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Without Merit: Why “Merit” Selection Is the Wrong Way for States to Choose Judges

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Abstract: *Those who argue for merit selection know that it gives them their best chance to get judges on the bench who share their political and policy views. Advocates of elections are willing to take their chances openly in the public square, with the people deciding which candidate has merit. Public elections allowing all voters to decide who should be the state’s appellate judges, while not flawless, are the best of the alternatives. Voters can decide whether the candidates are too close to their backers and who has merit. The final measure should be that elections—to a greater degree than any other system, and surely more than merit selection does—allow the people to change their courts if they wish to. Such power for our citizens is entirely consistent with this nation’s approach to governance and should not be abandoned precipitously for an alternative system that casually deals them out.*

Any state appellate court judicial selection method—gubernatorial appointment with or without legislative confirmation, partisan or nonpartisan election, or the currently hyped and cleverly named merit selection—can and does create the potential for the selectee to feel, or be perceived to feel, beholden to the selector. That raises troubling concerns that there will be favoritism, but of all these systems, selection by election is, I believe, the one that is actually least compromised by these problems.

I’m very aware that elections can misfire and that candidates can be smeared and their records distorted as I, after having been successfully elected twice state-

Talking Points

- The great divide on how powerful judges should be in making public policy explains both the battles of the past 25 years played out in the U.S. Senate over the confirmation of federal judges and the fractious state supreme court justice campaigns of recent years.
- Those who argue for merit selection really know that it is just an attractive ruse and represents their best chance to get judges who share their political and policy views.
- Elections—to a greater degree than any other system—allow the people to rise up and change their courts if they wish to. Such power for our citizens is entirely consistent with this nation’s approach to governance and should not be abandoned precipitously for an alternative system that casually deals them out.

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wide to serve as a member of the Michigan Supreme Court, was defeated in 2008, while serving as Chief Justice, by a lethal combination of lies and misrepresentations about me and the court coupled with the powerful undertow of the Obama landslide in Michigan. So I'm aware that elections are an imperfect vehicle for selecting judges, but warts and all, elections are, in my view, still better than some of the other methods of selection, particularly so-called merit selection.

The "Best People" or "We the People?"

We are increasingly told by advocates of merit selection of judges—which is selection by a blue-ribbon committee invariably overweighed with lawyers, with the final choice among the top three being made by the governor—that selection on merit puts just the best qualified on the bench and eliminates the problems found in judicial elections, which, as they are now, are causing the people to lose confidence in their courts.

Yet having the people decide who has merit by electing the candidate they think has it rather than having a committee of the "best people" decide that matter is consistent with American constitutionalism. Under our Constitution, we, the citizens, elect our policymakers: from the President to the city council.

While it is sometimes overlooked, state appellate court judges also have policymaking authority as stewards of their state's common law, and in the last 40 years or so, state appellate judges increasingly have made policy, not just by modifying the common law as they traditionally have, but also by, for the first time, deciding disputed moral values questions such as same-sex marriage and precluding, on little more basis than they think they are wrong-headed, certain economic regulations such as tort reform, product liability reform, and medical malpractice reforms of various sorts.

Today, however, allowing the people this authority to elect their judges, which they have in a majority of the states, is increasingly under siege from the bench and bar, to say nothing of good-government groups. They have largely come to these positions very recently, having been inflamed by the well-funded merit selection advocates' polling

results and predictions of civic calamity if "something isn't done."

It is wise to have some skepticism regarding the critics' claims and recall that these anti-majoritarian movements have been a part of the American experience ever since we adopted our Constitution in 1789, which famously began by introducing the notion that "We the people" were acting to govern ourselves.

Indeed, that the people would decide who their leaders would be was the "knock" on our Constitution: We won't get the best people to serve if they have to stand for election, and those we do get will be beholden to their backers. Those critics would agree with the judicial election critics today, such as George Soros and his allies, including former Justice Sandra Day O'Connor, that it is prudent that such choices on who is going to call the shots should be removed from the rabble and be made by just the "best people."

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It doesn't help their argument much to be seen as hostile to the people voting, so the anti-election advocates refine their arguments and say, well, we aren't entirely hostile to majority rule. We actually think average voters can evaluate legislators who represent political interests, but well-intentioned as they are, they are just unable to evaluate judges because judges' work is very sophisticated and common folks don't have the learning to appreciate it. Thus, they argue, we should remove judges from elections and select them on the basis of professional merit with that merit being divined by those capable of evaluating it: merit selection panels.

This has a plausible ring to it, of course, but let's look more closely.

Promoting Political Correctness

Merit selection advocates claim that it will get politics out of the process and focus only on the applicant's credentials. The credentials that are to be

examined and compared so as to send the best two or three applicants up to the governor concern academic excellence, practice reputation, community service, and the like.

The problem, however, is that looking at these things alone won't get you anywhere because, almost invariably, all the applicants will have good credentials. Bums, you see, just don't apply for these high-level posts in the state judiciaries. Further, even if diligent efforts are made to use just these merit templates, it quickly becomes clear that it is reckless to say that because one applicant, many years ago, had a 3.5 GPA and another a 3.6 GPA in different law schools, or that, later in life, one was a Boy Scout leader and the other a food bank volunteer, one is "merit qualified" and the other isn't.

In practice, the merit selection panel will be focused on where the applicant is on questions like abortion, sexual liberty, religious expression in the public square, pornography, immigration reform, and other traditionally political issues that are increasingly coming before our courts.

As a result, merit selection committee members themselves, trying to do a good job, can be expected to look about for other indicia of who would be a good judge, and so they move beyond considering just the barren statistics of a life in the law to look at more things about the applicants. The "more," I believe, will frequently be whether the applicant inclines to their views on political and social issues. That may sound like a harsh indictment of these estimable people, but it is inescapable that almost all the other things they could consider that come to mind—race, religion, or gender, to name a few—are all impermissible considerations on civil rights grounds.

Accordingly, in practice, what is to be expected is that the merit selection panel, having found no actionable differences in credentials, will be focused on where the applicant is on questions like abortion, sexual liberty, religious expression in the pub-

lic square, pornography, immigration reform, and other similarly edgy, traditionally political issues that are increasingly coming before our courts.

The public won't know this, of course, and the panelists themselves, likely proud of their work, will surely never acknowledge that they strayed this far from merit as the public understands it. Even the governor, if he learns they have departed from merit considerations, is likely to let it pass, because if he calls out the committee, it will be politically damaging. Further, if he takes on the committee, if they have the system that the flagship state for merit selection—Missouri—has, the chair of the committee will just get to make the selection rather than the governor.

As you can imagine, in operation, those on the merit selection panels will quickly come to understand this scenario and self-regardingly abandon any misgivings that this wasn't really a decision based on merit, because their decision was made by all the best people—people like them, of course—and, anyway, they will feel they sent the governor some good choices: applicants with the preferred judicial outlook.

In dismissing this concern, the usual response of the reformers is that this is too cynical and, anyway, there really isn't a debate about judicial philosophy in this country. Rather, the real story is that judges are just doing their best on hard cases with tough facts, and no appellate judges, except maybe conservative ones, have an agenda.

Politics vs. Merit in Missouri

You can believe that or not, and about half of the country doesn't, but when we look at how merit selection has worked in Missouri, it is hard to deny that they have been doing politics, not merit. Or, at best, merit is only incidental to the politics. We are assisted in this review by the study of the first 25 years of the Missouri merit selection system done in 1969 by Richard Watson and Ronald Downing, entitled *Politics of the Bench and Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan*.¹ Its conclusions are sobering.

1. Richard A. Watson and Ronald G. Downing, *Politics of the Bench and Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan* (New York: John Wiley & Sons, 1969).

The study found that the attorneys who selected the lawyer-members of the nominating commissions sought lawyer committee members who were protective of their own and their clients' broad socioeconomic interests and who, it was anticipated, would bring that perspective to selecting judicial nominees. None of this should be confused with selection on merit. Said more pointedly, one type of politics—the politics of self-interest—practiced underground with loud claims of good government echoing across the state had replaced the old-fashioned kind where the people themselves got to sort it all out in elections.

Things in Missouri, it appears, haven't gotten better in the 40 years since the report, as the controversy in 2007 concerning the replacement of retiring Justice Ronnie White of the Missouri Supreme Court made clear. To those unacquainted with the workings of the Missouri system, it appeared that the vacancy created an opportunity for Governor Matt Blount, who ran in part on curbing a runaway judiciary, to appoint a conservative justice—that is,

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a justice committed to letting the political branches set the public policy in areas such as tort reform, workers compensation, environmental matters, and the like. Yet they sent him the opposite: three well-credentialed, business-as-usual, “there is no problem with the Supreme Court of Missouri” candidates. The merit selectors were obviously fully aware that if Blount didn't pick one of their three candidates, the merit selection panel's chair got to pick the justice.

So Governor Blount, the only person in this process who had any claim to having presented his ideas on who should serve as justices to the people of Missouri, and thereafter having secured a majority of their votes, was blocked in a transparently political move that compelled his selection of the least disagreeable candidate. When the cry went up

that this was just politics masquerading as merit selection, the panelists denied it and scolded the critics by informing them that they were just doing their best and picking on merit.

Who Should Make Policy?

Perhaps they even believed it, and panelists in other merit selection jurisdictions, such as Florida, have said similar things when criticized, but what any evaluator of any selection system has to come to grips with, I believe, is the inescapable reality that there is a great divide in this country on how powerful judges should be in the making of public policy. This almost invariably will color any decision on the selection of judges, including those made by merit selection committees.

To grasp this, it is important to understand the split. Judicial conservatives believe judges are to apply constitutions and statutes by attempting to discern the original understanding of the language used in the document by the drafters or ratifiers and then follow that original understanding. They believe it is for the legislature, not judges, to decide social policy issues.

On the other hand, the liberals assertively advance a more muscular role for judges. They see judges as having warrant to make policy, or to sometimes cripple legislatively made policy, in politically contentious areas such as tort reform, medical malpractice reform, affirmative action, abortion, marriage, and the like through vehicles such as living or evolving constitutions, unenumerated rights, and even—recently in many states—by morphing the venerable rational basis test into, as they describe it, “rational basis with teeth,” which gives unlimited power to state supreme courts to second-guess the rationality of the legislature: declare it insufficient and thus kill off a statute as unconstitutional.

It is unimportant to our discussion which position is best for our country. The point we need to acknowledge is that such a split does exist. It is this split that explains the titanic battles of the last 25 years played out in the U.S. Senate over the confirmation of federal judges and the fractious state supreme court justice campaigns of recent years across the nation.

Clearly, these are not fights over credentials. They are fights over the direction of public policy and who will make it. We can take the fight out of one arena and put it in another, but it will still be the same fight. To claim to somehow convert this fundamental split over the proper judicial role in a representative democracy into a polite, almost scientific inquiry as to whether the candidate got an A or B in contracts or volunteered enough at the United Way is a fraud.

An Attractive Ruse

I believe the sophisticated folks who argue for merit selection really know that merit is just an attractive ruse, and what is really going on is that merit selection gives them the best chance to get judges on the bench who share their political and policy views. The advocates of election are less confident they will be advantaged by elections, but they are willing to take their chances that they can explain the stakes to the citizens in an election.

Accordingly, as there will be this kind of politics involved in the selection decision, however made, the only question is: Do we want it to occur openly and robustly in the public square, with all the people deciding which candidate has merit, broadly defined to include these essentially political mat-

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ters, or behind closed doors with phony proclamations that the merit process is just looking for the best person using impartial measures?

Public elections allowing all voters to decide who should be the state's appellate judges, while not flawless, are, I believe, the best of the alternatives. Voters can decide if the candidates are too close to their backers and who has merit.

Whatever else may be said in evaluating these systems, the final measure should be that elections have the virtue—to a greater degree than any other system, and surely more than merit selection does—of allowing the people to rise up and change their courts if they wish to. Such power for our citizens is entirely consistent with this nation's approach to governance and should not be abandoned precipitously for an alternative system that casually deals them out.

—*The Honorable Clifford W. Taylor is former Chief Justice of the Michigan Supreme Court.*