



January 2014

Accountability before the Fact

Michael R. Dimino Sr.

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

Recommended Citation

Michael R. Dimino Sr., *Accountability before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451 (2008).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol22/iss2/9>

This Speech is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ACCOUNTABILITY BEFORE THE FACT†

MICHAEL R. DIMINO, SR.*

Too often the debate concerning judicial-selection methods is framed as a balance between “independence” and “accountability,” without a serious attempt to explain what is meant by those terms. As a result, the opposing sides in the debate focus on anecdotes illustrating the need to protect either independence or accountability, and rarely ask whether the worst of both worlds can be avoided by developing a system that preserves both an opportunity for the people to influence the policy choices made by courts and judicial freedom to decide individual cases based on the law when the result is unpopular.

This Essay argues that such a balance is possible if we abandon the notion that “independence” requires that there be no direct role for the public in judicial selection and that “accountability” requires that the public be able to express its disagreement with judicial rulings by voting the offending judges out of office. The balance suggested here has two elements.

First, judicial terms of office should be long and non-renewable, such that there are neither reelections nor reappointments. Where judges know that their ability to stay in office depends on how politicians or voters view their decisions, there is the potential for decisions to be made on the basis of those political calculations rather than on the merits.

Second, the initial selection of judges should be by election for high courts and by appointment for lower courts.¹ Public

† On March 12, 2008, the *Notre Dame Journal of Law, Ethics & Public Policy* hosted a panel discussion entitled, “Judicial Accountability: Experiments in the States.” Professor Dimino’s remarks have been revised for publication.

* Associate Professor, Widener University School of Law. I wish to thank Lauren Galgano, Jessica Burke, and the rest of the *Notre Dame Journal of Law, Ethics & Public Policy* for the invitation to participate in this symposium; Charlie Geyh for his comments on an earlier draft; and Keely Espinar for her research assistance.

1. Intermediate appellate courts present a quandary, for they enjoy some of the discretion that states’ highest courts have, and thus make policy in those areas not decided by controlling precedent. On the other hand, because they are bound by the law established by the highest courts and because their dockets are mandatory, more of their decisions will be dictated by settled law than is the case for the highest courts. My purpose here is not to decide which side of the line mid-level courts fall on, but rather to suggest the questions relevant to such a determination by illustrating the reasons that elections are appropriate

involvement in the staffing of high courts is beneficial from a democratic perspective because of the greater discretion and policy-making authority exercised by high courts. Lower courts, by contrast, are more often bound by settled law, and the judges on such courts do not make policy to the extent that other courts do. As a result, there is less need for public involvement in the selection of lower-court judges, and such involvement may well be a negative influence if it encourages those judges to depart from the application of settled law.

INTRODUCTION

Choosing a method of judicial selection is about allocating governmental decision-making authority, and as such it is an application of political theory. But the political theories that motivate the choice of judicial-selection systems underlay more than just deciding between elections and appointive systems. The question of the proper degree of insulation that the judiciary should enjoy is fundamental to issues involving constitutional and statutory limits on jurisdiction; to setting the number of courts and judgeships, and allocating those courts and judgeships on the basis of geography, jurisdiction, or some other factor; to limits on the authority of courts to issue, and to ensure compliance with, affirmative injunctions; to decisions about courts' budgets and staffing; to limits on the speech of judges and judicial candidates; to the removal of judges from office; and indeed to the institution of judicial review itself.

Recognizing that judicial independence and accountability are implicated throughout these areas (and others) makes clear that it is practically impossible simply to be "for" either judicial accountability or independence. Rather, each of us, and each state, makes a determination as to the optimal degree of public involvement in the judiciary. The national Constitution, for example, establishes an appointive system that does not directly involve the people, but—especially after the Seventeenth Amendment established direct election of senators—provides an opportunity for members of the public to express their views about nominees. The Constitution also establishes "good Behaviour" tenure for all federal judges,² and the threat of impeachment—in all likelihood the most powerful (if unwieldy) way for

for the highest courts in states and appointments are appropriate for the lowest. My references throughout this Essay to "high" courts or "appellate" ones, therefore, should not be taken to resolve the status of the intermediate courts.

2. U.S. CONST. art. III, § 1, cl. 2.

Congress to exert its influence over judges³—is all but a dead letter not because of the Constitution but because of congressional practice.

Thus the national government is fairly protective of judicial independence as to both appointments and removals, and as to both constitutional requirements and unwritten rules. Similarly, the Constitution gives Congress power to influence judges and judicial decisions aside from the confirmation and impeachment processes, but norms have developed that those powers will be used only rarely. Congress may establish (and perhaps disestablish)⁴ “inferior” federal courts.⁵ Congress may change the number of Justices on the Supreme Court and the number sufficient to constitute a quorum.⁶ Congress probably has the authority to increase the pay of only those judges it likes.⁷ And, Congress can withdraw the jurisdiction of lower courts,⁸ and make “Exceptions” to the appellate jurisdiction of the Supreme Court,⁹ to ensure that the courts do not consider matters that Congress would prefer not to have adjudicated in a federal court.

With all these possible ways to interfere with judicial independence (or, stated differently, ways to encourage judicial accountability), it is surprising that so much of our focus concerning the state systems is on judicial selection. I think the puzzle can be explained in large part by the fact that states opting for a system of popular election uniformly permit their citizens to re-evaluate the performance of sitting judges. Thus the threat to judicial independence in the thirty-nine states that elect some of their judges comes primarily not from the system of initial judi-

3. Cf. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (“‘Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.’” (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986))).

4. Cf. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (upholding the Repeal Act of 1802 which eliminated judgeships); Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in *CONSTITUTIONAL LAW STORIES* 13, 20–21, 31 (Michael C. Dorf ed., 2004).

5. U.S. CONST. art. I, § 1.

6. See 28 U.S.C. § 1 (2000) (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”).

7. U.S. CONST. art. III, § 1 (providing that judges’ compensation “shall not be diminished during their Continuance in Office”).

8. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

9. U.S. CONST. art. III, § 2, cl. 3; see *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1869).

cial selection,¹⁰ but from the reelections that those judges are forced to contemplate and endure if they are to remain in office.

It is therefore quite natural for advocates of greater judicial independence to focus on judicial elections, because elections not only involve the public directly in the choice of judges, but because they provide a mechanism for making sitting judges fearful of the political consequences of their decisions. In combination, then, judicial elections and reelections present the dangers to independence that jurisdiction-stripping, court-packing, etc., present in the federal model as well as the risks that judges will be chosen by the unqualified, uninterested voters who care far less about the law than about advancing their preferred policies.

But there is no reason *a priori* to link judicial elections to short, renewable terms of office. Likewise, there is no reason to think that an appointments process will be concerned solely with the qualifications of potential judges, or that the political popularity of a judge's decisions will have no impact on his or her future employment prospects. If we decouple initial selection from re-selection—separating “public input” from “accountability”—we can examine judicial independence in a more sophisticated way and protect the independence values about which we care the most while still preserving an arena for the public to influence the policies made by the judiciary.

Judicial independence helps to keep law separate from politics. Even the most cynical legal realist would acknowledge that law should and does constrain judges from deciding cases based solely on their policy preferences, or the policy preferences of their communities. If part of a judge's job is to protect minority rights against the preferences of the majority¹¹—indeed, if the very reason we have a judiciary as one of the three branches of government is to enable the performance of that counter-majoritarian function—then requiring judges to obtain the approval of the voters to continue in office fatally undermines that crucial function.

10. Even states that purport to have an electoral method of initial selection often see judges selected initially by appointment because appointment is the method used to fill vacancies. See Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 FORDHAM URB. L.J. 13, 13 (2007) (“Virtually every state appoints some judges, whether the appointments are of interim judges who are selected to fill unexpired terms of departing judges, initial appointments of all judges, or something in between.”).

11. See, e.g., Richard L. Hasen, “*High Court Wrongly Elected*”: A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305, 1363–65 (1997). “After all, lifetime federal judges are the ones who have enforced the VRA, school desegregation orders, and the like.” *Id.* at 1363.

Yet the law is not in fact or theory completely separate from politics, and all judges possess discretion in the performance of their jobs that allows them to apply the law differently from the way other judges would. A regime providing too much judicial independence runs the risk that judges will exercise that discretion to promote their own preferred policies and in so doing subvert the democratic process.¹² Indeed, if judges are completely independent then they face no constraints at all, including constraints imposed by law itself.¹³

In short, we seek to protect the rule of law and simultaneously avoid both pure majority rule and the rule of judges. The remainder of this Essay seeks to defend two proposals for resolving the independence/accountability dilemma: providing for lengthy, non-renewable terms of judicial office, thus substantially decreasing reelections, which showcase the worst fears of independence advocates; and electing high-level judges but appointing lower-level ones.

I. ELIMINATING THE REELECTION PROBLEM

A. *Reelections' Threat to Independence*

The most significant problems with judicial elections occur not because elections are used as the initial means of choosing judges, but because sitting judges must run in elections to retain their jobs. The prospect of reelection, not the initial election, gives rise to the "crocodile-in-the-bathtub" concern, according to which judges cannot help but be aware of the possibility that certain rulings will affect their ability to retain office.¹⁴

The Framers of the Federal Constitution wisely provided Article III judges with tenure during "good Behaviour," anticipating that any system of "[p]eriodical appointments, however regu-

12. See Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 72 (2001) ("The trade off for judicial independence is the risk that judges will pursue personal agendas that are in conflict with their judicial responsibilities.").

13. See 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? How about lower court judges being independent of judges of a higher court?").

14. See Paul Reidinger, *The Politics of Judging*, 73 A.B.A. J. 52, 58 (1987) (quoting California Supreme Court Justice Otto Kaus); see also Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994); 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 (1997).

lated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.”¹⁵ To the particular suggestion that judges have their performance evaluated in popular elections, Alexander Hamilton in *Federalist* 78 responded that if such elections were held, “there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.”¹⁶ Nothing, it seems, has changed. A lengthy tenure remains “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.”¹⁷

Massachusetts, New Hampshire, and Rhode Island follow the national government’s lead and give the judges on their courts of last resort tenure during good behavior. (Rhode Island’s judges’ tenure, like that of Article III judges, is potentially for life, whereas Massachusetts and New Hampshire impose a mandatory retirement age of seventy.) The other forty-seven states, however, require their supreme court justices to undergo a process of re-selection to continue in office.¹⁸ In nine of those states, the justices are reappointed, either by the executive, the legislature, or, in Hawaii, by a judicial nominating commission. Thirty-eight states re-select their supreme-court justices by election, with twenty of those states using Missouri-Plan-style retention elections, where the justice runs unopposed and voters are asked to vote yes or no on the question whether the justice should be retained in office.¹⁹

In forty-seven states, then, incumbent judges know that their ability to keep their jobs depends on gaining the approval of others. This is hardly a scheme calculated to ensure that judges will apply the law; indeed, the opposite is more nearly true. Reappointments and reelections are instituted precisely so that the incumbent judges do not stray too far from the preferences of the reappointing authorities. From an independence perspective, it makes no difference whether the re-selection is done by popular election or reappointment; in both cases judges are

15. See THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

16. *Id.*

17. *Id.* at 465.

18. See AM. JUDICIAL SOC’Y, JUDICIAL SELECTION IN THE STATES 5–12 (2007), available at <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf>; COUNCIL OF STATE GOV’TS, 39 THE BOOK OF THE STATES 263–70 (Keon S. Chi et al. eds., 2007); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 283 n.80 (2008).

19. See Charles B. Blackmar, *Missouri’s Non-Partisan Court Plan from 1942–2005*, 72 MO. L. REV. 199 (2007) (discussing the history and features of the Missouri Plan).

made answerable—accountable—for their decisions to an institution that is concerned with political results far more than with legal principle.²⁰

Retention elections, though they were designed to provide some measure of independence to judges,²¹ may not accomplish that objective well enough. A judge anticipating an impending retention election must be careful not to anger voters or interest groups so much that a campaign is run against his or her retention.²² Incumbent judges must also raise money in advance of a retention election in case such a campaign is waged, and as a result some commentators have claimed that independence is sacrificed to the demands of fund-raising.²³

As long as judges need to fear removal from office, independence will be threatened. States need not, however, give all their judges life tenure to accommodate this concern. States may reasonably conclude that allowing any government official to remain in office for a lifetime would permit the original selection of that official to have too much of a continuing effect on future generations. As times change, it may be appropriate to re-staff courts, as well as other branches of government, with new personnel better acquainted with modern legal theories and perspectives.

It would be preferable, however, to accomplish this result through setting fairly lengthy terms of office²⁴ and forbidding

20. Perhaps there are forty-six states in this category. Whether one counts Hawaii depends on one's faith in the political neutrality of the members of the judicial nominating commission. I have my doubts. See Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 732–33 (2002) (discussing the impact of politics in the selection and deliberations of nominating commissioners).

21. See, e.g., Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 55 (2003) ("Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents."); G. Alan Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, in BENCH PRESS 52, 53 (Keith J. Bybee ed., 2007).

22. See Geyh, *supra* note 21, at 56–57.

23. See *id.* at 57.

24. See David B. Rottman et al., Nat'l Ctr. for State Courts, *Call to Action: Statement of the National Summit on Improving Judicial Selection* 8 (2002), available at http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf ("States with relatively short judicial terms of office should consider increasing the length of those terms."); Harold See, *An Essay on Judicial Selection: A Brief History*, in BENCH PRESS, *supra* note 21, at 77, 88 ("The longer the term, the greater the independence and the less the accountability of the judge; the shorter the term, the greater the accountability to the retention authority and the less the independence from that authority.").

judges from running for multiple terms.²⁵ If a judge cannot be appointed or elected to succeed himself, then the greatest pressure to conform judicial decisions to the popular will is lessened.²⁶ At the same time, by forbidding the re-selection of the same judge, turnover is ensured but the people of the state would be free to install another judge with the same judicial philosophy, if the incumbent's is to its liking.

To be sure, lengthy terms and prohibitions on serving multiple terms do not eliminate all influences that might pressure judges to decide cases differently from what the law requires. Judges still may decide cases to appease their families, editorial writers, interest groups, or their own senses of justice—a risk present regardless of the manner of selection.²⁷ Judges may also believe that their chances for future judicial office may depend on the political acceptability of their decisions, for even in a system eliminating reelections, judges will want to run for (or be appointed to) higher judicial office.²⁸ But that problem is present under any system that permits judges to move up the hierarchy. In the completely appointive federal model, Presidents will nominate judges whose decisions have been, and are likely to be, politically acceptable, and the Senate will apply the same criterion in evaluating those nominees.

Even in systems where nominations are made by, or filtered through, a commission, such an incentive is present. For example, in a system where the governor must nominate judges from a list approved by a nominating commission, and where those nominees will then be subject to confirmation by the state senate, judges will have to appeal to the desires of the governor and the senate, as well as ensure that their prior behavior has not disqualified them in the eyes of the commission. Such a system may make judges more cautious about rendering politically unpopu-

25. *But see* Rottman et al., *supra* note 24, at 8 ("Term limits . . . are not appropriate for judicial office.").

26. *See* See, *supra* note 24, at 88 ("Limiting a judge to a single term, whatever its length, similarly increases independence and decreases accountability, because the judge has little incentive to please a retention authority.").

27. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting) (citing "worldly ambition" as an influence on judicial decision making).

28. *See* 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) (noting the influence on appointed judges of the desire to be appointed to higher courts).

lar decisions,²⁹ even as such systems are recommended as ways of lessening the impact of politics in the judicial-selection process.

Any proposal for eliminating reelections must deal with judges who are appointed to fill unexpired terms.³⁰ If they are permitted to run for office at the end of that period, the crocodile-in-the-bathtub danger is present. If they are prohibited from running, it may be difficult to find judges who would be willing to serve for only a portion of a single term. States may, therefore, wish to draw a distinction based on the length of time the judge was able to serve before the end of the term, in the same way the Twenty-Second Amendment deals with presidential succession.³¹ Thus, if the regular term of office for an elected judge is twenty years, judges who are appointed with, for example, fewer than ten years remaining in the term would be permitted to run for reelection, while judges appointed to a term of ten years or more would be prohibited from seeking another term. Under such a system, the current possibility for judges to make decisions based on their own prospects for reelection would be reduced, and yet few potential judges would be dissuaded from accepting an appointment to serve half of an unexpired term if the unexpired term is sufficiently lengthy.

So while eliminating reelections will not remove every possibility that judges will consider the political consequences of their decisions, it surely negates the political consequence of the greatest import to most elected judges.

B. *Public Involvement in Initial Judicial Selection*

Without question, it is more difficult for the public to make judges "accountable" if judges' decisions need not be defended come election time. But those who worry about rogue judges may

29. See ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 75-77 (1974) (reporting on the influence of politics in the deliberations of nominating commissions); JOANNE MARTIN, *MERIT SELECTION COMMISSIONS* 20-22 (1993) (same).

30. Similar concerns are raised by recess appointments even in systems, such as the federal one, that grant judges good-behavior tenure. Where a judge takes office before his or her permanent appointment has taken effect, there is a danger that the appointing authority will consider the judge's decisions during the period of temporary service in deciding whether to appoint the judge to a full term, with the concomitant danger that a recess appointee will seek to appeal to the appointing authority when deciding cases.

31. See U.S. CONST. amend. XXII, § 1 ("No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.").

be given some consolation if the *initial* process of selecting judges involves a frank discussion of the judicial philosophies of the persons seeking judicial office. Public input into initial judicial selections helps ensure that judges will assume the bench only if their general approaches to judging are consonant with the public's belief about the proper judicial role, but does not pressure those judges into deciding individual cases according to public opinion. As a result, promoting public involvement in initial selection but not in the continuing evaluation of judges may prove a workable compromise between champions of independence and accountability.

Initial selections—whether by election or appointment—present quite different, and less substantial, hazards to judicial independence than do reelections and reappointments. Gone is the crocodile-in-the-bathtub phenomenon; in its place critics of public involvement can decry only public ignorance about the candidates and the legal issues, as well as the concern that would-be judges might prejudge cases to appease powerful interests and make their appointment more likely.

To understand the different threats to independence posed by initial elections and reelections, one must separate what may be called decisional accountability from prospective accountability.³² If individual judges are accountable to the public or to politicians for their decisions, then the capacity of the judiciary to serve as a bulwark on behalf of the law against the popular will is undermined. Decisional accountability thus seeks to extend democratic control over policy to the individual case and uses as its means the intimidation of the individual judges who make the decisions.

Prospective accountability seeks to correct a different perceived harm of the independent judiciary, and can achieve it by means drastically different from the means used to impose decisional accountability on judges. Advocates of prospective accountability understand that results in individual cases may be

32. Fellow panelist Charles Gardner Geyh deserves credit for the latter term. See CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE* 221 (2006). I acknowledge the oxymoronic quality of the term; perhaps it would be better to speak simply in terms of prospective public influence. Beyond semantics, the idea of prospective "accountability" can be criticized as not providing much, if any, real accountability. For someone who identifies accountability as only oversight of decisions by incumbent judges, there is no room for compromise with those who favor decisional independence. I offer the idea of prospective accountability not as a means of achieving both independence and accountability, but of compromising and avoiding the worst possible results under systems providing more robust guarantees of either.

unpopular, and that the rule of law requires that the majority will be obstructed on occasion. But accepting unpopular individual cases is far different from accepting the imposition of public policy created by judges whose views are out of step with society.³³ Where judicial decisions are not dictated by the law, but instead are the product (in whole or in part) of the judges' political or contestable judicial philosophies, judges are making policy through their decisions, according to the same criteria by which legislators make it. As such, democratic principles suggest that judicial policy-makers, like legislative ones, be subject to some public influence.

The national government provides for the courts to be prospectively accountable in this sense by giving the political branches the responsibility for judicial appointments,³⁴ but provides decisional independence by giving tenure and salary protection to individual judges. It is therefore unsurprising that throughout our history, as many scholars have demonstrated, presidents and congresses have shaped the law by shaping the courts.³⁵

33. See, e.g., WILLIAM H. REHNQUIST, *THE SUPREME COURT* 236 (1987) ("We want our federal courts, and particularly the Supreme Court, to be independent of popular opinion when deciding the particular cases or controversies that come before them But the manifold provisions of the Constitution with which judges must deal are by no means crystal clear in their import, and reasonable minds may differ as to which interpretation is proper. When a vacancy occurs on the Court, it is entirely appropriate that that vacancy be filled by the president, responsible to a national constituency, as advised by the Senate, whose members are responsible to regional constituencies.").

34. See REHNQUIST, *supra* note 33, at 236 ("[I]t is . . . both normal and desirable for presidents to attempt to pack the Court"). Democratic presidential candidate Barack Obama has already stated his intention to choose his Supreme Court nominees on the basis of the nominees' commitment to fulfilling Obama's political views through judicial interpretation of the Constitution and laws. See Edward Whelan, *Obama's Constitution: The Rhetoric and the Reality*, WKLY. STANDARD, Mar. 17, 2008, at 12, 12, available at <http://weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp> ("We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old—and that's the criterion by which I'll be selecting my judges." (quoting Sen. Barack Obama)). Of course Obama is not exceptional in his desire to achieve and entrench policy gains through the judiciary; every president has done so. Indeed, John Adams's appointments of the midnight judges in 1801 entrenched the practice in constitutional lore because it gave rise to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

35. See generally, e.g., HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* (5th ed. 2008); LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005); CHRISTINE L. NEMACHECK, *STRATEGIC SELECTION* (2007); LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985); DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES* (1999); Michael R. Dimino,

Recognition of the policy-making role played by the courts has led to an increase in the scrutiny given to judicial nominees' (including lower-court nominees') philosophies by the Senate and interest groups. Thus while the federal system does not use elections to select judges, the public has become increasingly involved in the process in a manner that may be seen as balancing the independence that judges have acquired for themselves once they assume the bench.³⁶

States should be able to achieve the same balance, and doing so through initial elections may be an appropriate way to do so. States may reasonably conclude, as their predecessors in the Jacksonian era did, that elections can be a positive force in helping the judiciary achieve independence from the political elites who would otherwise control the appointments process.³⁷ Similarly, states may reasonably be wary of the potential influence of the organized bar and other interest groups in a system using nominating commissions in the appointments process. Elections do, of course, have the potential of advantaging other interests—political bosses and candidates with name recognition or money, for example—but they provide some opportunity for the people to check those influences, and to do so before the judges assume office. Retention elections, by contrast, occur after the judges have taken the bench, thus raising problems of decisional accountability, even if they otherwise allow the public to object to the choices made by the nominating commissions and political officials involved in the appointments process.³⁸

Without such a popular check on elites' judicial appointments, there is an increased risk that the judges will decide cases

Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 284 (2005) ("[I]t is undeniable . . . that the attitudes of the judges forecast their decisions on the bench. 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." (footnotes omitted)).

36. See GEYH, *supra* note 32, at 171–222, 254–55.

37. See 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).

38. Retention elections typically do not give the public this opportunity. Because retention elections are uncontested, there is no opponent to point to the deficiencies of the incumbent. It is rare that interest groups will pick up the slack, as they did in the famous 1986 California retention elections that ousted Chief Justice Bird and her colleagues, and advocate for the defeat of judges seeking retention. Of course, that is exactly the point of having retention elections rather than more competitive, and more democratically effective, alternatives.

on the basis of a philosophy not shared by most of the people.³⁹ The point here is not that those judges will violate the law, or even that they will consciously shape the law consistent with their policy preferences, but rather that judges decide cases predictably based on their judicial philosophies, and that a wide range of outcomes is consistent with judges' obligation to decide cases faithfully. There is a tremendous difference between a Brandeis and a Van Devanter, between a Douglas and a Frankfurter, and between a Brennan and a Rehnquist. One may believe that each of those Justices faithfully applied the law as he understood it, and yet their jurisprudential philosophies yielded starkly disparate, and predictable, votes in individual cases. Within the wide range of judges who would faithfully interpret the law, surely the public has a legitimate interest in encouraging the appointment of one over another. Elections provide one means for states to provide this aspect of prospective accountability.

Some proponents of judicial independence maintain that permitting the public to influence even the initial choice of judges creates problems in that it causes judges to prejudge cases and/or causes them to be beholden to special interests that assist the judge in gaining the appointment. As I've written at length elsewhere, however, judges have views about cases whether or not the public is permitted to know those views,⁴⁰ and interest groups play a significant role in judicial appointments, as well as in elections.⁴¹

In judging, as in everyday life, it is rhetorically beneficial to claim "open-mindedness." Sophisticated defenders of judicial independence, who understand the weakness of arguing that judges must be independent because they merely apply law and do not decide cases based on their own policy views, instead claim that independence is necessary to ensure fairness to litigants.⁴² In the view of these commentators, parties appearing before a judge should not have to go through the motions of

39. See TRIBE, *supra* note 35, at xi ("[T]hose who interpret and enforce the Constitution simply cannot avoid choosing among competing social and political visions, and . . . those choices will reflect *our* values . . . only if we peer closely enough, and probe deeply enough, into the outlooks of those whom our Presidents name to sit on the Supreme Court.").

40. See 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, 340-42 (2003).

41. See Dimino, *supra* note 35, at 289-94.

42. See Charles Gardner Geyh, *Straddling the Fence Between Truth and Pretext: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 435, 447 (2008).

making legal argument to convince somebody who has already made up his mind.

A realistic assessment of the judicial process, however, would recognize that judges often sit on cases presenting legal issues on which the judge has made up his mind. We should want this to be the case. Judges spend their careers, both before assuming the bench and while in office, thinking about legal issues.⁴³ Surely they not only have general thoughts concerning legal topics but have firm views on some legal questions. The judge who has assumed the bench after spending a career in a prosecutor's or a public defender's office should have a firm view as to the correctness of *Miranda v. Arizona*⁴⁴ and *Mapp v. Ohio*.⁴⁵ The civil-rights attorney-turned-judge should have a firm view on *Brown v. Board of Education*.⁴⁶ And every lawyer should have a firm view on the correctness of *Marbury v. Madison*'s conclusion that federal courts have the power of judicial review.⁴⁷ Do we really want a judge to be "impartial"—in the sense of open to persuasion—on the question whether a person can be convicted of treason on the testimony of fewer than two witnesses?⁴⁸ And do we think that appointing judges will make judges impartial in that sense? Surely not.

Justices Brennan,⁴⁹ Marshall,⁵⁰ and Blackmun⁵¹ committed themselves to reversing every capital sentence presented to them, regardless of precedent or the facts of any individual case. That commitment in death-penalty cases is perhaps the most famous example of judicial closed-mindedness, but it is hardly unique. Judges regularly issue opinions in which they announce their reasons for reaching a decision in a case, and in the process explain how the law would be applied in other situations not presented

43. See *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem.) (recognizing that by the time most judges ascend to the bench they have "formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution").

44. *Miranda v. Arizona*, 384 U.S. 436 (1966).

45. *Mapp v. Ohio*, 367 U.S. 643 (1961).

46. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

47. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803).

48. See U.S. CONST. art. III, § 3, cl. 1; *Marbury*, 5 U.S. (1 Cranch) at 179 (arguing that judicial review requires adherence to the provisions of the Constitution and explaining that, in the context of the treason question, "the language of the constitution [sic] is addressed especially to the courts . . . [and] prescribes, directly for them, a rule of evidence not to be departed from").

49. See *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring).

50. See *id.* at 358–60 (Marshall, J., concurring).

51. See *Callins v. Collins*, 510 U.S. 1141, 1145–46 (1994) (Blackmun, J., dissenting) (denying Petition for Certiorari).

in the case at bar.⁵² Statements made extra-judicially—be it in a commencement address, a campaign speech, or a confirmation hearing—could not possibly evince any more of a commitment than Justices Brennan, Marshall, and Blackmun made, and might be considerably more equivocal. If those Justices were “impartial” when they participated in death-penalty cases, then surely elections can co-exist with the requisite impartiality.⁵³

In addition, it is worth remembering that whatever “impartial” means, litigants are guaranteed a judge who is actually impartial, and not just a judge whose predispositions are unknown. Thus, a judge who is inclined to view cases in line with the positions of chambers of commerce or trial lawyers’ associations will (or will not) be “partial” regardless of whether the candidate makes campaign statements or accepts contributions that would associate himself with those groups.

Elections are potentially problematic from an impartiality perspective only if the campaign process makes it *more difficult* to reconsider statements one has made during the campaign, as compared to the effect on the judge of other statements that may have indicated his views on legal issues. Justice Stevens cited the possibility for campaign statements to have this effect when he argued in dissent in *Republican Party of Minnesota v. White* that judicial candidates could constitutionally be prohibited from speaking their views on disputed legal or political issues: “Once elected, he may feel free to disregard his campaign statements, . . . but that does not change the fact that the judge announced his position on an issue likely to come before him *as a reason to vote for him*.”⁵⁴ Even if one thinks that judges will be faithful to such announcements for fear of electoral retribution,⁵⁵ the effect can occur only in a regime providing for *reelections*. Without the looming threat of a vote, one’s campaign statements are no more binding than are any other statements the judge has made about legal issues.

52. See Laurence H. Tribe, *Foreword* to PAUL SIMON, *ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT’S NOMINATION BATTLES* 13, 18 (1992).

53. See Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 745 (2002) (making the same point with regard to Justice Scalia’s participation in abortion cases).

54. *Republican Party of Minn. v. White*, 536 U.S. 765, 800 (2002) (Stevens, J., dissenting).

55. The majority did not. See *id.* at 780 (opinion of the Court) (“[O]ne would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.”).

Likewise, campaign contributions are alleged to be influential not only because the judge might feel indebted to the contributor, but because the judge would fear that a similar contribution to the judge's reelection campaign would be forthcoming only if the judge's decisions are to the contributor's liking. Eliminating reelections lessens the potentially pernicious influence of campaign contributions. Further, if campaign financing causes a problem of impartiality, there are alternatives short of eliminating elections. Public financing systems, as seen in North Carolina and as recommended in Wisconsin, would accomplish the goal.

Thus, regardless of the system for selecting judges, those judges will (and should) prejudge issues before those issues are presented in actual cases, and judges who successfully assume the bench will always be indebted to the politicians and interest groups who facilitated the selection, whether the selection comes as the result of a popular election or an appointment. More fundamentally, however, one might question whether the harm of excluding the public from the policy-making process—prospectively, in the case of the judiciary—exceeds whatever harm might be caused by including them. Those who seek to minimize public influence in judicial selection need to demonstrate why open-mindedness as to legal questions that should be open and shut is such an important goal, and why—in an age of legal realism and empirical study of judicial behavior—judicial policy making should be immune from public influence. Bald assertions of “due-process” rights⁵⁶ will not suffice.⁵⁷

Appointments by public officials who themselves are decisionally accountable provide some of this prospective accountability, as we see in the national government. One may doubt,

56. See, e.g., *In re Bybee*, 716 N.E.2d 957, 959–60 (Ind. 1999) (per curiam) (“We firmly believe that the ability of judges to provide litigants due process and due course of law is directly and unavoidably affected by the way in which candidates campaign for judicial office.”); 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 (1999); Max Minzner, *Gagged But Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 UMKC L. REV. 209, 228–31 (1999); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1060 (1996); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 189 (1996); see also *Ackerson v. Ky. Judicial Ret. & Removal Comm’n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (characterizing speech by judicial candidates as raising concerns about “fundamental fairness and impartiality”).

57. See *Brown v. Doe*, 2 F.3d 1236, 1248–49 (2d Cir. 1993); Chemerinsky, *supra* note 53, at 743–45; Dimino, *supra* note 40, at 333 nn.215–16, 338–46.

however, whether appointments provide the same opportunity for public input on the state level. Because state judges are not given the same media attention as are federal nominees, especially nominees to the Supreme Court, it is possible for state officials to appoint judges with relatively extreme philosophies and not trigger the kind of interest-group reaction that would accompany a similar appointment to the federal courts. Furthermore, because legislators are rarely elected based on their *judicial* philosophies, it appears that judicial elections provide much more of an opportunity for the public to focus on judges and make known their desires for the appropriate judicial role than does a process of action by the political branches in which those officials act as proxies for the public.

II. DIFFERENT SELECTION SYSTEMS FOR DIFFERENT COURTS

States commonly select judges on different courts by different means. Ten states,⁵⁸ out of the thirty-nine that hold some elections for judges, select other judges by appointment.⁵⁹ Curiously, however, states employing both elective and appointive systems uniformly appoint judges serving on high courts, and reserve elections for low-level ones. This approach is exactly backwards.

Elections are at their worst when applied to trial courts. The electorate is ill-informed about the candidates, and pressure to rule for a particular party is greatest for trial courts because of the publicity surrounding a trial, and because a trial takes place soon after the incident giving rise to it. More importantly, if a trial court caves to political pressure, it is more likely to violate a clear command of the law than would an appellate court that reaches a decision based in part on political calculations because trial courts typically have less discretion than do appellate courts.

One might think that holding elections for low-level courts would enable voters to have a greater ability to become informed about the candidates. Small districts mean that voters have a better chance of being personally acquainted with the candidates,⁶⁰ and insofar as judicial decisions in local matters should be reflec-

58. Plus Maryland, which appoints its trial-court judges and then holds contested elections for subsequent terms, and appoints its appellate judges under the Missouri Plan.

59. See COUNCIL OF STATE GOV'TS, *supra* note 18, at 263–70. The figure includes appellate judges and general-jurisdiction trial judges, and it ignores the often varied methods states use to select judges of courts with limited jurisdiction.

60. See Larry T. Aspin & William K. Hall, *The Friends and Neighbors Effect in Judicial Retention Elections*, 40 W. POL. Q. 703, 707 (1987) (reporting that reten-

tive of the community, it might make sense to permit the community to have input.

As it actually happens, however, voters do not know who the candidates are in these elections, and there is little reason for them to become informed. The more routine and less discretionary the business of the court, the less difference it makes who is selected. Further, even where the choice of judge affects the outcome of litigation, voters will rarely have reason to believe those outcomes will have a material effect on the voters' lives. As if that were not enough reason for voters to remain rationally ignorant about the candidates, there are often so many judgeships on a ballot that becoming knowledgeable about the candidates would take an unreasonable amount of time.⁶¹

Further, because trial courts apply law that is more likely to be settled than is the law applied by appellate courts, trial courts have less freedom to accommodate the desires of the electorate without breaking the law. Judges need to rule in unpopular ways. Applying a principle of law to the benefit of an unpopular party, or to the detriment of a popular one, is a fundamental requirement of the judicial function. Reelections, however, make such a choice doubly difficult because the judge will be hampered not only by his own feelings about the case but by electoral consequences as well.

Some have argued that the actual, potential, or perceived influence of elections on judicial decisions should lead us to eliminate all judicial elections, if not as a requirement of due process, then as a matter of wise policy.⁶² And certainly judges at all levels have law that binds, or is supposed to bind, them no matter what the judges' or the public's preferences are. Nevertheless, the differences between trial courts' responsibilities and those of appellate courts—particularly the highest courts of the states—are significant.

It is those high courts whose decisions impact the most people and set policy to be applied by the rest of the judicial hierarchy. Further, it is often the high courts for whom the law has not provided a clear result in the case under review. Therefore, pub-

tion-election voters in judges' home counties are more likely to vote than are out-of-county voters).

61. See Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, 83 JUDICATURE 79, 81 (1999) ("There is also some evidence that voters fail to differentiate among judges on the same ballot. For example, judges in the same district received very similar proportions of affirmative votes."); Reddick, *supra* note 20, at 735 (citing William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 346 (1987)).

62. See, e.g., Geyh, *supra* note 21, at 58–72.

lic involvement in judicial policy might be able to help shape the law in a manner consistent with society's goals rather than with the judges'.

State high courts are accountable within the judiciary to only the Supreme Court of the United States, and even there only as to matters of federal law.⁶³ No decisional law of the state binds state supreme courts, for they can overrule even their own past decisions, and they have the discretion to reach different conclusions than federal district courts and courts of appeals as to matters of federal law. To be sure, statutory law and precedent from the U.S. Supreme Court can place considerable constraints on judges of state supreme courts (as, incidentally, state courts' decisions place constraints on the Supreme Court),⁶⁴ but where such courts' dockets are discretionary, it is unlikely that they will take a case unless reasonable jurists could disagree as to the meaning of the law. Thus, the most sympathetic case for judicial independence—the judge who is punished at the polls for performing his job in the only way faithful to the law—is rarely present when considering elections for state supreme courts.

State supreme courts are even more clearly able to exercise their discretion in making policy than is the Supreme Court of the United States. No one would seriously dispute the proposition that the members of that Court make policy when they give effect to the broad terms in the Constitution and federal statutes.⁶⁵ State supreme courts have similar authority in interpreting state constitutions and statutes.⁶⁶

63. See generally RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 466–541 (5th ed. 2003).

64. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature or by its highest court in a decision is not a matter of federal concern.”); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) (limiting the U.S. Supreme Court's power to reverse the decisions of any state's highest court on matters of state law).

65. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (describing the Supreme Court as a “political institution”); Dimino, *supra* note 35, at 277–78 (“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, criminal justice, family relations and sexual intimacy, tort liability, religion, education, and elections, just to name a few areas, have come about through the actions of courts.” (footnotes omitted)).

66. See *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (“Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well. Which is precisely why the election of state judges became popular.” (citation omitted)).

Whereas, however, in the federal courts, "with a qualification so small it does not bear mentioning, there is no such thing as common law,"⁶⁷ state courts regularly apply the common law to fields—contracts, property, and torts—having significant impacts on citizens' daily lives. Except where the state legislatures have acted to strip the courts of common-law authority, state courts retain the power, not just to interpret the law made by other branches of government, but to make the law themselves. It has even been suggested that state courts should take a greater, more activist, role in construing legislation because their experience with the common law has accustomed them to shaping the law.⁶⁸

This greater policy-making authority held by state supreme courts makes it all the more vital that their actions be subject to some popular control.⁶⁹ The justification for independence is to ensure the ability to apply the law; the justification for all elections—legislative and executive, as well as judicial—is to ensure that lawmakers have the requisite connection to the sovereign authority in a democratic republic: the people.⁷⁰

Voters in today's judicial elections do not know much about any of the candidates, including those running for seats on high courts. Nevertheless, because there are few seats on states' highest courts, the number of elections and candidates will be small. Accordingly, it will be possible for voters to become informed. Particularly if the ballot is not crowded with lower-court races, voters would be able to focus their attention on the small number of high-court candidates.

Furthermore, the current ignorance of voters may be due in large part to limitations on the speech of judicial candidates. In 2002, in *Republican Party of Minnesota v. White*,⁷¹ the Supreme Court declared unconstitutional the most restrictive of these regulations, the "announce clause," which prohibited judicial candidates from announcing their views on disputed legal or political

67. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 13 (Amy Gutmann ed., 1997).

68. See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 18–34 (1995).

69. Cf. TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999). Peretti argues that "value-voting and political motive [are] both necessary and legitimate ingredients in constitutional decisionmaking . . ." *Id.* at 77.

70. Cf. U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 15, at 468 ("[T]he power of the people is superior to both [the judicial and the legislative power] . . .").

71. *White*, 536 U.S. 765.

issues. However, several other restrictions, whose constitutionality has been challenged in lower courts, remain on the books. Some of those restrictions prohibit candidates from making "pledges or promises of conduct in office"⁷² and from making statements that "commit or appear to commit the candidate" to "issues that are likely to come before the court."⁷³ If elections are defective because of the ignorance of voters, such ignorance is not necessarily the voters' fault. States may or may not decide that elections are an appropriate method of judicial selection. But it straw-mans the argument to complain about the voters' inability to select good candidates when the voting scheme itself makes it difficult for voters to become informed.

Appointments display the opposite set of advantages and disadvantages. Removing the public from the direct involvement in judicial selection can permit trial judges the freedom to render unpopular rulings in individual cases, but removing the public from the selection of high-court judges invites policy making by officials who hold views the public does not support. Limiting elections to high-courts, however, capitalizes on the comparative advantage of appointments in permitting elites to identify qualified potential judges unknown to the general public, while also taking advantage of elections' comparative advantage in permitting the public to influence the institutions most involved in policy making.

CONCLUSION

Defenders of judicial independence concede that, "[i]nsofar as judges abuse their independence by implementing their political or class agendas instead of adhering to the law, it would seem that the time has come to rethink, in a fundamental way, the need for their independence,"⁷⁴ though they deny the truth of the statement's major premise. Still, such concessions do not go far enough.

Such statements imply a false dichotomy between "adhering to the law" and "implementing political or class agendas," and

72. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2000).

73. *Id.* at Canon 5A(3)(d)(ii).

74. GEVH, *supra* note 32, at 263; *see also id.* at 279 ("If, as postrealists insist, independent judges ignore the rule of law and implement their own policy predilections, judicial independence loses its *raison d'être* and simply liberates unelected judicial elites to trump the majority's political preferences with their own."); *id.* at 281 ("If we ultimately conclude that judges employ law as a shill to conceal nakedly political decision making of a sort best reserved for Congress or the people, then insulating such decision making from the influence of Congress or the people becomes largely indefensible . . .").

therefore do not address that vast area of appellate judging in which the correct answer is not clear, and judges with different political inclinations will reach different results though each judge is "adhering to the law." The public has an interest in shaping those results, and selecting appellate judges initially by election is one way of satisfying that interest without unduly undermining the decisional independence that underlies judicial review and the rule of law.