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Race and Gender on the Bench: How Best to Achieve Diversity in Judicial Selection

Constance A. Anastopoulo, *Charleston School of Law*



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Race and Gender on the Bench: How Best to Achieve Diversity in Judicial Selection

Constance A. Anastopoulou* and Daniel J. Crooks III†

ABSTRACT

How can states increase diversity on the bench? This article begins by presuming that increasing racial and gender diversity is a worthy goal—among other positive results, a diverse bench increases the judicial system’s perceived legitimacy by increasing a diverse citizenry’s confidence that judges will treat them fairly and impartially. Next we examine the unique judicial selection systems of South Carolina and Virginia—where the entire process is controlled exclusively by the state legislature—and reach the counterintuitive conclusion that these systems actually increase judicial diversity very effectively when compared with the systems of other states. Finally, we propose four specific reforms to improve the already effective systems in South Carolina and Virginia: (1) preclude sitting legislators from membership, at least in the majority, on any merit selection commission; (2) raise the cap in South Carolina on the number of qualified applicants submitted to the General Assembly from the current three to at least ten, or in Virginia place a reasonable limit on the number of names submitted to the legislative delegation from which they may select; (3) require any merit selection commission, including the Judicial Merit Selection Committee in South Carolina, to give “substantial weight” to ethics decisions rendered by a tribunal within the judicial department; and (4) include the state’s Bar association in the selection process.

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“Too many Americans don’t understand the importance of minority rights and the independent judiciary.”¹

INTRODUCTION

Much has been written about the different processes of judicial selection employed in various states throughout the country. A large amount of the focus has been on the importance of an independent and diverse judiciary and how best to achieve these objectives in the judicial selection process in order to ensure this result. There is a longstanding belief that the judiciary must be structured so as to instill confidence in citizens that court decisions will be fair and impartial.² Much of the focus in promoting diversity at all levels of state judiciaries has been to enhance the legitimacy of the judicial system in the eyes of an ever-more diverse public. Demographic imbalance in the composition of the judiciary, as well as any actual or perceived lack of independence, may erode citizens’ confidence that judges will treat them fairly and impartially. A lack of independence, whether actual or perceived, undermines the legitimacy of the state court system.

When the public loses confidence in the fairness and impartiality of the courts, justice and democracy themselves are at stake. The lack of diversity “can malign the legitimacy of not only lawyers, but the law itself.”³ A recent report from the New York University Brennan Center entitled *Improving Judicial Diversity* recognized that the nomination of Judge Sonia Sotomayor to the Supreme Court in 2009 highlighted the

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¹ Douglas E. Abrams, Associate Professor of Law, University of Missouri School of Law.

² CIARA TORES-SPELLISY ET AL., *IMPROVING JUDICIAL DIVERSITY* 4 (Brennan Center for Justice ed., 2nd ed. 2010).

³ AMERICAN BAR ASSOCIATION, *DIVERSITY AND THE LEGAL PROFESSION: THE NEXT STEPS* 31 (Cie Armstead ed., A.B.A. Presidential Initiative Commission on Diversity 2010).

issue of diversity, particularly gender, on the bench.⁴ The report noted that as Sotomayor proceeded through the nomination process, attention was focused on the fact that “of 111 Supreme Court Justices in the Court’s history since 1789, 106 have been white men.”⁵ Sotomayor was only the third person of color and only the third woman appointed to serve in the Court’s 221-year history.⁶ Her nomination keenly illustrated the lack of diversity on the country’s highest court. More importantly, her nomination suggested that the problem with respect to state courts may be even greater.⁷

Despite the fact that women now comprise forty-eight percent of law school graduates and forty-five percent of law firm associates, they make up only twenty-six percent of state judiciaries and twenty-two percent of the federal judiciary.⁸ To be sure, some progress has been made. For example, twenty states across the nation now have a woman serving as chief justice of their highest court, a number higher than at any other time in the history of the United States.⁹ Nevertheless, evidence in states such as South Carolina suggests a broader problem on the circuit, or lower-level, courts. These courts handle the bulk of cases in the court system and serve a broad range of constituencies. Conversely, appellate courts are more removed from the litigants who are at the heart of the legal system. Therefore, while gains have been made in terms of diversity in the appellate courts, there is still much work to be done in the lower-level courts.

According to the 2010 Brennan Center report, most judiciaries do not reflect the diversity in their states.¹⁰ Unfortunately, there are no simple answers to the problem posed by the lack of diversity in the judiciary. One challenge arises from the fact that judges are not selected in a uniform manner on the state level. Most states employ a system of either merit selection, such as Florida or Maryland, or judicial election, such as North Carolina or Georgia. However, both systems are equally challenged when it comes to addressing the issue of diversity on the bench. Moreover, other states employ a hybrid of the two systems—such as the “Missouri Plan”—that raises separate and distinct concerns. Another challenge to improving diversity on the bench lies in the fact that “few states have systematic recruitment efforts to attract diverse judicial applicants.”¹¹

Beyond the problem posed by the type of selection process employed, many states do not use a transparent selection system. This lack of transparency contributes to a limited pool of applicants for judicial positions because lawyers are reticent to leave their practices to enter a system where both the application and the interview processes are unknown.¹² Similarly, judicial salaries are well below those found in the private sector, particularly for minorities who are highly valued by their firms. This substantial salary cut further limits the pool of quality female and minority candidates for judicial positions.¹³ Finally, there is the issue of politics in the selection process. As the political

⁴ TORES-SPELLISCY, *supra* note 2, at iv (Foreword).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ FORSTER-LONG, LLC, *AMERICAN BENCH: JUDGES OF THE NATION 2* (2012).

⁹ Mark Curriden, *Tipping the Scales*, A.B.A. J., July 1, 2010, http://www.abajournal.com/magazine/article/tipping_the_scales/.

¹⁰ TORES-SPELLISCY, *supra* note 2, at iv.

¹¹ *Id.* at 2.

¹² *Id.* at 3.

¹³ *Id.* at 5.

pendulum swings, the prioritization of diversity on the bench is affected. These are just a few of the challenges facing the efforts to ensure that our courts reflect the diverse make-up of their constituencies.

This article presumes that diverse and independent judiciaries are necessary and beneficial goals. While it is important to understand these objectives, this article focuses on the current state of judicial selection in two particular states: South Carolina and Virginia. Both of these states have a system of judicial selection that is unique only to them—one that is controlled exclusively by the state legislature, without input from any other branch of government. Further, in South Carolina, the legislature serves as *both* the qualifying commission and the selecting entity. While on its face, a system with limited input would seem counterproductive to achieving diversity on the bench, when this system is compared to other states' judicial selection process, exclusive legislative control has proven to be an effective method in attaining diversity. This Article suggests reforms to this process to enhance further its ability to realize diversity in the judicial selection process.

Part I of this article begins by examining judicial selection processes utilized generally by states, particularly the Missouri Plan. It continues by exploring the evolution of judicial selection in South Carolina and Virginia, ending with details about each state's current judicial selection systems. Part II compares and contrasts each state's process in order to highlight the differences and evaluate how South Carolina and Virginia compare to other states in terms of diversity on the bench. Part III analyzes the problems associated with the method of legislatively controlled judicial selection by reviewing a recent South Carolina Supreme Court case addressing judicial selection in that state. Finally, Part IV proposes reforms to the current systems utilized in each state, the employment of any one of which would be a meaningful step forward in depoliticizing judicial selection with the ultimate goal of achieving a more diverse bench.

I. JUDICIAL SELECTION: GENERAL OVERVIEW:

States employ a variety of different methods to choose their judges. These methods include filling judicial posts by direct elections (either partisan or non-partisan), appointment by the governor with advice and consent of the state senate, or election by the state legislature. South Carolina and Virginia employ the latter method.¹⁴ Perhaps the most well known plan is the so-called Missouri Plan.¹⁵ This plan originated in Missouri in 1940 and has been adopted by several states, including Alaska, Arizona, Colorado, Iowa, and Florida to name a few.¹⁶

The Missouri Plan is a non-partisan approach that incorporates different elements of the political system to select judges.¹⁷ Under the plan, a non-partisan qualifying commission proposes a list of names to the governor, who in turn has sixty days to decide whether to appoint a candidate from the list.¹⁸ If the governor fails to make a selection

¹⁴ *Methods of Judicial Selection*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Mar. 22, 2013).

¹⁵ See Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 759 (2009).

¹⁶ *Methods of Judicial Selection*, *supra* note 14.

¹⁷ MO. CONST. art. V, § 25(a).

¹⁸ *Id.*

within sixty days, the commission may make the selection instead.¹⁹ After one year of service, the judge faces a retention vote during the general election by which voters decide whether to retain the judge for his or her full term.²⁰ If the majority of voters vote against the judge, then the process begins all over again to fill the seat.²¹

The composition of the commission is an important element in the Missouri Plan. The commission is comprised of lawyers proposed by the state bar association, citizens selected by the governor, and the chief justice of the state's supreme court who acts as the chair of the commission.²² Interestingly, Iowa, a state that utilizes the Missouri Plan, includes an additional element of requiring a gender balance on the nominating commission.²³ Further, the Missouri Plan includes voters as well, thereby incorporating different elements—the executive, the legislature, and voters—of the political process. By employing different components, the plan's objective is to remove politics from the selection procedure while utilizing a “checks and balances” approach. The use of a checks and balances approach is significant when compared to the approach to judicial selection in South Carolina and Virginia. A system of checks and balances is at the heart of the separation of powers form of government adopted in the United States Constitution, which is also enshrined as a doctrine in all state constitutions.²⁴ Separation of powers with clearly defined branches of government, each with its own separate and independent powers, ensures that no branch of government becomes more powerful than any other branch, thereby preventing an abuse of power. The lack of any system a checks and balance would allow the legislative branch to exert too much power over the judicial branch, creating a threat to the separation of powers.

The Missouri Plan is not without its critics, however. Some of these criticisms include that there is too much influence by lawyers,²⁵ too much politics in the process, and that there is a conspicuous lack of diversity on the nominating commission, which translates into a lack of diversity on the bench.²⁶ As Professor Stephen J. Ware points out, the Missouri Plan may not be the panacea many hope.²⁷ Missouri ranks thirty-second in terms of diversity on the bench in comparison to other states.²⁸ Professor Ware, in his article, *The Missouri Plan in National Perspective*, places states on a continuum in terms of “elitism” based on the amount of influence exerted by bar associations in the judicial selection process.²⁹ Missouri ranks in the second highest tier in terms of “More Elitist, High Bar Control,” while South Carolina and Virginia are in the second to last tier in terms of elitism, outpaced only by states with pure contestable elections.³⁰ Some of the other states mentioned above that utilize the Missouri Plan for judicial selection are as geographically diverse as Alaska, Arizona, Colorado, and Florida.³¹ Interestingly, Alaska

¹⁹ *Id.*

²⁰ MO. CONST. art. V, § 25(c)(1).

²¹ *Id.*

²² MO. CONST. art. V, § 25(d).

²³ IA. STAT. § 46.3.

²⁴ U.S. CONST. art. I-III.

²⁵ See Ware, *supra* note 15, at 759.

²⁶ See TORES-SPELLISCY, *supra* note 2, at 6.

²⁷ See Ware, *supra* note 15, at 759.

²⁸ See *infra* Appendix A.

²⁹ Ware, *supra* note 15, at 755.

³⁰ *Id.* at 775.

³¹ *Id.* at 759.

ranks fortieth in terms of diversity, Arizona is tied for twenty-first, Colorado is fourteenth, and Florida ranks twelfth.³²

Additionally, critics of the Missouri Plan note that it increasingly injects politics into judicial selection through its use of retention elections. The survival of a judge may depend on whether or not his or her decisions are popular with voters. Even more so, survival may depend on whether a judge is in the “right party” at the time of the election rather than whether a judge’s decisions are correct under the law.³³ Therefore, perhaps there is another system of judicial selection available to address the criticisms directed at the Missouri Plan which may in fact be better suited to achieve the objectives of a more diverse and independent judiciary, especially when employing “tweaks” to that system as proposed in this Article.

A. *South Carolina*

1. Overview

The population of South Carolina is 66.1% Caucasian, 27.9% African American, 1.3% Asian, and 5.1% Hispanic ethnicity (independent of racial classification).³⁴ Women make up 51.3% of the state’s population.³⁵ Like all other states, South Carolina’s judiciary consists of several levels, beginning with the highest court, the South Carolina Supreme Court.³⁶ The Supreme Court is made up of five elected justices,³⁷ and each serves a ten-year term.³⁸ The court consists of a Chief Justice and four associate justices.³⁹ The terms are staggered so that the legislature elects one member of the court every two years,⁴⁰ and a justice may be re-elected to any number of terms.⁴¹ The court acts in an appellate capacity, which includes cases on certiorari from the South Carolina Court of Appeals and seven classes of appeals directly from circuit and family court cases that are within the exclusive jurisdiction of the court.⁴²

The second highest court in the state, the Court of Appeals, is comprised of nine judges.⁴³ The nine judges of the Court of Appeals are arranged and elected by seat,⁴⁴ and candidates can be from any geographic region in the state.⁴⁵ Each member of the Court of

³² See *infra* Appendix A.

³³ Ware, *supra* note 15, at 772.

³⁴ See *2010 Census Interactive Population Search – SC*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=45> (last visited June 6, 2013).

³⁵ *Id.*

³⁶ South Carolina courts include Probate Courts and Magistrate Courts; however, these are not addressed in this article because the process of judicial selection is different from legislative appointment.

³⁷ *Supreme Court*, S.C. JUD. DEP’T, <http://www.judicial.state.sc.us/supreme/> (last visited Mar. 22, 2013).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* The South Carolina Constitution is void of any mention of term limits for Supreme Court justices. See S.C. CONST. art. V, § 3.

⁴² These classes include the following: cases involving the sentence of death; cases involving the constitutionality of state law or local ordinances; cases pertaining to elections; and appeals of family court orders related to abortion by a minor. S.C. CODE ANN. § 14-8-200 (2012).

⁴³ § 14-8-10; see also *Court of Appeals*, S.C. JUD. DEP’T, <http://www.judicial.state.sc.us/appeals/> (last visited Mar. 22, 2013).

⁴⁴ § 14-8-20.

⁴⁵ *How Judges Are Elected in South Carolina*, S.C. JUD. DEP’T, <http://www.judicial.state.sc.us>

Appeals is elected to six-year terms, which are also staggered.⁴⁶ The court consists of a Chief Judge and eight associate judges who hear cases in panels of three or en banc.⁴⁷ Jurisdiction of the Court of Appeals covers questions of law and equity arising from the circuit and family courts except those seven classes noted above which are the exclusive jurisdiction of the South Carolina Supreme Court.⁴⁸

The second largest branch of the judiciary in the state is the circuit court system. The General Assembly elects forty-six circuit court judges from the sixteen judicial circuits and thirteen circuit court judges from the state at-large for six-year terms.⁴⁹ The South Carolina circuit courts sit either as the Court of Common Pleas (civil cases) or as the Court of General Sessions (criminal cases).⁵⁰

In addition to the circuit courts there is also a system of family courts. Similar to other judges discussed above, family court judges are elected by a joint public vote of the General Assembly.⁵¹ At least two family court judges are elected for six-year terms to each of the sixteen judicial circuits, with fifty-two judges who rotate primarily from county to county within their resident circuits.⁵² Jurisdiction of the family court is limited to domestic or family relations and cases involving juvenile-minors under the age of seventeen.⁵³

South Carolina's court system is structured like many other states with the bulk of cases being heard on the circuit court and family court levels. With an understanding of the court system in place, it is important to understand how South Carolina came to its current process of judicial selection.

a. A Brief History of the Election of Judges in South Carolina

South Carolina has always been, and continues to be, a strong legislative state.⁵⁴ Since 1776, the General Assembly has enjoyed unfettered control over the election of justices and judges. The state's prior constitutions of 1776, 1778, 1790, 1861, 1865, and 1868 are all consistent with respect to the General Assembly's plenary control over the election process.⁵⁵ Under the 1895 constitution and until 1997, this legislative dominance continued virtually unaltered.⁵⁶ However, the passage of a 1997 constitutional amendment⁵⁷ led to the establishment of the Judicial Merit Selection Committee, an independent body exclusively charged with determining which three judicial candidates'

/judges/howjudgesselected.cfm (last visited Mar. 22, 2013).

⁴⁶ S.C. CONST. art. V, § 8.

⁴⁷ See S.C. CODE ANN. § 14-8-80; see also *Court of Appeals*, *supra* note 43.

⁴⁸ § 14-8-200.

⁴⁹ See § 14-5-610; *Circuit Court*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/circuitCourt/> (last visited Mar. 22, 2013).

⁵⁰ See *Circuit Court*, *supra* note 49.

⁵¹ S.C. CODE ANN. § 2-19-80 (providing for the Judicial Merit Selection Commission to nominate candidates to be elected by the General Assembly to the family court, among other courts).

⁵² See *Family Court*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/familyCourt/> (last visited Mar. 22, 2013); S.C. CODE ANN. §§ 63-3-30, 63-3-40, 63-3-320.

⁵³ S.C. CODE ANN. § 63-3-510.

⁵⁴ See COLE BLEASE GRAHAM, JR., *THE SOUTH CAROLINA CONSTITUTION: A REFERENCE GUIDE* 46 (2007).

⁵⁵ See *infra* Part I.A.1.b.

⁵⁶ See *infra* Part I.A.1.b.

⁵⁷ South Carolina Constitution article V ("The Judicial Department") was amended by House Bill 3063 to add Section 27 ("Judicial Merit Selection Commission"). Act of June 4, 1997, 1997 S.C. Acts 76.

names will be submitted to the General Assembly. The General Assembly, in turn, is now constitutionally limited to choosing only among the three candidates submitted by the commission.⁵⁸ The merit selection system presently used in South Carolina differs significantly from both a popular election system and a system based on executive appointment, as well as from a true merit-based selection process.⁵⁹

b. South Carolina's Past Constitutions

Between the years 1776 and 1895, South Carolina was governed by six constitutions: The constitutions of 1776, 1778, 1790, 1861, 1865, and 1868.⁶⁰ Provisions from the antebellum constitutions of 1776,⁶¹ 1778,⁶² and 1790⁶³ concerning the election of judicial officers (other than justices of the peace)⁶⁴ are virtually identical, and all three provide for election by joint vote of both houses of the state legislature. However, the two Civil War era constitutions of 1861 and 1865 differ with respect to the joint vote.⁶⁵ Finally, the Reconstruction era constitution of 1868 contains two provisions calling for election by a joint legislative vote.⁶⁶ Without exception, the power to elect judges rested exclusively with the legislature from the years 1776 until 1895.

⁵⁸ See *infra* Part I.A.1.c.

⁵⁹ “Known as either the Missouri Plan or the A.B.A. Plan, the merit system was first formulated by Professor Albert Kales for the American Judicature Society in 1914.” Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1224-25 (1998) (citing Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, in JUDICIAL SELECTION AND TENURE: SELECTED READINGS 29, 30-31 (Glenn R. Winters ed., 1973)).

⁶⁰ See GRAHAM, *supra* note 54, at 10 (“South Carolina adopted its first state constitution March 26, 1776. Since then, it has formally had six more (1778, 1790, 1861, 1865, 1868, and 1895).”). The 1861 constitution is included, although some scholars debate whether it should be counted as a separate constitution to the extent that “the existing provisions for internal governance were not changed significantly.” *Id.* at 16.

⁶¹ The 1776 constitution provides “[t]hat all other judicial officers shall be chosen by ballot, jointly by the general assembly and legislative council, and except the judges of the court of chancery, commissioned by the president and commander-in-chief, during good behavior, but shall be removed on address of the general assembly and legislative council.” S.C. CONST. of 1776, art. XX, *available at* http://avalon.law.yale.edu/18th_century/sc01.asp.

⁶² The 1778 constitution provides “[t]hat all other judicial officers shall be chosen by ballot jointly by the senate and house of representatives, and, except the judges of the court of chancery, commissioned by the governor and commander-in-chief during good behavior, but shall be removed on address of the senate and house of representatives.” S.C. CONST. of 1778, art. XXVII, *available at* http://avalon.law.yale.edu/18th_century/sc02.asp.

⁶³ The 1790 constitution provides that “[t]he judges of the superior courts . . . shall be elected by the joint ballot of both houses in the house of representatives.” S.C. CONST. of 1790, art. VI, § 1, *reprinted in* THE CONSTITUTIONS OF SOUTH CAROLINA 18 (1976) [hereinafter CONSTITUTIONS].

⁶⁴ A justice of the peace, as used in the prior South Carolina constitutions, is similar to modern-day magistrates in South Carolina. *Cf.* S.C. CONST. art. V, § 26 (“The Governor, by and with the advice and consent of the Senate, shall appoint a number of magistrates for each county as provided by law.”).

⁶⁵ Compare S.C. CONST. of 1861, art. VI, § 1, *available at* <http://docsouth.unc.edu/imls/southcar/south.html> (“The Judges of the Superior Courts . . . shall be elected by the joint ballot of both Houses, in the House of Representatives.”), with S.C. CONST. of 1865, art. III, § 1, *reprinted in* CONSTITUTIONS, *supra* note 63, at 44 (“The judges of the superior courts shall be elected by the general assembly . . .”).

⁶⁶ See S.C. CONST. of 1868, art. IV, § 2, *reprinted in* CONSTITUTIONS, *supra* note 63, at 56 (“[The Chief Justice and two Associate Justices] shall be elected by a joint vote of the General Assembly . . .”); S.C.

c. The 1895 Constitution and the 1997 Reforms

White farmers of the up-country supported Tillman's call for a constitutional convention; the result was the 1895 Constitution.⁶⁷ As expected, the 1895 constitution continued the election of judicial candidates by a joint vote of the General Assembly.⁶⁸ Election of justices of the Supreme Court and judges of the circuit courts were originally provided for in article V, sections 3 and 13, respectively.⁶⁹ In 1985, section 8 was added to article V to address the election of judges of the new court of appeals.⁷⁰ Prior to 1997, an eight-member joint committee of the General Assembly functioned as a type of merit commission.⁷¹ But the process of judicial selection suffered from some noteworthy defects.⁷² The two most obvious defects included a dearth of objective criteria with which legislators could evaluate a candidate, and the public perception that the General Assembly simply elected those whom it knew best, i.e., former or sitting legislators.⁷³ The calls for change were loud,⁷⁴ and the subsequent reforms were real.⁷⁵

The 1997 reforms were substantial because they banned sitting legislators from running for a judicial office and vested nomination power exclusively in the new Judicial Merit Selection Commission (JMSC). The JMSC is constituted as such:

(B) Notwithstanding any other provision of law, the Judicial Merit Selection Commission shall consist of the following individuals:

CONST. of 1868, art. IV, § 11, *reprinted in* CONSTITUTIONS, *supra* note 63, at 56 (“All vacancies in the Supreme Court or other inferior tribunals shall be filled by election as herein prescribed . . .”).

⁶⁷ GRAHAM, *supra* note 54, at 33-35.

⁶⁸ See S.C. CONST. art. V, § 3 (“The members of the Supreme Court shall be elected by a joint public vote of the General Assembly . . .”).

⁶⁹ S.C. CONST. art. V, § 3 (“Election of the members of the Supreme Court”); S.C. CONST. art V, § 13 (“Judicial circuits”).

⁷⁰ S.C. CONST. art. V, § 8 (“Election of members of Court of Appeals”).

⁷¹ S.C. CODE ANN. §§ 2-19-10 to -60.

⁷² See, e.g., Driggers, *supra* note 59, at 1227 (noting legislators “were able to elect any constitutionally qualified candidate without regard to the General Assembly’s own standards for competency”); see also Kevin Eberle, *Judicial Selection in South Carolina: Who Gets to Judge?*, S.C. LAW., May-June 2002, at 20, 22 (“[T]he public became increasingly vocal about the perception that judges were being selected based on the good-old-boy system.”).

⁷³ See Driggers, *supra* note 59, at 1227 (“The public perceived that the General Assembly too often elected those [whom] it knew best—sitting or former legislators.”); see also Cindi Ross Scoppe, *High-Level Reformers Want to Change Way S.C. Selects Judges*, THE STATE, Feb. 16, 1994, at B5 (noting that, in 1994, all Supreme Court justices and over one-half of circuit court judges had at one point served in the General Assembly).

⁷⁴ See Driggers, *supra* note 59, at 1228 (“Both citizens and legislators were quick to denounce the perceived inbreeding of South Carolina’s judicial selection system.”) (citing Chad Jenkins, Letter to the Editor, *Judicial Selection: State’s System Clearly Falls Short*, THE STATE, Mar. 4, 1996, at A8; James “Bubba” Cromer, Editorial, *Fairness, Merit Must Be Part of Judicial Selection Process*, THE STATE, Apr. 21, 1995, at A17); Cindi Ross Scoppe, *Legislature Overhauls Judiciary, Third Pillar of Reforms Set*, THE STATE, May 30, 1996, at A1 (“A tradition of cronyism, based on political connections rather than competence, was firmly entrenched in state law and custom.”).

⁷⁵ See Driggers, *supra* note 59, at 1230 (“The new Act changes how South Carolina elects its judges in two significant ways . . .”).

(1) Five members appointed by the Speaker of the House of Representatives and of these appointments:

(a) Three members must be serving members of the General Assembly; and

(b) Two members must be selected from the public,
(2) three members appointed by the Chairman of the Senate Judiciary Committee and two members appointed by the President Pro Tempore of the Senate and of these appointments:

(a) Three members must be serving members of the General Assembly; and

(b) Two members must be selected from the public.⁷⁶

d. The JMSC: Functions and Membership

1. Functions

Title 2, Chapter 19 of the South Carolina code details the JMSC's powers and duties.⁷⁷ The most significant of these include: (1) publicizing judicial vacancies;⁷⁸ (2) soliciting the Bar's assessment of candidates;⁷⁹ (3) holding public hearings regarding a candidate's qualifications;⁸⁰ (4) evaluating candidates based upon a non-exhaustive list of nine categories;⁸¹ (5) considering a candidate's race, gender, national origin, and other demographic factors;⁸² (6) administering oaths, taking depositions, and issuing subpoenas;⁸³ (7) ensuring candidates are neither sitting legislators nor former legislators, who have been out of the General Assembly for less than one year;⁸⁴ (8) submitting no more than three candidates' names for one seat and no fewer than three unless the Commission explains itself to the General Assembly in writing;⁸⁵ (9) screening retired justices and judges on whom the Chief Justice might call to sit to hear certain cases;⁸⁶ and, (10) selecting members to serve on various Citizens Committees, whose task includes advising the Commission about a particular candidate, pursuant to rules established by the Commission.⁸⁷

In evaluating a candidate's qualifications, the JMSC considers the following, non-exhaustive list of nine categories: (1) constitutional qualifications; (2) ethical fitness; (3) professional and academic ability; (4) character; (5) reputation; (6) physical health; (7) mental stability; (8) experience; and, (9) judicial temperament.⁸⁸

⁷⁶ S.C. CODE ANN. § 2-19-10(B) (2012).

⁷⁷ § 2-19-10.

⁷⁸ § 2-19-20.

⁷⁹ § 2-19-25.

⁸⁰ § 2-19-30.

⁸¹ § 2-19-35.

⁸² § 2-19-35.

⁸³ § 2-19-60.

⁸⁴ § 2-19-70.

⁸⁵ § 2-19-80.

⁸⁶ § 2-19-100.

⁸⁷ § 2-19-120.

⁸⁸ These nine categories are listed in § 2-19-35(A).

2. Membership

Although close to a “true” merit-based selection system, the JMSC fails in one important regard: sitting legislators dominate its membership.⁸⁹ According to the American Judicature Society, a true merit system includes the following three necessary elements: “(1) a commission comprised of both lay and lawyer members to recruit, screen, investigate and evaluate judicial candidates; 2) nomination to the appointing authority of a limited number of candidates; and 3) appointment by the governor or other appointing authority.”⁹⁰ “The logic behind merit selection is as follows: Most judicial selection systems involve politics; politics is bad; *ergo*, judicial selection systems without politics will yield ‘good’ judges.”⁹¹ However, politics and judicial elections are inseparable, for “[t]he process of picking a person to be a judge is woven into the political fabric and is, by any definition, a political process.”⁹² The key consideration then becomes how much politics is too much.

B. Virginia

1. Overview

According to recent census data, Virginia has approximately eight million people, of whom 68.6% are Caucasian, 19.4% are African American, 5.5% are Asian, approximately 3.2% are other and almost 3% are “two or more races”.⁹³ The population is 7.9% Hispanic ethnicity, which is independent of racial classification.⁹⁴ The Commonwealth is 50.9% female and 49.1% male.⁹⁵ Virginia’s judicial system is comprised of three levels of courts: appellate, trial, and limited jurisdiction courts.⁹⁶ These levels consist of five jurisdictionally distinct courts: the supreme court, the court of

⁸⁹ The ideal commission consists of seven members: three lawyers chosen by the state bar association, three members of the general public chosen by the governor of the state, and one sitting judge who serves as the chairman. See Driggers *supra* note 59, at 1225.

⁹⁰ AMERICAN JUDICATURE SOCIETY, JUDICIAL MERIT SELECTION: CURRENT STATUS, Introduction (1993). As of March 2013, the following ten individuals constitute the JMSC’s membership: (1) Sen. Larry A. Martin; (2) Sen. Floyd Nicholson; (3) Sen. George E. “Chip” Campsen, III; (4) Joseph Preston “Pete” Strom Jr.; (5) Kristian M. Cross; (6) Rep. Alan D. Clemmons; (7) Rep. David J. Mack, III; (8) Rep. Bruce W. Bannister; (9) John Davis Harrell, Esq.; and (10) H. Donald Sellers, Esq. See *Judicial Merit Selection Commission Members*, S.C. LEGISLATURE, <http://www.scstatehouse.gov/judicialmeritpage/JMSCMembersMarch2013.pdf> (last visited June 6, 2013). The membership of the JMSC has mostly remained the same since *Segars-Andrews v. JMSC* was decided. What has not changed is legislators comprising the majority of the JMSC. The presence of legislators on the JMSC necessarily makes the JMSC a political body, an effect that wholly defeats the rationale behind a merit-based selection system. *Segars-Andrews v. JMSC* is a case involving a sitting family court judge who was deemed “unfit” to be re-appointed to her seat. The case is discussed at length *infra* Part III.A.

⁹¹ Driggers *supra* note 59, at 1224.

⁹² Daniel J. Meador, *Some Yins and Yangs of Our Judicial System*, 66 A.B.A. J. 122, 122 (1980).

⁹³ See *2010 Census Interactive Population Search – VA*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=51> (last visited June 6, 2013).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ VA. CONST. art. VI, § 1.

appeals, the circuit courts, the general district courts, and the juvenile and domestic relations district courts.⁹⁷

The Supreme Court of Virginia possesses both original and appellate jurisdiction, with its primary function being review of decisions of the lower courts, including decisions of the court of appeals.⁹⁸ The court consists of seven justices who serve for terms of twelve years.⁹⁹ The Court of Appeals of Virginia provides appellate review of final decisions of the circuit courts in domestic relations matters, appeals from decisions of an administrative agency, traffic infractions, and criminal cases.¹⁰⁰ The eleven judges of the court of appeals serve for terms of eight years and sit in panels of at least three judges, and membership on the panel is rotated.¹⁰¹ The only trial court of general jurisdiction in Virginia is the circuit courts.¹⁰² The judges of the circuit courts also serve for terms of eight years.¹⁰³ Virginia's unified district court system consists of the general district court and the juvenile and domestic relations district courts.¹⁰⁴ Judges of the general district courts and judges of the juvenile and domestic relations courts serve for terms of six years.¹⁰⁵

a. A Brief History of the Election of Judges in Virginia

In Virginia, judges are selected for the bench by a process of legislative election. Like South Carolina, Virginia also has had several constitutions, including the original constitution adopted in 1776. There were six subsequent major revisions in 1830, 1851, 1864, 1869, 1902, and, most recently, 1971.¹⁰⁶ Interestingly, not all of these constitutions are consistent with respect to the General Assembly's plenary control over the election process of judges.¹⁰⁷ Under the 1851 constitution, and until 1870, the state reverted to election of judges by popular vote.¹⁰⁸ However, the passage of the 1870 constitution reestablished selection of the judiciary by the General Assembly in the state, reverting judicial selection to a process of exclusive legislative control.¹⁰⁹

An important contrast to South Carolina's constitutional history is that Virginia has never adopted a provision similar to the 1997 South Carolina constitutional amendment establishing an "independent" body exclusively charged with determining which judicial candidates are qualified for submission to the General Assembly. This constitutional change led to the creation of the Judicial Merit Selection Commission in South

⁹⁷ *Id.* (establishing the foundation for the judiciary as set forth by General Assembly); VA. CODE ANN. § 17.1-300 (2012) (supreme court); § 17.1-400 (court of appeals); § 17.1-500 (circuit courts); § 16.1-69.5 (general district, juvenile, and domestic relations courts).

⁹⁸ VA. CONST. art. VI, § 1.

⁹⁹ VA. CONST. art. VI, §§ 2, 7.

¹⁰⁰ *See* VA. CODE ANN. § 17.1-405; § 17.1-406.

¹⁰¹ §§ 17.1-400(A), -402(B).

¹⁰² § 17.1-513.

¹⁰³ VA. CONST., art. VI, § 7.

¹⁰⁴ VA. CODE ANN. § 16.1-69.7.

¹⁰⁵ § 16.1-69.9.

¹⁰⁶ THE HORNBOOK OF VIRGINIA HISTORY: A REFERENCE GUIDE TO THE OLD DOMINION'S PEOPLE, PLACES, AND PAST 95-98 (Emily J. Salmon & Edward D.C. Campbell, Jr. eds., 4th ed. 1994) [hereinafter VIRGINIA HISTORY].

¹⁰⁷ *See infra* Part I.B.1.b.

¹⁰⁸ *See infra* Part I.B.1.b.

¹⁰⁹ VA. CONST., art. VI, § 7.

Carolina.¹¹⁰ Virginia's lack of a qualifying commission is an interesting and significant difference between the only two states that employ a selection process exclusively controlled by the legislature. It would seem that in order to qualify truly as a "merit" system, the process of judicial selection would need to incorporate some element of actual qualifications. Thus, the lack of any qualifying commission, much less a diversified one, places Virginia's selection process in a unique category. Virginia's system is one with complete legislative control with little or no outside influence or considerations.

b. Virginia's Past Constitutions

Virginia's constitutional changes reflect various power struggles occurring in the Commonwealth—and in the country—over its long history. The 1776 Virginia Constitution, adopted shortly after the Declaration of Independence, limited the right to vote in the state to the wealthy and to landowners, effectively concentrating power in the hands of a few.¹¹¹ As discontent grew between farmers in the western part of the state, who owned and cultivated their own land, and wealthy slave-owners in the east, a constitutional convention was called in 1829. One of the key issues at the convention was concern about representation in the legislature and who had the right to vote.¹¹² Ultimately, members of the convention reached a resolution and adopted a new constitution, giving the western counties only a slightly larger proportion of legislative seats.¹¹³ Discontent between the westerners and wealthy easterners continued.¹¹⁴

As tensions in the country grew over the issue of slavery, mistrust and hostility persisted between the two divisions of populations in Virginia.¹¹⁵ The legislature called another constitutional convention in 1851 in the wake of the 1840 census.¹¹⁶ The alterations made to the 1851 constitution changed the Virginia political system to a system of popular election. This included popular election for the governor, the newly created office of lieutenant governor, and all Virginia judges.¹¹⁷ It was a dramatic alteration from the prior system, in which the top two state officers were elected by the legislature and the judges were appointed.¹¹⁸ This marked a significant, albeit brief, change in judicial selection in Virginia.

The Virginia legislature adopted, without a popular vote, the 1864 constitution after the legislature voted for secession from the Union.¹¹⁹ The legitimacy of this

¹¹⁰ See *supra* Part I.A.

¹¹¹ See VIRGINIA HISTORY, *supra* note 106, at 97; VA. CONST. of 1776, Bill of Rights §6, *available at* <http://www.nhinet.org/ccs/docs/va-1776.htm> ("and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage").

¹¹² See VIRGINIA HISTORY, *supra* note 106, at 41.

¹¹³ See *id.*

¹¹⁴ See *id.* (discussing westerners' calls for more representation).

¹¹⁵ See *id.*

¹¹⁶ See *generally id.* at 41-42.

¹¹⁷ See VA. CONST. of 1851, art. VI, *available at* http://vagovernmentmatters.org/archive/files/vaconstitution1851_ded45111de.pdf.

¹¹⁸ See VA. CONST. of 1851.

¹¹⁹ See VIRGINIA HISTORY, *supra* note 106, at 46.

constitution has been questioned in light of its creation and adoption during wartime and without ratification by voters.¹²⁰

The 1870 constitution marked a stark contrast to the 1864 constitution. The changes adopted after the Civil War included the right to vote by all men over the age of 21, including freedmen.¹²¹ Importantly, the 1870 constitution incorporated the provisions of the 1864 constitution, which had returned the process of judicial selection to the General Assembly.¹²² Unlike the 1864 constitution, the 1870 constitution was ratified by a popular vote.¹²³ Following 1864 and the post-Civil War/Reconstruction era of the 1870 constitution, the 1902 constitution reflected the ideas of racial segregation and the adoption of Jim Crow laws throughout the South, including Virginia.¹²⁴ These changes were an attempt to marginalize or eliminate the Black vote, which came about earlier in the post-Civil War era.¹²⁵

Ultimately, the latest revision to the Virginia constitution in 1971 replaced the 1902 constitution. This constitution broadly reflected the principles of the civil rights movement in the United States.¹²⁶ The 1971 constitution included the right to vote for all men and women, regardless of color, and reaffirmed the judicial selection system that had been in place since the constitution of 1864, (i.e., through legislative appointment).¹²⁷ The 1971 constitution is the most current constitution in Virginia, and more importantly, it reflects the current state of judicial selection in the Commonwealth.

c. Current System

Under the current system of judicial selection, once a vacancy occurs or a new seat is created by the General Assembly, the Virginia Supreme Court advises the General Assembly with regard to the circuit courts and appellate courts as to whether or not a vacancy should be filled.¹²⁸ Additionally, the Committee on District Courts also advises the General Assembly regarding vacancies on the district level.¹²⁹ This certification process to fill the vacancies is primarily based on caseload statistics.¹³⁰ However, while this certification process is not binding on the legislature, it is required for district court vacancies prior to filling.¹³¹

“Once the vacancy is ‘certified’ by the appropriate body, the House and Senate Committees for Courts of Justice begin taking nominations from General Assembly members.”¹³² However, the Senate’s rules require all senators—both Republican and

¹²⁰ See VA. CONST. Foreword, n. 1, available at <http://legis.state.va.us/Laws/search/ConstOfVa.pdf>; Leroy Rountree Hassell, Sr., *The Evolution of Virginia’s Constitutions: A Celebration of the Rule of Law in America*, 20 REGENT U. L. REV. 1, 9-10 (2007).

¹²¹ See VA. CONST. of 1870, art. II, § 1.

¹²² See VA. CONST. of 1870, art. VI, §§ 5, 11, 13.

¹²³ See VIRGINIA HISTORY, *supra* note 106, at 98.

¹²⁴ See *id.* at 63-64.

¹²⁵ See *id.*

¹²⁶ See *id.* at 98.

¹²⁷ See generally VA. CONST. of 1971.

¹²⁸ See VA. CODE ANN. § 17.1-511.

¹²⁹ See VA. CODE ANN. § 16.1-69.9:3.

¹³⁰ See *Judicial Selection Overview*, COMMW. OF VA. DIV. OF LEGIS. SERVS., <http://dls.virginia.gov/judicial.html> (last visited Mar. 22, 2013).

¹³¹ See VA. CODE ANN. § 16.1-69.9:3.

¹³² *Judicial Selection Overview*, *supra* note 130.

Democrat—representing each circuit to unanimously nominate a candidate for each vacancy or new seat.¹³³ Typically, that person is supported on the floor by the rest of the senators.¹³⁴ In the event that the circuit senators do not nominate anyone, any senator may make a nomination on the floor.¹³⁵ The Committees then determine whether each individual is qualified for the judgeship sought.¹³⁶ Following the Courts Committee’s determination of qualification, a report listing qualified candidates is made to each house of the General Assembly.¹³⁷ The House and Senate vote separately, and the candidate receiving a plurality of votes in each house is elected to the vacant judgeship or new seat.¹³⁸ Incumbent judges standing for election to a subsequent term must go through the same process.¹³⁹ The election does not require action by the Governor.¹⁴⁰

II. COMPARISONS BETWEEN SOUTH CAROLINA AND VIRGINIA

One cannot fully appreciate the issue of diversity on the court without a conversation involving statistics. Statistics is the study of the collection, organization, analysis, and interpretation of data. Statistics also provides tools for prediction and forecasting using this data. However, statistics and the data can be manipulated. Therefore, a thorough explanation and understanding of what is being measured and how it is measured is necessary so as not to draw improper conclusions from the collection of data.

In South Carolina, it appears that the appellate courts are extremely diverse in their current makeup. The South Carolina Supreme Court has a current composition of two female justices and one African American justice out of a total of five justices overall.¹⁴¹ As a result, South Carolina’s Supreme Court is 40% female and 20% African American. Additionally, it appears that the Court of Appeals is diverse as well, with two

¹³³ See *A Legislator’s Guide to the Judicial Selection Process*, VA. DIV. OF LEGIS. SERVS., <http://dls.virginia.gov/pubs/legisguidejudicselect.pdf> (last visited Mar. 22, 2013).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Judicial Selection Overview*, *supra* note 130. This process has been described further in a recent bill amending §17.1-100.1 of the Virginia code. H.B. 745, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (“The Supreme Court shall develop and implement a weighted caseload system to precisely measure and compare judicial caseloads throughout the Commonwealth on the circuit court, general district court, and juvenile and domestic relations district court levels. The system shall include the development of a comprehensive workload model, an objective means of determining the need for judicial positions, an assessment of the optimum distribution of judicial positions throughout the Commonwealth, and a recommended plan for the realignment of the circuit and district boundaries. The Supreme Court shall report to the General Assembly by November 15, 2013, on the weighted caseload in each court in each county and city, and in each circuit and district based on the current circuit and district boundaries. The report shall include the current number of judges assigned to each court in each county and city. The Court shall also recommend a plan for the realignment of the circuit and district boundaries and the number of judges the Court recommends for assignment to each court in each county and city within the new circuits and districts.”)

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Judges by Gender and Race*, LEAGUE OF WOMEN VOTERS OF S.C., http://lwvsc.org/files/race_and_gender_chart_1_.pdf (last visited Mar. 23, 2013).

female judges and one African American judge out of nine total judges.¹⁴² Thus, the South Carolina Court of Appeals is 22% female and 11% African American.

As stated earlier, a broader look at all courts in the state suggests the circuit or lower level courts do not statistically reflect the demographics of the state. On the circuit court level, which has jurisdiction over all criminal and civil cases and where the majority of litigants appear, South Carolina has only four African American judges and five female judges out of a total of forty-six judges.¹⁴³ By way of illustration, in 2010, the circuit courts in South Carolina handled approximately 232,000 cases.¹⁴⁴ The appellate courts—the court of appeals and the supreme court combined—handled approximately 3100 cases, or 1.3% percent of the number handled at the trial level.¹⁴⁵ Thus, while it may appear that South Carolina is achieving some measure of diversity based on the statistical makeup of the appellate courts in the state, the appearance of diversity is more pronounced on the appellate level than on the circuit level, which is where most litigants appear. The statistics for Virginia’s courts are similar. In 2009, the Virginia trial level courts handled approximately 4.1 million cases,¹⁴⁶ while the appellate courts combined resolved approximately 5200 cases or .13% of the trial court cases.¹⁴⁷ Nonetheless, it is instructive to compare statistically how South Carolina and Virginia compare to the other forty-eight states and the District of Columbia based on diversity, as well as against each other.

According to the American Bar Association’s database on diversity in state courts, as of 2010, the racial diversity of the judiciary in South Carolina was 9%.¹⁴⁸ In Virginia, the racial diversity of its judiciary was 11%.¹⁴⁹ By way of comparison, Georgia, which employs a system of non-partisan popular election of judges, had a composition of 11% of a racially diverse judiciary.¹⁵⁰ California, which employs a system of election by the General Assembly with confirmation from a committee of individuals who are not legislators, has a diversity composition of 23%.¹⁵¹ Ohio utilizes a system of partisan primary selection followed by a nonpartisan general election.¹⁵² Ohio has a diversity composition of 4%.¹⁵³ In New Mexico, where judges are selected by partisan election,¹⁵⁴ the diversity composition of the judiciary is 30%.¹⁵⁵ However, in

¹⁴² *Id.*

¹⁴³ *Id.* Judges Jefferson and Lee are counted in both statistics as female and African-American. *Id.*

¹⁴⁴ *State Court Caseload Statistics*, COURT STATISTICS PROJECT, <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> (follow “Civil and Criminal– National Caseloads” hyperlink) [hereinafter *Trial Caseloads*] (last visited June 6, 2012).

¹⁴⁵ *State Court Caseload Statistics*, COURT STATISTICS PROJECT, <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> (follow “Appellate – Grand Total Court Caseloads” hyperlink) [hereinafter *Appellate Caseloads*] (last visited June 6, 2012).

¹⁴⁶ *Trial Caseloads*, *supra* note 144.

¹⁴⁷ *Appellate Caseloads*, *supra* note 145.

¹⁴⁸ *National Database on Judicial Diversity in State Courts*, A.B.A., <http://apps.americanbar.org/abanet/jd/display/national.cfm#3> (last visited Mar. 23, 2013).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See *Judicial Selection in the States: Ohio*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/index.cfm?state=OH (last visited Mar. 23, 2013).

¹⁵³ *National Database*, *supra* note 148.

¹⁵⁴ See *Judicial Selection in the States: New Mexico*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/index.cfm?state=NM (last visited Mar. 23, 2013).

Illinois, which also uses partisan elections to select judges,¹⁵⁶ the diversity composition is 14%.¹⁵⁷

Assuming again that diversity on the bench is a worthy objective, the conclusion to be drawn is that there is no system that outpaces the others in achieving greater diversity on the bench. Factors such as diversity of the state population play an important role. For example, in Hawaii, which utilizes a system of General Assembly election from a nominating committee with senate confirmation,¹⁵⁸ but with a high percentage of minorities in the state, the judiciary has a diversity composition of 67%.¹⁵⁹ Clearly, this is not to say that the judicial selection process in Hawaii is better suited to create a more diverse judiciary. So where does the answer to the question of how best to achieve diversity on the bench lie?

We now return to South Carolina and Virginia. Given the statistical data above, with 9% and 11% diversity compositions of the judiciary respectively, this ranks South Carolina twenty-first and Virginia fourteenth out of the fifty states and the District of Columbia.¹⁶⁰ In contrast, Missouri is thirty-second out of fifty.¹⁶¹ Other states that utilize the Missouri Plan and their ranks are as follows: Alaska ranks fortieth,¹⁶² Arizona, tied with South Carolina, ranks twenty-first;¹⁶³ Florida ranks twelfth;¹⁶⁴ and Iowa, which includes a requirement of gender diversity on its commission, ranks thirty-sixth.¹⁶⁵ As shown, South Carolina and Virginia, while utilizing a system of judicial selection that is controlled exclusively by one branch of government without input or inclusion of other branches, appear to perform well against other systems in achieving the goal of diversity on the bench, including when compared to the lauded Missouri Plan.

There are important differences in the processes in South Carolina and Virginia however. South Carolina's use of the JMSC, which has a statutory requirement of being comprised of a majority of sitting legislators, but includes four non-legislators, has led to criticism of South Carolina's system for lacking checks and balances. Conversely, the use of the JMSC has led to credit for the state's adoption of a qualifying commission, which furthers the idea of a merit system.¹⁶⁶ The inclusion of a checks and balances approach is clearly present in the Missouri Plan, which utilizes a non-partisan commission in addition to legislative, gubernatorial, and voter input in the process. An additional criticism of the South Carolina system is the statutory requirement that legislators comprise a majority of the JSMC, which results in sitting legislators in South

¹⁵⁵ *National Database, supra* note 148.

¹⁵⁶ *See Judicial Selection in the States: Illinois*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/index.cfm?state=IL (last visited Mar. 23, 2013).

¹⁵⁷ *National Database, supra* note 148.

¹⁵⁸ *See Judicial Selection in the States: Hawaii*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/index.cfm?state=HI (last visited Mar. 23, 2013).

¹⁵⁹ *National Database, supra* note 148.

¹⁶⁰ *See infra* Appendix A.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See* Larry O'Dell, *Critics Target Virginia Judge Selection Process*, PILOTONLINE.COM (March 20, 2009), <http://hamptonroads.com/2009/03/critics-target-virginias-judge-selection-process>.

Carolina acting as both the “qualifiers” and the “selectors” of the judges.¹⁶⁷ In contrast, Virginia’s selection process is criticized for not using any qualifying commission, but instead using a system in which a legislative committee acts as the qualifiers with no outside interests represented.¹⁶⁸ This criticism also goes to the issue of a checks and balances system in Virginia by vesting complete, unfettered control in the legislature.¹⁶⁹

Another important concern is that of judicial independence. How is independence to be measured? A recent court decision in South Carolina sheds light on the issue of judicial selection and independence of judges and, more particularly, on the issue of politics in the judicial selection process in a state that employs an exclusive legislature-controlled system. Politics and judicial elections are inseparable, for, as Professor Daniel Meador observes, “the process of picking a person to be a judge is woven into the political fabric and is, by any definition, a political process.”¹⁷⁰ The key consideration then becomes how much politics is too much.

III. *SEGARS-ANDREWS V. JMSC*: WHAT IT TEACHES

A. *Factual Background*

On July 30, 2004, Mr. Simpson brought a divorce action in Clarendon County Family Court between Mr. Simpson and his wife.¹⁷¹ There was no true adversary proceeding, as Mrs. Simpson “had been induced to sign a [*pro se* answer] at the time the complaint was filed.”¹⁷² The answer she filed was drafted by her husband’s lawyer.¹⁷³ “Under the Agreement, Mrs. Simpson gave up claims to substantial marital assets . . . but [the Agreement] was later challenged by Mrs. Simpson for various reasons, including issues pertaining to her competence to enter into the Agreement in light of her ‘medical disorders and medications’”¹⁷⁴ Family Court Judge McFadden agreed with Mrs. Simpson and held the agreement to be invalid.¹⁷⁵

¹⁶⁷ Brief of League of Women Voters of S.C. as Amicus Curiae Supporting Petitioner at 5, *Segars-Andrews v. JMSC*, 691 S.E.2d 453 (S.C. 2010), [hereinafter League Brief] available at http://www.justiceatstake.org/file.cfm/media/news/Amicus_Brief_South_Carolina_32CD4C5A3D6EE.pdf.

¹⁶⁸ O’Dell, *supra* note 166.

¹⁶⁹ *Id.*

¹⁷⁰ Meador, *supra* note 92, at 122.

¹⁷¹ See JUDICIAL MERIT SELECTION COMM., REPORT OF A CANDIDATES QUALIFICATIONS: THE HONORABLE F.P. “CHARLIE” SEGARS-ANDREWS, FAMILY COURT, NINTH JUDICIAL CIRCUIT, SEAT 1 24 (2008) [hereinafter JMSC REPORT], available at <http://www.scstatehouse.gov/judicialmeritpage/FinalSegarsAndrewsCharlie.pdf>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 25. Professor John P. Freeman elaborates on why he went into so much detail about the agreement in the Judicial Merit Selection Commission report on the Segars-Andrews case: “I call attention to the background concerning the Agreement between the parties in Simpson II because, in my opinion, had the Agreement not been executed and later challenged and then thrown out by Judge McFadden, Mr. Simpson[’s] attack on Judge Segars-Andrews qualifications matter would not have arisen. I say this because, in my opinion, absent that Agreement, the split between husband and wife in Simpson II would have been 60:40 in the husband’s favor, with each side paying their own fees. Had this occurred, I doubt Mr. Simpson[] would have raised any complaint about the judge’s fairness.” *Id.*

“By the time Judge Segars-Andrews came on the scene, the Agreement, created on behalf of Mr. Simpson to eliminate his wife’s rights to substantial marital assets, had already been set aside.”¹⁷⁶ Segars-Andrews ruled only on custody, child support, visitation, equitable division, and attorney’s fees and costs.¹⁷⁷ On April 12, 2006, Mr. Simpson filed a motion to disqualify Segars-Andrews from presiding over the divorce action.¹⁷⁸ His complaint was based upon Segars-Andrews’ husband’s law partner having rendered an affidavit in support of the fee petition submitted by the attorneys who represented Mr. Simpson’s mother in her divorce approximately fourteen months prior to Mr. Simpson’s divorce action.¹⁷⁹ On April 14, 2006, Segars-Andrews initially denied Mr. Simpson’s motion, but she then, *sua sponte*, decided to recuse herself when she discovered that Mr. Simpson’s wife’s attorney and Segars-Andrews’ husband’s law firm had previously worked together on a legal matter worth approximately \$300,000.¹⁸⁰

On April 26, 2006, Mr. Simpson’s wife’s attorney filed a memorandum of law with an affidavit attached from Professor Nathan Crystal.¹⁸¹ Professor Crystal offered his professional opinion regarding Segars-Andrews’ recusal, and he concluded that she did not have to recuse herself and, in fact, had a duty to rule in the case.¹⁸² On May 3, 2006, Segars-Andrews agreed that she had a duty to rule in the case and that there was no duty to disclose the working relationship in which her husband was involved.¹⁸³ Both the South Carolina Court of Appeals,¹⁸⁴ and the South Carolina Commission on Judicial Conduct¹⁸⁵ agreed with Segars-Andrews’ decision. Unsatisfied, Mr. Simpson pursued his grievance and filed a complaint with the JMSC.¹⁸⁶ Mr. Simpson had this to say:

And once we called it [the deal between Segars-Andrews’ husband and his law partner, Mr. Shull] out on the table in front of her [Segars-Andrews], she recused herself. And then now it’s another cover up of all the good old-boy-system, I feel like, and it’s cost me a lot of money and a lot of things had taken place and this is not right. It don’t smell good. It don’t look good.¹⁸⁷

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 26.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 26-27.

¹⁸⁰ *Id.* at 28-29.

¹⁸¹ *Id.* at 28.

¹⁸² *Id.*

¹⁸³ *Id.* at 28–29 (“After reviewing the memorandum provided from the [wife’s] counsel in this matter and the Canons, this court determines that it has a duty to rule in this case and that there was no duty to disclose the working relationship between.”).

¹⁸⁴ See *Simpson v. Simpson*, 660 S.E.2d 274 (S.C. Ct. App. 2008) (finding Segars-Andrews had not abused her discretion in making the division of marital property and an award of almost \$80,000 in costs and attorneys fees to Mr. Simpson’s wife).

¹⁸⁵ See *Segars-Andrews v. JMSC*, 691 S.E.2d 453, 456 n.1 (S.C. 2010) (per curiam) (“The Commission on Judicial Conduct dismissed the complaint, finding there was no evidence Petitioner [Segars-Andrews] had violated any ethical rules.”); JMSC REPORT, *supra* note 171, at 11 (“Mr. Simpson then brought a complaint against Judge Segars-Andrews to the Office of Judicial Conduct on September 20, 2006. Judge Segars-Andrews submitted a response on November 14, 2006. The complaint was summarily dismissed on November 22, 2006.”).

¹⁸⁶ JMSC REPORT, *supra* note 171, at 8.

¹⁸⁷ *Id.* at 12.

The judicial reforms of the late 1990s were directed in large part at remedying the perception that judicial elections were dominated by the “good-old-boy” system, and that this is to what Mr. Simpson alluded.¹⁸⁸ What is far from patent is how Segars-Andrews could ever have been seriously decried as being representative of this system. Unlike a vast majority of her colleagues who, in 1993, came from the General Assembly, Segars-Andrews was elected after having been in private practice in Charleston, S.C., since 1984.¹⁸⁹ In 2008, Segars-Andrews’ service to the Charleston County Juvenile Drug Court earned her the recognition of the South Carolina House of Representatives.¹⁹⁰ Unfortunately, a majority of the JMSC gave short shrift to the overwhelming evidence of Segars-Andrews’ fitness to remain on the family court bench.¹⁹¹

By a 7–3 vote,¹⁹² the JMSC found Segars-Andrews unqualified because “Segars-Andrews’ conduct caused an appearance of impropriety that led a litigant not only to question [her] ability to render a fair and impartial decision, but also to lose faith in the integrity of this state’s judicial system.”¹⁹³ Senator Glen McConnell,¹⁹⁴ the author of the majority’s opinion and chairman of the JMSC at the time,¹⁹⁵ wrote that Segars-Andrews’ conduct “create[ed] within a reasonable mind the perception that her ability to carry out judicial responsibilities with integrity, impartiality, and competence was impaired.”¹⁹⁶ Interpreting¹⁹⁷ and applying Canon 2 of the Code of Judicial Conduct, Sen. McConnell and the majority found that Segars-Andrews did not avoid the appearance of

¹⁸⁸ See *supra* text accompanying note 72–75.

¹⁸⁹ See *Judge Frances P. Segars-Andrews*, JUDGEPEdia, http://judgepedia.org/index.php/Frances_P._Segars-Andrews (last visited June 17, 2013).

¹⁹⁰ See H.R.J. Res. 5292, 117th Sess. (S.C. 2008).

¹⁹¹ See generally JMSC REPORT, *supra* note 171, at 24–33 (comments of Professor John P. Freeman). The only ethics expert on the Commission, Professor Freeman drafted an eloquent dissent from the majority’s views. *Id.*

¹⁹² *Id.* at 2 (“The Commission, in a 7 to 3 vote, found Judge Segars-Andrews to be Not Qualified. The attached Report details this candidate’s qualifications as they relate to the Commission’s evaluative criteria.”).

¹⁹³ *Id.* at 8.

¹⁹⁴ Senator McConnell was sworn in as the Lt. Governor on March 9, 2012 after then-Lt. Governor Ken Ard resigned and was sentenced for scheming to defraud the public with campaign funds. See *S.C. Lt. Gov. Ard Sentenced on Ethics Violations*, THE TIMES AND DEMOCRAT (Mar. 9, 2012), http://thetandd.com/news/s-c-lt-gov-ard-sentenced-on-ethics-laws-violations/article_f62f9228-69fa-11e1-980d-001871e3ce6c.html.

¹⁹⁵ See *id.* at 2. For more detailed information about the Commission, including current composition and procedures, see generally *Judicial Merit Selection Commission*, SOUTH CAROLINA LEGISLATURE, <http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php> (last visited June 6, 2013).

¹⁹⁶ JMSC REPORT, *supra* note 171, at 17 (comments of Senator Glenn F. McConnell).

¹⁹⁷ Senator McConnell’s interpretation of the Canons directly conflicts with the conclusions of four authorities that addressed the same set of facts: the court of appeals, the ethics commission, Professor Crystal, and Professor Freeman. Senator McConnell made the following statement: “The Canons impose a burden on judges to keep informed of the personal and economic interests of the judge and the judge’s spouse as well as requiring them to vigilantly monitor personal and professional affiliations in order to avoid conflicts of interest. Judge Segars-Andrews should have been very alert to this duty, given that her husband was a practicing attorney in a law firm, a matrimonial mediator in domestic relation cases in the family court, and might share fees with attorneys appearing before her.” JMSC REPORT, *supra* note 171, at 21 (comments of Senator Glenn F. McConnell).

impropriety.¹⁹⁸ Finding Segars-Andrews unqualified to continue serving as a family court judge, the JMSC ended the career of a 16-year veteran jurist.¹⁹⁹

On January 22, 2010, the Supreme Court of South Carolina granted²⁰⁰ Segars-Andrews' petition to hear her case in the court's original jurisdiction.²⁰¹ Segars-Andrews challenged the constitutionality of the JMSC on three grounds: (1) the presence of legislators on the JMSC violates the state's ban against dual office holding,²⁰² (2) the presence of legislators on the JSMC contravenes the manifest intent of the 1997 amendment, which Segars-Andrews argued was to create a body wholly apart from the General Assembly;²⁰³ and (3) the JMSC threatens judicial independence, which is necessary to the proper and legitimate functioning of the judiciary.²⁰⁴ Oral argument was heard on March 2, 2010, and the court issued an opinion on March 23, 2010,²⁰⁵ expressing that the court felt "constrained"²⁰⁶ to dismiss Segars-Andrews' complaint.

The first problem with the court's holding is its cursory review of the dual office holding, or *ex officio*, argument that Segars-Andrews raised in her petition.

B. Dual Office Holding

Segars-Andrews argued that sitting legislators are constitutionally ineligible for membership on the JMSC.²⁰⁷ To prevail on this claim, Segars-Andrews had to prove that service on the JMSC is a constitutional office and, consequently, legislators who sat on the JMSC violated the dual office holding prohibition of the South Carolina Constitution, as set forth in article III, section 24.²⁰⁸ As to whether service on the JMSC is a constitutional office, the court found in Segars-Andrews' favor, holding that "[t]he exercise of power of the sovereign by the JMSC is seen not only in its ability to favorably submit judicial candidates to the Legislature for consideration, but more importantly in its

¹⁹⁸ *Id.* at 16.

¹⁹⁹ Martha Neil, *16-Year Judge Loses Seat on Bench Over Husband's Peripheral Role in 1 Divorce Case*, A.B.A. J., http://www.abajournal.com/news/article/16-year_judge_loses_seat_on_bench_over_husbands_peripheral_role_in_1_divorc/ (Mar. 24, 2010).

²⁰⁰ Order Granting Petition for Original Jurisdiction, *Segars-Andrews*, 691 S.E.2d 453 (S.C. 2010) (No. 2010-01-22-01), available at <http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2010-01-22-01>.

²⁰¹ In its original jurisdiction, the Court "may allow actions to be commenced in the [Court] and may issue mandamus, certiorari and other extraordinary writs. Normally, this only occurs when the case involves significant public interest or other unusual circumstances." *South Carolina Supreme Court*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/supreme/> (last visited Mar. 23, 2013).

²⁰² See *Segars-Andrews*, 691 S.E.2d at 461–63 (addressing the dual office holding argument); see also League Brief, *supra* note 167, at 2–4 (discussing how allowing legislators to sit on the Commission violates the state constitution's prohibition against dual office holding).

²⁰³ See *id.* at 458–61 (addressing the separation of powers argument); see also League Brief, *supra* note 202, at 2–4 (discussing separation of powers concerns implicated by the Commission's decision).

²⁰⁴ See *id.* at 463–64 (addressing judicial independence concerns raised by Segars-Andrews and various amici curiae); see also League Brief, *supra* note 202, at 7 ("Judicial independence means, at least, that the judiciary is neither dominated nor controlled by the political branches and that it is disentangled to the extent possible from the forces that influence those branches' policy choices.").

²⁰⁵ *Id.* at 453.

²⁰⁶ *Id.* at 456 ("[W]e are constrained to dismiss the complaint.").

²⁰⁷ *Id.* at 461.

²⁰⁸ *Id.* (citing S.C. CONST. art. III, § 24).

power to *exclude* candidates.”²⁰⁹ The court reasoned that since the Legislature lacks the authority to consider a judicial candidate whose name is not submitted by the JMSC,²¹⁰ there could be “no serious contention that the JMSC is not a constitutional office”²¹¹ Instead of ending its analysis there and holding that legislative membership on the JMSC violated the dual office holding ban, the court continued by stating that “[a] finding of an ‘office,’ for constitutional purposes does not end the inquiry.”²¹² The court claimed that its jurisprudence contains “a narrow, yet *firmly established*, exception”²¹³ known as the “ex officio” or “incidental duties” exception.²¹⁴ Citing no case to support its rule statement, the court characterized the ex officio exception as one that “may be properly invoked only where there is a constitutional nexus in terms of power and responsibilities between the first office and the ‘ex officio’ office.”²¹⁵ To support its conclusion, the court cited to and relied upon two of its precedents: *Ashmore v. Greater Greenville Sewer District*²¹⁶ and *Spartanburg County v. Miller*.²¹⁷ There is, however, a glaring gap in the Court’s analysis: the ex officio exception is far from “firmly established.” The following analysis of these two cases, along with analysis of the cases to which each cites, will provide the necessary background for understanding the significance of the *Segars-Andrews* court’s application of the ex officio exception.

Neither *Ashmore* nor *Miller* applied the ex officio exception. In *Ashmore*, the court held that “a member cannot sit upon the board of auditorium trustees. . . and at the same time retain his membership in the General Assembly.”²¹⁸ Although the court invalidated the statute as violative of the dual office holding prohibition, the court stated in dicta that “[t]he rule here enforced with respect to double or dual officeholding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law.”²¹⁹ The court explained the exception by offering the example of “ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office.”²²⁰ Next, the court offered a more specific example of when the ex officio exception would apply: “In mind as an example is an airport operated by two or more units of government. A governing board of it might be properly created by appointment ex officio of officers of the separate governmental units whose duties of their respective offices have reasonable relation to their functions ex officio.”²²¹ Finally, in support of its analysis, the court cites two cases: *State ex rel. Ray v. Blease*²²² and *McCullers v. Board of Wake*

²⁰⁹ *Id.*

²¹⁰ See S.C. CONST. art. V, § 27 (“No person may be elected . . . unless he or she has been found qualified by the [JMSC].”).

²¹¹ *Segars-Andrews*, 691 S.E.2d at 462.

²¹² *Id.*

²¹³ *Id.* (emphasis added).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Ashmore v. Greater Greenville Sewer Dist.*, 44 S.E.2d 88 (S.C. 1947).

²¹⁷ *Spartanburg County v. Miller*, 132 S.E. 673 (S.C. 1924).

²¹⁸ *Ashmore*, 44 S.E.2d at 90.

²¹⁹ *Id.* at 95.

²²⁰ *Id.*

²²¹ *Id.*

²²² 79 S.E. 247 (S.C. 1913).

County.²²³ Neither of these cases is persuasive. In *Blease*, the court never reached the question of whether the ex officio exception applies because the court concluded as a threshold matter that the office in question was not a constitutional office and, therefore, the dual office holding prohibition did not apply.²²⁴ *McCullers* is a North Carolina case that interpreted the dual office holding prohibition enshrined in the North Carolina constitution, but its analysis does not shed any light on South Carolina's dual office holding jurisprudence.²²⁵ Thus, the *Ashmore* case provides us with a vaguely defined, never-before-applied ex officio exception, with only two unhelpful cases cited as support.

Equally as unenlightening as *Ashmore* is *Miller*. As an initial matter, it should be noted that the *Miller* court was not even presented with a constitutional challenge based on the constitution's dual office holding provision.²²⁶ The *Miller* court clearly stated that it was addressing whether the act in question violated the separation of powers clause of the constitution.²²⁷ Additionally, the only case to which *Miller* cites for support of its analysis is *Stockman v. Leddy*,²²⁸ a Colorado case that does not address dual office holding.²²⁹ Thus, *Miller* is wholly unhelpful for purposes of a constitutional analysis under the dual office holding provision of the constitution since the case deals exclusively with separation of powers concerns.

Neither of the cases to which the *Segars-Andrews* court cites provides a sufficient precedential basis for applying the ex officio exception. Interestingly enough, the one case that *does* provide support for application of the exception was cited nowhere in the *Segars-Andrews* opinion. Five years after *Ashmore*, the supreme court decided *Welling v. Clinton Newberry Natural Gas Authority*.²³⁰ In *Welling*, the petitioner challenged the constitutionality of an act that created the Clinton Newberry Natural Gas Authority.²³¹ The act provided that the Authority would "consist of seven members, six of whom shall be members ex officio,"²³² and the ex officio members consisted of the mayors of Clinton and Newberry, along with two members of each municipality's city council chosen by their respective city councils.²³³ The petitioner challenged the act as violative of article 2, section 2 of the South Carolina Constitution.²³⁴ Without providing any substantive analysis, the court held that "[i]t was distinctly recognized in [*Ashmore*] that ex officio membership of the character here involved did not contravene this constitutional provision."²³⁵ If the *Segars-Andrews* court had to rely on any precedent, it surely should

²²³ 73 S.E. 816 (N.C. 1912).

²²⁴ *Blease*, 79 S.E. at 251 ("The answer to this objection is that membership in the [Sinking Fund Commission] is not an office.").

²²⁵ *McCullers*, 73 S.E. at 818 ("Article 14, § 7, of state Constitution, forbids the holding of two offices by one man at the same time.") (internal quotations omitted).

²²⁶ See *Spartanburg Cnty. v. Miller*, 132 S.E. 673, 676 (S.C. 1924) ("The third proposition advanced is that the act contravenes section 14, article 1, of the Constitution . . .").

²²⁷ *Id.*

²²⁸ 129 P. 220 (Colo. 1912).

²²⁹ *Id.*

²³⁰ 71 S.E.2d 7 (S.C. 1952).

²³¹ *Id.* at 8.

²³² *Id.* at 9.

²³³ *Id.*

²³⁴ *Id.* at 10.

²³⁵ *Id.*

have cited *Welling*, especially since *Welling* is the court's first application of the ex officio exception. The second application, of course, is in *Segars-Andrews* itself.

When the dust finally settles, we are left with only two examples of when it is appropriate to apply the "ex officio" exception. The first example is "an airport operated by two or more units of government," where the governing board "might be properly created by appointment ex officio of officers of the *separate governmental units* whose duties of their respective offices have reasonable relation to their functions ex officio."²³⁶ The second example is the natural gas Authority that was the focus of the *Welling* case.²³⁷ Both of these examples provide us with two general cases in which the ex officio exception may apply: (1) a joint venture by two municipalities (or counties) to provide services to citizens of both municipalities (or counties), and (2) the creation of an oversight board comprised of elected officials of each municipality. In light of these examples, the ex officio exception is narrow, indeed. However, the intent of the exception, in light of these cases, is clear. The exception appears to exist to allow elected officials of a unit of state government to enjoy membership on a governing board for purposes of furthering or protecting the interests of each respective member's municipality. At least, that could have been the *Segars-Andrews* court's conclusion had it chosen not to cherry-pick a loosely defined exception to an important constitutional rule and to allow that exception to dictate the rule. That is precisely what the *Segars-Andrews* court did.

In light of the cases discussed above involving when it is appropriate to employ the ex officio exception, it should come as no surprise why the court held the way it did. First, it is unreasonable to conclude that all of the staff attorneys, law clerks, and justices at the supreme court overlooked the *Welling* case. A simple Keyciting or Shepardizing would have picked up the case because it cited directly to *Ashmore*, the case to which the *Segars-Andrews* court cites as its primary authority. If we presume, which I think we must, that the court was aware of *Welling*, then we must also conclude that their omission of that case was intentional. If, then, the court intentionally sidestepped *Welling* in favor of *Ashmore's* dicta and *Miller's* inapposite separation of powers analysis, perhaps the court embellished a bit when it referred to the ex officio exception as "firmly established."²³⁸

Not only did the court's dual office holding analysis prevent *Segars-Andrews's* most obvious constitutional claim from succeeding, but the *Segars-Andrews* decision also greatly expanded the once narrow ex officio exception to the point of perhaps undermining the constitutional provision itself. Whether or not the ex officio exception's expansion will affect substantive change in the way the General Assembly crafts its laws remains to be seen. However, it is certainly appropriate to ask whether such an expansion of a narrow exception threatens to dictate the constitutional rule itself. What the court did in *Segars-Andrews* was allow the tail to wag the dog—a dangerous precedent to set when interpreting constitutional provisions.

²³⁶ *Ashmore v. Greater Greenville Sewer Dist.*, 44 S.E.2d 88, 95 (S.C. 1947) (emphasis added).

²³⁷ *Welling*, 71 S.E. at 8.

²³⁸ *Segars-Andrews v. JMSC*, 691 S.E.2d 453, 462 (S.C. 2010) (per curiam).

C. Separation of Powers and Judicial Independence

Separation of powers and judicial independence will be discussed together. In response to Segars-Andrews' argument that membership of sitting legislators on the JMSC violates separation of powers principles, the court concluded that article V, section 27²³⁹ neither expressly nor by clear implication prevents legislative membership.²⁴⁰ The court continued by holding that "[t]he separation of powers argument that the Legislature is 'both creating and executing' law must be rejected."²⁴¹ In so doing, the court readily admitted that the JMSC has the power to decide "in a political context a matter concomitantly determined by the judicial branch."²⁴² Next, the court acknowledged that "judicial independence considerations are implicated."²⁴³ In the very next sentence, however, the court retreated by refusing to intervene in what it decided was a purely political question.²⁴⁴ Invoking the political question doctrine, the court emphasized that it "will not rule on questions that are exclusively or predominantly political in nature rather than judicial."²⁴⁵

In general, when making a determination regarding whether a particular challenge presents a bona fide legal challenge or a nonjusticiable political question, the court considers its constitutional duty to review actions of the General Assembly,²⁴⁶ but the court also considers the extent to which adjudication of a question would place the court "in conflict with a coequal branch of government."²⁴⁷ The United States Supreme Court has characterized the political question doctrine as "one of political questions, not one of political cases."²⁴⁸ To be sure, the distinction is not always clear. Nonetheless, the Court should not be "misled by mere pretenses,"²⁴⁹ and it must not abdicate its "solemn duty . . . to look at the substance of things whenever [it] enter[s] upon the inquiry whether the legislature has transcended the limits of its authority."²⁵⁰

Of particular interest, here is the fact that the South Carolina Supreme Court's two authoritative cases addressing nonjusticiable political questions have one element in common: the JMSC.²⁵¹ That the court's modern political question jurisprudence can be found exclusively within the two cases in which the JMSC is the defendant might imply simply that the two cases have been the most ripe in which to discuss the doctrine. Of course, it might also be reasonably inferred that the court has employed the doctrine as a shield to protect the court from having to face off with their legislative coequals across

²³⁹ This section of the constitution created the JMSC. S.C. CONST. art. V, § 27.

²⁴⁰ *Segars-Andrews*, 691 S.E.2d at 459.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 460 (citing *S.C. Pub. Interest Found. v. JMSC*, 632 S.E.2d 277, 278 (S.C. 2006)).

²⁴⁶ *See id.* at 460–61.

²⁴⁷ *Id.* at 460 (citing *S.C. Pub. Interest Found.*, 632 S.E.2d at 278).

²⁴⁸ *Baker v. Carr*, 369 U.S. 186, 210–11 (1962).

²⁴⁹ *McCullough v. Brown*, 19 S.E. 458 (S.C. 1894), *overruled on other grounds*, *State ex rel. George v. City Council of Aiken*, 20 S.E. 221 (S.C. 1894).

²⁵⁰ *Id.*

²⁵¹ *See Segars-Andrews v. JMSC*, 691 S.E.2d 453 (S.C. 2010) (per curiam); *S.C. Pub. Interest Found.*, 632 S.E.2d 277.

the street in the state capitol.²⁵² In either event, the fact remains that the two main opinions from the court addressing the scope of nonjusticiable political questions are in the context of constitutional challenges directed at the JMSC.

In *Segars-Andrews*, the South Carolina Supreme Court preoccupied itself with the contention that the JMSC *per se* violated separation of powers.²⁵³ What the court failed to do was delve deeper into the cause and effect relationship between an action of the JMSC on the one hand, and the reaction of South Carolina judges on the other. That is, when does a political decision of the JMSC regarding one judge create a ripple effect throughout the South Carolina judiciary such that judges charged with conducting themselves according to the Judicial Canons *as interpreted and applied by the judicial branch* feel obligated to reconsider their behavior in light of how the JMSC has interpreted or might interpret the Canons? The court in *Segars-Andrews* focused too much on validating the right of the JMSC under the constitution to use whatever criteria it desires to evaluate candidates. As a result, the court neglected to seriously consider the absurdity of its own hypothetical, in which a court or commission within the judicial branch finds a judge guilty of misconduct by violating the Canons, but where the JMSC nonetheless decides to ignore those conclusions and find the judge qualified.²⁵⁴

Such a hypothetical is far less probable and implicates far fewer independence concerns for the legislative branch than does a set of facts similar to the *Segars-Andrews* case. For example, what is the likelihood that the politically accountable legislators on the JMSC are going to risk their seats by trying to explain to their constituents why they decided to ignore a prior finding made by the judicial branch that one of its own judges is guilty of misconduct? Contrast that likelihood with the likelihood that the *Segars-Andrews* ruling will be perceived as a *carte blanche* to impose even *higher* restrictions on judges than those required under the Canons. This is not merely a likelihood—it is a promise from the mouth of Senator McConnell himself. Immediately after the court handed down its opinion, Senator McConnell spoke to reporters outside the courtroom.²⁵⁵ On Wednesday, March 24, 2010, The Post and Courier newspaper reported this:

McConnell, R-Charleston, also called it a victory for higher standards for state judges. “This is a green light to us that we can have higher standards and that we can impose those higher standards,” he said. “Judges in the family court, they’re judge and jury there. A judge in the family court has broad discretion. And there is no assurance in South Carolina that you’re going to be a judge for life.”²⁵⁶

²⁵² The Supreme Court is located across the street from the State Capitol. See *Location Map—Supreme Court Building*, S.C. JUD. DEP’T, <http://www.sccourts.org/gmaps/supremeMap.cfm> (last visited Mar. 23, 2010).

²⁵³ See *Segars-Andrews*, 691 S.E.2d at 459 (“The separation of powers argument that the Legislature is ‘both creating and executing’ law must be rejected.”).

²⁵⁴ See *id.* (“Assume the court of appeals reversed [Segars-Andrews’] decision not to recuse or that the Commission on Judicial Conduct had made a finding adverse to Petitioner: would the JMSC be bound by that determination and be required to find Petitioner unqualified? Absolutely not.”).

²⁵⁵ See Robert Behre, *Justices Side with Panel*, The Post and Courier (Mar. 23, 2010, 11:25 AM), <http://www.postandcourier.com/article/20100324/PC1602/303249959>.

²⁵⁶ *Id.*

How far legislators are willing to go in light of this “green light” is unclear. What *is* clear, however, is that legislators are unwilling to relinquish any control over the process anytime soon.

It is axiomatic that South Carolina’s judges and justices are elected by the General Assembly.²⁵⁷ It is also axiomatic that only the JMSC has the constitutional authority to submit qualified applicants’ names to the General Assembly.²⁵⁸ What remains to be seen is how the South Carolina Supreme Court has given anything more than lip service to the notion of a constitutionally mandated independent judiciary. The court cannot expect judges to take comfort in the fact that they may still be deemed qualified for reelection even in light of a reprimand from the court itself, while these same judges are now wondering which political impulse will provide the tainted lens through which Senator McConnell and other legislators on the JMSC will view a set of facts and haphazardly and inconsistently apply its own fickle interpretations of the Canons. Where can a current judge go to obtain an ethics opinion, if not from experts like Professors Crystal and Freeman? Should their inquiries, instead, be directed to the JMSC itself? Can we as a sovereign political entity with a stake in the independent decision making abilities of our judges, afford the high price of allowing political whim to triumph over sound, well-reasoned interpretations of judicial ethics? And, most importantly, will the next judge that encounters a disgruntled litigant rule out of reason or trepidation? Once a reasonable doubt exists about the answer to this last question, “judicial independence” means naught.

D. *Confronting the Elephant²⁵⁹ Head On*

Judicial independence is, indeed, the “[t]he elephant in the room.”²⁶⁰ The Constitution of South Carolina provides for an independent judiciary.²⁶¹ To be “independent” means to be free from dependence on another’s authority and, most importantly, *not subject to external control or rule. . . .*²⁶² This definition of “independent” has not changed since April 21, 1970, the date that the framers of article I, section 8 redrafted the separation of powers clause precisely as it existed previously in article I, section 14.²⁶³ To quote from the seminal case by Chief Justice Marshall: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . This is of the very essence of judicial duty.”²⁶⁴ Unfortunately, South Carolina’s *Marbury* moment has come and gone, and the reality in South Carolina is simple: It’s politics as usual in the state capitol.

²⁵⁷ S.C. CONST. art. V, §§ 3, 8, 13.

²⁵⁸ S.C. CONST. art. V, § 27.

²⁵⁹ See *Segars-Andrews v. JMSC*, 691 S.E.2d 453, 463 (S.C. 2010) (per curiam) (“The elephant in the room is judicial independence. A central feature of Petitioner’s case concerns judicial independence.”).

²⁶⁰ *Id.* at 463.

²⁶¹ S.C. CONST. art. I, § 8.

²⁶² See OXFORD ENGLISH DICTIONARY (2d ed. 1989).

²⁶³ See *State ex rel. McLeod v. Edwards*, 236 S.E.2d 406, 408 (S.C. 1977) (“[T]his resubmission of the separation of powers clause, in the exact language it had previously existed, expressed the contentment of the General Assembly, not merely with the separation of powers principle as originally expressed, but with those words as then judicially construed by the Supreme Court of South Carolina.”).

²⁶⁴ *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803).

E. Solutions

All is not lost, however. If change is to come, it must come from the people, for at least in South Carolina, the state supreme court has declined the invitation. All political power is vested in and derived from the people only; therefore, the people have the right at all times to modify their form of government.²⁶⁵ As stated at the beginning of this Article, we propose solutions. These solutions are necessarily limited to the two states we have focused on in this Article because South Carolina and Virginia remain the only states whose judicial selection process continues to be dominated exclusively by their legislatures. First, in South Carolina, the state must adopt reform to the JMSC as it currently exists. Title 2, Chapter 19 of the South Carolina Code²⁶⁶ dealing with the JMSC should be amended: (1) to preclude legislative membership;²⁶⁷ (2) to raise the cap on the number of qualified applicants' names submitted to the General Assembly from three to no fewer than ten; and (3) to require the JMSC to give substantial weight to decisions of the court of appeals, the South Carolina Supreme Court, or ethics commissions within the judicial branch.²⁶⁸

The first measure—precluding legislative members from the JMSC—would cure the constitutional dual office holding violation and ensure that politics are kept as far removed from the decisionmaking process as practicable. Additionally, it would lend more credibility to the JMSC's decisions. The second measure—raising the cap on the number of qualified applicants' names submitted to the General Assembly from three to no fewer than ten—is designed to increase the possibility that more minority applicants will be qualified by the JMSC and submitted for consideration by the General Assembly. Many have characterized the current system, where the JMSC may submit no more than three candidates' names, as the “steak and two hamburgers” method.²⁶⁹ That is, the JMSC will pick the top candidate of the three, and the remaining two candidates are lesser-qualified applicants who stand little if any chance of garnering a sufficient number of votes in the legislature. Expanding the number of qualified candidates put forth by JMSC to the legislature would mandate a more detailed explanation and raise public skepticism if the increased slate still included no or a bare minimum number of minority candidates. The third measure would require the JMSC to give “substantial weight” to the ethics decisions of tribunals within the judicial branch. “Substantial weight” means that the JMSC should view such decisions as persuasive rather than binding. Moreover, the JMSC, if void of sitting legislators, may naturally be more apt to rely on the expertise and credibility of such decisions. If enacted, any one of these measures would bring much needed reform to the current JMSC. The desired result is for the General Assemblies to relinquish control over the merit selection process, once and for all.

²⁶⁵ S.C. CONST. art. I, § 1 (“Political power in people.”).

²⁶⁶ S.C. CODE ANN. § 2-19-10 *et seq.* (“Election of Justices and Judges”).

²⁶⁷ Currently, the Commission includes six sitting legislators, three from the House of Representatives and three from the Senate, and only four non-legislators. *See* § 2-19-10 (establishing the composition of the Commission).

²⁶⁸ Currently, the Commission may submit *no more than* three qualified applicants' names, notwithstanding the fact that more than three may be eminently qualified to run in the general election. *See* § 2-19-80 (“[The Commission] shall review the qualifications of all applicants for a judicial office and select therefrom and submit to the General Assembly the names and qualifications of the three candidates whom it considers best qualified for the judicial office under consideration.”).

²⁶⁹ Our thanks to Dr. Barbara Zia for this information.

Similar measures could be adopted or enacted in Virginia in an attempt to weed politics out of the process, particularly, the adoption of a diverse qualifying commission that includes individuals outside of the state's legislature.

While Professor Ware raises legitimate concerns of elitism resulting from disproportionate influence by members of the Bar,²⁷⁰ surely NO input from members of the state Bar is equally dangerous. It is hard to identify a group better suited to give input on necessary judicial temperament of a judicial candidate, legal acumen regarding an understanding of the law, and the required independent nature of their colleagues who will be chosen as a judge, than those who practice before the courts and among the candidates. The exclusion of any meaningful input by members of the state Bar in both South Carolina and Virginia identifies a glaring weakness in judicial selection in both states. Ideally, this commission would be comprised of members of the Bar, members of the legislature, and members at-large who would reflect the common man's approach to the court system. The lack of a truly diverse qualifying commission in both South Carolina and Virginia detracts significantly from their processes of judicial selection, and this simple solution may cure many criticisms of the current system, thereby depoliticizing a worthy selection process. For as the 2010 Brennan Center report concluded, "[m]ore diverse Commissions end up nominating more diverse slates of candidates."²⁷¹

CONCLUSION

This Article has presented a brief historical sketch of the evolution of judicial selection in Virginia²⁷² and South Carolina,²⁷³ culminating in the recent and controversial case involving former South Carolina Family Court Judge F.P. "Charlie" Segars-Andrews. In South Carolina, plenary control over the judicial election process remained in the General Assembly until 1997,²⁷⁴ at which time the new constitutional entity known as the Judicial Merit Selection Commission came into existence.²⁷⁵ Although the constitutional amendment submitted to the people for ratification did not state that sitting legislators would comprise a majority of the JMSC's membership,²⁷⁶ the enabling legislation passed contemporaneously with the amendment provided for legislative dominance.²⁷⁷ In contrast, Virginia's constitution has in the past provided for judicial selection via popular vote, but the legislative bodies chose to return to a process by which judicial selection is controlled exclusively by the legislature. As a result of the structures in both Virginia and South Carolina, both states lend themselves to criticism and attack as demonstrated in the *Segars-Andrews* case.

In 2009, a disgruntled litigant whose ethics complaint against Segars-Andrews had been dismissed by both the South Carolina Court of Appeals and the Commission on Judicial Conduct filed a complaint with the JMSC, raising the same issues addressed by

²⁷⁰ See Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 757-59 (2009).

²⁷¹ TORES-SPELLISCY ET AL., *supra* note 2, at 10.

²⁷² See *supra* Part I.B.

²⁷³ See *supra* Part I.A.

²⁷⁴ See *supra* Part I.A.1.c.

²⁷⁵ See *supra* Part I.A.1.d.; see also *supra* text accompanying note 57.

²⁷⁶ See *Segars-Andrews v. JMSC*, 691 S.E.2d 453, 457-58 (S.C. 2010) (per curiam).

²⁷⁷ See *id.* at 458-59.

both the court and the commission.²⁷⁸ After considering the complainant's case, the JMSC voted 7–3 to find Segars-Andrews unqualified to continue serving as a judge.²⁷⁹ In her petition to the South Carolina Supreme Court,²⁸⁰ Segars-Andrews argued multiple constitutional grounds to invalidate the JMSC.²⁸¹ The court subsequently dismissed the complaint after finding none of Segars-Andrews' claims to have merit.²⁸² In its opinion, the court held that the ex officio exception applied to Segars-Andrews' dual office holding argument, but the court was not straightforward in its assessment of the viability of this exception.²⁸³ The court's painstaking attempt to enlarge this dormant exception to cover the composition of the JMSC raises doubts about the extent of the exception's scope and the resulting effect on the constitutional rule prohibiting dual office holding.²⁸⁴

Segars-Andrews' separation of powers and judicial independence arguments were not enough to persuade the court to consider them fully.²⁸⁵ Instead, the court invoked the political question doctrine and declined to scrutinize the decision of the JMSC.²⁸⁶ The court's refusal to address the separation of powers concerns implicated by JMSC members' interpretation and application of the Canons leaves judges at the mercy of disgruntled litigants like Mr. Simpson.²⁸⁷ Moreover, judges are left wondering whose interpretations of the Canons they should follow—the courts' or the JMSC's?²⁸⁸ When such uncertainty leads to a judge potentially ruling for or against a party out of fear of the JMSC's reaction, or out of uncertainty as to the applicability of the Canons, an independent judiciary exists only in form, not in substance.²⁸⁹

It is instructive to look at Virginia's system of judicial selection in light of the decision in *Segars-Andrews*, given that Virginia and South Carolina are the only two states that incorporate a process of judicial selection vested exclusively in the General Assembly of the state. The lessons learned from *Segars-Andrews* and the concerns it raises apply equally to the process in Virginia.

In the absence of the court's willingness to address the pressing issues surrounding judicial reform, the bench and the bar must galvanize the people and encourage them to petition their representatives to enact meaningful change. We propose four solutions to be adopted in both states: (1) preclude sitting legislators from membership, at least in the majority, on any merit selection commission; (2) raise the cap in South Carolina on the number of qualified applicants submitted to the General Assembly from the current three to at least ten, or in Virginia place a reasonable limit on the number of names submitted to the legislative delegation from which they may select;

²⁷⁸ See *supra* Part III.A.

²⁷⁹ See *id.*

²⁸⁰ See *supra* Part III.A.; see also *Segars-Andrews*, 691 S.E.2d at 457 (“Petitioner filed an action challenging the decision of the JMSC on multiple grounds, an action we accepted in our original jurisdiction.”).

²⁸¹ See *supra* Part III.A.; see also *Segars-Andrews*, 691 S.E.2d at 457 (“Petitioner raises several constitutional challenges . . .”).

²⁸² See *supra* Part III.A.; see also *Segars-Andrews*, 691 S.E.2d at 464 (dismissing the complaint).

²⁸³ See *supra* Part III.B.

²⁸⁴ See *id.*

²⁸⁵ See *supra* Part III.A.C.

²⁸⁶ See *id.*

²⁸⁷ See *id.*

²⁸⁸ See *id.*

²⁸⁹ See *id.*

(3) require any merit selection commission, including the JMSC in South Carolina, to give “substantial weight” to ethics decisions rendered by a tribunal within the judicial department; and (4) include the state’s Bar association in the selection process.²⁹⁰ Real reform of South Carolina’s and Virginia’s legislatively dominated systems will take time. However, while advocating for improvement, let us also remember that these systems have already proven to be effective in increasing diversity when compared with other states’ judicial selection processes. To borrow from Winston Churchill,²⁹¹ it may be the case that South Carolina’s and Virginia’s systems are the worst – except for all the others that have been tried.

²⁹⁰ *See supra* Part III.E.

²⁹¹ Winston Churchill, Speech to the House of Commons (Nov. 11, 1947), *in* 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, 7566 (Robert Rhodes James, ed., 1974).