

THE PERILS OF MERIT SELECTION*

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INTRODUCTION

My interest in the judicial selection debate stems from my successful representation of the Republican Party of Minnesota in *Republican Party of Minnesota v. White* before the United States Supreme Court.¹ It became apparent to me after *White* that judicial selection in this country had strayed from constitutional and republican principles and needed to be reexamined. I was particularly troubled by the trend towards merit selection and away from popular elections, and, since *White*, I have taken up three legal challenges to the use of merit selection in the states.²

Merit selection is inherently perilous to a well-functioning democracy and is fundamentally illegitimate because it permits groups of selected elites, not the People, to choose our policy makers, i.e., judges. Merit selection is founded on the erroneous belief that expertise is the only quality necessary for a person to be a good judge because it claims to ignore an even more important qualification: judicial philosophy. The art of judging is not merely the product of skill and experience; judging depends heavily on the perspective, values, and judicial philosophy of the judge.³ Law-making is at the heart of common-law judge's function. Through this role, the judge assumes responsibilities, like those assigned to the legislature—to craft law and public policy on behalf of the People.⁴

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1. 536 U.S. 765 (2002). *White* involved a challenge to one of Minnesota's canons of judicial conduct prohibiting candidates for judicial office from stating their "views on disputed legal or political issues." *Id.* at 768. The Court held that the canon was an unconstitutional infringement on a judicial candidate's First Amendment rights. *Id.* at 788.

2. See *Dool v. Burke*, No. 10-3320, slip op. (10th Cir. Sept. 13, 2012) (challenging Kansas's merit selection system); *Carlson v. Wiggins*, 675 F.3d 1134 (8th Cir. 2012) (challenging Iowa's merit selection system), *cert. denied*, No. 12-51, 2012 WL 2906861 (U.S. Oct. 1, 2012); *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010) (challenging Alaska's merit selection system).

3. See Anca Cornis-Pop, *Republican Party of Minnesota v. White and the Announce Clause in Light of Theories of Judge and Voter Decisionmaking: With Strategic Judges and Rational Voters, the Supreme Court Was Right to Strike Down the Clause*, 40 WILLIAMETTE L. REV. 123, 166 (2004).

4. John V. Orth, *The Role of the Judiciary in Making Public Policy*, 4 N.C. INSIGHT 12, 14-

Merit selection purports to remove considerations of politics and ideology from the selection process on the pretense that such considerations are not relevant to the judge's role.⁵ This assumes that the law can be found; it can be discerned merely through the application of legal skill and expertise in all cases. But common law judges frequently make the law based on the judge's public policy preferences.⁶ And as any lay person would attest, when judges exercise their discretion, the judge's personal policy preferences influence his or her judicial decision-making.⁷ Often, the law as written does not address the particular facts of the case, and so it is up to the judge to determine how the legislature intended to resolve the case, if at all.⁸ In other instances, the judge is asked to develop the common-law and apply it to the facts of a novel case.⁹ Here, the judge's law-making discretion is at its pinnacle. There is no right answer, no written laws to guide the judge's decision. Instead, there is only a choice about which policy is the best policy to create the type of society in which we want to live. The judge's unique experiences, judgment, values, and judicial philosophy inevitably will guide the judge in answering these questions.¹⁰

Furthermore, politics is woven into the very fabric of our society and permeate every aspect of our lives. Politics, and political ideology in particular, define the type of society we live in, the powers of our government, the rights and liberties of each of us, and thus the very structure of our society. Such ideas are not abstract concepts that we choose to invoke when convenient; they are personal and inextricably woven into our actions. It is unrealistic to expect that people can set aside such fundamental parts of their identity. Lawyers and judges are no exception.

Merit selection is also fraught with many perils that contradict the fundamental principles of representative government. It eliminates the People from any direct role in the initial selection process and afterward offers only a weak accountability mechanism in periodic retention elections.¹¹ This is a poor substitute for the consent of the governed. Moreover, by giving lawyers a privileged role in the selection process, the system invites the selection of judges whose values and world-views differ widely from the People, resulting in a more liberal and more judicially active bench.

15 (1981).

5. Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 13-15 (1995).

6. Brian Z. Tamanaha, *The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influences" Is Not "Partisanship,"* 61 EMORY L.J. 759, 761-62, 770-71 (2012).

7. *Id.* at 765.

8. See Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 280-87 (1997).

9. See Andrew Beckerman-Rodau, *A Jurisprudential Approach to Common Law Legal Analysis*, 52 RUTGERS L. REV. 269, 293-94 (1999).

10. See Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 4-5 (2007).

11. See David Barron, *Judges: Should They Be Elected or Appointed?*, WALL BUILDERS (Jan. 2001), <http://www.wallbuilders.com/libissuesarticles.asp?id=107>.

While Indiana has avoided many of the perils associated with merit selection over the past three decades, it is the exception, not the rule. We have avoided these perils simply by happenstance and luck, due in large part to the efforts and political acumen of former Chief Justice Randall Shepard, who guided the merit selection system in Indiana for the last twenty-five years.

I. ROLE OF THE JUDGE

A judge's fundamental role is to resolve the disputes of the parties before him or her according to the law.¹² In fulfilling this role, the judge must strive to provide equal justice under the law. This means that the judge should ensure that the law is applied consistently to all parties. In so doing, the judge must ensure that the law not only applies consistently to those parties coming before him or her but also that the law is applied in the same manner as it would be applied in other courts.¹³ There are three elements necessary to ensure equal justice under the law: independence, impartiality, and respect for the constitutionally established boundaries of judicial authority.¹⁴

Independence refers to both institutional and personal independence. Institutional independence requires the judiciary to be separated from the legislative and executive branches and its decision-making insulated from outside influences.¹⁵ Such independence is inherent in our American system of democratic government because the Constitution establishes the judiciary as a separate branch of government with its own separate set of powers.¹⁶ It is also ensured in the United States by providing the judiciary with separate budget, facilities, and personnel over which the judiciary has exclusive control.¹⁷ Personal independence demands that a judge's decision-making power should be free from control by other judicial officers, executive and legislative officials, and from any other person or institution. Yet, by independence, I do not mean that the judge should not be beholden to the People. In a representative democracy such as ours, independence and accountability to the People can never be inconsistent. The consent of the governed is the principle mechanism the People have for holding their government in check and is therefore always a legitimate source of influence.

Impartiality requires the judge to set aside his or her idiosyncratic biases and

12. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 19 (2002).

13. See Stephen J. Markman, *An Interpretivist Judge and the Media*, 32 HARV. J.L. & PUB. POL'Y 149, 154 (2009).

14. See *History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/talking_ji_tp.html (last visited Nov. 30, 2012).

15. See Renée M. Landers, *An Independent and Accountable Judiciary*, 48 BOS. B.J. 2, 2 (2004).

16. U.S. CONST. art. III, § 1.

17. See Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 220-21, 226-27 (1993).

personal predilections towards the parties or the parties' circumstances and ensure that each party enjoys the equal protection of the law.¹⁸ In *White*, the Supreme Court defined impartiality as

lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.¹⁹

Of course, bias is part of human nature, and true impartiality is impossible. Nevertheless, it is a goal to which all judges should aspire and one which our court system seeks to foster through the incorporation of several countermeasures, such as the opportunity for appeal to multi-judge panels, the requirement of written decisions and orders, and the limitations on ex-parte communications.²⁰

Third, a judge must strive to stay within the bounds of judicial power. Once a judge steps outside of the legitimate exercise of the judicial power, the judge necessarily invades the power of another branch of government or the freedoms reserved to the People. Any exercise of power outside of the judicial power is illegitimate because the power is disconnected from the consent of the governed.²¹ Such illegitimate usurpation of power is a grave offense against the rule of law and democratic self-government.

Staying within the legitimate bounds of judicial authority requires the judge to recognize the dual functions played by a judge. On the one hand, judges must decide cases based on the particular facts of each case applied to the applicable law.²² On the other hand, judges often must determine what the "law" is because in many instances the law is vague or does not speak precisely to the facts before the court.²³ As such, judges are tasked with the job of making the law in certain instances. All judges, both state and federal, also exercise discretion in defining and applying broad and general written laws to specific facts and circumstances while adhering to the scope of the law set forth by the legislative branch. Further, state judges are inherently vested with the power to develop the scope and

18. Barak, *supra* note 12, at 55-57.

19. Republican Party of Minn. v. White, 536 U.S. 765, 775-76 (2002).

20. Cornis-Pop, *supra* note 3, at 127 ("Securing an impartial judiciary has been a concern in the United States since colonial times.").

21. Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 371, 374-77, 381 (2000).

22. See, e.g., Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 35 (2009) ("Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make rules, they apply them. The role of the umpire and a judge is critical. They make sure everyone plays by the rules but it is a limited role.") (quoting Chief Justice Roberts during his confirmation hearings).

23. See Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48, 58-60, 62, 73-74 (2005).

substance of the common law.²⁴ Because the boundaries of these law-making functions are rarely clear, the judge must always be vigilant not to usurp the power of the legislative and executive powers.

The structure of the judicial selection system can help ensure that a judge stays within the legitimate bounds of his or her authority by incorporating meaningful accountability measures. The more direct the accountability mechanism, the more cautious and restrained the judge will be in treading at the edges of judicial authority. In a democratic republic like ours, the only legitimate source of accountability is the People, so the best judicial selection systems provide for the People to have a voice in the selection of judges.²⁵ Of course, there are other forces to help ensure accountability: appellate judges, commentators, future judges, and history, but none of these forces is a legitimate substitute for the consent of the governed.

II. HISTORY OF JUDICIAL SELECTION

The public's perception of the appropriate balance of these four factors has changed over time, resulting in a shifting landscape of judicial selection. In Colonial times, judges served "at the pleasure of the Crown" and served only so long as it pleased the King.²⁶ During the Early Period, the states shifted to a system of gubernatorial appointment with legislative approval, and judges were usually appointed with life-tenure.²⁷ Then, with the rise of Jacksonian Democracy and the fervor for popular sovereignty, many states adopted a system of popularly electing judges.²⁸ Finally, in the Progressive Era, when reform was the watch-word of the day, merit selection began to grow in popularity out of the idea that so called "experts" were better suited to make policy choices than ordinary people.²⁹ Merit selection was a natural extension of the growing faith in expertise, the application of scientific principles to public policy, and the loss of faith in the ability of ordinary people to make reasonable choices for themselves.³⁰

24. See Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron into State Administrative Law*, 20 WIDENER L.J. 801, 832-33 (2011) ("[S]tate judges possess common law authority that confers upon them law-generating functions that federal courts lack in areas of common law.").

25. See Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B.J. 904, 908 (1996).

26. Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1107, 1117 (1976).

27. Matthew Schneider, *Why Merit Selection of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609, 611 (2010).

28. *Id.* at 611-12, 621-22.

29. *Id.* at 624 n.62; Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 677-78 (2009).

30. See Daniel W. Shuman, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOL. PUB. POL'Y & L. 242, 244-46 (1997).

Indiana's history has largely followed the national trajectory. Upon becoming a state in 1816, Indiana's constitution provided for appointment of justices of the supreme court by the governor with the advice and consent of the senate and the popular election of trial court judges.³¹ The 1851 constitution rejected appointment in favor of the popular election of all appellate and trial court judges.³² Then, in 1970, Indiana amended its Constitution, adopting merit selection for appellate judges, which has since served as our system of judicial selection.³³

III. MERIT SELECTION UNDER THE MISSOURI PLAN

Merit selection is often referred to as The Missouri Plan because Missouri was the first state to adopt a system of merit selection for its judges in 1940.³⁴ While there are many variations of the Missouri model by other states, the general model has two primary features.³⁵ First, the initial selection of the judge is made by the governor from a list of names assembled by a judicial nominating commission.³⁶ This commission is usually comprised of some combination of lay persons and attorneys chosen by the state bar.³⁷ The second predominant feature is the requirement that the judge be subject to a retention referendum (i.e., a retention election) one or more times after appointment, at which point the electorate can remove the judge if he or she fails to receive a sufficient number of votes in favor of retention.³⁸

Indiana's system for selecting appellate judges is largely similar. The judicial nominating commission reviews applications, interviews candidates, and selects three candidates for recommendation to the governor.³⁹ The governor then must choose one of the candidates from the list of three candidates provided by the judicial nominating commission.⁴⁰ If the governor fails to make an appointment within sixty days of receiving the list of candidates, the appointment is made by the chief justice of the supreme court.⁴¹ The newly appointed justice or judge must then stand for retention at the first general election occurring after the judge has served two years of the appointment.⁴² The justice or judge can retain the

31. IND. CONST. of 1816, art. V, § 7.

32. IND. CONST. of 1851, art. VII, § 3 (amended 1970).

33. IND. CONST. art. VII, § 10.

34. Fitzpatrick, *supra* note 29, at 675 n.31, 678.

35. *Id.*

36. *Id.*

37. *Id.* at 680.

38. *Id.* at 678-79.

39. Adrienne Meiring, *The Role of the Judicial Nominating Commission in Judicial Selection*, IND. CT. TIMES (Sept. 3, 2010), <http://indianacourts.us/times/2010/09/the-role-of-the-judicial-nominating-commission-in-judicial-selection/>.

40. IND. CONST. art. VII, § 10.

41. *Id.*

42. IND. CONST. art. VII, § 11.

office only if they receive a majority of favorable votes. Afterward, the justice or judge must stand for a retention election every ten years while remaining on the bench.⁴³ The judicial nominating commission is comprised of seven members.⁴⁴ Three of the members must be citizens “not admitted to the practice of law” and are appointed by the governor.⁴⁵ Another three members must be “admitted to the practice of law” and are elected by those so admitted to the bar.⁴⁶ The seventh member is the chief justice of the supreme court.⁴⁷ None of the commission members can hold office in any political party or organization.⁴⁸

IV. JUSTIFICATIONS FOR MERIT SELECTION

Proponents of merit selection generally advance four main arguments in support of the system: (1) merit selection takes politics out of the selection process;⁴⁹ (2) merit selection eliminates the influence of campaign contributions;⁵⁰ (3) merit selection “produces better quality judges”;⁵¹ and (4) merit selection increases “public confidence in the judiciary.”⁵² None of these justifications are persuasive. Two of these justifications are premised on faulty reasoning, and two are not supported by the experiential evidence.

First, supporters argue that merit selection “removes the ‘politics’ from the” judicial selection process.⁵³ I say “politics” because the concept is a fuzzy one and not well-defined by proponents of the system.⁵⁴ Some scholars have taken the claim to mean that merit selection commissions are “less inclined to examine the personal ideological preferences of judicial candidates than are voters or elected officials” such as “whether a candidate is a Republican or a Democrat, a conservative or a liberal.”⁵⁵ However, by “politics,” proponents could also be referring more broadly to “how” the political process is involved in campaigning for office (i.e., politicking).⁵⁶ Ultimately, I suspect that proponents of merit selection consider both kinds of “politics” to be an undesirable component of judicial selection to some extent.⁵⁷

43. *Id.*

44. IND. CONST. art. VII, § 9.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Fitzpatrick, *supra* note 29, at 685.

50. Schneider, *supra* note 27, at 626.

51. *Id.* at 627.

52. *Id.* at 627-28.

53. *Id.* at 625.

54. Fitzpatrick, *supra* note 29, at 676.

55. *Id.*

56. *Id.* at 685 n.32.

57. Additionally, to the extent politicking is perceived as harmful to the legitimacy of the judiciary, at least one study found that exposure to negative advertising in judicial elections in

However, neither conception of politics is a persuasive reason to adopt a merit selection system. With respect to political ideology, merit selection does not eliminate politics from judicial selection but, instead, simply moves the focus for political considerations from the public arena to the closed door meetings of the nominating commission. As explained in the introduction, it is unrealistic to expect people to set aside considerations of political ideology because political ideology is part of a person's identity.⁵⁸ Conversely, if politicking is the concern, it is not clear why merit selection should be preferred over gubernatorial or legislative appointment as either would accomplish the same objective with more opportunities for the People to have input.

Proponents of merit selection also argue that the system "reduces the influence of money" in the judiciary and increases the independence of judges from campaign contributors.⁵⁹ The problem with this justification is that it presumes elected judges are somehow more corruptible than other elected officials. Yet, our whole system proceeds on the notion that judges strive to be impartial.⁶⁰

Moreover, there is plenty of concern over the influence of campaign

Kentucky had either no effect on or actually increased support for the justices on the Kentucky Supreme Court. JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* 122-23 (University of Chicago Press 2012) (ser. Chicago Studies in American Politics, Benjamin I. Page et al., eds.).

58. Fitzpatrick is of the same view:

Even if bar associations are better able to identify more intelligent or more qualified judges than are voters or public officials, it does not follow that they are less inclined to consider the political beliefs of judicial candidates. In my view, state bar associations are just as likely to be concerned—if not more concerned—with the decisional propensities of judicial candidates as are voters and elected officials. Moreover, insofar as a judge's personal ideological preferences are correlated with his or her decisions, and insofar as those preferences are often more easily observed than his or her decisional propensities, it is hard for me to believe that state bar associations accord those preferences any less weight than voters or elected officials when they select judges. In short, I am skeptical that merit selection *removes* politics from judicial selection. Rather, merit selection may simply *move* the politics of judicial selection into closer alignment with the ideological preferences of the bar.

Fitzpatrick, *supra* note 29, at 676 (emphasis added).

59. Schneider, *supra* note 27, at 625-26.

60. "There is a presumption of impartiality on the part of judges," *Wilson v. Neal*, 166 S.W.3d 228, 231 (Ark. 2000), that they "are honest, upright individuals . . . [who] rise above biasing influences," *Franklin v. McCaughtry*, 398 F.3d 955, 959 (7th Cir. 2005), and that, because a "judge [is] sworn to administer impartial justice, [the judge] is qualified and unbiased," *Dillard's v. Scott*, 908 So. 2d 93, 99 (Miss. 2005)." Justice Anthony Kennedy put it thusly, "[T]he conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect." *Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (2d Cir. 1943)) (internal quotation marks omitted). We should remain faithful to our belief in judicial impartiality.

contributions on elected officials in the executive and legislative branches,⁶¹ yet there are no widespread calls for merit selection of governors, state legislators, or other elected officials on grounds that they are corrupted by the campaign process. This is because, as a nation, we are committed to the idea that legitimacy is conferred only by the consent of the governed. Instead, in addressing these problems of influence peddling, we have adopted a more direct solution to remedy the perceived corrupting influence of money in elections by imposing contribution limitations on the amounts individuals and organizations can give to judicial candidates to dilute the influence of any one contributor and spread the electoral fortune of candidates across a plethora of interested parties.⁶² There is no reason to suspect that such prophylactic measures would be any less effective for judicial candidates.

The third reason advanced in support of merit selection is that the “system produces better-quality judges.”⁶³ Because the nominating commission is supposedly detached from political considerations, as the argument goes, merit selection focuses on “the professional qualifications”—i.e., “judicial temperament, experience, education, and collegiality”—of candidates rather than ideological concerns or other factors, such as likability, name recognition, and advertising.⁶⁴ The justification is grounded directly in the belief that “experts” (i.e., nominating commissions) are better at choosing judges than ordinary voters.⁶⁵

This justification, however, evinces a complete lack of respect for and faith in the wisdom and judgment of the People and is deeply flawed for two reasons. First, the evidence does not support it. Research examining the differences between merit selected and elected judges has found little or no discernible difference between the quality of judges selected by either system.⁶⁶ Second, and on a more fundamental level, the notion that quality should be measured only in terms of education, experience, collegiality, and temperament is misleading. It ignores the inherent dual role of the common law judge as both umpire and law-

61. See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 423 (2000) (“Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”) (quoting *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (emphasis in original)).

62. As the Supreme Court said in *Buckley v. Valeo*, “The overall effect of . . . contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons.” 424 U.S. 1, 21-22 (1976).

63. *Schneider*, *supra* note 27, at 627.

64. *Id.*

65. *Id.*

66. Michael DeBow et. al., *The Case for Partisan Judicial Elections*, THE FEDERALIST SOCIETY FOR LAW & PUB. POL’Y STUDIES (Jan. 1, 2003), <http://www.fed-soc.org/publications/detail/the-case-for-partisan-judicial-elections> (surveying research on the differences in quality between elected and merit selected judges).

maker.⁶⁷ The exercise of law-making power is heavily influenced by a person's political beliefs and value preferences. It is not an endeavor susceptible to scientific or mathematical deduction. Policy choices are directly linked to a person's values, experience, political philosophy, and personality among other things.⁶⁸ There is no reason to suspect that policy-making in the judicial branch is an exception.⁶⁹

Finally, proponents of merit selection contend that the system generates more public confidence in judges and the judiciary than popular elections.⁷⁰ Yet a 2002 study commissioned by the ABA directly contradicts this contention.⁷¹ The study found that 75% of "Americans believe that judges who are elected are more fair and impartial than those who are appointed" and also found that 61% of "Americans believe that someone who voices political opinions can later be a fair and impartial jurist."⁷² Together, these findings suggest that judicial elections do not undermine, but rather bolsters, the public's confidence in the judiciary. Thus, evidence actually suggests that elections confer legitimacy.

67. Eva S. Nilsen, *Introduction*, Symposium, *The Role of the Judge in the Twenty-first Century*, 86 B.U. L. REV. 1037, 1038-39 (2006).

68. See Fitzpatrick, *supra* note 29, at 687-89 ("[W]e have known for quite some time now that the decisions judges make are correlated with their personal ideological preferences. This correlation has been demonstrated over many years by both political scientists and legal scholars. It has been demonstrated for United States Supreme Court Justices, federal courts of appeals judges, federal district court judges, and state supreme court justices. It has been demonstrated across a broad range of litigation areas, including administrative law, sovereign immunity, labor law, employment law, campaign finance, piercing the corporate veil, civil rights, criminal law, religion, and free speech. It should be noted that this correlation exists not because judges are inappropriately smuggling their personal preferences into the law; it exists because, as the Legal Realists taught us nearly 100 years ago, language is often ambiguous. The Legal Realists famously demonstrated this in the early twentieth century by showing that precedents, statutes, and constitutional provisions can often be read in more than one way. Consequently, judges often cannot render decisions based solely on legal texts; they must incorporate—whether consciously or subconsciously—other considerations in order to resolve ambiguities. This is especially true of state court judges. Not only do state court judges have the power to shape the vague commands of statutes and constitutions, but, much more so than their federal counterparts, they also have the power to make common law.") (footnotes omitted).

69. See Debow et. al., *supra* note 66 ("Modern legal scholars and social scientists no longer deny that judges make policy.").

70. Schneider, *supra* note 27, at 627-28

71. HARRIS INTERACTIVE, *A Study About Judicial Impartiality*, A.B.A., 4-5 (Aug. 2002), available at <http://www.abavideonews.org/ABA245C/Shell.ppt>; see Press Release, Harris Interactive, Most Americans Want State Judges to Be Elected (Oct. 20, 2008), <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Electing-judges-2008-10.pdf> (reporting that survey results indicated that 55% of people in America want judges to be elected, while only 19% of people favor the appointment of judges).

72. HARRIS INTERACTIVE, *supra* note 71, at 4-5.

V. PITFALLS OF MERIT SELECTION

Aside from the lack of a convincing justification, merit selection systems contain several structural and practical pitfalls that further undermine the propriety of utilizing such a system in a republican democracy.

The primary pitfall is that merit selection lacks any strong accountability mechanism since retention elections are a weak substitute for popular elections.⁷³ As a structural matter, retention elections remove many of the elements of elections that generate public interest and attention.⁷⁴ Retention elections

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 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.⁷⁵

The actual results of retention elections support this assessment: judges in retention elections have been retained 98.9% of the time (99.5% of the time if Illinois is excluded, where over half of the defeats have occurred and which requires a judge to obtain 60% of the vote to be retained).⁷⁶ Such success rates are astonishing and make clear that retention elections are little more than formalities in most instances.

The structural posture of the retention election also places the judge seeking retention at a significant disadvantage if a serious challenge to oust the judge is mounted. The principle reason is that judicial canons impose severe limits on campaigning by judicial candidates, while leaving others without significant limitations. In Indiana, for example, judicial canons bar judges up for retention election from publicly identifying themselves as members or candidates of any political organization, accepting endorsements from any political organization, personally soliciting or accepting campaign contributions, soliciting funds for or making a contribution to any political organization, and attending dinners or other events sponsored by political organizations.⁷⁷ Even more damaging to the

73. See, e.g., Debow et al., *supra* note 66 (“The retention elections conducted in Missouri Plan states compare poorly with partisan election contests as a means of ensuring judicial accountability to the public.”).

74. Stephen J. Ware, *The Bar’s Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL’Y 392, 422 (2009) (explaining that judicial retention elections create merely an illusion of public involvement).

75. Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 807-08 (2004).

76. Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 495 (2008) (reporting the data compiled from ten states over a thirty-year period).

77. IND. CODE OF JUDICIAL CONDUCT R. 4.1(A) (2011).

challenged retention candidate, Indiana's judicial canons only allow a candidate for retention to form a campaign committee, "accept campaign contributions," "speak on behalf of his or her candidacy," or seek or accept endorsements from non-political organizations *after* the candidate has been attacked.⁷⁸ Obviously then, judicial canons incentivize groups seeking to unseat an incumbent to launch surprise attacks in the waning days before an election and take advantage of a candidate's lack of an organized campaign apparatus. This only increases the power of interest groups and their ability to affect the outcome of judicial elections. The 1986 ouster of California Supreme Court Chief Justice Rose Bird and two other justices is a prime example of how the lack of prior organization places the judge at a serious disadvantage. They were outspent by their opponents two to one, unable to assemble an organized campaign to mount a defense, and unable to formulate an effective counter-strategy to respond.⁷⁹

Moreover, in a contested election, the opposing candidate who attacks the incumbent is held accountable by the adversarial process for any accusations because the challenger will likely be scrutinized according to any attacks he levies at the incumbent. In a retention election, however, there is no challenging candidate, only interest groups seeking to turn the incumbent out of office for one reason or another.⁸⁰ The absence of a need to remain electable means that such anti-retention groups can level attacks against the incumbent with impunity.⁸¹ This stands in stark contrast to the contested election wherein an opposing candidate must always balance the benefits of making an attack with the risk that such an attack will harm the opposing candidate's own campaign.

A second major pitfall of merit selection is that the process for selecting the attorney members of the nominating commission is likely to result in a commission that is dominated by liberal trial lawyers.⁸² In most states that employ merit selection, a substantial portion of the members of the nominating commission must be attorneys, with more than half of such states requiring more than 50% of the commission members be attorneys.⁸³ More than half of these states also delegate the responsibility for choosing at least 50% of the attorney

78. *Id.* R. 4.2(D).

79. James Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 402-05 (2012).

80. Dimino, *supra* note 75, at 808-09.

81. *Id.* at 808.

82. See, e.g., L. STEVEN GRASZ, JUDICIAL SELECTION IN NEBRASKA, FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES (May 8, 2012), available at <http://www.fed-soc.org/publications/detail/judicial-selection-in-nebraska> (discussing the Nebraska State Bar Association's Executive Council, "which has the most direct influence on judicial nominating committee membership, does not necessarily reflect the Nebraska electorate either geographically or politically[, and] there is no requirement for political balance on the executive council" and how "[t]he influence of the trial bar on the selection of candidates for judicial nominating commissions is perceived, by at least some judicial candidates, to be pervasive and longstanding").

83. Fitzpatrick, *supra* note 29, at 680-81. In Indiana, three of the seven commission members must be attorneys, and all three of those attorneys must be elected by the members of the state bar. IND. CONST. art. VII, § 9.

members to state bar associations.⁸⁴ This is important because it means that the lawyer class of a state has a significant role in shaping the ideological composition of the state's judiciary. A disconnect between the ideological preferences of the People and the commission is thus inevitable given that lawyers, as a group, are more liberal than the general public,⁸⁵ as well as the fact that lawyers, particularly trial lawyers, have a concrete stake in the choice of judge because the judge's decisions directly affect their livelihood.⁸⁶

The combined effect of the first two pitfalls leads to the third: merit selection systems result in the selection of judges who are more liberal and more aligned with the preferences of the trial bar.⁸⁷ It is unrealistic to expect nominating commission members to set aside their personal ideological inclinations when selecting judges.⁸⁸ Even if members set out to choose candidates based only on "merit," such assessments are subjective because the law is not a fixed constant, but rather it is a tool for the implementation of policy preferences.⁸⁹ Further, a person's perception of whether a candidate is a good judge is likely to depend, at least in part, on whether that candidate shares the judicial philosophy and political ideology of the commissioner. Thus, to the extent that nominating commissions are dominated by persons with liberal ideological perspectives, and who share the interests of trial lawyers, the judges selected by that system are likely to reflect those characteristics, whether chosen that way intentionally or not.

Moreover, because judges who identify more closely with the liberal ideological perspective tend to reject originalism and textualism as a judicial philosophy, and are more inclined towards a judicial philosophy founded on purposivism and living constitutionalism, merit selection tends to result in more judicial activism.⁹⁰ This activism generally arises in the areas of elections, the expansion of common law tort liability, social issues, and criminal law. Prime illustrations of this pitfall include: the actions of the Florida Supreme Court in the

84. Fitzpatrick, *supra* note 29, at 680-81.

85. *Id.* at 690-91 ("[M]any people believe that lawyers are, on average, more liberal than are the members of the general public. Justice Scalia, for example, argued in his dissent in *Romer v. Evans* that the 'lawyer class' holds more liberal views on social issues than does the public. More broadly, a former head of the Federal Election Commission, pointing to larger campaign contributions to Democratic candidates than Republican candidates, opined that 'lawyers generally tend to lean left politically.' Surveys of lawyers confirm that lawyers associate themselves with the Democratic Party and the 'liberal' label more often than do members of the general public. . . . Although none of this evidence is conclusive, I tend to share the view of many people that, on average, lawyers are more liberal than the rest of the public.") (footnotes omitted).

86. *Id.* at 686.

87. *Id.* at 687.

88. *Id.*

89. Bradley P. Jacob, *Back to Basics: Constitutional Meaning and Tradition*, 39 TEX. TECH. L. REV. 261, 284-86 (2007).

90. See Brian T. Fitzpatrick, *On the Merits of Merit Selection*, 53 ADVOC. (TEX.) 67, 68-69 (2010).

2000 presidential election recount cases;⁹¹ the legalization of same-sex marriage by the Iowa Supreme Court in 2009; and the subsequent removal of three justices,⁹² as well as the removal of Chief Justice Rose Bird, who voted to vacate every death sentence ever reviewed by her, from the California Supreme Court in 1986.⁹³

VI. INDIANA'S EXPERIENCE

To a large extent, Indiana has avoided the pitfalls of merit selection. But this good fortune is not the result of a superior merit selection system. It is merely due to the luck of having been blessed with good leaders. These leaders have understood the proper role of the judiciary in an American republic and have remained committed to protecting that balance.⁹⁴

Indiana has not had any judges removed through retention campaigns.⁹⁵ This state's nominating commission has not been uniformly dominated by liberal trial lawyers, despite the fact that in recent years, Democrats and trial lawyers have comprised the majority of the members.⁹⁶ Even with this partisan balance, Indiana's merit selection commission has largely deferred to the party holding the governor's office and has tended to provide the governor with a pool of candidates identifying with the same political party as the governor. This has been true under both Democrat and Republican governors. Furthermore,

91. See James Bopp, Jr. & Richard E. Coleson, *Vote-Dilution Analysis in Bush v. Gore*, 23 ST. THOMAS L. REV. 461, 498 (2011) ("The Florida Supreme Court's failure to respect the deferentially expressed concerns in Bush I made it appear that the state court had little regard for constitutional concerns of its superior court. And it caused many to believe that it was acting in a partisan fashion for Gore, whether or not the four-member Harris II majority intended to create such an impression.").

92. A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1, available at http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0. At present, there is an ongoing campaign to remove a fourth justice of the Iowa Supreme Court during the 2012 General Election. Marcia Lense, *Competing Bus Tours Over Iowa Supreme Court Justice*, KWQC (Oct. 2, 2012, 3:41 PM), <http://www.kwqc.com/story/19636614/competing-bus-tours-over-iowa-supreme-court-justice>.

93. Sample, *supra* note 79, at 402-03.

94. See, e.g., Chief Justice Brent E. Dickson, *A Tribute to Randall T. Shepard, Justice, Indiana Supreme Court 1985-2012, Chief Justice of Indiana, 1987-2012*, 45 IND. L. REV. 585, 589, 591 (2012) (discussing the leadership style of the former Chief Justice of the Indiana Supreme Court, including his respect for colleagues and citizens and his understanding of the role of the judiciary, and how the quality of the court gained national recognition under his guidance).

95. See Dave Stafford, *Signs of Dissent in Retention Vote*, IND. LAW. (Oct. 24, 2012), <http://www.theindianalawyer.com/signs-of-dissent-in-retention-vote/PARAMS/article/29938?page=1> ("Since Indiana adopted a merit system for appellate judges in 1970, none has lost a retention question.").

96. Of the six most recent attorney members, five have been trial lawyers, four have been Democrats, and two have been Republicans.

Indiana's Supreme Court has not been characterized by judicial activism. It has upheld the results of popular elections in election disputes, ruling in favor of both Republican and Democratic candidates, and thereby avoided accusations of partisanship;⁹⁷ it has not significantly expanded common law tort liability;⁹⁸ it has deferred largely to legislative determinations on controversial social issues;⁹⁹ and it has been deferential to the legislature and to juries in the area of criminal law.¹⁰⁰

Much of the credit for this success, in my opinion, should be credited to the leadership and integrity of former Chief Justice Randall T. Shepard, who, from 1987 until spring of 2012, chaired the Indiana Judicial Nominating Commission and oversaw the selection and appointment of three of the five current supreme court justices and all of the court of appeals judges.¹⁰¹ While Indiana's system is in equally capable hands under the direction of newly appointed Chief Justice Brent E. Dickson, we should not hang the fortunes of our judiciary on the hope that humble leaders will continue to occupy positions of influence within our

97. *See, e.g.,* *White v. Ind. Democratic Party*, 963 N.E.2d 481, 482, 490 (Ind. 2012) (upholding Charlie White's election as Secretary of State, in part, because the allegations of ineligibility were known prior to the election, but White still received a majority of the votes for the office); *Burke v. Bennett*, 907 N.E.2d 529, 532-33 (Ind. 2009) (declining to interpret the federal Little Hatch Act to permit post-election disqualification of duly elected candidate); *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1314, 1318 (Ind. 1988) (upholding then-candidate Evan Bayh's qualification as a candidate for governor and finding that he met the constitutional residency requirement).

98. *See, e.g.,* *Spangler v. Bechtel*, 958 N.E.2d 458, 466 n.4, 471-72 (Ind. 2011) (reaffirming limitations on recovery of emotional distress damages and rejecting broader liability rule); *Pfenning v. Lineman*, 947 N.E.2d 392, 403-05, 407, 411 (Ind. 2011) (declining to extend scope of duty and breach in negligence actions involving sports participants); *Ind. Patient's Comp. Fund v. Patrick*, 929 N.E.2d 190, 192-94 (Ind. 2010) (declining to interpret the Indiana Medical Malpractice Act as creating new claims or causes of action); *Ledbetter v. Hunter*, 842 N.E.2d 810, 814-15 (Ind. 2006) (upholding constitutionality of Indiana Medical Malpractice Act's limitation period for claims by minors).

99. The Indiana Court of Appeals deferred to the General Assembly's determination regarding same-sex marriage and upheld Indiana's Defense of Marriage Act. *Morrison v. Sadler*, 821 N.E.2d 15, 19-20, 23-27, 30-31, 34-35 (Ind. Ct. App. 2005). The Indiana Supreme Court has never directly addressed the issue of the constitutionality of law limiting same-sex marriage. In the area of abortion, the Indiana Supreme Court largely upheld a state law regulating abortions. *See, e.g.,* *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 975, 982-86, 988 (Ind. 2005) (upholding Indiana law requiring informed consent prior to performing an abortion and requiring physicians to provide information about the abortion no less than eighteen hours before the abortion is performed); *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 257, 259-60 (Ind. 2003) (upholding constitutionality of state law restricting funding of abortion services for Medicaid recipients to certain cases of medical necessity).

100. *See, e.g.,* *State v. Barker*, 809 N.E.2d 312, 314-19 (Ind. 2004) (upholding constitutionality of Indiana death penalty statute).

101. *Judicial Nominating Commission Fact Sheet*, COURTS.IN.GOV, <http://www.in.gov/judiciary/jud-qual/2920.htm> (last visited Dec. 1, 2012).

court system. As the saying goes, past performance is no guarantee of future success. Indiana should not assume that future leaders and future commissions will possess the same commitment to the proper role of the judiciary and the foundational principles of republican democracy.

VII. CHARTING A NEW COURSE FOR THE FUTURE

A judicial selection system should embody the principles of republican government. It should be a system founded on the consent of the governed and should provide a direct link of accountability between the judge and the People. This means that only the people or their elected representatives should have a voice in the selection process. It means also that judges should not be appointed for life terms in order to preserve the People's ability to affirm their consent to be governed as values change and experience dictates. Lastly, it means that judges should, at least in a general sense, reflect the values and political ideology of those whom they govern. Three judicial selection systems meet these criteria: partisan elections, non-partisan elections, and gubernatorial or legislative appointments.

Of the three, the partisan election is the best system for choosing judges because it openly and honestly acknowledges the judicial law-making function and encourages candidates to be forthright about their own political ideologies. Partisan labels are a good, though admittedly imperfect, proxy for voters to identify candidates with whom they share similar political ideologies. Such information goes to the heart of the judge's role as policy-maker. Conversely, for this reason, the non-partisan election should be a less preferred option. Without information about a judge's political identity, the voter is largely left in the dark about the most critical aspect of a judge's qualifications. And, while the information might still be garnered from other sources, it places a significant and unrealistic burden on even the most savvy voter.

The least desirable alternative, though still preferable to merit selection, would be the gubernatorial or legislative appointment of judges. The system shares many of the characteristics of merit selection in that it delegates the selection of the judge to political elites, removes some of the considerations of political ideology from public view, and, to a lesser extent than merit selection, attenuates the connection between the People and the judge. Yet, unlike merit selection, these undesirable characteristics are not wholly unconnected from the People. The People elect the governor and the legislature, the People choose governors and legislators partly based on political ideology, and the People are able to hold governors and legislators accountable for the judges they choose through popular elections. Merit selection, on the other hand, removes the People from any effective participation in the process, resulting in the People being governed without their consent.