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## Supreme Court Showdown in the Show Me State

by Curt Levey ([more by this author](#))

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Conservatives have good reason to celebrate the changes on the United States Supreme Court wrought by the appointments of John Roberts and Samuel Alito. The Court's new direction -- away from a "living constitution" and towards judicial restraint -- is the result of decades of work by those who believe in the rule of law. Unfortunately, they cannot rest on their accomplishments at the federal level, for the ideological disciples of Earl Warren and William Brennan have turned their attention to the nation's state courts. Frustrated at the federal level, these ideologues are engaged in a mission to transform state supreme courts into the engines of judicial activism necessary to support their liberal agenda. The current battle over the Missouri Supreme Court is a paradigmatic example of this disturbing trend and what conservatives are doing to fight back.

A fierce fight broke out in Missouri over who would replace Supreme Court Justice Ronnie White. Setting the stage is the Missouri court's increasingly activist posture. As demonstrated in a recent study by University of Missouri law professor William Eckhardt and attorney John Hilton, Democratic appointees to Missouri's Supreme Court have been moving further and further to the left. The leftward shift has been dramatic enough to catch the attention of national conservative leaders and The Wall Street Journal, which recently noted the Missouri court's "growing pattern of judicial overreach." Examples of overreach abound in just the last year:

In *Glass v. State* (2007), the Missouri Supreme Court, citing ineffective assistance of counsel, reversed the death sentence of a man who confessed to raping and savagely beating a 13 year-old girl before choking her to death. Ordinarily, winning an appeal on those grounds requires showing that the defense counsel effectively slept through the trial. But in *Glass*, the Missouri justices put their near-religious opposition to the death penalty above the law and ruled that the defense's inherently subjective decisions about which witnesses to call amounted to

ineffective assistance of counsel.

*In Schoemehl v. Treasurer of State (2007)*, the Missouri Supreme Court made it clear that it would not let the plain meaning of statutes stand in the way of its liberal agenda. The justices held that disability benefits must be paid after the beneficiary has died, despite the relevant statute's clear language that such benefits are to be paid only "during the continuance of [the] disability."

The Missouri court made it equally clear that it would rather play ideological favorites than consistently apply the law. When the Supreme Court found in *Shipley v. Cates (2006)* that the state had illegally paid more than \$500,000 to Planned Parenthood, it nonetheless allowed the pro-choice group to keep the money. In contrast, when the state supreme court struck down a Missouri statute removing limits on campaign contributions in *Trout v. State (2007)*, it forced candidates who raised funds in reliance on the statute to give the money back. But it found an exception which allowed Democratic Senator Claire McCaskill to keep her campaign contributions.

Add to that the Missouri Supreme Court's decisions this year effectively imposing new taxes and discovering a right to collective bargaining for public employees, and it's easy to see why there is deepening concern about the court both in Missouri and nationwide.

The attention drawn by the court's increasing activism has focused on the state's judicial selection process. Unlike the federal model, where the President nominates the candidate of his choice, Missouri governors must appoint a judge chosen from a panel of three candidates submitted by the state's Appellate Judicial Commission. When it was initiated in 1940, the "Missouri Plan" was seen as a way of keeping politics and special interests out of the judicial selection process and was copied by most of the other states.

Unfortunately, the Plan's promise has not been fulfilled. Over the years, the Commission's secretive selection process has become increasingly controlled by the Missouri Bar Association, an organization with close ties to liberal special interest groups. As a result, the three finalists chosen by the Commission to replace retiring Justice White have records or backgrounds that indicate they will

do nothing to reign in the activist court.

Faced with choosing from among three unacceptable candidates, Republican Governor Matt Blunt criticized the Commission's highly politicized, backroom selection process and left open the possibility of lodging a protest by declining to select any of the three. While that would allow the Commission to make the final selection of a supreme court justice, many conservatives thought that rejecting all three finalists would be the principled response.

However, Governor Blunt instead backed down and appointed Judge Patricia Breckenridge, one of the three finalists, to the state's supreme court. Those working to advance the rule of law in Missouri are none too happy with this news. In fact, a coalition of national conservative leaders just released a strongly worded memo chastising Governor Blunt for his likely selection of Breckenridge. Concerned about her liberal record on the Missouri Court of Appeals, they cite hostility to the death penalty, sympathy for excessive jury awards, and a tendency to rely on a constitutional "right to privacy" in drug possession cases that would likely carry over to abortion cases.

Critics of Missouri's activist court are also working hard on the longer-term battle. Conservatives have launched a strong effort to reform the state's judicial selection process. Missouri legislators have proposed several alternatives, including a bill that would replicate the federal appointment model and another that would diminish the Missouri Bar's power over the selection process. Meanwhile, state leaders have called on the Commission to, at very least, open its records and transcripts to the public. So far, the Commission has refused to do so.

Public opinion appears to be on the side of reformers. A recent poll found that, when the current system is explained to Missourians, nearly two-thirds of them support change. And the margin of support is likely to become even greater now that educational efforts are underway. The Federalist Society is sponsoring debates about the state's judicial selection process. Others, including a new group called the Adam Smith Foundation, are using radio ads to educate Missourians about their supreme court's activist decisions and the various reform options.

Those who believe in judicial restraint are excited about the potential progress

they are seeing in Missouri. But sustained energy and the continuing support of ordinary Missourians are crucial if the state supreme court is to undergo the positive change in direction already achieved in the federal judiciary.

Similar battles are playing out in many other states, as supporters of judicial activism focus increasingly on state courts. Thus, conservatives across the nation need to take note of what is being done to fight back in the "Show Me" state. Missouri led the way in 1940 and it is likely to do so again.

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Mr. Levey is Executive Director of the Committee For Justice, which promotes constitutionalist judicial nominees and the rule of law

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