

MERIT SELECTION: CHOOSING JUDGES BASED ON THEIR POLITICS UNDER THE VEIL OF A DISARMING NAME

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Given the dispute in this country about the proper role of judges and how the people perceive what judges are doing, any sophisticated observer must conclude that judicial selection in the United States today is “political.”¹ People, whether or not they are educated, sophisticated, or engaged in a legal career, are largely divided into two schools of thought about what judges ought to do. This dispute has at its heart one question: What is the proper scope of a judge’s authority?

There is a traditional approach to judging that is advanced by conservatives and judges in the Scalia and Bork model. According to this traditional approach, judges are to interpret constitutions and statutes by attempting to discern the original understanding of the drafters or ratifiers and judges are then to follow that original understanding.² There is very little latitude

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1. See, e.g., AM. BAR ASS’N, JUSTICE IN JEOPARDY: REPORT OF THE ABA COMM’N ON THE 21ST CENTURY JUDICIARY 13–18 (2003), available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> (describing “recent developments that have politicized the American judiciary”); ZOGBY INT’L, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES 4–5 (2007), available at http://www.ced.org/docs/report/report_2007judicial_survey.pdf (“[F]our in five executive-level respondents from the companies surveyed (79%) indicat[ed] a belief that campaign contributions have an impact on judges’ decisions.”); George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1569 (2008) (“[F]our Supreme Court Justices [(Souter, Stevens, Ginsburg, and Breyer)] recently voiced concern about the effects of politicization on state courts.”).

2. See, e.g., Robert H. Bork, *The Judge’s Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 27–28 (2003); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989).

in this approach to judicial interpretation. The judge's role is important but constrained.³

The other approach, advanced by liberals, including almost the entire legal academy, supports a more aggressive role for judges. This model—the Douglas-Brennan-Breyer model—sees judges as possessing a greater capacity to make policy in politically contentious areas such as the death penalty, affirmative action, abortion, religion in the public square, sexual liberty, same-sex marriage, and so on through vehicles such as living constitutions, unenumerated rights, and the infamous emanations and penumbras.⁴

The point not to be missed, then, is that a split exists on the issue of the role of a judge. Moreover, few would doubt that this is an important public policy issue, as the titanic battles of the last twenty years in the United States Senate over the confirmation of federal judges demonstrate.⁵ Those battles inescapably turn on the potential judge's position in this debate.⁶

Everyone wants judges who agree with them on the proper role of a judge. This reality cannot be wished away. Any effort to construct a judicial-selection system that acts as though this is not the current state of affairs ignores the proverbial elephant in the room. Yet the merit-selection approach—which asserts that all a state has to do is find the best-qualified lawyers and make them judges⁷—asks the states to operate as though there is no elephant. Indeed, that is the fatal flaw of a merit-selection approach.

3. See Clifford W. Taylor, *A Government of Laws, and Not of Men*, 22 T.M. COOLEY L. REV. 199, 201–02 (2005).

4. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6 (2005); Michael Waldman, *Introduction for the Brennan Center for Justice and Thomas Jorde Living Constitution: A Symposium on the Legacy of Justice William J. Brennan, Jr.*, 95 CAL. L. REV. 2185, 2185–86 (2007); Justice William J. Brennan, Jr., *Speech to the Text and Teaching Symposium at Georgetown University* (Oct. 12, 1985), in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 55–70 (Steven G. Calabresi ed., 2007); Travis A. Knobbe, Note, *Brennan v. Scalia, Justice or Jurisprudence? A Moderate Proposal*, 110 W. VA. L. REV. 1265, 1269–70 (2008).

5. See, e.g., David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1033 (2008) (book review).

6. See, e.g., Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 434 (2008).

7. See, e.g., Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL'Y 343, 352–53 (2008).

I am not in favor of merit selection, even though it has the benefit of an appealing title. I am, with certain misgivings, an advocate for the popular election of judges, with the elections being full of robust debate as anticipated by the Supreme Court decision in *Republican Party of Minnesota v. White*.⁸ There are certainly problems with the election of judges, as there are problems with all elections. These include voter ignorance and voter misdirection by clever partisans.⁹ Although the electoral system has these problems, at least it acknowledges this reality. Rather than having elites make the decision while operating in a “good government” fog—which is also a largely political decision—judicial elections give the choice to ordinary, rank-and-file voters.

It is common in the modern age to condescend to regular folks, but this attitude should give us pause because the notion that citizens can make wise choices is unquestionably at the very heart of our system of government.¹⁰ In considering this recent bias against elections, it is useful to recall the famous quip by William F. Buckley, Jr., who said he would rather entrust the government of the United States to the first 2000 people listed in the Boston telephone directory than to the faculty of Harvard University.¹¹ There is wisdom in that quip.

Edmund Burke, the eighteenth-century English statesman and political philosopher, made one of his many penetrating and arresting observations when he argued for something akin to popular government. Burke maintained that although individual Englishmen could make poor choices, as a whole and over time the English people would not.¹² Thus, popular government could work. It is a simple but nonetheless sophisticated notion. Indeed, American and English history proves the truth

8. 536 U.S. 765, 772, 781–82 (2002).

9. See, e.g., Lee Goldman, *False Campaign Advertising and the “Actual Malice” Standard*, 82 TUL. L. REV. 889, 917–18 (2008); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL’Y 295, 331 (2008); Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1291–93 (2004).

10. See THE FEDERALIST NO. 71 (Alexander Hamilton).

11. See Lino A. Graglia, *Grutter and Gratz: Race Preference to Increase Racial Representation Held “Patently Unconstitutional” Unless Done Subtly Enough in the Name of Pursuing “Diversity,”* 78 TUL. L. REV. 2037, 2040 (2004).

12. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 185 (London, J. Dodsley 1790).

of that insight. Americans should be reluctant to assume incompetence in their fellow citizens to make judicial choices, especially because history has shown them competent to make other difficult electoral choices in other branches of government.

Moreover, upon closer examination, even merit-selection advocates would have to admit that their favored system in practice is also driven by politics. The difference is that in merit selection the politics are driven underground, whereas the politics of elections are public and obvious. Studies of the flagship merit-selection process in Missouri indicate that merit selection does not remove politics from the process but instead makes the politics harder to unearth by hiding it from public scrutiny and voter reaction.¹³

The classic study of the first twenty-five years of Missouri merit selection, *The Politics of the Bench and the Bar*, indicates that the attorneys who chose the lawyer members of the nominating commissions—merit selection is always lawyer-dominated—tended to split into two groups, the plaintiffs' bar and defense attorneys.¹⁴ Their choices were founded in part on their clients' broad socioeconomic interests. No one should be surprised that lawyers would consider their clients' interests, or their own, in choosing those who choose judicial nominees. In other words, one type of politics—the politics of self-interest—replaced another.

Recently, when Justice O'Connor contended that judicial elections have become "political,"¹⁵ one was tempted to respond, "You say that as if it is a bad thing." For those who advocate merit selection, "political" seems to be code for having the people involved in the selection of their judges. I am not persuaded that the reputation or quality of state courts suffers because the people have that choice. Moreover, there is little evidence that states with merit selection have better judicial decision-making than those that elect their judges.¹⁶ How then

13. RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 352* (1969).

14. *See id.* at 21–22.

15. Sandra Day O'Connor & Ronnell Andersen Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15, 23–24 (2008).

16. *See* Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN J.L. & PUB. POL'Y 386, 396–97 (2008).

can we justify taking the choice away from voters and placing it in the hands of a select few? The arguments presented so far are unconvincing.

What must be acknowledged, even if perhaps unwelcome, is that there is an increasing national perception that courts are out of control.¹⁷ The appropriate response to that concern is not to take the people out of the selection process. Notice who is not calling for merit selection: it is not the business community, not labor unions, not farmers, teachers, retirees, or church pastors. Merit selection calls come only from either lawyers or advocacy groups who are opponents of judicial elections.¹⁸ They are hardly the only people who care about justice; they simply want the whip hand in choosing who dispenses it. These people do not truly want to preserve judicial independence, which is not really threatened. They want to make sure that candidates who share their views in the great debate over the role of judges will have a selection system that strengthens their prospects of making it to the bench.

Merit selection is a solution that fails to acknowledge the real problem. Politics will always play a role in the selection of judges. Do we want it openly and robustly present in the public square or behind closed doors with phony proclamations that the process is looking for the best person using impartial measures? In sum, all selection systems for the foreseeable future will be political. We need to acknowledge that reality and evaluate methods of selection with that truth in mind. Public elections, though not flawless, appear better in that regard compared to the alternative merit-selection system.

17. See, e.g., Leita Walker, *Protecting Judges from White's Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371, 382–83 (2007) (“[F]orty-six percent of [survey] respondents agreed that judges were ‘arrogant, out-of-control and unaccountable.’”).

18. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 309 (2008).