constitutional But Unwise?*, 10 STAN. L. REV. 124, 132 (1957). *But see* Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 UNIV. PA. J. CONST. L. 61, 114 (2006) ("Although supporters of presidential power are correct that recess appointments are a constitutionally created loophole to advice and consent, that loophole does not apply to Article III judges. The guarantees of Article III nullify the President's ability to circumvent the Senate in the case of judicial appointments.").

23. U.S. CONST. art. II, § 2 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

24. NLRB v. Canning, 573 U.S. 513, 527, 538 (2014) (interpreting the Recess Appointments power to be available only for Senate recesses of "substantial length," presumptively not less than ten days; "a [Senate] recess of more than 3 days but less than 10 days is presumptively too short to fall within the [Recess Appointments] Clause"); *id.* ("If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. And[, based on relatively consistent historical practice over time,] a recess lasting less than 10 days is presumptively too short as well."); *see also* Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 554 (2020) (explaining that the Supreme Court's *Canning* "ruling enables the Senate to easily block recess appointments by the President, as the Senate reportedly did during the August 2017 recess by holding pro forma sessions every three business days.").

25. No recess appointment to the Supreme Court of the United States has occurred since 1958. President Eisenhower named Potter Stewart to a recess appointment in 1958, and the following year the Senate confirmed Stewart. *See* Alexander M. Wolf, *Taking Back What's Theirs: The Recess Appointments Clause, Pro Forma Sessions, and A Political Tug-of-War*, 81 FORDHAM L. REV. 2055, 2102 (2013) ("[A]fter President Dwight Eisenhower made recess appointments to the Supreme Court, Senator Philip Hart introduced and passed a resolution expressing the Senate's disapproval of such appointments. Since then, no Supreme Court Justices have been recess appointed, and the number of judicial appointments has generally decreased.").

26. *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm (last visited Jan. 29, 2023).

serving the function of having other people—in fact, people accountable to the voters—share power with the President, so the important appointment decision does not rest with a single individual. And even a Senate controlled by the President's party may influence the President's choice of nominees—perhaps in the White House's pre-nomination consultations with same-party senators, or in the White House anticipating how same-party senators will respond to various possible nominees. So whatever party controls the Senate, the confirmation requirement can be expected, as Alexander Hamilton wrote, to "have a powerful, though, in general, a silent operation."[27] And sometimes same-party influence on the President is more open. For example, many suggest criticism from his own Republican Party contributed to President Bush withdrawing his nomination of Harriet Miers to the Supreme Court,[28] which was followed by Bush's nomination of reliably conservative Justice Alito. In sum, the confirmation requirement is a significant check on the president's power to appoint justices.

C. Constraining Executive Power in Selecting the Supreme Courts of the Fifty States

1. Overview

Much as the U.S. Constitution avoids the problem of concentrating Supreme Court appointment power solely in the President, all fifty states' methods of selecting justices to begin a new term on the state's supreme court avoid the

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27. THE FEDERALIST NO. 76 (Alexander Hamilton). In addition to deterring controversial nominations, the requirement of Senate confirmation may also lead executives to withdraw controversial nominations. Some suggest this is what led President Bush to withdraw Harriet Miers' nomination to the Supreme Court. *See, e.g.*, John Cochran, *A Troubled Nomination Implodes*, CQ WKLY (Oct. 29, 2005). Similarly, in Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee withdrew his name. At least one commentator attributes the withdrawal in part to the prospect of a "grilling" (i.e., "rough" questioning), before the state Senate. *See* Lynne Tuohy, *Court Saga Left Bruises, Balm*, HARTFORD COURANT (Mar. 17, 2007) at A1, https://www.courant.com/news/connecticut/hc-xpm-2007-03-17-0703170010-story.html; *see also* Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL'Y, 386, 423 (2008).

28. *See, e.g.*, Michael A. Fletcher & Charles Babington, *Miers, Under Fire from Right, Withdrawn as Court Nominee*, WASH. POST (Oct. 28, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102700547.html; *see also* Lissa Griffin & Thomas Kidney, *Comparative Judicialism, Popular Sovereignty, and the Rule of Law: The US and UK Supreme Courts*, 77 WASH. & LEE L. REV. ONLINE 323, 329 n.24 (2021) ("Harriet Miers, nominated by President George W. Bush to succeed Justice Sandra Day O'Connor, withdrew her own nomination after receiving criticism from both Republicans and Democrats.") (citing Timothy Williams, *Miers Withdraws Her Nomination*, N.Y. TIMES (Oct. 27, 2005), https://perma.cc/Y9XV-5QX5); John Cochran, *A Troubled Nomination Implodes*, CQ WKLY (Oct. 29, 2005); Eugene B. Meyer et al., *Resolved: The Constitution Is Designed for A Moral and Religious People and It Is Wholly Unsuited for the Government of Any Other*, 49 CONN. L. REV. 995, 1008 (2017) (statement of Professor John McGinnis) ("We saw a remarkable instance of [the Federalist Society's] power I might say, when George W. Bush was forced to withdraw Harriet Miers.").

problem of concentrating power solely in the governor. To select a justice to begin a new term on the state supreme court, all fifty states' constitutions provide one of three basic methods:

(1) Contestable Elections (21 states);[29]

(2) Democratic Appointment (17 states);[30] or

(3) the Missouri Plan, which is often touted as "merit selection" (12 states).[31]

Each of these methods of judicial selection avoids the problem of unconstrained gubernatorial power.

2. Contestable Elections

Contestable judicial elections avoid the problem of unconstrained gubernatorial power by placing selection power not in the governor, but "directly in the hands of the people, the voters."[32] Contestable elections are basic to democracy,[33] and all fifty states use them to select governors, legislatures, and some other state offices.[34] Twenty-one states' constitutions similarly provide for the initial selection of supreme court justices through contestable elections—that is, they allow multiple candidates to stand for election to begin a new term as a justice on the state's supreme court.[35] Contestable judicial elections are subject to many criticisms,[36] but concentrating selection power in the governor

29. *See* App. A.

30. *See* App. B.

31. *See* App. C.

32. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 753 (2009).

33. *See, e.g.*, Universal Declaration of Human Rights art. 21 (1948):

> Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. . . . The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures[;]

see also Jill I. Goldenziel & Manal Cheema, *The New Fighting Words?: How U.S. Law Hampers the Fight Against Information Warfare*, 22 U. PA. J. CONST. L. 81, 121 (2019) ("[F]ree and fair elections are fundamental to American democracy.").

34. *State and Local Government*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government/ (last visited Jan. 13, 2023):

> In every state, the Executive Branch is headed by a governor who is directly elected by the people. In most states, other leaders in the executive branch are also directly elected, including the lieutenant governor, the attorney general, the secretary of state, and auditors and commissioners. . . . All 50 States have legislatures made up of elected representatives . . . .

35. *See* App. A.

36. Perhaps the most common criticism is the risk of judges favoring litigants or lawyers who have contributed to the judge's election campaign. *See, e.g.*, Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 134 (1998) ("[T]he source of [judicial] campaign funds is primarily

is not among them. Even if a popular governor endorses a supreme court candidate, the people ultimately decide whether to vote for that candidate or an opponent.

3. Democratic Appointment

The second common method of judicial selection—democratic appointment—also avoids the problem of unconstrained gubernatorial power because democratic appointment systems divide the power to appoint judges among elected officials. One form of democratic appointment, found in the constitutions of Virginia and South Carolina, provides for supreme court justices to be appointed by the legislature.[37] This very traditional and longstanding form of democratic appointment plainly divides judicial selection power among elected officials, rather than concentrating it in the governor.[38]

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lawyers and litigants," and such contributions "risk both the reality of undue influence and the appearance of impropriety."); Stephen J. Ware, *Judicial Elections, Judicial Impartiality and Legitimate Judicial Lawmaking: Williams-Yulee v. The Florida Bar*, 68 VAND. L. REV. EN BANC 59, 76 (questioning "whether the public should trust the integrity of a system in which judges[] [or their] campaign committees accept contributions from lawyers or parties who then appear before the judge."). Another is the worry that judges who will lose their jobs if they lose re-election may hesitate to decide high-profile cases in unpopular ways. *See, e.g.*, Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133, 1150 (1997) (recounting that a California Supreme Court justice famously remarked that deciding controversial cases when facing reelection is like, "finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."). A third criticism of judicial elections is that "[i]t is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently." Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 5 (2006). *See id.* at 6 (denying "any correlation between the skills of a judge and the skills of a political candidate"). And a fourth criticism of judicial elections is that the ideological composition of the judiciary can change significantly from one election to the next, which can cause the content of the law to move sharply to the left or to the right after each election. *See, e.g.*, Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL'Y, 386, 406 (2008) (advocating the indirect democracy of a senate confirmation appointment process over the direct democracy of contestable elections); *id.*:

> [While judicial elections] embody the passion for direct democracy prevalent in the Jacksonian era[,] . . . senate confirmation exemplifies the republicanism of our Nation's Founders. The Framers of the United States Constitution devised a system of indirect democracy in which the structure of government mediates and cools the momentary passions of popular majorities. Senate confirmation strives to make judicial selection accountable to the people while protecting the judiciary against the possibility that the people may act rashly.

37. *See* App. B (13), (17). Thoughtful consideration of judicial selection in Virginia and, especially, South Carolina can be found in Constance A. Anastopoulo & Daniel J. Crooks III, *Race and Gender on the Bench: How Best to Achieve Diversity in Judicial Selection*, 8 NW. J. L. & SOC. POL'Y 174 (2013).

38. HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 134 (2d ed. 1998) ("[I]n the early years of the republic, state judicial appointments were usually placed under legislative control.");

And much as Senate confirmation of U.S. Supreme Court nominees divides judicial selection power among elected officials, so does subjecting the governor's state supreme court nominee to confirmation by the state senate or other democratically elected officials. This form of democratic appointment is provided by the constitutions of fourteen states, which subject the governor's supreme court nominee to confirmation by the state senate, by both houses of the legislature, or by other officials.[39] And much as requiring the President's nominee to win confirmation importantly constrains presidential power, even though votes denying confirmation are uncommon,[40] requiring the governor's nominee to win confirmation importantly constrains gubernatorial power, even though votes denying confirmation are uncommon.[41] Moreover, some governors' judicial nominees, in fact, lose confirmation votes. In recent years,

id. (explaining that the executive appointed judges, that was subject to legislative veto or "concurrence of executive councils."); Rachel Paine Caufield, *The Evolving Patchwork of Judicial Selection in the United States*, 53 THE ADVOC. (TEXAS) 85, 85 (2010) ("Eight of the thirteen original states granted one or both houses of their legislature the power to choose judges, two allowed for gubernatorial appointment with confirmation, two permitted gubernatorial appointment, and three provided for gubernatorial appointment with the consent of an executive council.")

39. *See* App. B.

40. *See supra* notes 26–28 and accompanying text.

41. *See, e.g.*, Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL'Y 386, 405–06, 417–19 (2008) (examining the two most recent votes for initial supreme court confirmation in each of twelve states and reporting that all twenty-four of the governors' nominees were confirmed, usually unanimously).

this occurred in several states including New York,[42] Connecticut,[43] Hawaii,[44] Kansas,[45] New Jersey,[46] and Utah.[47]

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42. Luis Ferre-Sadurni, *State Senate Rejects Nominee for Chief Judge in Defeat for Hochul*, N.Y. TIMES (Feb. 15, 2023), https://www.nytimes.com/2023/02/15/nyregion/hector-lasalle-chief-judge-vote.html ("the New York State Senate rejected Gov. Kathy Hochul's nominee to lead the state's highest court," Hector LaSalle, "vot[ing] against him 39 to 20, a defeat propelled by Democrats who opposed him because they believed he was too conservative and hostile to unions, abortion rights and other liberal values.").

43. Rick Rojas, *Connecticut Rejects Nominee for Chief Justice After Intense Battle*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/nyregion/connecticut-chief-justice-mcdonald-rejected.html (noting that Justice Andrew McDonald was nominated by the governor for chief justice, but "faced robust opposition mounted by Republicans angered over his role in a Supreme Court decision on the repeal of the death penalty and his relationship with the governor, Dannel P. Malloy, a Democrat[;]" McDonald was Malloy's general counsel before Malloy appointed McDonald to the supreme court).

44. Sophia McCullough & Ku'uwehi Hiraishi, *Senate Formally Rejects Gov. David Ige's Court of Appeals Nominee*, HAWAII PUBLIC RADIO (July 29, 2021, 5:29 PM) https://www.hawaiipublicradio.org/local-news/2021-07-29/senate-formally-rejects-gov-david-iges-court-of-appeals-nominee:

> The state Senate formally rejected Gov. David Ige's appointment of Daniel Gluck to the Hawai'i Intermediate Court of Appeals after Gluck expressed his desire to withdraw from the process. . . . [; testimony before the Senate Judiciary Committee] was not so much against Gluck as a judicial appointee, but against the nomination process that has left a lack of representation of women and persons of color on Hawai'i's highest courts. Critics questioned Ige's choice of Gluck, a white man, for the job, noting it's been 30 years since a Native Hawaiian was appointed to the appeals court and 20 since a Native Hawaiian was appointed to the Supreme Court.

45. Kansas Governor Laura Kelly, a Democrat, has had two nominees for the Kansas Court of Appeals lose confirmation votes in the Republican majority senate. The first of these was Judge Jeffry Jack, whose "nomination was doomed after political posts on his twitter feed from 2017 came to light. They included tweets containing vulgar language and criticism of President Donald Trump and other Republicans." John Hanna, *Kansas governor becomes 1st to have appeals judge rejected*, AP (May 14, 2019), https://apnews.com/article/b4c1f3aaa4004757ac922bce11204cf2. The second, Carl Folsom, lost confirmation votes in both 2020 and 2021 after senate Republicans expressed concern that the bulk of his experience was as a public defender. Titus Wu, *Gov. Kelly's Court of Appeals pick Carl Folsom rejected again by Kansas senators*, CJONLINE (Jan. 21, 2021, 12:22 PM), https://www.cjonline.com/story/news/politics/courts/2021/01/21/gov-laura-kelly-amy-cline-carl-folsom-confirmation-hearings-kansas-senators/4237877001/; Noah Taborda, *Senate rejects governor's nominee for Kansas Court of Appeals for a second time*, KANSAS REFLECTOR (Jan. 21, 2021, 7:00 PM) https://kansasreflector.com/2021/01/21/senate-rejects-governors-nominee-for-kansas-court-of-appeals-for-a-second-time/.

46. Statehouse Bureau Staff, *N.J. Senate Committee Rejects Gov. Christie's Supreme Court Nominee Phillip Kwon*, NJ.COM (Mar. 23, 2012, 1:43 AM), https://www.nj.com/news/2012/03/senate_committee_rejects_phill.html (stating that the Democratic-led Senate Judiciary Committee rejected Republican Governor Chris Christie's Supreme Court nominee Phillip Kwon, and explaining that "Democrats grilled Kwon about the legal problems of his family's business and accused Christie of trying to stack the court with Republicans."); MaryAnn Spoto, *Bruce Harris returns to Chatham after rejection for N.J. Supreme Court spot*, NJ.COM (Jun. 12, 2012, 11:15 AM),

A final democratic appointment state, Colorado, is discussed below.[48]

4. The Missouri Plan

The third common method of judicial selection was first adopted in Missouri and is thus widely known as the "Missouri Plan,"[49] although its advocates typically call it "merit selection."[50] For example, a Brennan Center report says

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https://www.nj.com/news/2012/06/bruce_harris_returns_to_chatha.html ("Democrats said they rejected Harris because he lacked courtroom experience Christie said they were playing politics because they don't want more Republicans on the bench.").

47. Katie McKellar and Annie Knox, *Senate GOP blocks governor's 'exceptionally qualified' pick for appeals judge*, KSL.COM (Dec. 7, 2020), https://www.ksl.com/article/50062870/senate-gop-blocks-governors-exceptionally-qualified-pick-for-appeals-judge (explaining that Gov. Gary Herbert nominated Margaret Plane to the Utah Court of Appeals but "Sen. Todd Weiler, chairman of the Senate Judicial Confirmation Committee, [said] that she was not included on the hearing agenda because it was clear she would not get enough votes for advice and consent."); *id.* ("In 2008, the Utah Senate rejected Judge Robert Hilder's bid to join the Utah Supreme Court in a 16-12 vote, with some state lawmakers expressing concerns over his 2003 decision upholding a University of Utah policy barring guns on campus.").

48. *See infra* note 70 and accompanying text.

49. *See, e.g.*, Republican Party of Minnesota v. White, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring) (stating that in response to concerns about judicial elections, "some States adopted a modified system of judicial selection that became known as the Missouri Plan (because Missouri was the first State to adopt it for most of its judicial posts)."). California in 1934 adopted retention elections, but instead of a nomination commission constraining the governor, the governor appoints a judge subject to confirmation by a three-person commission made up of the chief justice, attorney general and most senior presiding justice of the court of appeals in California. *See* App. B (1); HERBERT M. KRITZER, JUD. SELECTION IN THE STATES: POLITICS AND THE STRUGGLE FOR REFORM 21 (2020); *see also id.* at 22 n.95 ("Schotland includes California in his list [of states adopting version of the Missouri Plan], but I omit it because it does not have a required nominating commission.").

50. According to its proponents:

> Merit selection is a way of choosing judges that [1] uses a nonpartisan commission of lawyers and non-lawyers to locate, recruit, investigate, and evaluate applicants for judgeships. The commission then [2] submits the names of the most highly qualified applicants (usually three) to [3] the appointing authority (usually the governor), who must make a final selection from the list.

Merit Selection: The Best Way to Choose the Best Judges, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf (last visited Feb. 12, 2021); *see, e.g.*, How the Missouri Plan Works, YOUR MISSOURI JUDGES, https://yourmissourijudges.org/the-missouri-plan/how-it-works/ (last visited Nov. 19, 2022):

> Fed up with corrupt judicial elections, the people of Missouri adopted to the state Constitution The Missouri Plan in 1940 and, two years later, reaffirmed their support in a statewide vote, rejecting the legislature's attempt to repeal it. The Missouri Plan is the foundation for merit-based judicial selection in America. Also known as the Non-Partisan Court Plan, it is Missouri's constitutional system for selecting our appellate judges[;]

see also Frequently Asked Questions About Selection, ALASKA JUD. COUNCIL, http://www.ajc.state.ak.us/selection/faq.html (last visited Nov. 19, 2022) ("Based on a review of what worked best in other states to achieve a fair, independent, impartial, and accountable judiciary,

that "[f]or the past 85 years, the gold standard for many in the reform community has been merit selection of judges, based on 'the Missouri Plan'—named after the first state to adopt it."[51] The Missouri Plan constrains gubernatorial power over supreme court selection by requiring the governor to appoint a justice from among the nominees of a commission.[52] Thus, the Missouri Plan's check on

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Alaska's constitutional framers established a merit selection system for choosing judges and a retention election system for retaining them."); *Indiana's Judicial Retention System*, INDIANA JUD. BRANCH, https://www.in.gov/courts/about/retention/ (last visited Nov. 19, 2022) ("In 1970, the voters of Indiana approved a constitutional amendment providing for merit selection of Indiana Supreme Court justices and Indiana Court of Appeals judges. This system has been used to select all of the current members of the Indiana Supreme Court and the Indiana Court of Appeals."); *About Merit Selection, Appointing Authority, and Accountability*, IOWA JNC, https://www.iowajnc.gov/about (last visited Nov. 19, 2022) ("Iowa voters replaced the process of selecting judges by popular vote with a merit selection and retention election process by passing a Constitution Amendment in 1962."); *Become a Judge*, KANSAS JUD. BRANCH, https://www.kscourts.org/Judges/Become-a-Judge (last visited Nov. 19, 2022) ("Justices are appointed to the Supreme Court through a merit-based nomination process Kansas voters added to our state Constitution in 1958."); *Voters' Guide to Nebraska's Judicial Retention Elections*, STATE OF NEBRASKA JUD. BRANCH, https://supremecourt.nebraska.gov/public/vote (last visited Nov. 19, 2022):

> *Merit Selection*, as the name implies, allows lawyers to apply for judgeships based on the merit of their work. It emphasizes the selection of judges based upon their professional qualifications rather than political name recognition and is the most effective way to ensure that Nebraska has fair and impartial courts.

51. John F. Kowal, *Judicial Selection for the 21st Century*, BRENNAN CENTER FOR JUSTICE 2 (June 6, 2016), https://www.brennancenter.org/our-work/research-reports/judicial-selection-21st-century; *see also* Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 469 (2002):

> Many public-spirited people and institutions, including the American Bar Association, the American Judicature Society, the League of Women Voters, and most state bar organizations, responded to the problems of judicial elections by expressing preference for 'merit selection' of judges. That idea was popular in numerous states in the twentieth century . . . .

52. MO. CONST. ART. V, § 25(a). The Missouri Plan's supreme court selection centers on a nominating commission, chaired by a member of the supreme court, with an equal number of lawyers selected by the state's bar and non-lawyers selected by the governor. MO. CONST. ART. V, § 25(a), (d):

> 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. . . . Non-partisan judicial commissions whose duty it shall be to nominate and submit to the governor names of persons for appointment as provided by sections 25(a)–(g) are hereby established and shall be organized on the following basis: For vacancies in the office of judge of the supreme court or of the court of appeals, there shall be one such commission, to be known as "The Appellate Judicial Commission" . . . the appellate judicial commission shall consist of a judge of the supreme court selected by the members of the supreme court, and the remaining six members shall be chosen in the following

gubernatorial power indirectly belongs to whomever appoints members of the commission.[53] Missouri Plan states typically divide power to appoint the commission among the governor and others, mostly the state's bar.[54] So, the typical Missouri Plan makes the bar the check on the governor's power in judicial selection. This extraordinary privileging of the bar is the Missouri Plan's distinctive trait.

All three of (1) the nominating commission, (2) with some members selected by the bar, and (3) the label "merit selection" relate to the Missouri Plan's goal of moving judicial selection from politics toward professional merit. The broad agenda of professionalizing government with expertise, rather than the cronyism of political hacks, was central to the Progressive movement of the early 1900s.[55]

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

Crucially, the Missouri Plan requires the governor to pick one of the commission's three nominees within 60 days and if the governor fails to do that then the commission is obligated to appoint one of the three. MO. CONST. OF 1945, art. V, § 25(a) ("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.").

53. The power of such a nominating commission's check on the governor exemplifies the broader political principle stated by Boss Tweed: "I don't care who does the electing so long as I do the nominating." William "Boss" Tweed, political boss of Tammany Hall, quoted in J. JACKSON BARLOW ET AL. THE NEW FEDERALIST PAPERS 338 (1988).

54. The bar selects most of the commission in Kansas and a near majority in Alaska, Indiana, Missouri, Nebraska, South Dakota, and Wyoming. *See* App. C (1), (4), (6), (7), (8), (11), (12).

55. Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1041 (2001).

> Progressivism was a *reform movement* that brought together a coalition of earnest reformers . . . . In their view, an enlightened, professionalized government was indispensable, but government needed to be reformed to carry out its role. Progressives believed that corrupt party bosses, allied with increasingly powerful and selfish corporate interests, had seized control of representative government, especially legislatures, and were using government to retard social progress. It was imperative, they believed, to liberate representative government from these corrupt forces so that it might become an effective instrument for social reform. . . . Progressives sought to make government more responsive and accountable to the electorate . . . [and] sought to strengthen and professionalize government by establishing professional bureaucracies, non-partisan commissions, strong city managers, and the like.

Id. at 1041–42 (emphasis in original); *see also* Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 721 (2020) ("The Progressive Era criminal justice reform movement had several defining features. Its aim was to combat corruption by professionalizing criminal justice: reformers sought to replace political cronies with disinterested experts who applied the law to facts rather than basing their decisions on impermissible personal, partisan, or political considerations. . . . [Progressive Era] criminal justice reformers sought to bring rational business management to chaotic courts."); JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS 175 (2012) ("[P]rogressives were using the phrase 'merit system' for civil service reform in various bureaucracies, addressing the problem of partisanship and patronage.")

And this agenda was central to the 1913 founding of the American Judicature Society ("AJS") by leading lawyers who were "products of the Progressive movement."[56] In 1914, an AJS researcher, Albert Kales, proposed to replace judicial elections with a system in which judges would be "nominated for office by a nonpolitical commission that would affirmatively seek out the best qualified candidates."[57] Missouri and later states adopting this system privilege the bar to select some members of this commission, a privilege usually justified on the ground that lawyers are uniquely suited to a commission "that discusses lawyers and their qualifications for a job about which lawyers know the most."[58] However, this undemocratic privileging of insiders is what makes Missouri Plan systems controversial.[59] As Paul Carrington and Adam Long wrote in 2002, the

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

> While today AJS conducts a wide variety of programs, the advocacy of and education about the merit selection of judges as an alternative to the elective system has, since its formation, been the cornerstone of its activities. AJS was formed in 1913 with the general progressive mission of improving the 'efficiency' of the administration of justice. The founders of AJS shared the commonplace Progressive belief that the solution to most of the country's problems lay in more efficient public administration. The Society's negative attitude toward the election of judges, for example, was part of a widespread denigration of partisan politics. Progressives tended to view partisanship as productive of inefficiency in governance and to believe that government should be run like a business corporation.

Id. at 7–8 (footnotes omitted); *see also* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 723 (1995) ("By the early twentieth century, elective judiciaries were increasingly viewed as plagued by incompetence and corruption—a view that in 1913 led Herbert Harley, Albert Kales, Roscoe Pound, John Wigmore, and others to establish the American Judicature Society ('AJS') in the pursuit of judicial reform.").

57. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 8 (1994). In 1928, the AJS endorsed this proposal with the governor picking among the commission's nominees, and then the appointee (now an incumbent judge) subject to periodic retention elections for additional terms on the court. *Id.* at 9–10.

58. Linda S. Parks, No Reform is Needed, 77 J. KAN. B. ASS'N 4 (2008); *see also* Janice D. Russell, *The Merits of Merit Selection*, 17 KAN. J.L. & PUB. POL'Y 437, 441 (2008) ("[Lawyers] are in a better position than any other group of people to determine which applicants possess the proper combination of professional knowledge, skill, integrity, and work ethic to carry out the duties of a judge.").

59. This special role for the bar, I argue, makes the Missouri Plan "an aberrant violation of our society's practice of selecting lawmakers democratically." Stephen J. Ware, *Originalism, Balanced Legal Realism and Judicial Selection: A Case Study*, 22 KAN. J.L. & PUB. POL'Y, 165, 204 (2013).

> We have known, at least since the Legal Realists of the early 20th Century, that judges make law. And it is similarly well established that, although judging has a professional/technical side, as well as a political/lawmaking side, the latter's importance rises, the higher the court. All appellate judges are "occasional legislators" and supreme court justices are tremendously important and powerful lawmakers.

Id. at 203. Allowing a lawyer, but not her fellow citizen, to select members of the commission central to selecting high court judges, therefore, "empower[s] lawyers at the expense of non-

idea of selecting judges on merit, "was popular in numerous states in the twentieth century," but is "an increasingly difficult idea to sell" because today's "citizenry is quick to see that political power would be transferred from themselves to those who do the merit selecting."[60] Nevertheless, Missouri Plan systems do avoid the problem of concentrating supreme court appointment power entirely in one person.[61]

5. Hybrid Processes, Some of Which Doubly Constrain the Governor

Some states doubly constrain gubernatorial power in supreme court selection by requiring both that the governor choose a nominee from among those recommended by a commission and that the governor's nominee win confirmation by the senate or other elected body. These states are Connecticut, Hawaii, New York, Rhode Island, Utah, and Vermont.[62] One might add Delaware, Maine, Maryland, Massachusetts, New Hampshire, and New Jersey, except that in these states, the commission's power is not constitutional or statutory, but merely due to an executive order, so the governor (who may rescind such an order) is not required to use a commission.[63] And because these commissions are created by executive order, they are "generally populated entirely by individuals chosen by the governor."[64] So, in these states, the legal constraint on the governor's appointment power is just confirmation.

States with both a nominating commission and a confirmation requirement are categorized differently by different commentators. Several commentators categorize such states as Missouri Plan or "merit selection." For instance, Herbert Kritzer uses "the term 'Missouri Plan' for systems with the three elements of (1) a mandatory nominating commission, (2) gubernatorial appointment from among those nominated by the commission, and (3) retention elections," and "include[s] under this label states that also require legislative

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lawyers, in violation of basic democratic equality, the principle of one-person, one-vote." *Id.* at 204.

60. Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 469 (2002); *see also* KRITZER, *supra* note 49, at 202 ("The most common argument against Missouri Plan type selection and retention systems raised by opponents is that it denies voters the opportunity to choose judges, handing that over to various groups of elites.").

61. *But see* note 73 (discussing Colorado and Florida).

62. *See* App. B (2), (5), (11), (12), (15), (16).

63. *See* App. B (4), (6), (7), (8), (9), (10).

64. Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV. 249, 272 n.80 (2011). In addition, "[t]he governor may also have more discretion in selecting an individual" nominee. *Id.* "For example, in Delaware, the governor may reject the first list of recommendations and request a supplemental list from the commission," and "[i]n Massachusetts and New Hampshire, the governor may request additional names from the commission." *Id.* These executive-order commissions are well-described as "assisted appointment." *See, e.g.*, CHARLES GEYH, WHO IS TO JUDGE? 45, 77 (2019) (explaining how that phrase does not fit so well in systems in which the commission is empowered not only to assist the governor but to require the governor to choose among the commission's few nominees).

confirmation of the governor's selection from the nominating commission."[65] Similarly, Rachel Paine Caufield lists under "merit selection plans" the supreme courts of many states with commissions and confirmation: Connecticut, Delaware, Hawaii, Maine, Maryland, New Hampshire, New Jersey, New York, Rhode Island, Utah, and Vermont.[66] And, Brian Fitzpatrick categorizes all but one of these states as "commission" or "gubernatorial commission," rather than "appointment."[67]

Perhaps the main principle underlying these commentators' categorizations is, as Greg Goelzhauser puts it, that "merit selection's core component is the use of a commission to winnow judicial candidates before elite appointment."[68] If commission-winnowing is key, then states with both a commission and confirmation should be categorized to emphasize the "merit" commission. Consequently, Goelzhauser objects that some states with both a commission and confirmation—Connecticut, Hawaii, New York, and Rhode Island—sometimes are "mistakenly excluded from merit selection lists."[69]

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65. KRITZER, *supra* note 49, at 24; *see also id.* at 165 ("[In 1985,] Utah adopted a variant of the Missouri Plan."); *id.* at 183 (referring to Utah's "Missouri Plan system with the added element of Senate consent."); *id.* at 204 (referring to Connecticut, Rhode Island, and South Carolina as states "adding 'merit' to nonelective systems."); CHARLES GEYH, WHO IS TO JUDGE? 43 (2019) ("The last state to adopt a merit selection system was Rhode Island, in 1994."); *id.* at 45–46 (categorizing states by method of judicial selection); *see also* GREG GOELZHAUSER, CHOOSING STATE SUPREME COURT JUSTICES: MERIT SELECTION AND THE CONSEQUENCES OF INSTITUTIONAL REFORM 5 (2016) (objecting that Connecticut, Hawaii, New York, and Rhode Island sometimes are "mistakenly excluded from merit selection lists.").

66. Rachel Paine Caufield, *Inside Merit Selection*, AMERICAN JUDICATURE SOC'Y, at App. B (2012), http://web.archive.org/web/20131009205930/http://www.judicialselection.com/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf; *see also Merit Selection: The Best Way to Choose the Best Judges*, AMERICAN JUDICATURE SOC'Y, http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf (last visited Feb. 12, 2021) ("Two thirds of the states and the District of Columbia select some or all of their judges under the merit system."); *Judicial Merit Selection: Current Status*, AMERICAN JUDICATURE SOC'Y (2011), http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf. Similarly, Charles Geyh refers to at least one these states as "merit selection." CHARLES GEYH, WHO IS TO JUDGE? 43 (2019) ("The last state to adopt a merit selection system was Rhode Island, in 1994."); *id.* at 45–46 (categorizing states by method of judicial selection).

67. Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 VAND. L. REV. 1729 tbl.1 (2017).

68. GREG GOELZHAUSER, CHOOSING STATE SUPREME COURT JUSTICES: MERIT SELECTION AND THE CONSEQUENCES OF INSTITUTIONAL REFORM 4 (2016).

69. *Id.* at 5; *see id.* at 4 (distinguishing "merit selection" from "merit plan" and "Missouri Plan."). As Goelzhauser defines these terms, "merit selection's core component is the use of a commission to winnow judicial candidates before elite appointment. Under the merit plan, judges are chosen through merit selection and retained through retention elections. Consequently, merit selection is a necessary but not a sufficient condition for instituting the merit plan Indeed, merit selection can be linked to any retention institution." *Id.* at 4.

In contrast, I do not believe commission-winnowing is as fundamental a principle as democracy. More specifically, I do not believe the main principle underlying categorization should be whether a commission winnows applicants before the governor picks one, but whether the constraint on the governor—whether provided by a commission, confirmation, or both—is democratic. All states with appointments (rather than elections) to begin a new term on the supreme court divide appointment power between the governor and others. In democratic appointment systems, those others are selected democratically. In Missouri Plan systems, they are not—Missouri Plan systems divide appointment power between the governor and the bar.

So, Colorado, which lacks confirmation and requires the governor pick from finalists winnowed by a democratically selected commission, should be categorized as a democratic appointment system.[70] And if a hypothetical state lacking a commission required the governor's nominee to win a confirmation vote by members of the state's bar, its lack of a commission would be less important than its undemocratic (bar-privileging) similarities with the Missouri Plan. So, likely this hypothetical system's most vocal defenders would come largely from the bar which would argue that the bar's confirmation vote is based on the nominee's professional merit rather than the nominee's politics, and thus this hypothetical system counts as "merit selection."

No actual state's confirmation body is undemocratic. So, in categorizing states with both a commission and confirmation, the crucial questions are whether the commission is democratically selected and, if not, whether it is superior or subordinate to democratically elected officials. If the commission is democratically selected, as in Colorado and the states with executive-order commissions,[71] then the system of which it is a part should be categorized as democratic appointment, even if the commission is charged with winnowing applicants based on their merit rather than their politics. And if the commission is not democratically selected—which in practice means some members are selected by the bar—then categorization should turn on whether the bar-privileging commission is superior or subordinate to democratically elected officials. Under the Missouri Plan, the governor is subordinate to the commission because the governor is required to appoint from among the three nominees of a commission, and if the governor fails to do that, then the commission is obligated to appoint one of the three.[72] In contrast, in a state with

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70. Colorado's nominating commission is appointed by the governor, attorney general, and chief justice. *See* App. B (3). While the Chief Justice is not directly elected, the Chief Justice is selected by the governor and attorney general, who are, (and a previous chief justice) so it is as indirectly democratic process, albeit with one more indirect step then of democratically elected officials selecting justices. *Id.*

71. *See supra* notes 63-64 & 70.

72. MO. CONST. OF 1945, art. V, § 25(a) ("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.").

both a commission and confirmation, even if the governor must choose a nominee from among those recommended by the commission, the confirmation requirement ultimately empowers the legislature or other confirming body over the commission. So, even if the governor cannot stop appointment from the commission's small group of nominees, the legislature can, so the system should be categorized as democratic.

In any event, however one categorizes states' methods of selecting justices to begin a new term on the state's supreme court, all fifty of them avoid the problem of unconstrained gubernatorial power.[73] The constitutions of the fifty states, like the Constitution of the United States, reflect the widespread consensus that the selection of supreme court justices should not be left to the unchecked discretion of a single person.

II. INTERIM APPOINTMENTS AND UNCONSTRAINED EXECUTIVE POWER

The previous Part shows the longstanding consensus against unconstrained executive power in the selection of supreme court justices. And it details how this longstanding consensus is evidenced by the constitutions of all fifty states and of the United States, none of which places solely in the executive the power to appoint justices to begin new terms on the supreme court. In contrast, however, this Part shows several states that fail to constrain executive power in selecting justices to *finish a term* already started by another justice.

These troubling states are all among the twenty-one states that constitutionally provide for the initial selection of justices on the state's supreme court through a contestable election.[74] Of these twenty-one states, nineteen provide for gubernatorial appointment to fill mid-term vacancies.[75] Of the nineteen states whose constitutions provide both for the initial selection of supreme court justices through contestable elections and gubernatorial appointments to fill mid-term vacancies, six states' constitutions constrain the governor's discretion over interim appointments with a nominating commission,[76] or confirmation requirement.[77]

The remaining thirteen states' constitutions and statutes, however, fail to check the governor's interim appointment power with either a nominating commission or a confirmation vote.[78] These states are: (1) Alabama, (2)

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73. Although, one might question the strength of the constraint on governors in Colorado and Florida where the governor is constrained only by a commission to which the governor appoints a bare majority of members. *See* App. B (3); *see also* App. C (3).

74. *See* App. A.

75. *See* App. A, D (1), (4), (10), (12), (17), (22)–(24), (26), (28), (33)–(35), (37), (38), (43), (47)–(49). The other two states' constitutions fill interim supreme court vacancies by special election (Louisiana) or appointment by the supreme court (Illinois), both of which avoid the problem of unconstrained executive power. *See* App. D (13), (18).

76. *See* App. D (12), (17), (28), (34).

77. *See* App. D (26), (38).

78. *See* App. D (1), (4), (10), (22)–(24), (33), (35), (37), (43), (47)–(49).

Arkansas, (3) Georgia, (4) Michigan, (5) Minnesota, (6) Mississippi, (7) North Carolina, (8) Ohio, (9) Oregon, (10) Texas, (11) Washington, (12) West Virginia, and (13) Wisconsin.

These states excessively concentrate interim selection power in the governor; the highest court of a state is simply too important to leave even interim appointments to the unconstrained discretion of one person. So, these states should amend their constitutions, or at least enact statutes, to constrain the governor's discretion over interim supreme court appointments with either a nominating commission or a confirmation vote.

Some governors in these states, although not required to, may nevertheless choose to appoint a commission to recruit and vet possible supreme court nominees.[79] For instance, Minnesota governors sometimes create a commission,[80] or use the Commission on Judicial Selection,[81] which is only statutorily prescribed for certain lower courts,[82] to consider applications for the Minnesota Supreme Court and generate a short list of finalists. Similarly, Georgia governors often choose to use the Georgia Judicial Nominating

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79. *See, e.g.*, Governor Tony Evers, *Gov. Evers Announces Appointments to Judicial Selection Advisory Committee*, GOVERNOR TONY EVERS (Apr. 15, 2019), https://evers.wi.gov/Pages/Newsroom/Press-Releases/041519-Gov—Evers-Announces-Appointments-to-Judicial-Selection-Advisory-Committee.aspx ("Gov. Tony Evers announced the membership of the Governor's Judicial Selection Advisory Committee. The committee is responsible for interviewing and recommending candidates to the governor for consideration when he fills judicial vacancies.").

80. *Updated: Moore among finalists for Minnesota Supreme Court*, THE GLOBE (Apr. 24, 2020, 3:54 PM), https://www.dglobe.com/news/crime-and-courts/6275456-Updated-Moore-among-finalists-for-Minnesota-Supreme-Court ("Earlier this year, Gov. Tim Walz asked a merit selection panel consisting of leadership in the Governor's Office, the Chair of the Commission on Judicial Selection, and the at-large members of that Commission, to solicit applicants, review candidates, and recommend finalists for appointment to the Minnesota Supreme Court. The panel announced today that it is recommending four candidates for consideration to fill the current vacancy on the Supreme Court occurring upon the retirement of the Honorable David L. Lillehaug.").

81. *Mpls. Rep. Thissen among Minnesota Supreme Court Finalists*, MPR NEWS (Mar. 21, 2018, 3:58 PM), https://www.mprnews.org/story/2018/03/21/minnesota-supreme-court-finalists-thissen-jesson.

> A state panel is recommending Gov. Mark Dayton pick among four candidates to fill an open Minnesota Supreme Court seat. Finalists include Minneapolis DFL Rep. Paul Thissen . . . . Also named as finalists by the Commission on Judicial Selection: ex-Minnesota Department of Human Services commissioner and current appellate court judge Lucinda Jesson, Ramsey County Judge Jeffrey Bryan and Judge Bradford Delapena, who serves as chief judge of the Minnesota Tax Court.

82. MINN. STAT. § 480B.01 (West) (applying the Commission on Judicial Selection only to vacancies for district courts and Worker's Compensation Court of Appeals); *Judicial Appointments*, OFF. OF GOVERNOR TIM WALZ & LT. GOVERNOR PENNY FLANAGAN, https://mn.gov/governor/administration/judicialappointments/ (last visited Nov. 19, 2022) ("The Commission on Judicial Selection solicits, considers, and recommends candidates to the Governor for vacancies in the District Courts and the Workers' Compensation Court of Appeals").

Commission to generate a list of finalists.[83] Such governor-dependent commissions may sometimes improve the governor's selection process. However, they do not legally constrain the governor because the governor is not required to choose an appointee from among those approved by such a commission, or perhaps even to ask the commission to consider applicants.[84] For instance, "Georgia Governor Roy Barnes famously ignored his own nominating commission in making one appointment."[85] And even if a governor kept her pledge to appoint only from among the commission's approved finalists, the vetting of commissioners all or mostly appointed by the governor hardly serves as a check on the governor. Also insufficient are statutes creating nominating commissions that are merely advisory, but do not legally constrain the governor. For instance, West Virginia subjects interim supreme court

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83. *About Us*, JUDICIAL NOMINATING COMMISSION, https://jnc.georgia.gov/about-us (last visited Nov. 19, 2022). Georgia's Judicial Nominating Commission was originally established in 1972 by executive order of former Governor Jimmy Carter. *Methods of Judicial Selection*, AMERICAN JUDICATURE SOCIETY (Oct. 2, 2014), http://web.archive.org/web/20141002174825/http:/www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=GA ("In 1972, Governor Carter became the first Georgia governor to establish a judicial nominating commission by executive order."); Camille L. Tribble, *Awakening a Slumbering Giant: Georgia's Judicial Selection System After White and Weaver*, 56 MERCER L. REV. 1035, 1035–36 (2005):

> [T]he Georgia Constitution grants the governor the power to appoint a judge when a judgeship becomes vacant. . . . Since 1971, Georgia's governors have followed the example of Jimmy Carter and used a Judicial Nominating Commission ('JNC') in tandem with their absolute appointment power. When a vacancy occurs, the JNC takes nominations, screens candidates, and gives the governor a list of recommended candidates. However, the governor is not obligated to appoint from the JNC's choices. The structure of Georgia's JNC also makes the appointment process vulnerable to the appearance of judgeships for sale[;]

see, e.g., *Executive Order of Governor Brian Kemp*, (Feb. 7, 2019), *https://gov.georgia.gov/document/twenty-five-25-appointments-judicial-nominating-commission/download*, accessed via https://gov.georgia.gov/executive-action/executive-orders-0/2019-executive-orders ("Ordered: That there is created the Judicial Nominating Commission for the State of Georgia. The Commission shall make nominations to fill vacancies on all courts of record in the State.").

84. *See* Patrick Emily Longan, *Judicial Professionalism in a New Era of Judicial Selection*, 56 MERCER L. REV. 913, 937 (2005) ("[I]n Georgia, Massachusetts, Minnesota, and North Dakota, the governor is under no duty to appoint from the list of approved candidates."); *id.* at 936 ("[T]he Georgia Judicial Nominating Commission, first created by then-Governor Jimmy Carter thirty years ago, is entirely a creature of the governor, and its members serve at the pleasure of the governor.").

85. *Id.* at 937. The appointment in question was to a lower court. *See* Alan Judd, *Judgeships often go to donors to Barnes*, ATLANTA JOURNAL-CONSTITUTION (Oct. 13, 2002) at A1, A10:

> Barnes bypassed the nominating commission once in 2000. That August, the governor had picked Jerry W. Baxter, a State Court judge in Fulton County, for a Superior Court opening. Before filling Baxter's old job, Barnes normally would have advertised for applicants. Or he could have considered the other finalists for the job Baxter got. Instead, a week later, the governor simply appointed his own executive counsel, Penny Brown Reynolds. It is the only time he has selected a judge without soliciting applications.

appointments to a nominating commission, but West Virginia statutes do not require the governor to call upon or pick from among those recommended by the commission, which is merely advisory.[86] So, these states, like the others on the above list of thirteen, should amend their constitutions, or at least enact statutes, to constrain the governor's discretion over interim supreme court appointments with either a nominating commission or a confirmation vote.

The urgency of this reform is highest in states in which interim appointments are common. Examples include Minnesota, Oregon, and Georgia. In each of these states, the supreme court acquires most of its new members through interim appointment. All seven members of the Minnesota Supreme Court initially joined the court by interim appointment,[87] as did all seven members of

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86. W. VA. CODE § 3-10-3a(a):

> The Judicial Vacancy Advisory Commission shall assist the Governor in filling judicial vacancies. The commission shall meet and submit a list of no more than five nor less than two of the most qualified persons to the Governor within 90 days of the occurrence of a vacancy, or the formal announcement of the justice or judge by letter to the Governor of an upcoming resignation or retirement that will result in the occurrence of a vacancy, in the office of Justice of the Supreme Court of Appeals, judge of the Intermediate Court of Appeals, judge of a circuit court, or judge of a family court. The Governor shall make the appointment to fill the vacancy, as required by this article, within 30 days following the receipt of the list of qualified candidates or within 30 days following the vacancy, whichever occurs later[;]

id. at (b):

> The commission shall consist of eight appointed members appointed by the Governor for six-year terms, including four public members and four attorney members. The Governor shall appoint attorney members from a list of nominees provided by the Board of Governors of the West Virginia State Bar. The Board of Governors of the West Virginia State Bar shall nominate no more than 20 nor less than 10 of the most qualified attorneys for appointment to the commission whenever there is a vacancy in the membership of the commission reserved for attorney members. The commission shall choose one of its appointed members to serve as chair for a three-year term. No more than four appointed members of the commission shall belong to the same political party. All members of the commission shall be citizens of this state. Public members of the commission may not be licensed to practice law in West Virginia or any other jurisdiction[;]

id. at (d) ("The Governor, or his or her designee, the President of the West Virginia State Bar, and the Dean of the West Virginia University College of Law shall serve as ex officio members of the commission.").

87. Justice G. Barry Anderson's 2004 interim appointment filled a vacancy left by the mid-term resignation of Justice James Gilbert. Barbara L. Jones, *Meet Minnesota's Newest Supreme Court Justice*, MINNESOTA LAWYER (Sept. 6, 2004), https://minnlawyer.com/2004/09/06/meet-minnesota8217s-newest-supreme-court-justice. Justice Natalie E. Hudson's 2015 interim appointment by Governor Mark Dayton filled a vacancy left by the mid-term resignation of Justice Alan Page. *Natalie E. Hudson, Associate Justice 2015-*, MINNESOTA STATE LAW LIBRARY, https://mncourts.libguides.com/hudson (last visited Jan. 17, 2023). Justice Margaret H. Chutich joined the court on Jan. 22, 2016, upon appointment by Governor Mark Dayton. *Margaret H. Chutich, Associate Justice 2016-*, MINNESOTA STATE LAW LIBRARY, https://mncourts.libguides.com/chutich (last visited Jan. 17, 2023). Justice Anne K. McKeig joined

the Oregon Supreme Court,[88] and eight of the nine members of the Georgia Supreme Court.[89] An interim appointment in these states nearly always leads to

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the court on Aug. 31, 2016, upon appointment by Governor Mark Dayton. *Anne K. McKeigh, Associate Justice 2016-*, MINNESOTA STATE LAW LIBRARY, https://mncourts.libguides.com/mckeig (last visited Jan. 17, 2023). Justice Paul C. Thissen joined the court on May 14, 2018, upon appointment by Governor Mark Dayton. Paul C. Thissen, Associate Justice 2018-, MINNESOTA STATE LAW LIBRARY, https://mncourts.libguides.com/thissen (last visited Jan. 17, 2023). Justice Gordon Moore joined the court on Aug. 3, 2020, upon appointment by Governor Tim Walz. *Gordon Moore, Associate Justice 2020-*, MINNESOTA STATE LAW LIBRARY, https://mncourts.libguides.com/moore (last visited Jan. 17, 2023). Chief Justice Lorie Skjerven Gildea's 2006 appointment filled a vacancy indirectly created by Chief Justice Kathleen Blatz's mid-term resignation. The governor's interim appointment elevated Justice Russell Anderson to Chief Justice and then Anderson's associate justice seat was filled by the governor's interim appointment of Gildea. *Lorie Skjerven Gildea*, MINNESOTA STATE LAW LIBRARY, https://mn.gov/law-library/research-links/justice-bios/lorie-skjerven-gildea.jsp (last visited Feb. 25, 2023).

88. Chief Justice Meagan Aileen Flynn's 2017 interim appointment filled a vacancy created by the mid-term resignation of Justice Richard Baldwin. *Judge Meagan Flynn Appointed to Oregon Supreme Court*, THE REGISTER-GUARD (Mar. 31, 2017), https://web.archive.org/web/20170401005354/http://registerguard.com/rg/news/local/35436605-75/judge-meagan-flynn-appointed-to-oregon-supreme-court.html.csp. Justice Rebecca Duncan's 2017 interim appointment filled a vacancy created by the mid-term resignation of Justice David Brewer. *Hon. Rebecca Duncan Appointed to Oregon Supreme Court*, OREGON STATE BAR, https://appellatepractice.osbar.org/2017/05/15/hon-rebecca-duncan-appointed-oregon-supreme-court/ (last visited Feb. 24, 2023). Justice Bronson James 2023 interim appointment filled a vacancy created by the mid-term resignation of Chief Justice Martha Walters. Justice Stephen K. Bushong's 2023 interim appointment filled a vacancy created by Justice Balmer's mid-term resignation. *Oregon Governor Appoints 2 More State Supreme Court Judges*, KPIC (Dec. 28, 2022, 11:09 PM), https://kpic.com/news/local/oregon-governor-appoints-2-more-state-supreme-court-judges. Justice Chris Garrett's 2019 interim appointment filled a vacancy created by the mid-term resignation of Justice Rives Kistler. Aimee Green, *Gov. Brown Appoints Appeals Court Judge Chris Garrett to Oregon Supreme Court*, THE OREGONIAN (Dec. 24, 2018, 5:23 PM), https://www.oregonlive.com/news/2018/12/gov-brown-appoints-appeals-court-judge-chris-garrett-to-oregon-supreme-court.html. Justice Roger J. DeHoog's 2022 interim appointment filled a vacancy created by the mid-term resignation of Justice Lynn Nakamoto. Julia Shumway, *Brown Appoints Appeals Court Judge Roger DeHoog to Oregon Supreme Court*, OREGON CAPITAL CHRONICLE (Jan. 19, 2022, 11:10 AM), https://oregoncapitalchronicle.com/briefs/brown-appoints-appeals-court-judge-roger-dehoog-to-oregon-supreme-court/. Justice Adrienne Nelson's 2018 interim appointment filled a vacancy created by the mid-term resignation of Justice Jack Landau. Aimee Green, *Governor Appoints First African American Judge to Oregon Supreme Court: Adrienne Nelson*, THE OREGONIAN (Jan. 2, 2018, 7:46 PM), https://www.oregonlive.com/portland/2018/01/governor_appoints_first_africa.html.

89. Justice John Ellington was elected to the Georgia Supreme Court in 2018. He faced no opposing candidate. *See May 22, 2018 General Primary and Nonpartisan General Election*, https://results.enr.clarityelections.com/GA/74658/Web02-state.206999/#/ (last visited July 30, 2020). The other eight justices were initially appointed. In 2016, Governor Nathan Deal appointed Justice Michael Boggs to complete Justice Hugh Thompson's un-expired term. *Chief Justice Michael P. Boggs*, Sup. Ct. of Ga., https://www.gasupreme.us/court-information/biographies/justice-michael-p-boggs/ (last visited July 30, 2020). In 2017, Governor Nathan Deal appointed Justice Britt Grant and Nels Peterson to fill two newly established seats on

a safe multi-term position on the supreme court. No Georgia Supreme Court justice has ever lost re-election,[90] no Minnesota Supreme Court justice has lost re-election since 1946,[91] and only once since the 1932 has an incumbent lost re-election to the Oregon Supreme Court.[92] So in these states unconstrained

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the court. *See ALI Members: The Hon. Britt C. Grant*, A.L.I., https://www.ali.org/members/member/448179/ (last visited July 30, 2020); *see also*, *Presiding Justice Nels S.D. Peterson*, Sup. Ct. of Ga., https://www.gasupreme.us/court-information/biographies/justice-nels-s-d-peterson/ (last visited July 30, 2020). In 2018, Governor Nathan Deal appointed Justice Charles Bethel to complete Justice Harris Hines' un-expired term, and Governor Deal appointed Justice Sarah Warren to complete Justice Britt Grant's un-expired term. *See Justice Charles J. Bethel*, Sup. Ct. of Ga., https://www.gasupreme.us/court-information/biographies/justice-charles-j-bethel/ (last visited July 30, 2020); *see also*, *Justice Sarah H. Warren*, Sup. Ct. of Ga., https://www.gasupreme.us/court-information/biographies/justice-sarah-hawkins-warren/ (last visited July 30, 2020). Governor Brian Kemp appointed Carla McMillian on March 27, 2020, to complete the unexpired term of Justice Robert Benham. *Georgia Supreme Court Elections, 2020*, Ballotpedia, https://ballotpedia.org/Georgia_Supreme_Court_elections,_2020 (last visited Jan. 4, 2022). In December 2020, Governor Brian Kemp appointed Justice Shawn Ellen LaGrua to complete Justice Keith R. Blackwell's un-expired term. *Shawn Lagrua Sworn Into GA Supreme Court*, Sup. Ct. of Ga. (Jan. 7, 2021), https://www.gasupreme.us/justice-lagrua-sworn-in/. In July 2021, Governor Brian Kemp appointed Justice Verda M. Colvin to the Supreme Court to complete the unexpired term of Justice Harold Melton. *Verda Colvin*, Ballotpedia, https://ballotpedia.org/Verda_Colvin (last visited Feb. 15, 2023). In July 2022, Governor Kemp appointed Justice Andrew A. Pinson to complete Justice David E. Nahmias' un-expired term. Gov. *Kemp Announces Four Judicial Appointments*, Governor Brian P. Kemp Office of the Governor (Feb. 14, 2022), https://gov.georgia.gov/press-releases/2022-02-14/gov-kemp-announces-four-judicial-appointments.

90. Bill Rankin, *Two Georgia Supreme Court Justices Face Election Competition*, THE ATLANTA JOURNAL-CONSTITUTION (May 19, 2020), https://www.ajc.com/news/local/two-georgia-supreme-court-justices-facing-election-competition/82dtsQhyVBfDWUh53JXHPN/.

91. Douglas A. Hedin, *Results of Elections of Justices to the Minnesota Supreme Court, 1857-2018*, MINN. LEGAL HIST. PROJECT, 62 (Oct. 2019), http://www.minnesotalegalhistoryproject.org/assets/Election%20Results%201857-2018=tttt.pdf ("The defeat of William Christianson was the first loss of an incumbent since 1916, when Albert Schaller lost in the primary. No incumbent has been defeated since 1946.").

92. *See* Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 380–81 (2002) ("In 1970, Multnomah County Circuit Court Judge Dean Bryson mounted the first effective challenge to a supreme court incumbent since 1932, when he defeated Justice Gordon Sloan."). From 2000 through 2022, twenty-four incumbents sought re-election, and all won. Of these, only four even faced an opponent, while the other twenty were unopposed. In the 2004 non-partisan primary election, incumbent Oregon Supreme Court Justices William Riggs and Rives Kistler both won re-election upon defeating Rudy Murgo and James Leuenberger respectively. Or. Sec'y of State, *2004 Primary Election Official Results Nonpartisan Offices*, at 3 (May 18, 2004), http://records.sos.state.or.us/ORSOSWebDrawer/Record/6873504. In the 2018 elections, incumbent Justice Meagan Flynn won re-election after defeating Van Pounds in the nonpartisan primary election. Or. Sec'y of State, *2018 General Election Abstract of Votes*, at 20 (Nov. 6, 2018), http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873825. In the 2020 elections, incumbent Justice Thomas Balmer won re-election by defeating Van Pounds. *Oregon Supreme*

executive power is the usual method of filling tremendously important positions with individuals likely to hold those positions for a long time.

CONCLUSION

The United States has a long and strong tradition of concerns about executive power, and a complementary tradition of Madisonian checks and balances on

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Court Elections, Ballotpedia, https://ballotpedia.org/Oregon_Supreme_Court_elections#2020 (last visited Mar. 26, 2023).

In the 2000 elections, Oregon Supreme Court Justices Robert Durham and Wallace Carson ran un-opposed for re-election. Or. Sec'y of State, *2000 Primary Election Official Results Candidates* (May 16, 2000), http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6937382. In the 2002 elections, Justice Thomas Balmer ran un-opposed to win re-election. Or. Sec'y of State, *2002 Primary Election Official Results* (May 21, 2002), http://records.sos.state.or.us/ORSOSWebDrawer/Record/687355; Or. Sec'y of State, *2002 General Election Official Results* (Nov. 5, 2002), http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/6873550. In the 2004 elections, Justice Michael Gillette ran un-opposed for re-election to the court. Or. Sec'y of State, *2004 Primary Election Official Results Nonpartisan Offices*, at 1–3 (May 18, 2004), http://records.sos.state.or.us/ORSOSWebDrawer/Record/6873504. In the 2006 elections, incumbent Justices Pail DeMuniz and Robert Durham both won re-election after running un-opposed. Or. Sec'y of State, *2006 Primary Election Official Results*, at 50–51 (May 16, 2006), http://records.sos.state.or.us/ORSOSWebDrawer/Record/6873574. In the 2008 elections, incumbent Justices Thomas Balmer and Martha Walters both ran un-opposed and won re-election to the court. Or. Sec'y of State, *2008 Primary Election Official Results*, at 55 (May 20, 2008), http://records.sos.state.or.us/ORSOSWebDrawer/Record/6873621; Or. Sec'y of State, *2008 General Election Official Results*, at 26 (Nov. 4, 2008), http://records.sos.state.or.us/ORSOSWebDrawer/Record/6873598. In the 2010 elections, Justice River Kistler ran un-opposed and won re-election to the court. Or. Sec'y of State, *Official Results, May 18, 2010 Primary Election*, at 52, http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873663. In the 2012 elections, incumbent Justice Virginia Liner won re-election after running un-opposed. Or. Sec'y of State, *Official Results, May 15, 2012 Primary Election*, at 48, http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873711. In the 2014 elections, incumbent Justices Thomas Balmer and Martha Walters both won re-election to the court after running un-opposed. Or. Sec'y of State, *May 20, 2014 Primary Election Abstract of Votes*, at 41–42, http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873756. In the 2016 elections, incumbent Justices River Kistler, Jack Landau, and Lynn Nakamoto all won re-election after all three ran un-opposed. Or. Sec'y of State, *May 17, 2016 Primary Election Abstract of Votes*, at 82–83, http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873801; Or. Sec'y of State, *Nov. 8, 2016, General Election Abstract of Votes U.S. President*, at 25, http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873777. In the 2018 elections, incumbent Justices Rebecca Duncan and Adrienne Nelson ran un-opposed and both won re-election. Or. Sec'y of State, *Nov. 6, 2018 General Election Abstract of Votes U.S. Representative*, at 20, http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873825. In the 2020 elections, incumbent Justices Chris Garrett and Martha Walters both ran un-opposed and won re-election to the court. *Oregon Supreme Court Elections*, Ballotpedia, https://ballotpedia.org/Oregon_Supreme_Court_elections#2020 (last visited Mar. 26, 2023). In the 2022 elections, incumbent justice Roger DeHoog won re-election after running un-opposed. *Oregon Supreme Court Elections*, Ballotpedia, https://ballotpedia.org/Oregon_Supreme_Court_elections#2020 (last visited Mar. 26, 2023).

and to the executive, including in the selection of supreme court justices. This longstanding consensus is evidenced by the constitutions of all fifty states and of the United States, none of which places solely in the executive the power to appoint justices to begin new terms on the (state or federal) supreme court. In contrast, thirteen states' constitutions and statutes fail to constrain executive power in selecting justices to *finish a term* already started by another justice. That is, thirteen states fail to constrain the governor's interim appointment power with either a nominating commission or a confirmation vote. This failure permits shenanigans like the notorious "Triple Play of 1956," which occurred in Kansas when its constitution was like the thirteen states noted previously.[93]

> The "triple play" involved Chief Justice of Kansas Supreme Court Bill Smith, Governor Fred Hall, and Lieutenant Governor John McCuish. In 1956, Governor Hall was defeated in the Republican Primary by Warren Shaw, who then lost the general election to Democrat George Docking. In December of that year, Chief Justice Smith, who was seriously ill, forwarded his resignation to Governor Hall. Hall then immediately resigned his post of Governor in favor of Lieutenant Governor McCuish, who prematurely returned from a Newton Hospital to make his first and only official act of his 11 day tenure as Governor: The appointment of Hall to the supreme court.[94]

The lesson of the "triple play" is that governors should not have absolute power over the selection of supreme court justices, even as interim appointments. "Power tends to corrupt and absolute power corrupts absolutely."[95] Governors are ambitious people and "[a]mbition must be made to counteract ambition[,]"[96] through a Madisonian system of checks and balances. The case for subjecting interim supreme court appointments to a confirmation vote or nominating commission rests on the familiar rationale for the separation of powers.

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93. *See* KAN. CONST. art. III, § 11 (repealed 1957) ("All the judicial officers provided for by this article shall be elected at the first election under this constitution[.]"); *see also* Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. KAN. B. ASS'N 32, 34 (2000) (describing Kansas's current judicial selection method as a version of the "Missouri Plan"); *see also Political "Triple Play" Resignations and Oaths of Office*, KANSAS MEMORY, http://www.kansasmemory.org/item/228731 (last visited Apr. 1, 2017).

94. Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. KAN. B. ASS'N. 32, 34 (2000).

95. Letter from Lord Acton to M. Creighton (1887), available at https://oll.libertyfund.org/title/acton-acton-creighton-correspondence (accessed via https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2254/Acton_PowerCorrupts1524.html).

96. THE FEDERALIST NO. 51 (James Madison).

APPENDICES

Appendix A

States Providing Initial Selection of Justices by Contestable Election

(1) ALA. CONST. art. VI, § 152 ("All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts.");
(2) ARK. CONST. amend. 80, § 18:

> Supreme Court Justices and Court of Appeals Judges shall be elected on a nonpartisan basis by a majority of qualified electors voting for such office. Provided, however, the General Assembly may refer the issue of merit selection of members of the Supreme Court and the Court of Appeals to a vote of the people at any general election. If the voters approve a merit selection system, the General Assembly shall enact laws to create a judicial nominating commission for the purpose of nominating candidates for merit selection to the Supreme Court and Court of Appeals[;]

(3) GA. CONST. art. VI, § VII, para. I(a) ("All Justices of the Supreme Court and the Judges of the Court of Appeals shall be elected on a nonpartisan basis for a term of six years.");
(4) IDAHO CONST. art. V, § 6 ("The justices of the Supreme Court shall be elected by the electors of the state at large. The terms of office of the justices of the Supreme Court, except as in this article otherwise provided, shall be six years.");
(5) ILL. CONST. art VI, § 12(a) ("Supreme, Appellate and Circuit Judges shall be nominated at primary elections or by petition. Judges shall be elected at general or judicial elections as the General Assembly shall provide by law.");
(6) KY. CONST. § 117 ("Justices of the Supreme Court and judges of the Court of Appeals, Circuit and District Court shall be elected from their respective districts or circuits on a nonpartisan basis as provided by law.");
(7) LA. CONST. art. V, § 22(a) ("Except as otherwise provided in this Section, all judges shall be elected. Election shall be at the regular congressional election.");
(8) MICH. CONST. art. VI, § 2 ("The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. The term of office shall be eight years and not more than two terms of office shall expire at the same time.");
(9) MINN. CONST. art. VI, § 7 ("The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.");
(10) MISS. CONST. art. VI, § 145 ("The Legislature shall divide the state into three Supreme Court districts, and there shall be elected one judge for and from each district by the qualified electors thereof at a time and in the manner provided by law[.]"); MISS. CONST. § 145A:

> The Supreme Court shall consist of six judges, that is to say, of three judges in addition to the three provided for by Section 145 of this Constitution, any four of whom when convened shall form a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by Section 145 of this Constitution[;]

MISS. CONST. § 145B:

> The Supreme Court shall consist of nine judges, that is to say, of three judges in addition to the six provided for by Section 145A of this Constitution, any five of whom when convened shall constitute a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by Section 145A of this Constitution[;]

(11) MONT. CONST. art. VII, § 8(1) ("Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.");

(12) NEV. CONST. art. VI, § 3 ("The justices of the Supreme Court, shall be elected by the qualified electors of the State at the general election, and shall hold office for the term of six years . . . .");

(13) N.C. CONST. art. IV, § 16 ("Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years . . . .");

(14) N.D. CONST. art. VI, § 7 ("The justices of the supreme court shall be chosen by the electors of the state for ten-year terms, so arranged that one justice is elected every two years.");

(15) OHIO CONST. art. IV, § 6(A)(1) ("The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.");

(16) OR. CONST. art. VII, § 1 ("The judges of the supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years . . . .");

(17) PA. CONST. art. V, § 13(a) ("Justices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve.");

(18) TEX. CONST. art. V, § 2(c) ("Justices [of the Texas Supreme Court] shall be elected (three of them each two years) by the qualified voters of the state at a general election; shall hold their offices six years; and shall each receive such compensation as shall be provided by law.");

(19) WASH. CONST. art. IV, § 3 ("The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected, unless some other time be provided by the legislature.");

(20) W. VA. CONST. art. VIII, § 2:

> The supreme court of appeals shall consist of five justices. A majority of the justices of the court shall constitute a quorum for the transaction of business. The justices shall be elected by the voters of the State for a term of twelve years, unless sooner removed or retired as authorized in this article[;]

(21) WIS. CONST. art. VII, § 4(1) ("The supreme court shall have 7 members who shall be known as justices of the supreme court. Justices shall be elected for 10-year terms of office . . . .").

Appendix B

States Providing Initial Selection of Justices by Democratic Appointment

(1) California is complex. While Article VI of the California Constitution includes a section titled "Election; Terms; Vacancies[,]" which provides "Judges of the Supreme Court shall be elected at large[,]" this refers to retention elections for judges already on the supreme court. CAL. CONST. art. VI, § 16(a). In contrast, initial selection of such judges is provided for in CAL. CONST. art. VI, § 16(d):

> (1) Within 30 days before August 16 preceding the expiration of the judge's term, a judge of the Supreme Court or a court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. *If the declaration is not filed, the Governor before September 16 shall nominate a candidate*. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected.
>
> (2) The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies. *A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments*[;]

Id. art. VI, § 16(d) (emphasis added). So, initial selection is by the governor subject to confirmation by the Commission on Judicial Appointments, which "consists of the Chief Justice, the Attorney General, and the presiding justice of the court of appeal of the affected district or, if there are 2 or more presiding justices, the one who has presided longest or, when a nomination or appointment to the Supreme Court is to be considered, the presiding justice who has presided longest on any court of appeal." CAL. CONST. art. VI, § 7.

(2) CONN. CONST. art. V, § 2, *amended by* CONN. CONST. amend XXV (legislature):

> Judges of all courts, except those courts to which judges are elected, shall be nominated by the governor exclusively from candidates submitted by the judicial selection commission. The commission shall seek and recommend qualified candidates in such numbers as shall by law be prescribed. Judges so nominated shall be appointed by the general assembly in such manner as shall by law be prescribed[;]

CONN. GEN. STAT. §§ 51-44a(a)–(b) (prescribing that the commission be comprised of twelve members, six appointed by governor, one each by the

president pro tempore of the Senate, the speaker of the House, and the majority and minority leaders of the senate and house);

(3) COLO. CONST. art. VI, § 20(1):

> A vacancy in any judicial office in any court of record shall be filled by appointment of the governor, from a list of three nominees for the supreme court . . . , such list to be certified to him by the supreme court nominating commission for a vacancy in the supreme court . . . . If the governor shall fail to make the appointment . . . from such list within fifteen days from the day it is submitted to him, the appointment . . . shall be made by the chief justice of the supreme court from the same list within the next fifteen days. A justice or judge appointed under the provisions of this section shall hold office for a provisional term of two years and then until the second Tuesday in January following the next general election[;]

COLO. CONST. art. VI, § 24(2) ("The supreme court nominating commission shall consist of the chief justice or acting chief justice of the supreme court, ex officio, who shall act as chairman and shall have no vote, one citizen admitted to practice law before the courts of this state and one other citizen not admitted to practice law in the courts of this state residing in each congressional district in the state, and one additional citizen not admitted to practice law in the courts of this state); id. § 24(4) ("Members of each judicial nominating commission selected by reason of their being citizens admitted to practice law in the courts of this state shall be appointed by majority action of the governor, the attorney general and the chief justice. All other members shall be appointed by the governor.")

(4) DEL. CONST. art. IV, § 3 ("The Chief Justice and Justices of the Supreme Court, . . . shall be appointed by the governor, by and with the consent of a majority of all the members elected to the Senate . . . ."); Del. Exec. Order No. 16 (Oct. 18, 2017), available at https://governor.delaware.gov/executive-orders/eo16/ (nominating commission consists of twelve members: eleven appointed by governor—at least four lawyers and three non-lawyers—and one nominated by president of bar association, with consent of governor, and appointed by governor);

(5) HAW. CONST. art. VI, § 3:

> The governor, with the consent of the senate, shall fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts, by appointing a person from a list of not less than four, and not more than six nominees for the vacancy, presented to the governor by the judicial selection commission[;]

HAW. CONST. art. VI, §§ 3–4 (prescribing that commission consists of nine members: two appointed by the governor, two by the senate president, two by the house speaker, one by the chief justice, and two by members of the state bar);

(6) ME. CONST. art. V, pt. 1, § 8 ("The Governor shall nominate, and, subject to confirmation as provided herein, appoint all judicial officers, except judges of

probate and justices of the peace if their manner of selection is otherwise provided for by this Constitution or by law . . . ."); *id.*:

> The procedure for confirmation shall be as follows: an appropriate legislative committee comprised of members of both houses in reasonable proportion to their membership as provided by law shall recommend confirmation or denial by majority vote of committee members present and voting. The committee recommendation shall be reviewed by the Senate and upon review shall become final action of confirmation or denial unless the Senate by vote of 2/3 of those members present and voting overrides the committee recommendation. The Senate vote shall be by the yeas and nays[;]

Me. Exec. Order No. 32 FY 20/21 (Feb. 24, 2021), available at https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/EO%2032%2088.pdf (nominating commission members are all appointed by the governor);

(7) MD. CONST. art. II, § 10 ("[The Governor] shall nominate, and, by and with the advice and consent of the Senate, appoint all civil and military officers of the State, whose appointment, or election, is not otherwise herein provided for, unless a different mode of appointment be prescribed by the Law creating the office."); Md. Exec. Order No. 01.01.2019.05 (May 6, 2019), available at https://governor.maryland.gov/wp-content/uploads/2019/05/01.01.2019.05-Judicial-Nominating-Commissions.pdf (nominating commission consists of seventeen members, twelve appointed by the governor, five Maryland bar members appointed by the governor from a list of ten such persons submitted by the president of bar association);

(8) MASS. CONST. ch. II, § I, art. IX:

> All judicial officers, [the attorney-general,] the solicitor-general, [all sheriffs,] coroners, [and registers of probate,] shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment[;]

MASS. CONST. ch. II, § II, art. I ("There shall be a council for advising the governor in the executive part of government, to consist of [nine] persons besides the lieutenant governor, whom the governor, for the time being, shall have full power and authority, from time to time, at his discretion, to assemble and call together."); MASS. CONST. ch. II, § II, *amended by* MASS. CONST. amend. art. XVI ("Eight councillors shall be annually chosen by the inhabitants of this commonwealth, qualified to vote for governor"); Mass. Exec. Order No. 558 (Feb. 5, 2015), available at https://www.mass.gov/doc/executive-order-no-558/download ("A Judicial Nominating Commission ('Commission') is hereby established to identify and invite application by persons qualified for judicial office and to advise the Governor with respect to appointments . . . . The Commission shall consist of twenty-one persons appointed by the Governor . . .");

(9) N.H. CONST. pt. II, art. 46:

> All judicial officers, the attorney general, and all officers of the navy, and general and field officers of the militia, shall be nominated and appointed by the governor and council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto[;]

N.H. CONST. pt. II, art. 60 ("There shall be biennially elected, by ballot, 5 councilors, for advising the governor in the executive part of government."); N.H. Exec. Order 2017-01 cl. 2 (Feb. 6, 2017), available at https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2017-01.pdf (stating that the commission shall include between nine and eleven members, all appointed by the governor). *Id. at cls. 1, 5, 6*:

> [The Governor hereby orders] [t]he establishment of a Judicial Selection Commission . . . . Whenever a vacancy occurs or is anticipated in the office of a Supreme court justice, . . . the Governor may notify the chair of the Commission of the vacancy. The Commission shall assist the Governor in examining qualified persons for each vacancy in accordance with a schedule provided by the Governor. The commission shall, in accordance with the Schedule provided by the Governor, submit to the Governor a list of names of individuals it deems qualified for a judicial vacancy[;]

(10) N.J. CONST. art. VI, § VI, para. 1 ("The Governor shall nominate and appoint, with the advice and consent of the Senate, the Chief Justice and associate justices of the Supreme Court."); N.J. Exec. Order No. 16 (Mar. 20, 2018), available at https://nj.gov/infobank/eo/056murphy/pdf/EO-16.pdf (continuing Executive Order No. 36 (2006)); N.J. Exec. Order No. 36 (Sept. 22, 2006), available at https://nj.gov/infobank/circular/eojsc36.htm (nominating commission of seven members, all appointed by governor, including five retired judges);

(11) N.Y. CONST. art. VI, § 2(e) ("The governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission."); *id.* § 2(d)(1) (nominating commission consists of twelve members: four appointed by the governor, four by the chief judge of the Court of Appeals, and four by legislative leaders);

(12) R.I. CONST. art. X, § 4:

> The governor shall fill any vacancy of any justice of the Rhode Island Supreme Court by nominating, on the basis of merit, a person from a list submitted by an independent non-partisan judicial nominating commission, and by and with the advice and consent of the senate, and by and with the separate advice and consent of the house of representatives, shall appoint said person as a justice of the Rhode Island Supreme Court. . . . The powers, duties, and composition of the judicial nominating commission shall be defined by statute[;]

R.I. GEN. LAWS §8-16.1-5(a) ("The governor shall fill any vacancy of any justice of the Rhode Island supreme court by nominating one of the three (3) to five (5) highly qualified persons forwarded to him or her by the commission for the court."); *id.* § 8-16.1-5(i):

> In case a vacancy shall occur when the general assembly is not in session, the governor shall appoint some person from a list of three (3) to five (5) persons submitted to the governor by the commission to fill the vacancy until the general assembly shall next convene, when the governor shall make an appointment as provided in this section[;]

id. § 8-16.1-2 (prescribing that judicial nominating commission be appointed by governor from lists submitted by the speaker of the house, the president of the senate, and the minority leaders of the house and senate);

(13) S.C. CONST. art. V, § 3:

> The members of the Supreme Court shall be elected by a joint public vote of the General Assembly for a term of ten years, and shall continue in office until their successors shall be elected and qualified, and shall be classified so that the term of one of them shall expire every two years[;]

S.C. CONST. art. V, § 27:

> In addition to the qualifications for circuit court and court of appeals judges and Supreme Court justices contained in this article, the General Assembly by law shall establish a Judicial Merit Selection Commission to consider the qualifications and fitness of candidates for all judicial positions on these courts and on other courts of this State which are filled by election of the General Assembly. The General Assembly must elect the judges and justices from among the nominees of the commission to fill a vacancy on these courts[;]

S.C. CODE ANN. § 2-19-10 (prescribing that judicial selection commission be composed of 10 members appointed by speaker of the house, president of the senate, and the senate judiciary committee chairman);

(14) TENN. CONST. art. VI, § 3:

> Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state. Confirmation by default occurs if the Legislature fails to reject an appointee within sixty calendar days of either the date of appointment, if made during the annual legislative session, or the convening date of the next annual legislative session, if made out of session[;]

TENN. CODE ANN. § 17-1-301(a):

> If a vacancy occurs during the term of office of a judge of the supreme court, the court of appeals, or the court of criminal appeals, then the

> governor shall appoint a qualified person to fill the vacancy. The governor's appointee shall be confirmed and shall stand for election in a retention election in accordance with chapter 4, part 1 of this title[;]

(15) UTAH CONST. art. VIII, § 8:

> (1) When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the Judicial Nominating Commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the Supreme Court shall within 20 days make the appointment from the list of nominees. (2) The Legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the Legislature may serve as a member of, nor may the Legislature appoint members to, any Judicial Nominating Commission. (3) The Senate shall consider and render a decision on each judicial appointment within 60 days of the date of appointment. If necessary, the Senate shall convene itself in extraordinary session for the purpose of considering judicial appointments. The appointment shall be effective upon approval of a majority of all members of the Senate. If the Senate fails to approve the appointment, the office shall be considered vacant and a new nominating process shall commence. (4) Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political consideration[;]

UTAH CODE ANN. § 78A-10-201 ("(1) There is created an Appellate Court Nominating Commission. (2) The Appellate Court Nominating Commission shall nominate justices of the Supreme Court and judges of the Court of Appeals."); UTAH CODE ANN. § 78A-10-202(1), (4)–(5):

> The Appellate Court Nominating Commission shall consist of seven commissioners, each appointed by the governor to serve a single four-year term. . . . The Utah State Bar shall submit to the governor a list of six nominees to serve as Appellate Court Nominating Commissioners. The governor shall appoint two commissioners from the list of nominees provide by the Utah State Bar. The governor may reject the list submitted by the Utah State Bar and request a new list of nominees. The governor may not appoint more than four persons who are members of the Utah State Bar to the Appellate Court Nominating Commission[;]

(16) VT. CONST. ch. II, § 32:

> The Governor, with the advice and consent of the Senate, shall fill a vacancy in the office of the Chief justice of the State, associate justice of the Supreme Court or judge of any other court, except the office of

> Assistant Judge and of Judge of Probate, from a list of nominees presented by a judicial nominating body established by the General Assembly having authority to apply reasonable standards of selection[;]

VT. STAT. ANN. tit. 4, § 603 (2022) ("Whenever the Governor appoints a Supreme Court Justice, . . . he or she shall select from the list of names of qualified persons submitted by the Judicial Nominating Board pursuant to law."); VT. STAT. ANN. tit. 4, § 601(b) (2019):

> The Board shall consist of 11 members who shall be selected as follows: (1) The Governor shall appoint two members who are not attorneys at law. (2) The Senate shall elect three of its members, not all of whom shall be members of the same party, and only one of whom may be an attorney at law. (3) The House shall elect three of its members, not all of whom shall be members of the same party, and only one of whom may be an attorney at law. (4) Attorneys at law admitted to practice before the Supreme Court of Vermont, and residing in the State, shall elect three of their number as members of the Board[;]

(17) VA. CONST. art. VI, § 7:

> The justices of the Supreme Court shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of twelve years. . . . During any vacancy which may exist while the General Assembly is not in session, the Governor may appoint a successor to serve until thirty days after the commencement of the next session of the General Assembly. Upon election by the General Assembly, a new justice or judge shall begin service of a full term.

Appendix C

States Providing Initial Selection of Justices by Versions of the Missouri Plan

(1) ALASKA CONST. art. IV, § 5 ("The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council."); *id.* § 8 (prescribing that council be comprised of seven members: the chief justice, three lawyers appointed by governing body of bar for six-year terms, three non-lawyers appointed by the governor subject to confirmation by a majority of the members of the legislature for six-year terms)

(2) ARIZ. CONST. art. VI, § 37(A):

> Within sixty days from the occurrence of a vacancy in the office of a justice or judge of any court of record, except for vacancies occurring in the office of a judge of the superior court or a judge of a court of record inferior to the superior court, the commission on appellate court appointments, if the vacancy is in the supreme court or an intermediate appellate court of record, shall submit to the governor the names of not less than three persons nominated by it to fill such vacancy . . . [;]

ARIZ. CONST. art. VI, § 36(A) (commission consists of sixteen members: the chief justice, five lawyers nominated by the governing body of the state bar and appointed by the governor with the advice and consent of the senate for staggered four-year terms, and ten non-lawyers appointed by the governor with the advice and consent of the senate for staggered four-year terms);

(3) FLA. CONST. art. V, § 11(a):

> Whenever a vacancy occurs in a judicial office to which election for retention applies, the governor shall fill the vacancy by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission[;]

id. § 11(d) ("There shall be a separate judicial nominating commission as provided by general law for the supreme court, each district court of appeal, and each judicial circuit court for all trial courts within the circuit."); FLA. STAT. § 43.291 (stating that supreme court nominating commission consists of nine members appointed to four-year terms: four lawyers appointed by governor from lists of nominees submitted by the board of governors of the bar association, and five other members appointed by the governor, with at least two being members of the state bar);

(4) IND. CONST. OF 1851 art. VII, § 10 ("A vacancy in a judicial office in the Supreme Court or Court of Appeals shall be filled by the Governor, without regard to political affiliation, from a list of three nominees presented to him by the judicial nominating commission."); Ind. Const. art. VII, § 9:

> The judicial nominating commission shall consist of seven members, a majority of whom shall form a quorum, one of whom shall be the Chief Justice of the State or a Justice of the Supreme Court whom he may designate, who shall act as chairman. Those admitted to the practice of law shall elect three of their number to serve as members of said commission. All elections shall be in such manner as the General Assembly may provide. The Governor shall appoint to the commission three citizens, not admitted to the practice of law;

(5) IOWA CONST. art. V, § 15:

> Vacancies in the Supreme Court and District Court shall be filled by appointment by the Governor from lists of nominees submitted by the appropriate judicial nominating commission. Three nominees shall be submitted for each Supreme Court vacancy, and two nominees shall be submitted for each District Court vacancy. If the Governor fails for thirty days to make the appointment, it shall be made from such nominees by the Chief Justice of the Supreme Court[;]

Iowa Const. art. V, § 16:

> There shall be a state judicial nominating commission. Such commission shall make nominations to fill vacancies in the supreme court. Until July 4, 1973, and thereafter unless otherwise provided by law, the state judicial nominating commission shall be composed and selected as follows: There shall be not less than three nor more than eight appointive members, as provided by law, and an equal number of elective members on such commission, all of whom shall be electors of the state. The appointive members shall be appointed by the governor subject to confirmation by the senate. The elective members shall be elected by the resident members of the bar of the state. The judge of the supreme court who is senior in length of service on said court, other than the chief justice, shall also be a member of such commission and shall be its chairman;

IOWA CODE § 46.1 (2019) ("The governor shall appoint, subject to confirmation by the senate, nine eligible electors to the state judicial nominating commission"); id. § 46.2 ("The resident members of the bar of each congressional district shall elect two eligible electors of different genders to the state judicial nominating commission.");

(6) KAN. CONST. art. III, § 5(a):

> Any vacancy occurring in the office of any justice of the supreme court and any position to be open thereon as a result of enlargement of the court or the retirement or failure of an incumbent to file his declaration of candidacy to succeed himself as hereinafter required, or failure of a justice to be elected to succeed himself, shall be filled by appointment by the governor of one of three persons possessing the qualifications of office who shall be nominated and whose names shall be submitted

> to the governor by the supreme court nominating commission established as hereinafter provided[;]

Kan. Const. art. III, § 5:

> The supreme court nominating commission shall be composed as follows: One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each congressional district, appointed by the governor from among the residents of each such district.

(7) MO. CONST. art. V, § 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[;]

id. § 25(d):

> [T]he appellate judicial commission shall consist of a judge of the supreme court selected by the members of the supreme court, and the remaining members shall be chosen in the following manner: The members of the bar of this state residing in each court of appeals district shall elect one of their number to serve as a member of said commission, and the governor shall appoint one citizen, not a member of the bar, from among the residents of each court of appeals district, to serve as a member of said commission[;]

(8) NEB. CONST. art. V, § 21(1):

> In the case of any vacancy in the Supreme Court . . . , such vacancy shall be filled by the Governor from a list of at least two nominees presented to him by the appropriate judicial nominating commission. If the Governor shall fail to make an appointment from the list within sixty days from the date it is presented to him, the appointment shall be made by the Chief Justice or the acting Chief Justice of the Supreme Court from the same list[;]

Neb. Const. art. V, § 21:

> There shall be a judicial nominating commission for the Chief Justice of the Supreme Court and one for each judicial district of the Supreme Court and of the district court and one for each area or district served by any other court made subject to subsection (1) of this section by law. Each judicial nominating commission shall consist of nine members, one of whom shall be a Judge of the Supreme Court who shall be designated by the Governor and shall act as chairman, but shall not be entitled to vote. The members of the bar of the state residing in the area from which the nominees are to be selected shall designate four of their number to serve as members of said commission, and the Governor shall appoint four citizens, not admitted to practice law before the courts of the state, from among the residents of the same geographical area to serve as members of said commission.

(9) N.M. CONST. art. VI, §35:

> There is created the 'appellate judges nominating commission', consisting of: the chief justice of the supreme court or the chief justice's designee from the supreme court; two judges of the court of appeals appointed by the chief judge of the court of appeals; the governor, the speaker of the house of representatives and the president pro tempore of the senate shall each appoint two persons, one of whom shall be an attorney licensed to practice law in this state and the other who shall be a citizen who is not licensed to practice law in any state; the dean of the university of New Mexico school of law, who shall serve as chairman of the commission and shall vote only in the event of a tie vote; four members of the state bar of New Mexico, representing civil and criminal prosecution and defense, appointed by the president of the state bar and the judges on this committee. The appointments shall be made in such manner that each of the two largest major political parties, as defined by the Election Code, shall be equally represented on the commission. If necessary, the president of the state bar and the judges on this committee shall make the minimum number of additional appointments of members of the state bar as is necessary to make each of the two largest major political parties be equally represented on the commission. These additional members of the state bar shall be appointed such that the diverse interests of the state bar are represented. The dean of the university of New Mexico school of law shall be the final arbiter of whether such diverse interests are represented. Members of the commission shall be appointed for terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated. The commission shall actively solicit, accept and evaluate

> applications from qualified lawyers for the position of justice of the supreme court or judge of the court of appeals and may require an applicant to submit any information it deems relevant to the consideration of his application. Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission. Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of additional names, and the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment to the judicial office. The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of justice of the supreme court or judge of the court of appeals within thirty days after receiving final nominations from the commission by appointing one of the persons nominated by the commission for appointment to that office. If the governor fails to make the appointment within that period or from those nominations, the appointment shall be made from those nominations by the chief justice or the acting chief justice of the supreme court[;]

N.M. CONST. art. VI, § 34:

> The office of any justice or judge subject to the provisions of Article 6, Section 33 of this constitution becomes vacant on January 1 immediately following the general election at which the justice or judge is rejected by more than forty-three percent of those voting on the question of retention or rejection or on January 1 immediately following the date the justice or judge fails to file a declaration of candidacy for the retention of the justice's or judge's office in the general election at which the justice or judge would be subject to retention or rejection by the electorate. Otherwise, the office becomes vacant upon the date of the death, resignation or removal by impeachment of the justice or judge[;]

(10) OKLA. CONST. art. VII-B, § 4:

> When a vacancy in any Judicial Office, however arising, occurs or is certain to occur, the Judicial Nominating Commission shall choose and submit to the Governor and the Chief Justice of the Supreme Court three (3) nominees, each of whom has previously notified the Commission in writing that he will serve as a Judicial Officer if appointed. The Governor shall appoint one (1) of the nominees to fill the vacancy, but if he fails to do so within sixty (60) days the Chief

> Justice of the Supreme Court shall appoint one (1) of the nominees, the appointment to be certified by the Secretary of State[;]

id. § 3 (stating that commission consists of fifteen members who serve six year terms: six non-lawyers appointed by the governor, six lawyers elected by members of the state bar, and three non-lawyers elected by the other 12 members);

(11) S.D. CONST. art. V, § 7:

> A vacancy, as defined by law, in the office of a Supreme Court justice or circuit court judge, shall be filled by appointment of the Governor from one of two or more persons nominated by the judicial qualifications commission. The appointment to fill a vacancy of a circuit court judge shall be for the balance of the unexpired term; and the appointment to fill a vacancy of a Supreme Court justice shall be subject to approval or rejection as hereinafter set forth[;]

S.D. CODIFIED LAWS § 16-1A-2 (2020) (stating that commission consists of seven members who serve four-year terms: two circuit judges elected by the judicial conference, three lawyers elected by state bar commissioners, and two non-lawyers appointed by the governor);

(12) WYO. CONST. art. V, § 4(b):

> A vacancy in the office of justice of the supreme court or judge of any district court or of such other courts that may be made subject to this provision by law, shall be filled by a qualified person appointed by the governor from a list of three nominees that shall be submitted by the judicial nominating commission. The commission shall submit such a list not later than 60 days after the death, retirement, tender of resignation, removal, failure of an incumbent to file a declaration of candidacy or certification of a negative majority vote on the question of retention in office under section [subsection] (g) hereof. If the governor shall fail to make any such appointment within 30 days from the day the list is submitted to him, such appointment shall be made by the chief justice from the list within 15 days[;]

Wyo. Const. art. V, § 4:

> The commission shall consist of seven members, one of whom shall be the chief justice, or a justice of the supreme court designated by the chief justice to act for him, who shall be chairman thereof. In addition to the chief justice, or his designee, three resident members of the bar engaged in active practice shall be elected by the Wyoming state bar and three electors of the state not admitted to practice law shall be appointed by the governor to serve on said commission for such staggered terms as shall be prescribed by law.

Appendix D

State Constitutional Provisions for Filling Interim Supreme Court Vacancies

(1) ALA. CONST. art VI, § 153 ("Vacancies in any judicial office shall be filled by appointment by the governor[.]");

(2) ALASKA CONST. art. IV, § 5 ("The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council"); *id*. § 8 (council comprised of seven members: the chief justice, three lawyers appointed by the governing body of the state bar for six-year terms, three non-lawyers appointed by the governor subject to confirmation by a majority of the members of the legislature in joint session);

(3) ARIZ. CONST. art. VI, § 37(A):

> Within sixty days from the occurrence of a vacancy in the office of . . . any court of record, except for vacancies occurring in the office of a judge of the superior court or a judge of a court of record inferior to the superior court, the commission on appellate court appointments, if the vacancy is in the supreme court or an intermediate appellate court of record, shall submit to the governor the names of not less than three persons nominated by it to fill such vacancy[;]

(4) ARK. CONST. amend. 80, § 18(B) ("Vacancies in these offices [of Supreme Court Justices and Court of Appeals Judges] shall be filled by appointment of the Governor, unless the voters provide otherwise in a system of merit selection.");

(5) CAL. CONST. art. VI, § 16(d)(2):

> The Governor shall fill vacancies in those courts [including supreme court] by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies. A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments[;]

(6) COLO. CONST. art. VI, § 20(1):

> A vacancy in any judicial office in any court of record shall be filled by appointment of the governor, from a list of three nominees for the supreme court . . . , such list to be certified to him by the supreme court nominating commission for a vacancy in the supreme court . . . . If the governor shall fail to make the appointment . . . from such list within fifteen days from the day it is submitted to him, the appointment . . . shall be made by the chief justice of the supreme court from the same list within the next fifteen days. A justice or judge appointed under the provisions of this section shall hold office for a provisional term of two years and then until the second Tuesday in January following the next general election[;]

(7) CONN. CONST. art. V, § 2 ("Judges of all courts, except those courts to which judges are elected, shall be nominated by the governor exclusively from candidates submitted by the judicial selection commission. The commission shall seek and recommend qualified candidates in such numbers as shall by law be prescribed."); CONN. GEN. STAT. § 4-19 (2022):

> When the General Assembly is not in session and when no other provision has been made for filling any vacancy in an office, appointment to which is made by the General Assembly or either branch thereof, whether or not on nomination by the Governor, or appointment to which is made by the Governor with the advice and consent of the General Assembly or either branch thereof, the Governor may fill the same until the sixth Wednesday of the next regular session of the General Assembly, and until a successor is elected or appointed and has qualified. The Governor may fill any vacancy in any office to which he has power of appointment, provided the Governor may not appoint a person who was nominated for an appointment subject to the advice and consent of the General Assembly or either branch thereof and whose nomination was rejected by the General Assembly or either branch thereof during the last preceding regular session of the General Assembly to the same or similar vacancy unless the General Assembly is in regular session[;]

(8) DEL. CONST. art. IV, § 3:

> The Chief Justice and Justices of the Supreme Court . . . shall be appointed by the governor, by and with the consent of a majority of all the members elected to the Senate . . . . If a vacancy shall occur, by expiration of term or otherwise, at a time when the Senate shall not be in session . . . an incumbent whose term has expired may hold over in office until the incumbent, or a new appointee is confirmed and takes the oath of office for the next term, but in no event shall an incumbent whose term has expired hold over in office for more than 90 days after the expiration of the term[;]

(9) FLA. CONST. art. V, § 11(a):

> Whenever a vacancy occurs in a judicial office to which election for retention applies, the governor shall fill the vacancy by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least on year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission[;]

id. § 11(d) ("There shall be a separate judicial nominating commission as provided by general law for the supreme court, each district court of appeal, and each judicial circuit court for all trial courts within the circuit."); FLA. STAT. § 43.291 (stating that the supreme court nominating commission consists of nine members appointed to four-year terms: four lawyers appointed by governor from

lists of nominees submitted by the board of governors of the state bar association, and five other members appointed by the governor with at least two being members of the state bar);

(10) GA. CONST. art VI, § VII, para. III ("[Judicial] [v]acancies shall be filled by appointment of the Governor except as otherwise provided by law in the magistrate, probate, and juvenile courts.");

(11) HAW. CONST. art. VI, § 3:

> The governor, with the consent of the senate, shall fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts, by appointing a person from a list of not less than four, and not more than six nominees for the vacancy, presented to the governor by the judicial selection commission[;]

id. §4 (stating that commission consists of nine members: two appointed by the governor, two by the senate president, two by the house speaker, one by the chief justice, and two elected by state bar members);

(12) IDAHO CONST. art. IV, § 6:

> If the office of a justice of the supreme or district court . . . shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, as provided by law, and the appointee shall hold his office until his successor shall be selected and qualified in such manner as may be provided by law[;]

id. art. V, § 19 ("All vacancies occurring in the offices provided for by this article of the Constitution shall be filled as provided by law"); IDAHO CODE § 1-2102(3):

> [The Idaho Judicial Council shall] [s]ubmit to the governor the names of not less than two (2) nor more than four (4) qualified persons for each vacancy in the office of justice of the supreme court . . . *one (1) of whom shall be appointed by the governor*; provided, that the council shall submit only the names of those qualified persons who are eligible to stand for election . . . [;]

(emphasis added); IDAHO CODE § 1-2101(1). The Idaho Judicial Council is selected as follows:

> Three (3) permanent attorney members, one (1) of whom shall be a district judge, shall be appointed by the board of commissioners of the Idaho state bar with the consent of the senate [and] [t]hree permanent non-attorney members shall be appointed by the governor with the consent of the senate . . . [and] [t]he chief justice of the Supreme Court shall be the seventh member and chairman of the judicial council[;]

(13) ILL. CONST. art. VI, § 12(c):

> A vacancy occurring in the office of Supreme, Appellate or Circuit Judge shall be filled as the General Assembly may provide by law. In the absence of a law, vacancies may be filled by appointment by the Supreme Court. A person appointed to fill a vacancy 60 or more days

> prior to the next primary election to nominate Judges shall serve until the vacancy is filled for a term at the next general or judicial election. A person appointed to fill a vacancy less than 60 days prior to the next primary election to nominate Judges shall serve until the vacancy is filled at the second general or judicial election following such appointment[;]

see also Cincinnati Ins. Co. v. Chapman, 691 N.E.2d 374, 384 (Ill. 1998) (holding unconstitutional ILL. CONST. art. VI, § 12(c), which would have allowed the governor to fill a vacancy).

(14) IND. CONST. art. VII, § 10 ("A vacancy in a judicial office in the Supreme Court or Court of Appeals shall be filled by the Governor, without regard to political affiliation, from a list of three nominees presented to him by the judicial nominating commission.");

(15) IOWA CONST. art. V, § 15:

> Vacancies in the Supreme Court and District Court shall be filled by appointment by the Governor from lists of nominees submitted by the appropriate judicial nominating commission. Three nominees shall be submitted for each supreme court vacancy, and two nominees shall be submitted for each District Court vacancy. If the governor fails for thirty days to make the appointment, it shall be made from such nominees by the Chief Justice of the Supreme Court[;]

(16) KAN. CONST. art. III, § 5(a):

> Any vacancy occurring in the office of any justice of the supreme court and any position to be open thereon as a result of enlargement of the court, or the retirement or failure of an incumbent to file his declaration of candidacy to succeed himself as hereinafter required, or failure of a justice to be elected to succeed himself, shall be filled by appointment by the governor of one of three persons possessing the qualifications of office who shall be nominated and whose names shall be submitted to the governor by the supreme court nominating commission established as hereinafter provided[;]

(17) KY. CONST. §118(1):

> A vacancy in the office of a justice of the Supreme Court, . . . shall be filled by the Governor from a list of three names presented to him by the appropriate judicial nominating commission. If the Governor fails to make an appointment from the list within sixty days from the date it is presented to him, the appointment shall be made from the same list by the chief justice of the Supreme Court[;]

(18) LA. CONST. art. V, § 22(B):

> A newly created judgeship or a vacancy in the office of a judge shall be filled by special election called by the governor and held within twelve months after the day on which the vacancy occurs or the

> judgeship is established, except when the vacancy occurs in the last twelve months of an existing term[;]

(19) ME. CONST. art. V, pt. 1, § 8 ("The Governor shall nominate, and, subject to confirmation as provided herein, appoint all judicial officers, except judges of probate and justices of the peace if their manner of selection is otherwise provided for by this Constitution or by law . . . .");

(20) MD. CONST. art. IV, § 5A(a) ("A vacancy in the office of a judge of an appellate court, whether occasioned by the death, resignation, removal, retirement, disqualification by reason of age, or rejection by the voters of an incumbent, the creation of a judge, or otherwise, shall be filled as provided in this section."); *id.* § 5A(b) ("Upon the occurrence of a vacancy the Governor shall appoint, by and with the advice and consent of the Senate, a person duly qualified to fill said office who shall hold the same until the election for continuance in office as provided in subsections (c) and (d).");

(21) MASS. CONST. ch. II, § I, art. IX:

> All judicial officers, [the attorney-general,] the solicitor-general, [all sheriffs,] coroners, [and registers of probate,] shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment[;]

id. ch. II, § III, art. I ("There shall be a council for advising the governor in the executive part of government, to consist of [nine] persons besides the lieutenant governor, whom the governor, for the time being, shall have full power and authority, from time to time, at his discretion, to assemble and call together.");

(22) MICH. CONST. art. VI, §23:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term[;]

(23) MINN. CONST. art. VI, § 8:

> Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment[;]

(24) MISS. CONST. art. VI, § 177:

> The governor shall have power to fill any vacancy which may happen during the recess of the senate in the office of judge or chancellor, by making a temporary appointment of an incumbent, which shall expire at the end of the next session of the senate, unless a successor shall be

> sooner appointed and confirmed by the senate. When a temporary appointment of a judge or chancellor has been made during the recess of the senate, the governor shall have no power to remove the person or appointee, nor power to withhold his name from the senate for their action[;]

MISS. CODE ANN. § 9-1-103

> Whenever a vacancy shall occur in any judicial office [including the Supreme Court] by reason of death of an incumbent, resignation or retirement of an incumbent, removal of an incumbent from office, or creation of a new judicial office in which there has not heretofore been an incumbent, the Governor shall have the authority to appoint a qualified person to fill such vacancy to serve for the unexpired term or until such vacancy is filled by election . . . [;]

State ex rel. Collins v. Jones, 64 So. 241, 256–57 (Miss. 1914) (holding that amendment of MISS. CONST. § 153 removing governor's power to appoint circuit judges and chancellors also deprived governor of the ability to make appointments under Section 177). David W. Case, *In Search of Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 9 n. 52 (1992) ("Because of *Jones*, the governor's authority to make interim judicial appointments appears to come strictly from MISS. CODE ANN. § 9-1-103 (1991). Accordingly, it appears that Section 177's requirement of senatorial approval for such appointments is also inert.")

(25) MO. CONST. art. V, § 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[;]

(26) MONT. CONST. art. VII, § 8(2):

> For any vacancy in the office of supreme court justice or district court judge, the governor shall nominate a replacement from nominees selected in the manner provided by law. If the governor fails to appoint within thirty days after receipt of nominees, the chief justice or acting chief justice shall make the appointment from the same nominees within thirty days of the governor's failure to appoint. Appointments made under this subsection shall be subject to confirmation by the senate, as provided by law. If the appointee is not

> confirmed, the office shall be vacant and a replacement shall be made under the procedures provided for in this section. The appointee shall serve until the election for the office as provided by law and until a successor is elected and qualified. The person elected or retained at the election shall serve until the expiration of the term for which his predecessor was elected. No appointee, whether confirmed or unconfirmed, shall serve past the term of his predecessor without standing for election[;]

MONT. CODE ANN. § 3-1-906(2):

> The following appointments are not subject to senate confirmation, and there must be an election for the office at the general election immediately preceding the scheduled expiration of the term or following the appointment, as applicable: (a) an appointment made while the senate is not in session if the term to which the appointee is appointed expires prior to the next legislative session, regardless of the time of the appointment in relation to the candidate filing deadlines for the office; and (b) an appointment made while the senate is not in session if a general election will be held prior to the next legislative session and the appointment is made prior to the candidate filing deadline for primary elections under 13-10-201(7), in which case the position is subject to election at the next primary and general elections[;]

Brown v. Gianforte, 488 P.3d 548, 552 n.2 (Mont. 2021):

> Senate confirmation is required for every interim appointment except in two specific circumstances: (1) if the appointment is made while the Senate is not in session and the term to which the appointee is appointed expires prior to the next legislative session, or (2) if a general election will be held prior to the next legislative session and the appointment is made prior to the candidate filing deadline for primary elections, in which case the position is subject to election at the next primary and general elections.

(citing MONT. CODE ANN. § 3-1-1013(2)(a)–(b)).

(27) NEB. CONST. art. V, § 21(1):

> In the case of any vacancy in the Supreme Court . . . , such vacancy shall be filled by the Governor from a list of at least two nominees presented to him by the appropriate judicial nominating commission. If the Governor shall fail to make an appointment from the list within sixty days from the date it is presented to him, the appointment shall be made by the Chief Justice or the acting Chief Justice of the Supreme Court from the same list[;]

(28) NEV. CONST. art. VI, § 20(1), (3):

> When a vacancy occurs before the expiration of any term of office in the Supreme Court or the court of appeals or among the district judges, the Governor shall appoint a justice or judge from among three

> nominees selected for such individual vacancy by the Commission on Judicial Selection . . . . Each nomination for the Supreme Court or the court of appeals must be made by the permanent Commission, composed of: (a) The Chief Justice or an associate justice designated by him; (b) Three members of the State Bar of Nevada, a public corporation created by statute, appointed by its Board of Governors; and (c) Three persons, not members of the of the legal profession, appointed by the Governor[;]

(29) N.H. CONST. pt. II, art. 46:

> All judicial officers, the attorney general, and all officers of the navy, and general and field officers of the militia, shall be nominated and appointed by the governor and council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto[;]

N.H. CONST. pt. II, art. 60 ("There shall be biennially elected, by ballot, 5 councilors, for advising the governor in the executive part of government."); N.H. Exec. Order 2017-01 cls. 1, 5, 6 (Feb. 6, 2017), available at https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2017-01.pdf:

> [The Governor hereby orders] [T]he establishment of a Judicial Selection Commission . . . . Whenever a vacancy occurs or is anticipated in the office of a Supreme court justice, . . . the Governor may notify the chair of the Commission of the vacancy. The Commission shall assist the Governor in examining qualified persons for each vacancy in accordance with a schedule provided by the Governor. The commission shall, in accordance with the Schedule provided by the Governor, submit to the Governor a list of names of individuals it deems qualified for a judicial vacancy[;]

(30) N.J. CONST. art. VI, § VI, para. 1 ("The Governor shall nominate and appoint, with the advice and consent of the Senate, the Chief Justice and associate justices of the Supreme Court."); N.J. CONST. art. V, § 1, para. 13:

> The Governor may fill any vacancy occurring in any office during a recess of the Legislature, appointment to which may be made by the Governor with the advice and consent of the Senate, or by the Legislature in joint meeting. An ad interim appointment so made shall expire at the end of the next regular session of the Senate, unless a successor shall be sooner appointed and qualify; and after the end of the session no ad interim appointment to the same office shall be made unless the Governor shall have submitted to the Senate a nomination to the office during the session and the Senate shall have adjourned without confirming or rejecting it. No person nominated for any office shall be eligible for an ad interim appointment to such office if the nomination shall have failed of confirmation by the Senate[;]

(31) N.M. CONST. art. VI, §35:

> There is created the 'appellate judges nominating commission', consisting of: the chief justice of the supreme court or the chief justice's designee from the supreme court; two judges of the court of appeals appointed by the chief judge of the court of appeals; the governor, the speaker of the house of representatives and the president pro tempore of the senate shall each appoint two persons, one of whom shall be an attorney licensed to practice law in this state and the other who shall be a citizen who is not licensed to practice law in any state; the dean of the university of New Mexico school of law, who shall serve as chairman of the commission and shall vote only in the event of a tie vote; four members of the state bar of New Mexico, representing civil and criminal prosecution and defense, appointed by the president of the state bar and the judges on this committee. The appointments shall be made in such manner that each of the two largest major political parties, as defined by the Election Code, shall be equally represented on the commission. If necessary, the president of the state bar and the judges on this committee shall make the minimum number of additional appointments of members of the state bar as is necessary to make each of the two largest major political parties be equally represented on the commission. These additional members of the state bar shall be appointed such that the diverse interests of the state bar are represented. The dean of the university of New Mexico school of law shall be the final arbiter of whether such diverse interests are represented. Members of the commission shall be appointed for terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated. The commission shall actively solicit, accept and evaluate applications from qualified lawyers for the position of justice of the supreme court or judge of the court of appeals and may require an applicant to submit any information it deems relevant to the consideration of his application. Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission. Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of additional names, and the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment to the judicial office. The

> governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of justice of the supreme court or judge of the court of appeals within thirty days after receiving final nominations from the commission by appointing one of the persons nominated by the commission for appointment to that office. If the governor fails to make the appointment within that period or from those nominations, the appointment shall be made from those nominations by the chief justice or the acting chief justice of the supreme court[;]

N.M. CONST. art. VI, § 34:

> The office of any justice or judge subject to the provisions of Article 6, Section 33 of this constitution becomes vacant on January 1 immediately following the general election at which the justice or judge is rejected by more than forty-three percent of those voting on the question of retention or rejection or on January 1 immediately following the date the justice or judge fails to file a declaration of candidacy for the retention of the justice's or judge's office in the general election at which the justice or judge would be subject to retention or rejection by the electorate. Otherwise, the office becomes vacant upon the date of the death, resignation or removal by impeachment of the justice or judge[;]

(32) N.Y. CONST. art. VI, § 2(f):

> When a vacancy occurs in the office of chief judge or associate judge of the court of appeals and the senate is not in session to give its advice and consent to an appointment to fill the vacancy, the governor shall fill the vacancy by interim appointment upon the recommendation of a commission on judicial nomination as provided in this section. An interim appointment shall continue until the senate shall pass upon the governor's selection. If the senate confirms an appointment, the judge shall serve a term as provided in subdivision a of this section commencing from the date of his or her interim appointment. If the senate rejects an appointment, a vacancy in the office shall occur sixty days after such rejection[;]

(33) N.C. CONST. art. IV, § 6(1) ("The Supreme Court shall consist of a Chief Justice and six Associate Justices, but the General Assembly may increase the number of Associate Justices to not more than eight."); N.C. CONST. art. IV, §19:

> Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article [including supreme court] shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in

> which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held, and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified[;]

N.C. GEN. STAT. § 163-9(a) ("Vacancies occurring in the offices of Justice of the Supreme Court . . . other than expiration of term shall be filled by appointment of the Governor.");

(34) N.D. CONST. art. VI, § 13(1):

> A judicial nominating committee must be established by law. The governor shall fill any vacancy in the office of supreme court justice or district court judge by appointment from a list of candidates nominated by the committee, unless the governor calls a special election to fill the vacancy for the remainder of the term. Except as provided in subsection 2, an appointment must continue until the next general election, when the office must be filled by election for the remainder of the term[;]

N.D. CENT. CODE § 27-25-03 ("The committee shall submit to the governor a list of not fewer than two nor more than seven nominees for appointment within sixty days after receipt of written notice from the governor that a vacancy in the office of judge exists.");

(35) OHIO CONST. art. IV, § 13:

> In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term[;]

(36) OKLA. CONST. art. VII-B, § 4:

> When a vacancy in any Judicial Office, however arising, occurs or is certain to occur, the Judicial Nominating Commission shall choose and submit to the Governor and the Chief Justice of the Supreme Court three (3) nominees, each of whom has previously notified the Commission in writing that he will serve as a Judicial Officer if appointed. The Governor shall appoint one (1) of the nominees to fill the vacancy, but if he fails to do so within sixty (60) days the Chief

> Justice of the Supreme Court shall appoint one (1) of the nominees, the appointment to be certified by the Secretary of State[;]

(37) OR. CONST. art. V, § 16:

> When during a recess of the legislative assembly a vacancy occurs in any office, the appointment to which is vested in the legislative assembly, or when at any time a vacancy occurs in any other state office, or in the office of judge of any court, the governor shall fill such vacancy by appointment, which shall expire when a successor has been elected and qualified. When any vacancy occurs in any elective office of the state or of any district or county thereof, the vacancy shall be filled at the next general election, provided such vacancy occurs more than sixty-one (61) days prior to such general election[;]

(38) PA. CONST. art. V, § 13(b):

> A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. The appointment shall be with the advice and consent of two-thirds of the members elected to the Senate, except in the case of justices of the peace which shall be by a majority. The person so appointed shall serve for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term whichever is less . . . [;]

(39) R.I. CONST. art. X, § 4:

> The governor shall fill any vacancy of any justice of the Rhode Island Supreme Court by nominating, on the basis of merit, a person from a list submitted by an independent non-partisan judicial nominating commission, and by and with the advice and consent of the senate, and by and with the separate advice and consent of the house of representatives, shall appoint said person as a justice of the Rhode Island Supreme Court . . . . The powers, duties, and composition of the judicial nominating commission shall be defined by statute[;]

R.I. GEN. LAWS §8-16.1-5(a) ("The governor shall fill any vacancy of any justice of the Rhode Island supreme court by nominating one of the three (3) to five (5) highly qualified persons forwarded to him or her by the commission for the court."); *id.* § 8-16.1-5(a), (i) (2021):

> The governor shall immediately notify the commission of any vacancy or prospective vacancy of a justice of the Rhode Island supreme court. The commission shall advertise for each vacancy and solicit prospective candidates and shall consider names submitted from any source. Within ninety (90) days of any vacancy the commission shall publicly submit the names of not less than three (3) and not more than five (5) highly qualified persons for each vacancy to the governor. The governor shall fill any vacancy of any justice of the Rhode Island supreme court by nominating one of the three (3) to five (5) highly

> qualified persons forwarded to him or her by the commission for the court . . . . In case a vacancy shall occur when the general assembly is not in session, the governor shall appoint some person from a list of three (3) to five (5) persons submitted to the governor by the commission to fill the vacancy until the general assembly shall next convene, when the governor shall make an appointment as provided in this section[;]

(40) S.C. CONST. art. V, § 3:

> The members of the Supreme Court shall be elected by a joint public vote of the General Assembly for a term of ten years, and shall continue in office until their successors shall be elected and qualified, and shall be classified so that the term of one of them shall expire every two years.

S.C. CONST. art. V, § 18:

> All vacancies in the Supreme Court, Court of Appeals, or Circuit Court shall be filled by elections as prescribed in Sections 3, 8, and 13 of this article; provided, that if the unexpired term does not exceed one year such vacancy may be filled by the Governor. When a vacancy is filled by either appointment or election, the incumbent shall hold office only for the unexpired term of his predecessor[;]

(41) S.D. CONST. art. V, § 7:

> A vacancy, as defined by law, in the office of a Supreme Court justice or circuit court judge, shall be filled by appointment of the Governor from one of two or more persons nominated by the judicial qualifications commission. The appointment to fill a vacancy of a circuit court judge shall be for the balance of the unexpired term; and the appointment to fill a vacancy of a Supreme Court justice shall be subject to approval or rejection as hereinafter set forth[;]

S.D. CODIFIED LAWS § 3-4-1 (2015):

> An office becomes vacant if one of the following events applies to a member of a governing body or elected officer before the expiration of the term of the office; the person: (1) Dies; (2) Resigns; (3) Is removed from office; (4) Fails to qualify as provided by law; (5) Ceases to be a resident of the state, district, county, municipality, township, ward, or precinct in which the duties of the office are to be exercised or for which elected; (6) Is convicted of any infamous crime or of any offense involving a violation of the official oath of the office; or (7) Has a judgment obtained against the person for a breach of an official bond[;]

(42) TENN. CONST. art. VI, § 3:

> Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter,

> shall be elected in a retention election by the qualified voters of the state[;]

TENN. CODE ANN. § 17-1-301(a) (2021):

> If a vacancy occurs during the term of office of a judge of the supreme court, the court of appeals, or the court of criminal appeals, then the governor shall appoint a qualified person to fill the vacancy. The governor's appointee shall be confirmed and shall stand for election in a retention election in accordance with chapter 4, part 1 of this title[;]

(43) TEX. CONST. art. V, § 28(a) ("A vacancy in the office of Chief Justice, Justice, or Judge of the Supreme Court . . . shall be filled by the Governor until the next succeeding General Election for state officers, and at that election the voters shall fill the vacancy for the unexpired term."); TEX. CONST. art. IV, § 12(b), (c):

> An appointment of the Governor made during a session of the Senate shall be with the advice and consent of two-thirds of the Senate present. In accordance with this section, the Senate may give its advice and consent on an appointment of the Governor made during a recess of the Senate[;]

(44) UTAH CONST. art. VIII, § 8:

> (1) When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the Judicial Nominating Commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the Supreme Court shall within 20 days make the appointment from the list of nominees. (2) The Legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the Legislature may serve as a member of, nor may the Legislature appoint members to, any Judicial Nominating Commission. (3) The Senate shall consider and render a decision on each judicial appointment within 60 days of the date of appointment. If necessary, the Senate shall convene itself in extraordinary session for the purpose of considering judicial appointments. The appointment shall be effective upon approval of a majority of all members of the Senate. If the Senate fails to approve the appointment, the office shall be considered vacant and a new nominating process shall commence. (4) Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political consideration[;]

(45) VT. CONST. ch. II, § 32:

> The Governor, with the advice and consent of the Senate, shall fill a vacancy in the office of the Chief justice of the State, associate justice

> of the Supreme Court or judge of any other court, except the office of Assistant Judge and of Judge of Probate, from a list of nominees presented by a judicial nominating body established by the General Assembly having authority to apply reasonable standards of selection.[;]

VT. CONST. ch. II, § 33:

> When the Senate is not in session, the Governor may make an interim appointment to fill a vacancy in the office of chief justice, associate justice of the Supreme Court or judge of any other court, except the office of Assistant Judge and of Judge of Probate, from a list of nominees presented by the judicial nominating body. A justice or judge so appointed shall hold office, with all the powers incident to the office, until the Senate convenes and acts upon the appointment submitted by the Governor. Thereafter, the appointee shall continue in office if the Senate consents to the appointment. If the appointment is not confirmed upon vote of the Senate, the appointment shall be terminated and a vacancy in the office will be created[;]

(46) VA. CONST. art. VI, § 7:

> The justices of the Supreme Court shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of twelve years. . . . During any vacancy which may exist while the General Assembly is not in session, the Governor may appoint a successor to serve until thirty days after the commencement of the next session of the General Assembly. Upon election by the General Assembly, a new justice or judge shall begin service of a full term[;]

(47) WASH. CONST. art. IV, § 3:

> If a vacancy occur in the office of a judge of the supreme court the governor shall only appoint a person to ensure the number of judges as specified by the legislature, to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term[;]

(48) W. VA. CONST. art. VIII, § 7:

> If from any cause a vacancy shall occur in the office of a justice of the supreme court of appeals or a judge of a circuit court, the governor shall issue a directive of election to fill such vacancy in the manner prescribed by law for electing a justice or judge of the court in which the vacancy exists, and the justice or judge shall be elected for the unexpired term; and in the meantime, the governor shall fill such vacancy by appointment until a justice or judge shall be elected and qualified. If the unexpired term be less than two years, or such additional period, not exceeding a total of three years, as may be

> prescribed by law, the governor shall fill such vacancy by appointment for the unexpired term[;]

W. VA. CODE § 3-10-3a ("The Judicial Vacancy Advisory Commission shall assist the Governor in filling judicial vacancies.");

(49) WIS. CONST. art. VII, § 9:

> When a vacancy occurs in the office of justice of the supreme court or judge of any court of record, the vacancy shall be filled by appointment by the governor, which shall continue until a successor is elected and qualified. There shall be no election for a justice or judge at the partisan general election for state or county officers, nor within 30 days either before or after such election[;]

(50) WYO. CONST. art. V, § 4(b):

> A vacancy in the office of justice of the supreme court or judge of any district court or of such other courts that may be made subject to this provision by law, shall be filled by a qualified person appointed by the governor from a list of three nominees that shall be submitted by the judicial nominating commission. The commission shall submit such a list not later than 60 days after the death, retirement, tender of resignation, removal, failure of an incumbent to file a declaration of candidacy or certification of a negative majority vote on the question of retention in office under section [subsection] (g) hereof. If the governor shall fail to make any such appointment within 30 days from the day the list is submitted to him, such appointment shall be made by the chief justice from the list within 15 days.