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CHOOSING THE JUDGES WHO CHOOSE THE PRESIDENT

JOHN COPELAND NAGLE*

George W. Bush might not be the forty-third President of the United States but for the United States Supreme Court. Al Gore's own candidacy for the Presidency would have ended two weeks earlier had it not been for two decisions of the Florida Supreme Court. This unprecedented—albeit unsolicited¹—judicial involvement in the election of the President provoked unimaginably hostile attacks upon both courts. Bush's supporters accused the Florida court of distorting state election law and ignoring federal statutory and constitutional requirements in an effort to facilitate the election of Gore. When the tables turned a few days later, Gore's supporters voiced the same charges. It was not a happy time to be a judge.

These events occurred in the midst of a longstanding debate concerning the best method of choosing the individuals who will serve as judges. State court judges have faced strongly contested elections. On the same day that voters selected the President, elections for state court judgeships attracted an unprecedented amount of money and attention in Ohio, Michigan, and elsewhere. Likewise, federal judicial nominees have confronted increasingly skeptical senators and hostile interest groups. The appointment of federal judges was an issue in the presidential campaign itself.² Even after the election was resolved, President Clinton demonstrated his frustration with the federal judicial selection process by naming Roger Gregory to a position on the United States Court of Appeals for the Fourth Circuit, the first recess appointment by

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¹ Bush v. Gore, 531 U.S. 98, 111 (2000). The Court stated:

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand in more admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

Id.

² E.g. Editorial, *Election 2000 Presidential Race: Courts on Political Stage*, L.A. TIMES, Sept. 24, 2000, at M4.

a lame-duck president in recent memory.³ The circumstances of President Bush's election, combined with the closely divided Senate in the 107th Congress, have greatly complicated the confirmation of Bush's judicial nominees.

The stakes for the selection of judges have never been so high. Federal and state court judges have ruled on such divisive issues as education funding, exclusionary zoning, capital punishment, same-sex marriages, school prayer, affirmative action, partial birth abortion, and legislative redistricting. And all of that occurred before the courts were called upon to intervene in the selection of the President of the United States.

The selection of those who possess such awesome powers is bound to be contested. But the mode of choosing judges is a secondary question. The debate concerning the selection of judges is fueled by a broader debate about the appropriate role of judges. If one feels passionately about a particular substantive issue or a conception of the judicial power, and if the individuals who wish to serve as judges are seen to hold contrasting views on those issues, then it is perfectly understandable why the selection of judges has become such a flashpoint for the most intractable social issues that states and the entire nation confront today.

The procedures for choosing those judges are caught up in this larger substantive debate, and rightly so. Any effort to identify the "best" candidates for judicial office presupposes a vision of an ideal judge or an ideal judiciary. For some, that vision seeks a diversity of life experiences and individual characteristics. For others, the vision focuses on how the legal expertise that a prospective judge brings to the judicial office. But those profound questions begin to fade when selecting a judge who must decide presidential election contests or questions of life and death. Then judicial philosophy becomes paramount.

³ Remarks on the Recess Appointment of Roger L. Gregory to the United States Court of Appeals for the Fourth Circuit and an Exchange with Reporters, 36 PUB. PAPERS (Jan. 1, 2001). The fact that Congress was in recess when the President appointed Gregory was unusual, but not unprecedented, as demonstrated by Presidents Truman's and Kennedy's recess appointments to the federal courts. Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2213 (1994). Nor was the appointment the only recent one made by a lame-duck president: President Carter nominated and appointed Stephen Breyer to the First Circuit after Carter was defeated in the November 1980 election, but the Senate was still in session and it confirmed Breyer's appointment. John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 492-93 (1997). But Gregory was the first judicial appointment by a lame-duck president while the Senate was in recess, at least since the Twentieth Amendment shortened the lame-duck period in 1933. Upon taking office, President Bush re-nominated Gregory for a permanent position on the Fourth Circuit. Nominations Submitted to the Senate, 37 PUB. PAPERS (May 14, 2001).

The primary importance of judicial philosophy only begins the debate on the best mode of judicial selection. Neither judicial elections, nor merit based systems, nor executive appointments, nor a hybrid combination of those means can claim to consistently produce judges who possess the preferred judicial philosophy. Instead, the effectiveness of each method depends how they are employed. A variety of innovative responses like those proposed by Paul Carrington,⁴ and the creative application of the diverse existing systems, holds the most promise of ensuring the accountability of judges to both the rule of law and to the People.

I.

There are two principal methods of selecting judges in the United States: appointment and election.⁵ The federal judiciary illustrates the best-known process for the appointment of judges. Article II of the United States Constitution provides that the President appoints Justices subject to the advice and consent of the Senate.⁶ The current members of the Court were appointed by five different Presidents: three by President Reagan, two each by Presidents Bush and Clinton, and one each by Presidents Ford and Nixon.⁷ They all received the consent of the Senate, albeit with varying degrees of support, unlike one of President Reagan's nominees and two of President Nixon's.⁸ Federal court of appeals and district court judges are appointed through the identical process, with somewhat more mixed results for presidential judicial nominees facing Senate confirmation. Once in office, Article III of the United States Constitution grants life tenure to federal judges, subject only to impeachment by the Senate.⁹

The federal judicial appointment process is the most familiar way of selecting judges, yet the election of judges is more common in the United States. Nearly twice as many states rely upon elections to select judges than rely upon executive or legislative appointment.¹⁰ Elective judiciaries emerged

⁴ Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 113-25 (1998).

⁵ See MARVIN COMISKY & PHILIP C. PATTERSON, *THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* 4-10 (1987).

⁶ U.S. CONST. art II, § 2.

⁷ *THE JUSTICES OF THE UNITED STATES SUPREME COURT—THEIR LIVES AND MAJOR OPINIONS 1910-11* (Leon Friedman & Fred L. Israel eds., 1997).

⁸ LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1986).

⁹ U.S. CONST. art III, § 1.

¹⁰ Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-26 (1995) (reporting that twenty-three states use elections to select judges, twelve use appointments, and the balance employ some combination of the two procedures).

in the early nineteenth century due to a confluence of motivations.¹¹ Some judicial elections today are partisan, while others are nonpartisan.¹² Judicial candidates are often subject to a special set of ethical canons modeled on those promulgated by the American Bar Association.¹³ In other respects, judicial elections are like other elections.

A hybrid model combines the initial appointment of judges with periodic retention elections.¹⁴ Florida uses such an approach. The Governor of Florida appoints the seven justices of the Florida Supreme Court.¹⁵ Of the current justices, Governor Lawton Chiles appointed five, Governor (and now Senator) Bob Graham appointed one, and Chiles and incumbent Governor Jeb Bush appointed one jointly.¹⁶ Once in office, the justices must be approved in retention elections every six years.¹⁷ The current justices have all survived their periodic retention elections, though not for want of opposition.¹⁸ Justice Harry Lee Anstead will likely face electoral opposition in 2002 for joining the court's 4-3 majority opinion that, at least momentarily, revived Gore's presidential hopes.¹⁹

II.

How judges should be chosen depends upon what kind of judges are desired. The history of judicial selections suggests three general criteria for identifying a desirable judge. One criterion emphasizes the representation of diverse groups within the judiciary. Geographic diversity was crucial

¹¹ *Id.* at 717 (“*Marbury*, Jacksonianism, participation in politics by settlers of the western frontier, judicial rulings favorable to creditors, resistance to the English common law, and judicial corruption are all overlapping factors frequently mentioned by scholars (Jacksonianism most of all) as contributing to the adoption of elective judiciaries.”).

¹² Carrington, *supra* note 4, at 142.

¹³ *E.g.* MODEL CODE OF JUDICIAL CONDUCT (1990). *See also* James J. Alfini & Terrence J. Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671 (1989); Vincent R. Johnson, *Ethical Campaigns for the Judiciary*, 29 TEX. TECH. L. REV. 811 (1998).

¹⁴ Carrington, *supra* note 4, at 143-44.

¹⁵ FLA. CONST. art. V, § 11(a).

¹⁶ Shane R. Heskin, *High Court Study, Florida's State Constitutional Adjudication: A Significant Shift as Three New Members Take Seats on the State's Highest Court?*, 62 ALB. L. REV. 1547, 1559-60 (1999).

¹⁷ FLA. CONST. art. V, § 10(a).

¹⁸ *See* Carrington, *supra* note 4, at n.185 and accompanying text (noting past efforts to challenge sitting Florida Supreme Court justices).

¹⁹ *High Court Justice in Florida Will Be Target at Election*, ST. LOUIS POST-DISPATCH, Dec. 15, 2000, at A13. The three other justices in the majority easily survived their own retention elections days before they confronted the issues raised by the presidential election. *Id.*

throughout the nineteenth century.²⁰ Certain positions on the Supreme Court were viewed as the “New England seat” or the “Southern seat,” to be occupied only by jurists hailing from that part of the nation.²¹ Religious diversity has also been important on occasion, particularly since the implicit establishment of a “Jewish seat” on the Court with President Wilson’s appointment of Justice Brandeis.²² More recently, racial and gender diversity has played a significant role in appointments throughout the federal and state judiciary.²³

In each instance, the premise of the selection is that there is a virtue in selecting judges belonging to different groups within the state or the nation.²⁴ The benefit can be to the court if one believes that the inclusion of such diversity improves the work of the court itself. The benefit can also extend to the groups themselves if their perspective is included within the judiciary. The Court has implicitly recognized the force of this model by holding that state court judges are “representatives” within the meaning of the federal Voting Rights Act.²⁵

A second approach seeks the selection of the “best” judges as determined by some objective measure of judicial qualifications.²⁶ These measures can include wisdom, legal skills, and judicial temperament. Or they can emphasize the impartiality of the judge as evidenced by the absence of any bias toward campaign contributors and other parties, partisan considerations, or judicial philosophy. The various merit selection schemes employed and proposed for the selection of state court judges rest upon the belief that such characteristics are both measurable and most appropriate for the selection of judges.

The third general approach to judicial selection considers the substantive perspective of a judicial candidate. This perspective can be gleaned either from indications of general judicial philosophy or from positions on particular substantive issues. The repeated calls for judges that will interpret the law instead of make the law suggest a quite different judicial philosophy from admonitions to select judges who will employ all of their powers to do justice. Likewise, several issues have dominated the selection of federal and state

²⁰ See Ronald D. Rotunda, *Innovations Disguised as Traditions: A Historical Review of the Supreme Court Nominations Process*, 1995 U. ILL. L. REV. 123, 125-26 (1995).

²¹ See TRIBE, *supra* note 8, at 128 (noting the New York seat and the New England seat); Paul A. Freund, *Appointment of Judges: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1150-51 (1988) (describing the New England seat).

²² TRIBE, *supra* note 8, at 128 (noting the Jewish seat and the Catholic seat).

²³ *Id.* at 133.

²⁴ See *id.* at 132-33.

²⁵ *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

²⁶ See JUDICIAL APPOINTMENTS WHITE PAPER TASK FORCE, THE CASE FOR JUDICIAL APPOINTMENTS, at <http://www.fed-soc.org/Publications/White%20Papers/judicialappointments.htm> (last modified 2001) [hereinafter WHITE PAPER TASK FORCE].

judges. The right to an abortion has been especially prominent in the appointment of many recent Supreme Court Justices, lower federal court judges, and state court judges.²⁷ Capital punishment provides another example, as illustrated by the failure of Rose Bird and two of her colleagues to win the retention election necessary for her to continue to serve on the California Supreme Court; the defeat of Tennessee Supreme Court Justice Penny White and Mississippi Supreme Court Justice James Robertson in retention elections; and most recently by the Senate's refusal to confirm Missouri Supreme Court Justice Ronnie White to a federal district court judgeship.²⁸ Issues of racial justice can play such a substantial role in judicial selections that Pamela Karlan has described *Brown v. Board of Education*²⁹ as "the third rail of judicial nomination: touch it and you die."³⁰

Such reliance upon a judge's perspective on particular issues has been controversial. The concern is that judicial nominees and candidates are somehow compromised if they are required to state their position on a particular issue that might come before them once they are judges, but without having the benefits that the adversary process affords for deciding a question. In other words, litmus tests for judicial candidates are frowned upon. Thus, Vice President Gore tried to avoid stating that he would only appoint judges who agreed with the constitutional right to an abortion even as he hinted that such a result was an expected outcome of his general judicial philosophy.³¹ Likewise, state judicial candidates around the country commonly face questions whenever they appear to suggest a position on a particular legal issue during the course of an election campaign. Indeed, the canons governing judicial elections prohibit candidates from campaigning based upon their position on particular issues that they could then be in a position to decide as a judge.³² Nonetheless, statements of judicial philosophy can serve as a proxy

²⁷ See Carrington, *supra* note 4, at 80 (mentioning "[t]he sustained assault on the presidency of Bill Clinton that began the day of his election in 1992 was, it seems, initially animated in part by the purpose of preventing him from appointing Supreme Court Justices who would reaffirm *Roe v. Wade*").

²⁸ See *id.* at 83, 110 (discussing the electoral defeat of Bird, Robertson, and Penny White). For a brief discussion of Ronnie White's confirmation experience, see *infra* notes 83-88 and accompanying text.

²⁹ 347 U.S. 483 (1954).

³⁰ Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 543 (1999).

³¹ *The 2000 Campaign; Transcript of Debate Between Vice President Gore and Governor Bush*, N.Y. TIMES, Oct. 4, 2000, at A30 (Vice President Gore explained that "[i]t'd be very likely that [his Supreme Court appointments would] uphold *Roe v. Wade*, but I do believe it's wrong to use a litmus test.").

³² MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3) (1990) (stating "a candidate for a judicial office . . . (d) shall not: (i) make pledges or promises of conduct in office other than the
(continued)

for views on particular issues, and such statements are more often encouraged than discouraged.

These three approaches to judicial selection are not mutually exclusive. A prospective judge might be desirable because she adds diversity to the court, she is widely respected for her abilities, and she holds the preferred judicial philosophy. President Bush, for example, has championed his first judicial nominees as satisfying each of those criteria.³³ Sometimes, though, a judicial candidate fails to receive the approval of all of those interested in the composition of the courts because the three criteria often lead in different directions.³⁴ Then we need to decide what kind of judges we want. Once that is done, it must be determined which method of judicial selection—appointment, election, or hybrid—is most likely to produce them.

III.

The debate concerning the role that the courts played in the 2000 presidential election illustrates the importance of who serves as judges on those courts. The judicial decisions rendered in response to that election elicited charges of judicial activism, partisanship, and incompetence. Both the United States Supreme Court and the Florida Supreme Court faced such criticisms, albeit from different critics.

The most troubling criticisms suggested the judges acted to further their own judicial agendas. The Florida Supreme Court's seeming emphasis on generalized ideas of intent rather than textual plain meaning worked in favor of Vice President Gore, who favored such an approach to statutory interpretation. The United States Supreme Court's Equal Protection holding led to complaints that it was designed solely to favor Governor Bush, whom many expect to appoint judges more sympathetic to the judicial philosophy of the

faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court").

³³ See Press Release, Office of the Press Secretary, Remarks by the President During Federal Judicial Appointments Announcement (May 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html> (last visited Feb. 18, 2002) (explaining his judicial nominees "come from diverse backgrounds, and will bring a wide range of experience to the bench;" they "have sterling credentials and have met high standards of legal training, temperament and judgment;" and each nominee "clearly understands the role of a judge is to interpret the law, not to legislate from the bench"); see also Elizabeth A. Palmer, *Early Signs of Comity Emerge in Judicial Nomination Process*, CONG. Q. WKLY, May 12, 2001, at 1071 (describing Bush's first judicial nominees as "generally young, conservative and ethnically and racially diverse").

³⁴ See Thomas L. Jipping, *Senate Stonewalling: Lawmakers Delaying Judicial Confirmations* WASH. TIMES, Jan. 14, 2002, at A17 (discussing the effect of partisanship on the confirmation process).

majority. True or not, such charges have become commonplace in the immediate aftermath of the 2000 presidential election.

Neal Kumar Katyal wrote the most striking response to the Court's decision in *Bush v. Gore*: "Since the New Deal, the Supreme Court has been received well by the public and Congress. Now all that is jeopardized."³⁵ With all respect to Professor Katyal, whose excellent scholarship I very much admire, this statement profoundly misconceives the popular attitude toward the Court during that past sixty years. The Court has been the object of bitter hostility for its decisions concerning abortion, the Establishment Clause, school segregation, and affirmative action, to name just a few issues. The very adjectives that Professor Katyal applied to *Bush v. Gore*—"lawless and unprecedented"—have also been deployed to describe many other controversial decisions.³⁶ Those terms, moreover, were used to characterize the Florida Supreme Court's decision that was reversed in *Bush v. Gore*.³⁷ Nor are such views limited to isolated decisions. In 1996, for example, the scholarly journal *First Things* published a symposium on the illegitimacy of the Court, suggesting that civil disobedience to the Court's rulings was in order.³⁸ Similar complaints often arise concerning the Court's jurisprudence in the areas of race, religion, and sexuality.

The point is that the People often disagree with the Court's determination of "what the law is."³⁹ Nor is this phenomenon limited to constitutional law. The Florida courts demonstrated that statutory interpretation can be just as important and troubling as constitutional interpretation. Common law decisions regarding tort liability, property rights, or contractual duties can become unpopular. Even the content of international law can generate substantial public debate.

³⁵ Neal Kumar Katyal, *Politics Over Principle*, WASH. POST, Dec. 14, 2000, at A35.

³⁶ E.g. Alan M. Dershowitz, *On Demjanjuk, Unprecedented Lawlessness*, WALL ST. J., Aug. 5, 1993, at A12 (criticizing the Sixth Circuit's decision to re-open a prior habeas corpus petition filed by a former Nazi officer six years after the court had first ruled).

³⁷ E.g. Richard L. Berke, *Contesting the Vote: The Strategies*, N.Y. TIMES, Dec. 9, 2000, at A1 (quoting Jack Kemp as stating "[t]oday, America has witnessed a judicial coup d'état by the Florida Supreme Court unprecedented in modern history."); Linda Greenhouse, *Counting the Vote: The Legal Battle*, N.Y. TIMES, Nov. 23, 2000, at A1 (quoting Bush's brief in the United States Supreme Court, which described the Florida Supreme Court as having "embarked on ad hoc, standardless and lawless exercise of judicial power, which appears designed to thwart the will of the electorate"). Still more tellingly, my LEXIS search among news sources published during the three months after the election for "*Florida Supreme Court*" and (*lawless or unprecedented*) was interrupted because it would have returned more than one thousand results.

³⁸ Symposium, *The End of Democracy? The Judicial Usurpation of Politics*, FIRST THINGS, Nov. 1996, at 18.

³⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Any disagreement between the courts and the People about the meaning of the law suggests that one of them must be wrong. The alternative methods of judicial selection, in turn, presuppose different answers to the question of whether the courts or the People are more likely to be wrong. Conventional legal wisdom discounts the possibility that the courts may be wrong about the law instead of the People. Opposition to judicial elections, for example, claims that the People are easily misled by judicial campaigns and that they lack the ability to discern the qualities that produce a good judge. Conversely, merit selection systems assert that the best judges will be those individuals with the most legal skills. More broadly, the law is increasingly viewed as something that can be understood only by those with special expertise—in other words, lawyers. The more expert the lawyer, the better the candidate to serve as a judge.

This is amply demonstrated by the media's reliance upon so many law professors to explain the daily developments in the battle between Governor Bush and Vice President Gore after Election Day 2000. The many legal issues raised during the election decision involved previously obscure federal constitutional provisions and virtually unknown state election statutes. The legal questions surrounding the recount and contest procedures were so obscure that all questions of the mechanics of an election are omitted altogether from the only casebook on election law.⁴⁰ Thus many of the confident claims about the legal questions were based on knowledge that the academic experts themselves had only gained since election day. I speak from experience, having appeared regularly on the local television news broadcast to explain legal issues that I had examined myself for the first time only hours before.

The contention that such legal expertise ineluctably yields the best judiciary is in tension with three related strands of legal thought. First, it collides with the emphasis that the literature on judicial selections places upon the need for the accountability of judges to the People. Judges must be both independent and accountable. Independence protects judges from popular passions that demand actions contrary to the rule of law. Accountability is a necessary check on judges whose vision of the law begins to be shaded more by their own desires than the designs of the People who made it. Accountability is ensured by judicial elections, legislative advice and consent to judicial appointments, the regulation of a court's jurisdiction, limitations on

⁴⁰ DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* (1995); *see also* SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (1998) (another otherwise excellent book that omits any discussion of the mechanics of elections). The 2000 election began to remedy that void in the academic literature within a matter of weeks. SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (2001) (casebook supplement on election law procedures).

court funding, and the awareness that statutes and constitutions can be changed in response to an unwanted court ruling. Accountability can also be achieved through informal mechanisms, such as the need for judicial decisions to "generate sufficient support to ensure their execution."⁴¹

Judges ignore such accountability at their own peril. Professor Carrington has carefully documented the many instances in which the courts failed to remember their relationship to the People.⁴² The 1986 electoral defeat of Chief Justice Bird occurred after "the California Supreme Court had supplied its critics with an ample list of decisions reflecting the court's disregard for moral and political values widely shared by Californians."⁴³ The court did more than act contrary to the wishes of most state citizens, "[i]t had forsaken even the pretense of an institution engaged in the interpretation of authoritative legal texts or traditions enacted by the people or their representatives whose votes they would need to retain their offices."⁴⁴ This episode was just the most recent of the People rising "to throw off the yoke of judicial oppression."⁴⁵

Professor Akhil Amar reinforced the concern for accountability in his recent article, *The Document and the Doctrine*.⁴⁶ Professor Amar's thesis is that the courts have wrongly exalted judicial doctrine over actual legal documents, to the detriment of the law more generally.⁴⁷ For Professor Amar, the United States Constitution itself contains better law than the Supreme Court's constitutional law jurisprudence.⁴⁸ The Court's 1999 term alone provides Professor Amar with seven examples of the dichotomy between the constitutional text and constitutional decisions. In *Flippo v. Virginia*,⁴⁹ the Court reversed the conviction of a man who murdered his wife because the jury considered evidence obtained by the police when they opened a briefcase in the course of securing the crime scene.⁵⁰ Professor Amar contrasts the Fourth Amendment's prohibition on unreasonable searches and seizures with the Court's exclusionary rule, objecting to *Flippo* because the police search was not unreasonable and because of the absence of textual support for the exclusionary rule.⁵¹ In *Carmell v. Texas*,⁵² the Court reversed the conviction of

⁴¹ Croley, *supra* note 10, at 709.

⁴² Carrington, *supra* note 4, at 89-107.

⁴³ *Id.* at 83-84.

⁴⁴ *Id.* at 86.

⁴⁵ *Id.* at 87.

⁴⁶ Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

⁴⁷ *Id.* at 133.

⁴⁸ *See id.* at 26 (asserting that "the Constitution has often proved more enlightened and enlightening than the case law glossing it.").

⁴⁹ 528 U.S. 11 (1999).

⁵⁰ *Id.* at 12-15.

⁵¹ Amar, *supra* note 46, at 90-95.

a man who sexually assaulted his stepdaughter because the state had relied upon a different evidentiary law than had existed at the time of the attacks.⁵³ Professor Amar contrasts the actual Ex Post Facto Clause with the broad and rigid doctrine applied by the Court in excluding the evidence.⁵⁴ In *United States v. Morrison*,⁵⁵ the Court held that the civil cause of action created in the Violence Against Women Act exceeded congressional power under the Commerce Clause and the Fourteenth Amendment.⁵⁶ Professor Amar contrasts “the vision of the Fourteenth Amendment” with the troublesome nineteenth century precedents upon which the Court relied.⁵⁷ In *Stenberg v. Carhart*,⁵⁸ the Court invalidated a Nebraska statute prohibiting partial birth abortions.⁵⁹ Professor Amar contrasts the potentially relevant constitutional texts—including the Preamble, which states the desire to “secure the Blessings of Liberty to ourselves *and our Posterity*”⁶⁰—with the Court’s abortion jurisprudence, concluding that “*Casey* built on *Roe* without ever explaining why *Roe* was right. Now *Stenberg* builds on *Casey* and *Roe*, and critics may justly feel that this is a shell game with no pea.”⁶¹ In *Kimel v. Florida Board of Regents*,⁶² the Court held that the Age Discrimination in Employment Act could not empower state employees to sue states for damages.⁶³ Professor Amar contrasts the Eleventh Amendment with the Court’s state sovereignty immunity decisions, repeating his claim that the original decision of *Hans v. Louisiana*⁶⁴ was misguided.⁶⁵ In *Mitchell v. Helms*,⁶⁶ the Court upheld a federal program that provided computers and other educational equipment to private religious schools along with other private and public schools.⁶⁷ Professor Amar contrasts the Establishment Clause with the Court’s contrary decisions of recent years, applauding the Court for heeding the document instead of its doctrine in this instance.⁶⁸ Finally, in *Troxel v. Granville*,⁶⁹ the Court

⁵² 529 U.S. 513 (2000).

⁵³ *Id.* at 516-17, 552-53.

⁵⁴ Amar, *supra* note 46, at 96-102.

⁵⁵ 529 U.S. 598 (2000).

⁵⁶ *Id.* at 627.

⁵⁷ Amar, *supra* note 46, at 103-09.

⁵⁸ 530 U.S. 914 (2000).

⁵⁹ *Id.* at 922.

⁶⁰ Amar, *supra* note 46, at 113 (quoting the U.S. CONST. Pmbbl.) (emphasis added).

⁶¹ *Id.* at 110.

⁶² 528 U.S. 62 (2000).

⁶³ *Id.* at 66-67.

⁶⁴ 134 U.S. 1 (1890).

⁶⁵ Amar, *supra* note 46, at 114-18.

⁶⁶ 530 U.S. 793 (2000).

⁶⁷ *Id.* at 801.

⁶⁸ Amar, *supra* note 46, at 118-21.

invalidated a Washington statute that granted broad visitation rights to grandparents.⁷⁰ Professor Amar contrasts the Fourteenth Amendment's Privileges and Immunities Clause with the Court's confusing substantive due process precedents, concluding that the Court got the case right but for the wrong reasons.⁷¹ One can disagree with the particular examples offered by Professor Amar, but his general point regarding the divorce between constitutional text and constitutional doctrine is more difficult to refute.

The third tension is best explained in the work of Mike Paulsen. Drawing upon an analogy to the original television program *Star Trek* that I could not do justice to here, Paulsen chides the Court for distancing the law from the People:

The Court speaks in terms of multi-part tests and tiers of scrutiny, language that corrupts the plain-spoken words of a document intended to be accessible to all, and to belong to all, by adding a venire of pseudo-sophisticated legalese. This corruption serves to distance the people from their Constitution by rendering it inaccessible to common understanding. Simultaneously, it removes the Constitution from the People's view and from their control. Thus corrupted, the words of the Constitution, our fundamental charter of rights and of government, have become the exclusive province of an elite cabal of high priests. The priests are careful to recite the formulae of their predecessors, rather than the words of the document itself, and so keep up the illusion that their guardianship is necessary in order to translate an increasingly incomprehensible document (which they have made so) into concrete command they then issue to the (small "p") people as "law." The people are treated, rightly as it turns out, as constitutional illiterates who lack the understanding necessary to read the Constitution with their own eyes. That task must be performed by a special class of intermediaries.⁷²

Paulsen's article offers several proposals for "returning the Constitution to the interpretive supremacy of the People,"⁷³ though none involve changes in the selection or tenure of judges. Those recommendations appear elsewhere in

⁶⁹ 530 U.S. 57 (2000).

⁷⁰ *Id.* at 75.

⁷¹ Amar, *supra* note 46, at 122-24.

⁷² Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretism: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 674-75 (1995).

⁷³ *Id.* at 676.

Paulsen's work, where he explicitly endorses the primacy of judicial philosophy in the presidential and senate evaluation of prospective judges.⁷⁴

But the ability of the People to understand their laws better than the judiciary should not be exaggerated. The People are probably more prone than judges to confuse popular policy preferences with the outcomes demanded by the rule of law. A system that would rely upon the People alone to apply their laws could encounter great difficulty in preserving the rule of law as we debate what law or even "the law" is. These problems are substantial, and they help establish the need for an independent judiciary taught to both abide by and to expound the law. But we also need a means for addressing those cases in which the People, not the court, are right about the law.

IV.

If we expect the courts to do things like resolve disputes about presidential elections, then judicial philosophy is paramount in selecting judges. Indeed, judges decide many other questions that transcend the temporary holder of the Presidency, including the scope of individual rights of expression and privacy in a free society, the role of race and religion in a culture divided by both, and issues of life and death such as abortion and capital punishment. But judges also decide far more mundane questions, and far more of them. The reported decisions are filled with disputes concerning the application of tax codes, the disposition of personal bankruptcies, the minutiae of hazardous waste regulation, and countless other cases that are of keen concern to the parties litigating the issue but few others. The vast number of unreported local, state, and even federal judicial decisions are by definition less worthy of popular concern.

Perhaps, then, different judges should be chosen in different ways. Judges who decide cases that lack interest to the People could be chosen by simple executive appointment or merit selection; judges who rule on the most controversial questions affecting social policy could be elected or appointed by the executive with legislative confirmation designed to probe judicial philosophy. The problem with this approach is that legal issues are not neatly sorted into those of interest to the People and those that are uninteresting. A state trial court judge might seem the ideal candidate for a mode of selection that emphasizes expertise instead of judicial philosophy, yet many such judges played a crucial role during the Florida election disputes. Even those courts with specialized jurisdiction sometimes encounter a case that raises a controversial issue that holds great interest for the public at large. Nor, on the other hand, is the fact that the Supreme Court has chosen to decide a case a guarantee that the matter is of keen interest to the People. As Frederick

⁷⁴ Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 562-78 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994)).

Schauer points out, the Justices themselves find many cases boring.⁷⁵

The prominence of the legal issues decided by different kinds of courts should not be exaggerated, of course, because the United States Supreme Court will confront many more controversial questions than the Circuit Court of Leon County. Yet questions of judicial philosophy become relevant for a wider range of judges as the People continue to present an increasing number of important issues to all kinds of courts. So while judicial philosophy is of greatest concern for the Justices of the United States Supreme Court, it is also of great concern for state supreme court justices and federal circuit and district judges, and is still of relevance for state and local judges at all levels. The importance, and frequent primacy, of that criterion presents the most profound question for evaluating methods of judicial selection: How do we choose judges with the right judicial philosophy?

Judicial elections seem best designed to facilitate accountability. Elections offer the People themselves a direct opportunity to measure their understanding of the law against the jurisprudence of current or prospective judges. But the reality of judicial elections raises serious questions regarding the achievement of that goal. As Professor Carrington observes, experience with judicial elections has demonstrated problems with the substantive content of campaigns given the tension between articulating specific positions and retaining impartiality once on the bench and the troublesome question of the source of funding for the campaigns of judicial candidates.⁷⁶ Elections often fail to generate much public attention, though the increased spending on judicial campaigns can begin to change that.⁷⁷ Also, voters often complain that it is difficult to understand the real issues raised in judicial elections, a problem that is exacerbated by the restrictions on campaigning. The wisdom of judicial elections raises other questions as well, even as such elections often fail to achieve their intended purpose of achieving judicial accountability to the People.

Merit selection systems are even worse from the perspective of

⁷⁵ Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 246 (referring to statutory interpretation cases).

⁷⁶ Carrington, *supra* note 4, at 91-93; see also WHITE PAPER TASK FORCE, *supra* note 26, at 18-26 (describing evidence of partisan behavior and the influence of campaign funding on judicial behavior); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 646 (1999) (empirical study finding a "remarkably close correlation between a justice's votes on arbitration cases and his or her source of campaign funds" in 106 decisions of the Alabama Supreme Court between 1995 and 1999).

⁷⁷ See Warren Richey, *Justice for Sale? Cash Pours into Campaigns*, CHRISTIAN SCI. MONITOR, Oct. 25, 2000, at 2 (discussing the recent increases in judicial campaign spending, including the \$1.7 million spent by Citizens for a Strong Ohio on television ads critical of Ohio Supreme Court Justice Alice Robie Resnick).

accountability—they are elitist. They are most disconnected from the views of the People. They become even more problematic as we ask the courts to decide broader social questions that are better understood by the public rather than applying longstanding but obscure legal principles.

The federal judicial appointments process has problems of its own. First, the role of the judiciary and the composition of its members is just one issue among many to consider when voting for President. In the 2000 presidential elections, Vice President Gore placed more emphasis on the President's role in selecting judges than Governor Bush did, but the candidates also stressed a variety of other substantive issues, including the economy, Social Security, education, health care, the military, and foreign policy. Those many substantive issues, moreover, competed with questions about the leadership abilities, trustworthiness, intelligence, and other characteristics of the candidates. Not surprisingly, exit polls indicated that the choice of judges ranked low among the reasons that voters offered for their choice for President.⁷⁸

Second, voters cannot know how many Justices or judges their choice for President will be able to select. Federal judges can control who will replace them because they serve until they either retire or die.⁷⁹ Increasingly, Supreme Court Justices will not retire during the tenure of a President of the other political party.⁸⁰ They are more likely to retire than to die in office, thus allowing a sitting member of the Court to influence the choice of his or her successor. The result is the closest thing to a hereditary succession based on political party affiliation that exists under the United States Constitution.

Third, the President may find it necessary to balance competing criteria. Ethnic and gender diversity continues to play a role in judicial appointments throughout the nation. Even so, judicial philosophy often trumps diversity, as demonstrated by the opposition of many civil rights groups to the nomination

⁷⁸ This is not to say that the courts have never been a principal issue in a presidential campaign. For example, “[f]ederal judicial power was one of the major issues in the presidential elections of 1924.” Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1681 (2000). Progressive Party candidate Robert La Follette advocated judicial reforms such as ten-year term limits for federal judges, which incumbent President Coolidge—encouraged by Chief Justice Taft—opposed. *Id.* at 1730. The reelection of Coolidge was followed by a lame-duck congressional session in which Congress approved a bill authorizing the Court to use certiorari jurisdiction to exercise broad discretion in deciding which cases to decide—a discretion that “has had a profound role in shaping our substantive constitutional law.” *Id.* at 1731.

⁷⁹ See U.S. CONST. art. III, § 1 (stating “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior”).

⁸⁰ Timothy M. Hagle, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 14 POL. BEHAV. 25, 31, 37 (1993).

of Clarence Thomas,¹¹ and the efforts of some women's groups to block the rumored choice of Fifth Circuit Judge Edith Jones for the position now occupied by Justice Souter.

Fourth, there are many examples of judges whose performance on the court came as an unpleasant surprise to those who appointed them. Most famously, President Eisenhower regretted his appointments of Chief Justice Warren and Justice Brennan.¹² It is also doubtful that President Nixon was pleased with his appointment of Justice Blackmun, or that President Bush continues to approve of his appointment of Justice Souter. The same phenomenon occurs frequently with lower federal court judges and with state court judges precisely because judicial philosophy sometimes gives way to other considerations, and especially because judicial philosophy is difficult to discern.

V.

The irony is that an increased emphasis on judicial philosophy may make it more difficult to determine a potential judge's judicial philosophy. The awareness that one's expressed views on a topic of judicial attention can threaten to discourage prospective judges from addressing any controversial topics for fear of later opposition. President Bush's selection of David Souter to the Supreme Court is often described as a stealth appointment because Justice Souter had expressed so few views about the issues of greatest concern to those who were most concerned about the Court. Nonetheless, evidence is available to evaluate the judicial philosophy of many prospective judges. Sometimes that evidence is gleaned from decisions that the individual made in prior legislative, executive, or judicial offices. Sometimes the evidence is found in the voluntary writings of an individual working in a governmental position or in an academic capacity. Two examples involving the judicial resolution of life-and-death questions well illustrate the way in which such evidence of judicial philosophy is produced, and the consequences it can have.

Ronnie White failed to obtain Senate confirmation to a federal judgeship because of what he wrote in the course of dissenting in several capital punishment cases while serving on the Missouri Supreme Court.¹³ Those opinions elicited strikingly different interpretations in the Senate. Perhaps

¹¹ See *Endorsements of and Opposition to Thomas*, CHI. TRIBUNE, Sept. 15, 1991, at C4 (listing several civil rights who were opposed to Justice Thomas' confirmation, including the NAACP).

¹² HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 263 (2d ed. 1985) (recounting that "[w]hen Eisenhower was asked later if he had made any mistakes while he had been President, he replied: 'Yes, two, and they are both sitting on the Supreme Court.' 'Both' referred to Warren and Brennan.'").

¹³ See e.g. *State v. Johnson*, 968 S.W.2d 123, 136 (Mo. 1998) (White, J., dissenting); *State v. Kinder*, 942 S.W.2d 313, 340 (Mo. 1996) (White, J., dissenting).

most importantly, they provoked a number of Missouri law enforcement organizations to oppose his nomination.⁸⁴ They found a champion in Senator Ashcroft, who characterized White as someone who was inadequately sensitive to the punishment of criminals.⁸⁵ Ashcroft also emphasized the importance of White's judicial philosophy for the position he was nominated to hold.⁸⁶ As Ashcroft explained, "if confirmed, Judge White will have the power to review the death penalty decisions of the Missouri Supreme Court on habeas corpus. In the seat of district court, Judge White's sole dissents are transformed into a veto power over the judicial system of the State of Missouri."⁸⁷ Judge White's defenders protested that he did support capital punishment in appropriate circumstances, that he was only following the governing law, and that his record had been distorted by his opponents. They did not dispute the relevance of Judge White's judicial philosophy to the position for which he was nominated. Once defeated, Judge White's opponents were accused of acting for a different motivation—racism—which they vehemently denied.⁸⁸

We may encounter an even more telling indication of the cost of expressing one's judicial philosophy in the next few years. On July 1, 1991, numerous sources reported that Emilio Miller Garza was likely to be President Bush's choice to fill the vacancy on the Supreme Court caused by the retirement of Thurgood Marshall.⁸⁹ The sources were wrong. The next day, President Bush nominated Clarence Thomas. The ensuing confirmation process was, let us say, unprecedented, but Justice Thomas took his seat on the Supreme Court in October 1991. Garza has served on the Fifth Circuit since then, and with the inauguration of a new President Bush, Garza is perfectly positioned to become the first Hispanic justice on the Supreme Court. Except that since 1991, he happened to be in the wrong place at the wrong time, and according to the conventional wisdom about these matters, he said the wrong thing.

Of course, it was not Garza's fault that he was chosen to sit on panels deciding two abortion cases. But rather than exploit his status as a junior judge by saying nothing when he agreed that Supreme Court precedent dictated the result for the court of appeals, Judge Garza wrote two concurring

⁸⁴ See 145 CONG. REC. S11873 (daily ed. Oct. 4, 1999) (statement of Sen. Ashcroft).

⁸⁵ See 145 CONG. REC. S11872 (daily ed. Oct. 4, 1999) (statement of Sen. Ashcroft).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Andrew Miga, *Ted K Set to Grill AG Choice*, BOSTON HERALD, Jan. 16, 2001, at A1 ("Some have charged that race played a factor in Ashcroft's opposition to White. Republicans vehemently deny any racism on Ashcroft's part, asserting the judge's death penalty views were critical.").

⁸⁹ Michael Wines, *Bush Aides Say 4 Are on Court List*, N.Y. TIMES, July 1, 1991, at A8 (reporting that "two television networks reported that Mr. Bush is leaning toward nominating Emilio M. Garza").

opinions expressing his own opinions about the matter.⁹⁰

The first case should have been easy. In June 1991, Louisiana enacted a law criminalizing abortion in nearly all circumstances.⁹¹ In defense of the statute, the State argued "*Roe v. Wade* has been overruled sub silentio by *Webster v. Reproductive Health Services*, and its progeny."⁹² That argument vanished almost exactly one year later when the Supreme Court decided *Planned Parenthood v. Casey*.⁹³ Thus, when the Fifth Circuit reviewed the Louisiana statute three months later, Judge Garza agreed that *Casey* "reaffirmed the essential holding of *Roe v. Wade*," and the Louisiana statute must fall as a result.⁹⁴

Garza did not even need to say that much; Judge Jolly reached that conclusion in an opinion for the court that Judge Garza joined.⁹⁵ But Garza added a short, three-paragraph concurrence, admitting "*Casey*, nonetheless, causes me concern."⁹⁶ He then proceeded to quote approvingly the *Casey* dissents written by Chief Justice Rehnquist and by Justice Scalia, relying upon Justice Scalia to show *Casey* is about power, not abortion; and relying upon Rehnquist to insist that "'liberty' gives way to protection of human life" in this kind of situation.⁹⁷ In a footnote, Garza directly challenged the *Casey* plurality opinion's disclaimer that it was not mandating a moral code.⁹⁸ Judge Garza responded that "[s]tates legislate morality every day in the form of criminal statutes"—and he cited *Bowers v. Hardwick*⁹⁹ to support the constitutionality of such laws.¹⁰⁰ It only took two pages, but for a federal judge who could entertain realistic hopes of serving on the Supreme Court, the rejection of a constitutional right to abortion and the apparent approval of the state's power to regulate homosexual activity—in a concurrence, no less—was an unconventional strategy.

That, however, was only the beginning. In 1997, Judge Garza once again sat on a Fifth Circuit panel reviewing a Louisiana abortion statute.¹⁰¹ The new law, enacted in 1995, established a revised judicial bypass procedure available

⁹⁰ *Causeway Med. Suites v. Ieyoub*, 109 F.3d 1096, 1113 (5th Cir. 1997) (Garza, J., concurring specially); *Sojourner T. v. Edwards*, 974 F.2d 27, 28 (5th Cir. 1992) (Garza, J., concurring specially).

⁹¹ *Sojourner T.*, 974 F.2d at 29.

⁹² *Id.* at 28 (citation omitted).

⁹³ 505 U.S. 833 (1992).

⁹⁴ *Sojourner T.*, 974 F.2d at 31 (Garza, J., concurring specially).

⁹⁵ *Id.* at 28.

⁹⁶ *Id.* at 31 (Garza, J., concurring specially).

⁹⁷ *Id.* at 31-32 (Garza, J., concurring specially).

⁹⁸ *Id.* at 32 n.9 (Garza, J., concurring specially).

⁹⁹ 478 U.S. 186, 196 (1986).

¹⁰⁰ *Sojourner T.*, 974 F.2d at 32 n.9 (Garza, J., concurring specially).

¹⁰¹ *Causeway Med. Suites v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997).

to a minor who wished to obtain an abortion but who did not want to secure her parent's permission to do so.¹⁰² The Supreme Court has upheld such parental consent statutes, but only if they contain a very specific type of parental bypass procedure.¹⁰³ Louisiana's original statute had tracked the Court's requirements, but the 1995 amendments made two controversial changes: (1) they provided that a judge "may" order an abortion if it is in the minor's best interests or if the minor is sufficiently mature, rather than providing that a judge "shall" order an abortion in such circumstances; and (2) they directed the judge to notify the minor's parents when that notification is in the minor's best interests.¹⁰⁴

Once again, the Fifth Circuit struck down the law.¹⁰⁵ Once again, Judge Garza concurred in the court's opinion because he acknowledged that the Supreme Court abortion precedents supported that result.¹⁰⁶ And once again, Judge Garza wrote a special concurring opinion expressing his own thoughts on the case.¹⁰⁷ This time, though, Judge Garza stated his opposition to *Casey* and *Roe* much more directly, and he explained his reasoning in far greater length.¹⁰⁸ Indeed, by the time he was done, Judge Garza had compared the Court's abortion jurisprudence to *Dred Scott*, *Plessy v. Ferguson*, and *Lochner*, and he had indicated his disagreement with *Griswold* and the entire notion of substantive due process.¹⁰⁹

I have not read the entire corpus of Judge Garza's work while serving on the Fifth Circuit, but I do not need to. Right or wrong, Judge Garza's concurrences greatly complicate the possibility that he will ever become Justice Garza. Abortion is probably the most controversial issue facing the Court, so the record of prospective judicial nominees is scrutinized to discern the tiniest clues about how they might address such questions.¹¹⁰ Judge Garza has saved interested parties the trouble. By expressing his views so forcefully, he has deprived himself of any opportunity for those who want to believe him to be sure that he thinks exactly like them, a strategy responsible in part for the current positions of Justices Kennedy, Souter, and Thomas—and others before them.

¹⁰² *Id.* at 1099.

¹⁰³ *E.g.* *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502 (1990).

¹⁰⁴ *Causeway Med. Suites*, 109 F.3d at 1100-01.

¹⁰⁵ *Id.* at 1112.

¹⁰⁶ *Id.* at 1113 (Garza, J., concurring specially).

¹⁰⁷ *Id.* (Garza, J., concurring specially).

¹⁰⁸ *Id.* at 1113-24 (Garza, J., concurring specially).

¹⁰⁹ *Id.* at 1115-24 (Garza, J., concurring specially).

¹¹⁰ *E.g.* Gia Fenoglio, *But Where Do They Stand On Abortion?*, NAT'L J., May 26, 2001, at 1596 (noting the attention paid to abortion in evaluating federal judicial appointments, and evaluating the available evidence of the attitudes of President Bush's first judicial nominees toward abortion).

The details of Judge Garza's concurrences also prove the priority of judicial philosophy. The fact that Judge Garza would become the first Hispanic to serve on the Supreme Court, and that his other work has been well-received by judicial observers, would probably be overwhelmed by questions regarding his substantive approach to interpreting the Constitution, reading federal statutes, and the role of the judiciary. And that is how it should be.

VI.

What the stories of Judge Garza and Judge White do not resolve is the best means of choosing judges, even if it is agreed that judicial philosophy is of highest importance for the positions to which they aspire. We know the fate of Judge White's nomination in the Senate; we can only speculate about a possible nomination for Judge Garza. Would either of those judges be able to be elected to a higher post? Judge White received the support of nearly two-thirds of Missouri voters in his 1996 retention election,¹¹¹ though whether he would garner as much support nationwide under a hypothetical federal election scheme is less certain. It is even more difficult to imagine whether Judge Garza would prevail in a national election for the Supreme Court. It should be noted, though, that the idea of a political campaign for a candidate to the Supreme Court has already been proposed. Professor Paulsen has advised a candidate "having a controversial paper trail of either ideological or provocative, idiosyncratic views and who consequently faces a difficult confirmation process in a potentially hostile or divided Senate" to wage a proactive campaign for senate confirmation.¹¹² The distance from such a scenario to an elected judiciary is not too far.

There are other strategies as well. Judicial selections would be less controversial if the stakes declined, but any effort to reduce the power of the judiciary confronts the reality that many prefer an aggressive judiciary. Even those who protest against judicial activism are sometimes accused of it, as *Bush v. Gore* shows. The elimination of life tenure—a proposal advocated by Professor Carrington¹¹³—would simultaneously reduce the stakes for any given judicial selection, plus afford an opportunity to revisit a selection several years after it is made.¹¹⁴

More realistically, and probably more wise in any event, the existing checks on the selection of judges can be exploited more frequently. People can vote against judges when retention elections are available. The Senate can refuse to confirm judicial nominees who articulate an undesirable judicial philosophy. During times of divided government, the Senate could also press

¹¹¹ 145 CONG. REC. S13008 (daily ed. Oct. 21, 1999) (statement of Sen. Leahy).

¹¹² Paulsen, *supra* note 74, at 577.

¹¹³ Carrington, *supra* note 4, at 118-19.

¹¹⁴ *See id.*

the President to agree to some of its choices for judgeships as the prices for approving the President's nominees.

The contentiousness of federal judicial appointments during the past decade has obscured some movement toward a more collaborative approach to judicial selection. During the latter years of the Clinton Administration, the Senate was often criticized for refusing to consider nominees whom the majority regarded as too liberal. Now, the Senate is being pressed to block President Bush's judicial nominees because they are too conservative. If neither the President nor the Senate relents, then there will be no new judges. That was too often the result toward the end of the Clinton Administration when little effort was made by President Clinton to identify prospective judges who would be welcomed by the Republican majority in the Senate in order to gain approval of other nominees whom the Senate would not otherwise confirm.

President Bush's first nominees suggest a willingness to nominate a group of judges that includes individuals who are appealing to a variety of constituencies. The re-nomination of Roger Gregory, and the nomination of New York Federal District Court Judge Barrington Parker to the Second Circuit, serves as an unprecedented move toward a collaborative approach to judicial nominations.¹¹⁵ Individual senators, moreover, have suggested that they will approve the appointment of nominees whom they would otherwise oppose if the President also nominates judges they favor but who would otherwise be unlikely to be selected by the President.¹¹⁶ Only one such effort was made under President Clinton when the Administration agreed to nominate a conservative state Supreme Court justice to the Ninth Circuit in exchange for Senator Gorton's approval of one of Clinton's other nominees to that court, but the deal collapsed when the judge sought by Senator Gorton had to withdraw from consideration because of family concerns.¹¹⁷ The precise nature of what constitutes an appropriate compromise is almost always contested, but the mere existence of such discussions represents a unique effort to name judges who are acceptable as a group, even if they would face

¹¹⁵ See Palmer, *supra* note 33, at 1073 (providing a brief biography of President Bush's first eleven judicial nominees).

¹¹⁶ See *id.* at 1073-74 (describing efforts by North Carolina Senator Edwards and Michigan Senator Levin to obtain approval for their preferred judicial candidates).

¹¹⁷ Dan Carney, *Agreement on Judgeships No Guarantee of Quick Confirmations*, CONG. Q., May 9, 1998, at 1217 (describing how "Clinton would name Barbara Durham, a conservative chief justice on the Washington State Supreme Court, to the 9th U.S. Circuit Court of Appeals, in return for Gorton's support for liberal University of California at Berkeley law professor William A. Fletcher"); see also Neil A. Lewis, *A Nomination is Withdrawn, and a Deal is Threatened*, N.Y. TIMES, May 28, 1999, at A18 (reporting that Justice Durham had withdrawn from consideration for the Ninth Circuit because of her husband's heart ailments, after the Senate had already confirmed Judge Fletcher).

resistance individually.

Such deals hold the most promise of appointing the most talented judges to serve in the federal judiciary. For recent experience shows that it is often the most talented judicial nominees who are most likely to face the most opposition from groups who fear the influence that such individuals will possess once on the bench. Nominees to federal courts of appeals are likely to face particular scrutiny if they are viewed as potential candidates for future Supreme Court vacancies. Thus, the most attractive feature of President Bush's first nominees is that they are no more identical in judicial philosophy than in other characteristics.

By contrast, any attempt to limit judicial selections to the narrow range of individuals who are judged to hold a "moderate" judicial philosophy is a recipe for failure. The threshold problem, of course, is that moderation is in the eye of the beholder. When Cass Sunstein believes that "[t]he Supreme Court has moderates but no liberals,"¹¹⁸ while Robert Bork insists that "there is no far-right legal thought in the U.S.,"¹¹⁹ the search for the elusive middle is unlikely to include any potential judge who already holds a prominent place in American law today. Yet the Senate's initial response to President Bush's first nominees includes a continued desire to limit judicial nominees to undefined moderates.

Senate Majority Leader Tom Daschle advised, "we don't want right-wingers. We don't, for that matter . . . want any extreme left-wingers. I want people who come from the middle."¹²⁰ The Judicial Advisory Committee created to review candidates for federal district court judgeships in California will face the same issue. Senator Feinstein explained that the committee is designed to "provide a bipartisan balance" on the federal bench, a result that can be achieved by naming judges of many different philosophies so long as the requisite balance is maintained.¹²¹ Senator Boxer, however, sees the role of the committee as identifying "moderate judicial candidates," which significantly narrows the pool of individuals who will be eligible to serve as federal judges.¹²² The distinction between Senator Feinstein's view and Senator Boxer's view asks whether we are best served by naming the best moderate, the best conservative, and the best liberal to the Court, or rather whether we should appoint the first, second, and third best moderates. The best judges of all philosophies can serve on the federal district courts and

¹¹⁸ Cass Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A18.

¹¹⁹ Robert H. Bork, *Blue-Slip Blackmail*, WALL ST. J., May 10, 2001, at A18.

¹²⁰ *This Week* (ABC television broadcast, May 6, 2001) (remarks of Senator Daschle).

¹²¹ Press Release, Senators Boxer and Feinstein Announce Bipartisan Judicial Nomination Panel (May 22, 2001), available at http://feinstein.senate.gov/releases01/judicial_nomination_panel.html (last visited Apr. 13, 2002).

¹²² *Id.*

courts of appeals if the President and the Senate are willing to work together. A search restricted to "moderates" is unlikely to yield any different results in the future than it has to date.

The premise of this collaborative approach—that multiple vacancies provide an opportunity to appoint different kinds of judges—makes it unlikely to solve the debate surrounding the selection of Supreme Court Justices. The primacy of judicial philosophy reaches its apex when the composition of the Court is at issue. Each Court nomination, therefore, can expect to provoke a public relations battle commensurate with the competing parties' view of the importance of the questions at hand. The rising perception of the stakes of each Court appointment make it increasingly likely that any nominee will have to receive the consent of sixty senators, rather than fifty, in order to defeat a filibuster by the discontented minority. Any President who confronts that scenario must decide which interested parties he or she is willing to offend. Such an unenviable task may lead politicians take the same escapist route that shifts many contested questions to be decided through direct democracy—leave the decision to the People themselves, in this instance via judicial elections. That may be the only way to accurately gauge the People's view of the appropriate judicial philosophy, but the well-documented concerns about judicial elections suggest caution before choosing judges by election even in those circumstances.¹²³

Judicial elections and judicial appointments thus face many of the same challenges. Which method is best has occupied Americans at least since Alexander Hamilton defended judicial appointments in Federalist No. 78,¹²⁴ and it is unlikely that either method will displace the other any time soon. What is new is the stakes of judicial selections, as demonstrated most dramatically by the role of state and federal judges in adjudicating the disputes arising out of the 2000 presidential election. Those events should remind us that the most important question is not how judges are selected, but why.

¹²³ See generally PHILLIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* (1980); *JUDICIAL REFORM IN THE STATES* (Anthony Champagne & Judith Haydel eds., 1993).

¹²⁴ THE FEDERALIST NO. 78, at 576-82 (Alexander Hamilton) (John C. Hamilton ed., 1998).

