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The Meaning of the Constitution and the Selection of Judges

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I. INTRODUCTION

In the ongoing debate over the best method for choosing judges, the focus has been on the perceived drawbacks of judicial election without commensurate consideration of either the advantages of popular elections or the disadvantages of the commission system—usually styled the "Missouri plan" or "merit selection." One such consideration is the means of defining the judicial power.

II. THE AGE OF THE EXPERT

A hallmark of the Progressive Era was its emphasis on the expert. Frederick Winslow Taylor concluded his introduction to *The Principles of Scientific Management* by stating that, although he aimed his book especially at engineers and manufacturers:

> It is hoped . . . that it will be clear to other readers that the same principles can be applied with equal force to all social activities: to the management of our homes; the management of our farms; the management of the business of our tradesmen, large and small; of our churches, our philanthropic institutions, our universities, and our governmental departments.[1]

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[1] FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 6 (Dover Publ'ns 1997) (1911).

Albert Wiggam stated that "[t]here should be technologists in control of every field of human need and desire—in politics, in business, industry, education, religion, ethics, philosophy, charity, law, health, labor, employment; above all, in sociology, which is simply the application of the sciences to human life and destiny."[2] Popular author and consultant Edward Earle Purinton stated in his *Efficiency Question Box* column of the *Independent*, a Progressive Era publication, that "[t]he efficiency response to almost any situation . . . was to seek expert advice."[3]

I recall my mother telling me that, when she took me to kindergarten in 1948, she told the teacher she was already teaching me the alphabet. The teacher, my mother said, chastised her for trying to teach me herself. The teacher informed her that teaching was the teacher's job because the teacher was trained. The Progressive Era was the age of the expert. Teachers were to do the teaching; police were to do the policing. Ordinary citizens were to stay out of the things they did not understand and were to seek out expert advice.

I do not know that I can trace to the progressive movement the phenomenon of the laws being left to the lawyers and the Constitution being left to the Supreme Court, but I recall, when I was in high school, researching a bill debated in the House of Representatives. A representative asked the bill's sponsor whether the bill was constitutional. The sponsor responded that it was for the Supreme Court to decide. Even as a high school student, I was aware that each member of Congress swears an oath to uphold the Constitution.[4] The sponsor appeared to be shirking that

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[2] ALBERT EDWARD WIGGAM, THE NEW DECALOGUE OF SCIENCE 277 (1922).

[3] JENNIFER KARNS ALEXANDER, THE MANTRA OF EFFICIENCY: FROM WATERWHEEL TO SOCIAL CONTROL 97 (2008); *see also id.* at 98 ("Seek expert advice: that was uniformly the *Independent*'s response to correspondents seeking efficiency counsel.").

[4] U.S. CONST. art. VI, cl. 3.

responsibility with his response.[5] What a change this was from the days of the early Republic when the meaning of the Constitution was debated in the popular press in what today we call the Federalist Papers and the Anti-Federalist responses.[6]

III. ORIGIN OF THE COMMISSION-SELECTION SYSTEM

It was during the Progressive Era that the so-called "Missouri Plan"—or "merit selection"—was born. In 1906, Roscoe Pound, then of the University of Nebraska College of Law, addressed the American Bar Association (ABA) on the need for reforms to limit political influences on state court judges.[7] In 1913, Pound and Albert Martin Kales were instrumental in founding the American Judicature Society.[8] In 1914, Kales published the book *Unpopular Government in the United States*.[9] In "Chapter XVII: Methods of Selecting and Retiring Judges," he proposed a change in the way judges were selected.[10] In the earliest days of the republic, state judges, like federal judges, were almost always appointed—usually by governors and sometimes

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[5] Other scholars have commented on this all-too-common Congressional practice of passing legislation without regard for its constitutionality. *See* Mark Tushnet, *Flourishing and the Problem of Evil*, 63 TUL. L. REV. 1631, 1639 (1989) ("Most scholars think that members of Congress fail to honor their oaths to uphold the Constitution, or at least do not operate at their best, if they respond to [constitutional questions raised about proposed legislation] by saying, 'That's for the courts to decide.'").

[6] *See* EDWARD S. ELLIS, THE LIFE OF COLONEL DAVID CROCKETT 142–49 (1884) (He reports that David Crockett, then a member of Congress (1827–1835), told the story of a yeoman farmer constituent who confronted Crockett with the charge that Crockett had voted for an appropriation that the constituent considered unconstitutional. The meaning of the Constitution, the constituent seemed to believe, was the proper domain of the citizen voter.).

[7] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1 (1956) (reprinting the speech given by Pound to the American Bar Association).

[8] *See* Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128, 128 (1990); *see also* Charles Gardner Geyh, *The American Judicature Society and Judicial Independence,* 96 JUDICATURE 257, 257 (2013).

[9] *See* ALBERT M. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES (1914).

[10] *Id.* at 225–51.

with legislative consent.[11] There was a reaction to the system of judicial appointment because of perceived corruption and cronyism.[12] The response was a movement—apparently led by lawyers—to switch to the popular election of judges.[13] In addition to states changing to the popular election of judges—Mississippi being the first to switch in 1832—"[b]etween 1846 and 1912 every new state entering the Union embraced this scheme of selection, as did most of the previously settled states."[14]

Kales' proposal recognized that (in his era, before the development of the administrative state) judges effectuated the plans of the executive.[15] Because "[t]he power of the state to preserve order and settle the rights of parties is subject to be invoked in one way or another, according as the judge's mind reacts and operates," the selection and retirement of judges, Kales concluded, "is of the first importance."[16] Kales noted that, while there may be communities in which "the power of selecting and retiring judges really resides in the lawyers, subject only to the approval of the electorate,"—presumably, as Kales thought it should be—in "a metropolitan district" it is the political machine (the "politocrats") that actually does the selecting.[17] Moreover, these politocrats may, at any election, withhold re-nomination.[18] Because the public in metropolitan districts cannot know all of the judges, judges will be *de facto* appointed.[19] Moreover, Kales asserted the electorate is "too ignorant politically to make a choice

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[11] Patrick Winston Dunn, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267, 277 (1976).

[12] Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Justices, 1850–1920*, 1984 AM. B. FOUND. RES. J. 345, 348 (1984) ("Proponents of popular election insisted that the appellate judiciary had suffered because governors and legislators had distributed judgeships on the basis of 'service to the party' rather than on the 'legal skills or judicial temperament' of appointees.").

[13] *Id.* at 347–48 ("The rise of popular, partisan election of appellate judges is best understood as an essentially thoughtful response by constitutionally moderate lawyers and judges.").

[14] *Id.* at 346–47; *see also id.*at 346 n.6; *id.* at 347 n.7.

[15] KALES, *supra* note 9, at 225.

[16] *Id.*

[17] *Id.* at 226.

[18] *Id.* at 228 (a problem he says is exacerbated by actual recall elections).

[19] *Id.* at 229.

of judges."[20] In true progressive form, he states, "the determination of who are qualified for the office is unusually difficult, even when an expert in possession of all the facts makes the choice."[21] The public, he says, lacks the "knowledge required to vote intelligently."[22]

Having concluded that in a metropolitan area "the selection of judges by the electorate is practically impossible," Kales addressed "the best method of appointment."[23] Kales concluded that appointment by the governor, because it is "conspicuous and legal," is superior to secret appointment by the "politocrats of the extra-legal government" by means of the election process.[24] However, the method he actually discussed is appointment by an elected high court or chief justice of the district.[25]

The judicial head, Kales believed, would want the "most efficient judges" and, therefore, would select from among the most successful practitioners before the court.[26] Kales suggested:

> [A] probationary period—say three years—at the end of which time the judge must submit at a popular election to a vote on the question as to whether the place which he holds shall be declared vacant. This is not a vote which puts anyone else in the judge's place, but a vote which can at most only leave the place to be filled by the appointing power . . . . After surviving such a probationary period his appointment should continue for—let us say—six or nine years. At the end of that time the question might again be submitted as to whether his place should be declared vacant.[27]

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[20] *Id.* at 232.
[21] KALES, *supra* note 9, at 232.
[22] *Id.*
[23] *Id.* at 234–35.
[24] *Id.* at 238 (referring to the then-existing system of judicial elections as "the present misnamed plan of the popular election").
[25] *Id.* at 238–39.
[26] *Id.* at 241.
[27] KALES, *supra*, note 9, at 246.

For the selection itself, Kales suggested "a judicial counsel composed of the chief justice and the presiding justices of the different divisions," which would "provide a service test for candidates for places on the bench."[28] The judicial council would be empowered to put on an "eligible list" twice the number of lawyers as there are judges in the division.[29] The appointing authority—the chief justice—would be required to select appointments from the eligible list.[30] Thus, the appointing authority would have a list of those who would make "satisfactory judges."[31]

IV. THE RISE AND DECLINE OF THE COMMISSION-SELECTION SYSTEM

In 1940, the State of Missouri was the first to adopt a variation of Kales' proposal.[32] It did so upon an initiative petition sponsored by the recommendation of the Missouri Bar Association.[33] Laurance M. Hyde, then a judge on the Missouri Supreme Court, described the Missouri Plan:

> [S]election is made by the Governor's appointment, but this must be from a list of three names submitted to him by a Selection Commission. The Selection Commission . . . is composed of the Chief Justice of the Supreme Court as Chairman, three lawyers elected by the Bar, and three laymen appointed by the Governor . . . .
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> The next step, after a judge has been appointed from the list submitted, is that when he

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[28] *Id.* at 249–50.
[29] *Id.* at 250.
[30] *Id.* (The chief justice "should be required to select from this eligible list on the occasion of every other appointment at least.").
[31] *Id.* It would also, Kales suggested, encourage specialization among the practicing bar and "would develop expertise." *Id.*
[32] *See* Laurance M. Hyde, *The Missouri Plan for Selection and Tenure of Judges*, 39 J. CRIM. L. & CRIMINOLOGY 277, 280 (1948).
[33] *Id.* at 279.

> has served one year, the people vote at the next general election, following such year of service, upon the question of whether or not this judge shall have a full regular term . . . . Thereafter, a judge given a full term must submit his declaration of desire for another term, at the expiration of his term, and be voted on by the people . . . . At all such elections, the judge's names are placed on a separate judicial ballot, without party designation, the only question submitted being: "Shall Judge . . . . . ., of the . . . . . Court, be retained in the office? Yes. No."[34]

Thus, a lawyer-dominated commission, heavily influenced by the organized bar, selects three eligible candidates from which the Governor chooses one. However, it remains for the electorate potentially to reject the selection following the judge's probationary service on the bench. Although "there is every reason to expect that he would receive a favorable vote,"[35] the Missouri Bar had taken steps to inform the public.[36] Note the implicit confidence that the author, himself a judge on the Missouri Supreme Court, expressed in the wisdom of lawyers in selecting judges:

> If this practice [of "informing" the voters] becomes well established so that the people will look to and follow the endorsement of the Bar, a long step will have been taken toward safeguarding the effective and beneficial operation of the plan . . . . The adoption of our court plan by the people demonstrated that they had great confidence in our lawyers because of the prominent part it gives them in the selection of judges.[37]

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[34] *Id.* at 279–80. This language describes the mechanism for selecting appellate court judges. A similar plan is employed for trial court judges.
[35] *Id.* at 280.
[36] *Id.* at 283–84.
[37] *Id.* at 284.

The notion that lawyers know best who should be judges had its season. Between 1958, when a second state (Kansas) adopted the Missouri Plan, and 1994, nineteen states adopted some version of the nominating commission plan for selecting some of their judges.[38] In 2009, then-ABA President H. Thomas Wells, Jr., stated: "The ABA has long held that the best way to ensure access to justice is to choose judges through nonpartisan appointment with input from citizen commissions."[39] Note that, contemporaneous with the waning of the movement toward commission-selection plans at the end of the twentieth century, there has been a move to expand non-lawyer representation on judicial nominating commissions.[40]

V. JUDICIAL-ELECTION MYTHS AND THE EVIDENCE

In the meantime, scholars have been developing substantial social science literature on judicial selection. One argument after another has been raised for preferring nomination commissions to judicial elections, but the research has failed to support any such preference. It is not the purpose of this paper to catalog the research on judicial selection; however, it is useful to demonstrate that, at least, none of the arguments advanced for a commission-system preference is convincing.

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[38] *See* Am. Judicature Soc'y, *Chronology of Successful and Unsuccessful Merit Selection Ballot Measures*, NAT'L CTR. FOR STATE CTS., http://www.judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf (last visited Jan. 24, 2017). The States adopting such a plan were Kansas (1958), Alaska (1959), Iowa and Nebraska (1962), Colorado (1966), Oklahoma (1967), Indiana (1970), Wyoming (1972), Arizona and Vermont (1974), Florida and North Dakota (1976), New York (1977), Hawaii (1978), South Dakota (1980), Utah (1985), Connecticut (1986), New Mexico (1988), and Rhode Island (1994).

[39] H. Thomas Wells Jr., *Preserving a Fair and Impartial Judiciary*, 36 HUM. RTS. 1, ii (2009).

[40] The efficacy of adding non-lawyers—as opposed to its value as a selling point—is debatable in light of both the nature of the task (selecting lawyers to be judges), which is likely to encourage input from lawyers and discourage it from the non-lawyers, and the function of lawyers as trained advocates. *See* Harold See, *An Essay on Judicial Selection in* BENCH PRESS: THE COLLISION OF COURTS, POLITICS AND THE MEDIA 77 n.22 (Keith J. Bybee ed., 2007).

A. The Tone of Judicial Elections

First, it is commonly argued that judicial elections are nasty, ugly affairs. Melinda Gann Hall studied judicial elections and reported her findings in her book, *Attacking Judges: How Campaign Advertising Influences State Supreme Court Elections*.[41] The argument that judicial elections are mean and nasty affairs relies on unrepresentative examples. Hall found that, between 2002 and 2008, only one in five contested supreme court elections contained even a single negative advertisement, and data for 2010 and 2012 showed no increase in negative ads.[42] Moreover, the percentage that she reported is of contested elections, and a quarter of all judicial "races" were uncontested.[43] Thus, the percentage of total supreme court elections with any attack ads at all was below 17% (moreover, with the focus on state supreme court races, lower-court races are far less likely targets of attack advertising than are supreme courts).

Whatever nastiness there may be in judicial election campaigns, however, cannot justify the adoption of a commission-selection system absent a showing that commission selection will remove that nastiness. Although I am only aware of anecdotal evidence of ugly rumors being shared about prospective commission selections, it is reasonable to suspect that interests seeking to block a potential judicial candidate from being elected would have the same interest in blocking that candidate from being submitted to and appointed by the governor. The difference would be that, instead of publicizing the story to voters, it would be published to the members of the commission and/or to the governor—the relevant decisionmakers in a commission-selection system. This likely has the incidental effect of denying the prospective candidate an opportunity to respond if he or she is never told of the concern.

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[41] *See generally* Melinda Gann Hall, ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS (Keith J. Bybee ed., 2015).
[42] *Id.* at 75.
[43] *Id.* at 74 (calculated from Figure 3-1).

Finally, if nastiness were a sufficient justification for abandoning elections and substituting a commission system, then nastiness in other elections—executive and legislative—should also be sufficient to justify appointment of qualified executive and legislative officials. But, it is not.

B. Judicial Elections and the Legitimacy of the Judiciary

It is argued, though, that nasty elections undermine public confidence in the judiciary, and public confidence is essential to the functioning of the judiciary.[44] The judiciary is not unique in this regard. Every public officer—from President to mayor—and every legislative body in a democratic republic ultimately depends on public confidence for its legitimacy. Absent that, only brute force remains.

That the legitimacy argument argues too much, however, need not concern us. A 2009 survey sponsored by the National Center for State Courts found that, while the public thought the courts are too "mixed up in politics," "[i]ronically when judges have to run for elective office, people are more likely to think their decisions are above politics."[45] A 2002 ABA poll found essentially the same result: while 72% of respondents were concerned about whether the "impartiality of judges is compromised by the need to raise campaign money to successfully run for office," 75% thought that elected judges were more fair and impartial than appointed judges.[46] And a recent analysis by Michael Nelson concluded that, while there may be some short-term negative effects, "the good that comes by involving the public in the process of judicial

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[44] The Supreme Court of the United States has stated that, "States have a compelling interest in preserving public confidence in their judiciaries." Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1673 (2015).

[45] Princeton Survey Research Assocs. Intl., *Separate Branches, Shared Responsibilities: A National Survey of Public Expectations on Solving Justice Issues, NATIONAL CENTER FOR STATE COURTS* 20 (Apr. 2009), http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctcomm/id/118.

[46] Harris Interactive Telephone Survey, Prepared for the American Bar Association, August, 2002, available as Exhibit 1, Brief of Amicus Curiae James Madison Center for Free Speech Supporting Respondents, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08–22), 2009 WL 298469 (2009) at *5a–7a.

selection and retention appears to outweigh the negative aspects of campaigning" and enhances judicial legitimacy.[47] The legitimacy effect found by Nelson may also help explain the results of the 2002 and 2009 surveys, which may not be "ironic" at all. In fact, the nastiness, which may be common in political campaigns in general, is rare in judicial campaigns and does not appear to undermine confidence in the judiciary; to the contrary, elections may enhance the legitimacy of the judiciary.

C. The Quality of Elected Judges

The initial and underlying justification for the commission system was that the commission would make better choices than the voters.[48] Before examining the subsidiary arguments propounded in support of this justification, it is appropriate to ask whether the evidence supports the premise. Do commission-selected judges appear to be better qualified than elected judges? Melinda Gann Hall states: "To the extent that quality can be measured objectively, however, the evidence to date suggests that the Missouri Plan does not fulfill its promise."[49] Stephen Choi, et al., analyzed the actual performance measured by productivity, opinion quality, and independence and concluded that "[c]onventional wisdom holds that appointed judges are superior to elected judges because appointed judges are less vulnerable to political pressure. However, there is little empirical evidence for

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[47] Michael J. Nelson, *Judicial Elections and Support for State Courts*, *in* JUDICIAL ELECTIONS IN THE 21ST CENTURY 229 (Chris W. Bonneau & Melinda Gann Hall eds., 2017); *see also*, JAMES GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 130 (2012) ("The most important conclusion of this book is that judicial campaign activities do not seem to damage the legitimacy of those courts that select their judges through popular elections.").

[48] *See* KALES, *supra* note 9; *see also* Judicial Elections White Paper Task Force, *The Case for Partisan Judicial Elections*, 33 U. TOLEDO L. REV. 393, 396 (2002) ("[T]he use of a judicial nominating commission composed primarily of lawyers is seen as bringing a degree of expertise to the process of picking judges.").

[49] Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV., 315, 316 (2001).

this view."[50] Choi concluded, "[a]t a minimum the conventional wisdom needs to be reexamined."[51]

Moreover, thoughtful consideration of the premise, that commission members will do a better job of ascertaining the quality of judges than will the electorate, renders the premise suspect. First, the relative ability of commission members to evaluate prospective judges has to depend in substantial measure on who is selected to serve on the commission. What will the governor or other appointing officials and the bar association or other appointing interest groups be looking for in a commission member? Will the official be looking more for like-minded representatives rather than competent neutral analyzers of ability? Will the bar association and other appointing groups be subject to capture by, for example, trial lawyers or others with an interest in particular outcomes?[52] Are such appointing authorities not apt to

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[50] Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 290 (2010).

[51] *Id.* at 328; *see also* Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 231 (1987) ("Overall, there were few differences among the judges, but most important, since there is so little variation among them in terms of actual method of recruitment, it is impossible to draw any conclusions regarding the variations which were observed."). *But see* Damon Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226, 232 (2007) (concluding, based on survey data from judges, that "using elections to select judges actually diminishes the overall performance").

[52] *See* Michael E. DeBow, *The Bench, the Bar, and Everyone Else: Some Questions about State Judicial Selection*, 74 MO. L. REV. 777, 778 (2009) (addressing more careful thinking about ". . . the nature of lawyer domination of judicial nominating commissions—specifically, the extent to which lawyers call the shots, either in terms of numbers or because their expertise can generally be expected to allow them to control the agenda and set the tone for the lay members").

have as their first test: is he or she one of us?[53] Watson and Downing concluded that, under the Missouri Plan in Missouri, the selection process was influenced by two "communities of interest: the legal-judicial, which pursues a strategy of cooptation in recruitment; and the political, which stresses partisan political criteria in the choice of judges."[54] Henry Glick found that "[a]ttorneys are motivated to select judges whose social and economic views are most likely to coincide with those of the litigants they represent in court," and "[t]he lay appointees have intrinsic sympathies for the governor's appointment preferences."[55]

Second, a recommendation will depend upon the information available to the decisionmakers. To the extent the process is kept confidential, the commission members will have only their independent knowledge of the applicants and the information submitted by the applicants themselves, plus whatever information they solicit or comes in "over the transom." In a contested election, on the other hand, the public has someone—the opposing candidate—with an interest in uncovering additional information on the party or parties being considered.

It is often argued that the public does not know enough to select good judges. As I have just noted, this begs the question

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[53] For example, according to data released by the Federal Election Commission, lawyers have made more campaign contributions to Democratic candidates than Republican candidates in every election cycle going back to at least 1990. In the 2015–2016 election cycle, Democratic contributions outpaced Republican contributions as of October 16, 2016, by more than 250%. Ctr. for Responsive Pol., *Lawyers/Law Firms*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/indus.php?ind=K01 (last visited Oct. 21, 2016). *See also*, Adam Bonica, Adam S. Chilton, & Maya Sen, *The Political Ideologies of American Lawyers*, HARVARD KENNEDY SCH. FAC. RES. WORKING PAPER SERIES, August 2015, at 17, File No. RWP15-049 ("This confirms prior scholarship and journalism that has argued that the legal profession is liberal on balance."); William C. Duncan, *"A Lawyer Class": Views on Marriage and "Sexual Orientation" in the Legal Profession*, 15 BYU J. PUB. L. 137 (2001); and Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339 (2006).

[54] RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 198 (1969).

[55] Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 MIAMI L. REV. 509, 520–21 (1978).

whether the commission really knows better. But, the argument is usually couched this way: "The public does not even know who is on the State Supreme Court." This is probably true, and, of course, someone could tell the commission (and the public). But, it argues too much. The public does not know who their congressman is, who represents them in the state legislature and numerous other public offices.[56] If that is an argument against popular elections, then it is an argument against representative democracy itself—at least, below the level of the chief executive officer. It also miscomprehends the nature of elective democracy. Incumbents are re-elected,[57] unless there is a problem.[58] If there is a problem, voters know whom they are going to vote against. We either believe in this type of elective government, or we reject it; but we cannot pick and choose.

But, it is argued that the judiciary is different. Every elected office is different, but the public appears to be able to consider candidates for the school board differently from how it considers candidates for the utilities commission or the zoning board. It is anecdotal, but the members of the electorate I meet generally have a pretty clear idea what they expect of judges. They expect judges to decide cases in accordance with the law and tempered with a modicum of common sense. If voters have a

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[56] Studies have shown that only 28% of Americans could name their state senator or county clerk, only 35% could name both of their U.S. senators, and only 46% could name their incumbent House candidate. MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 75 (1997). One study found that only 43% could identify the Chief Justice of the United States. *Id.* at 98.

[57] Since 1952, the percentage of U.S. House of Representatives electoral races featuring an incumbent where the incumbent lost the race has fluctuated between 1 and 11%. Daniel Stockemer & Rodrigo Praino, *The Incumbency Advantage in the US Congress: A Roller-Coaster Relationship*, 32 POL. 220, 224 (2012).

[58] *See* Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives, 1952–82*, 31 AM. J. POL. SCI. 126, 139 (1987) ("The key [to the incumbency advantage] is to maintain an image of invulnerability that convinces activists of the other party that a major challenge would be effort wasted. This requires constant attention to the district to keep personal ties and reputation intact and the avoidance of mistakes—unpopular votes, a prominent position on the wrong side of a major issue—that galvanize potential opponents.") (internal citations omitted).

problem knowing and understanding the judicial function, is not the proper answer education—more information—rather than taking away the choice?

D. Elections and the Incentive to Adhere to the Rule of Law

There is at least one question that merits more study. Michael Kang and Joanna Shepherd, in their review of Melinda Gann Hall's *Attaching Judges*, note Hall's conclusions that attack advertising has little electoral impact and, at least in non-partisan elections, actually increases voter participation and motivates voters to vote for the incumbent.[59] They then argue that there is another effect—an effect on judicial decisionmaking.[60] "We discover," they state, "a significant relationship between attack advertising and state supreme court decisionmaking against criminal defendants in both partisan and nonpartisan states."[61] Specifically, Kang and Shepherd "find a statistically significant relationship between attack advertising and hostility to appeals by criminal defendants in state supreme courts."[62] They also state that "most judges become significantly more punitive when reelection concerns grow salient, but virtually no judges become more lenient, even in very liberal jurisdictions."[63] Kang and Shepherd reject, as improbable, that elections force judges to act in a way "more consistent with the law."[64] That is, they assert that elections incentivize judges to depart from the law.

Whatever the influence may be, if any, this apparent effect merits further investigation. Correlation is not causation, nor does it tell us which way causation may flow—to more closely adhere

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[59] *See* Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 930 (2016).
[60] *See id.* at 938, 938–39 nn.38–42, 940; *see also* John A. Dove, *The Economic Effects of Judicial Selection*, 8 FAULKNER L. REV. 157, 165–72 (2016).
[61] Kang & Shepherd, *supra* note 59, at 949.
[62] *Id.* at 945.
[63] *Id.* at 943–44.
[64] *Id.* at 944.

to the law or to depart from it.[65] Moreover, the fact that judges are human and that contemporary United States Supreme Court Justices not uncommonly become more "liberal" but never seem to become more "conservative" may call into question Kang and Shepherd's easy dismissal of the notion that elections may hold judges' feet to the fire. Kang and Shepherd's study is not comparative. It inquires into the effect of elections. It does not ask about the effect of the absence of elections or the effect of a potential appointment to a higher court. Nonetheless, the effect of various incentives on judicial decisionmaking merits further investigation.[66]

VI. THE PEOPLE SHOULD SELECT THEIR JUDICIARY

At this point, we can conclude there is no clear evidence to support the allegation that judicial elections are inferior to a commission system for the selection of judges. Therefore, such considerations will not outweigh another consideration that heavily favors a substantial popular role in the selection of judges.

In his *Constitutional History of the American Revolution*, John Phillip Reid opens with a discussion of the nature of the British constitution and its influence on the American revolutionary generation:

> Unlike the American state and federal constitutions, the British constitution was never written; it was not a set of directives adopted by the people granting government its prerogatives and limiting its powers. The British constitution, rather, was an idea, a way of thinking and arguing about authority, an outline of governmental goals and principles derived from existing institutions, laws, and customs, and drawn

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[65] We could state Kang and Shepherd's conclusion as this, "We discover a significant relationship between [the absence of] attack advertising and Supreme Court decisionmaking [in favor of] criminal defendants." *Id.* at 949.

[66] Note that while Kang and Shepherd address only criminal cases, there is nothing in principle to distinguish criminal law issues from those in other areas of popular concern.

> by deduction from the patterns by which they functioned. More to the point, the unwritten British constitution was an apparatus of limitation, a restraint on command, both the source of definition of individual civil rights and the chief protector of those rights.[67]

Reid describes two aspects of eighteenth-century constitutionalism. The first was to limit government.[68] "The second was security," to secure liberty and property.[69] Reid says of the American constitutionalists that they "were 'looking backward,' not to a government by popular consent but to government by the rule of law, to a sovereign that did not grant rights but was limited by rights, and that was the creature rather than the creator of law, (with law the guardian of liberty)."[70] Reid describes this constitution as "not command, but was groped by arguing natural law, community consensus, right reason, established usage, precedential evidence, implied contracts, collective ownership, and, most importantly, customary practice."[71]

While there is a distinct difference between a "written" and an "unwritten" constitution, there is also a fundamental commonality. The former includes both written documents—for example, the Magna Carta—and unwritten—principally customs.[72] Similarly, the United States' "written" constitution includes both a written document—the Constitution—and unwritten customs and practices. In their essences, neither the British nor the American Constitution is a writing on paper. Rather, each is a conceptual construct.

The best evidence of the content of the American Constitution is no doubt the written document, but that the whole of the Constitution is *not* contained within the writing is readily

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[67] JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 3 (abr. ed., 1995).
[68] *Id.* at 4.
[69] *Id.*
[70] *Id.* at 5.
[71] *Id.*
[72] *Id.* at 7.

demonstrated. First, the Preamble itself necessarily draws upon the Declaration of Independence:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[73]

In an era of kings, the authority of "the People" to establish a government clearly comes from the Declaration of Independence, which states as its purpose to explain and to justify the separation from England.[74] The premises—the self-evident truths of equality, "Life, Liberty and the Pursuit of Happiness"—that justify "the People to alter or to abolish [the present government], and to institute new Government," thus inhere in the Constitution that itself derives from the foundational premises of the Declaration.[75]

It is also clear the Constitution is not an attempt to start with first principles but to call to mind acceptations of the People to whom the document is attributed. In other words, the Constitution is a conceptual construct being described, epitomized, and effectuated in a writing. Section 1, for example, begins: "All legislative Powers herein granted shall be vested in a Congress of the United States."[76] Thus it details a structure, a Congress, and—in Section 8 in particular—powers expressly granted to the Congress.[77] It does not, however, define the term "legislative Powers" or enumerated powers such as "Taxes," "Debts," "general Welfare," "Money," "Commerce," "Piracies and Felonies committed on the high Seas," or "declare War."[78] In the words of

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[73] U.S. CONST. pmbl.
[74] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("[A] decent respect to the opinions of mankind requires that they [the People of the United States] should declare the causes which impel them to the separation.").
[75] *Id.* at para. 2.
[76] U.S. CONST. art. I, § 1.
[77] *Id.* at art. I, § 8.
[78] *Id.*

Chief Justice John Marshall in *McCulloch v. Maryland*, "[W]e must never forget that it is a constitution we are expounding."[79]

This notion that there is more to the Constitution than the writing itself may be best demonstrated by the Bill of Rights. The First Amendment's Free Speech Clause states, "Congress shall make no law . . . abridging the freedom of speech."[80] But, to appreciate whether the "freedom of speech" has been abridged requires an understanding of the "unabridged" level of freedom of speech. What is the speech that is being protected? To answer that question, we must go outside the Constitution and look at what speech was understood to be protected from governmental intrusion—speech that was free.

Most importantly for the purposes of this analysis, Article III of the Constitution addresses the judicial power. It vests the judicial power in "one supreme Court" and in such inferior courts as Congress may create.[81] Article III states that the judicial power extends to cases and controversies,[82] but it does not define the judicial power. Therefore, we need to look beyond the written document to determine what is meant by the "judicial Power," as that term is used in the Constitution.

Edmund Burke, in his "Speech on Parliamentary Incapacitation," delivered on January 31, 1770, addressed the difference between the legislative and judicial powers:

> It will be necessary to state shortly the difference between a Legislative and a juridical act. . . .
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> A Legislative Act has no reference to any rule; but these two Original Justice; and discretionary application. Therefore it can give rights rights where no rights existed before; and it can take away rights where they were before established. For the Law which binds all others

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[79] 17 U.S. 316, 407 (1819).
[80] U.S. CONST. amend. I.
[81] *Id.* at art. III, § 1.
[82] *Id.* at § 2.

> does not, and cannot bind the Law-maker: He and he alone is above the Law.
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> But a Judge, a person exercising a Judicial Capacity—is neither to apply to original Justice alone; nor to a discretionary application of it. He goes to Justice and discretion only at second hand, and through the medium of some superiours. He is to work neither upon his opinion of the one nor of the other. But upon a fixed Rule, of which he has not the making, but singly and solely the application to the Case. The very Idea of Law to exclude discretion in the Judge.
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> . . . .
>
> The properties of Law are first—1. That it should be known—2. That it should be fixed and not occasional.[83]

It is this agreed principle—that judges follow the law—that divided Hamilton, the Federalist, from "Brutus," the Anti-Federalist, in the debate over the adoption of the Constitution. Explaining the relation between the legislative and the judicial power, Hamilton stated:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable

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[83] Edmund Burke, Speech on Parliamentary Incapacitation (Jan. 31, 1770), *in* 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE 235 (Paul Langford & William B. Todd eds., 1981); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *149–57, *259–60 ("[F]undamental principles of law; which, though Legislators may depart from, yet judges are bound to observe.").

> variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
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> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[84]

Hamilton rejected any superiority of the judiciary over the legislature, recognizing instead the superiority of the People in the adoption of their Constitution over that of the legislators—the People's agents—who adopted the statutes. Hamilton identified the judicial function as "interpretation of the laws," preferring the Constitution—the People's law—over a statute, the law of the People's agents in the legislature. Implicitly, he expected judicial fealty to the law.

Brutus was less sanguine about such judicial fealty:

> The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will

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[84] THE FEDERALIST NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This is the position adopted by Chief Justice Marshall in Marbury v. Madison, 5 U.S. 137 (1803).

> declare it void; and therefore in this respect their power is superior to that of the legislature . . . . The judges are supreme—and no law, explanatory of the constitution, will be binding on them.[85]

Brutus sees the federal judiciary as unrestrained and, therefore, a superior branch of government. That, Brutus asserts, is a reason to reject what, at that time, was the proposed constitution.[86]

At the inception of our constitutional government, there was a fundamental disagreement as to the nature and scope of the judicial power. That debate continued. In *Calder v. Bull*, Justices Samuel Chase and James Iredell, while agreeing on the outcome of the case, disagreed as to the more abstract question of the power of the federal judiciary.[87] Justice Chase expressed a willingness to judicially limit state legislative power "although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State."[88] He continued: "The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it."[89] Justice Iredell disagreed with Justice Chase's premise:

> If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court

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[85] 2 THE ANTI-FEDERALIST NOS. 78–79 at 439–40, 441 (Brutus) (Herbert J. Storing ed., 1981).
[86] *Id.*
[87] 3 U.S. 386 (1798).
[88] *Id.* at 388.
[89] *Id.*

> could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2nd. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.[90]

Today, as the debate continues, we call these two conceptions of judicial power, in the first instance, by such terms as a "living" or "evolving" Constitution and, in the latter, by such terms as "strict construction" or "originalism." This is not to suggest there are only two methods of construing a constitution; there are many, depending on one's concept of a constitution. However, among those who inquire into the proper function (i.e., judicial philosophy) of a judge, the various philosophies generally fall into one of these two contending classifications.

The question of which judicial philosophy is appropriate is constitutional in nature. It is the Constitution that grants the judicial power, and the nature and scope of that power is determined by the Constitution as a conceptual construct. And, although we have been speaking in terms of the federal Constitution, the same analysis applies to state constitutions modeled after the federal Constitution—that is, state constitutions that do not clearly define the judicial power.

Questions, then, present themselves: Who defines the meaning of the judicial power? Whose Constitution is it? Who is

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[90] *Id.* at 398 (Iredell, J. concurring).

the ultimate guardian of the Constitution? The Supreme Court of the United States famously said in *Cooper v. Aaron*, that "[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[91] If that statement is read broadly, then Brutus was correct, and there is no check on the judiciary. Judges are the watchmen, but "*quis custodiet ipsos custodes*?"[92] In some measure, each branch of the government watches over the others.[93] However, to suggest it is within the judicial function to determine whether to adhere to the "language" or to the "spirit" of the Constitution, or in what relative measures to do so, misses the point of having a written constitution and fails to answer the question of who should decide what the Constitution means. It is circular to say the Constitution means, by a delegation of the judicial power to the judiciary, that the judiciary is free to decide what that delegation encompasses—that is, to define the nature and scope, not only of the nature and power of the other branches to declare the law, but of its own power to do so.

The Declaration of Independence declares "it is the Right of the People to alter or to abolish [their government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[94] On this premise, the "People of the United States" established their Constitution.[95]

For the people to own their constitution, they need more than "parchment barriers"—a writing. Madison wrote:

> The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against

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[91] Cooper v. Aaron, 358 U.S. 1, 18 (1958).
[92] A Latin phrase which translates as "who will guard the guards themselves?"
[93] *See* THE FEDERALIST NO. 51 (James Madison).
[94] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[95] U.S. CONST. pmbl.

> those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.[96]

There must be some accountability to the people, either directly or indirectly—directly, through elections, or indirectly, through appointment by elected officials who are themselves accountable to the People.

The meaning of "judicial power" is a fundamental constitutional concept. It is, therefore, appropriate that the people define it by their selection of judges. Because of the structural importance of the nature and scope of the judicial power, absent a sufficiently compelling reason to place its definition at a greater remove from the People, the default method should be direct election of judges.

The federal judiciary presents just such a special case. The function of the federal judiciary is to enforce the Supremacy Clause, which provides that the federal Constitution, and federal laws and treaties made pursuant to it, "shall be the supreme Law of the Land."[97] Therefore, federal judges cannot be elected from their respective districts, or their allegiance would be to their local constituencies instead of to the federal government. Moreover, nation-wide election is, at best, impractical. Therefore, the indirect selection of federal judges by an elected president with confirmation by elected senators (or, originally, senators appointed by elected state representatives of the people) is justifiable.

As discussed above, however, with respect to the selection of state judges, there is no substantial justification for taking the selection out of the hands of the public. If there were, that consideration would have to be weighed against the compelling concern for a constitution of, by, and for the People.

Judicial selection by popular election is justified on constitutional grounds. Where there are special circumstances, selection by elected officials is permissible as a means of indirect

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[96] THE FEDERALIST NO. 48, at 313 (James Madison) (Clinton Rossiter ed., 1961).

[97] U.S. CONST. art. VI, cl. 2.

popular selection. However, the selection of judges by an essentially anonymous and unaccountable commission is unjustified. Although it may be argued that, under a commission system, the governor ultimately makes the appointment and is accountable to the public, this is a sleight of hand. First, the governor has a very small area of discretion under a commission system.[98] Thus, the governor's choice is not representative of the public will. Second, the governor can escape accountability by, very reasonably, saying that he or she did the best he or she could with the limited choices available. If you do not like it, complain to the (unaccountable) commission.

VII. CONCLUSION

The commission system of judicial selection, born in the Progressive Era and coming of age in its afterglow, offers a heritage of experts replacing citizens and their representatives. There is, however, a striking absence of substantiation, either of such expertise or of any beneficial results from it. The evidence that judges produced by the commissions are better than those who are elected, or that the judiciary is any stronger or otherwise better as a result of the commission system, is far from convincing. On the other hand, there is a clear cost to such a selection system. In the presence of an ongoing constitutional debate over the meaning of "judicial power," the People—the authors of that phrase in the Constitution—are, in commission states, being denied the means to address that question through their selection of judges who share their understanding of the proper role of the judiciary.

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[98] Imagine stopping by a roadside apple stand, observing the orchard full of beautiful apples, and asking to buy one. The farmer offers you three, from which you may pick one. If you decline, the farmer says, depending on the state in which the farmer resides, "Okay, then I will pick one for you," or "Okay, here are three more just like the first three, pick one of them."