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Merit Selection: Does It Meet the Burden of Proof in Ohio?

Brian Cyril Salvagni
University of Dayton

MERIT SELECTION: DOES IT MEET THE BURDEN OF PROOF IN OHIO?

I. INTRODUCTION

The question of how judges of Ohio's Supreme and appellate courts should be selected has become a volatile topic for debate. At present, Ohio's judicial selection is composed of partisan primary elections and nonpartisan general elections.[1] Recently, however, in an effort to improve judicial selection an alternative method has gained support. The alternative is a nonpartisan merit selection plan proposed as an amendment to the Ohio Constitution.[2] The plan, like most institutional

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1. The Ohio Constitution provides that the electors of the state at large elect all justices of the Ohio Supreme Court, and the judges of the courts of appeals shall be elected by the electors of their respective appellate districts. OHIO CONST. art. IV, §§ 6(A)(1)–(2). With regard to nominating persons as candidates for election to judicial office, the Ohio Revised Code provides that the Board of Elections shall distribute separate primary election ballots to each political party having candidates in a primary judicial election. OHIO REV. CODE ANN. § 3513.13 (Anderson Supp. 1986). In fact, to a certain extent, candidates in partisan primary judicial elections are permitted to "politick". *See* Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 JUDICATURE 420, 423 (1983) (concise description of Ohio's unique method of judicial selection—partisan primaries and nonpartisan general elections). With regard to a judicial election, however, the Ohio Revised Code provides that candidates for election must have their names printed on a nonpartisan ballot. The Code section pertinent to nonpartisan judicial elections reads:

> Such ballots shall have printed across the top and below the stubs "Official Nonpartisan Ballot". . . .
>
> No name or designation of any political party nor any words, designations, or emblems descriptive of a candidate or his political affiliation, or indicative of the method by which such candidate was nominated or certified, shall be printed under or after any nonpartisan candidate's name which is printed on the ballot.

OHIO REV. CODE ANN. §§ 3505.04 (Anderson Supp. 1986).

2. The proposed amendment, introduced by Senator Paul Pfeifer as S.J. Res. 23, is a variation of the nonpartisan merit selection plan. The amendment, in pertinent part, provides:

> Section 6. (A) (1) The chief justice and the justices of the supreme court AND THE JUDGES OF THE COURTS OF APPEALS SHALL SERVE for terms of six years.
>
> (2) The GOVERNOR SHALL APPOINT, AND FILL VACANCIES IN THE OFFICES OF, THE CHIEF JUSTICE OF THE SUPREME COURT, THE JUSTICES OF THE SUPREME COURT, THE JUDGES OF THE COURT OF APPEALS . . . . THE GOVERNOR SHALL APPOINT AND FILL VACANCIES IN SUCH OFFICES, UNDER AN APPOINTIVE-ELECTIVE SYSTEM BY SELECTING AN INDIVIDUAL FROM A LIST OF THREE OR MORE QUALIFIED PERSONS WHO ARE ADMITTED TO THE PRACTICE OF LAW IN THIS STATE AND WHOSE NAMES ARE PROVIDED TO THE GOVERNOR BY A JUDICIAL NOMINATING COMMISSION . . . .
>
> (3) THE GENERAL ASSEMBLY SHALL FIX BY LAW THE NUMBER AND ORGANIZATION OF JUDICIAL NOMINATING COMMISSIONS, AND THE NUMBER, METHOD OF SELECTION, QUALIFICATIONS, . . . AND TERMS OF OFFICE FOR THE MEMBERS OF EACH COMMISSION . . . . AT LEAST ONE-HALF OF THE MEMBERS OF EACH COMMISSION SHALL BE MEMBERS OF

improvement proposals, allegedly borrows and profits from the past, meets the needs of the present, and remains flexible for future development.[3] The desired result of this reform is an improved judiciary. The purpose of this comment is to determine whether or not an improved judiciary will result. To make that determination, this comment examines empirical evidence and anticipates the likely consequences of the implementation of merit selection in Ohio.

To this end, the comment begins with a brief overview of both the current method of judicial selection and the proposed merit selection system. The focus then shifts to the proposed merit selection system by evaluating its impact on both democratic accountability and judicial independence. Next, the analysis evaluates the present hybrid system's impact on both democratic accountability and judicial independence Finally, there is a brief discussion of the factors that may help in evaluating the quality of a judge.

II. BACKGROUND

The method of judicial selection in Ohio is once again a topic for debate. For the third time, there is a proposed amendment to the Ohio Constitution calling for merit selection of Ohio Supreme Court and appellate court judges.[4] Although previous efforts to amend the constitu-

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THE SAME POLITICAL PARTY.

(4) (a) . . . A JUDGE . . . MAY FILE A DECLARATION OF CANDIDACY TO SUCCEED HIMSELF.

IF A JUSTICE OR JUDGE DOES NOT FILE A DECLARATION OF CANDIDACY . . . THERE SHALL BE A VACANCY IN THE OFFICE UPON THE EXPIRATION OF THE JUSTICE'S OR JUDGE'S TERM OF OFFICE.

(b) . . . THE QUESTION OF THE JUSTICE'S OR JUDGE'S CONTINUANCE IN OFFICE FOR A FULL TERM SHALL BE SUBMITTED TO THE ELECTORS AT THE GENERAL ELECTION. . . .

IF FIFTY-FIVE PER CENT OF THE ELECTORS VOTING ON THE QUESTION VOTE "YES," THE JUSTICE OR JUDGE SHALL BE CONTINUED IN OFFICE FOR A FULL TERM. . . . IF . . . NOT . . . THERE SHALL BE A VACANCY IN THE OFFICE UPON THE EXPIRATION OF THE TERM.

(c) . . . THE COMMISSION SHALL RATE THE JUSTICE OR JUDGE AS "WELL QUALIFIED," "QUALIFIED," OR "NOT QUALIFIED" FOR RETENTION IN OFFICE, AND INFORM THE JUSTICE OR JUDGE, IN WRITING, OF THE PARTICULAR RATING . . . THIS RATING SHALL APPEAR, . . . ON THE BALLOT. . . .

. . . .

[(6)] (B) (1) . . . A SUCCESSOR JUSTICE OR JUDGE SHALL SERVE IN OFFICE FOR A FULL TERM . . . .

S.J. Res. 23, 116th Gen. Assembly, Reg. Sess., (1985-1986).

3. A. ASHMAN, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 2 (1974).

4. The most recent effort was in 1979. *See* Riley, *State Bar Launches a Merit Selection Campaign in Ohio*, Nat'l L.J., June 30, 1986, at 7, col. 1. Yet the Ohio electorate has not actually voted on this issue since a proposal was put to the voters on November 9, 1938. *See The Ohio*

tion have failed, proponents of the change feel that the time is right to try again.[5] This time the target date for placing the issue on the ballot is November 3, 1987.

In order to get a constitutional amendment on the ballot, the proponents of the change must gather the signatures of six percent of the electorate on a petition which demands a referendum.[6] If the requisite number of signatures are gathered, proponents may order the submission of their amendment to the electors of the state for approval or rejection by ballot.[7] "A shorter and far simpler route [to put a constitutional amendment on the ballot] would be to get both houses of the Ohio legislature to pass a joint resolution placing the question on the ballot . . . ."[8] However, with the cynicism aimed at a proposal to include merit selection on the ballot from such people as former Chief Justice of the Ohio Supreme Court Frank D. Celebrezze, that course is unlikely.[9]

The basic premise of this proposed change in the selection of judges is grounded in the philosophy that an improved judiciary will result if Ohio abolishes the nomination of judicial candidates by party primaries and eliminates the competitive character of the general elections of judges.[10] Arguments have been made that the elimination of the competitive character and formal political party participation in judicial selection will result in a substantial net improvement over the present hybrid system.[11] This substantial net improvement is said to

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Merit Plan for Judicial Selection and Retention: SJR 23, Pfeifer (R-Bucyrus), STATEHOUSE ACTION, Apr. 1986, at 2, col. 1 [hereinafter *Ohio Merit Plan*]. *See also supra* note 2.

5. Proponents in Ohio include, but are not limited to: the A.B.A., League of Women Voters of Ohio, Ohio Congress of Ohio Parents and Teachers, Ohio Council of Churches, Common Cause/Ohio, Women's City Club of Cincinnati, and Ohio Association of Civil Trial Attorneys. *See* Thomas, *Voter Retention and Merit Selection Continues to Proceed to a 1987 Vote by the Citizens of Ohio*, 59 OHIO ST. B.A. REP. 436, 436 (1986).

6. OHIO CONST. art. II, § 1(c).

7. *Id. See also* OHIO CONST. art XVI, § 1 (Ohio voters must pass the constitutional amendment by a three-fifths majority vote). The number of signatures to place this amendment on the ballot is in dispute because of differences of opinion in the exact number of registered voters. Estimates of the number of signatures to place the referendum on the ballot range from 350,000 to 500,000. *See* Riley, *supra* note 4, at 7, col. 1. *See also Merit Selection Plan Statewide Petition Drive is Underway*, 59 OHIO ST. B. REP. 1356 (1986).

8. Riley, *supra* note 4, at 7, col. 1.

9. *See id.*

10. *See* Mullinax, *Judicial Revision—An Argument Against the Merit Plan for Judicial Selection and Tenure*, 5 TEX. TECH. L. REV. 20 (1973).

11. *Ohio Merit Plan*, *supra* note 4, at 2, col. 2. *See generally Report of the Selection of Judicial Administration*, 87 ANN. REP. A.B.A. The committee's comments to § 5, ¶ 1 of the Draft of a Model Judicial Article for State Constitutions states that "[t]he importance of removing the process of judicial nomination from the political arena is probably the most essential element in any scheme for adequate judicial reform. *Id.* at 395.

include both a higher quality of justice and of judges.[12] However, before endorsing a proposal that calls for a radical change in Ohio's method of judicial selection, careful consideration must be given to ensure that empirical evidence supports the assertion that a substantial net improvement will indeed result from a change in the method of judicial selection. In short, the burden of proof rests heavily upon the proponents of merit selection if the present system is to be altered.

The proposed change is a variation of the nominative-appointive-elective plan instituted in Missouri in 1940.[13] That plan, commonly referred to as the merit plan, Missouri plan, or nonpartisan selection plan, has several variations, but three characteristics tend to be recurrent in all.[14] They are:

> (1) a permanent, non-partisan commission of lawyers and non-lawyers chaired by a judge, which independently generates, screens and submits a list of judicial nominees to fill every vacancy (2) an executive who appoints one of these nominees for a probationary period after which (3) the judge runs for election *unopposed* on a non-partisan ballot.[15]

The implementation of these characteristics is essentially the proposed change in Ohio.[16] Judges in Ohio are currently elected to six-year terms through partisan primary elections and nonpartisan general elections.[17] If a vacancy should occur in mid-term, either by death, retirement, or any other reason, the vacancy is filled by an appointment by the governor, and a successor is elected for the unexpired term at the first general election for the office which is vacant.[18] This method of judicial selection has produced competent, well-qualified judges.[19] One commentator contends that Ohio's present judiciary is "one of the best judicial systems in the country."[20] However, evaluating a judicial sys-

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12. *See* Douglas, *Plan Would Lead to Better Judges*, The Columbus Dispatch, Mar. 8, 1987, at 3B, col. 1.

13. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, in SELECTED READINGS JUDICIAL SELECTION AND TENURE 29, 37 (G. Winters rev. ed. 1973).

14. There is no precise definition of merit selection because states differ on the necessary elements. In this comment, therefore, reference to merit selection refers to the plan as generally outlined in the text accompanying note 15.

15. Flango & Ducat, *What Difference Does Method of Judicial Selection Make?*, 5 JUST. SYS. J. 25, 26 (1979)(emphasis original).

16. *See supra* note 2.

17. OHIO CONST. art. IV § 6. For a more detailed explanation of the present method of judicial selection in Ohio see generally *supra* note 1.

18. *Id.* at art. IV § 13.

19. Telephone interview with Judge George F. Burkhart of Monroe County Court of Common Pleas (Feb. 27, 1987). *See also* Burkhart, *Move to Merit Selection Requires Serious Consideration by Voters*, 6 JUDICATURE Jan. 1986, at 192.

20. Riley, *supra* note 4, at 7, col. 2 (quoting former Ohio Chief Justice Frank D.

tem is difficult, and the opinions of those with vested interests in the present system cannot be substituted for empirical data. Therefore, further investigation into criteria of judicial evaluation and quality is necessary before praising the present system of judicial selection or endorsing a proposed change.

When structuring an efficient and effective judicial system a paramount concern is to strike the proper balance between the competing values of democratic accountability[21] and judicial independence.[22] On one hand, judges' decisions have an immediate impact on the public; thus, judges must be held accountable for their behavior. While on the other hand, to do their job proficiently judges must remain independent "from the ebb and flow of public opinion and politics."[23] Hence, the method of judicial selection that strikes the more democratic balance between these forces will likely result in a more effective judiciary. Advocates of both the proposed merit plan and the present hybrid method of judicial selection claim such a balance. Thus, to determine the validity of these claims, both judicial accountability and independence are examined in each method of judicial selection.

III. ANALYSIS

A. Merit Selection

1. Accountability

Advocates of the proposed merit selection plan allege that this method of judicial selection promotes judicial accountability to the public. According to the merit selection plan, each appointed judge must participate in a two-year probationary period.[24] After the probationary period and at the end of each six-year regular term thereafter, a judge must participate in a retention election[25] whereby the electo-

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Celebrezze).

21. Democratic accountability is the degree that a judge can be held accountable to the public for his behavior on the bench. *See* Lovrich & Sheldon, *Voters in Judicial Elections: An Attentive Public or An Uninformed Electorate?*, 9 JUST. SYS. J. 23, 23 (1984).

22. Judicial independence is the degree that a judge can remain independent of party platforms or party expectancy. *Id.* "Since impartiality is a mode of behavior made possible by the *independence* of judges, independence becomes the second criterion by which means of judicial selection should be measured." Barber, *Ohio Judicial Elections—Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762, 763 (1971).

23. Lovrich & Sheldon, *supra* note 21 at 23.

24. *See* Liber, *1986—Time of Change*, TRIAL, Jan.–Feb. 1986, at 4, col. 2 (summarizing Ohio Senator Paul Pfeifer's proposed amendment to the Ohio Constitution in which the two-year probationary period is addressed).

25. The proposed retention election ballot for Ohio is worded: "SHOULD (CHIEF JUSTICE, JUSTICE OR JUDGE) (INSERT APPROPRIATE NAME) BE CONTINUED IN OFFICE FOR A FULL TERM AFTER THE EXPIRATION OF HIS CURRENT TERM OF OFFICE?." Answer "yes" or "no." S.J. Res. 23, 116th Gen. Assembly, Reg. Sess. (1985–1986).

rate has an opportunity to evaluate the judge's progress.[26]

It is argued that "[i]n principle, the public's opportunity to [vote] in merit retention election[s] of judges is the ultimate check on judicial accountability."[27] This contention is based on the premise that voters can examine the judge's record and decide whether or not he or she is doing a suitable job.

Contrary to the opinion of merit selection advocates, most empirical evidence refutes the contention that retention elections are the ultimate check of judicial accountability. An exhaustive analysis of the Missouri system completed after twenty-five years of operation was studied in 1974 when Texas proposed a constitutional change in the selection of judges.[28] The Texas study concluded that "the Missouri Plan destroys judicial accountability to the electorate, and the judiciary risks losing its credibility with the people."[29] Similarly, a study exploring voter interest and participation, using both national data and a case study of the 1978 retention elections in Wyoming, revealed that a prominent characteristic of retention elections was increased voter abstention or lack of participation.[30] That study also revealed that voter apathy was exacerbated by merit selection.[31] In yet another study, it was found that among states using merit retention elections between 1948 and 1974 the rate of voter participation was markedly lower than that of states employing partisan and nonpartisan elections of judges.[32]

The end result of these data is evident. The empirical evidence indisputably leads to the conclusion that merit selection decreases voter participation. With decreased voter participation there is sure to be decreased judicial accountability.

The purpose of retention elections is undoubtedly to maintain some semblance of responsiveness and public accountability for the judici-

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26. *See* Liber, *supra* note 24. *See also* Frank, *Choosing Judges: Time for a Change?*, BAR LEADER Mar.–Apr., at 4, col. 2.

27. Griffin & Horan, *Judicial Merit Retention in Wyoming: An Analysis and Some Suggestions for Reform*, 15 LAND & WATER L. REV. 567, 569 (1980). *See also* Lovrich & Sheldon, *supra* note 21.

28. The analysis was performed by a team from the University of Missouri. *See* Watson, Downing & Speigel, *Bar Politics, Judicial Selection and the Representation of Social Interests*, 61 AM. POL. SCI. REV. 54 (1967). *See also* Mullinax, *supra* note 10, at 20.

29. Mullinax, *supra* note 10, at 33–34. The study reaches this conclusion by establishing that retention elections are simply a deceptive means to convince the electorate that the democratic process is being honored by the judiciary. *Id.* at 33.

30. Griffin & Horan, *Merit Retention Elections: What Influences Voters?*, 63 JUDICATURE 78, 88 (1979)

31. *Id.*

32. *Id.* at 82. *See also* Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite*, 41 J. POL. 865, 886 (1979).

ary.[33] But a persuasive argument may be made that retention elections simply serve a cosmetic purpose, one that does not genuinely satisfy the goal of public accountability.[34] "Political analysts would agree that the end result of these well-intentioned reforms of judicial elections has been . . . a significant decline in voter participation in judicial elections . . . ."[35] Support for this contention lies in the several studies which conclude noncompetitive, nonpartisan retention elections simply generate less participation and voter interest than contested judicial elections.[36] In addition, it is undisputed that where there is a greater potential for voter interest and participation, there is also greater potential for accountability.[37] Therefore, retention elections which purport to spur responsiveness and public accountability, while maintaining independence, do not fulfill all of these objectives.

The available data suggests that the implementation of merit selection results in a sharp decline in voter participation.[38] "While the notion of holding judges accountable to the people through the electoral process expresses our conviction that even the operations and policies of the judicial branch of government are fundamentally subject to democratic political principles,"[39] merit selection works against this conviction because it creates a decline in voter participation.[40] In short, the adoption of merit selection in Ohio could inevitably result in increased voter apathy, decreased voter participation, and decreased judicial accountability.

2. Independence

Proponents of judicial selection on the basis of merit may stand on firmer ground when they suggest judicial independence is advanced by merit selection. The empirical evidence substantiates that the imple-

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33. Comment, *Selecting Michigan's Supreme Court Justices: Enough of Partisan Non-Partisan Elections?*, 1984 DET. C.L. REV. 731, 750.

34. *Id.* at 749.

35. Lovrich & Sheldon, *supra* note 21, at 24.

36. An analysis of several studies is included in P. DUBOIS, FROM BALLOT TO BENCH (1980); and R. WATSON, THE POLITICS OF THE BENCH AND BAR (1969).

37. Comment, *supra* note 33, at 750.

38. Yet another study examining voter turnout in elections held for justices of state courts of last resort, utilizing various types of ballots, found a wide disparity in mean voter turnout between partisan ballot, nonpartian ballot, and merit retention ballot. P. DUBOIS, *supra* note 36, at 46.

39. Griffin & Horan, *supra* note 30, at 88.

40. Dubois presented a study demonstrating that the implementation of merit selection reduces voter participation. That study is presented below. Ohio, of course, does not have a partisan judicial ballot; further, this study focuses solely on the consequences of switching from a partisan judicial ballot to a nonpartisan retention election. It is significant, however, in that it underscores the strong correlation between decreased voter participation and implementation of merit selection.

mentation of merit selection decreases judicial accountability,[41] and increased judicial independence follows from the decreased accountability.[42] A caveat is necessary at this point: Too much or too little of either judicial independence or accountability is not desirable.[43]

These antithetical forces of accountability and independence produce a state of tension between judicial conduct and political reality.[44] Since both accountability and independence are essential in a democratic system, logic suggests that an appropriate balance will result in the most efficient method of judicial selection. It is rarely disputed, in fact, that an appropriate *balance* between these antithetical forces produces an efficient judiciary.[45]

The Effect of Ballot Form Upon Voter Participation
Mean Participation Differentials in Four States
Switching From Partisan to Merit Retention Ballots

State	Percent Partisan Ballots	Percent Retention Ballots	Percent Difference
Presidential Years			
Colorado	92.2	66.2	−26.0
Indiana	97.0	45.6	−51.4
Iowa	90.0	46.2	−43.8
Kansas	87.2	67.2	−20.0
Mid-Term Years			
Colorado	93.1	61.3	−31.8
Indiana	97.8	40.8	−57.0
Iowa	83.6	40.8	−42.8
Kansas	89.9	66.9	−23.0

The merit retention ballot was first used in Colorado in 1968, in Indiana in 1972, in Iowa in 1964, and in Kansas in 1960. Dubois, *supra* note 32, at 876.

41. *See supra* text accompanying notes 24–40.

42. *See* Lovrich & Sheldon, *supra* note 27, at 23 (discussing the importance of striking an appropriate balance between accountability and independence).

43. *See* Barber, *supra* note 22, at 762; Lovrich & Sheldon, *supra* note 21, at 23.

44. Judges are sworn to remain independent from political influence in the courtroom. However, while on the bench, judges shape and develop the law and allocate societal values such as life and liberty. They are, in other words, making policy. Barber, *supra* note 22.

A political reality is that policy makers in a democracy should be accountable to the people they rule. Inherent in any elected branch of government is politicking. Thus, although judges should be free from political influence, the reality is that politics influence the selection of judges under any type of election, general, retention or otherwise.

45. Logic supports the notion that a balance is necessary. If judges have no accountability to the public for their behavior, they could make decisions in court depending on their moods. If they have no independence they could be catering to the whims of the electorate. Thus, there is

"Since impartiality is a mode of behavior made possible by the independence of judges,"[46] proponents of merit selection contend that increased judicial independence solves a host of problems associated with popular elections. These problems include "the increased politicalization of the bench as a result of increasing electoral competition."[47] A popular complaint of increased politicalization is that the judiciary is no place for bitterly fought political battles.[48] Naturally, proponents of merit selection express concern about judges owing their positions to the political machines that help them onto the bench.[49] Proponents argue that all too often political coalitions are instrumental in successful judicial campaigns. Since politics has infiltrated the judiciary, proponents conclude that serious questions can be raised about a judge's ability to maintain independence and impartiality.[50]

Other conventional arguments in the context of favoring the adoption of merit selection "concern themselves with the inconvenience[s] inherent in the popular election process."[51] These inconveniences include the "[p]hysical effort of campaigning, candidate's time consumed in a political race, campaign expenses, and [the] general indignities of direct exposure to the voting public."[52] Reacting to these inconveniences, advocates of merit selection point to history to demonstrate that campaign spending and competition are on an uncontrollable skyward journey.[53] The advocates' ultimate conclusion is that these increases will undoubtedly lead to elevated "concern about conflicts of interest and judges' ability to decide cases solely on their merits."[54] Without increased independence, these deficiencies, it is argued, will undoubtedly result in a less effective judiciary.[55]

Despite legitimate concern, empirical evidence demonstrates that the adoption of merit selection neither removes politics from the judiciary nor results in a more trustworthy judiciary.[56] Perhaps the most frequently cited reason to adopt merit selection is that its increased inde-

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little dispute that the most effective judiciary results form a balance between accountability and independence. *See* Lovrich & Sheldon *supra* note 21; *see also* Barber, *supra* note 22.

46. Barber, *supra* note 22, at 763.

47. Zelman, *A Merit Selection System for California*, CAL. ST. B.J. 420, 420 (1980).

48. Comment, *supra* note 33, at 744.

49. *Id.*

50. *Id.*

51. Burnett, *Observations on the Direct-Election Method of Judicial Selection*, 44 TEX. L. REV. 1098, 1100 (1966).

52. *Id.*

53. Zelman, *supra* note 47, at 420.

54. *Id.*

55. *See* Garwood, *Judicial Revision—An Argument for the Merit Plan for Judicial Selection*, 5 TEX. TECH. L. REV. 1, 1 (1973).

56. *See infra* text accompanying notes 57–68.

pendence removes politics from the judiciary.[57] In fact, a study examining the merits and demerits of the Missouri Plan during the course of the 1940 election, its resubmission to the people of Missouri in 1942, and the debates in the Missouri Constitutional Convention of 1943–44, concluded that the effect of merit selection is not to remove the courts from politics, but "to drive what politics exist underground."[58] Similarly, an extensive study that focuses on the operation of the nonpartisan court plan in Missouri, variations of which have been instituted in a majority of the states recently,[59] shows that the

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57. *See* Peltason, *Merits and Demerits of the Missouri Court Plan*, in SELECTED READINGS JUDICIAL SELECTION AND TENURE 95 (G. Winters rev. ed. 1973); Winters, *supra* note 13.

58. Peltason, *supra* note 57, at 103.

59. Ohio's proposed change concerns only its Supreme and appellate courts. Therefore, a list of the state courts of last resort which utilize some form of merit selection (*see generally supra* note 15 and accompanying text) or a nominative appointive procedure to place judges on the bench is presented below. The applicable constitutional and statutory provisions are also presented. Several states, however, do not utilize merit selection for initial selection of judges but they do utilize some form of merit selection or a nominative appointive procedure for filling interim vacancies. Therefore, those states are included in the "majority of the states" currently utilizing merit selection.

States that utilize merit selection in their courts of last resort for interim vacancies include: Alabama, Colorado, Georgia, Idaho, Kentucky, Montana, Nevada, Pennsylvania, Tennessee, and Wyoming. *See* Flango & Ducat, *supra* note 15, at 29.

States that utilize merit selection in their courts of last resort for initial selection include: ALASKA CONST. art. IV § 5 (governor fills vacancies in supreme or superior courts by appointing persons nominated by judicial council); ARIZ. CONST. art. VI, §§ 36–38 (nonpartisan commission with appointment by governor); CAL. CONST. art. VI, § 16 (appointed by governor and confirmed by commission); COLO. CONST. art. VI, §§ 20, 24–26 (appointment by governor from a list of nominees provided by nonpartisan commission); CONN. CONST. art. V, § 2 (nominated by governor and appointed by general assembly); DEL. CONST. art. IV, § 3 (appointed by governor with consent of majority of all members elected to Senate); FLA. CONST. art. V § 20 (judicial nominating commission submits names of candidates approved by governor); HAWAII CONST. art. V, § 3 (governor nominates, by and with the advice and consent of the Senate, justices are appointed by Senate); IND. CONST. art. VII, §§ 3, 5, 11 (selected by judicial nominating commission and appointed by governor); IOWA CONST. art. V, §§ 15–17 (appointed by governor from a list of nominees submitted by judicial nominating commission); KAN. CONST. art. III, § 2 (appointment by the governor of one of three nominees submitted by a nominating commission, the Supreme Court only); ME. CONST. art. V, pt. 1, § 8 (appointed by governor with advice and consent of seven member body elected by general assembly); MD. CONST. art. IV, § 5A (appointed by governor with advice and consent of Senate); MASS. CONST. art. IX, pt. 2, § 1, cl. 2 (nominated and appointed by governor with advice and consent of eight member body); MO. CONST. art. V §§ 29(c)(1), 29(c)(2)(d) (nonpartisan judicial commission nominates and submits names to governor for appointment); NEB. CONST. art. V, § 21 (list of at least two nominees presented to governor by judicial nominating commission for appointment); N.H. CONST. art. XLVI, pt. 2 (power of nomination of judge is granted exclusively to governor and the power of appointment granted exclusively to council); N.J. CONST. art. VI, § 6, pt. 1 (governor nominates and appoints with the advice and consent of the Senate); OKLA. CONST. art. VIIB, §§ 1–3 (appointed under Missouri plan by governor); S.D. CONST. art. V, § 7 (governor appoints from one or more persons nominated by a judicial qualification commission); UTAH CONST. art. VIII, § 8 (governor fills vacancy from a list of at least three nominees certified to governor by a judicial nominating commission); VT. CONST. ch. 2, §§ 32, 34 (governor appoints from a list of nominees presented to him by judicial nominat-

plan has not eliminated political forces from the selection of judges.[60] On the contrary, that study found:

> [T]he Plan has not eliminated "politics" as the term is used in its broadest sense, that is, the maneuvering of individuals and groups to influence who will be chosen as judges. Rather, it has changed the nature of that politics to include not only partisan forces but also those relating to the interests of the organized Bar, the judiciary, and the court's "attentive publics."[61]

These studies conclude that rather than removing politics from the judiciary, merit selection merely camouflages reality from the less attentive electorate.

Other studies have also indicated that the increased independence of merit selection does little in the way of diminishing politics in the judiciary. For example, an early study found that appellate judges were influenced by party affiliation in their decisions regardless of whether their selection was by appointment, nonpartisan ballot, or popular election.[62] Likewise, a more recent study involving "nearly 5000 state appeals court decisions in all fifty states found no statistically significant relationship between selection method and the success of various types of appellants."[63] The data collectively suggests that politics is part of our democratic society, and regardless of the method of judicial selection utilized, politics will exercise an important influence.

Although proponents of merit selection suggest that increased independence will diminish the political involvement in judicial elections, the empirical evidence appears to be to the contrary. The true effect of merit selection on politics in the judiciary is likely to be an increase in the "secret, backroom type" of politics.[64] As United States Senator James A. Reed[65] contended: "One is very naive, very ignorant, who

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ing body); WYO. CONST. art. V, § 4 (appointed by governor from a list of three nominees submitted by judicial nominating commission).

States that have statutory provisions covering merit selection for the judicial selection of the courts of last resort include: CONN. GEN. STAT. ANN. §§ 2-40, 2-42, 2-43 (Supp 1986); HAW. REV. STAT. §§ 602-2, 602-51 (Supp. 1984)); IND. CODE ANN. §§ 33-2.1-.6 (West 1983); *see also* IOWA CODE ANN. §§ 46.14-.15, 46.20-.21 (West Supp. 1986); KAN. STAT. ANN. § 25-111 (1986); OKLA. STAT. ANN. tit. 26 § 11-109 (1976); S.D. CODIFIED LAWS §§ 16-11, 16-1-2, 16-1-2.2 (Supp. 1986); UTAH CODE ANN. §§ 20-1-7.1-.3, 20-1-7.6-.7 (Supp. 1986); VT. STAT. ANN. tit. 4 §§ 601-603 (Supp. 1986);

60. R. WATSON, *supra* note 36, at 352.

61. *Id.*

62. *See* Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961).

63. Drechsel, *Judicial Selection and Trial Judge—Journalist Interaction in Two States*, 10 JUST. SYS. J. 6, 8 (1985).

64. Peltason, *supra* note 57, at 102.

65. Senator Reed served as a United States Senator from Missouri from 1911 until 1929.

does not know that Governors always have been and always will be influenced by political and selfish considerations in making appointments."[66] Furthermore, nothing prevents the governor, working within a merit selection plan, from making a selection based on partisanship, nor is the panel which selects potential candidates prohibited from doing the same.[67] Thus, if proponents of merit selection sincerely maintain that partisan politics in the judiciary is undesirable, they should object all the more strenuously to their system which conceals partisanship.[68]

The judiciary does, however, benefit in some less significant ways from increased independence. The aforementioned inconveniences inherent in the popular election process are no longer significant. Because merit selection increases voter apathy and decreases participation and interest, few judges lose their seats in retention elections.[69] The net result of this nearly perfect guarantee of life tenure is that the pressures and expense of an election are virtually eliminated. However, the recently defeated Chief Justice of the Ohio Supreme Court, Frank D. Celebrezze, contended: "It seems to me that [the growing expense of judicial campaigns is] a poor reason to get people to give up their right to vote."[70] Relief from the pressures and expense of a general election seems to be an insufficient rationale to support the contention that the increased judicial independence from merit selection will significantly enhance Ohio's judiciary. There is no assurance that the removal of the inconvenience and sacrifice associated with popular general elections suggests a dramatic improvement in the judiciary.[71] In fact, the empirical evidence suggests there will be no significant change in the quality of the judiciary.[72]

B. Hybrid

1. Accountability

Ohio's present method of judicial selection does not provide an overabundance of judicial accountability. In order to hold judges accountable for their behavior on the bench, the electorate must be able to make a reasoned and well-informed evaluation of a judge's performance. "In partisan elections, it has been shown that the dominant

66. Peltason, *supra* note 57, at 102 (quoting St. Louis Post-Dispatch, Dec. 18, 1943, at 1, col. 1).

67. Comment, *supra* note 33, at 745.

68. *Id.* at 746.

69. Winters, *supra* note 13, at 33.

70. Riley, *supra* note 4, at 7, col. 3.

71. Burnett, *supra* note 51, at 1098.

72. *See supra* text accompanying notes 54–71.

source of information for voters regarding judicial candidates is the party endorsement; this informational source is followed by conversations with friends, the media, and bar association recommendations."[73] Because Ohio's general elections of the judiciary are nonpartisan, the main source of voter information, the party endorsement, is not available.[74] The explanation for the lack of party endorsement in the present hybrid system is quite simple. When judicial reform created these hybrid systems of partisan primaries and nonpartisan general elections, the intent was most likely "to free voters to give more sober and thoughtful consideration to the qualifications and qualities of the competing candidates."[75]

In principle, the present hybrid method of judicial selection allows the preelection process to educate the electorate concerning a candidate's partisan affiliation. However, in practice, "the low visibility of judicial contests has meant that the partisanship of the preelection process does not penetrated to the electorate, leaving voters to call upon alternative non party voting cues"[76] often with voters abandoning their traditional partisan allegiances. Proponents of merit selection support this depoliticalization of the judiciary contending that "judges should be above popular clamor."[77] However, "[i]t is widely suggested that [due to the decrease in partisan affiliation] democratic accountability has lost the upper hand in its struggle with judicial independence . . . and that the average voter has been reduced to the position of an unknowledgeable participant in a largely symbolic process."[78]

A recent study in Oregon exemplifies the problems associated with a decrease of partisan affiliation in judicial selection.[79] Oregon, in an

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73. Griffin & Horan, *supra* note 27, at 568.

74. Given the low stimulus nature of judicial elections, it is not surprising that many voters do not retain much information from the partisan primaries held in Ohio's hybrid system. Accordingly, voters must look for alternative voting cues other than partisanship to guide their voting in the general election. "Two such guides available to the voter are incumbency and name recognition." P. DUBOIS, *supra* note 36, at 80.

> Though incumbency and name recognition have often encouraged Ohio voters to abandon their traditional partisan allegiances in casting their votes in the judicial elections, [many] examples also suggest that a name strongly associated with [Ohio's] partisan politics can invoke a partisan response from the voters despite the nonpartisan ballot. The name of Taft for example, which is virtually synonymous with the Ohio Republican party, invariably produces a partisan electoral response.

Id. 82–83. However, some argue that races for the Supreme Court of Ohio have a fairly strong "partisan tinge" because party organizers are actively involved in primary campaign publicity. *See* Baum, *supra* note 1.

75. *See* Dubois, *supra* note 36, at 79.

76. *Id.* at 81.

77. Peltason, *supra* note 57, at 98.

78. Lovrich & Sheldon, *supra* note 21, at 24.

79. *Id.* at 23.

effort to secure the appropriate balance between the competing values of democratic accountability and judicial independence in judicial selection, reformed its selection method by instituting nonpartisan judicial elections on separate judicial ballots.[80] Although this reform was intended "to remove judges from partisan politics while retaining a direct electoral link with the public,"[81] its result was quite the contrary. In fact, the net result of the Oregon experience is in accord with what political analysts say has resulted from a reduction in partisan politics in the judiciary:

> (1) a significant decline in voter participation in judicial elections . . . (2) the substitution of incumbency, name familiarity, ethnicity, and gender for the party label as major voting cues . . . (3) a preponderance of uncontested races . . . and most importantly, (4) a paucity of public information on and limited citizen knowledge concerning judicial candidates and courts."[82]

Additionally, the removal of the party label from a general election cuts the candidates off "from the two major parties and their political resources, such as party rallies, the aid of some party organizations, and the crucial partisan identity so familiar to the electorate."[83]

Nevertheless, proponents of merit selection contend that the removal of political influences from the judiciary improves the quality and impartiality of justices. In reality, the result of merely removing party endorsements from the ballot in judicial elections has been to burden and discourage the participation of the electorate.[84] Furthermore, in comparison with a partisan judicial election, the competitive character of nonpartisan general elections is markedly decreased.[85]

Voter participation and competition in judicial elections are perhaps the two most important variables in evaluating judicial accountability. If a judge is to be held accountable for his behavior, the electorate must be interested in matters applicable to the judiciary and must voice that interest on their ballots by endorsing the incumbent or a

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80. *Id.*

81. *Id.* at 24.

82. *Id.* (citations omitted). *See also* Adamany & Dubois, *The Forgetful Voters and an Unreported Vote*, 39 PUB. OPINION Q. 277 (1975); Dubois, *supra* note 32, at 865; Hannah, *Competition in Michigan's Judicial Elections: Democratic Ideals vs. Judicial Realities*, 24 WAYNE L. REV. 1267 (1978); Johnson, Staefer & McKnight, *The Salience of Judicial Candidates and Elections*, 59 SOC. SCI. Q. 372 (1978).

83. Lovrich & Sheldon, *supra* note 21, at 24.

84. "[A] nonpartian ballot discourages voter participation, both because nonpartisan judicial races are less frequently contested and because in a low-salience contest many voters will refrain from voting without a party label to help them cast their ballots." P. DUBOIS, *supra* note 36, at 144.

85. *Id.*

more qualified candidate. In Ohio, the present hybrid system results in limited voter interest and participation.[86] However, the proposed merit selection plan would eliminate competition and further reduce both voter interest and participation.[87] Thus, if judicial accountability is to be preserved in Ohio, the proposed merit selection plan should not be implemented.

2. Independence

When compared to the proposed merit selection system of judicial selection, Ohio's present hybrid system results in considerably less judicial independence. The hypothesis that "the effect of merit selection is to perpetuate the present judges in office for the balance of their lives"[88] is well documented. For example, a 1978 Wyoming study of judicial retention elections concluded that it was unlikely for a judge to lose his seat in a retention election in that state.[89] These data are characteristic of the results of merit retention elections of trial court judges across the nation.[90] In 1978 for instance, 408 retention elections of trial court judges were held, and only twelve of the judges (2.9%) were not retained in the thirteen states where such elections were held.[91] Although Ohio's proposed change does not include trial court judges, these results are typical of *all* retention elections. For example, several studies before 1978 indicate that defeats at retention election polls amount to "statistical rarities."[92] In particular, "[a]n analysis of 1976 election data from thirteen states found that 350 of 353 judges [(over 99%)] standing for retention were approved by the electorate, often by lopsided majorities."[93] Furthermore, "[i]n the [eleven] states which held retention elections in 1972, 308 judges ran 'on their records,' but only four were rejected."[94] The conclusion which one arrives at in view of these data is clear—merit retention elections have long operated to the decided advantage of incumbent judges.

These data lend strong support to those who endorse the contention that merit retention elections are "nothing more than window-dressing, a facade for maintaining popular accountability of judicial of-

86. *See supra* text accompanying notes 80–84.
87. *See supra* text accompanying notes 33–40.
88. Peltason, *supra* note 57, at 101.
89. Griffin & Horan, *supra* note 27 (Wyoming study of judicial selection).
90. Griffin & Horan, *supra* note 30 at 81.
91. *Id.*
92. *Id.* at 79.
93. *Id.* (footnote omitted). *See also* Jenkins, *Retention Elections: Who Wins When No One Loses?*, 61 JUDICATURE 79, 80 (1977).
94. Griffin & Horan, *supra* note 30, at 79 (footnote omitted). *See also, Merit Retention Elections in 1972: A Special Society Report*, 56 JUDICATURE 252, 254 (1973).

ficers by a means of a plebiscite whose favorable outcome is assured in advance."[95] The empirical evidence seems to imply that merit selection almost guarantees life tenure, which in turn suggests an extremely high level of judicial independence.

On the whole, if judicial selection "methods were limited to methods that require competitive elections and methods that do not,"[96] the empirical evidence suggests that judges who must compete for their seats are more likely to see a need to communicate with the public to retain their seats.[97] Increased communication with the public resulting from competitive election campaigns leads to greater accountability and less independence.

A common assumption involving the Ohio judiciary "is that the 'normal' means of access to the bench is gubernatorial appointment to fill an unexpired term, followed by election which is virtually automatic due to the appointee's advantage of incumbency."[98] If this assumption were true, the present system would have little advantage over the proposed merit selection system in the way of judicial accountability or independence. Furthermore, life tenure would be virtually guaranteed.

This assumption, however, is far from the truth. From 1852 through 1970, only 19.9% of the accessions to the Ohio Supreme Court were by appointment.[99] Of the appointees who stood for election, a *majority* were defeated by the voters.[100] These data can be appreciated best when compared with a similar study in Missouri, the first state in which the merit plan was officially adopted. "In Missouri, where retention elections are used for some judges while others must run for office on partisan ballots, only one judge in almost 40 years has ever failed to be retained. Yet, in 1976 alone, six incumbent circuit judges running on partisan ballots were defeated for re-election."[101]

Two findings from these studies are especially noteworthy. First, although voter interest and participation is relatively low in Ohio, a judge is not completely independent once he has ascended to the bench

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95. Griffin & Horan, *supra* note 27, at 582 (footnote omitted). *See also* Wormuth & Rich, *Politics, the Bar and Selection of Judges*, 3 UTAH L. REV. 459 (1953) (compares merit selection and nonpartisan elections).

96. Id. at 460.

97. Drechsel, *supra* note 63, at 8.

98. Barber, *supra* note 22, at 768 (footnote omitted). *See also* Henderson, *Appointment as a Means of Initial Accession to Elective State Courts of Last Resort*, 38 N. DAK. L. REV. 60, 67 (1962).

99. Barber, *supra* note 22, at 769. "This percentage measures 38 of the total 191 accessions. Tabulated from Ohio Secretary of State, Official Roster of Federal, State, County Officers 106–12 (1970); T. Brown, Secretary of State, Ohio Election Statistics 1969–70, 133 (1971)." *Id.* at 769 n.30.

100. Barber, *supra* note 22 at 769.

101. Griffin & Horan, *supra* note 30, at 79 (footnote omitted).

by gubernatorial appointment. Second, partisan elections ensure that the judicial branch is fundamentally subject to the checks and balances of democratic political principles, and merit selection does not. For example, a Missouri judge facing retention election has nearly a guaranteed life tenure and an extremely high level of independence. While a Missouri judge facing partisan election is not a guaranteed life tenure, and his independence is greatly reduced. The comparison underscores the importance of a competitive popular election.

At this point a curious query arises: Does the method of judicial selection really have a significant impact on the balance of judicial independence and judicial accountability? The studies suggest the real value of a judicial election is to raise judicial accountability and lower independence. Although the correlation is apparent, further research in this area is necessary.

C. Merit Selection Versus Hybrid System

To recapitulate, the purpose of examining both the present hybrid method of judicial selection and the proposed merit selection plan, in light of judicial accountability and judicial independence, is to determine which system will be the most beneficial to the people of Ohio. Perhaps it is easier to visualize these antithetical forces on a continuum. At one end is complete judicial independence and zero judicial accountability, and at the other end is complete accountability and zero independence.

Proponents of merit selection suggest that their method of judicial selection strikes a fair balance between the two. Support for that contention is: (1) A retention election is the ultimate in accountability, and (2) the appointment procedure limits the political influence on the judiciary. Proponents of the merit selection conclude that removing politics from the judicial branch will result in ultimate independence whereby judges will be relieved of potential conflicts of interest in order to decide cases solely on the merits. Empirical evidence demonstrates these assertions are exaggerated or unfounded. In fact, keeping with the continuum example, the evidence undoubtedly places merit selection far to one side of the scale, that is, dangerously close to complete independence and zero accountability.

Of course, it might be said that judges selected through the present hybrid judicial selection plan in Ohio are not independent, since their selection depends on popular choice; nor are judges in Ohio accountable, since their selection method uses a nonpartisan election system which indicates many voters use nonpartisan voting cues to make their final selections. However, this criticism of Ohio's present method of judicial selection itself suggests that the hybrid system is in accord with the recurring objective of this analysis—striking an appropriate

balance between the antithetical forces of accountability and independence. In addition, the empirical evidence places the hybrid system at a more acceptable point on the hypothetical continuum scale, somewhere closer to the middle. It was, of course, the purpose of this evaluation to determine which method of judicial selection arrived at a more acceptable balance between judicial independence and accountability. It must be concluded that the present hybrid system achieves the sought after balance. Therefore, Ohio's current system of judicial selection should be retained.

IV. JUDICIAL EVALUATION

Even in the wake of empirical evidence demonstrating that Ohio's present hybrid system strikes a more appropriate balance between accountability and independence, proponents of the merit selection system still contend that merit selection improves the quality of the judiciary. A qualified judiciary is undoubtedly important; therefore, it is imperative to determine whether this claim has validity.

Commentators have proposed several judicial "qualifications" that are said to gauge the capacity of prospective justices.[102] These qualifications include education, localism, and prior experience. But studies comparing qualification indicators and subsequent decisions of particular judges have shown that there is no meaningful relationship between different judges' decision making behavior and indicators of qualification.[103]

One study evaluating the quality of judges relied upon different sources of advice for screening judicial prospects. "[T]he focus [of this study was] upon the 658 judges appointed to sit on California's major trial court, the Superior Court, from 1959 through 1977 by three governors: Edmund G. 'Pat' Brown, Sr. (1959-1966), Ronald Reagan (1967-1974), and Edmund G. 'Jerry' Brown, Jr. (1975-1982)."[104] This study, which examined judicial qualities important to a governor for the purpose of appointing nominees, concluded "[d]ifferent gubernatorial administrations open up distinct paths of access to the bench."[105] In particular, this study found:

> Edmund G. Brown, Sr. judged candidates' potential for "judicial temperament," legal and academic background, professional reputation, involvement in the community, and experience in public positions. Governor Reagan's Judicial Selection Advisory Boards were advised to

102. Comment, *supra* note 33, at 747.

103. *Id.* at 748.

104. Dubois, *State Trial Court Appointments: Does the Governor Make a Difference?*, 69 JUDICATURE 20 (1985).

105. *Id.* at 28.

> evaluate candidates' "personal integrity, temperament, legal ability and experience, stature and reputation in the community, and capacity for work." Governor Edmund G. Brown, Jr.'s administration claimed to seek individuals "who are very intelligent, who are experienced in courts, who have a judicious temperament, who have commitment to hard work, who will bring some imagination to the job . . . ."[106]

In addition, this study also concluded that "[a]ppointees were . . . de facto required to share the governor's party affiliation and to be located on the same side of the ideological spectrum as the governor."[107]

The California study demonstrates that there is little consistency or objectivity in the qualities necessary to perform well on the bench. While studies show that particular qualifications of a judge do not influence his decision making, or that different governors search for different qualities in nominating a judge, there is no conclusive data to suggest any particular characteristics improve the "quality" of a judge. Because the variety of judicial selection methods employ different criteria to evaluate judicial competence, ability, or potential, it is premature to conclude that any method of judicial selection produces higher quality judges. The indicators used in evaluating judges are, at best, imperfect. Therefore, the proponents' claim that merit selection produces a higher quality judiciary is unfounded.

V. CONCLUSION

The proposed merit selection of supreme and appellate court judges calls for a radical change in the means of selecting Ohio's judiciary. Empirical evidence demonstrates that merit selection will result in decreased democratic accountability and increased judicial independence. The net result of these changes is likely to be reduced voter participation and interest in Ohio's judicial elections. The benefits of the plan seem to be minimal. It is argued that as a result of the change, the inconveniences associated with popular elections (cost and campaigning) will be greatly reduced. The people of Ohio, however, should not relinquish their right to vote in order to avoid the inconveniences of a democracy.

Proponents of the merit plan contend that there are many other benefits associated with the plan. They contend that political involvement in the judiciary will decrease and the quality of judges will increase. The empirical evidence refutes these claims. In fact, studies have shown that politics in the judiciary will not diminish, but rather will be of the insidious backroom type. Furthermore, measuring the

106. *Id.*

107. *See* Flango & Ducat, *supra* note 15, at 33–34.

qualities of a judge is not a simple task with agreed upon standards. Therefore, it is difficult to express anything more than an opinion about the essential qualities of a "good" judge.

In summation, there is no empirical evidence to show deficiencies in the quality of the elected judges under Ohio's hybrid system of judicial selection. Furthermore, the present system strikes a more democratic balance between the antithetical forces of accountability and independence than does the merit selection. If Ohio is interested in improving its judiciary, perhaps an educational program to properly educate the electorate on the record and background of the candidates would be most beneficial. That would most likely spur voter interest and participation and fill the void associated with nonpartisan elections. In brief, proponents of merit selection have not met their burden of proof that merit selection will benefit Ohio's judiciary; therefore, the current system should be retained.

Brian Cyril Salvagni