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The Futile Quest for a System of Judicial “Merit” Selection

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THE FUTILE QUEST FOR A SYSTEM OF JUDICIAL “MERIT” SELECTION

*Michael R. Dimino**

It is a mistake . . . to try to establish and maintain, through ignorance, public esteem for our courts.

—*Judge Jerome Frank*¹

I. INTRODUCTION

The challenge in designing the optimal selection system for judges is that judicial independence and accountability are mutually antagonistic: To the extent that greater public involvement in judicial campaigns occurs, the threat to judicial independence is increased.² The “Missouri Plan,” or alternatively the “merit-selection plan,” was an attempt to find a middle ground. Under merit selection—purely, so far as I can tell, a propagandistic misnomer: nothing ensures that judges chosen under that plan will be better than judges under any other system³—the public has little

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¹ JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 3 (1949).

² Independence, that is, from the public. Greater public involvement may increase judicial independence from other branches of government, and the latter kind of independence was one of the driving forces in the initial establishment of judicial elections. See Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 *THE HISTORIAN* 337, 347, 350 (1983).

³ The backgrounds of judges selected under appointive and elective systems are quite similar. See, e.g., HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 150 (2d ed. 1998) (explaining that one reason “why researchers are able to find so little difference in the characteristics of judges selected irrespective of the mechanism used . . . is that the mechanisms are not that different; in fact, at bottom, they are about the same”); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 *JUDICATURE* 228 (1987) (presenting research relating to the characteristics of state supreme court judges and concluding that, generally, the characteristics of these judges did not vary depending on the method of selection). Nevertheless, it is a leap to conclude that the *quality* of the judges chosen under both systems is similar. A stellar resume does not necessarily indicate an excellent analytical mind or first-class judicial craftsmanship. To my knowledge, no studies have tried to incorporate a better

say in who assumes the bench initially, but can vote out incumbents at retention elections. The elections to which judges under the Missouri Plan are subject differ in important ways from the elections judges face in other systems. Most notably, there is no opponent in a retention election. Incumbent judges appear on a ballot asking voters only whether the judge should be retained in office. In most states with the Missouri Plan, a majority vote is sufficient for retention for a term, at the conclusion of which the judge must again stand for retention. The ballot discloses only the name of the judge; no partisan affiliations appear on the ballot.⁴

Public involvement under the merit selection plan, generally confined simply to retention elections,⁵ is so constrained as to be

definition of judicial quality than mere background characteristics. See DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 33 (6th ed. 2003) ("Any definition of 'judicial merit' is artificial."); Walter F. Murphy, *Reagan's Judicial Strategy, in LOOKING BACK ON THE REAGAN PRESIDENCY* 207, 215 (Larry Berman ed., 1990) ("[I]t is not likely we shall ever have enough data—even assuming agreement on standards—to make judgments on the collective moral fitness of a group of human beings engaged in such complex and controversial work as judges.").

Although one could use citations to written opinions as proxies for the quality of those opinions, such an approach raises a host of other problems. See RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 70–72 (1990) (using a citation study and noting the shortcomings); Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 306–09 (2004) (noting shortcomings but favoring the use of citation studies). Notably, judicial decisions are now often cited for their stylish prose as much as for their analysis, and cases dealing with certain legal questions will be cited regardless of their cogency (or even, perhaps, as examples of faulty analysis that the one citing the case greets with contempt). See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *Roe v. Wade*, 410 U.S. 113 (1973); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); *Guinn v. Legislature of Nev.*, 71 P.3d 1269, *reh'g denied*, 76 P.3d 22 (Nev. 2003); *N.J. Democratic Party, Inc. v. Samson*, 814 A.2d 1028 (N.J.), *cert. denied*, 537 U.S. 1083 (2002). Professor Mary Anne Case terms the last phenomenon "anti-precedent[.]" Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1469 n.112 (2000), while others refer to such cases as "anticanonical," PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 207 (4th ed. 2000).

⁴ Parties have a First Amendment right to endorse candidates, even those running in nonpartisan elections, including retention elections. See *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (en banc), *vacated as unripe*, 501 U.S. 312 (1991); *Cal. Democratic Party v. Lungren*, 919 F. Supp. 1397, 1404 (N.D. Cal. 1996) (striking down a constitutional provision prohibiting political party endorsements in elections for nonpartisan offices). Cf. *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (striking down a ban on party endorsements of primary candidates for partisan offices). The right of a party to express its preferences, however, does not give it the right to have its endorsement appear on the ballot. See *Geary*, 911 F.2d at 287 (Reinhardt, J., concurring) (noting that "[n]o one quarrels with" the ability of states to conduct nonpartisan elections).

⁵ Not all states that use retention elections eliminate the public from the initial selection. Illinois and Pennsylvania, for example, initially elect their judges on partisan ballots, and thereafter hold nonpartisan retention elections for successive terms. New Mexico has a similar system, whereby judges are initially appointed, then elected on a partisan ballot, and then subject to nonpartisan retention elections. Montana holds nonpartisan, contested elections, before subjecting the winners to nonpartisan retention elections. See COUNCIL OF

misdirected and ineffective. By removing challengers from the ballot, retention races eliminate the public figures most likely to motivate and organize opposition to the incumbent. In contested elections, challengers have an incentive to exploit every ruling by their opponents that might be characterized as benefiting an unpopular group or policy. Merit selection hopes to limit the pressure on incumbents to rule in particular ways by ensuring that there will be no candidate opposing the incumbent, and therefore less chance that the public will be alerted to those instances where the judge has flouted the popular will.

Furthermore, by removing party labels from judicial elections, voters are deprived of an important proxy for determining whether a judge’s decisions are likely to reflect the preferences of the voter. In low-visibility races, including most judicial elections, party affiliation can provide one of the most valuable indications voters have of a judge’s likely future decisions.⁶ Without knowing a candidate’s party, voters often use racial, ethnic, and gender stereotypes in a less accurate, and more offensive, attempt to predict the decisions of the candidates.⁷

Others have discussed exhaustively the merits and demerits of merit selection, and I do not intend in this essay to debate the

STATE GOVERNMENTS, THE BOOK OF THE STATES 209–10 (2002).

⁶ See, e.g., Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999) (employing meta-analysis to compare political party and judicial ideology and concluding “that party is a dependable yardstick for ideology”); Stuart S. Nagel, *Political Party Affiliation and Judges’ Decisions*, 55 AM. POL. SCI. REV. 843, 845–47 (1961) (noting a clear relationship between party affiliation and the decisions made by judges).

⁷ See Howard A. Scarrow, *Vote Dilution, Party Dilution, and the Voting Rights Act: The Search for “Fair and Effective Representation,”* in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 51 (David K. Ryden ed., 2d ed., 2002); Roy Schotland et. al., *Judicial Elections and Campaign Finance Reform*, 33 U. TOL. L. REV. 335, 350–51 (2002) (statement of Roy A. Schotland) (giving examples of the use of race in judicial campaigns).

The elimination of party affiliation from judicial election ballots seems to be an attempt to induce voters not to think of judicial candidates in terms of their membership in one particular type of group—the party. Voters, in effect, are told that not all Republicans behave the same way on the bench, and even if they did it is inappropriate to vote on the basis of that perception. It is curious that the state would perceive a vital interest in disabusing voters of the notion that members of a party think alike when often those members have joined the party precisely because of their agreement with the views of the party. See Malcolm M. Feeley, Research Note, *Another Look at the “Party Variable” in Judicial Decision-Making: An Analysis of the Michigan Supreme Court*, 4 POLITY 91, 92–93 (1971) (citing David Adamany, *The Party Variable in Judges’ Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57 (1969)). It is true, of course, that not all party members join because of their agreement on *judicial* policy, but it is undeniable that judges of the same party are more likely to approach legal problems similarly than are judges of different parties. See, e.g., Nagel, *supra* note 6, at 846.

“success” or “failure,” per se, of merit selection since its introduction in Missouri in 1940.⁸ Instead, I wish to discuss the effect merit selection has on squelching public debate about the judiciary. Once that effect is demonstrated, I then wish to assess this antidemocratic tendency against the purported goal of merit selection: maintaining some measure of accountability in a selection system nonetheless designed to make judges confident enough in their independence to render decisions according to the law rather than the will of the public.

In making it difficult for voters to remove an unpopular judge, merit selection gives up on the goal of judicial accountability. Merit selection uses the public as participants in what is predetermined to be a useless exercise designed to ensure the retention of the incumbent.⁹ Thus, accountability is sacrificed for independence, but the public is pacified with assurances that they continue to have the power, through retention elections, to discard unfit judges.

I claim only that the Missouri Plan is unwise as a policy matter; I do not suggest any constitutional defects in the plan, and indeed insofar as it distances the public from judicial selection, merit selection approximates the model of appointing judges prescribed in the Constitution for federal judges.¹⁰ Merit selection, though, is not forthright about its distaste for public input.¹¹ The public is given

⁸ Others have admirably done so. In addition to the contributions in this issue, see, for example, Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315 (1997); Elmo B. Hunter, *Revisiting the History and Success of Merit Selection in Missouri and Elsewhere*, 60 UMKC L. REV. 69 (1991).

⁹ For an argument in favor of the Missouri Plan precisely because of its antidemocratic tendencies, see, for example, Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 SW. L.J. (Special Issue) 15 (1986); see also American Judicature Society, *Merit Selection: The Best Way to Choose the Best Judges*, at http://www.ajs.org/selection/ms_descrip.pdf (last visited Apr. 6, 2004) (arguing for merit selection principally because it eliminates party politics and the need for campaigning).

¹⁰ See U.S. CONST. art. II, § 2, cl. 2 (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for”). This is not to say, however, that the federal model has been beyond criticism as undemocratic. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (suggesting the abandonment of judicial review); ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996) (arguing for a constitutional amendment permitting Congress to override, by majority vote of each house, Supreme Court invalidations of statutes); Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 188–92 (1998) (surmising that “[t]he Supreme Court, in *politically unpredictable* ways, imposes *culturally elite* values in a *marginally countermajoritarian* fashion”).

¹¹ It is possible that some supporters of the Missouri Plan thought of retention elections as a way for voters to dismiss judges plagued by scandal or otherwise personally unfit for office,

the opportunity to reject unacceptable judges, but then is hampered in exercising that right. Accordingly, merit selection is a sham, where public participation means the popular validation and legitimization of previously selected judicial officers.

II. ON ITS OWN TERMS: MERIT SELECTION, INDEPENDENCE, AND ACCOUNTABILITY

Even assuming the worth of the goal of independence sought by the Missouri Plan, it is worth asking whether the system has served that goal. True, retention rates for judges are greater than reelection rates in states with judicial elections (though reelection rates are quite high—fewer than twenty percent of incumbent judges are defeated, on average).¹² But incumbents' good fortune in retention races could simply be due to the difficulties voters face in obtaining information about those judges.¹³ Voters may reasonably feel (and apparently do feel) that in the absence of information to the contrary, and without any indication of the incumbent's political affiliation, it is better to retain the incumbent than face the prospect of an election to fill the vacated position, with the chance that the replacement could be much worse.¹⁴ Thus, retention elections protect incumbency in multiple, related ways: They minimize the incentives for opposing forces to wage antiretention campaigns by preventing any individual from opposing the incumbent directly; they eliminate indications of partisanship that allow voters to translate their policy preferences cost-effectively into votes; and

without regard to the voters' agreement *vel non* with the judges' decisions. Accountability for judicial policymaking was, under this theory, not a consideration at all. Because the factors influencing voter choice could not be restricted, however, there was always the potential for voters to use retention elections as a way of influencing policy, and a failure to recognize that eventuality was, if it existed, remarkably naïve. Cf. Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 312–14 (2003) (arguing that the policy-influencing potential of judicial elections was known and accepted when those elections were put into place). In any event, retention elections have been justified as providing accountability, and any legitimizing effect of elections is due to the electorate being able to vote on the basis of policy, not personal characteristics. Thus, even if accountability concerns did not motivate some or all states adopting the Missouri Plan, the plan nonetheless tells voters that their opinions matter, even as it ensures that few votes are cast and that voters will face hurdles in obtaining information.

¹² See Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 325 (2001).

¹³ See Mary L. Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not*, in THE ANALYSIS OF JUDICIAL REFORM 79, 87 (Philip L. Dubois ed., 1982).

¹⁴ See Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 68, 73 (1983).

they increase voter fears of uncertainty by forcing a choice of retaining or rejecting the incumbent before the voter knows the names of potential replacements.

But all this effort to marginalize the public has had little effect on the supposed dangers of judicial elections, including the partisan pressures,¹⁵ increased expense, personal invective, and threats to independence posed by recent judicial elections.¹⁶ Indeed, the record for spending in a judicial election was the (non-)retention election of California Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin in 1986.¹⁷ Such an impact stands to reason once one recognizes that retention elections' removal of party labels and opponents, who at least have the potential to engage an incumbent about broad approaches to the administration of justice, leaves little for voters to consider but the manipulative characterizations of a few decisions by interest groups.¹⁸ Whereas an opposing candidate who attacks an incumbent's record might be expected to explain how he would have approached a case differently, the interest group typically shouts from the sidelines that the incumbent "cares only about big business," is responsible for exponentially increasing tort verdicts, opposes voter preferences on the death penalty, opposes "traditional family values," or (ironically) has been captured by the "special interests." Charges such as these, and the problems judges face in trying to respond to these characterizations, have led one commentator to charge that "retention elections are the most unfair system of all judicial elections."¹⁹

¹⁵ See Hall, *supra* note 12, at 319.

¹⁶ See Owen G. Abbe & Paul S. Herrnsen, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286, 294 (2002). As one commentator has pithily put it, judicial elections have become "nastier, noisier, and costlier." Roy A. Schotland, *Comment*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

¹⁷ See Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1406 (2003). Professor Schotland notes, however, that the 1986 California election was an aberration, and that many retention elections have very low levels of spending, due to the lack of opposition. See *id.* at 1406 n.39. Nevertheless, it is often necessary for incumbent judges facing retention to raise large amounts of money so as to fend off opposition or to combat a movement against retention, which may take hold late in a campaign and thereby catch a poorly financed incumbent judge unable to defend himself. See *id.* at 1407 n.40.

¹⁸ See generally David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. CIN. L. REV. 1, 5-17 (2003) (using the 2000 Ohio judicial elections to argue about the dangers of interest group influence); Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 684-85 (2002).

¹⁹ Gerald F. Uelman, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL.

Unfair or not, whenever a judge is subject to an election—retention or otherwise—there is the risk that the judge will decide cases so as to maximize his electoral chances. And the cases that will be most closely watched by interest groups are likely to be the same cases that would be used by an opponent in a contested election.²⁰ Judges know that decisions setting dangerous criminals free, for example, can be used by either an opponent or an interest group to paint the judge as “soft on crime,” whether the characterization is apt or not.²¹ It is therefore at best unclear whether retention elections insulate judges from the feeling that someone is looking over their shoulders.²² Increasingly they are indeed being watched, and they know it.

Thus, Tennessee Supreme Court Justice Penny White was defeated largely based on her vote (with the majority) to vacate a single death sentence,²³ and Nebraska’s Supreme Court Justice David Lanphier faced strong opposition because of his decision holding that a term-limits initiative lacked sufficient signatures to appear on the ballot.²⁴ Tennessee’s governor praised the public’s involvement in the judicial selection process, commenting, “[s]hould a judge look over his shoulder about whether they’re [sic] going to be thrown out of office? I hope so.”²⁵ The remainder of this essay essentially asks whether there is anything objectionable with the governor’s attitude or, more particularly, whether a state should

L. REV. 2069, 2073 (1988); see also Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 980 n.26 (2001) (“As I see it, retention elections may be more threatening to judicial independence than contested elections.”); Robert J. Danhof, *Shaping the Judiciary: A Framer Traces the Constitutional Origins of Selecting Michigan’s Supreme Court Justices*, 80 MICH. BAR J. 15, 18 (2001) (“When a justice has the newspapers and the media to contend with and isn’t fighting a live opponent, it is like fighting a wisp, and that is hard.”).

²⁰ See B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431 (2001); Traciell V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 77 (1999).

²¹ See Edmund V. Ludwig, *Another Case Against the Election of Trial Judges*, 19 PA. LAW. 33, 34 (1997) (reporting that because interest-group pressure can jeopardize the retention prospects of judges making unpopular decisions, “some courts do not assign a judge to potentially inflammatory cases during the year or so before he or she faces a retention election”).

²² Survey results indicate that very few judges see retention elections as giving them substantially more independence than they would have under a system of contested elections. See Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312–14 (1994).

²³ See *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996).

²⁴ See *Duggan v. Beermann*, 515 N.W.2d 788 (Neb. 1994). For discussions of the White and Lanphier races, see generally Dann & Hansen, *supra* note 20, at 1433–36; Reid, *supra* note 20, at 69–72.

²⁵ Paula Wade, *White’s Defeat Poses Legal Dilemma; How is a Replacement Justice Picked?*, COMM. APPEAL (Memphis, Tenn.), Aug. 3, 1996, available at 1996 WL 11059250.

rebuke the governor's sentiment but nonetheless involve the public by adopting a system of retention elections.

III. THE SUBJECTIVITY OF ASSESSING JUDICIAL MERIT

The history surrounding the adoption of judicial elections demonstrates quite clearly that promoting an objectively superior judiciary is never the sole motivation of reformers, and often that interest has been far subordinated to the interest in promoting particular policy outcomes.²⁶ Such remains the pattern today, with controversies over judicial selection fueled by controversial judicial rulings, and factions supporting those methods of selection that will yield judges sympathetic with the factions' policy views.²⁷ Accordingly, whether a particular observer thinks that a particular form of judicial selection is worthy of the title "merit selection" may have as much to do with whether the judges produced under that system make decisions that match the observer's policy preferences as with whether the plan is superior in any objective way.²⁸ The

²⁶ See Dimino, *supra* note 11, at 312–13 (noting that both policy motivations and the desire to improve the judiciary played a role in states' decisions to use elections for judges, and that "those who were most dissatisfied with the appointive system tended, unsurprisingly, to be those who were most dissatisfied with the decisions made by the appointed judges"); Anthony Champagne & Judith Haydel, *Introduction to JUDICIAL REFORM IN THE STATES* 1, 2 (Anthony Champagne & Judith Haydel eds., 1993) (arguing that interest-group politics is at the heart of debates concerning judicial selection methods). For the history of states' adoption of the elective method of judicial selection, see Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993); Hall, *supra* note 2, at 337.

²⁷ See Schotland, *supra* note 17, at 1414 (noting that when North Carolina changed its form of judicial elections to minimize the chance that a Republican would be elected, "the change to nonpartisanship was ironically partisan"); Judicial Elections White Paper Task Force, *The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 407 (2002) [hereinafter, *The Case for Partisan Judicial Elections*] (noting that when a new Republican majority on the Alabama Supreme Court began to limit tort awards, the Democratic governor began pushing for non-partisan judicial elections); Steve LeBlanc, *With Gay Marriage Debate Over, Lawmakers Briefly Tackle Other Amendments*, Mar. 30, 2004 (reporting that in the wake of decisions requiring the state to recognize same-sex marriages, Massachusetts legislators were considering a constitutional amendment to make the Supreme Judicial Court elective, and therefore more responsive to public desires and less activist), available at http://www.boston.com/news/local/massachusetts/articles/2004/03/30/with_gay_marriage_debate_over_lawmakers_briefly_tackle_other_amendments/ (last visited Apr. 8, 2004); Michele Radosevich, *Toward Meaningful Judicial Elections: A Case for Reform of Canon 7*, 17 U. PUGET SOUND L. REV. 139, 149–51 (1993) (describing the partisan wrangling over judicial elections in Washington State).

²⁸ See Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002) (arguing that criticism of courts reflects disagreement with the results of decisions, rather than with the courts' legal reasoning); *The Talk of the Town: Notes and Comment*, THE NEW YORKER, Oct. 28, 1991, at

Missouri Plan, insofar as it was developed to protect incumbent judges, reflects a vision of judging under which the public is not qualified to assess judicial merit,²⁹ and therefore the confluence of judicial decisions with public sentiment does not indicate merit.

It should therefore be clear that merit selection seeks to keep in office those judges the public would oppose if voters had access to all the information available in other campaigns. Beyond simply limiting the information available to voters who wish to affect judicial policy, retention elections suppress the representation of the interests of the public in another, related way: nonpartisan elections between largely unknown candidates, which are often held at times different from more noteworthy elections, systematically lead to low voter turnout, particularly among members of the lower classes.³⁰ Thus, not only is it difficult for ordinary voters, who lack knowledge about the judicial candidates and do not receive it during the campaign, to effectuate policy through their votes, but also the elections are organized to decrease the likelihood that members of the public will vote at all.³¹ Once again, retention elections seek to have the benefit of appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy.

In short, judicial selection systems that hinder the public in making informed choices favor those interest groups and judges who would lose popular votes.³² Under such a system, whose interests are left protected? The answer, of course, is the elites,³³ the Platonic guardians, who are the ones who craft canons and statutes governing the judiciary.³⁴ Proponents of removing judicial selection

29, 31 ("[T]he law is now always spoken of popularly in terms of outcomes that are indistinguishable from political ends.").

²⁹ See *The Case for Partisan Judicial Elections*, *supra* note 27, at 396 (citing Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOL. PUB. POL'Y & L. 242, 244 (1997)).

³⁰ See Dimino, *supra* note 11, at 374–76 and sources cited therein.

³¹ See Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031, 1037–38 (1997) (describing Wisconsin's system of holding judicial elections temporally distant from other elections, and the effect on voter turnout); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 JUSTICE SYS. J. 23 (1984) (arguing that judicial elections may benefit from lowering turn-out by uninformed voters).

³² Relatedly, the low levels of information readily available in retention elections result in depressed turnout. See Aspin & Hall, *supra* note 22, at 307.

³³ I am by no means breaking new ground in calling attention to independent courts' solicitude for elite opinion. See, e.g., *Romer v. Evans*, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

³⁴ Attorneys in general and the judiciary in particular are largely self-regulating.

from public control contend that judicial decisions must be based on the law and not on fears of electoral defeat—but that only begs the questions of what the law is, and whether the public's view of law is just as legitimate (from a democratic perspective, it certainly seems more so) as the elites'.³⁵

I certainly do not go so far as to claim that there are no objective standards against which merit can be assessed. Literacy, sanity, and the ability to articulate complex thoughts in clear prose are all essential, fairly objective qualities for a good judge to possess. The list of areas universally conceded to be reflective of judicial competence, however, is not much larger. Should a judge subordinate his policy preferences to the law? Yes, but according to some theories a judge's views of wise policy should be used to interpret statutory ambiguity and formulate the common law.³⁶ Surely the Constitution should trump judges' policy preferences, right? Yes, but the meaning of the Constitution's majestic generalities must be discerned by reference to "the evolving

Moreover, even committees formed to recommend changes in judicial ethics codes tend to have judges and supporters of judicial independence well represented. As examples, the Steering Committee of the National Symposium on Judicial Campaign Conduct and the First Amendment, which recommended that measures be taken to undermine public influence in judicial elections, was composed of five judges. See *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649 (2002). Similarly, the frighteningly forthrightly titled New York Commission to Foster Public Confidence in Judicial Elections, which has, unsurprisingly, issued a report urging reforms in the judicial elections system to bring public trust to the judiciary, is a twenty-nine member body, hand-picked by a chief judge who has made a point of stressing the value of an independent judiciary in a state where most judges are elected. See Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703 (1997). Of the Commission's twenty-nine members, only one is not a lawyer. Eleven are current or former judges. See The New York State Commission to Promote Public Confidence in Judicial Elections, *Commissioners and Staff*, at <http://law.fordham.edu/commission/judiciaelections/comm-roster.html> (last visited Apr. 8, 2004).

³⁵ The series of begged questions considered in this essay proceeds thusly:

Question: What makes a system one of "merit selection?"

Answer: Merit selection systems choose the best judges.

Question: What makes one judge better than another?

Answer: Qualifications.

Question: But since we know that the experience of elected judges is no different from that of appointed judges, see *supra* note 3, what other qualifications bear on judicial merit?

Answer: The better judge follows the law and shapes the law in a manner promoting better policies.

Question: Whose opinion matters as to whether certain policies are better than others? And isn't the content of the law open to substantial question? If so, what is wrong with allowing the public's opinion of the law to have some influence?

³⁶ See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

standards of decency that mark the progress of a maturing society,”³⁷ and a judge discovering those standards will often find that “society’s” standards correlate quite well with the judge’s personal standards.³⁸

The push for merit selection is not about establishing a balance between accountability and independence. It rests instead on the determination that public input is bad for the judicial system, and must be tolerated only as a political compromise. This is clear once one sees the degree to which success under the merit selection plan is equated with the retention of incumbents.³⁹ A high rejection rate is not necessarily bad for a system that balances accountability and independence—perhaps the judges need to be more responsive. By favoring high retention rates as a way of increasing judicial independence, merit selection supporters show that they value independence to the virtual exclusion of accountability.

The greatest crisis in judicial-elections circles is when a “highly regarded” judge is defeated in his bid for retention or reelection by someone without the qualifications or reputation of the losing candidate. Some of these defeats are uncontroversially unfortunate, even for someone generally in favor of the democratic influence on judging. Instances in which competent judges are defeated by candidates with nothing to their credit but famous names, or elections that place a winning candidate in office because his name happened to be listed first on the ballot, are failures of the

³⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

³⁸ See *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (“[U]nsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable”’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)) (alteration in original) (citations omitted); see also, e.g., *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (claiming that the electorate’s preference for capital punishment did not truly reflect society’s views, because popular opinion was not well enough “informed”); *Furman v. Georgia*, 408 U.S. 238, 361–63 (1972) (Marshall, J., concurring) (same); Christopher E. Smith, *The Malleability of Constitutional Doctrine and its Ironic Impact on Prisoners’ Rights*, 11 B.U. PUB. INT. L.J. 73, 79 (2001) (“[I]n many respects, the Eighth Amendment serves as the prime illustration of Feeley and Rubin’s description of opportunities for overt judicial policymaking with little justifiable pretense that judges’ decisions are guided by the constitutional text.”) (citing MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 206 (1998)); Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 39 (Amy Gutmann ed., 1997) (“[I]t is known and understood that if . . . logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then . . . the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean.”).

³⁹ See, e.g., Daugherty, *supra* note 8, at 320–22 (cataloguing the “[p]anic” had by Missouri Plan supporters when retention rates fell).

democratic process.⁴⁰ Even in those circumstances, however, it is not at all clear that such random results of the electoral process are qualitatively worse than the cronyism and patronage factors that impact judicial selection in an appointive system.⁴¹ The merit selection system itself, by installing judges initially via an appointment process and then keeping them in office with elections designed to minimize defeats, “seems only to obscure, not remove, many important partisan features and influences in judicial selection.”⁴² The potential influence on the judiciary and the law by the appointing authorities and those who seek to exclude the public from judicial selection—though just as much a threat to judicial independence as an initial selection by partisan election—rarely troubles champions of reform.

The fundamental concern, however, of those who urge the removal of the public from judicial selection is that the policy views of the electorate—ordinary citizens who do not value judicial independence as much as they should—will influence judicial decisions.⁴³ I do not quarrel with that concern. I, like most of the legal academy, value the role of the courts as countermajoritarian institutions, positioned to protect the individual from the unconstitutional excesses of a popular faction. The twentieth century has seen scores of examples where constitutional rights were protected by the courts in the face of popular determination to deny those rights, and perhaps a more accountable court system would have failed adequately to enforce the Constitution.

⁴⁰ See, e.g., Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643 (2002) (noting several instances where public opinion of a judge bore little resemblance to the judge’s professional performance and discussing the factors that led to such results).

⁴¹ See Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOL. PUB. POL’Y & L. 244, 247 (1997).

⁴² Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 519 (1978).

⁴³ See *Republican Party v. White*, 536 U.S. 765, 789 (2002) (O’Connor, J., concurring) (citing Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–94 (1995), for the proposition that elected judges are more likely than non-elected ones to impose the death penalty over a jury’s recommendation of life without parole); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992) (finding that judges fearing re-election are less likely to dissent from decisions affirming death sentences than are judges more removed from the public); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1579–84 (1990). While Justice O’Conner and Professor Eule clearly see public influence as problematic, Professor Hall is more neutral, concluding only that “[i]ndividual states must decide whether such respons[iveness] is desirable from judicial actors or whether more of an independent role is preferred.” Hall, *supra*, at 443.

“But judicial independence is only a means to an end; it is the mechanism chosen by the Founders [of the national Constitution] to ensure the rule of law.”⁴⁴ Where judicial independence can be used to subvert the rule of law rather than serve it, support for the independence of courts must be qualified. First, appointed, life-tenured judges—the ones more independent than any others in the United States—have conspicuously failed to fulfill the counter-majoritarian ideal on occasion.⁴⁵ The behavior of elected judges must, therefore, be measured against that of fallible appointed judges, not the ideal of an “independent” judiciary. Second, “independent” courts have been over-protective of individual rights on occasion, stripping power from the political branches to regulate conduct not protected by the Constitution, fairly interpreted.⁴⁶ Independence is thus subject to abuse, as constitutional theorists have made abundantly clear. Third, of relevance to discussions of the Missouri Plan, retention elections make it more difficult for voters to hold judges accountable, but do not eliminate public influence, and are justified in part because they do allow the public to have a voice. The Missouri Plan should, therefore, be evaluated not merely on the basis of its balance between independence and accountability, but also for the way it manipulates the public into thinking it has a voice in judicial policy, when every decision below the surface ensures as much as possible that the voice will go unheard.

The fundamental point behind the movement for partisan judicial elections, unaddressed in the literature supporting limits on public influence, is that the “merit” of judges is almost entirely subjective. Indeed, the central problem behind the judicial selection controversy is our society’s disagreement over what the law is, and what methods should be employed to discover (or manufacture) what the law is. “The movement to constrain elections . . . is motivated by the belief . . . that ‘an elite cadre of philosopher-kings’ must limit democracy in order to save the people from

⁴⁴ Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 632 (1999).

⁴⁵ Justice Brennan brought together several examples of occasions where he thought the Supreme Court had insufficiently protected individual rights. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495–98 (1977).

⁴⁶ Justice Scalia listed instances where he determined that states had been excessively constrained by improper interpretations of the Constitution. See Scalia, *supra* note 38, at 41–42. Readers are, of course, free to add to and subtract from these lists as they see fit, thereby driving home my point that judicial merit is subjective.

themselves.”⁴⁷ But it is surely possible that the influence of the public could save democracy from the elites. Perhaps the best judges—that is, the judges who most faithfully represent the “true” law—are the ones that reflect the preferences of ordinary voters.

On what basis may we say that the public’s interpretation of the Establishment Clause, or the Due Process Clause, or the Eighth Amendment is wrong? Thanks to the notion of the “living Constitution,” we cannot say that a particular interpretation is wrong even if it is contradicted by hundreds of years of Anglo-American law.⁴⁸ If Justices of the Supreme Court can opine that the death penalty (though accepted by the text of the Constitution)⁴⁹ in fact violates the Constitution,⁵⁰ then what possible interpretation is out of bounds as indisputably wrong?⁵¹ We as a society, or as a legal culture, have not even agreed on a methodology for determining the interpretation of legal texts; in light of that, the meanings themselves must be open to dispute.⁵² Questions as to the meaning of law are both endless and timeless, and there is no way to answer without deciding on a judicial philosophy and/or incorporating a set of moral values into the law one is charged with interpreting.

Once it is conceded that each individual’s moral choices are

⁴⁷ Dimino, *supra* note 11, at 377 (quoting W. Bradley Wendel, *The Ideology of Judging and the First Amendment in Judicial Election Campaigns*, 43 S. TEX. L. REV. 73, 105 (2001)).

⁴⁸ See *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (rejecting the rationale of the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986)—premised primarily on the condemnation of homosexual conduct throughout history—and holding a Texas same-sex sodomy law unconstitutional).

⁴⁹ See, e.g., U.S. CONST. amend. V (“No person shall be . . . deprived of life . . . without due process of law”); U.S. CONST. amend. XIV, § 1 (“No state shall . . . deprive any person of life . . . without due process of law”); *Callins v. Collins*, 510 U.S. 1141, 1141 (1994) (Scalia, J., concurring), *denying cert. to* 998 F.2d 269 (5th Cir. 1993) (“[T]he text and tradition of the Constitution . . . clearly permit[] the death penalty to be imposed, and establish[] beyond doubt that the death penalty is not one of the ‘cruel and unusual punishments’ prohibited by the Eighth Amendment.”).

⁵⁰ See *Callins*, 510 U.S. at 1145–46 (Blackmun, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 305 (Brennan, J., concurring); *Furman*, 408 U.S. at 358–60 (Marshall, J., concurring).

⁵¹ See *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) (“[I]t is really quite impossible for us dissenters to contend that the majority is *wrong* on the law—any more than it could be said that one is *wrong in law* to support or oppose the death penalty, or to support or oppose mandatory minimum sentences. The most that we can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law.”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (“The death penalty, for example, was not cruel and unusual punishment because it is referred to in the Constitution itself; and the right of confrontation by its plain language meant, at least, being face-to-face with the person testifying against one at trial. For the non-originalists, even these are open questions.”).

⁵² See Scalia, *supra* note 38, at 14 (“Surely this is a sad commentary: We American judges have no intelligible theory of what we do most.”).

equivalent,⁵³ however, it must be illegitimate to limit public involvement in judicial elections on the ground that independent judges make better moral choices.⁵⁴ The value of judicial independence then reduces to the question whether independent judges are better at discerning the meaning of law exclusive of moral considerations. Here, an independent judiciary does seem to have an institutional-competence argument that the true meaning of constitutional and statutory law⁵⁵ can be discerned through the application of peculiarly “lawyers’ work:”⁵⁶ deciphering the meaning of language.

As has been made abundantly clear in recent years, however, all too often legal considerations give way to policy concerns, and case decisions frequently reflect what judges think the law should be rather than what it is. Legal realism opened our eyes to this truth nearly a century ago, and recent political science has demonstrated it empirically.⁵⁷ But when court decisions are nothing more than judicially imposed policy, the pronouncements of independent courts have no more entitlement to legitimacy than do courts that are pure reflections of majority sentiment. In neither case are the decisions based on law, the protection of which is the only justification for courts’ antimajoritarianism.

In fact, returning to history, it was in part the perception that judges had strayed from the applicable law that led to the establishment of judicial elections in the first place. Popular elections were seen by some supporters as a way of undermining the

⁵³ See *Lawrence*, 123 S. Ct. at 2480 (“Our obligation is to define the liberty of all, not to mandate our own moral code.”) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)).

⁵⁴ See *Planned Parenthood v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., dissenting) (“[T]he people *should* demonstrate[] to protest that we do not implement *their* values instead of *ours*. . . . Value judgments, after all, should be voted on, not dictated . . .”).

⁵⁵ Insofar as the common law pronounced by unelected courts is reflective of the personal policy views of the judges, see, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921) (“If you ask how [a judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection . . .”), it appears wholly oligarchical to subject the populace to judges’ policy ideals without imposing an electoral check on judicial decisions. Perhaps that concern with democracy in the evolving common law is reflected in the states’ preference for elected judiciaries and the federal government’s appointive system, in which the common law plays an infinitesimal role. Insofar as the common law is reflective of the general practices and understandings of the community, what better way is there for the community to communicate their understandings than in issue-based elections where information is plentiful?

⁵⁶ *Casey*, 505 U.S. at 1000 (Scalia, J., dissenting).

⁵⁷ I have elsewhere summarized this literature. See Dimino, *supra* note 11, at 357–70. The most thorough treatment is in JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

entrenched power of the conservative judiciary and as a way of ensuring that policy from the bench would be more liberal.⁵⁸ Far from being an incitement to judicial lawlessness, voters have classically been seen as the overseers of their representatives, charged with making sure the government stays within the law. Arguably, judicial elections continue to serve that function today. No system of accountability is perfect, and judges will retain considerable discretion to decide cases differently from their electorates' desires, but judicial election systems take as an assumption (if not a fervent hope) that the public will hold judges accountable for decisions widely variant from the popular understanding of what the law should be.

Issue-based judicial elections, with candidate information readily available, allow ordinary Americans to take part in the dialogue about the development of law in society. Only if the law exists independently of what judges want the law to be is it justifiable for the courts to interpose themselves between the people and their desires.⁵⁹ If the law be defined, explicitly or through spurious interpretation, as the policy views of judges, courts have no rightful claim to independence.

Independent judges who apply the law without reference to debatable policy judgments benefit from the freedom that comes with not having to run competitive campaigns for office, and those of us who live with their judgments likewise benefit from the triumph of the rule of law. Judges who use their office as a means of forcing their policy judgments on an otherwise free people need to be checked, if necessary, by the votes of the populace. Judicial independence is not always and everywhere beneficial, and we should recognize that once we reduce law to contests over policy or morals, voters have as much claim to the meaning of law as do judges.⁶⁰

⁵⁸ See Hall, *supra* note 2, at 341, 345, 348. Others who supported judicial elections apparently did so, however, without regard for the likely policy outcomes. See *id.* at 343–46.

⁵⁹ Such was the theory of judicial review supported in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). There, the Court held that the Constitution trumped statutory law because the people had restrained themselves *ex ante* such that only laws consistent with the Constitution would be legal. See *id.* at 178. Obviously a constitution whose contents were subject to the caprice of judges could not justify judicial review on *Marbury's* rationale.

⁶⁰ See Stephen Markman, *The Debate over the Judiciary*, 35 SUFFOLK U. L. REV. 443, 451 (2001); Zemans, *supra* note 44, at 646; Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 14 (1991).

IV. CONCLUSION

As long as there are disagreements about what makes one judge better than another, there will be disagreements as to whether the merit-selection process fulfills the promise that its name implies. While it obviously overstates the case to declare that there are no objective criteria on which to evaluate judges, it does American justice no good to ignore the truth of the critique that methods of judging, and judicial decisions, benefit certain interests to the exclusion of others. To the extent that merit selection represents a rigged process to ensure the continued policy influence of elites who cannot justify their decisions to the electorate—all the while holding judicial elections as a means of capturing “the energy and the legitimizing power of the democratic process”⁶¹—it should be reevaluated.⁶²

⁶¹ *Republican Party v. White*, 536 U.S. 765, 788 (2002) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

⁶² Cf. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).