The impact of Amendment 3 on judicial diversity is daunting.

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We could spend an inordinate amount of time criticizing Amendment 3. Amendment 3's supporters' view of the origins of the Missouri Plan is ahistorical, the goals of the Missouri Plan manipulative, and the overall results of the Missouri Plan deceptive. Each of these issues merits lengthy discussion, and most have had it elsewhere. However, one area that has had comparatively little comment is the potential impact of Amendment 3 on minority and women's representation on the Missouri bench. Let's begin by discussing judicial selection, the Missouri Plan, and diversity.

Diversity was not the intent of the Missouri Plan. It was not created as a bulwark for racial, gender, or other diversities. As nearly any reader of this piece knows, the Missouri Plan was created to limit the undue influence enjoyed in court selection by figures like party boss Tom Pendergast (given the partisan nature that the Amendment 3 supporters have injected into this debate, it is worth noting, though not determinative, that Pendergast was a Democrat). The aim of the voters and the initial champions of the Missouri Plan was simple – to decouple the strong relationship between judicial selection and party politics. This goal is undoubtedly a good and necessary one, but it's worth considering downstream effects from the Plan's inception.

Over the past few decades, several papers have attempted to assess the impact of judicial selection methods on the diversity of jurists. These studies, apparently due to limitations in scope – in terms of the regions, court levels, or selection methods assessed – arrived at conflicting results. In 2009, Malia Reddick, Michael J. Nelson, and Rachel Paine Caufield of the American Judicature Society tried to resolve the conflict by examining all 50 states, all court levels, and all selection methods. The results of their study were mixed. In examining state Supreme Courts, the study found that appointive methods were more likely to place a minority jurist on a court than popular elections. However, this nominative selection grouping includes both gubernatorial appointment systems and merit-based systems, with the gubernatorial appointment system slightly ***more*** likely to create a minority placement. In appellate and trial courts, no selection method appeared to place racially diverse jurists at a higher rate.

For women jurists, the judicial selection method appeared to have no clear impact on trial or Supreme Court placements, nationally. On appellate courts, popular elections were in fact more likely to place a woman jurist than nominative methods.

Comparing the federal system to the Missouri courts yields similar results. Approximately 33 percent of trial judges, 25 percent of appellate judges, and three of six sitting Supreme Court Justices are women in Missouri courts. In contrast, 33 percent of magistrate judges and 37.5 percent, not including those with senior status, of district court judges are women in the Federal courts. Only the 8th Circuit Court of Appeals is significantly aberrant, with only 1 woman jurist out of 17.

So, what does this mean? If gubernatorial nominations lead to equivalent diversity, would expanding the governor's role via Amendment 3 hurt diverse representation? Effectively, Amendment 3 would expose all potential nominees to greater partisan whims by expanding the governor's authority to appoint nominees to the commission.

What impact would greater partisan control have on selection? Here we have data – at federal and state levels, judicial nominations are much more likely to place women and minority justices when the Democratic Party controls than when the Republican Party does. This makes a non-merit based nomination system quite the gamble for diverse members of the bar. In one election cycle, we might see several minority and women appointments. And in another, we might see few. And in both cases, we'll be left wondering whether merit was really determinative or even a factor.

The most salient point that the pro-Amendment 3 coalition makes is that they want more diversity on the courts in terms of political opinion. It seems most of this group is seeking viewpoint diversity in the form of more conservative justices. From their perspective, such a goal is understandable for the same reasons that diversity is generally desirable – it leads to more confidence in the courts, more breadth of judicial analysis, and a sense for more individuals that the system is fair to them. And the coalition can trot out its own statistics on under-representation of conservative voices. But the method they seek is simply the wrong tool – it would expose them to the same gamble that it would for diverse candidates, ironically.

It's important to briefly remember the role that history plays in courts, as well. Despite our desire to make bold and sweeping statements about the characteristics of jurists in America, they are quite fluid. Just 30 years ago, we saw the first law school classes that had proportional (if sporadically so) representation of women and minorities. The bar has become substantially more diverse, and many analysts expect that this will lead to diversity on all levels of American courts, and soon. And, non-trivially, legal scholarship has also expanded in a variety of ways, expanding the spectrum of legal analysis. It seems profoundly likely that the Missouri courts we see in 20 years will be far more diverse, if we don't tamper with our system and overly politicize it.

The fight against Amendment 3 is not about diversity as a particular issue. It's a fight to ensure that cronyism, bias, and politics do not overcome merit in the selection process. But, as the country has discovered – both in private and public spheres – over the past 50 years in its experiments with nationwide merit-based systems, a funny thing can happen with meritocracy: when you search for the best candidates, they just happen to end up being pretty diverse. ■