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Section 2 Challenges to Appellate Court Elections: Federalism, Linkage, and Judicial Independence

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Abstract

In *Chisom v. Roemer*, the United States Supreme Court held that judicial elections fall within the ambit of section 2 of the Voting Rights Act of 1965, which precludes election practices and structures that result in racial discrimination. In so doing, though, the *Chisom* Court recognized that "serious problems [may] lie ahead in applying the 'totality of circumstances' standard" developed in section 2 to cases involving legislative elections to the election of judges. These problems stem from the significantly different roles that the two branches serve in our republican form of government. As Justice Ginsburg explained in her dissent in *Republican Party of Minnesota v. White*, "judges perform a function fundamentally different from that of the people's elected representatives;" judges "represen[t] the Law," not "the voters who placed them in office." Consequently, to "assure its people that judges will apply the law without fear of favor," states have broad authority to adopt and to maintain the judicial selection method they deem best to preserve the independence and integrity of their judiciary.

When applied to judicial elections, then, section 2 raises novel and difficult federalism concerns, pitting seminal civil rights legislation against a state's inherent authority to structure its judicial department. Specifically, in the judicial election context, section 2 challenges a state's interest in "linkage"—i.e., in maintaining the connection between a judge's jurisdiction and her electoral base. The Fifth, Sixth, Seventh, and Eleventh Circuits have turned away section 2 challenges to the election of trial judges, concluding that linkage constitutes a substantial state interest bearing on both the totality of the circumstances analysis and whether there is a feasible remedy to the challenged electoral scheme. The Fifth and Eleventh Circuits, however, have suggested that a state's linkage interest may be diminished with respect to its appellate courts, which decide cases through multimember panels that resemble legislative bodies, not trial courts. Drawing on

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these claims, the NAACP and other individual plaintiffs have filed section 2 actions in Texas and Alabama, arguing that the statewide election of appellate judges in those states impermissibly dilutes the vote of minority voters.

Given that thirty-eight states use some form of judicial elections in selecting their appellate courts, these new section 2 cases directly threaten the ability of states to adopt the judicial selection method that they think best advances the independence and accountability of their judiciary. This Article contends that a state's interest in linkage applies equally to its trial and appellate courts and that this interest should be accorded significant weight under a section 2 analysis, especially when the overarching judicial selection scheme (and not a particular discriminatory device) is challenged. To provide a better understanding of a state's linkage interest, Section II explores the different methods of judicial selection that the federal and state governments adopted at the founding as well as the reasons for these selections. In particular, this Section explains how developing threats to the independence and accountability of state judiciaries—not racial animus—led a majority of the states in the nineteenth century to adopt judicial elections. Section III examines two problems that attend section 2 challenges to judicial election schemes: the lack of a benchmark (which is a necessary condition under *Holder v. Hall*) and the states' linkage interest in their appellate courts. Given the variety of judicial election methods states have adopted—partisan, nonpartisan, districts, statewide, and retention elections—courts do not have an objective way to specify an appropriate benchmark, a norm for deciding whether there has been vote dilution. Moreover, a state's concern with the accountability and independence of its judiciary is heightened with regard to its appellate courts because these courts interpret the state constitution, make common law, and affect policy for all the citizens of the state. Accordingly, the article concludes that federal courts should afford the states' linkage interest substantial deference under section 2 of the Voting Rights Act.

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INTRODUCTION

The Voting Rights Act of 1965[1] (the "VRA") "employed extraordinary measures to address an extraordinary problem,"[2] the prolonged failure to enforce the Fifteenth Amendment's guarantee of the right of *all* citizens to vote.[3] Initial legislative efforts to enforce the Amendment were inconsistently applied and ultimately repealed during Jim Crow.[4] Legislation in the 1950s and 1960s proved equally ineffective as enforcement actions were slow and states found new ways to suppress minority voting.[5] Section 2 of the VRA, therefore, took a different tack. It imposed a nationwide prohibition on any infringement of the right to vote "on account of race or color."[6] In particular, section 2(a) declared that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[7] Section 2(b) stated that,

> [a] violation of [section 2(a)] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally

1. 52 U.S.C. § 10101 (2012).
2. Shelby Cty. v. Holder, 570 U.S. 529, 534 (2013).
3. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.").
4. *See* South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966) ("As the years passed and fervor for racial equality waned, enforcement of the laws became spotty and ineffective, and most of their pro-visions were repealed in 1894.").
5. *See* Nw. Austin Mun. Util. Dist. Co. One v. Holder, 557 U.S. 193, 197–98 (2009).
6. 52 U.S.C. § 10301(a) (2012).
7. *Id.*

> open to participation by members of a class of citizens protected by [section 2(a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[8]

Consequently, section 2 precludes election practices (e.g., poll taxes and literary tests) and structures (e.g., subdistricts or at-large elections) that are intended to discriminate based on race or that result in such racial discrimination. To make out a section 2 claim, a plaintiff must show that the challenged practices and procedures either (1) were adopted with discriminatory intent or (2) resulted in the denial or abridgement of the right to vote.[9]

In two companion cases, *Chisom v. Roemer*[10] and *Houston Lawyers' Ass'n v. Attorney General of Texas*,[11] the United States Supreme Court held that section 2 applies to judicial elections but did not provide guidance as to what a plaintiff would have to show to make out her claim in the judicial context.[12] Given that the *Gingles* factors "cannot be applied mechanically and without regard to the nature of the claim,"[13] the Court recognized that "serious problems [may] lie ahead in applying the 'totality of circumstances'" test developed in the context of legislative elections to judicial elections.[14] Although judges are "representatives" for the purpose of section 2, they "perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; 'judge[s] represent[t] the Law.'"[15] As a result, "[a] State may assure its people that judges will apply the law

8. § 10301(b).

9. Chisom v. Roemer, 501 U.S. 380, 383–84 (1991).

10. 501 U.S. 380 (1991).

11. 501 U.S. 419 (1991).

12. *Id.* at 428.

13. Johnson v. De Grandy, 512 U.S. 997, 1009 (1994) (quoting Voinovich v. Quilter, 507 U.S. 146, 158 (1993)). In *Thornburg v. Gringles*, 478 U.S. 30 (1986), the Supreme Court developed a three-factor test for plaintiffs claiming voter dilution. Plaintiffs must show "that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district' . . . that the minority group is 'politically cohesive' . . . [and] 'that the white majority votes sufficiently as a block to enable it . . . to defeat the minority's preferred candidate.'" *Id.* at 50–51.

14. *Chisom*, 501 U.S. at 403.

15. Republican Party of Minn. v. White, 536 U.S. 765, 803 (2002) (Ginsburg, J., dissenting) (quoting *Chisom*, 501 U.S. at 411 (Scalia, J., dissenting)).

without fear or favor"[16] by, among other things, adopting the method of judicial selection that a State deems most appropriate for promoting the independence, accountability, and integrity of its judiciary.

With respect to judicial elections, the Court has held that states have an important interest in "linkage"—in making a judge's jurisdiction co-extensive with his or her voters' area of residency—to safeguard these qualities in their judiciaries.[17] The Fifth and Eleventh Circuits, however, have suggested that a state's linkage interest might be limited to its trial courts. Whereas trial judges decide cases on an individual basis, multi-member appellate courts conduct their work through panels such that "there might be more to be said for some form of 'representation' on a collegial court (like a state supreme court) than on a single-judge trial court."[18] Two current cases working through the federal system (one in Alabama and one in Texas)[19] require the federal courts to decide two important issues—whether states have a linkage interest with regard to appellate court elections and, if so, how much weight should be given that interest when considering the *Gingles* totality of the circumstances analysis and the feasibility of the plaintiffs' proposed remedy.[20] Given that thirty-eight states use elections in some

16. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015).

17. *See* Hous. Lawyers' Ass'n v. Att'y Gen. of Tex., 501 U.S. 419, 426 (1991) (explaining that a state's "interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters—is a legitimate factor to be considered by courts among the 'totality of the circumstances' in determining whether a § 2 violation has occurred"); Nipper v. Smith, 39 F.3d 1494, 1542 (11th Cir. 1994) (stating that a state's linkage interest "plays a major role in our consideration of the remedies the appellants propose as alternatives to the challenged electoral schemes").

18. *See Nipper*, 39 F.3d at 1535 n.78, 1542 (implying that the state's linkage interest is more relevant to trial courts by minimizing the relevance of linking its bases to the circuit and county court judges); *see also* League of United Latin Am. Citizens Council v. Clements, 914 F.2d 620, 650 (5th Cir. 1990) (Higginbotham, J., concurring in judgment), *rev'd on other grounds*, Hous. Lawyers' Ass'n v. Att'y Gen. of Tex., 501 U.S. 419.

19. *See* Ala. State Conference of the NAACP v. Alabama, 264 F.Supp.3d 1280, 1286 (M.D. Ala. 2017); Lopez v. Abbott, Civil Action No. 2:16-cv-00303, 2017 WL 1209846, at *1 (S.D. Tex. Apr. 3, 2017). On September 12, 2018, the federal district court in Texas ruled in favor of Texas, concluding that plaintiffs "failed to satisfy their burden of demonstrating that the lack of electoral success by Hispanic-preferred candidates for high judicial office is on account of race rather than other factors, including partisanship." Lopez v. Abbott, Civil Action No. 2:16-cv-303, 2018 WL 4346891 at *1 (S.D. Tex. Sept. 12, 2018). With respect to Texas's linkage interest, the district court gave "this factor heavy, but not dispositive, weight in favor of the State." *Id.* at *20.

20. *See* Thornburg v. Gingles, 478 U.S. 30, 46 (1986) ("First, electoral devices . . . may not be considered *per se* violations of § 2. Plaintiffs must

capacity in selecting the members of their judiciary, the resolution of these issues will have a wide-ranging impact on a critically important facet of federalism—the ability of states to adopt the method of judicial selection that they believe best promotes the independence, accountability, and integrity of their judicial departments.[21]

In the Alabama and Texas actions, the plaintiffs allege, *inter alia*, that the use of at-large, statewide elections to select members of the appellate courts dilutes the voting strength of minority voters in violation of section 2.[22] That is, the plaintiffs claim that the challenged election systems deny minority voters an equal opportunity "to participate in the political process and to elect representatives of their choice."[23] In such situations, the Supreme Court has instructed that courts must engage in a "searching practical evaluation of the 'past and present reality'" of the electoral scheme at issue.[24] Toward that end, the next section examines the historical factors that led a majority of the states—including northern and southern, free and slave—to adopt judicial elections in the middle of the nineteenth century. In particular, this section explains how the shift to judicial elections was motivated by concerns over judicial independence and accountability, not racial animus. The third section focuses on two important aspects of federalism that courts must consider when applying section 2 to a state's longstanding method of judicial selection: the need to identify a benchmark among the myriad methods of judicial selection before altering a state's judicial system and the states' important interest in

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demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.") (internal citations omitted).

21. *See Nipper*, 39 F.3d at 1532–33 ("Federal courts may not, however, alter the state's form of government itself when they cannot identify a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison. *Holder* also confirms that, from the inception of a section 2 case, the existence of a workable remedy within the confines of the state's system of government is critical to the success of a vote dilution claim.") (internal citation omitted).

22. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) (noting that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot").

23. 52 U.S.C. § 10301(b) (2012).

24. *Gingles*, 478 U.S. at 45 (1986) (quoting S. REP. NO. 97-417, at 30 (1982)).

linkage, which protects the independence and accountability of its appellate and trial courts.[25]

I. JUDICIAL SELECTION AT THE FOUNDING TO THE MID-NINETEENTH CENTURY: THE FEDERAL AND STATE METHODS DIVERGE IN RESPONSES TO DIFFERING THREATS TO JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

By the end of 1861, twenty-four of the thirty-four states had adopted judicial elections for at least some of their courts.[26] The number of states electing all of the members of their judiciaries increased during the Reconstruction Era.[27] The decision to select appellate judges by statewide popular election was part of a broad-based, nationwide trend predicated on concerns over legislative and executive overreach, not racial discrimination.[28] The economic crises in the late 1830s, coupled with the weakness of appointed state judiciaries, led the majority of states to reconsider their views on the separation of powers and to adopt a new method of promoting judicial independence from the coordinate branches while still holding the judiciary accountable—judicial elections.[29] These concerns with judicial independence, accountability, and the (proper) separation of powers can be traced back to the beginning of our nation. A direct line can be drawn from the Framers' concern with ensuring that the judicial power remained distinct from the legislative and executive functions to the choice by the majority of states in the 1850s and 1860s to require that all appellate judges be accountable, through popular elections, to all the voters of the state.

A. The Federal Model of Appointments: Independence from the Crown

When the Framers met to amend the Articles of Confederation and Perpetual Union in May 1787, judicial selection was one component of

25. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Taylor v. Beckham, 178 U.S. 548, 570–71 (1900)) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. 'It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.'").

26. JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 276–77 app. A (2012).

27. *See, e.g.*, ALA. CONST. of 1868, art. VI, § 11 (adopting elections for its appellate courts); N.C. CONST. of 1868, art. IV, § 16 (adopting elections for its appellate courts).

28. *See* SHUGERMAN, *supra* note 26, at 57.

29. *See id.* at 57–58.

a larger problem: how best to structure the government so that it could carry out its allotted functions while remaining within its prescribed limits. James Madison eloquently described the challenge in *Federalist No. 51*:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[30]

The shortcomings of the unicameral system of government under the Articles of Confederation,[31] which emphasized the sovereignty of the states,[32] highlighted the need to give the federal government sufficient power to control the governed. Accordingly, the Framers sought to provide the federal government with specific enumerated powers that were deemed necessary for the federal government to function properly.[33] The nature and scope of the appropriate federal powers were the subject of heated debate between the Federalists and Anti-Federalists during the convention and through ratification.

At the same time, though, the Framers recognized the potential for abuse of such power and the concomitant need to provide for checks on the government. The "primary control on the government" would come from "[a] dependence on the people,"[34] who were the source of political power, being able to control the federal government by electing new representatives and, when necessary, by amending the Constitution.[35] History, however, confirmed "the necessity of auxiliary precautions" to ensure that the government would control itself.[36] In particular, the Framers relied on the structure of the government. By dividing power between the state and federal governments ("the power surrendered by the people is first divided between two distinct governments"[37]—the

30. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

31. *See, e.g.*, ARTICLES OF CONFEDERATION of 1781, art. V.

32. *See id.*, art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

33. *See, e.g.*, U.S. CONST. art. I, § 8; *id.* art. II, § 2.

34. THE FEDERALIST NO. 51, *supra* note 30.

35. U.S. CONST. art. V.

36. THE FEDERALIST NO. 51, *supra* note 30.

37. *Id.* at 323.

vertical separation of powers) as well as between and among the legislative, executive, and judicial branches ("then the portion allotted to each subdivided among distinct and separate departments"[38]—the horizontal separation of powers), the Framers diffused power to protect the liberty of the people,[39] who were, as Hamilton noted, "the only proper objects of government."[40]

The Framers viewed the horizontal separation of powers as necessary to combat the threat of tyranny—and the subsequent loss of liberty—that would result if any one branch of government aggrandized power by trenching on the sphere of the other branches. As James Madison explained in *Federalist No. 47*, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[41] The Framers' concern was not new. John Locke advanced a theory of separation of powers as early as 1690, focusing on the need for separation of the legislative and executive functions.[42] Montesquieu included the judicial function in the list of powers that needed to be separated from the legislature and the executive departments:

> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were

38. *Id.*

39. *See* Bond v. United States, 564 U.S. 211, 220–21 (2011) (explaining that the vertical separation of powers was based on a novel and "what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one'") (quoting Alden v. Maine, 527 U.S. 706, 758 (1999)); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to protect the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

40. THE FEDERALIST NO. 15, *supra* note 30, at 109 (Alexander Hamilton).

41. THE FEDERALIST NO. 47, *supra* note 30, at 301 (James Madison); *see also* THE FEDERALIST NO. 78, *supra* note 30, at 466 (Alexander Hamilton) ("[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments.").

42. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT §§ 143, 144 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

> it joined to the executive power, the judge might behave with all the violence of an oppressor.[43]

William Blackstone echoed Montesquieu, highlighting the unique role of the judiciary and the importance of keeping the judicial function separate from the other branches of government:

> [P]ublic liberty . . . cannot exist long in any state, unless the administration of common justice be separated both from the legislative, and also from the executive power. Were it joined with the legislature, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which though legislators may depart from, yet judges are bound to observe.[44]

Hence, Blackstone advocated for the "distinct and separate existence of the judicial power . . . not removable at pleasure by the crown."[45] Thus, the Framers would not have been surprised in 1776 when reading John Adams' admonition that "the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both."[46]

Judicial independence, therefore, was important for at least three reasons. First, an independent judiciary safeguarded liberty. Absent a separate and independent judicial branch, the legislature or executive would, as Montesquieu put it, be able to exercise "arbitrary control" or act as an "oppressor," respectively.[47] At the time of the founding, the threat that another branch might usurp judicial power was not merely theoretical. The list of grievances against King George in the Declaration of Independence included his control over the judiciary: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[48] Second, providing for judicial independence acknowledged the unique role of

43. Charles Louis De Secondat, The Spirit of the Laws 202 (David Wallace Carrithers ed., 1977) (1748).

44. William Blackstone, Commentaries on the Laws of England 88 (Wm. Hardcastle Browne ed., L. K. Strouse & Co. 1892.

45. *Id.*

46. John Adams, *Thoughts on Government (1776)*, *in* 4 The Works of John Adams, Second President of the United States 189, 198 (Charles Francis Adams ed., 1851).

47. De Secondat, *supra* note 43.

48. The Declaration of Independence para. 11 (U.S. 1776); *see id.* at para. 10 ("He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.").

judges, who "are bound to observe" the society's "fundamental principles of law."[49] Unlike the legislature that makes the laws and the executive who enforces them, the judiciary is bound to interpret those laws and to "support this Constitution,"[50] which is our nation's foundational legal document (i.e., the "supreme Law of the Land"[51]). Judicial independence enables judges to be impartial interpreters of the law, not partisans who are beholden to any specific branch, party, or constituency. Third, as John Adams noted, independence is necessary to ensure that the judiciary can serve as a check on the other branches of government, holding them accountable to the Constitution and the law.[52]

Accordingly, securing the independence of the judiciary—i.e., creating a system in which judges could decide cases without being subject to personal or political pressure—was a central concern of the Framers. This concern manifested itself in two ways. First, the Framers sought to secure independence from a centralized power, such as the Crown. In the period leading up to the American Revolution, judges served at the "pleasure" of the King.[53] Because judges could be dismissed for ruling contrary to the King's interests or desired outcome, they were under the monarch's direct control. The appointment process for federal judges under the Constitution is a direct response to the complaints lodged against the monarchy in the Declaration of Independence. To avoid having judges dependent on the will of the executive alone, the Constitution provided that the President would nominate judicial candidates to the federal bench, subject to the advice and consent of the Senate.[54] If a majority of the Senators approved the nomination, then the nominee was appointed to the judicial "Office[] during good Behavior,"[55] which Hamilton viewed as "the best expedient which can be devised in any government, to secure a steady, upright,

49. BLACKSTONE, *supra* note 44, at 23–24; *see also* Republican Party of Minn. v. White, 536 U.S. 765, 803 (2002) (Ginsburg, J., dissenting) ("Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; 'judge[s] represent[t] the Law.'") (alterations in original, internal citation omitted).

50. U.S. CONST. art. VI, cl. 3.

51. U.S. CONST. art. VI, cl. 2.

52. ADAMS, *supra* note 46, at 198.

53. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 128 (1973).

54. U.S. CONST. art. II, § 2, cl. 2.

55. U.S. CONST. art. III, § 1.

and impartial administration of the laws."[56] Once appointed, the judiciary was insulated from the use of appointment and removal (by the legislative and executive branches) to pressure a judge to rule in accordance with the wishes of the other branches of government. This is a form of "relative" independence, insulating the judiciary from political pressure from a specific source.[57]

Second, appointment during good behavior furthered the "general" independence of judges by insulating the judiciary from political pressures.[58] Given that federal judges effectively had a lifetime appointment, they were free to decide cases based on their understanding of the Constitution and the law without having to worry that a controversial or unpopular decision might lead to their removal.[59] Fixing the amount of a judge's compensation had the same effect. By prohibiting Congress from manipulating "the amount and payment of [judges'] salaries," the federal judiciary was insulated from control by the legislature as well as from financial pressures from other sources.[60]

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56. THE FEDERALIST NO. 78, *supra* note 30, at 465 (Alexander Hamilton). Of course, not all of the Framers shared Hamilton's view. Brutus contended that lifetime appointments effectively made the judiciary unaccountable: "They are to be rendered totally independent, both of the people and the legislature . . . . No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications." Essays of Brutus, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST § 2.9.130 at 418 (Murray Dry, Herbert J. Storing ed., 1981). By 1816, Thomas Jefferson argued for judicial elections instead of lifetime appointments:

> [I]n a government founded on the public will, this principle [of lifetime appointment] operates in an opposite direction, and against that will . . . . It has been thought that the people are not competent electors of judges *learned in the law.* But I do not know that this is true, and, if doubtful, we should follow principle. In this, as in many other elections, they would be guided by reputation, which would not err oftener, perhaps, than the present mode of appointment.

Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1861, *in* THE WRITINGS OF THOMAS JEFFERSON 34 (Andrew A. Lipscomb et al. eds., 1903).

57. SHUGERMAN, *supra* note 26, at 7.

58. *Id.*

59. This is not to say that a judge is immune from other social or political pressures. Public opinion, desire for promotion (and hence the opinion of legal or political elites), and concern about reputation might influence a judge and affect her opinions even though she has life tenure as an Article III judge.

60. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776); U.S. CONST. art. III, § 1.

Although the Framers were concerned about the relative and general independence of the judiciary, they were less concerned about its accountability given the perceived weakness of the judiciary in relation to the other branches of government: "the general liberty of the people can never be endangered from [the courts of justice]; I mean so long as the judiciary remains truly distinct from both the legislature and the executive."[61] As Hamilton famously put the point in *Federalist No. 78*, the judiciary was the "least dangerous to the political rights of the Constitution."[62] Unlike the executive and the legislature, the judiciary "has no influence over either the sword or the purse."[63] Given its unique function in interpreting and applying the law, the judiciary "may truly be said to have neither Force nor Will but merely judgment."[64] The apparent weakness of the early federal courts was illustrated by John Jay, who declined reappointment as Chief Justice of the United States Supreme Court because he thought the institution was "so defective it would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."[65]

Given this historical context, Chief Justice Marshall's defense of judicial review in *Marbury v. Madison*[66] is all the more important. By confirming the power of judicial review that Hamilton had suggested in *Federalist No. 78*[67] but that the Supreme Court had not exercised up to that point, Chief Justice Marshall strengthened the judicial branch giving it "the necessary constitutional means and personal motives to resist encroachments of the other[]" branches.[68] Because "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[69] the judiciary has the authority—and the constitutional responsibility—to review the actions of the other

61. THE FEDERALIST NO. 78, *supra* note 30, at 466 (Alexander Hamilton).

62. *Id.* at 465.

63. *Id.* (internal formatting omitted)

64. *Id.*

65. Letter from John Jay to John Adams, President of the United States (Jan. 2, 1801), *in* THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1794–1824, 284–85 (Henry P. Johnston ed., 1983).

66. 5 U.S. (1 Cranch) 137 (1803).

67. *See* THE FEDERALIST NO. 78, *supra* note 30, at 466 (Alexander Hamilton) (explaining that the "duty" of the judiciary "must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.").

68. THE FEDERALIST NO. 51, *supra* note 30, at 321–22 (James Madison).

69. *Marbury*, 5 U.S. (1 Cranch) at 177.

branches, providing a critical check on both the legislature and the executive. After all, in *Marbury*, Chief Justice Marshall not only struck down § 13 of the Judiciary Act as unconstitutional (thereby exercising the power to check legislative actions that exceeded Congress's authority under the Constitution),[70] but also held that President Jefferson violated Marbury's rights by failing to deliver the commission (thereby claiming the power of judicial review over the executive, even though the Court could not remedy that violation given the legislature's constitutional violation).[71] Accordingly, after *Marbury v. Madison*, the federal judiciary had the power of judicial review, i.e., the power to protect the will of the people as embodied in the Constitution.

When drafting the Constitution, however, the Framers could not foresee how the role of the federal courts would evolve. Because they believed "the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two,"[72] providing mechanisms to hold the judiciary accountable was not a central concern. Under the Constitution, Congress and the President could affect the judiciary in limited ways,[73] but lacked the ability to directly overturn or veto judicial decisions.[74] The people were similarly limited in their ability to check the judiciary if a judge exceeded her constitutional authority or usurped the legislative or executive function. In response to what was viewed as an improper or unconstitutional decision by a federal court, the people could amend the Constitution pursuant to Article V[75] or put pressure

70. *See id.* at 174–76.

71. *See id.* at 167–70.

72. THE FEDERALIST NO. 78, *supra* note 30, at 465–66 (Alexander Hamilton).

73. The power of the other branches over the judiciary includes the following. First, the President and Congress directly influence the federal judiciary through the nomination and confirmation process. Second, the judiciary lacks the ability to enforce its own orders and, consequently, must rely on the executive branch. *See id.* at 465 (discussing the weakness of the judiciary and noting that the judicial department "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"). Third, Congress has broad authority over the purse (i.e., funding for the judiciary) and, fourth, Congress also has broad authority over federal court jurisdiction. *See* U.S. CONST. art. I, § 8, cl. 1; *id.* art. III, § 2, cl. 2.

74. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (holding that Congress does not have the authority to review and alter final decisions of the courts).

75. U.S. CONST. art. V. For example, the Eleventh Amendment was passed in direct response to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793). *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890) (explaining that *Chisholm* "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh

on the President and the Senate to appoint and confirm judges in the future who had jurisprudential views that were more in line with those of the people.[76]

Under the Constitution, then, the primary checks on the judiciary come from two sources: (1) the integrity and self-restraint of judges and (2) impeachment. In the first instance, the judiciary must rely on individual judges to regulate themselves and to preserve the integrity of the judicial department.[77] This is especially true for federal judges, who are appointed during good behavior and, consequently, lack a significant external check beyond impeachment. "[B]ecause peculiar qualifications being essential in the members" of the judiciary, the Framers recognized the importance of adopting a method of judicial selection that "best secures these qualifications."[78] As Chief Justice Roberts stated during his confirmation hearings, "[w]hen the other branches of government exceed their constitutionally-mandated limits, the courts can act to confine them to the proper bounds. It is judicial self-restraint, however, that confines judges to their proper constitutional responsibilities."[79] With regard to judicial overreach in the federal system, judges have the initial and primary responsibility to guard against exceeding their constitutional authority.

The primary external check on the federal judiciary is impeachment. If a judge exceeds the constitutionally defined role of the judiciary or otherwise fails to exhibit good behavior, then that judge can be impeached. Under the Constitution, the House of Representatives has the power to impeach a federal judge by majority vote.[80] The Senate has the power to try the case, taking evidence and removing the judge from office by a two-thirds majority of those

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Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States").

76. Prior to ratification of the Seventeenth Amendment, the pressure on the Senate was indirect given that state legislatures—and not the people—elected Senators to six-year terms. U.S. CONST. art. I, § 3, cl. 1. With respect to the executive, the Electoral College elected the President without any requirement of a popular vote. *Id.* art. II, § 1, cls. 2–4.

77. *See* Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

78. THE FEDERALIST NO. 51, *supra* note 30, at 321 (James Madison).

79. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 121A (2005) (statement of John G. Roberts, Chief Justice of the Supreme Court of the United States, response to question 28).

80. U.S. CONST. art. 1, § 2, cl. 5.

present.[81] The impeachment process provides Congress with a way—albeit a difficult one—to remove a federal judge from office. The Jeffersonian Republicans used this power to remove John Pickering, a judge from New Hampshire and "one of [its] most distinguished citizens."[82] Judge Pickering was a Federalist and suffered from alcoholism and mental illness.[83] The House impeached Pickering by a 45–8 vote, and a year later, the Senate convicted him along party lines.[84] Emboldened by this success, the Jeffersonian Republicans subsequently attempted to remove Associate Justice Samuel Chase from the Supreme Court through impeachment, but the effort failed in the Senate, despite the Jeffersonian Republicans' holding a 25–9 majority.[85] Since then, no Supreme Court justice has been impeached by the House. Moreover, impeachment has been used sparingly with respect to other federal judges, covering only the most extreme cases of improper conduct.[86] And impeachment has never been used to remove a judge based on a substantive holding in a case, making it a relatively ineffective way to ensure that judges do not exceed their constitutionally prescribed role.[87]

81. *Id.* § 3, cls. 6–7.

82. Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 487 (1949).

83. *Id.* at 492–93.

84. *Id.* at 491, 505.

85. WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 103–05, 107–08 (1992).

86. *See* JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS §§ 15.03–04 (4th ed. 2007) (explaining that impeachment is rarely used in the state and federal systems and, even then, is normally reserved for situations where a judge is accused of a crime or the improper use of the judicial office rather than an alleged error in judicial adjudication); *Impeachments of Federal Judges*, FED. JUD. CTR., https://www.fjc.gov/history/judges/impeachments-federal-judges [https://perma.cc/KR5Y-7P8J] (last visited Oct. 5, 2018) (listing the fifteen federal judges who have been impeached since the creation of the federal judiciary, of whom only eight have been convicted by the Senate). Of course, with respect to improper or unethical behavior, the threat of impeachment (even if not carried out) may be sufficient to cause some judges to resign.

87. *See* Thomas Tinkham, *Applying a Rational Approach to Judicial Independence and Accountability on Contemporary Issues*, 37 WM. MITCHELL L. REV. 1633, 1640–41 (2011) ("Over the intervening years we have seen removal by impeachment rarely used and, while occasionally threatened based upon the apparent merit of a particular judicial decision, never actually used in this way.").

B. The Vertical Separation of Powers and Judicial Selection in the States at the Founding

One of the unique features of the newly proposed Constitution was that it provided for the vertical separation of power between two distinct sovereigns: "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[88] As Madison put the point, "[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments," which provides "a double security . . . to the rights of the people."[89] This dual system is predicated on "what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'"[90] The vertical separation of powers, like the horizontal separation of powers within each government, establishes "a healthy balance of power between the States and the Federal Government," thereby "reduc[ing] the risk of tyranny and abuse from either front"[91] while permitting each sovereign "to address itself immediately to the hopes and fears of individuals."[92] In this way, the Constitution prevents either sovereign from undermining the proper authority of the other: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States,"[93] as highlighted by Article IV's ensuring "every State in this Union a Republican Form of Government."[94]

Not surprisingly, then, as sovereign states have broad authority to determine the structure of their governments (including their judiciary) and the method of selecting those who serve as government officials:

> Through the structure of its government, and the character of those who exercise government authority, a state defines itself as a sovereign. 'It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to

88. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

89. THE FEDERALIST NO. 51, *supra* note 30, at 323 (James Madison).

90. Bond v. United States, 564 U.S. 211, 220–21 (2011) (quoting Alden v. Maine, 527 U.S. 706, 758 (1999)).

91. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

92. THE FEDERALIST NO. 16, *supra* note 30, at 116 (Alexander Hamilton).

93. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869); *see also Gregory*, 501 U.S. at 461 ("[T]he States retain substantial sovereign powers under our constitutional scheme, power with which Congress does not readily interfere.").

94. U.S. CONST. art. IV, § 4.

> prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.'[95]

This power stems from "a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders."[96] As a result, "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen."[97]

In exercising this authority to structure their own internal operations, "[t]he Constitution permits States to make a different choice" than the appointment method for Article III judges.[98] And while "most of them have done so" since the founding,[99] all of the original states initially followed the federal model and adopted legislative or executive appointment of state court judges.[100] Given the perceived weakness of the judiciary in relation to the other branches of government, state officials did not spend a lot of time weighing alternative methods of judicial selection.[101] At the state level, ensuring

95. *Gregory*, 501 U.S. at 460 (quoting Taylor v. Beckham, 178 U.S. 548, 570–71 (1900)).

96. *Id.* at 462 (quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1972)).

97. Shelby Cty. v. Holder, 570 U.S. 529, 543 (2013) (quoting Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 161 (1892)).

98. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015); *see id.* at 1671 (explaining the Court's need to "respect . . . sensitive choices by States in an area central to their own governance—how to select those who 'sit as their judges'") (quoting *Gregory*, 501 U.S. at 460). Currently, only a few states use some form of democratic appointment to select the members of their state judiciaries. New York, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Delaware, Maine, and New Jersey rely on gubernatorial appointment, while South Carolina and Virginia employ legislative appointment. ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, CHOOSING STATE JUDGES: A PLAN FOR REFORM 3 (2018) https://www.brennancenter.org/sites/default/files/publications/2018_09_JudicialSelection.pdf. California and Maryland have hybrid systems that combine gubernatorial appointment and retention elections. *Id.*

99. *Williams-Yulee*, 135 S. Ct. at 1662.

100. EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 98 (photo. reprint 1981) (1944) ("[I]n eight of the thirteen states, the judges were elected by the legislature. In the remaining five, they were appointed by the governor . . .").

101. *See, e.g.*, Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1969 (2011) ("The Founders who drafted the

independence from a centralized authority (such as the Crown) was a central concern. States sought to prevent the executive from usurping judicial power and fostering the tyranny about which Montesquieu, Blackstone, Adams, and others had warned.[102] Separating the judiciary from the other branches of government, however, did not necessarily establish "judicial independence" as that term is used today. Even though the limited power of the judiciary restricted its ability to render important political decisions that might warrant public scrutiny and review,[103] most states provided for removal by impeachment and other means. While eight states provided for judicial tenure of office during good behavior, only three of those states restricted removal to impeachment by supermajority legislative vote.[104] The other five states provided for "removal by address," i.e., a process by which a bare legislative majority could petition the governor to remove a judge.[105] In the five states that did not provide for a commission during good behavior, judges served only for a specific term or at the pleasure of the legislature.[106] Moreover, only six of the original thirteen states provided judges with a fixed salary.[107] Thus, although independence was important to states at the founding, it was a relative independence from the monarchy and executive authority; in most states, the judiciary

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eighteenth century state and federal constitutions reflected only briefly on the problem of judicial independence and integrity.").

102. *See* SHUGERMAN, *supra* note 26, at 19 ("In the years leading up to the Revolution, the independence of the judiciary from the Crown was a key issue in a majority of the colonies, and this debate focused on offices held during 'good behavior.'"); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1125–28 (1976).

103. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 4 (2009) ("Originally, judges were selected [by appointments] because the judiciary was considered a weak institution without the power to reach important political judgments and thus was in no need of close public scrutiny.").

104. SHUGERMAN, *supra* note 26, at 20. As James Madison noted in *Federalist No. 51*, the appointment method in these three states was not viewed to be as important as holding the judicial office during good behavior "because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority confirming them." *See* THE FEDERALIST NO. 51, *supra* note 30, at 321 (James Madison); *see also* BENJAMIN FRANKLIN, *The Causes of the American Discontents Before 1768*, *in* 5 THE WRITINGS OF BENJAMIN FRANKLIN 84 (Albert Henry Smyth ed., 1906) (1768) (advocating for judicial tenure during good behavior accompanied by secure, sufficient salaries).

105. SHUGERMAN, *supra* note 26, at 20.

106. *Id.*

107. SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER 327 (2011).

remained dependent in important ways on the legislature, the representatives of the people who ultimately were accountable to the people.

While these separations of powers and judicial selection principles were evident in varying degrees in all of the states at the founding, Alabama provides a particularly useful example throughout this Article given that Alabama (1) currently is engaged in section 2 litigation relating to its election of appellate judges and (2) is a deep South State with a long and sad history of racial discrimination. Alabama's first Constitution in 1819 affirmed that the people were the source of political authority[108] and provided expressly for the separation of powers between and among the legislative, executive, and judicial departments: "The powers of the government of the State of Alabama shall be divided into three distinct departments; and each of them confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."[109] The Supreme Court had "appellate jurisdiction only, which shall be co-extensive with the state," and the Supreme Court judges were viewed as "conservators of the peace throughout the State."[110] Judicial selection followed the legislative appointment model used in other states, being entrusted to a "joint vote of both Houses of the General Assembly."[111] This method provided for the relative independence of the judiciary from the executive branch while affording accountability through the popular election of legislators. General independence was secured by specifying that judges would "receive for their services a compensation, which shall be fixed by law, and shall not be diminished during their continuance in office"[112] and by specifying that judges "shall hold their offices during good behavior."[113] But Alabama judges remained dependent on the legislature given that they could be removed through impeachment as well as "removal by address," i.e., removal by petition to the Governor by "two thirds of each House of the General Assembly."[114] Accordingly, while Alabama's 1819 Constitution provided for general independence in relation to compensation, the Alabama judiciary remained directly accountable to

108. ALA. CONST. of 1819, art. I, § 2.

109. *Id.* art. II, § 1. While the separation of powers is inherent in the federal system, it is expressly stated in the Alabama Constitution, highlighting the importance of the doctrine to the state.

110. *Id.* art. V, §§ 2, 16.

111. *Id.* § 12.

112. *Id.* § 11.

113. *Id.* § 13.

114. *Id.*

the legislature for their behavior while in office as well as their legal opinions, which severely curtailed the judiciary's relative independence from the legislature.[115]

C. During the Mid-Nineteenth Century, States Shifted to Judicial Elections to Promote Independence from the Legislature and Accountability to the People

The move toward judicial elections in the mid-nineteenth century resulted from a series of factors that led many states to reexamine the proper way to balance competing values related to the judiciary—judicial independence, accountability, separation of powers, and the legitimacy of their courts generally. This re-balancing represented an exercise of the states' inherent power as sovereigns because it is "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."[116] Legislative excess and overreach in the first half of the nineteenth century highlighted the weaknesses of an appointed judiciary and caused states to look for ways to increase judicial power—thereby enabling the courts to serve as a proper check on the legislative and executive branch—while retaining the ability to hold a more active judiciary accountable for its decisions. The method of accountability that the majority of states adopted—judicial elections—had the added advantage of conferring democratic legitimacy on the courts,[117] further strengthening their relative independence from the other branches of government.

The rise of Jacksonian democracy, which emphasized the need to empower the people and to increase participation in all facets of government, was one factor that facilitated the move toward judicial elections. The emphasis on democratically electing government officials sought to shift power away from political elites and back to the people, away from the agents of the people back to the people themselves. As the United States Supreme Court explained in *White*, "[s]tarting with Georgia in 1812, States began to provide for judicial election, a development rapidly accelerated by Jacksonian democracy."[118] But

115. *See, e.g.*, *In re* Aiken Cty., 645 F.3d 428, 442 (D.C. Cir. 2011) (stating that "the power to remove is the power to control").

116. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

117. JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 140 (2012) ("And the simple truth is that elections themselves build legitimacy in a democracy, for courts, as for other political institutions as well."); BONNEAU & HALL, *supra* note 103, at 2 (concluding that "elections generally are one of the most powerful legitimacy-conferring institutions in American democracy").

118. Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002); *see also* CHARLES H. SHELDON & LINDA MAULE, CHOOSING JUSTICE: THE

while Jacksonian democracy played an important role in the dramatic shift by states to judicial elections in the 1850s, it is easy to overstate the impact of that movement. After all, during Andrew Jackson's lifetime only a small number of states began experimenting with judicial elections. The focus in the 1810s and 1820s was moving to the election of many state officers, such as the attorney general and treasurer, instead of having the legislature or the governor appoint them.[119] In 1812, Georgia became the first state to use judicial elections to select its "inferior" courts (but not its appellate courts), and a few other states followed Georgia's lead.[120] But it was not until 1832 that Mississippi became the first state to adopt judicial elections for all of its state courts,[121] for which it was viewed as an outlier.[122] No other state adopted judicial elections for all of its judges until the mid-1840s, after the financial crises of the 1830s discussed below.[123] Thus, although an important influence, Jacksonian democracy was not a sufficient cause of the widespread movement to judicial elections in the 1840s and 1850s.

Another important development was the Jeffersonian Republicans' ongoing efforts to weaken the judiciary and limit its influence on the executive and legislative departments.[124] Following the hotly contested election of 1800,[125] the Federalists lost the presidency and control over Congress. The federal judiciary was the last bastion of Federalist control, and the lame duck Federalist Congress sought to secure its control over the courts before Jefferson's term began. They did this by increasing the number of Federalist judges through the Judiciary Act of 1801 (also known as the Midnight Judges Act, which created sixteen circuit court positions, reduced the Supreme Court from six justices to five, and stopped the practice of having Supreme Court justices "ride circuit")[126] and the Organic Act of the District of Columbia (which

Recruitment of State and Federal Judges 4 (1997) ("[T]he Jacksonian movement . . . encouraged more popular control of judges.").

119. Shugerman, *supra* note 26, at 77.

120. *Id.* at 60, 62, and 66.

121. Miss. Const. of 1832, art. IV, § 2.

122. Shugerman, *supra* note 26, at 66–77.

123. *Id.* at 86.

124. *Id.* at 30; *see also* Jed Shugerman, *Marbury and Judicial Deference: The Shadow of* Whittington v. Polk *and the Maryland Judiciary Battle*, 5 U. Pa. J. Const. L. 58, 107–08 (2002).

125. *See, e.g.*, John Ferling, Adams v. Jefferson: The Tumultuous Election of 1800 (2005).

126. Act of Feb. 13, 1801, ch. 4, §§ 3–4, 2 Stat. 89, 89–90 (providing for the more convenient organization of the Courts of the United States) (repealed 1802).

created forty-two justice of the peace positions).[127] When Madison refused to deliver several of the commissions that the Adams administration had not delivered prior to Jefferson's taking the oath of office, Marbury sued, giving rise to *Marbury v. Madison* and Chief Justice Marshall's invocation of the power of judicial review.[128] Upon taking office, the Jeffersonian Republicans sought to limit the Federalists' authority in the judiciary by repealing the Judiciary Act of 1801[129] and seeking the impeachment of Judge Pickering (who, as discussed above, was convicted in the Senate) and Justice Chase (who was not convicted).[130] Although the Jeffersonian Republicans did not try to impeach any other Supreme Court justices after the failed attempt to remove Justice Chase, the Supreme Court largely avoided confrontation with the other branches of the federal government, not exercising the power of judicial review again in a significant federal case until its notorious decision in *Dred Scott v. Sanford*.[131]

At the state level, though, legislatures retained a variety of ways to hold the judiciary accountable and, in the process, limit its independence.[132] In addition to impeachment, state officials used removal by address (by which a majority or supermajority of the legislature petitioned the governor to remove a judge), shortened terms of office, imposed limitations on the courts' jurisdiction, and passed "ripper bills," which removed the members of a court (replacing them with judges who were more likely to rule consistently with the legislature) or entirely divested a court of its jurisdiction.[133] As a result, state appellate courts could not serve as a meaningful check on state legislatures. Even though Chief Justice Marshall had secured the power of judicial review in 1803, state judiciaries lacked independence and, consequently, remained comparatively feeble: "A closer examination of the dramatic showdowns over the courts shows that these appointed judges were relatively weak and that judicial review was more paper

127. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103, 107; *see The Marshall Court, 1801–1835*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_court_marshall.html# [https://perma.cc/57JB-7S2L] (last visited Oct. 14, 2018).

128. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

129. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (repealing the Judiciary Act of 1801).

130. SHUGERMAN, *supra* note 26, at 45.

131. 60 U.S. (19 How.) 393 (1857).

132. Because the legislature had various means to control the state judiciaries, judicial elections were not considered to be necessary to hold judges accountable: "Thus, judicial elections were not in the Jeffersonian repertoire, and they were uncommon in the early phase of judicial democracy from 1800 to the early 1830s." SHUGERMAN, *supra* note 26, at 30.

133. *Id.* at 55.

than practice, more bark than bite."[134] From 1780 through the start of the Civil War, state supreme courts on average "invalidated only one or two state statutes per decade through the 1830s."[135] Thus, state legislatures not only had the authority to countermand decisions of state appellate courts by removing judges and restricting jurisdiction, but also could appoint individuals who were sympathetic to a legislature's agenda, thereby limiting the need to exercise its other means of controlling the judiciary.

Without a clear separation of the legislative and judicial functions, Montesquieu, Blackstone, Adams, and Madison (among others) had warned that the liberty of the individual and the functioning of the government could be jeopardized. And those fears were realized in the latter part of the 1830s when a series of financial shocks—the Panics of 1837 and 1839—jolted the American economy, ultimately causing a depression in the early 1840s.[136] In the period leading up to the Panics, state legislatures had spent freely on public works projects, including canals, roadways, and railroads.[137] The success of the Erie Canal led state legislatures in the 1820s and early 1830s to believe that the economic benefits of infrastructure improvements would pay off the large debts incurred to fund such projects.[138] When the panic hit, these legislatures soon discovered that their amassed debts far exceeded the states' ability to pay,[139] causing nine states to default between 1841 and 1842.[140]

The resulting financial crises fostered a movement toward fiscal restraint and limited government.[141] At the time of the founding, state constitutions created powerful legislatures to carry out the people's will and to avoid the problems of concentrated power in the monarchy. In the 1840s, voter distrust of state legislatures and executives grew, and the people sought ways to restrict the excesses that had given rise to

134. *Id.* at 9.

135. *Id.* at 31, app. D. During this same period, the United States Supreme Court was much more active monitoring state legislative enactments than the state courts, invalidating one state statute roughly every two years. *Id.*

136. *Id.* at 84–102; Jessica M. Lepler, The Many Panics of 1837: People, Politics, and the Creation of a Transatlantic Financial Crisis 251 (2013).

137. Shugerman, *supra* note 26, at 84.

138. *Id.*

139. *Id.* at 86 (noting that New York's "debts grew to more than fifty times the size of the annual state budget").

140. *Id.* at 85.

141. *Id.* at 6.

the financial problems.[142] A central component of this movement involved strengthening state courts by limiting partisan appointments and bolstering judicial review. For the judiciary to serve as an appropriate check on the other branches, it needed to be independent from them. As one commentator noted, the shift to judicial elections was meant to insulate the judiciary from "the corrosive effects of politics and . . . to restrain legislative power."[143] Thus, judicial independence required severing the legislatures' control over the judiciary (i.e., removing the legislatures' appointment power and doing away with political patronage and cronyism) and bolstering the authority of the judiciary to police legislative or executive overreach (i.e., increasing the courts' authority and willingness to engage in judicial review). By increasing the relative independence of the judiciary vis-à-vis the other branches, states increased the accountability of those branches. At the same time, though, states also recognized the importance of making sure that the judiciary was accountable. If (1) the legislature would no longer serve as a direct check on the judiciary and (2) the judiciary would have more authority to exercise judicial review, then there needed to be an alternative check on the judicial department. And judicial elections were deemed to accomplish all of these goals.

Electing members of the judiciary strengthened the separation of powers by reinforcing the independence of the judiciary in relation to the other branches of government. By removing the legislature's role in appointing (and removing) judges, the judiciary could interpret laws and constitutions without having to worry about legislative reprisals (other than impeachment). That is, in Madison's words, the judiciary would have its own "will," providing a meaningful check on legislative (and executive) actions:

> In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people,

142. *Id.* at 86.

143. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 44 Historian 337, 343 (1983).

> through channels having no communication whatever with one another.[144]

At the same time, judicial elections were thought to remove the "corrosive effects of politics" by getting rid of behind-closed-doors appointments (which enabled legislators or executives to appoint partisans to the bench) and moving any political considerations into the open (which enabled voters to consider the character and jurisprudential views of judicial candidates).[145] In addition, elections conferred democratic legitimacy, empowering judges to exercise judicial review and to strike down government actions that violated the state or federal Constitution. As states turned to judicial elections in the 1840s and 1850s, elected state supreme courts began invalidating state statutes at a much higher rate, "almost quadrupling the rate between the 1830s and the 1850s."[146]

Furthermore, judicial elections advanced accountability and popular sovereignty. Judicial elections made judges directly accountable to the people, whom the federal and state constitutions recognized as the source of all political power.[147] Removing legislative and executive control over the judiciary augmented the judicial department's power. But if judges were going to review—and possibly invalidate—democratically enacted legislation, then they would be directly participating in the creation of law and policy. As a result, direct elections were deemed an appropriate way to check the "political" activity of the judiciary, making judges accountable to the people instead of the legislature: "[E]specially . . . as it became clear to many citizens that all American appellate judges were following the model of John Marshall and declaring many kinds of new law in their published judicial opinions. By the middle of the nineteenth century, . . . judges were elected in many states."[148]

The shift to judicial elections was widespread across the United States, including states that would remain in the Union during the Civil War and states that would join the Confederacy. Starting with New

144. THE FEDERALIST NO. 51, *supra* note 30, at 321 (James Madison).

145. Charles T. McCormick, *Judicial Selection—Current Plans and Trends*, 30 ILL. L. REV. 446, 447 (1935) ("[P]opular election was widely advocated on the ground that it would take the judges out of politics."); SHUGERMAN, *supra* note 26, at 6 ("Intriguingly, [reformers] believed that partisan elections promised a *less* partisan and *less* politicized bench that would be emboldened to act as a stronger check and balance against the other branches.").

146. SHUGERMAN, *supra* note 26, at 51, app. D.

147. *See, e.g.*, ALA. CONST. art. 1, § 2 ("That all political power is inherent in the people, and all free governments are founded on their authority.").

148. Carrington, *supra* note 101, at 1972.

York in 1846,[149] the movement spread quickly over the next decade and a half. From 1846 through 1861, twenty of the thirty-four states adopted judicial elections for all of their judges while four others adopted elections for some lower court judges.[150] Only Massachusetts and Rhode Island voted to retain judicial appointments during this period.[151] The broad-based movement to judicial elections was motivated by important concerns over separation of powers, judicial independence, popular sovereignty, accountability, and democratic legitimacy—the same concerns underlying the states' linkage interest.

Alabama's movement toward judicial elections in the 1850s reflected these national trends. Under its 1819 Constitution, both Houses of the legislature appointed judges, who held their commissions during good behavior.[152] The legislature could not reduce a judge's compensation but, as discussed above, could remove judges by address of two-thirds of both Houses of the legislature as well as by impeachment.[153] Consequently, job security was not assured despite the "good behavior" provision in the 1819 Constitution. Moreover, consistent with the Jeffersonian Republicans' earlier efforts to weaken the judiciary, in 1830 Alabamians had amended the judiciary article to reduce the tenure of judges from "good behavior" to a fixed term of six years,[154] increasing legislative appointment power (by permitting the legislature to exercise that power more frequently) and weakening the judiciary's power (by curtailing job security and making judges accountable at shorter intervals). In the wake of Mississippi's adopting judicial selection for all judges (1832) and Georgia's doing so for superior court judges (1835), the call for popular elections in Alabama increased, with proposed amendments in 1843 to elect county judges and in 1849 to elect county and circuit judges.[155]

Although the 1843 amendment failed, these proposals fostered a sustained discussion in Alabama about judicial selection generally and the benefits and problems of popular elections in particular. Opponents of elections acknowledged that legislative appointments "had resulted

149. N.Y. CONST. of 1846, art. VI, § 2.

150. SHUGERMAN, *supra* note 26, app. A at 276–77; Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176 (1980) ("By the time of the Civil War, 24 of 34 states had established an elected judiciary with seven states adopting the system in 1850 alone.").

151. SHUGERMAN, *supra* note 26, app. A at 276–77.

152. MALCOLM COOK MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM 40–41 (1955).

153. *See supra* notes 114–115 and accompanying text.

154. MCMILLAN, *supra* note 152, at 64.

155. *Id.*

in log rolling and the election in many cases of inferior judges"[156] but contended that judicial elections would make things worse: "[The people] are more likely to choose flippant and specious demagogues, than able, well-read and honest lawyers."[157] Supporters of judicial elections echoed the calls for fiscal restraint and limited government that had motivated New York and many other states to adopt popular elections:

> The experience of the past demonstrates, that the members have legislated too much for themselves and too little for the people—have urged local and personal interest at the expense of the general welfare—have bartered away their votes in the election of judges and other public officials to incompetent men, to secure their influence in favor of turnpike roads, ferries, and other minor interests—and thus have frequently foisted upon the bench men of little character and less learning.[158]

Proponents of judicial elections put their trust in the people rather than their elected representatives in the legislature: "[W]e believe that the masses of people are less liable to be reached and influenced by corrupt and improper motives, than bodies constituted and managed as are our legislatures."[159] In 1849, amendments concerning the popular election of county and circuit judges were proposed. The voters ratified the amendments, reflecting the "growing distrust of the legislature in Alabama and bitter criticism of the dominant position in the government given the legislature by the Constitution of 1819."[160] The Alabama legislature ratified the amendments in 1850, and the first popular election of county and circuit court judges was held in May 1850.[161]

The call for the popular election of *all* judges in Alabama persisted as concerns over legislative overreach continued. A June 1852 article in the Huntsville *Southern Advocate* compiled a list of "the most important changes which are proposed to be made in the constitution,"

156. *Id.* at 65.

157. *Id.* at 64 n.5 (quoting Florence Gazette, July 21, 1849).

158. *Id.* at 66 (quoting Huntsville Democrat, Apr. 25, 1850); *see also id.* at 66 (quoting Huntsville Democrat, May 16, 1849) (arguing that legislative appointment of judges "becomes neither more nor less than a system of intrigue, bargain, barter and compromise, which are all summed up by one expressive American word, log rolling").

159. *Id.* at 67 (quoting Ala. J., July 30, 1849); *see also id.* at 66 (quoting Huntsville Democrat, May 16, 1849) (contending that the "people are more honest than the politicians").

160. *Id.* at 68.

161. *Id.* at 67.

and the first item on the list was the "[e]lection of judges of the supreme court, chancellors, and solicitors by the people."[162] The driving forces for the election of Alabama's appellate judges remained the same: a desire to strengthen the separation of powers, do away with partisan appointments, promote accountability, and extend popular sovereignty to every branch.[163]

Consequently, the adoption of popular elections in the 1865 Constitution for "judges of the circuit and probate courts, and of such other inferior courts as may be by law established" was not surprising.[164] The 1868 Constitution's extension of popular elections to the appellate courts[165] continued this trend, promoting judicial independence and accountability, not racial discrimination.[166] In fact, the convention delegates rejected a proposal by the judiciary committee that called for the governor to appoint, with the consent of the Senate, all judges, solicitors, and justices of the peace.[167] As the *New York Times* reported, the appointment method was proposed to discriminate against the former slaves, the newest members of the electorate: the "appointment of judicial officials is provided in order to [prevent] the elections being controlled by colored voters"[168] and "the provision for establishing an appointed rather than elected judiciary . . . was undoubtedly framed so as to avoid the contingency of colored judicial officers being elected in strongly Negro districts."[169]

Thus, the shift to judicial elections in Alabama's 1868 Constitution was meant to promote the values underlying the widespread movement of states to popularly elect judges and to preclude the use of appointments to perpetuate racial discrimination in the judiciary. And these efforts were successful during the reconstruction period, enabling

162. *Id.* at 72 (quoting SOUTHERN ADVOCATE (Huntsville, Ala.), June 30, 1852).

163. Alabama's 1868 Constitution submitted all executive offices to popular elections, replacing legislative elections of the secretary of state, treasurer, auditor, and attorney general. ALA. CONST. of 1868, art. V, § 1. These officers continue to be elected statewide today. ALA. CONST. art. V, § 114.

164. ALA. CONST. of 1865, art. VI, § 11.

165. ALA. CONST. of 1868, art. VI, § 11.

166. *See, e.g.*, MCMILLAN, *supra* note 152, at 149 ("Nevertheless, the election by the people of all executive and judicial officers had been portended when by amendment in 1850 the people began the election of circuit and county judges, and when in the eighteen fifties widespread demand developed for the election of all executive and judicial officers by the people.").

167. *Id.* at 40.

168. *The Alabama Reconstruction Convention*, N.Y. TIMES, Nov. 23, 1867.

169. *The Alabama Convention*, N.Y. TIMES, Nov. 25, 1867.

black and white Republicans who favored racial equality to elect judges who shared their views. Alabama retained similar provisions in its 1875 and 1901 Constitutions as well as Amendment 328 (which was known as the Judicial Article and replaced article VI of the 1901 Constitution) and maintained linkage for all of Alabama's judges: "All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts."[170]

Starting in 1927, Alabama used at-large numbered positions for the election of circuit judges. As the Eleventh Circuit has explained, though, given disenfranchisement and the fact that there were no black attorneys in Alabama at the time, this shift was based on political, not racial, considerations: "The historical context of the 1927 law reveals that the measure was promoted by conservative elements within the Democratic Party who felt threatened by victories in the 1926 elections by rival Progressive/Prohibitionist/Ku Klux Klan factions."[171] In 1961, the Alabama legislature passed Act 221, which adopted numbered posts for all state elections that filled more than one position for the same office. As the Eleventh Circuit has explained in *SCLC*, though, "[b]ecause judges were already elected under an at-large numbered place system, Act 221 did not change the judicial electoral process."[172] Moreover, the Eleventh Circuit has recognized that, in the context of judicial elections, numbered posts serve important non-discriminatory functions:

> Requiring judges to run for unnumbered seats on the court . . . would have a detrimental effect on the collegiality of the court's judges in administrative matters[,] . . . would dampen lawyer interest in a judicial career, thereby decreasing the pool of candidates[, and] . . . would adversely affect the independence of the judiciary: Judges would begin running for reelection from the moment they took office.[173]

170. ALA. CONST. amend. 328, § 6.13 (1973).

171. S. Christian Leadership Conf. of Ala. v. Sessions, 56 F.3d 1281, 1286 (11th Cir. 1995).

172. *Id.*

173. Nipper v. Smith, 39 F.3d 1499, 1546 (11th Cir. 1994); *see also* Davis v. Chiles, 139 F.3d 1414, 1417 n.1 (noting that numbered posts make it such that "incumbents do not have to run against each other, and more focused competition may develop between a limited number of candidates running for particular posts"); *S. Christian Leadership Conf.*, 56 F.3d at 1291–92 (summarizing the district court's conclusion that "a worse system could not be imagined" than "eliminat[ing] the numbered place system and forc[ing] judges to run against one another").

Subsequent efforts to change the method of judicial selection in the 1970s to an appointment system failed largely for political reasons and Alabamians' longstanding commitment to judicial elections.[174]

Thus, despite the fact that, prior to the passage of the Voting Rights Act, Alabama and other southern states used certain racially discriminatory devices to block minority access to the at-large, statewide system, the Eleventh Circuit concluded that "there was no evidence that the at-large, majority vote, and numbered place requirements were instituted or are being maintained for discriminatory purposes."[175] These requirements were adopted—and are maintained today in states across the country—to promote judicial independence, accountability, separation of powers, and the integrity of the judicial department.

III. SECTION TWO CHALLENGES TO JUDICIAL ELECTIONS MUST PROVIDE A BENCHMARK AND OVERCOME A STATE'S SUBSTANTIAL INTEREST IN LINKAGE

In adopting popular elections as their method of judicial selection, twenty-two states have exercised the power reserved to them under the Constitution to structure their judicial departments in the way that they believe best promotes the separation of powers generally as well as the independence, accountability, and legitimacy of their courts.[176] In so doing, these states have determined that, among other things, appellate judges should (1) be independent from the other branches of

174. *S. Christian Leadership Conf.*, 56 F.3d at 1286 ("The Judicial Article and reform movement of the 1970s also did not attempt changes from a popularly elected judiciary. Moving toward an appointment system would have garnered opposition from many Alabamians and would have lead to the defeat of the Judicial Article because enactment required voter approval.").

175. *Id.* at 1292; *see also id.* at 1298 (Edmondson, J., concurring) ("[N]o evidence in this case shows that, in Alabama today, black people or anyone else is obstructed on account of race from voting or otherwise working politically, to change the structure.").

176. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015) ("The Constitution permits States to make a different choice, and most of them have done so."); *see also* THE FEDERALIST NO. 45, *supra* note 30, at 292–93 (James Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern . . . the internal order, improvement, and prosperity of the State.").

government,[177] (2) exercise appellate jurisdiction over the entire state,[178] and (3) be accountable to all the voters in the state.[179] The states' "considered judgments" that appellate judges should be selected in this way "reflect sensitive choices by states in an area central to their own governance—how to select those who 'sit as their judges.'"[180] Given each state's "constitutional responsibility for the establishment and operation of its own government," Congress should "not readily interfere" with a state's exercise of its "substantial sovereign powers" to structure its judiciary and the selection of its judges.[181] Accordingly, in *Chisom* the Supreme Court recognized that "serious problems [may] lie ahead in applying the 'totality of the circumstances'" factors under section 2, which were developed in the legislative context, to judicial selection.[182] In particular, judicial elections (1) pose unique problems when trying to identify an appropriate benchmark under section 2 and (2) directly implicate a state's substantial interest in linkage.[183]

A. Courts Lack Objective Criteria for Determining Which Method of Judicial Selection Should Serve as a Reasonable Benchmark

In *Holder v. Hall*,[184] the Supreme Court confirmed that plaintiffs bringing a section 2 challenge must identify a feasible benchmark against which dilution can be measured: "In a § 2 vote dilution suit,

177. *See, e.g.*, ALA. CONST. art. III, § 42 ("To the end that the government of the State of Alabama may be a government of laws and not of individuals, . . . the legislative branch may not exercise the executive or judicial power, the executive branch may not exercise the legislative or judicial power, and the judicial branch may not exercise the legislative or executive power.").

178. *See, e.g.*, *id.* art. VI, § 6.02; ALA. CODE § 12-2-7(1) (1993) (stating that the Supreme Court shall have authority "to exercise appellate jurisdiction coextensive with the state").

179. *See, e.g.*, ALA. CONST. art. VI, § 6.13 ("All judges shall be elected by vote if the electors within the territorial jurisdiction of their respective courts.").

180. *Williams-Yulee*, 135 S. Ct. at 1671 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460); *see also* Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 161 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.").

181. *Gregory*, 501 U.S. at 461–62 (quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1973)).

182. Chisom v. Roemer, 501 U.S. 380, 403 (1991).

183. *See* Davis v. Chiles, 139 F.3d 1414, 1421 n.16 (11th Cir. 1998) ("Because of the importance of this linkage interest, our circuit has effectively ruled out the division of at-large judicial election districts into separate subdistricts as a permissible remedy.").

184. 512 U.S. 874 (1994).

along with determining whether the *Gingles* preconditions are met and whether the totality of the circumstances supports a finding of liability, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice."[185] As Justice O'Connor explained the requirement in *Gingles*,

> [t]he phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained . . . . [I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system.[186]

Absent "a principled reason why one size [of a government body] should be picked over another as a benchmark for comparison," federal courts lack the authority to change the form of the state's judicial department.[187] Accordingly, "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2."[188]

In many section 2 cases, the benchmark is apparent. If a state adopts a new voting rule or device, a court simply can compare the effect on voting under the old and new rules. As the plurality instructed in *Holder*, "[t]he effect of an anti-single-shot voting rule, for instance, can be evaluated by comparing the system with that rule to the system without that rule."[189] Justice O'Connor echoed this view, explaining that "[a] court may assess the dilutive effect of majority vote requirements, numbered posts, staggered terms, residency requirements, or anti-single-shot rules by comparing the election results under a system with the challenged practice to the results under a

185. *Id.* at 880; *see id.* at 887 (O'Connor, J., concurring) (recognizing "general agreement" that "courts must choose an objectively reasonable alternative practice as a benchmark for the dilution comparison"); *id.* at 951 (Blackmun, J., dissenting) (acknowledging "widespread agreement" that the court must identify a "benchmark . . . that is reasonable and workable under the facts of the specific case").

186. Thornburg v. Gingles, 478 U.S. 30, 88 (1986) (O'Connor, J., concurring in judgment).

187. *Holder*, 512 U.S. at 881; *see also* Nipper v. Smith, 39 F.3d 1494, 1532 (11th Cir. 1994) ("Federal courts may not, however, alter the state's form of government itself when they cannot identify 'a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison.'").

188. *Holder*, 512 U.S. at 881.

189. *Id.* at 880–81.

system without the challenged practice."[190] Similarly, if a state (such as North Carolina in *Gingles*) adopts a system of multimember and single-member legislative districts and a plaintiff challenges the multimember at-large system, "a court may compare it to a system of multiple single-member districts."[191]

In other cases, though, "there is no objective and workable standard for choosing a reasonable benchmark."[192] The *Holder* Court determined that such was the case with a challenge to the size of a government body. The plurality emphasized that there was "no principled reason why one size should be picked over another as the benchmark for comparison."[193] The principle concern is with the effects of the proposed benchmark "on a minority group's voting strength," not on how common or uncommon a particular size of the government body is.[194] Moreover, "[t]he wide range of possibilities makes the choice 'inherently standardless.'"[195] Thus, a section 2 plaintiff must do more than simply "say that a benchmark can be found;" the plaintiff must "give a convincing reason for finding it in the first place."[196] Because the plaintiffs could not do so in *Holder*, they could not maintain their section 2 claim.

Although the recent challenges in Alabama and Texas do not involve the size of each state's appellate courts, they raise the same problem that the Court confronted in *Holder*—whether there is an "objective and workable standard for choosing a reasonable benchmark."[197] Plaintiffs do not challenge a voting rule (such as a poll tax, literary test, or property requirement) that states used prior to the passage of section 2 nor do they challenge a shift from using one form of judicial selection (e.g., single districts) to another (e.g., multimember districts). Rather, they are challenging the statewide election system itself—a system that Alabama has employed since 1868 and Texas has used since 1876.[198]

190. *Id.* at 888 (O'Connor, J., concurring in part and in the judgment).

191. *Id.*

192. *Id.* at 881.

193. *Id.*

194. *Id.*

195. *Id.* at 885 (quoting *id.* at 889 (O'Connor, J., concurring in part and in the judgment)).

196. *Id.* at 882.

197. *Id.* at 881.

198. *History of Reform Efforts: Texas*, AM. JUDICATURE SOC'Y, https://web.archive.org/web/20141003171900/http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=TX [https://perma.cc/TSD9-2288] (last visited Oct. 15, 2018). Another consideration is whether other factors, such as politics, explain

The Fifth Circuit has explained, "[a] district court cannot simply assume that racial subdistricting is such a benchmark."[199] After all, popular election is only one of four different methods of judicial selection that states have adopted—judicial elections, democratic appointment, the Missouri Plan, and hybrid models (which combines elements of the Missouri Plan with democratic appointment). Thus, the court must determine which of these selection methods provides a reasonable and workable benchmark. But this is made all the more difficult given the permutations that have developed within each broad category of judicial selection.[200] Democratic appointment can follow the federal model (where the governor appoints judges with the advice and consent of one or both Houses of the legislature)[201] or can involve legislative election (where a majority of the state legislature directly elects state court judges).[202] In Missouri Plan States, the governor appoints judges from a list supplied by a nomination commission, but these states vary as to the size and make-up of the committees, the

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the voting patterns in a particular state. The partisan nature of recent elections in Alabama illustrates the point. Starting in the 1980s and continuing into the 1990s, Alabama experienced a dramatic shift in the political voting patterns in the wake of an ongoing tort reform battle. During this period, the Alabama Supreme Court shifted from all Democrats to all Republicans. *See* SHUGERMAN, *supra* note 26, at 250–53; *Judicial Selection in the States: Alabama*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=AL [https://perma.cc/CY4R-9PFC] (last visited Oct. 15, 2018) ("Judicial races in Alabama became increasingly politicized in the 1980s and 1990s, in large part because of the controversy over tort reform. The size of jury verdicts began to increase during this time, to the extent that Alabama was dubbed 'Tort Hell' by *Forbes* magazine. The legislature passed a tort reform package in 1987, but many of its provisions were declared unconstitutional by the Alabama Supreme Court during the early 1990s.").

199. Prejean v. Foster, 227 F.3d 504, 515 n.20 (5th Cir. 2000).

200. The judicial selection methods discussed below are compiled from the following sources: (1) *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state [https://perma.cc/ETX4-4XWS] (last visited Oct. 15, 2018), (2) The Federalist Soc'y, *Method of Selection*, STATE COURTS GUIDE (Oct. 1, 2018), http://www.statecourtsguide.com [https://perma.cc/DUQ5-RC27], and (3) relevant state constitutional and statutory provisions.

201. The states using gubernatorial appointment with the advice and consent of a democratic body are Maine and New Jersey. *Methods of Judicial Selection*, *supra* note 200. The Governor of California also appoints state supreme court justices, but all such appointments must be confirmed by the Commission on Judicial Appointments, consisting of the Chief Justice of California, the Attorney General, and the Senior Presiding Justice on the Courts of Appeal. *Id.*

202. South Carolina and Virginia utilize legislative elections. *Id.*

number of nominees, and whether the governor must select from the nominating commission's list of nominees.[203] Eleven of these states give the Bar a special role in the selection process, while Colorado and Tennessee do not. The ten hybrid states also vary with respect to the size of the judicial nomination commission, the number of candidates, the process for retention, whether the governor must appoint someone on the list, and which body must approve the nominee.[204]

Seven states use partisan elections to select their appellate judges,[205] while fifteen use nonpartisan elections.[206] Out of these twenty-two states that use direct elections, only four elect their judges from districts (two partisan[207] and two nonpartisan[208]). Two other election states have partisan primaries and nonpartisan general elections.[209] Three states initially select judges through partisan elections but use nonpartisan retention elections.[210] Moreover, sixteen additional states use statewide retention elections even though they appoint judges in the first instance.[211] Thus, there are a plethora of selection models from which "a benchmark can be found," but the plaintiffs must "give a convincing reason for finding [a particular method as the benchmark] in the first place."[212]

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203. The Missouri Plan States are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, and Wyoming. The Federalist Soc'y, *supra* note 200.

204. Hybrid states include Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Utah, and Vermont. *Id.*

205. Alabama, Illinois, Louisiana, New Mexico, North Carolina, Pennsylvania, and Texas employ partisan judicial elections. *Methods of Judicial Selection*, *supra* note 200.

206. Nonpartisan elections are used in Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, West Virginia, and Wisconsin. *Id.*

207. Illinois and Louisiana hold partisan district elections to select their state supreme court judges. *Id.*

208. Kentucky and Mississippi have nonpartisan district elections to select members of the state supreme court. *Id.*

209. Michigan and Ohio employ this mixture of partisan primaries and nonpartisan general elections. *Id.*

210. These states are Illinois, New Mexico, and Pennsylvania. *Id.*

211. The states employing appointment with retention elections are Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. Because these states use appointment in addition to elections, they are not included in the twenty-two states using direct elections. *Id.*

212. Holder v. Hall, 512 U.S. 874, 882 (1994).

The plaintiffs in the Texas and Alabama actions seek multi-district remedies and, consequently, must explain why districting, which only four of the twenty-two states with direct elections use,[213] should serve as the benchmark in these cases. That is, under *Holder*, the plaintiffs must provide the courts with a principled reason for picking one system of judicial selection as a benchmark when considering their challenges to Texas's and Alabama's selection method: "Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system."[214] As Justice Frankfurter put the point in his dissent in *Baker v. Carr*,[215] "[t]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth."[216] Although the number of choices for a possible benchmark may not be as large as it was in *Holder*, the court must determine whether there is a clear standard for choosing one form of judicial selection over another as the benchmark for dilution, and this requirement is separate from the *Gingles* preconditions.[217] Consequently, even if a "single-member district is generally the appropriate standard against which to measure" compactness,[218] "the Voting Rights Act supplies no rule for a court to rely upon in deciding, for example, whether a multimember at-large system of election is to be preferred to a single-member district system; that is, whether one provides a more 'effective' vote than another."[219]

213. *See supra* notes 207–208 and accompanying text.

214. Thornburg v. Gingles, 478 U.S. 30, 88 (1986) (O'Connor, J., concurring).

215. 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

216. *Id.* at 300.

217. *See* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 480 (1997) (citing *Holder*, 512 U.S. at 881) ("Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice.").

218. *Gingles*, 478 U.S. at 50 n.17.

219. *Holder*, 512 U.S. at 896 (Thomas, J., concurring); *see also* S. Christian Leadership Conf. of Ala. v. Sessions, 56 F.3d 1281, 1298 (11th Cir. 1995) at 1298 (Edmonson, J., concurring) ("Most important, no need (and I think no rightful, federal judicial power) exists to compare the strength and weaknesses—as a matter of political science—of Alabama's current system of electing trial judges with the system for which plaintiffs contend."); Nipper v. Smith, 39 F.3d 1494, 1531 (11th Cir. 1994) (concluding that "federal courts simply lack legal standards for choosing among alternatives").

As Justice O'Connor instructed in *Gingles*, voters can influence elections even when they cast their votes for candidates who ultimately lose.[220]

Moreover, as discussed above, each state's decision as to the proper method for its citizens is based on its balancing of various concerns, such as the proper level of separation of powers, judicial independence, judicial accountability, and the legitimacy of the court system. Each of the different methods of judicial selection has "given our Nation jurists of wisdom and rectitude who have devoted themselves to maintaining 'the public's respect . . . and a reserve of public goodwill, without becoming subservient to public opinion.'"[221] As a result, challenges to an ongoing system of judicial selection provide unique difficulties when it comes to picking an appropriate benchmark, whether between elections and appointments or between districted and statewide elections, which is why the Eleventh Circuit has instructed that "[f]ederal courts may not, however, alter the state's form of government itself when they cannot identify 'a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison.'"[222]

As a result, a threshold consideration for any court analyzing a section 2 challenge to a state's longstanding method of judicial selection is which of the various systems of judicial selection—elections, democratic appointment, Missouri Plan, or hybrid method—might serve as a benchmark and, then, which of the various permutations on that particular method is the reasonable and appropriate benchmark to be used in this case. If a court determines that there is an "objective and workable standard for choosing a reasonable benchmark,"[223] then the court must articulate the reason why its chosen method is the appropriate standard for assessing vote dilution.

B. The States' Substantial Interest in Linkage Applies Equally to Their Appellate Courts, Which Establish Precedent and Policy for All of Their Citizens

In *Nipper*, the Eleventh Circuit instructed that, because the *Gingles* factors "cannot be applied mechanically and without regard to the

220. *Gingles*, 478 U.S at 98–99 (O'Connor, J., concurring). In fact, to deny the importance of the ability of voters to influence elections would mean "that all measures of success be found in the win-loss column. This mandates proportional representation as the measure of dilution, contrary to the explicit terms of § 2." League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 873 (5th Cir. 1993) (en banc).

221. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1673 (2015) (quoting Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 596 (2004)).

222. *Nipper*, 39 F.3d at 1532 (quoting *Holder*, 512 U.S. at 881).

223. *Holder*, 512 U.S. at 881.

nature of the claim,"[224] courts must "consider the unique features of judicial elections and the manner in which they affect the vote dilution inquiry."[225] In particular, courts must consider "the state's interest in the structure of its judiciary,"[226] including its decision to link the jurisdiction of a specific court to the electoral base for that court.[227] Special consideration must be given to a state's use of elections to select the members of its judiciary because judicial elections are "qualitatively different" from elections for representatives in multimember legislative bodies.[228] Although judicial elections fall within the ambit of section 2, the judicial function differs significantly from the legislative function. Judges (both trial and appellate) do not represent a particular person or constituency; they are responsible for interpreting and applying the law for all: "Legislative and executive officials act on behalf of the voters who placed them in office; 'judge[s] represent[t] the Law.'"[229] Whereas "it is the business of judges to be indifferent to popularity,"[230] legislators "are generally viewed as advocates, or 'representatives' in the conventional sense of the word, of their constituents."[231] In a collegial, multimember legislative body, "representatives compromise in order to satisfy both the needs of the voters back home and the competing goals of various groups."[232] Thus, as the Eleventh Circuit explained in *Nipper*, "there are significant differences between the legislative and judicial arenas, chief among them being the varied expectations of responsiveness and bias in favor of constituents."[233]

Instead of "catering to particular constituencies," all judges are entrusted with "neutrally applying legal principles, and, when necessary, 'stand[ing] up to what is generally supreme in a democracy:

224. *Nipper*, 39 F.3d at 1527 (quoting Johnson v. De Grandy, 512 U.S. 997, 1007 (1994)).

225. *Id.* at 1527–28.

226. *Id.* at 1528.

227. *See* Hous. Lawyers' Ass'n v. Att'y Gen. of Tex., 501 U.S. 419, 426 (1991) (holding that section 2 covers "the election of . . . trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected").

228. *Nipper*, 39 F.3d at 1529.

229. Republican Party of Minn. v. White, 536 U.S. 765, 803 (2002) (Ginsburg, J., dissenting) (quoting Chisom v. Roemer, 501 U.S. 380, 411 (1990) (Scalia, J., dissenting)).

230. *Chisom*, 501 U.S. at 401 n.29.

231. *Nipper*, 39 F.3d at 1534.

232. *Id.*

233. *Id.*

the popular will.'"[234] Judges "are neither elected to be responsive to their constituents nor expected to pursue an agenda on behalf of a particular group."[235] In fact, legislative negotiating and give-and-take on behalf of constituents are antithetical to the judicial function: "Engaging in legislative-style 'logrolling' and negotiating would be reprehensible conduct in a judge and would violate the core principles governing the judicial role."[236]

Not surprisingly, "[t]he ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected,"[237] which is why, when evaluating a section 2 claim, courts should give special consideration to the state's decision on how to structure its judicial department. Whereas the federal Constitution requires appointment with tenure during good behavior, twenty-two states have adopted direct public participation in the selection of the judiciary through periodic elections.[238] In so doing, though, these states have "not thereby opted to install a corps of political actors on the bench; rather, [they have] endeavored to preserve the integrity of [their] judiciary by other means."[239]

In the Texas and Alabama actions, the states have sought to protect the integrity of their appellate courts through statewide elections. These states believe that "single-member districts . . . run counter to the state's judicial model" by severing the linkage interest that Texas and Alabama employ to preserve the integrity and independence of their appellate (and lower) courts.[240] To implement the

234. *White*, 536 U.S. at 804 (Ginsburg, J., dissenting) (citation omitted); *see id.* at 806 ("[Judges] must strive to do what is legally right, all the more so when the result is not the one 'the home crowd' wants.") (citation omitted).

235. *Nipper*, 39 F.3d at 1534–35.

236. *Id.* at 1535; *see, e.g.*, *Commentary to Canon 1*, ALABAMA CANONS OF JUDICIAL ETHICS (Aug. 25, 2004), http://judicial.alabama.gov/docs/library/rules/can1.pdf. ("An independent and honorable judiciary is indispensable to justice in our society . . . . Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor.").

237. *White*, 536 U.S. at 804 (Ginsburg, J., dissenting).

238. *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state [https://perma.cc/ETX4-4XWS] (last visited Oct. 15, 2018).

239. *White*, 536 U.S. at 804 (Ginsburg, J., dissenting).

240. *See* Lopez v. Abbott, Civil Action No. 2:16-cv-303, 2018 WL 4346891 at *6 (S.D. Tex. Sept. 12, 2018) ("The reasoning behind linkage is to promote the State's substantial interest in judicial effectiveness by balancing accountability and independence."). *See also Nipper*, 39 F.3d at 1531 (demonstrating why the test for the first *Gringles* factor must be changed

plaintiffs' proposed remedy, § 6.13 of Amendment 328 (Alabama's Judicial Article),[241] for example, would have to be amended to create new districts and to restrict the franchise of each voter to only those appellate court candidates seeking a seat in that voter's district. The Eleventh Circuit previously has upheld a state's linkage interest with respect to section 2 challenges to circuit and district courts in Alabama[242] and Florida,[243] holding that a state's linkage "interest plays a major role in [the Eleventh Circuit's] consideration of the remedies the appellants propose as alternatives to the challenged electoral schemes."[244] And the same analysis shows that Texas's and Alabama's interest in preserving the link between a judge's jurisdiction and her elective base is just as important (and perhaps more so) at the appellate level given that appellate judges not only "possess the power to 'make' common law, but they have the immense power to shape the states' constitutions as well."[245] Given that "[a]ppellate courts engage in a combined role of adjudication, lawmaking, and general interpretation, . . . it makes more sense under democratic theory for these judges to be more accountable to the public,"[246] i.e., to all of the citizens for the state for whom they are establishing precedent, making common law, and determining policy on a wide range of legal and social issues.

Linking an appellate judge's jurisdiction and electoral base, therefore, serves several important state interests. First, linkage promotes the independence of a state's appellate courts "by holding judges accountable to a broad section of the population."[247] As discussed above, a majority of states adopted statewide judicial elections in the mid-nineteenth century to ensure independence from the legislative and

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when dealing with challenges to judicial districts rather than legislative districts); *see also* Hous. Lawyers' Ass'n v. Atty. Gen. of Tex., 501 U.S. 419, 424 (1991) (summarizing the state's argument).

241. ALA. CONST. art. VI, § 152 ("All judges shall be elected by a vote of the electors within the territorial jurisdiction of their respective courts.").

242. S. Christian Leadership Conf. v. Sessions, 56 F.3d 1281, 1282 (11th Cir. 1995).

243. *Nipper*, 39 F.3d at 1495.

244. *Id.* at 1542.

245. Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002). *See Lopez*, 2018 WL 4346891, at *18 ("It is true that the *LULAC* case involved trial court judges instead of high court appellate judges. Still, any differences in the State's interest associated with what constitutes high court appellate judges are entitled to some deference.").

246. SHUGERMAN, *supra* note 26, at 60.

247. *S. Christian Leadership Conf.*, 56 F.3d at 1297; *see also* Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194, 1201 (7th Cir. 1997) (instructing that "[a]t-large elections from the whole of the judge's geographic jurisdiction are designed to balance accountability and independence").

executive branches of government, which, in turn, strengthened the judiciary's ability to serve as a proper check on these other departments. In so doing, though, these states limited the ability of certain groups in the electorate or, what James Madison called, "factions" to capture or control the members of its judiciary.[248] By broadening the electoral base to be co-extensive with the appellate courts' statewide jurisdiction, states make it much more difficult for any faction to capture or control an appellate judge. As the Seventh Circuit explained in *Thompson*, "[t]o free the judge to follow the law dispassionately, Wisconsin prefers to elect judges from larger areas, diluting the reaction to individual decisions."[249] The same is true in Texas where "[t]rial judges are elected by a broad range of local citizens, rather than by a narrow constituency. This electoral scheme balances accountability and judicial independence."[250]

This was one of the unique features of Madison's thinking at the founding. By expanding the size of the republic and allowing various groups freely to pursue their interests, elected officials could be free from improper influence:

> Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.[251]

In contrast, limiting the scope of the republic—like restricting the electoral base of appellate judges to specific districts—fosters dependence on factions that can dominate voting in that limited area: "in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or states, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizen, will be diminished . . . "[252] And Madison recognized that the same is true on the state level: "A rage for . . . any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a

248. The Federalist No. 10, *supra* note 30, at 78 (James Madison).

249. *Thompson*, 116 F.3d at 1201.

250. League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 868 (5th Cir. 1993).

251. The Federalist No. 10, *supra* note 30, at 83 (James Madison).

252. The Federalist No. 51, *supra* note 30, at 324 (James Madison).

particular county or district than an entire State."[253] Districts may have a detrimental effect on the actual or perceived independence of courts because "[s]ubdistricts . . . can render judges vulnerable to insular prejudices of the constituents or to targeted attacks by powerful interest groups."[254] Thus, statewide elections for appellate judges promote judicial independence by reducing the threat that judges will be responsive to particular factions within specific districts. As the Eleventh Circuit observed in *SCLC*, "any districting remedy that would further minimize the electoral base would encourage even greater 'responsiveness' on the part of judges to the special interests of the people who elected them."[255]

Second, linkage at the appellate level also "serves to preserve judicial accountability."[256] Statewide judicial elections of appellate judges "embod[y the states'] judgment" that all the voters within an appellate judge's jurisdiction have the right and the attendant responsibility "to hold that judge accountable for his or her performance in office."[257] States with direct appellate court elections have determined that each appellate judge should be accountable to all of those who are affected by her decision. And the Sixth Circuit has joined the Eleventh Circuit in recognizing the important role linkage plays in promoting accountability: "[L]inkage ensures that a state court judge serves the entire jurisdiction from which he or she is elected, and that the entire electorate which will be subject to that judge's jurisdiction has the opportunity to hold him or her accountable at the polls."[258] Because appellate judges do not "represent" particular constituents but serve all of a state's citizens and residents, states using statewide elections do not restrict the electoral base of their appellate judges to particular districts. Imposing districts on a state's judicial selection method, therefore, would dramatically alter the accountability of its appellate judges. Instead of having the right to vote for all appellate judges (e.g., in Alabama nine Supreme Court justices, five Court of Civil Appeals judges, and five Court of Criminal Appeals judges), voters would be able to vote for only those appellate judges running within each voter's assigned district (e.g., in Alabama voters would be able to vote for at most three appellate judges—on judge on each appellate court—instead

253. THE FEDERALIST NO. 10, *supra* note 30, at 84 (James Madison).

254. Prejean v. Foster, 227 F.3d 504, 516 (5th Cir. 2000).

255. S. Christian Leadership Conf. v. Sessions, 56 F.3d 1281, 1297 (11th Cir. 1995).

256. Nipper v. Smith, 39 F.3d 1494, 1543 (11th Cir. 1994); *see also S. Christian Leadership Conf.*, 56 F.3d at 1296.

257. *Nipper*, 39 F.3d at 1543.

258. Cousin v. Sundquist, 145 F.3d 818, 827 (6th Cir. 1998).

of the nineteen for which they currently vote).[259] Thus, the result on voters would be the same for appellate courts as it was for trial judges in *Nipper*: a district scheme "would disenfranchise every voter residing beyond a judge's [district], thus rendering the judge accountable only to the voters in his or her [district]."[260]

Moreover, if the court created majority-minority districts to remedy the vote dilution alleged in a section 2 claim under a state's at-large system, certain voters in each district would effectively lose the right to vote for any appellate judges: "In the white [districts], the voting power of blacks would be diluted to a degree greater than the dilution [allegedly] presently existing; in the black [districts], the voting power of whites would be diluted."[261] Accordingly, the threat to linkage applies with equal force to appellate courts as to lower courts:

> Creating 'safe' districts would leave all but a few [districts] stripped of nearly all minority members. The great majority of [appellate] judges would be elected entirely by white voters . . . . [T]he minority litigant would appear 'before [an appellate court with a vast majority of judges that] has little direct political interest in being responsive to minority concerns.'[262]

As a result, imposing districts would undermine a state's interest in accountability because such a districting scheme "would eliminate the minority voters' electoral influence over the majority of the [appellate] judges" in that state,[263] giving minority voters in majority-

259. The district court in *Lopez* made the same point, recognizing that single member districts:

> would also reduce any given voter's opportunity to have an impact on the personnel on the courts from a vote for each of nine (the full composition of the courts) to one justice or judge on each court (or one vote for the judge or justice from one's own district and one vote for the chief judge or justice to be elected at-large).

Lopez v. Abbott, Civil Action No. 2:16-cv-303, 2018 WL 4346891 at *19 (S.D. Tex. Sept. 12, 2018).

260. *Nipper*, 39 F.3d at 1543.

261. *Id.*; *see also S. Christian Leadership Conf.*, 56 F.3d at 1297 (making the same point regarding vote dilution within subdistricts).

262. League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 873 (5th Cir. 1993) (en banc) (citation omitted).

263. *Nipper*, 39 F.3d at 1543–44; *see, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 99 (1986) (O'Connor, J., concurring in judgment) (contending that courts "should also bear in mind that 'the power to influence the political process is not limited to winning elections'") (citation omitted); Hall v. Holder, 512 U.S. 874, 896–97 (1994) (Thomas, J., concurring) (discussing the difficulty of deciding whether a particular election method "provides a more 'effective' vote than another" because "[t]he choice is inherently a

minority districts the ability to vote for only two (or possibly three if the court of appeals is split into criminal and civil branches as it is in Alabama) appellate judges while effectively eviscerating the right of minority voters outside those "safe" districts to vote for any appellate judges.[264]

Third, districting undermines the appearance of (and possibly even the actual) "fair and impartial justice, without regard to the race of the litigants."[265] Under section 2, the express purpose of the proposed districting remedy is to help minority voters elect minority judges. But as the Eleventh Circuit explained in *Nipper*, having black judges accountable to black districts and white judges accountable to white districts "would be detrimental to this pattern of fair and impartial justice" and "would foster the idea that judges should be responsive to constituents" along racial (and perhaps other) lines, thereby "undermining the ideal of an independent-minded judiciary."[266] Justice Brennan described the concern well in *Carey*: "[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness."[267] Such race-based remedies "tend to entrench the very practices and stereotypes the Equal

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political one, and depends upon the selection of a theory for defining the fully 'effective' vote—at bottom, a theory for defining effective participation in representative government").

264. As the Fifth Circuit noted in *League of United Latin Am. Citizens*, 999 F.2d at 859 "[t]he irony, of course, is that the subdistricting remedy sought by plaintiffs provides most judges with the same opportunity to ignore minority voters' interests without fear of political reprisal they would possess if elections were in fact dominated by racial bloc voting."; *see also* Prejean v. Foster, 227 F.3d 504, 516 (5th Cir. 2005) (noting that "racial subdistricts tend to limit rather than extend the influence of minority voters for whom such districts are ostensibly created").

265. *Nipper*, 39 F.3d at 1544.

266. *Id.* The Seventh Circuit has acknowledged the states' legitimate concern in avoiding the perception of bias: "Wisconsin believes that election of judges from subdistricts would lead to a public perception (and perhaps the actuality) that judges serve the interests of constituencies defined by race or other socioeconomic conditions, rather than the interest of the whole populace." Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194, 1201 (7th Cir. 1997). The Fifth Circuit has held the same: "The state attempts to maintain the fact and appearance of judicial fairness that are central to the judicial task, in part, by insuring that judges remain accountable to the range of people within their jurisdiction. A broad base diminishes the semblance of bias and favoritism towards the parochial interests of a narrow constituency." *League of United Latin Am. Citizens*, 999 F.2d at 869.

267. United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part).

Protection Clause is set against."[268] Through linkage, a judicial election state seeks to "assure its people that judges will apply the law without fear or favor."[269] Linkage diminishes the view that judges are "responsive" to particular constituents, including particular racial groups.[270] All voters are able to vote for all appellate judges, thereby having the opportunity to affect each judicial race.[271] Consistent with Madison's concerns about factions, smaller districts increase the possibility of "home cooking" and bias by "placing added pressure on elected judges to favor constituents," not only in cases in which constituents are parties, but also any cases that might impact a judge's district generally.[272] The threat is even greater with court-ordered districting based on race, which creates "devastating effects" by sending the message that "race matters in the administration of justice."[273] A state can reasonably worry that under a court-imposed majority-minority districting plan "the fundamental fairness of the judicial system would continually be questioned."[274]

Fourth, doing away with linkage through the creation of districts would limit the pool of judicial candidates.[275] Under statewide at-large judicial election systems, any attorney meeting the statutory requirements can run for any of the appellate judge positions. If a

268. Johnson v. De Grandy, 512 U.S. 997, 1029 (1994) (Kennedy, J., concurring in part and in the judgment); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

269. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015).

270. *Id.* at 1667.

271. *Id.*

272. Nipper v. Smith, 39 F.3d 1494, 1544 (11th Cir. 1994); *see also* Davis v. Chiles, 139 F.3d 1414, 1421 (11th Cir. 1998) (discussing the importance of judicial accountability and the threat of even the appearance of "home cooking" when a "judge [is] answerable to an electorate smaller than his jurisdiction").

273. S. Christian Leadership Conf. of Ala. v. Sessions, 56 F.3d 1281, 1297 (11th Cir. 1995).

274. *Id.*; *see also* Offutt v. United States, 348 U.S. 11, 14 (1954) (recognizing that "justice must satisfy the appearance of justice").

275. To take just one example, according to the Alabama State Bar, the pool of African-American candidates is disproportionately small: "At last analysis, the Bar consisted of 17,925 members. Approximately 68% of Bar members are male; 32% are female. The Bar membership is overwhelmingly (92%) white; approximately 7% of Bar members are African-American; and 1% identify as having another ethnic background." ALA. STATE BAR, ADDENDUM 2 (Dec. 2017), https://www.alabar.org/assets/uploads/2017/12/December2017Addendum.pdf [https://perma.cc/Q8YR-G84M].

federal court imposes a districting plan, then a state would have to decide whether to impose a residency requirement on judges running in a particular district. Depending on the distribution of attorneys in a given state, such a requirement could severely curtail the pool of candidates in certain districts. In Alabama, for example, the vast majority of Alabama's attorneys reside in three counties: Jefferson, Montgomery, and Mobile.[276] Only four other counties have more than 400 attorneys: Madison, Tuscaloosa, Shelby, and Baldwin.[277] If there is a residency requirement, then at least some of the current appellate judges would be forced to oppose each other, which "would have a detrimental effect on the collegiality of the court's judges in administrative matters."[278] Going forward, attorneys would be limited to running for a single appellate seat, but the threat of competition (especially in those districts with the most attorneys) "would dampen lawyer interest in a judicial career, thereby decreasing the pool of candidates[, and] . . . would adversely affect the independence of the judiciary: Judges would begin running for reelection from the moment they took office."[279] Moreover, other districts will have a significantly smaller pool of candidates.

But even if there is no residency requirement, the geographic and racial composition of districts will discourage candidates from running in districts in which they do not reside or that have a certain racial composition: "black attorneys would be reluctant to stand for office in white [districts] and white attorneys would be reluctant to stand for office in black [districts]."[280] As a result, depending on how the districts were drawn, geographic, racial, or socioeconomic factors might come to characterize judges from specific districts, limiting the candidate pool and reinforcing the view that appellate judges represent certain constituents within their districts. Furthermore, in the absence of a residency requirement, potential appellate judges (especially those from districts with the most competition) might look for a "safe" district in which to run (i.e., a district with fewer attorneys or candidates without the same monetary or political connections), creating a situation in which a judicial candidate chooses the voters instead of the other way around.[281]

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276. *See* Alabama Attorney Distribution Chart, Ala. State Conf. of the NAACP v. State of Ala., 2:16-cv-00731-WKW-CSC (M.D. Ala. Aug. 31, 2017), ECF No. 75-1.

277. *Id.*

278. Nipper v. Smith, 39 F.3d 1494, 1546 (11th Cir. 1994).

279. *Id.*

280. *Id.* at 1544.

281. *See* Harris v. McCrory, 159 F. Supp. 3d 600, 628 (M.D.N.C. 2016) (Cogburn, J., concurring) (lamenting that, given "unfettered

Fifth, linkage advances a state's "compelling interest in preserving public confidence in the integrity of the judiciary."[282] Given that the judiciary "has no influence over either the sword or the purse,"[283] its "authority . . . depends in large measure on the public's willingness to respect and follow its decisions."[284] Accordingly, although single districts may be appropriate for legislative elections, states need not conduct judicial elections in the same way "because the role of judges differs from the role of politicians."[285] While politicians are meant to be responsive to their constituents, judges "must 'observe the utmost fairness,' striving to be 'perfectly and completely independent, with nothing to influence or control him but God and his conscience.'"[286] Linkage ensures that appellate judges are accountable to the public generally, which promotes the judiciary's independence from particular factions or groups that may come to dominate or control a particular district at a given time. The district models proposed by the plaintiffs in the Texas and Alabama actions could give rise to "a possible temptation" to consider—and even subconsciously favor—a judge's district "which might lead him not to hold the balance nice, clear and true."[287] The possibility of such bias is sufficient to warrant linkage for appellate courts given their duty to interpret and apply the state and federal constitutions, statutory law, and common law for all citizens of the state. Stated differently, linkage helps to reconcile the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics."[288]

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gerrymandering," "the fundamental principle of the voters choosing their representative has nearly vanished. Instead, representatives choose their voters").

282. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015) (discussing the States' "compelling interest in preserving public confidence" in the context of judicial fundraising under Canon 7C(1)).

283. THE FEDERALIST NO. 78, *supra* note 30, at 465 (Alexander Hamilton).

284. *Williams-Yulee*, 135 S. Ct. at 1666; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) ("The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

285. *Williams-Yulee*, 135 S. Ct. at 1667.

286. *Id.* (quoting John Marshall, Remarks at the Virginia State Convention of 1829–1830, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830, 616 (Ritchie & Cook ed., 1830)).

287. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

288. Chisom v. Roemer, 501 U.S. 380, 400 (1991).

States with statewide at-large appellate elections have determined that electing appellate judges in districts, including districts drawn based on race, creates an appearance of unfairness or bias,

> that may cause the public to lose confidence in the integrity of the judiciary . . . . These considered judgments deserve [the court's] respect, especially because they reflect sensitive choices by states in an area central to their own governance—how to select those who "sit as their judges."[289]

As the Eleventh Circuit explained in *SCLC* regarding lower court elections, mandating a system that makes "judges accountable primarily to" racial groups within a particular district "would threaten the administration of justice" and "undermine the existing public confidence in judges as fair and impartial decisionmakers."[290] The same reasoning applies, *a fortiori*, to a state's appellate courts, which establish precedents and common law for the entire state.

Relying heavily on the states' linkage interest, the Fifth,[291] Sixth,[292] Seventh,[293] and Eleventh[294] Circuits have rejected vote dilution claims in the judicial context. In addition to promoting the values discussed above, these courts have concluded that linkage "is also important because it lies at the heart of philosophical decisions about the role of judging in our system of government."[295] As the Fifth Circuit explained in *LULAC*, linkage:

289. *Williams-Yulee*, 135 S. Ct. at 1671 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)). In *Williams-Yulee*, the loss of confidence stemmed from "personal appeals for money by a judicial candidate," which the Court determined "inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary." *Id.* The same "sensitive choices" are involved when a state links a court's electoral base and jurisdiction to foster independence and accountability. *See id.* at 1671, 1674 (Ginsburg, J., concurring in part and in the judgment) ("'Favoritism,' *i.e.*, partiality, if inevitable in the political arena, is disqualifying in the judiciary's domain.").

290. S. Christian Leadership Conf. of Ala. v. Sessions, 56 F.3d 1281, 1295 (1995).

291. League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 868 (5th Cir. 1993).

292. Mallory v. Ohio, 173 F.3d 377 (6th Cir. 1999); Cousin v. McWherter, 46 F.3d 568 (6th Cir. 1995).

293. Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194 (7th Cir. 1997).

294. *S. Christian Leadership Conf.*, 56 F.3d at 1284; Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994).

295. Cousin v. Sundquist, 145 F.3d 818, 827 (6th Cir. 1998).

> is a decision of what *constitutes* a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges . . . . There is no evidence that linkage was created and consistently maintained to stifle minority votes. Tradition speaks to us about its defining role—imparting its deep running sense that this is what judging is about.[296]

Whether imposed on trial or appellate courts, "[s]ingle-member districting destroys the state's substantial linkage interest in maintaining the coterminous jurisdictional and electoral boundaries of its judges."[297] As the unanimity among the circuit courts demonstrates, a state's linkage interest "is powerful, indeed dispositive unless the plaintiffs show gross racial vote dilution."[298] In our federalist system, states are free to choose the method that they determine is best for their judiciary (subject, of course, to federal constitutional and statutory limitations), hence the fact that four states "use subdistricts no more obliges [an at-large state] to do so than the other way around."[299]

The Eleventh and Fifth Circuits, however, have suggested in passing that the linkage analysis might be different for collegial, multimember bodies such as appellate courts. In *Nipper*, the Eleventh Circuit stated that with collegial bodies, unlike trial judges, "all citizens continue to elect at least one person involved in the decision-making process and are, therefore, guaranteed a voice in most decisions."[300] The *Nipper* plurality also noted in a footnote that "representation" on a multimember court might be relevant, not in the sense of legislative-style logrolling, but in the sense of "bring[ing] diverse perspectives to the court."[301]

Although states may consider the importance of diverse perspectives when deciding which judicial selection method to adopt, there are several problems with a court's second-guessing the state's decision and taking this one consideration to trump a state's considered judgments about linkage, independence, accountability, and the integrity of its courts. First, as discussed above, creating districts for a state's appellate courts would disenfranchise many voters in that state.[302] Every voter would lose the right to vote in most judicial elections (namely, those outside the district in which he or she lives).

296. *League of United Latin Am. Citizens*, 999 F.2d at 872.

297. *Cousin*, 145 F.3d at 834.

298. *Milwaukee Branch of the NAACP*, 116 F.3d at 1200.

299. *Id.* at 1201.

300. Nipper v. Smith, 39 F.3d 1494, 1543 (11th Cir. 1994).

301. *Id.* at 1535 n.78.

302. *See supra* note 260 and accompanying text.

Furthermore, those who compose a minority in a given district, whether black or white, would effectively lose their ability to cast an effective vote for *any* appellate judge. By creating safe districts based on race, the minority race in each district would not be able to elect at least one person involved in the decision-making process. Blacks in majority white districts would have no voice on the multimember courts, and the same would be true for whites in a majority black district. On this view, racial diversity presumably would be equated with diverse perspectives, jurisprudential or otherwise. But such court-imposed diversity (assuming, arguendo, that districting would in fact result in more diversity) would threaten the independence and accountability that election states have taken to be critical to their appellate courts, creating at least the appearance that appellate judges represent a certain group or perspective within their court-assigned districts (which were created to foster and promote that specific perspective). The Supreme Court recognized this as a problem in the legislative context, explaining that a remedial scheme may "reinforce[] racial stereotypes and threaten[] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[303] And *Nipper* acknowledged that "[t]his effect may be more pronounced when interjected into an institution, like the state judiciary, that eschews the legislature's tradition of responsiveness."[304]

Second, judges are not supposed to give a voice to particular voters or perspectives because judges "are neither elected to be responsive to their constituents nor expected to pursue an agenda on behalf of a particular group."[305] Consequently, "whether the elected officials are addressing the 'particularized needs of the members of the minority group' is . . . inappropriate in the judicial context."[306] "It is emphatically the province and duty of [appellate judges] to say what the law is,"[307] not to advocate for what a particular segment of their districts want the law to be in a particular case. Even though appellate judges sit as part of a larger group, each judge has the same responsibility to the law and exercises her authority and judgment

303. Shaw v. Reno, 509 U.S. 630, 650 (1993).

304. *Nipper*, 39 F.3d at 1546 n.97. Moreover, as the district court explained in *Lopez v. Abbott*, "[t]he collegial nature of a multimember body does not prevent it from, in practice, running roughshod over any given minority of judges. Single-member districts could have the unintended effect of increasing the power of a majority of judges elected from districts with wider polarization levels in favor of white voters." Civil Action No. 2:14-cv-303, 2018 WL 4346891, at *19 (S.D. Tex. Sept. 12, 2018).

305. *Id.* at 1534–35.

306. *Id.*

307. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

independently of the other members of the court. Appellate judges neither "engag[e] in legislative-style 'logrolling'" nor "negotiate[e]" with fellow members of their court.[308] Such conduct would be "reprehensible . . . in a judge and would violate the core principles governing the judicial role."[309]

Unlike a multimember legislative body, appellate judges need not and do not seek to compromise or wheel-and-deal to promote a specific perspective or agenda. Each judge must consider the specific facts of the case, determine the appropriate law that governs, and apply that law to the facts in a fair and impartial way. In making her independent assessment, an appellate judge may write for or join with a majority of the appellate court, write or join a concurrence, or write or join a dissent. In each of these situations, an appellate judge carries out the judicial function and helps to develop the interpretations and policies that will govern within the state, which is why states with statewide elections permit all voters to participate in the selection of each appellate judge. The states' linkage interest, therefore, promotes and protects the independence, accountability, and legitimacy of their courts, both trial and appellate. And a state can reasonably believe that mandating districts would undermine those interests.

Third, to the extent the election of "a multimember appellate court" may raise concerns about "representation" or "diverse perspectives,"[310] a state's "considered judgment[]" that, given the unique and important role of the judiciary, linkage is as important for appellate courts as for trial courts "deserves [the federal courts'] respect, especially because they reflect sensitive choices by states in an area central to their own governance—how to select those who 'sit as their judges.'"[311] Four states elect their appellate judges through districts; eighteen other states that elect appellate judges do not use districts but instead elect statewide (and sixteen additional states use statewide retention elections after initial appointments).[312] This highlights the authority given to states to decide how best to select and structure their judicial department: "In a federal system, states are entitled to do things differently; Illinois' willingness to use subdistricts no more obliges Wisconsin to do so than the other way around."[313] Given that a state selecting its appellate judges through elections "has compelling interests

308. *Nipper*, 39 F.3d at 1535.

309. *Id.*

310. *Id.* at 1535 n.78.

311. Williams-Yulee v. Fla. Bar, 135 S. Ct 1656, 1671 (2015) (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

312. *See supra* notes 205–212 and accompanying text.

313. Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194, 1201 (7th Cir. 1997).

in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians,"[314] such a state has the authority to safeguard the integrity and independence of its appellate courts the same way that it protects those features of its trial courts, even if four other states have employed districts instead of statewide elections. This authority is simply an extension of a state's "power to prescribe the qualifications of its officers and the manner in which they shall be chosen."[315] Thus, "the Voting Rights Act does not compel a state to disregard a belief that larger jurisdictions promote impartial administration of justice" or to elect their appellate judges in legislative-style subdistricts.[316]

CONCLUSION

At the time of the founding, the new federal government and the states selected members of the judiciary through appointment. Under the federal model, the President nominated and appointed federal judges with the advice and consent of the Senate. Article III judges served during "good behavior" and were assured of a compensation that could not be reduced. These provisions sought to ensure the independence of the judiciary, but given the perceived weakness of the judiciary, the Framers relied primarily on impeachment to make the judiciary accountable. Although the states started with an appointment system for judges, in the mid-nineteenth century a majority of states began to reconsider the proper balancing of the separation of powers, judicial independence, and judicial accountability as a result of several factors. In particular, the rise of Jacksonian democracy, the weakening of state courts through varied means of legislative control, and unchecked legislative excess, which led to a severe economic crisis in the 1840s, caused a majority of states to adopt judicial elections. These states viewed judicial elections as the best way to (1) bolster judicial power (strengthening the separation of powers), (2) remove legislative control over state court judges (promoting judicial independence), (3) make judges accountable to the people (ensuring a check on the judiciary and advancing popular sovereignty), and (4) advance the integrity of the judiciary by moving the behind-closed-doors cronyism and politics of appointments into the public spotlight (enabling all voters to assess and to vote for their candidates of choice).

Under *Gingles* and *Holder*, in addition to considering the *Gingles* preconditions, federal courts must determine whether there is an "objective and workable standard for choosing a reasonable benchmark

314. *Williams-Yulee*, 135 S. Ct. at 1672.

315. Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 161 (1892).

316. *Milwaukee Branch of the NAACP*, 116 F.3d at 1201.

by which to evaluate a challenged voting practice."[317] If there is "no principled reason why one [method of judicial selection] should be picked over another as the benchmark for comparison," then "the voting [system] cannot be challenged as dilutive under § 2."[318] Given the different methods states have developed for judicial selection, as well as the variations on each method, finding an appropriate benchmark to the method of selection that states have used since the middle of the nineteenth century is a difficult (and perhaps impossible) task. With respect to elections, for example, there is no "principled reason" to use a district model instead of a statewide one "as the benchmark for comparison."[319] Unlike cases where a state or local government changes its method of judicial selection (or adopts a discriminatory device or practice) for discriminatory reasons, the section 2 challenges to the longstanding statewide elections systems in Alabama and Texas should end for want of a workable benchmark.

Moreover, even if a court is able to find a reasonable and appropriate benchmark, "there must be a remedy within the confines of the state's judicial model that does not undermine the administration of justice."[320] That is, the court must determine whether the plaintiffs' proposed remedy "constitutes an objectively reasonable and workable solution to the [alleged] vote dilution present in" the case, one that does not undermine a state's considered judgment about the proper way to select members of its judicial department.[321] As the Eleventh Circuit has expressly stated, although single-member districts may serve as a viable remedy in a case alleging vote dilution in multimember *legislative* districts,[322] such a remedy "may run counter to the state's judicial model."[323] Such is the case in Alabama and Texas given each State's substantial interest in linkage. This linkage interest is so important that the Eleventh Circuit "has effectively ruled out the division of at-large judicial election districts into separate subdistricts as a permissible remedy."[324] Because the states' interests in independence,

317. Holder v. Hall, 512 U.S. 874, 881 (1994).

318. *Id.*

319. *Id.*

320. Nipper v. Smith, 39 F.3d. 1494, 1531 (11th Cir. 1994).

321. *Id.* at 1542–43; Davis v. Chiles, 139 F.3d 1414, 1421 (11th Cir. 1998) ("When . . . there is no evidence that a state is administering its judicial election system in a racially discriminatory manner, the state's interest in preserving linkage between judges' jurisdictions and electoral bases is even weightier.").

322. *See* Thornburg v. Gingles, 478 U.S. 30, 34 (1986).

323. *Nipper*, 39 F.3d at 1531.

324. *Davis*, 139 F.3d at 1421 n.16; *see id.* at 1424 (stating that section 2 "frankly cannot be said to apply, in any meaningful way, to at-large judicial elections").

accountability, separation of powers, popular sovereignty, and the integrity of their courts apply to both their trial and appellate courts, linkage should weigh heavily in favor of the states under both the totality of the circumstances and possible remedy analyses under section 2.