

# Widener University Commonwealth Law School

---

From the Selected Works of Michael R Dimino

---

2005

## The Worst Way of Selecting Judges—Except all the Others That Have Been Tried

Michael R Dimino



SELECTEDWORKS™

Available at: [https://works.bepress.com/michael\\_dimino/4/](https://works.bepress.com/michael_dimino/4/)

# THE WORST WAY OF SELECTING JUDGES—EXCEPT ALL THE OTHERS THAT HAVE BEEN TRIED

*Michael R. Dimino, Sr.\**

## I. INTRODUCTION

We all know the defects of judicial elections. The public is too ignorant of the legal system, the candidates, and the law to make wise choices; consequently, judges are elected often because of their famous names, ethnicities, position on the ballot, party affiliation, and the like, rather than through an assessment of merit. Judicial candidates prostrate themselves before the majority, dependent on their votes; consequently, the ability of the judiciary to protect the rights of unpopular individuals and to maintain fidelity to precedent suffers. Candidates campaign by appealing to constituencies; consequently, judges once on the bench do not approach legal issues with entirely open minds. And judges approaching reelection look over their shoulders, cognizant of the political risk they run by performing their jobs honorably.

It sounds like a compelling case. Popular election is an awful way to select those charged with administering justice and personifying Law. I agree. And if you are not yet convinced, other essays in this volume and in innumerable other symposia will give you plenty of reasons to hate judicial elections.

Nevertheless, I write here in the defense of elections, or at least to urge caution in the face of the seeming torrent of criticism. Just as “you can’t beat something with nothing,” it is not enough to point to the flaws inhering in elections; those who would do away with them need to show that a different approach is superior.

This Essay critiques the arguments leveled at judicial elections. For each criticism—which I have discovered through a reasonably thorough review of cases and law review commentary—I assess the degree to which the criticism is

---

\* Assistant Professor, Widener University School of Law (Harrisburg, Pennsylvania). J.D. Harvard Law School, 2001; B.A. State University of New York at Buffalo, 1998. The title paraphrases a portion of a speech Sir Winston Churchill made to the House of Commons on November 11, 1947: “Democracy is the worst form of Government except all those other forms that have been tried from time to time.” THE OXFORD DICTIONARY OF MODERN QUOTATIONS 216 (Elizabeth Knowles ed., 5th ed. 1999). Ben Barros, Jim Diehm, and Randy Lee provided helpful comments, for which I am grateful. I thank Kristen Coy for excellent research assistance and Dean Doug Ray and the Widener University School of Law for a research grant to prepare this essay. Finally, I thank the *Northern Kentucky Law Review* and Mike Nitardy for the invitation to participate in this discussion and the law review staff for their editorial suggestions.

valid, and also the degree to which other judicial-selection methods fall prey to the same criticism. I argue that the flaws of judicial elections, though often considerable, are shared in large part by alternative selection systems. Beyond, however, being simply equivalent in malignity to other selection methods, elections have--or, rather, may have, depending on the content of judicial-election campaigns--one advantage over other systems that instigated the nineteenth century move to judicial elections and ensures their popularity with the everyday citizenry: the opportunity they provide for a free people to choose those officials who exercise policy-making authority. Democracy may indeed be the worst method of choosing judges . . . except for all the other ones.<sup>1</sup>

## II. THREATS TO JUDICIAL INDEPENDENCE

### A. *Independent from Whom?*

Two motivations inspired the move to judicial elections.<sup>2</sup> First, judges were seen by liberals of the mid-nineteenth century as too conservative, and it was thought that public involvement in the selection of judges would make the bench more liberal.<sup>3</sup> The goal was accountability.<sup>4</sup> Judges were making unpopular decisions, and the public wanted a voice in judicial selection to bring the judiciary back into line. Second, certain reformers thought judicial elections would raise the quality of the bench by making it independent of other parts of

---

<sup>1</sup> As Professor Schotland has put it, the reformers' quest is finding the "method of selecting judges [that] is least unsatisfactory." Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1398 (2003). See also Anthony Champagne & Judith Haydel, *Introduction*, in JUDICIAL REFORM IN THE STATES 15-16 (Anthony Champagne & Judith Haydel eds., 1993) ("The experience with the selection of judges in the states proves conclusively that there is no good way to select judges.").

<sup>2</sup> I summarize legal historians' explanations for the move to judicial elections in more detail in Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 310-14 (2003). See also John L. Dodd et al., *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 356-59 (2002) (discussing the historical beginnings of judicial elections); Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J.L. & POL. 691, 711-23 (2002).

<sup>3</sup> See FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEMS* 187-89 (1940); Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-60*, 45 HISTORIAN 337, 341, 345, 348 (1983).

<sup>4</sup> See, e.g., Dodd et al., *supra* note 2, at 358 ("By the time of the Presidency of Andrew Jackson . . . many states began to move towards an elected judiciary. The Hamiltonian desire for an independent judiciary, at the state level at least, was giving way to a concern that unelected judges . . . were not answerable to the electorate.").

the government.<sup>5</sup> According to this theory, judges who were dependent on the legislature or the governor for their positions could not, it was thought, fulfill their duties properly, for they would be constantly worried about the ways other governmental officials would perceive their performance.<sup>6</sup>

Elections were adopted, therefore, to change the philosophies of the courts and to make the judges *more* independent than they were under appointive systems--independent, that is, of other government officials.<sup>7</sup> In essence, the states adopting judicial elections made a conscious choice to trade dependence on a governmental appointing authority for dependence on the people.<sup>8</sup>

### B. *Independence in Non-Elective Systems*

This history should give us pause before condemning judicial elections as negating the independence of the judiciary, and force us to ask ourselves what we mean by the phrase. In a system most protective of judicial independence, judges would be subservient only to the law.<sup>9</sup> Protections of jurisdiction, tenure, and salary would be in place so judges could obey the law without fear of consequences.<sup>10</sup> But this is unrealistic in at least two ways. First, there will always be some controls the people and their representatives can place on all aspects of government. Second, as discussed in the next subsection, faithfulness to a concept as indeterminate as "law" is not terribly constraining.<sup>11</sup> With legal interpretations subject to endless debate among the most honorable jurists, and with the constant threat or presence of some judges who refuse to treat law as

---

<sup>5</sup> See Dimino, *supra* note 2, at 311.

<sup>6</sup> See Hall, *supra* note 3, at 347, 350.

<sup>7</sup> See F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 447 (2004) (arguing that changes in judicial selection methods were motivated by the desire to make courts more independent); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 207-19 (1993).

<sup>8</sup> See Nelson, *supra* note 7, at 217.

<sup>9</sup> See *Republican Party v. White*, 536 U.S. 765, 803 (2002) (Ginsburg, J., dissenting) ("Legislative and executive officials act on behalf of the voters who placed them in office; 'judge[s] represen[t] the Law.'") (quoting *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting)) (alterations in original). A system giving judges pure independence is unfathomable. See, e.g., Alex Kozinski, *The Many Faces of Judicial Independence*, 14 GA. ST. U. L. REV. 861, 863 (1998) ("The question becomes, what kinds of influence do we want judges to be independent of and what kinds do we want them to yield to? Do we want them to be independent of things like case law?").

<sup>10</sup> See, e.g., THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[A]s nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution . . .").

<sup>11</sup> See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 828-29 (1982) (arguing that because the Supreme Court decides what arguments "are out-of-bounds," no argument it makes is "out-of-bounds").

constraining in the least,<sup>12</sup> it is evident that a judge who need be responsive to only the law need be responsive to no one.

No state provides its judges with more independence than does the national government, with appointment followed by tenure for good behavior and salary protection.<sup>13</sup> Yet even that system places substantial constraints on judicial independence. Jurisdiction is provided and withdrawn by statute,<sup>14</sup> facilities and staff are provided (or not) by statute,<sup>15</sup> and enforcement of court decisions rests to some degree on the executive.<sup>16</sup> Furthermore, even though salary cannot be diminished by the political process, the possibility of increases, as well as the possibility of promotion, can motivate judges to shade their interpretations of law to be more politically palatable.<sup>17</sup>

---

<sup>12</sup> See, e.g., *Roper v. Simmons*, Docket No. 03-633, 2005 U.S. LEXIS 2200, at \*24, \*35 (Mar. 1, 2005) (holding that “our own independent judgment” is sufficient to shape the meaning of the Eighth Amendment and reject a “misguided” state statute “[f]rom a moral standpoint”); *New Jersey Democratic Party, Inc. v. Samson*, 814 A.2d 1028, 1037-42 (N.J. 2002), *cert. denied*, 537 U.S. 1083 (2002) (construing a statute, N.J. STAT. ANN. §§ 19:13-19:20 (2004), which provided that a candidate who withdraws from an election “not later than the 51st day before the general election” shall be replaced by the choice of the state committee of the candidate’s party, to mean that the Democratic state committee was entitled to replace a scandal-mired candidate who withdrew *thirty-six days* prior to an election he was sure to lose) (emphasis added); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444-46 (1934) (holding that a state acted consistently with the Contract Clause, U.S. CONST. art. I, § 10, cl. 1, which prohibits states from “impairing the Obligation of Contracts” when it forbade mortgagees from foreclosing on land as per pre-existing contracts); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 395 (1857) (construing Article IV, § 3, cl. 2 of the Constitution, which gives Congress the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,” to give no power to prohibit slavery in territories acquired after 1787).

<sup>13</sup> See U.S. CONST. art. III, § 1, cl. 2 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

<sup>14</sup> See *id.* § 1, cl. 1 (permitting, but not requiring, Congress to establish inferior federal courts); *id.* § 2, cl. 2 (permitting Congress to make “Exceptions” and “Regulations” governing the Supreme Court’s appellate jurisdiction).

<sup>15</sup> See James W. Douglas & Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?*, 63 PUB. ADMIN. REV. 441, 442-44 (2003); Kozinski, *supra* note 9, at 864 (noting influences of the political process on the judicial process).

<sup>16</sup> See David Adamany & Joel Grossman, *Support for the Supreme Court as a National Policy Maker*, 5 L. & POL’Y Q. 405, 406-09 (1983) (suggesting that the judiciary’s dependence on other political actors for the enforcement of its rulings creates an incentive for the courts to issue decisions in accord with public opinion).

<sup>17</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting) (noting the pressure of “worldly ambition”); Roundtable Discussion, *Is There a Threat to Judicial Independence in the United States Today?*, 26 FORDHAM URB. L.J. 7, 26 (1998) (statement of Circuit Judge Guido Calabresi) (“If I were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up.”); Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 12 (1995) (arguing that appointed judges pander to the appointing authority in the hopes of attaining a more powerful judgeship).

It is therefore apparent that independence of state courts from the other organs of government is unattainable under anything remotely reflecting American separation of powers, even altering the provisions respecting judicial appointment, salary, and removal. Moreover, even if protections are built into the state constitution, no constitutional protection can insulate judges from the desire to be respected--a motivation that can cause some judges to deviate from the law just as surely as can the availability of pecuniary gain.

Critics of judicial elections note with distress the potential for elected judges to decide cases so as to pander to the electorate.<sup>18</sup> As Justice O'Connor opined, "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."<sup>19</sup> The most colorful (and, as a result, the most famous) statement of this phenomenon was California Supreme Court Justice Otto Kaus's quip that trying to ignore the political impact of decisions was like trying to ignore a crocodile in one's bathtub.<sup>20</sup>

It would appear indisputable, though distasteful to many observers, that elected judges do take public opinion into account. Nevertheless, there is no reason to criticize judicial elections for that fact while ignoring the effect of public opinion on *appointed* judges. Surely public opinion took a toll on federal District Judge Harold Baer, after he suppressed evidence in *United States v. Bayless*.<sup>21</sup> Judge Baer concluded that the suspects in that case had not done anything to give the police reason to suspect a crime was occurring, reasoning that because "residents in this neighborhood [Washington Heights] tended to regard police officers as corrupt, abusive and violent," the suspects' flight from police was entirely reasonable.<sup>22</sup> After widespread, vocal opposition to the ruling, including calls for his impeachment, Judge Baer reversed his ruling.<sup>23</sup>

---

<sup>18</sup> See, e.g., Tillman J. Finley, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 56 (2003); Charles Gardner Geyh, *Perspectives on Judicial Independence: Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 51 (2003); Long, *supra* note 2, at 704; Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 144 (2003); Gerald E. Rosen & Kyle W. Harding, *Reflections Upon Judicial Independence as We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution's "Crown Jewel"*, 29 FORDHAM URB. L.J. 791, 802-03 (2002); Randall T. Shepard, *Telephone Justice, Pandering, and Judges Who Speak out of School*, 29 FORDHAM URB. L.J. 811, 813-21 (2002); Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 278 (2002); Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 855 (2002); Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 929-30 (2002); Dodd et al., *supra* note 2, at 368, 374-75.

<sup>19</sup> *Republican Party v. White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring).

<sup>20</sup> See Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

<sup>21</sup> 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated on reconsideration by* 921 F. Supp. 211 (S.D.N.Y. 1996).

<sup>22</sup> *Id.* at 242.

<sup>23</sup> See *United States v. Bayless*, 921 F. Supp. 211, 216-17 (S.D.N.Y. 1996).

Judge Baer's about-face may be notable because of the transparency of the political motivation, but by no means is it the only instance where public opinion influenced an appointed judge's decision. Studies indicate, though inconclusively, that the appointed Justices on the Supreme Court, and in particular the swing Justices, are affected by public opinion, though they certainly have little financial reason to placate the public.<sup>24</sup>

Indeed, appointed judges' departures from the law may be *worse* than elected judges', not in the sense that such departures are more frequent, but because appointed judges may try to curry favor with a different audience.<sup>25</sup> Whereas the incentive on elected judges is to rule consistently with the preferences of the median voter, appointed judges who bend the law in response to political pressure may disproportionately favor the desires of elites, whose opinions may be antagonistic to those of a majority of Americans.<sup>26</sup>

---

<sup>24</sup> See Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POLS. 1018, 1019-21 (2004); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 493 (1997) (finding responsiveness to public opinion "not peculiar to certain justices" and present across issue areas); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision-Making: A Micro-Analytic Perspective*, 58 J. POLS. 169, 177-79 (1996) (finding the effect particularly pronounced among the swing Justices); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POLS. 652, 655-61 (1985); see also Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH L. REV. 2596, 2599 (2003). But see DANIEL R. PINELLO, *IMPACT OF JUDICIAL-SELECTION METHOD ON STATE SUPREME COURT POLICY: INNOVATION, REACTION, AND ATROPHY* 130 (1995) (finding that appointed judges are not affected by public opinion, but elected judges are). Other scholars, however, are unconvinced that the relationship between public opinion and Court decisions is causally related. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 424-28 (2002). They posit that perhaps Supreme Court decisions are the result of the Justices' attitudes which, in turn, are the result of the same factors that impact public opinion. *Id.*

<sup>25</sup> See Paul Brace et al., *Measuring the Preferences of State Supreme Court Judges*, 62 J. POLS. 387, 397 (2000) (finding that appointed judges' preferences tend to reflect elite opinion at the time of appointment, while elected judges' preferences more closely match citizen ideology at the time of election).

<sup>26</sup> See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 90 (1994) (noting the Supreme Court's defiance of public desires in Establishment Clause cases, and further noting that opinion is most strongly antagonistic to the Court's approach among "the downtrodden"); Barnum, *supra* note 24, at 659 n.14 (noting that the Court has defied the will of the general public in school-prayer cases, but that the Court's decisions may have accorded with the preferences of some elites); see also *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (arguing that the Court imposes the views of "society's law-trained elite" on the rest of the country); *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains--and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 16-18, 130, 241-42 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 58-59 (1980).

In conclusion, while elected judges may show more of a tendency to tailor their decision to public decisions than do appointed judges, no system of judicial selection is immune from popular influence. In considering alternatives to election systems, reformers should bear in mind that public opinion always plays some role, and perhaps there is an advantage in the comparatively open way judicial elections attempt to make judges accountable.

### C. *Finding and Making the Law*

The single-minded pursuit of judicial independence places excessive faith in the capacity of judges to follow the law. All judicial-selection reformers seek a system where the law prevails.<sup>27</sup> But condemning judicial elections because they invite popular control over the meaning of law requires assuming that judges, left to their own devices, would follow the law better than would judges who are more tightly controlled. No explanation for that assumption has been offered or, perhaps, is possible.<sup>28</sup> So long as there are legal controversies, the proper interpretation of law will be uncertain. Whether one side or another has the “correct” interpretation is unknowable, for we have yet to agree on the proper methodology for determining what constitutes a “correct” legal answer.<sup>29</sup> Thus, because of the uncertainty of the law, insulating judges from influences elevates one vision of the law over another, but may not elevate law over the caprice of judges.

Modern defenders of judicial independence are forced to acknowledge the legal-realist critique that law is fluid and judicial decisions often turn on non-legal factors,<sup>30</sup> notably the attitudes of the judges themselves.<sup>31</sup> But the law must be more than that, for unless law exists independently of the attitudes of judges, there is no reason to engineer a system of judicial selection to protect it.<sup>32</sup> (No

<sup>27</sup> See, e.g., James Andrew Wynn, Jr., *Judging the Judges*, 86 MARQ. L. REV. 753, 754, 771 (2003).

<sup>28</sup> See DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 33 (6th ed. 2003) (“Any definition of ‘judicial merit’ is artificial.”); see also ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 14 (Amy Gutmann ed., 1997); Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 815-17 (2004).

<sup>29</sup> Dimino, *supra* note 28, at 816.

<sup>30</sup> See generally Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 278 (1997) (stating that when a “judge responds to the underlying facts of the case . . . the judge has nonlegal reasons . . . for deciding the way she does”).

<sup>31</sup> See generally, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (discussing the policy-making ability of the Court and using the attitudinal model to explain and predict decisions).

<sup>32</sup> See, e.g. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting) (“The Court has no reason for existence if it merely reflects the pressures of the day.”); see also James C. Foster, *The Interplay of Legitimacy, Elections, and Crocodiles in the Bathtub: Making Sense of Politicization of Oregon’s Appellate Courts*, 39 WILLAMETTE L. REV. 1313, 1317 (2003) (noting that the perception of judges as being above politics “has the singularly unfortunate



reason, that is, other than the political one that reformers prefer the decisions of independent judges to the views of the populace. However well that reason may explain the push for judicial independence,<sup>33</sup> it is an argument not based on the primacy of law but on reformers' subjective preference for one set of policy-makers over another.)<sup>34</sup>

Moreover, proponents of a nearly completely independent judiciary must not only view the law as capable of being discovered, but they must view the judges as having a comparative advantage over the people in discovering the law. This may well be an accurate conception--after all, judges are generally a conscientious lot, concerned with faithfully carrying out their duties,<sup>35</sup> and most judges believe themselves to be constrained to one degree or another by external law.<sup>36</sup> Nevertheless, it was not the conception of law that our framers, whose juries had the power to find the law as well as the facts, appear to have held.<sup>37</sup> And, fundamentally, if the law is more than what the judges say, then there is no reason why my opinions, or anyone else's, are necessarily any less valid than those of the members of the Supreme Court.

Beyond the practical problems of defining the institutions from whom judges should be independent and in ascertaining the law that the judicial-selection method should protect, judicial-selection reformers face a conceptual problem in doing away with accountability. The problem is the ancient one of guarding the guardians--*Quis custodiet ipsos custodies?* As one commentator stated the quandary, "[t]he trade-off for judicial independence is the risk that judges will pursue personal agendas that are in conflict with their judicial responsibilities."<sup>38</sup>

Two hundred eighteen years after the Philadelphia Convention, with the insights of centuries of political theory and the wisdom of the *Federalist* familiar to all with the most elementary exposure to history or government, one truth of politics should be clear: An institution not checked will accumulate power and smother liberty.<sup>39</sup> We know this to be true of the executive and the legislative

---

consequence of making judicial independence wholly contingent upon a profound social misperception of the judicial role").

<sup>33</sup> Cf. Schotland, *supra* note 1, at 1414 (noting that in North Carolina, "because the label 'Republican' is perceived as 'tough on crime,' the change to nonpartisanship [favored by Democrats] was ironically partisan").

<sup>34</sup> See Dimino, *supra* note 28, at 811-12.

<sup>35</sup> See, e.g., Kent Greenawalt, *Variations on Some Themes of a "Disporting Gazelle" and His Friend: Statutory Interpretation as Seen by Jerome Frank and Felix Frankfurter*, 100 COLUM. L. REV. 176, 213 (2000).

<sup>36</sup> See, e.g., Lewis A. Kornhauser, *A World Apart?: An Essay on the Autonomy of the Law*, 78 B.U. L. REV. 747, 761 (1998) (discussing DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 157-59 (1997)).

<sup>37</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 28-29 (2004).

<sup>38</sup> Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 72 (2001).

<sup>39</sup> See generally THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) ("It will not be denied that power is of an encroaching nature . . ."); *Id.* NO. 51, at 321-22 (James

branches, but the maxim applies equally to the judiciary. Are we really comfortable giving judges the power to interpret the law, knowing that some decisions will be wrong, without adequate means to force judges to follow the law correctly? Does anyone doubt that without checks on judicial power, judges will feel freer to alter the law to their own ends?

Of course no one doubts that side effect, and nobody doubts that judicial decisions are correlated with judicial selection methods.<sup>40</sup> Judges decide cases, particularly criminal cases, differently depending on the methods of accountability they face.<sup>41</sup> And reformers fear that the influence of the people will move judicial decisions away from the law and toward mob rule.<sup>42</sup> But for the cure to be better than the diseases caused by judicial elections, states must decide that it is better for judges to pursue their own ends than to have judges pursuing the people's desires. Only reformers' idealism and naïveté make the choice appear to be between systems where judges follow the mob and one where judges follow the law.

#### D. *The People's Law*

---

Madison) ("[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.").

<sup>40</sup> See Melinda Gann Hall & Paul Brace, *State Supreme Courts and Their Environments: Avenues to General Theories of Judicial Choice*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 284 (Cornell W. Clayton & Howard Gillman eds., 1999); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POLS. Q. 485, 487 (1995); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POLS. 427, 428 (1992); Melinda Gann Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POLS. Q. 147, 151, 164-65 (1992).

<sup>41</sup> See DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY 73-104, 130 (1995); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 702-03 (1995); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When it Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004) (finding "evidence that judges become significantly more punitive [in their sentencing decisions] the closer they are to standing for reelection").

<sup>42</sup> See, e.g., Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483, 1503-04 (2004).

Knowing that judges make law, and knowing that judges selected under different electoral systems make law different ways, beg the \$64,000 questions: Is it normatively good for the public to exert some influence on the content of law, and, if so, should that influence extend to the adjudication of individual cases?

Even the most tepid democrat would answer the first question affirmatively. We accept that public input into the legislative process is proper, and we view law as a manifestation of the public will.<sup>43</sup> On the other hand, ideals of due process require that individual cases be judged by one or more “neutral” decision-makers.<sup>44</sup> If the Rule of Law requires that like cases be treated alike, then public input would seem to be of little value (and considerable harm) in individual cases.<sup>45</sup>

---

<sup>43</sup> Of course it is not, at least if “public” is equated with “majority.” See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 15, 123-24 (1965); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 294 (1957) (“[T]he process [of national policy-making] is neither minority rule nor majority rule but what might better be called *minorities* rule, where one aggregation of minorities achieves policies opposed by another aggregation.”); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 810 (2001) (“Democracy is more than a math problem. The number of people favoring a particular candidate or proposition is only one factor for which an electoral system needs to account.”).

<sup>44</sup> See *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (“Petitioner is entitled to a neutral and detached judge in the first instance.”); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The Due Process Clause does not require that public influence play no role; otherwise, elections would be unconstitutional per se. See *Republican Party v. White*, 536 U.S. 765, 782 (2002), stating:

[E]lected judges . . . *always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench. So if . . . it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then – quite simply – the practice of electing judges is itself a violation of due process. . . . [But] the Due Process Clause of the Fourteenth Amendment . . . has coexisted with the election of judges ever since it was adopted.

Similarly, due process does not require that judges be “neutral” in the sense of being openminded to non-meritorious legal arguments. See *id.* at 775-77 (noting that due-process cases have used “impartiality” to refer to a lack of bias for or against a party before the court); Dimino, *supra* note 2, at 338-46 (arguing that the Due Process Clause does not require a judge to be open to arguments if he has come to a reasoned conclusion that those arguments are fallacious). Nevertheless, states may seek to protect judicial “neutrality” or “impartiality” beyond that which is constitutionally mandated. See *White*, 536 U.S. at 794 (Kennedy, J., concurring) (suggesting that states may adopt recusal standards more strict than required by the Due Process Clause).

<sup>45</sup> See *In re Bybee*, 716 N.E.2d 957, 960 (Ind. 1999) (per curiam); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1076 (1996); see also *Ackerson v. Kentucky Judicial Ret. & Removal Comm’n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (citing concerns about “fundamental fairness and impartiality” resulting from candidate speech); Stephen B. Bright et al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 127-28 (1999); Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35

The problem is that judges are both policy-makers and adjudicators; indeed, judges make policy *through* adjudication.<sup>46</sup> Rules governing judicial accountability, therefore, suffer in a dilemma: either the public is locked-out of a policy-making process that often can be as important as legislative policy-making, or individual litigants need fear that their unpopular, but legally correct, positions will not receive a fair hearing.<sup>47</sup> States, it seems to me, have good arguments on both horns of that dilemma. But it does the judicial-selection debate no good to point out elections' threats to independence without also pointing out their reinforcement of democracy.

Critics of judicial elections and popular accountability of judges minimize the extent to which judges effectuate policy. Justice Ginsburg, for example, claims that "[e]ven when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public."<sup>48</sup> History, social science, and common, modern-day experience, however, demonstrate beyond peradventure that courts have used those "individual cases" to formulate policy affecting far more people than the parties to any one case.<sup>49</sup> Anyone who has been the least bit attuned to the development of public policy over the last fifty years is well aware that massive changes in our nation's approach to problems involving race,<sup>50</sup> criminal justice,<sup>51</sup> family relations and sexual intimacy,<sup>52</sup> tort liability,<sup>53</sup>

---

IND. L. REV. 659, 665-66 (2002); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 202-04 (1996).

<sup>46</sup> As do administrative agencies. Agencies' dual functions present the same difficulties regarding public input into the adjudicative process as are present in the judiciary. See generally John L. Gidid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33, 37 (2002) (stating that "adjudicative decision-makers . . . also have responsibilities inconsistent with judging," which may result in policy making).

<sup>47</sup> In practical reality, the choice is not so distinct. The public has some input on policy decisions made by appointed judges, and public control over the actions of elected judges is far from total. Similarly, unpopular litigants do not always receive fair treatment before appointed judges, and often unpopular causes do receive fair hearings before elected judges.

<sup>48</sup> *White*, 536 U.S. at 806 (Ginsburg, J., dissenting).

<sup>49</sup> See generally Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982) (explaining that contemporary litigation is forward-looking and concerns policy, not merely two business litigants and a contract dispute); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283-84 (1976) (discussing the expanding role of federal courts in the crafting of public policy).

<sup>50</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954) (*Brown I*).

<sup>51</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 207 (1976); *Furman v. Georgia*, 408 U.S. 238, 240 (1972); *Katz v. United States*, 389 U.S. 347, 359 (1967); *Miranda v. Arizona*, 384 U.S. 436, 499 (1966); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

<sup>52</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 579 (2003); *Roe v. Wade*, 410 U.S. 113, 166-67 (1973); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003).

religion,<sup>54</sup> education,<sup>55</sup> and elections,<sup>56</sup> just to name a few areas,<sup>57</sup> have come about through the actions of courts.<sup>58</sup> And some decisions have been explicit about the degree to which policy considerations shape the holdings.<sup>59</sup>

<sup>53</sup> See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 398 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964); *Greenman v. Yuba Power Prods. Inc.*, 377 P.2d 897, 902 (Cal. 1963) (imposing strict products liability on a manufacturer); *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 287 (Cal. 1952) (establishing the tort of intentional infliction of emotional distress).

<sup>54</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 599 (1992); *Allegheny County v. ACLU*, 492 U.S. 573, 621 (1989); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963); *Engel v. Vitale*, 370 U.S. 421, 436 (1962); *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 18 (1947).

<sup>55</sup> See, e.g., *Campaign for Fiscal Equity, Inc. v. New York*, 801 N.E.2d 326, 350 (N.Y. 2003); *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306, 317 (Tex. 1993).

<sup>56</sup> See, e.g., *Bush v. Gore*, 531 U.S. 98, 111 (2000); *Shaw v. Reno*, 509 U.S. 630, 658 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986); *Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976) (per curiam); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969); *Reynolds v. Sims*, 377 U.S. 533, 587 (1964). See generally RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003) (discussing Supreme Court intervention in political campaigns and contests).

<sup>57</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (requiring states to provide hearings before terminating public-assistance benefits).

<sup>58</sup> See Lino A. Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165, 171 (2000) ("It would be incredible, if it were not true, that for the past four or five decades virtually every change in basic issues of domestic social policy has come not from state or federal legislatures but from the U.S. Supreme Court."). Some scholars have suggested that courts are relatively powerless to effectuate social change. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 343 (1991); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 293-98 (1977); Dahl, *supra* note 43, at 293 ("By itself, the Court is almost powerless to affect the course of national policy."). Other scholars have disputed the conclusion. See, e.g., David A. Schultz, *Introduction*, in *JUDICIAL REFORM IN THE STATES LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* 3 (David A. Schultz ed., 1998); Michael McCann, *How the Supreme Court Matters in American Politics: New Institutional Perspectives*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST PERSPECTIVES* 63 (Howard Gillman & Cornell Clayton eds., 1999). Recently political scientist Lawrence Baum has suggested that perhaps the failures of courts to change social policy owe more to the limitations of government generally than to those of courts in particular. See Lawrence Baum, *The Supreme Court in American Politics*, 6 ANNUAL REV. POL. SCI. 161, 176 (2003). Whether or not courts have achieved all that they set out to do, however, it is indisputable that courts have been engaged in social policy-making for several decades if not for time immemorial.

<sup>59</sup> See, e.g., *Roper v. Simmons*, Docket No. 03-633, 2005 U.S. LEXIS 2200, at \*24 (Mar. 1, 2005) (holding that "our own independent judgment" affects the Court's interpretation of the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (citing the influence of "our own judgment"); *Miranda v. Arizona*, 384 U.S. 436, 467-79 (1966); *Mapp v. Ohio*, 367 U.S. 643, 655-58 (1961); *Brown v. Bd. of Educ.* 349 U.S. 294, 300 (1955) (*Brown II*); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001) ("This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another."); *Foster v. Preston Mill Co.*, 268 P.2d 645, 647 (Wash. 1954) (stating that limitations on absolute liability are "based upon considerations of policy"); see also *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.

Irrespective of whether these changes have been beneficial, they demonstrate that the judiciary has both the capacity and the will to be more than a passive interpreter of law.

For unaccountable judicial review to be legitimate, judges must invalidate the popular will only when the Constitution, a more enduring expression of the popular will, demands such invalidation.<sup>60</sup> Thus, in Justice Ginsburg's words, "the will of the public" as expressed in statute can be ignored if the more authoritative will of the public, as expressed in the Constitution, conflicts with the statute.<sup>61</sup>

If, however, the judges do not apply the Constitution, but rather their own values, to strike down legislation, judicial review presents a particularly troubling form of the "countermajoritarian difficulty" about which Professor Bickel wrote more than forty years ago.<sup>62</sup> In that circumstance, the public would seem entitled to ask why its will should be ignored when the alternative is often that judges give effect to their own preferences.<sup>63</sup> Viewed in this way, demands for judicial accountability are the predictable, natural, and appropriate responses to judges who exceed (or are perceived to exceed) their authority.<sup>64</sup> Fundamentally, there

---

This is not logic. It is practical politics." See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 29, 103-05 (1921) (stating law is "an expression of customary morality which develops silently").

<sup>60</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803); *THE FEDERALIST* NO. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Nor does [judicial review] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . .").

<sup>61</sup> I am at a loss to understand why Justice Ginsburg believes the common law should not reflect the will of the public. I had understood the common law to be an expression of that law commonly felt by the public and reflected in their customs. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 427-29 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (tent. ed. 1958). That public understanding was mediated, to be sure, through judges, and public understanding may not have been sufficient to affect the law in the absence of customs reflecting that understanding, but judges were not supposed to develop the law to suit their own preferences in opposition to those of the people. See ANDREW L. KAUFMAN, *CARDOZO* 215 (1998), quoting Judge Cardozo:

Why can't you say that when I am doing my will, I am interpreting the common will, a process ever so much more respectable? I have always professed to be doing this, and now you tell me it was a sham, and maybe it was, though somehow or other there are times when I do feel that I am expressing thoughts and convictions not found in the books and yet not totally my own.

Arguably, as people's attitudes and behaviors change, so should the common law. See HART & SACKS, *supra* note 51, at 429.

<sup>62</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

<sup>63</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 1001 (Scalia, J., dissenting) ("[T]he people should demonstrate, to protest that we do not implement *their* values instead of *ours*.").

<sup>64</sup> *Id.* See also MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 164-65 (1994); Lino A. Graglia, *Judicial Review: Wrong in Principle, a Disaster*

is a substantial cost--call it tyranny--to insulating anyone who fashions public policy from public accountability.<sup>65</sup>

The very dilemma between public interference with adjudications and oligarchical rule from on-high suggests a potential solution. If one can separate the courts that engage in policy-making from the courts that merely apply pre-existing law, then there should be minimal damage to democratic principles in lessening the public accountability of the latter.<sup>66</sup> Perhaps trial courts should be categorized as policy-implementing, and state supreme courts as policy-making.<sup>67</sup> Trial-court judges would be selected by appointment, while supreme court justices would be elected.<sup>68</sup> Such a distinction between the powers of trial and appellate courts is at best a rough one, as I discuss below, but when crafting judicial-selection rules for a state-court system perhaps generalities are useful.

Under that analysis, the public could exercise influence through elections for the state supreme court justices, while the public's influence would be considerably less effectual in the day-to-day adjudications that more starkly

---

*in Practice*, 21 MISS. C. L. REV. 243, 245 (2002); Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 579 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994)) ("So long as the courts wield enormous power, it is implausible, as well as wrong in principle, to insist that the people develop an attitude of respectful indifference to how and by whom that power is exercised.").

<sup>65</sup> See Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 14 (1992) ("[C]ourts give up their defense against the charge that law is nothing more than politics when they explain their decisions as a choice of social policy with little effort to attribute that choice to any law."); Hans A. Linde, *Hercules in a Populist Age*, 103 HARV. L. REV. 2067, 2071 (1990) (reviewing JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* (1989)) ("[J]udges whose opinions . . . proudly embrace the realists' preferred style of explicit policy-making should not be surprised to have their policy choices challenged much like any legislator's."); Judicial Elections White Paper Task Force, *The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 394 (2002).

<sup>66</sup> I have previously argued that the policy-making power of trial courts argues for providing First Amendment protection to judges in trial-court elections wishing to discuss judicial philosophy. See Dimino, *supra* note 2, at 364. Justice Stevens, dissenting in *Republican Party v. White*, took the opposite view, arguing that "[e]ven if announcing one's views in the context of a campaign for the State Supreme Court might be permissible, the same statements are surely less appropriate when one is running for an intermediate or trial court judgeship." 536 U.S. 765, 799 (2002) (Stevens, J., dissenting). See also *id.* at 784 n.12 (majority opinion). Regardless of one's opinion on the constitutional question, however, the relative differences in policy-making between trial and appellate courts may well influence one's choice of the appropriate selection mechanisms.

<sup>67</sup> See HERBERT JACOB, *JUSTICE IN AMERICA* 31 (1965) (distinguishing between the policy-making function of appellate courts and the norm-enforcement function of trial courts). Cf. Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 32 (2001) (noting the varying policy-making capabilities of federal trial and appellate courts).

<sup>68</sup> No state currently uses a system like the one I suggest. A handful of states, including Florida, Indiana, New York, Oklahoma, South Dakota, and Tennessee, use different methods to select different types of judges. See THE COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* 209-11 (2002). There, however, the low-level, policy-implementing courts are *more* electorally accountable than the policy-making courts. *Id.*

present the unfortunate potential of a litigant being treated unfairly in court because of the unpopularity of his legal position. For the same reason, perhaps states should consider lengthening the terms of “policy-implementing” judges while maintaining or instituting relatively short ones for “policy-making” ones.

The appointments provisions for executive officials in the Constitution recognize a similar distinction.<sup>69</sup> While principal officers must be nominated by the President and confirmed by the Senate, thus exposing the nominees in policy-making positions to scrutiny by members of Congress elected and responsible to the public, a different rule may obtain for policy-implementing officials.<sup>70</sup> As the Constitution provides, “the Congress may by Law vest the Appointment of . . . inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>71</sup> Behind this distinction seems the conclusion that democratic involvement is not always worth the effort and distraction occasioned by public debate, but that such debate is necessary when choosing the people who are to make fundamental decisions about governmental policy.<sup>72</sup>

Unfortunately, of course, there is no clean distinction between the policy-making courts and policy-implementing courts, and there are two different reasons for the distinction’s imperfection. First, unchecked power corrupts, and a court that is insulated because it is perceived as not making policy may, for that very reason, be emboldened to take on more of a policy-making role.<sup>73</sup> Second, all courts have discretion, all courts’ decisions in some way affect people who are not parties to any particular proceeding, and therefore all courts make policy.<sup>74</sup>

<sup>69</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>70</sup> The Senate’s practice on nominations may indicate a similar lesson. While some Senate Democrats have filibustered and otherwise prevented the appointment of several of President George W. Bush’s nominees to the courts of appeals, those Senators have been considerably more deferential to the President’s choice of district judges. See T.R. Goldman, *Renomination of Appeals Court Candidates Stirs Up Another Round of Political Posturing*, PALM BEACH DAILY BUS. REV., Jan. 25, 2005, at 76. See *infra* Part III for a discussion of the impact of the Senate on the judicial selection process.

<sup>71</sup> U.S. CONST. art. II, § 2, cl. 2. See generally *Morrison v. Olson*, 487 U.S. 654, 670-77 (1988) (stating the Article divides all officers into two classes – inferior and principal officers).

<sup>72</sup> Madison’s notes report that the provision authorizing appointment outside of the senatorial-consent model was approved after Madison himself suggested that the provision “does not go far enough if it be necessary at all. Superior officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.” JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 647 (W.W. Norton & Co. 1987) (1893).

<sup>73</sup> The Supreme Court itself may be an example of this power-accretion trend. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) (“[N]o government official is ‘tempted’ to place restraints upon his own freedom of action, which is why Lord Acton did not say ‘Power tends to purify.’ The Court’s temptation is in the quite opposite and more natural direction – towards systematically eliminating checks upon its own power; and it succumbs.”); Judge Laurence Silberman, *Attacking Activism, Judge Names Names*, LEGAL TIMES, June 22, 1992, at 14 (“It was quite frustrating to see those particular jurists come to accept and even relish the temptation of activism.”).

<sup>74</sup> See HENRY R. GLICK, COURTS, POLITICS AND JUSTICE 278 (3d ed. 1993).



Trial courts, therefore, do not merely implement policy, but also make it.<sup>75</sup> “The local judge who invariably sends drunken drivers to jail, the judge . . . who throws the book only at youthful drug offenders, and the judge who . . . make[s] life miserable for errant spouses who fall behind in their child support and alimony payments--all are making policy.”<sup>76</sup>

State supreme courts, though they exercise substantial policy-making discretion in crafting common-law rules and interpreting state statutes, are bound by United States Supreme Court precedent concerning federal law, and to that extent are policy-implementers.<sup>77</sup> Mid-level appellate courts are the toughest call, as they exercise more discretion than trial courts but less than state supreme courts.<sup>78</sup>

If elections are to be retained, states that want to lessen public accountability for judges can adopt mechanisms to reduce public involvement. States may choose to hold elections at times other than the first Tuesday after the first Monday in November, thereby depressing turnout, or using a nonpartisan ballot or the Missouri Plan, both of which handicap the casual voter by making it more difficult to receive information about the persons desiring judicial office.<sup>79</sup> These reforms have one goal preeminently in mind: the reduction of popular control over the judiciary.<sup>80</sup>

Policy-making courts are a poor fit with a nation accustomed to self-governance. And yet it seems unlikely either that courts will stop making policy or that the people will stop caring. Our long history of legislating from the bench--in both a conservative and a liberal direction--should be enough to demonstrate that courts do more than “lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter

---

<sup>75</sup> See SUSAN U. PHILIPS, *IDEOLOGY IN THE LANGUAGE OF JUDGES: HOW JUDGES PRACTICE LAW, POLITICS, AND COURTROOM CONTROL* 14-26 (1998); ROBERT A. CARP & C. K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* 165 (1983); Lynn Mather, *Policy Making in State Trial Courts*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 119 (John B. Gates & Charles A. Johnson eds., 1991); Lynn Mather, *The Fired Football Coach (Or, How Trial Courts Make Policy)*, in *CONTEMPLATING COURTS* 170, 173-75 (Lee Epstein ed., 1995).

<sup>76</sup> HAROLD J. SPAETH, *SUPREME COURT POLICY-MAKING: EXPLANATION AND PREDICTION* 6-7 (1979).

<sup>77</sup> See Thomas V. Van Flein, *The Baker Doctrine and the New Federalism: Developing Independent Constitutional Principles Under the Alaska Constitution*, 21 ALASKA L. REV. 227, 247 (2004) (“[T]he Supreme Court’s decisions on issues of federal law, including issues arising under the Federal Constitution, bind the state courts’ consideration of those issues.”).

<sup>78</sup> Cf. BRADLEY C. CANON & CHARLES A. JOHNSON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* 204 (2d ed. 1999) (discussing the same phenomenon with respect to the federal courts of appeals).

<sup>79</sup> See, e.g., Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031, 1038 (1997); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 JUSTICE SYS. J. 23, 24 (1984). Cf. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

<sup>80</sup> See Dimino, *supra* note 28, at 813 (“The push for merit selection . . . rests . . . on the determination that public input is bad for the judicial system, and must be tolerated only as a political compromise.”).

squares with the former.”<sup>81</sup> Instead, the courts use their own ideas of good policy to interpret the law, thereby making the judges’ policy views critical to citizens interested in shaping the laws governing society. Accordingly, it is hardly surprising that voters expect accountability from those who govern them--whether they wear business suits or judicial gowns.

### III. IDEOLOGY AND INTEREST GROUPS IN JUDICIAL SELECTION

#### A. *Ideology*

Thus far I have considered the supposed threat to judicial independence of judges while on the bench, either due to an impending election, the desire for a positive public reputation, or the like.<sup>82</sup> Critics of elections have argued, however, that particularly in light of *Republican Party v. White*,<sup>83</sup> which invalidated some restrictions on judicial campaign speech, campaigns for judicial office pressure candidates to promise to rule in certain ways, such that even before a judge takes office he has compromised his impartiality.<sup>84</sup>

Judges often approach cases with an inclination about the proper resolution.<sup>85</sup> That inclination may have been gleaned from years of practice, from scholarly examination of a related question, or simply a philosophical feeling (whether that philosophy is political, judicial, social, or something else) that the case should be resolved one way or another. Such an inclination might influence the eventual decision more or less, depending on the type of case and the strength of the inclination. Nevertheless, it is undeniable that such intuitions exist and that the attitudes of the judges forecast their decisions on the bench.<sup>86</sup>

---

<sup>81</sup> *United States v. Butler*, 297 U.S. 1, 62 (1936).

<sup>82</sup> *See supra* Part II.

<sup>83</sup> 536 U.S. 765, 788 (2002) (invalidating Minnesota’s “announce clause,” which prohibited judicial candidates from “announcing their views on disputed legal or political issues”).

<sup>84</sup> *See id.* at 800 (Stevens, J., dissenting). Some candidates have responded to *White* by taking advantage of the freedom it affords, while others maintain that it is improper for judges to take positions on issues, even if the freedom to do so is constitutionally protected. *See, e.g.*, MacKenzie Carpenter, *Should Justice Be Mute as Well as Blind?: Supreme Court Rivals Disagree on Speaking Out*, PITTSBURGH POST-GAZETTE, Oct. 20, 2003, at A1. The candidate who spoke out, Max Baer, won. *Id.*

<sup>85</sup> *See* Memorandum of Mr. Justice Rehnquist, *Laird v. Tatum*, 409 U.S. 824, 833-35 (1972) (No. 71-288).

<sup>86</sup> *See, e.g.*, SEGAL & SPAETH, *supra* note 24, at 424-28.

And if the average voter does not understand this confluence of legal realism and political science, one can be sure that Presidents and Senators do.<sup>87</sup>

Because I believe the public has a strong interest in staffing its courts with judges faithful to the public's view of the proper jurisprudential philosophy, I view judicial discussion of philosophy--a candidate's "*honestly held views*," as *White* stressed<sup>88</sup>--as less of a problem than do critics of judicial elections.<sup>89</sup> Whether problematic or not, however, the pre-commitment phenomenon is as prevalent in appointment processes as in elections, and is becoming ever more so as Americans (and their Senators) recognize the policy-making power that appellate judges carry.<sup>90</sup>

Both the President in nominating judges and the Senate in providing "Advice and Consent"<sup>91</sup> have long been keenly aware that the philosophies of judges determine, in large part, the policies that result from the courts.<sup>92</sup> It is no surprise, then, that Presidents have nominated judges whose philosophies match their own, and that Senators look both to their constituents' policy preferences<sup>93</sup> and the Senators' own preferences in deciding how to vote on nominees.<sup>94</sup>

---

<sup>87</sup> See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2609 (2003) (finding studies show the "popular influence" on the Supreme Court is because the President, who appoints [Justices], "appoint[s] people whose views are congenial").

<sup>88</sup> *White*, 536 U.S. at 781 n.8.

<sup>89</sup> See Dimino, *supra* note 2, at 367-68.

<sup>90</sup> See, e.g., JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 148 (1995) ("[C]rass politics has always permeated the Supreme Court appointment process. What is new (indeed, refreshing) in recent years is the degree to which participants now admit that they are engaging in politics."); Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259, 260-62 (2002).

<sup>91</sup> U.S. CONST. art II, § 2, cl. 2.

<sup>92</sup> See LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 77-92 (1985). See generally HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 18-28 (rev. ed. 1999); see generally PAUL SIMON, *ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* (1992) (arguing that the Senate should take its "Advice and Consent" responsibilities seriously, and recommending that the Senate insure ideological diversity among Supreme Court nominees, inquire closely into the nominee's substantive views, and use executive sessions when nominees face serious charges).

<sup>93</sup> See Gregory A. Caldeira & Charles E. Smith Jr., *Campaigning for the Supreme Court: The Dynamics of Public Opinion on the Thomas Nomination*, 58 J. POLS. 655, 659 (1996); L. Martin Overby et al., *Courting Constituents?: An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas*, 86 AM. POL. SCI. REV. 997, 997-98 (1992).

<sup>94</sup> See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 215 (rev. ed. 2003); JOHN MASSARO, *SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* 135-40 (1990); Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 624-25 (2003); see also Overby et al., *supra* note 93, at 997-98. Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96, 97 (1992).

This trend is sure to continue,<sup>95</sup> and indeed judicial nominees have become a perennial presidential campaign issue since 1968.<sup>96</sup> In the 2004 campaign, for example, President Bush reiterated his pledge not to appoint “judicial activists,”<sup>97</sup> while Senator Kerry promised not to appoint any Justice who would overturn *Roe v. Wade*<sup>98</sup> or any other decision which had established a constitutional right.<sup>99</sup> In past presidential campaigns, Presidents Reagan and Bush promised to name pro-life Justices,<sup>100</sup> President Clinton promised Justices who would support a constitutional right to privacy,<sup>101</sup> and President Nixon promised judges who would favor “peace forces” against society’s criminal elements,<sup>102</sup> each with varying degrees of success. And the phenomenon is not limited to the federal system. Courts can become campaign issues in states with appointive and “merit selection” systems, too, as did the California Supreme Court.<sup>103</sup> Concern with that court’s approach to the death penalty produced a governor who appointed opponents of capital punishment to the bench, followed by a governor who appointed judges supportive of it.<sup>104</sup>

No more should be necessary, incidentally, to refute another criticism of judicial elections: that they undermine stare decisis.<sup>105</sup> Of course they can, but so can an appointive system whenever the courts become issues in campaigns of “political” officials. Richard Nixon and Ronald Reagan campaigned on reversing trends that had become apparent in the appointive federal judiciary. And the Massachusetts Supreme Judicial Court’s decree forcing that state to issue marriage licenses to same-sex couples<sup>106</sup> may have resulted in President Bush’s

---

<sup>95</sup> In a forthcoming book, Professor Richard Davis argues that Supreme Court nominations have become like elections in the extent to which the input of interest groups and the public is central. See RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* (forthcoming 2005). He argues that this democratization of the nominations process is irreversible. *Id.*

<sup>96</sup> See *id.*

<sup>97</sup> See Jeffrey Rosen, *Can Bush Deliver a Conservative Supreme Court?*, N.Y. TIMES, Nov. 14, 2004, at sec. 4, col. 1; see also President Bush’s *State of the Union*: “We Must Pass Reforms That Solve the Financial Problems of Social Security,” N.Y. TIMES, Feb. 3, 2005, at A22 (criticizing “activist judges”).

<sup>98</sup> 410 U.S. 113 (1973).

<sup>99</sup> See Peter Berkowitz, *A Second Chance to Unite: Four Ways George W. Bush Could Reach Out to Democrats*, WKLY. STANDARD, Nov. 12, 2004, available at <http://www.weeklystandard.com/content/public/articles/000/000/004/901rujep.asp?pg=1>.

<sup>100</sup> See Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 297 (1991).

<sup>101</sup> ABRAHAM, *supra* note 92, at 317.

<sup>102</sup> E.W. Kenworthy, *Nixon Scores ‘Indulgence,’* N.Y. TIMES, Nov. 3, 1968, at A1.

<sup>103</sup> See Craig F. Emmert & Carol Ann Traut, *The California Supreme Court and the Death Penalty*, 22 AM. POLS. Q. 41, 42 (1994).

<sup>104</sup> See *id.*

<sup>105</sup> See Finley, *supra* note 18, at 57; Larkin, *supra* note 38, at 78-79; Phillips, *supra* note 18, at 144.

<sup>106</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 972-73 (Mass. 2003).

re-election.<sup>107</sup> I do not see why elections are any more of a threat to stare decisis when the people are able to express their displeasure with judicial decisions by voting directly against the judges who created the offending policies.

Thus, candidates for offices that appoint judges often promise that their election will alter not only the policies of the branch for which they are running, but also those of the judiciary. For those pledges to mean anything,<sup>108</sup> the appointing President or Governor<sup>109</sup> and for that matter, leaders of the legislature,<sup>110</sup> must have some reasonably reliable way of discovering potential nominees' judicial philosophies or their likely approaches to specific cases.<sup>111</sup>

And indeed the appointing officials do investigate potential judges.<sup>112</sup> President Lincoln is reputed to have said, in considering whom to nominate to the Supreme Court, "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known."<sup>113</sup> Presidents (particularly President Reagan) who sought to use the courts to achieve policy goals established elaborate vetting mechanisms to ensure that the eventual nominees would not disappoint the President.<sup>114</sup> President Bush has continued this trend by seeking to nominate individuals with relatively conservative--the President would probably prefer "non-activist"--judicial philosophies.<sup>115</sup>

Likewise, the Senate has shown no sign of relinquishing its role in providing advice and consent to the President, and the filibusters during President Bush's first term attest to the fact that the Senate is very much concerned with the ideologies of the nominees.<sup>116</sup> But not only does the Senate consider ideology important as a general matter, but Senators may require commitments of

---

<sup>107</sup> See Douglas Belkin, *Exchanging Vows*, BOSTON GLOBE, Dec. 30, 2004, at 1; Elisabeth Bumiller et al., *A Triumph of Organization Turning Out More GOP Voters Was Critical Factor in Bush Victory*, PITTS. POST-GAZETTE, Nov. 4, 2004, at A6.

<sup>108</sup> I am not necessarily implying that the pledges do in fact mean anything. As *White* reminded us, "[C]ampaign promises are--by long democratic tradition--the least binding form of human commitment." *Republican Party v. White*, 536 U.S. 765, 780 (2002).

<sup>109</sup> See CHARLES H. SHELDON & LINDA S. MAULE, *CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES* 106 (1997). "Governors tend to appoint persons who have, through their past political, legal or social actions reflected the values, policies and preferences held by Governors." *Id.*

<sup>110</sup> See *id.* at 89 (reporting that majority parties in legislatures that appoint judges "[i]nvariably" choose members of that party).

<sup>111</sup> See Bruce Fein, *Benchmarks of Puppets*, WASH. TIMES, Oct. 19, 2004, at A16.

<sup>112</sup> See GEORGE S. BOUTWELL, *REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS* 29 (1902).

<sup>113</sup> *Id.* See also Fein, *supra* note 111, at A16.

<sup>114</sup> See, e.g., HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 58-149 (1988); DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 133-67 (1999).

<sup>115</sup> See, e.g., Chemerinsky, *supra* note 94, at 620-21.

<sup>116</sup> *Id.* at 620.

nominees regarding certain issues before confirmation is granted.<sup>117</sup> Thus, one's views of *Roe*,<sup>118</sup> *Griswold*,<sup>119</sup> *Brown*,<sup>120</sup> the Pledge of Allegiance,<sup>121</sup> and countless other topics (some more controversial than others) may mean the difference between confirmation and rejection.<sup>122</sup> And nominees, though they may decline to answer such questions as a prudential or political choice,<sup>123</sup> may not rely on ethical canons as tying their hands and forcing them to demur.<sup>124</sup> Nominees, like candidates, enjoy the constitutional right to discuss matters of judicial philosophy.<sup>125</sup>

Appointing authorities consider nominees' ideology in making judicial appointments.<sup>126</sup> To be sure, the Senate's exercise of advice and consent has been controversial, and the ideologically driven rejection of candidates qualified for the Court particularly so.<sup>127</sup> But my point here is not to defend normatively the Senate in rejecting such nominees as John Parker,<sup>128</sup> Clement Haynsworth,<sup>129</sup>

<sup>117</sup> Judge Edith H. Jones, *Symposium: The Ethics of Judicial Selection*, 43 TEX. L. REV. 1, 4-5 (2001).

<sup>118</sup> *Roe v. Wade*, 410 U.S. 959 (1973).

<sup>119</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965). See Silberman, *supra* note 73 at 14.

<sup>120</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>121</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004), *rev'g* 328 F.3d 466 (9th Cir. 2003).

<sup>122</sup> See Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1344 (2001) (quoting Senator Cranston during the Souter confirmation hearings, 136 CONG. REC. 25,293 (1990), as stating that "a nominee who would vote to overturn *Brown* . . . or refuse to discuss that case would be rejected on the basis of the single issue of desegregation"); Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N.U. L. REV. 511, 543 (1989) ("Opponents of Judge Bork . . . apparently [sic] were successful in convincing a majority of the senate committee that it could use allegiance to *Griswold* as a useful litmus test for membership in 'the mainstream' of constitutional thought."); see also Morton J. Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655, 656 (1989).

<sup>123</sup> In point of fact, nominees decline to answer questions only when providing an answer will decrease their chances for confirmation. See CARTER, *supra* note 26, at 59 (noting the types of questions answered and not answered by Justices Kennedy, Thomas, and Ginsburg).

<sup>124</sup> Judge Rick A. Johnson, *Judicial Campaign Speech in Kentucky After Republican Party of Minnesota v. White*, 30 N. KY. L. REV. 347, 413 (2003).

<sup>125</sup> See Geoffrey C. Hazard, Jr., "Announcement" by Federal Judicial Nominees, 32 HOFSTRA L. REV. 1281, 1281 (2004); see also *Republican Party v. White*, 536 U.S. 765, 781-82 (2002).

<sup>126</sup> Chemerinsky, *supra* note 94, at 620-21.

<sup>127</sup> See Senator Charles McC. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 200-07 (1987); Nathaniel R. Jones, *Whither Goest Judicial Nominations, Brown or Plessy?—Advice and Consent Revisited*, 46 SMU L. REV. 735, 742-46 (1992).

<sup>128</sup> See generally ABRAHAM, *supra* note 92, at 30-31, 149; J. MYRON JACOBSTEIN & ROY M. MERSKY, THE REJECTED: SKETCHES OF THE 26 MEN NOMINATED FOR THE SUPREME COURT BUT NOT CONFIRMED BY THE SENATE 113-22 (1993) (discussing the reasons the Senate would not confirm John Parker).

<sup>129</sup> See ABRAHAM, *supra* note 92, at 10-11; JACOBSTEIN & MERSKY, *supra* note 128, at 141-47; MASSARO, *supra* note 94, at 1-31, 78-104. See generally JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE AND THE SUPREME COURT (1991) (discussing why the Senate rejected Clement Haynsworth's confirmation).

and Robert Bork,<sup>130</sup> but rather to make the positivist point that scrutiny of nominees, and the selection of nominees, on the basis of ideology is standard operating procedure in appointive systems.<sup>131</sup> Recognition of this truth should mute criticism of elections as ideologically based.

The “merit selection” process was supposed to rid states of both candidate electioneering and the politics that is necessarily a part in any appointment process,<sup>132</sup> but of course it has done neither.<sup>133</sup> “Merit selection” systems call for the initial selection of a judge who then runs unopposed in a retention election.<sup>134</sup> The procedures for making the initial selection vary by state, but typically involve executive appointment (with all the problems of politics associated therewith), or the use of a nominating commission, which typically chooses a few nominees and leaves to the executive the choice of which nominee to fill the vacancy.<sup>135</sup> Any pretense that the nomination process rids judicial selection of politics evaporates when it is recognized that the members of the commission itself are appointed as part of a political process and they vote along ideological lines, seeking to install judges who favor their policy preferences.<sup>136</sup> If such use of ideology is acceptable, there seems little reason to limit involvement to the elites who are appointed to commissions.<sup>137</sup>

Whatever the form of judicial selection, ideology matters.<sup>138</sup> The question is *whose* ideology should matter. Though one might think that the choice of the median voter in a judicial election would not be much different from the choice of a democratically elected executive ratified by a democratically elected legislature, Professor Pinello’s scholarship indicates that the selection method

---

<sup>130</sup> See ABRAHAM, *supra* note 92, at 10-11; BORK, *supra* note 26, at 267-349; JACOBSTEIN & MERSKY, *supra* note 128, at 159-70; MASSARO, *supra* note 94, at 158-97. See generally ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989) (discussing the controversy surrounding Robert Bork’s confirmation).

<sup>131</sup> Smith, *supra* note 42, at 1485.

<sup>132</sup> See Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment*, 62 MO. L. REV. 315, 319 (1997); Bradley Link, *Had Enough in Ohio?*, 51 CLEV. ST. L. REV. 123, 137 (2004).

<sup>133</sup> See Kelley Armitage, *Denial Ain’t Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 655 (2002); Peter Paul Olszewski, Sr., *Who’s Judging Whom?: Why Popular Elections Are Preferable to Merit Selection Systems*, 109 PENN. ST. L. REV. 1, 9-10 (2004).

<sup>134</sup> Daugherty, *supra* note 132, at 319; Link, *supra* note 132, at 137.

<sup>135</sup> Daugherty, *supra* note 132, at 319; Link, *supra* note 132, at 137.

<sup>136</sup> See Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 733-34 (2002).

<sup>137</sup> See Armitage, *supra* note 133, at 655-56; Olszewski, *supra* note 133, at 9 (“[I]n practice, the Missouri Plan replaced the usual open politics associated with general elections with the closed-door politics of bar associations and executive appointments, in which the general population has no voice.”); A.J. Barranco, *Don’t Eliminate the Right to Elect Florida’s Trial Judges*, FL. BAR NEWS, Aug. 15, 1999, at 4; see also Randolph A. Piedrahita, *Deciding Who Will Be Judges*, ADVOCATE (Baton Rouge), Mar. 24, 2004, at 6-B (letter to the editor) (referring to the members of nominating commissions as “a bunch of unelected poobahs”); Webster, *supra* note 17, at 40 n.285.

<sup>138</sup> Chemerinsky, *supra* note 94, at 620-21.

does indeed alter the decisions of courts.<sup>139</sup> The elections-appointments dispute is about these results. The ubiquitous fretting about elected judges appeasing a bloodthirsty public by deciding cases against criminal defendants is little more than a substantive disagreement between elite lawyers and law professors on one side, and the median voter on the other.<sup>140</sup> Because it is impossible to determine who is “right” in the substantive dispute (or, more accurately, to convince anyone else that one’s substantive position is correct), there is little reason to privilege elite ideology over the rest of the public’s.<sup>141</sup> Indeed, democracy would seem to argue for quite the opposite.<sup>142</sup>

### B. *Interest Group Involvement*

Many of the same points made with regard to the impact ideology has on judicial selection in both appointive and electoral systems also apply to the role played by interest-group support and opposition. Interest groups, many of which are formed precisely to advocate for a certain ideology, have become increasingly active in both state electoral and federal appointive systems of judicial selection.<sup>143</sup> Chambers of Commerce push for pro-business judges.<sup>144</sup>

<sup>139</sup> See PINELLO, *supra* note 24, at app. A, 141-44.

<sup>140</sup> See, e.g., Smith, *supra* note 42, at 1504-05 (arguing for the elimination of judicial elections and the installation of “defense-oriented judges,” whom the author characterizes as “Bill of Rights-oriented, fairminded, open-minded, and open-hearted. These judges are not biased in favor of the accused; they merely afford the accused due process and dignity.”). Such analysis begs the operative question of the placement of the boundary between upholding the law and violating it, apparently assuming that judges who are not “defense-oriented” are “rubber-stamps for prosecutors,” apathetic or antagonistic to “protecting the rights of the accused” and willing to “defer[] to prosecutors at every step because they believe most defendants are in fact guilty.” *Id.* at 1485. One person’s “due process” and “fair-minded[ness]” is another’s “bias[.]” *Id.* at 1505.

<sup>141</sup> See Dimino, *supra* note 28, at 816-17.

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., Bert Brandenburg, *Keep the Courts Free and Fair: The Influence of Special Interests and Partisan Politics Threatens the Independence of Judges and the Rights of All Americans. But Groups Are Unifying to Counter the Trend*, TRIAL, July 1, 2004, at 32. The hypocrisy apparent in the title of Brandenburg’s piece is unfortunately common in debates on this issue. See generally CARTER, *supra* note 26, at 64-65 (noting that Senators Kennedy and Thurmond took different views of the propriety of inquiring into nominees’ philosophies depending on the party of the nominating President); Chemerinsky, *supra* note 94, at 620 (criticizing Republicans for “just plain hypocrisy” in opposing Clinton judicial nominees for excessive liberalism and then, once a Republican took the White House, claiming that the Senate should not consider ideology in evaluating nominees); Shepard, *supra* note 18, at 813 (noting the different positions Senator Kennedy has taken regarding the role of Senate confirmation depending on his agreement with the views of the nominee). Cf. Dimino, *supra* note 2, at 333 n.216 (criticizing Indiana Chief Justice Randall Shepard for writing an article arguing that due process prevented judicial candidates from taking positions on issues and then participating in a case where a judicial candidate was sanctioned for campaign speech); F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 AM. ECON. REV. 712, 729 (2004) (“[A]s one might expect, such self-control [as provided by the check of independent courts] is rendered more attractive by the



Associations of Trial Lawyers urge the selection of judges favorable to tort victims.<sup>145</sup> District Attorneys' Associations and Associations of Criminal Defense Lawyers advocate for judges sympathetic to their causes.<sup>146</sup> We should not be surprised. As the importance of judicially-crafted public policy has become clear, interest groups have exercised their influence to affect the selection of judges.<sup>147</sup>

Critics of judicial elections decry the involvement of interest groups, saying that candidates should not be pressured to subscribe to interest groups' agendas, and arguing that wealthy interest groups "can overwhelm campaign debate with [their] messages."<sup>148</sup> In the view of the critics, judges should keep open minds on legal questions, and that were judicial elections to become referenda on specific legal questions, the advantage of having a separate judicial branch would be undermined.<sup>149</sup> This argument presents merely a nuanced version of the argument that ideology should be removed from elections altogether. Normatively speaking, to the extent one believes that an individual in a democracy should be entitled to affect the choice of a judge that makes policy, so should that person be entitled to associate with like-minded others in an effort to be more effective.<sup>150</sup>

Even if one rejects the normative argument and concludes that interest group involvement in the judicial-selection process should be avoided, adopting an

---

prospect it will also be imposed on rivals with very different policy views."). The involvement of interest groups is deplorable, it seems, unless the groups agree with the commentator.

<sup>144</sup> See, e.g., Anthony Champagne, *The Politics of Judicial Selection*, 31 POL'Y STUDS. J. 413, 416 (2003); Jerry Mitchell, *McRae's Fiery Tenure Ends with no Regrets*, CLARION STAR-LEDGER (Jackson, Miss.), Jan. 5, 2004, at 1A.

<sup>145</sup> See, e.g., Champagne, *supra* note 144, at 416. For a specific discussion of money spent in judicial races, see David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Elections Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. CIN. L. REV. 1 (2003); Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849.

<sup>146</sup> See generally Smith, *supra* note 42, at 1485 (arguing we need more judges who will protect the rights of the accused).

<sup>147</sup> See Brandenburg, *supra* note 143, at 32.

<sup>148</sup> Goldberger, *supra* note 145, at 43. See also Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1423 (2001); Champagne & Cheek, *supra* note 18, at 920, 923.

<sup>149</sup> See generally Goldberger, *supra* note 145, at 43. "Unless it can be resolved satisfactorily, there will be a sense that the fragile wall between judicial independence and the political process can easily be penetrated by anyone with enough election campaign money to do so." *Id.* See also Champagne, *supra* note 148, at 1423; Champagne & Cheek, *supra* note 18, at 920, 923.

<sup>150</sup> See GERHARDT, *supra* note 94, at 219 (pointing out that individual citizens have rarely played much of a role in the appointments process and suggesting that individuals who want to be heard in the process affiliate with an interest group); Peter Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 574-76 (1997); see, e.g., ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 291-98 (1989); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 112-18 (1956).

appointive system is hardly likely to solve the problem.<sup>151</sup> Interest groups have been active in the appointment process on the federal level for generations, even if one begins looking as recently as organized labor and civil rights organizations' opposition to President Hoover's nomination of Judge Parker to the Supreme Court,<sup>152</sup> and they are becoming more involved. As Michael Gerhardt has written, "[t]hat the degree of participation by interest groups in the federal appointments process has risen enormously in the twentieth century is beyond question."<sup>153</sup>

What is more, the interest groups are successful in influencing the appointment process.<sup>154</sup> Political-science studies indicate that interest-group activity affects senatorial votes on confirmation to a statistically significant extent.<sup>155</sup> Professors Gregory Caldeira and John Wright, for example, have demonstrated that interest-group lobbying affects senatorial decisions on confirmation "above and beyond" the effects of "public opinion polls and constituency demographics,"<sup>156</sup> even when controlling for the effects of other factors, such as campaign contributions, party and ideology.<sup>157</sup> One may conclude that interest-group influence in the judicial-selection process is healthy or not, but the appointment process in no way avoids that influence.<sup>158</sup> Interest groups are plentiful, active, and effective in both elective and appointive systems.<sup>159</sup>

Nevertheless, there are two types of interest groups that present particular concerns in the debate between judicial elections and appointments: political parties and the organized bar.<sup>160</sup> Both interest groups can aid the selection process.<sup>161</sup> Parties provide voters with cues of judges' philosophical outlooks

---

<sup>151</sup> Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 474 (2004).

<sup>152</sup> See ABRAHAM, *supra* note 92, at 30-31.

<sup>153</sup> GERHARDT, *supra* note 94, at 218. See also ROBERT A. KATZMANN, COURTS AND CONGRESS 18-19 (1997); Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96, 105-06 (1992). See, e.g., Christine DeGregorio & Jack E. Rossotti, *Campaigning for the Court: Interest Group Participation in the Bork and Thomas Confirmation Processes*, in INTEREST GROUP POLITICS 215 (Allan J. Cigler & Burdett A. Loomis eds., 4th ed. 1995). On the techniques employed by interest groups, see Gregory A. Caldeira et al., *The Lobbying Activities of Organized Interests in Federal Judicial Nominations*, 62 J. POLS. 51, 51-68 (2000).

<sup>154</sup> See ABRAHAM, *supra* note 92, at 30-31; Miller, *supra* note 151, at 473; Segal, *supra* note 153, at 105-06.

<sup>155</sup> See Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499, 520-21 (1998); Segal et al., *supra* note 153, at 108-09, 112-14.

<sup>156</sup> Caldeira & Wright, *supra* note 155, at 521.

<sup>157</sup> See *id.* at 520.

<sup>158</sup> See *id.* at 520-21.

<sup>159</sup> See *id.*

<sup>160</sup> Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection*, 77 JUDICATURE 300, 300 (1994).

<sup>161</sup> *Id.*

and enable voters to make intelligent choices without extensive research,<sup>162</sup> while the organized bar can help evaluate the professional competence of prospective judges.<sup>163</sup> Though both groups can play a role in judicial selection, whether states use appointments or elections, parties hold a greater influence under elective systems (particularly systems using partisan elections) and the organized bar's influence is greatest when appointments are made by a non-partisan or bipartisan commission ostensibly trying to select meritorious potential judges.<sup>164</sup> As anthropologist Susan Philips has demonstrated by looking at the changes in Pima County (Tucson), Arizona, when the state altered its system of selecting trial judges from elections to appointments, participation in bar activities replaced political-party participation as the principal way of maximizing one's chances to ascend to the bench.<sup>165</sup>

Critics of elections may argue that this development is beneficial, and the input of a professional organization concerned with raising the quality of the judiciary is preferable to that of a political party concerned only with achieving policy results through the courts.<sup>166</sup> But the distinction is not so clear, and supposedly "neutral," "objective" professional organizations, including the American Bar Association,<sup>167</sup> have become "special conduit[s] through which potentially partisan considerations can be camouflaged as 'professional qualifications' concerns."<sup>168</sup> It is for that reason that the second Bush Administration has decided not to have the ABA rate its judicial nominees prior to nomination.<sup>169</sup>

Parties do not exercise the authority in appointments that they do in elections, but even in appointive systems their influence is hardly irrelevant.<sup>170</sup> Appointments are made by politicians who belong, and owe their offices to,

---

<sup>162</sup> See, e.g., PHILIP DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 245 (1980).

<sup>163</sup> Sheldon, *supra* note 160, at 300-01.

<sup>164</sup> See *id.*

<sup>165</sup> See PHILIPS, *supra* note 75, at 23-25; see also RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF BENCH AND BAR 258 (1969).

<sup>166</sup> James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: the Year 2000 Standards*, 106 DICK. L. REV. 683, 686-88 (2002).

<sup>167</sup> See NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 116-37 (1998).

<sup>168</sup> GERHARDT, *supra* note 94, at 229-30. See also Laurence H. Silberman, *The American Bar Association and Judicial Nominations*, 59 GEO. WASH. L. REV. 1092, 1095 (1991). "[T]he banner of 'insensitivity' was often used to rebuff those nominees whose political views were identified with the conservative wing of the Republican party or with notions of judicial restraint." *Id.*

<sup>169</sup> See, e.g., Elisabeth Frater, *Revenge of the Bork Conservatives*, NAT'L J., Mar. 31, 2001, at 970; Amy Goldstein, *Bush Curtails ABA Role in Selecting U.S. Judges*, WASH. POST, Mar. 23, 2001, at A1. And it may also explain why Democrats have been eager to make use of the ABA's judicial ratings. See Jonathan Ringle, *A Crucial Shift at the Judiciary Committee*, LEGAL TIMES, May 28, 2001, at 17 (reporting Democratic plans to reinstate the role of the ABA in rating nominees, after Republicans had disregarded the organization in response to its perceived liberal bias).

<sup>170</sup> Alfini & Gable, *supra* note 166, at 686-89.

parties.<sup>171</sup> Accordingly, those politicians reward party faithful with judgeships, as has historically been the case in the federal system.<sup>172</sup> President Carter, who pledged to select appellate judges on merit alone, selected more than ninety percent of his judges from his party, leading one scholar to quip, “Whatever Carter’s criteria for ‘merit’ were, they indicated that Democrats were far more deserving than Republicans.”<sup>173</sup> And Carter was the only President who bothered to use a sham to obscure the partisanship.<sup>174</sup>

It is obvious that in practice Presidents select judges from within their own parties, and it is at least arguable that such a practice is beneficial from a democratic point of view.<sup>175</sup> If party influence is a defect of a judicial selection system, however, that defect is present in both appointive and elective systems.<sup>176</sup> For the same reason that the public and interest groups have become involved in judicial selection, the parties have an interest in seeing sympathetic judges on the bench.<sup>177</sup> Every political actor knows that judges will be making policy and passing on the validity of policies enacted by the other branches, and that as a result court-packing is an invaluable tool of policy-making.<sup>178</sup> The importance of judgeships to parties has been recognized as central since at least the time President Adams filled the courts with the “midnight judges,” and parties have since taken plenty of opportunities to achieve policy results through the courts.<sup>179</sup> At best, appointment systems do not eliminate the influence of interest groups, but rather change the identities of the groups that do the influencing.<sup>180</sup> The special interests, therefore, provide no reason to dispense with elections.

---

<sup>171</sup> *Id.*

<sup>172</sup> See *TRIBE*, *supra* note 92, at 81-85 (discussing the Supreme Court nominations of, *inter alia*, Alexander Wolcott and Roscoe Conkling, both of whom owed their nominations to party loyalty rather than to legal acumen).

<sup>173</sup> Walter F. Murphy, *Reagan’s Judicial Strategy*, in *LOOKING BACK ON THE REAGAN PRESIDENCY* 207, 209 (Larry Berman ed., 1990). “Carter’s initial pledge of non-partisan judicial selection was reduced in practice to merit selection among Democrats.” *Id.* at 210 (citing Jon Gottschall, *Carter’s Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Court of Appeals*, 67 *JUDICATURE* 164, 173 (1983)).

<sup>174</sup> See generally Gottschall, *supra* note 173, at 173 (discussing the impact of Carter’s appointees on the judiciary).

<sup>175</sup> Chemerinsky, *supra* note 94, at 624. See generally Schwartz, *supra* note 114, at 3-9 (discussing the way presidents make judicial appointments).

<sup>176</sup> See David W. Case, *In Search of Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 *MISS. C. L. REV.* 1, 20-23 (1992).

<sup>177</sup> See *id.*

<sup>178</sup> See Schwartz, *supra* note 114, at 3-9.

<sup>179</sup> See generally Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 *AM. POL. SCI. REV.* 511 (2002) (arguing that politicians have used courts and judicial appointments to entrench their policy preferences by constitutionalizing them).

<sup>180</sup> See Case, *supra* note 176, at 20-23.

## IV. THE UNQUALIFIED

Closely related to the complaint that elections excessively empower parties and their bosses is the complaint that voters will select whomever the bosses put before them and, therefore, elections will fill courts with unfit judges.<sup>181</sup> Like the other criticisms leveled at judicial elections, this one has a basis in truth. The public is likely to vote based on visceral reactions to decisions and unlikely to understand the role that a judge plays in upholding the law.<sup>182</sup> Therefore a judge often becomes “politically vulnerable for being legally right,”<sup>183</sup> and the judges who succeed in the political game are often not the ones scholars and other elites most respect.<sup>184</sup> Furthermore, ballot position, famous names,<sup>185</sup> ethnicity and other factors are as likely as merit, intelligence, and other “objective” “qualifications” to influence a judge’s election, causing elites to lose further respect for the electoral process.<sup>186</sup>

This critique is unfair in two respects. First, the appointments process often selects the unqualified.<sup>187</sup> Second, voters have little choice but to focus on party

---

<sup>181</sup> See Armitage, *supra* note 133, at 655-56; Martha W. Barnett, *The 1997-98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 418 (2000); Champagne, *supra* note 148, at 1413-16; Champagne & Cheek, *supra* note 18, at 926. See generally Lawrence Baum, *Voters’ Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 KY. L.J. 645 (1989) (discussing merit selection’s effect on judicial races in Ohio).

<sup>182</sup> See, e.g., James H. Brickley & Clarice Jobes, *Speaking Out – Judicial Appointment v. Judicial Election*, 75 MICH. BAR J. 930, 932 (1996); Larkin, *supra* note 38, at 72-74; Long, *supra* note 2, at 708; Phillips, *supra* note 18, at 142-43.

<sup>183</sup> See Heffernan, *supra* note 79 at 1043.

<sup>184</sup> Witness the perennial appeal of candidates who label themselves as the “Ten Commandments Judge.” One such “jurist,” Roy Moore, was removed from his office as Chief Justice of Alabama after installing a monument inscribed with the Ten Commandments in his courthouse and defying federal-court orders to remove it, despite the popularity he engendered through that defiance. See generally *Eleventh Circuit Update*, 5 FLA. COASTAL L.J. 121, 135-36 (2004).

<sup>185</sup> See William W. Baker, *Named to the Bench*, 39 WILLAMETTE L. REV. 1281, 1281-85 (2003).

<sup>186</sup> See Schotland, *supra* note 145, at 1415 n.59 (discussing the importance of famous, short names that indicate ethnicities common in the jurisdiction); Symposium, *Judicial Elections and Campaign Finance Reform*, 33 U. TOL. L. REV. 335, 351 (2002) (statement of Professor Schotland) (discussing the importance of possessing an Irish surname in a particular jurisdiction); Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U. L. REV. 559, 562-63 (2002); Lawrence Baum & Mark Kemper, *The Ohio Judiciary*, in OHIO POLITICS 292-93 (Alexander P. Lamis ed., 1994); and Kathleen L. Barber, *Ohio Judicial Elections – Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762, 770-81 (1971). Some voters could cite no reason at all for their votes. See Baum & Kemper, *supra*.

<sup>187</sup> See, e.g., Webster, *supra* note 17, at 15-16 (noting that although voters are typically uninformed, so are individuals on appointment committees). *Contra* Finley, *supra* note 18, at 57 (arguing that merit selection provides for a high-quality judiciary).

affiliation (where available) and candidates' demographic characteristics as indications of future judicial rulings where the candidates refuse to answer questions about judicial philosophy or are prohibited from doing so by rules of judicial conduct.<sup>188</sup> In other words, elections might be more likely to reflect a public deliberation on judicial policy if judicial policy were allowed to play center stage in campaigns.

#### A. *Appointments Not Based on Merit*

Appointing authorities, be they Presidents, legislatures,<sup>189</sup> or Governors, do not focus exclusively on merit in selecting individuals for judgeships.<sup>190</sup> Presidents nominating Justices for the Supreme Court of the United States, the most prestigious judicial body in the nation, if not the world, have the ability to choose among the country's entire legal community and could, if they wanted, select the most intelligent, most articulate, and most experienced of America's legal scholars, judges, and practitioners. The fact that this does not happen--that Learned Hand spent fifty-two years on the district court and the court of appeals without a Supreme Court nomination, for example--indicates that factors other than merit influence the selection of Supreme Court Justices.<sup>191</sup> And if the Supreme Court does not contain the most talented members of the legal profession, state courts and lower federal courts would seem even more likely to be filled with individuals whose distinguishing features may not include legal proficiency.

##### 1. Demographics

These other distinguishing characteristics turn out to be virtually the same ones that voters care about when judicial candidates stand for election. Judicial candidates must be politically connected to get a place on the ballot, but so too must a would-be judge come to the attention of an appointing authority through his work on behalf of the appointer's political party.<sup>192</sup> Judicial candidates benefit from being able to "represent" a particular geographic region, in that

<sup>188</sup> See generally Finley, *supra* note 18, at 60 (stating one problem "is the general lack of public knowledge of and interest in judicial races").

<sup>189</sup> For a discussion of legislative appointment politics, see Long, *supra* note 2, at 766-72.

<sup>190</sup> See Reddick, *supra* note 136, at 733-34.

<sup>191</sup> See generally Chemerinsky, *supra* note 94, at 624; O'BRIEN, *supra* note 28, at 45-48 (discussing the factors other than merit that are taken into consideration during judicial selection).

<sup>192</sup> See O'BRIEN, *supra* note 28, at 45-48; Jonathan Groner, *Survival Guide: The Politics of Judicial Nominations is More Complicated Than Ever. Why Some Controversial Picks Are Making it Through, While Others Are Getting Stopped Cold*, LEGAL TIMES, May 5, 2003, at 1.

favorite-son candidates may receive a home-town bounce at the polls, but so too do appointing officials look to geography in making appointments.<sup>193</sup>

Most controversially, critics of judicial elections allege that members of certain ethnic groups or genders face a disadvantage in elections, because voters will prefer members of their own ethnicity and look more favorably on men than women.<sup>194</sup> Once again, the implied distinction from appointive systems fails.<sup>195</sup> Surely it is unquestionable that ethnicity, religion, and gender play a considerable role in appointing judges.<sup>196</sup> President Eisenhower selected Catholic Democrat, William Brennan to appeal to those groups.<sup>197</sup> President Johnson selected Thurgood Marshall because he believed naming a black man to the Court was “the right thing to do.”<sup>198</sup> President Nixon tried to name a Southerner to the Court, succeeding finally with Justice Powell.<sup>199</sup> President Reagan promised to name a woman to the Court (something Nixon had tried but failed to do)<sup>200</sup> and did so with his nomination of Justice O’Connor.<sup>201</sup> President Reagan was

<sup>193</sup> See O’BRIEN, *supra* note 28, at 45-48. Though the importance of geography on the Supreme Court is decreasing, it is still quite relevant in appointments in lower courts. *Id.* at 48. See also Groner, *supra* note 192, at 1 (reporting that Maryland’s Senators refused to approve the nomination of Claude Allen, a Virginian, to the Fourth Circuit because the seat to which Allen was nominated had traditionally been held by a Marylander).

<sup>194</sup> Becky Kruse, *Luck and Politics: Judicial Selection Methods and their Effect on Women on the Beach*, 16 WIS. WOMEN’S L.J. 67, 81 (2001); see also Monika L. McDermott, *Race and Gender Cues in Low Information Elections*, 51 POL. RES. Q. 895 (1998); Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 SW. L.J. (Special Issue) 15, 19 (1986); Theodore McMillan, *Selection of State Court Judges*, 40 SW. L.J. (Special Issue) 9, 10 (1986).

<sup>195</sup> See Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315 (1990) (failing to find an effect on judicial demographics caused by selection method); Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 SOC. SCI. Q. 110 (1996) (failing to find an effect on judicial demographics caused by selection method).

<sup>196</sup> *Id.* See generally BARBARA A. PERRY, A “REPRESENTATIVE” COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS (1991) (providing an in depth discussion on how race, religion and gender effect judicial selection).

<sup>197</sup> See, e.g., HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 77 (1995); John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1442 (2000) (book review).

<sup>198</sup> MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 266 (1992); NEIL D. MCFEELEY, APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY 172 (1987); John P. MacKenzie, *Thurgood Marshall*, in THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 3064 (Leon Friedman & Fred L. Israel eds., 1969).

<sup>199</sup> See, e.g., JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT 44-59 (2001); RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE 160-61 (2001).

<sup>200</sup> See DEAN, *supra* note 199, at 110-16, 174-85, 243; RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 423 (1978).

<sup>201</sup> See, e.g., NANCY MAVEETY, JUSTICE SANDRA DAY O’CONNOR: STRATEGIST ON THE SUPREME COURT 16-17 (1996); Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. L. REV. 523, 543 (2002).

attracted to Justice Scalia in part because naming him would place the first Justice of Italian ancestry on the Court.<sup>202</sup> President George H.W. Bush filled Justice Marshall's "black seat" with Justice Thomas.<sup>203</sup> And President George W. Bush is widely rumored to be interested in naming the first Hispanic Justice to the Court.<sup>204</sup> Though certain of these Justices were indisputably qualified for the Court, in each example merit was merely one concern among many, occasionally subordinate to the politics of demography.<sup>205</sup>

Against this background, it is curious indeed to object to *elections* on the ground that ethnicity and other demographic characteristics might make the difference to voters. Of course, one may object to the particular ethnic preferences of voters. That is, one may approve of giving a member of a minority group or a female a preference in the selection process, while disapproving of a preference for a white male.<sup>206</sup> But that criticism accuses voters not of focusing on the wrong criteria, but of coming to the wrong conclusion. Both reasons for opposing elections are strongly elitist. But to the extent that a desire for ethnic diversity,<sup>207</sup> rather than a desire for selections based

---

<sup>202</sup> See Entin, *supra* note 201, at 543.

<sup>203</sup> See generally KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 211-12 (2004) (discussing the effect of Clarence Thomas's appointment on the judiciary). JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE 169-90 (1994); accord ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 346 (2001).

<sup>204</sup> See Maria Echaveste, *Brown to Black: The Politics of Judicial Appointments for Latinos*, 13 LA RAZA L.J. 39, 39 n.1 (2002); Dan K. Thomasson, *Demos Changing Rules on Judicial Appointments*, DESERT MORNING NEWS (Salt Lake City), Sept. 9, 2003, at A13. Some definitions of Hispanic would consider Justice Cardozo, a Sephardic Jew of Spanish and Portuguese ancestry, to be the first Hispanic Justice. See John M. Bagyi, *Carmen Beauchamp Ciparick: The Court of Appeals' Voice of Compassion*, 59 ALB. L. REV. 1913, 1914 n.10 (1996); Luke Biermen, *Preserving Power in Picking Judges: Merit Selection for New York Court of Appeals*, 60 ALB. L. REV. 339, 357, n.a (1996).

<sup>205</sup> See, e.g., MACK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 52 (2005) ("[O'Connor] was appointed because she was a woman . . . [Y]ou have to go back some decades to find a Supreme Court nominee with as slender a record as O'Connor's prior to her nomination . . .").

<sup>206</sup> See generally James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 167 n.63 (2003) (reporting the desire of Presidents Clinton and G.H.W. Bush, the ABA, and Justice Brennan that the federal bench be diversified in terms of race and gender).

<sup>207</sup> See *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study*, 19 FLA. ST. U. L. REV. 591, 615-20 (1990); Symposium, *supra* note 186, at 351 (statement of Professor Schotland) (discussing the "happy event" that a black man named O'Riley won an election in a jurisdiction thought to favor persons of Irish extraction). I do not suggest that Mr. Riley's election was in any way an unhappy event, only that Professor Schotland should be equally upset at the use of ethnicity by voters regardless of whether the person selected is of European or African ancestry and regardless of whether the voters' use of race "succeeded" or not—in either event, "merit" was not the criterion leading to election.

The less-than-representative number of minority judges may be reflective of anti-minority prejudice by white voters, but it is also possible that political affiliation and the relatively low number of minority lawyers drive the relatively low number of minority judges. See League of



only on merit, fuels opposition to elections, that opposition looks more and more like an attempt to reshape the judicial-selection process so as to make the judiciary more liberal as opposed to an attempt to raise the competence of the bench non-ideologically.<sup>208</sup> It is no wonder that voters overwhelmingly reject attempts to eliminate judicial elections.

## 2. It's Whom You Know, Not What You Know<sup>209</sup>

Elections have a distinct advantage over other selection systems in that voters are relatively free from the pressures of cronyism that affect judicial selection in appointive systems.<sup>210</sup> Even where party nominees are selected through back-room politicking, and even where the nominees are the ones who know the right party officials, at least the voters are able to choose the more qualified of two different cronies.<sup>211</sup>

When the appointment is made by an executive, however, the possibility of judgeships being rewards for long-time political support or personal friendship is manifest.<sup>212</sup> Senatorial and presidential patronage have long been responsible for hundreds of appointments to lower federal courts,<sup>213</sup> and President Truman made personal friendship the single most important criterion for appointment to the Supreme Court.<sup>214</sup> More recently, President Johnson made a point to reward political and personal friends with judgeships, including nominating Abe Fortas as an Associate Justice<sup>215</sup> and then as a replacement for Chief Justice Warren and

---

United Latin Am. Citizens Council v. Clements, 999 F.2d 831, 859 (5th Cir. 1993); Champagne & Cheek, *supra* note 18, at 928.

<sup>208</sup> See generally Dimino, *supra* note 28, at 819 (suggesting that “merit selection [may] represent[] a rigged process to ensure the continued policy influence of elites who cannot justify their decisions to the electorate”).

<sup>209</sup> Or, as Professor Yalof phrased it when referring to President Kennedy’s nomination of Byron White, “loyalty first, credentials second.” YALOF, *supra* note 114, at 71 (typesetting altered).

<sup>210</sup> See Franklin S. Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 501, 524-25 (1988).

<sup>211</sup> See *id.*

<sup>212</sup> See *id.* at 508; FRANCES HOWELL RUDKO, *TRUMAN’S COURT: A STUDY IN JUDICIAL RESTRAINT* 25 (1988).

<sup>213</sup> See, e.g., Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 742-43 (1995); see, e.g., Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 30, 43 (2003) (noting the involvement of party officials in the selection process and the nomination of Judge William Fletcher, who was a classmate of the President’s and co-chair of his California campaign).

<sup>214</sup> See RUDKO, *supra* note 212, at 25 (stating that “personal friendship and political considerations were probably predominant” in Truman’s appointments); YALOF, *supra* note 114, at 20-40 (describing Truman’s Supreme Court appointments and concluding that the appointment of Sherman Minton was “the product of simple, unadulterated cronyism”); Yoo, *supra* note 197, at 1441 (“We learn [from Yalof] that Truman’s main goal in Supreme Court appointments was cronyism.”).

<sup>215</sup> See YALOF, *supra* note 114, at 81-86; SILVERSTEIN, *supra* note 65, at 14-15.

Homer Thornberry--another Johnson crony--to take Fortas's seat.<sup>216</sup> The influence of cronyism is no less present in the states.<sup>217</sup> As one commentator stated, even in states that select their judges by appointment "[p]olitics and cronyism remain the order of the day when it comes to selecting judges."<sup>218</sup>

Voters have neither the expertise nor the inclination to choose the most qualified jurists for their states' courts. Instead, they rely on proxies including party affiliation and loyalty, ethnicity, and gender to indicate the candidates' likely approaches to judging.<sup>219</sup> Such reliance may be distasteful, but eliminating elections does not solve the problem, for appointing authorities use the same criteria.

### B. *Who Is to Blame for Public Ignorance?*

Few quarrel with the idea that voters know too little about the law and the legal system to make informed choices in judicial elections.<sup>220</sup> Voter ignorance, however, has not stopped us from extending universal suffrage in legislative and executive races, where the public votes with the same visceral, half-informed opinions as determine their votes in judicial races.<sup>221</sup> For political offices, we have accepted that risks of oligarchy outweigh the risks of democracy. Given the judicial capacity for, and history of, policy-making, it is unclear why democracy's risks to the judiciary are much worse than their risks to other branches of government.<sup>222</sup>

Moreover, the alternatives are to allow appointment by an executive, legislature, or nominating commission, each of which presents considerable problems.<sup>223</sup> Though the nominating commission, one would hope, has the expertise to evaluate judicial competence, commissions are unrepresentative of the polity and may use their power to achieve certain policy aims rather than to raise the quality of the bench.<sup>224</sup> Appointments by governors or legislatures are

---

<sup>216</sup> See YALOF, *supra* note 114, at 90-94; CARTER, *supra* note 26, at 75; SILVERSTEIN, *supra* note 64, at 22. Since Fortas was not confirmed as Chief Justice, Thornberry had no position to fill. ABRAHAM, *supra* note 92, at 219; YALOF, *supra* note 114, at 94.

<sup>217</sup> See Spears, *supra* note 210, at 524-25.

<sup>218</sup> Smith, *supra* note 42, at 1504.

<sup>219</sup> See, e.g., Michael W. Bowers, *Public Financing of Judicial Campaigns: Practice and Prospects*, 4 NEV. L.J. 107, 111-12 (2003).

<sup>220</sup> See Anca Cornis-Pop, *Republican Party of Minnesota v. White and the Announce Clause in Light of Theories of Judges and Voters Decisionmaking: With Strategic Judges and Rational Voters, The Supreme Court was Right to Strike Down the Clause*, 40 WILLAMETTE L. REV. 123, 170-73 (2004).

<sup>221</sup> See *id.*

<sup>222</sup> See Dimino, *supra* note 2, at 308-09 (discussing the independence of the Senate and the President).

<sup>223</sup> See Olszewski, *supra* note 133, at 8-9.

<sup>224</sup> See generally *id.* (stating a preference for elections over merit selections).

even worse in that regard.<sup>225</sup> Many elected public officials are lawyers (though typically a lower percentage of state legislators than federal legislators have law degrees), but their incentives are to use judicial appointments to attract votes and make policy, and as a result they may not focus on judicial competence. Thus, while appointing authorities *could* evaluate the competence of every appointed judge, in practice they decline to do so.<sup>226</sup> And if elected officials can rely on outside groups' assessments of judicial competence (like those provided by the ABA), it is unclear why voters would be unable to do the same.

To the extent that voters lack the information required to make wise choices, that ignorance stems from the muzzle placed on judicial candidates by the same elites who play heightened roles in non-elective selection processes.<sup>227</sup> Until the Supreme Court's 2002 decision in *Republican Party v. White*,<sup>228</sup> states could forbid judicial candidates from making the least enlightening speech on judicial philosophy.<sup>229</sup> As a result, there was virtually no information available for voters to discern differences between candidates, and yet that lack of information was used as a reason for denying the public the capacity to vote on judges. Since the *White* decision, some judicial candidates have been more upfront about their views and informing the public about the judicial system, but some states have resisted *White* and continue to restrict the ability of candidates to talk about the law in any substantive way.<sup>230</sup> So long as information is restricted, elections will not be fully effective, but that is hardly the fault of the voters.<sup>231</sup>

## V. THE PROBLEM OF MONEY

---

<sup>225</sup> See generally Long, *supra* note 2, at 766-72 (discussing legislative appointments and elections).

<sup>226</sup> See United States Senate Committee on the Judiciary, *Nominations in the 108th Congress (2003-05)*, at <http://judiciary.senate.gov/nominations.cfm> (last visited Feb. 10, 2005) (reporting that 105 nominees of President Bush have been confirmed to federal district courts, courts of appeals, or the Court of International Trade). I feel reasonably confident in speculating that not every Senator personally examined the records of each of those nominees over the last two years and that the Senators relied on surrogates to do research for them and devoted more time to examining nominees for noteworthy posts than for positions of lesser authority. This is an entirely natural and proper way to dedicate resources to investigating nominees and is equally so when voters do the same to evaluate candidates.

<sup>227</sup> See Cornis-Pop, *supra* note 220, at 177-78.

<sup>228</sup> 536 U.S. 765 (2002).

<sup>229</sup> See *id.* at 768.

<sup>230</sup> See *Watson v. New York State Comm'n on Judicial Conduct*, 794 N.E.2d 1, 4 (N.Y. 2003); *In re Kinsey*, 842 So. 2d 77, 85-91 (Fla. 2003). But see *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002).

<sup>231</sup> See generally, Shirley S. Abrahamson, *Speech: The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 977, 994-95 (2001) (arguing that elections are an opportunity to educate the public about the judiciary); see also generally, Shirley S. Abrahamson, *Courtroom With a View: Building Judicial Independence with Public Participation*, 8 WILLAMETTE J. INT'L L. & DISPUTE RES. 13, 17-25 (2000) (arguing that elections are an opportunity to educate the public about the judiciary).

Unless campaigns are publicly funded, judges running for election must raise money from private sources, which often include interests that would practice before the judge, were he elected.<sup>232</sup> In this way, elections raise a threat of bias,<sup>233</sup> in that potential donors feel obligated to contribute to a judge's campaign lest he remember their lack of generosity the next time the contributor appears before the judge.<sup>234</sup> Even for those who do not believe that judges in fact consider relative contributions when deciding cases, critics claim that a system of private financing creates the *appearance* that justice is for sale,<sup>235</sup> and argue that elections should be scrapped to eliminate this appearance.<sup>236</sup>

Unquestionably, campaign contributions create a serious risk of undermining public confidence in the impartiality of judicial decisions.<sup>237</sup> Eliminating elections will reduce the dependence of would-be judges on direct donor-to-candidate contributions,<sup>238</sup> but even under an appointive system, money matters. Interest-group lobbying, whose presence and success in appointive systems was discussed earlier,<sup>239</sup> requires extensive resources. Interest groups need money to

---

<sup>232</sup> Only North Carolina and Wisconsin have in place a system of public financing where candidates who accept the public funds voluntarily limit their expenditures from private fund-raising. See N.C. GEN. STAT. § 163-278.63 (2004); WISC. STAT. § 11.50 (2004); see also Seth Andersen, *Judicial Elections Versus Merit Selection: Examining the Decline in Support of Merit Selection in the States*, 67 ALB. L. REV. 793, 802 (2004); Link, *supra* note 132, at 134. The American Bar Association has advocated for the public financing of judicial campaigns. See AMERICAN BAR ASSOCIATION, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS: PART II, at 7 (1998). See generally Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467 (2001) (arguing publicly funded judicial elections would help restore the integrity of the judiciary).

<sup>233</sup> See, e.g., T.C. Brown, *Millions Keep Pouring in for Justices*, PLAIN DEALER (Cleveland), Sept. 13, 2004, at B1; Ronald D. Rotunda, *A Preliminary Empirical Inquiry into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, 14 NO. 2 PROF. LAW. 16, 16-19 (2003).

<sup>234</sup> See Nathan Richard Wildermann, *Bought Elections: Republican Party of Minnesota v. White*, 11 GEO. MASSON L. REV. 765, 782-85 (2003).

<sup>235</sup> See ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS: REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2002), available at <http://www.abanet.org/judind/pdf/commissionreport4-03.pdf>.

<sup>236</sup> See, e.g., Wildermann, *supra* note 234, at 772-73. Cf. *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (per curiam) (holding that limiting campaign contributions was constitutionally permissible in part because unlimited contributions created an appearance of legislative corruption).

<sup>237</sup> See Rotunda, *supra* note 233, at 16.

<sup>238</sup> Often the candidate's campaign funds are not administered by the candidate himself, but a candidate who wants to know who the donors are can certainly take note of the persons in attendance at fund-raising dinners and the like. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) (providing that a judicial candidate should not personally solicit funds but may establish a committee to do so on his behalf).

<sup>239</sup> See *supra* notes 144-81 and accompanying text.

pay their staffs, make information available to the media, coordinate with other interest groups, and energize their own members about the prospective judge.<sup>240</sup>

This last activity provides a parallel between appointments and elections. Campaign contributions assist the candidate in broadcasting his message to potential voters, but raise the possibility that the candidate will become beholden to contributors. Interest groups spend money for the analogous purpose of inspiring everyday citizens to become motivated in support of, or in opposition to, a particular nominee.<sup>241</sup> In that way, money can be (and is) used to educate voters or spur their participation in the judicial selection process. The danger presented by money in the appointment process is also analogous to the dangers in elective systems: Nominees know interest-group support could mean the difference between confirmation and rejection and as a result there is a risk that the judge will be beholden to the groups and contributors who supported him in the confirmation process.<sup>242</sup>

I do not mean to overstate the point. I do not fear that appointed judges are deciding cases so as to appease friendly interest groups. But neither am I very concerned that elected judges will decide cases to repay generous donors. The worry, to the extent there is one, stems from the requirement of *reelection*.<sup>243</sup> Judges about to face reelection may decide cases in certain ways to avoid upsetting potential donors.<sup>244</sup> But if an appointed judge were required to be reconfirmed, there is the same danger that the judge will decide cases so as not to upset interest groups or their contributors.<sup>245</sup> Thus, contributions can induce corruption in both appointive and elective systems, and may cause more of a problem in elective systems only because those systems require judges to undergo the selection process multiple times.

---

<sup>240</sup> See DeGregorio & Rossotti, *supra* note 153, at 221-231 (detailing the activities of interest groups surrounding the Bork and Thomas nominations).

<sup>241</sup> See, e.g., DAVIS, *supra* note 95; MICHAEL PERTSCHUK & WENDY SCHAETZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* 62-92 (1989).

<sup>242</sup> See Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935, 939-40 (1990).

<sup>243</sup> See Dimino, *supra* note 2, at 350-53.

<sup>244</sup> See Wildermann, *supra* note 234, at 79-80; see also Shapiro, *supra* note 242, at 939-40.

<sup>245</sup> See Shapiro, *supra* note 242, at 935, 939-40.

## VI. CONCLUSION

One need not be enamored with judicial elections to conclude that they are no worse than the other available selection systems. I have argued two points which should at least cause readers to think twice before advocating the abandonment of an institution that has kept one branch of government accountable to the people of many states since the Jacksonian era. First, many of the same problems that critics see with judicial elections are present in appointive systems as well. Second, the democratic accountability that was a major impetus for instituting elections continues to present a powerful argument for their continuance.

I do not argue that each of the problems discussed in the body of this Essay are worse, or even as bad, in appointive systems as in electoral ones. Scholars and policy-makers may well conclude that the threats caused by privately financing judicial election campaigns are worse than are the threats caused by the interest group involvement and financing of “campaigns” for and against the confirmation of judicial nominees. Similarly, though one must concede that appointive systems occasionally select cronies and hacks, perhaps states will conclude that the risk of selecting unqualified judges is greater with elections than appointments<sup>246</sup> (though empirical evidence as yet belies such a position).<sup>247</sup>

It is imperative that we examine both the plusses and the minuses of alternative systems before condemning our current ones, and when we do we find that many of the same problems that animate reformers will persist under appointive systems. Additionally, appointments have the considerable disadvantage of creating an “independent” but unaccountable judiciary, whose policy judgments are insulated from popular change.

---

<sup>246</sup> A recent working paper suggests that greater levels of judicial independence are correlated with greater levels of quality in the judiciary. See Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on Courts: Evidence from the American States* (Aug. 2004) (on file with the Northern Kentucky Law Review). Unfortunately, the conclusions about judicial “quality” are based on surveys of elite opinion, which may indicate nothing more than that independent judges’ decisions correlate better with elite opinion than do elected judges. Regardless, states may believe that providing greater independence to judges may raise the quality of their courts, either by removing incentives to decide cases wrongly or by making a career on the bench more attractive for the best lawyers.

<sup>247</sup> See, e.g., HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 150 (2d ed. 1998) (“[W]hy researchers are able to find so little difference in the characteristics of judges selected irrespective of the mechanism used . . . is that the mechanisms are not that different; in fact, at bottom, they are about the same.”); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 *JUDICATURE* 228, 228-35 (1987). Nevertheless, judicial quality may be heightened by increasing judicial independence even if the objective indicia of judges’ competence show no difference across selection schemes. See Dimino, *supra* note 28, at 803 n.3 (“A stellar résumé does not necessarily indicate an excellent analytical mind or first-class judicial craftsmanship.”).

The debate on the proper balance between judicial accountability and independence is centuries-old and will not end with the contributions in this volume. Recent years have shown the dangers of both. We have seen an apathetic public unqualified to stand guard over the rule of law and those bound to uphold it. But we have also seen a judiciary that has treated the rule of law as an invitation to politico-judicial policy-making.<sup>248</sup>

No system of judicial selection can guard against every danger. Any system of selecting fallible humans, by fallible humans, is bound to face some challenges. In the end, a healthy rule of law depends on both a judiciary and a public dedicated to preserving it.<sup>249</sup> No system of judicial selection can guarantee both. If the public maintains the “spirit of moderation” about which Judge Hand wrote,<sup>250</sup> then judicial elections present no problems. To continue paraphrasing, if the people lack that spirit, an appointive system will not be the salvation.<sup>251</sup> And if the people abdicate their responsibility, blindly delegating legal authority to judges, the rule of law “will perish.”<sup>252</sup>

We live in an imperfect world where government is “to be administered by men over men,”<sup>253</sup> where human nature foreordains self-interested politics,<sup>254</sup> and where we must choose to risk the tyranny of the majority or the tyranny of the judges.<sup>255</sup> Each of us must decide which risk he fears less.

---

<sup>248</sup> See, e.g., *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting) (“[T]he Court must be living in another world. Day by day, case by case, it is designing a Constitution for a country I do not recognize.”); *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“[T]his most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society’s law-trained elite) into our Basic Law.”).

<sup>249</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (“Our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.”). The “changeable philosophical predilections of” voters may provide no better protection for individual rights than do the predilections of Justices, but one or the other danger must be confronted.

<sup>250</sup> Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 155, 164 (Irving Dillard ed., 3d ed. 1960) (“[A] society so riven that the spirit of moderation is gone, no court can save . . . a society where that spirit flourishes, no court need save; [and] in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.”).

<sup>251</sup> See *id.*

<sup>252</sup> *Id.*

<sup>253</sup> *THE FEDERALIST* NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>254</sup> *THE FEDERALIST* NO. 10, at 77 (Clinton Rossiter ed., 1961).

<sup>255</sup> Cf. Hanssen, *supra* note 143 (analyzing the decision to grant courts independence as akin to a prisoners’ dilemma, where political actors will be willing to tie their hands with independent courts if the hands of their opponents are also tied).