

2018

## Weighing Democracy and Judicial Legitimacy in Judicial Selection

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### Recommended Citation

Kenneth S. Klein, *Weighing Democracy and Judicial Legitimacy in Judicial Selection*, 23 *Tex. Rev. L. & Pol.* 269 (2018).

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# WEIGHING DEMOCRACY AND JUDICIAL LEGITIMACY IN JUDICIAL SELECTION

KENNETH S. KLEIN\*

## ABSTRACT

*For over two centuries Americans have debated whether judges should be elected or appointed. While the explicitly-framed tension has been about the relative importance of judicial independence and judicial accountability in a democracy, the underlying issue has been about which structure better promotes the legitimacy of the judiciary. An institution has legitimacy when it enjoys diffuse support even for controversial decisions. Judicial legitimacy is in inherent tension with a judiciary in a democracy, since democracy implicitly assumes political elements to selection of all leaders (including judges), while judicial legitimacy is undermined by politics. The contemporary work on the relationship between judicial selection methods and legitimacy does not support a clear preference for judicial election versus judicial appointment. This Article proposes that in order to promote judicial legitimacy in a democracy, consideration should be given to a civil service-like, nonpartisan, objective merit screening of judicial aspirants—whether the aspirant ultimately is selected through election or appointment.*

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## INTRODUCTION

Yogi Berra is attributed with saying, “You can observe a lot by just watching.”<sup>1</sup> This Article seeks to “re-watch” the centuries old American debate—should judges be elected or appointed—and “observe” that it largely may have been asking the wrong question. In 2015, the U.S. Supreme Court acknowledged,

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years. Hamilton believed that appointing judges to positions with life tenure constituted “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.” Jefferson thought that making judges “dependent on none but themselves” ran counter to the principle of “a government founded on the public will.”<sup>2</sup>

The debate over how judges are selected is a robust one and continues today in decisional law and academic literature. The focus is primarily on elections. What is the impact, both on voters and on judicial behavior, of money? Of campaigning based on issues the judge might rule upon? Of aggressive advertising? Of partisan affiliation? Are judicial elections different from other elections? Should they be?

The underlying narrative is one about what contemporary theorists call “legitimacy.” Essential to a functioning democracy is a judicial function seen as legitimate—meaning it is trusted even when it rules in controversial or unpopular ways.

The thesis of this Article is that engaging in the debate over how judges should be selected is more important now than ever, but that what has emerged so far is a chaotic and contradictory data set. The solution to this apparent Gordian knot is to shift focus to

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1. Nate Scott, *The 50 Greatest Yogi Berra Quotes*, USA TODAY (Sept. 23, 2015), <http://ftw.usatoday.com/2015/09/the-50-greatest-yogi-berra-quotes>.

2. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1672–73 (2015) (citations omitted).

an earlier process juncture—being precise, objective, apolitical, and unforgiving in screening who is qualified to be considered to be a judge.

The stakes today are higher than they have ever been. Over two centuries ago, Hamilton and Jefferson had a conversation about balancing the values of democracy and justice. What is the more important system value—an accountable judge or an independent judge? The conundrum goes to the essence of what a judiciary should be in a democracy. Can we trust a judge who has to answer to the people? Can we trust a judge who does *not* have to answer to the people?<sup>3</sup> And contemporaneously with addressing that philosophical riddle, the Founders embedded in the Constitution a thrice-memorialized democratic check on potentially autocratic judges—the jury.<sup>4</sup> But today the jury has all but disappeared:

[J]uries hear . . . around one to four percent of criminal cases in federal and state courts and hear less than one percent of civil cases in federal and state courts. . . . Even when juries hear cases, judges often second-guess them, taking cases from them using procedures that did not exist at the time of the founding.<sup>5</sup>

So today the manner of judicial selection often is the *only* democratic check on potentially autocratic power in the judicial branch.

Little clarity has come from the academic and judicial focus on whether—and if so, how—judges should be elected. Much study has been given to the impact on the perceived legitimacy of the courts from electing judges. Much study has looked at the increased politicization of the judicial appointment process. And read collectively, the body of work approaches being oxymoronic.

That is not to say that the work is flawed. Rather, correctly-structured study of whether legitimacy is enhanced by electing or appointing judges should not come to a clear answer if it turns out that picking one manner of judicial selection or the other does not materially matter to balancing democracy, justice, and legitimacy.

There is a recent anecdotal case study concretely illustrating precisely that—that the manner of judicial selection in fact may

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3. See Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URBAN L.J. 363, 364–67 (2006) (arguing that the predominant view in the United States—that independence and accountability can be simultaneously served—is itself a flaw, as exemplified by Europe where a clear choice for independence has been made).

4. U.S. CONST. art. III, §2; U.S. CONST. amends. VI, VII.

5. Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L.J. 1261, 1262–63 (2016).

not matter to the ultimate legitimacy of the judiciary. Consider the firestorm of reaction to California Judge Aaron Persky after the sentencing hearing of convicted rapist and former Stanford swimmer Brock Turner.

Aaron Persky was a California superior court judge. In California, all trial judges nominally are elected for six-year terms.<sup>6</sup> But new judges rarely gain their seats by election.<sup>7</sup> Typically the Governor appoints a judge to a position that has vacated midterm, and the judge is then on the ballot as the incumbent in the next general election.<sup>8</sup> California judicial elections are nonpartisan.<sup>9</sup> Incumbent judges are rarely opposed, and even when opposed are rarely defeated.<sup>10</sup>

Judicial appointments have a significant apolitical, merit-selection component. Persons interested in becoming a judge apply to the Governor's appointments office.<sup>11</sup> Applications go through extensive review by the State Bar of California's Judicial Nomination Evaluation Commission.<sup>12</sup> The Governor nominates a person who survives that evaluation.<sup>13</sup> And then the nominee is subject to legislative advice and consent.<sup>14</sup>

The California approach is an intricate one intended to produce a professional, qualified—in other words, a neutral and independent—judiciary through a democratic process. Sometimes judges are opposed; sometimes a judicial seat is “open,” with no incumbent on the ballot; and, sometimes an incumbent does lose. But even that process does not always lead to a perception of judicial legitimacy.

Brock Turner, a former freshman swimmer at Stanford, was convicted of three counts of sexual assault.<sup>15</sup> Turner digitally

6. CAL. CONST. art. VI, § 16.

7. *Judicial Selection in the States: California*, NAT'L CTR. FOR ST. CTS., [http://judicialselection.us/judicial\\_selection/index.cfm?state=CA](http://judicialselection.us/judicial_selection/index.cfm?state=CA).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Judicial Appointment Applications*, OFFICE OF GOV. EDMUND G. BROWN JR., [https://www.gov.ca.gov/s\\_judicialappointments.php](https://www.gov.ca.gov/s_judicialappointments.php).

12. *Commission on Judicial Nominees Evaluation*, STATE BAR OF CAL., <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Judicial-Nominees-Evaluation>; *Title 7: Miscellaneous Provisions*, STATE BAR OF CAL. (2007), [http://www.calbar.ca.gov/Portals/0/documents/rules/Rules\\_Title7\\_Div1-JNE.pdf](http://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title7_Div1-JNE.pdf).

13. *Title 7: Miscellaneous Provisions*, *supra* note 12, at 1.

14. REECE TREVOR ET AL., STANFORD L. SCH. L. AND POL'Y LAB, JUDICIAL SELECTION IN CALIFORNIA 15–17 (2017), [https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/Judicial\\_Selection\\_in\\_California\\_Report.pdf](https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/Judicial_Selection_in_California_Report.pdf).

15. Janette Gagnon & Emanuella Grinberg, *Mad About Brock Turner's Sentence? It's Not*

penetrated an unconscious woman behind a trash dumpster.<sup>16</sup> On June 2, 2016, Judge Persky, himself a former student athlete at Stanford University,<sup>17</sup> adjudicated the sentencing hearing of Brock Turner. Judge Persky—weighing among other evidence a victim impact statement that had “gone viral” as a moving description of the consequences of rape,<sup>18</sup> countered by a defense statement by Turner’s father describing the rape conviction as “a steep price to pay for 20 minutes of action out of his 20 plus years of life”<sup>19</sup>—sentenced Turner to six months in jail, citing the “extraordinary circumstances” of Turner’s youth and lack of criminal record.<sup>20</sup>

Public response could be charitably described as an explosion. A petition drive began to impeach Judge Persky.<sup>21</sup> The California legislature passed a law to prohibit similarly “light” sentences in the future.<sup>22</sup> Judge Persky was “voluntarily” reassigned to only civil cases.<sup>23</sup> A formal recall campaign began.<sup>24</sup> The saga seemed to come to a close when, on December 19, 2016, the California Commission on Judicial Performance concluded there was no evidence that Judge Persky displayed bias or was otherwise guilty of judicial misconduct warranting discipline.<sup>25</sup> But, on January 23, 2018, the County of Santa

Uncommon, CNN (Sept. 4, 2016), <http://www.cnn.com/2016/09/02/us/brock-turner-college-athletes-sentence/index.html>.

16. *Id.*

17. *Full Biography for Aaron Persky*, LEAGUE OF WOMEN VOTERS OF CAL.: SMARTVOTER (Feb. 26, 2002), [http://www.smartvoter.org/2002/03/05/ca/scl/vote/persky\\_a/bio.html](http://www.smartvoter.org/2002/03/05/ca/scl/vote/persky_a/bio.html).

18. Lindsey Bever, *You Took Away My Worth: A Sexual Assault Victim’s Powerful Message to Her Stanford Attacker*, WASH. POST (June 4, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/06/04/you-took-away-my-worth-a-rape-victim-delivers-powerful-message-to-a-former-stanford-swimmer/>.

19. Tom Cleary, *READ: Full Letter to the Judge by Dan Turner, Brock’s Father*, HEAVY (Updated Aug. 29, 2016, 5:40 PM), <http://heavy.com/news/2016/06/brock-turner-father-dad-dan-turner-full-letter-statement-stanford-rape/>.

20. Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, ATLANTIC (June 17, 2016), <https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/>.

21. Maria Ruiz, *Remove Judge Aaron Persky from the Bench for Decision in Brock Turner Rape Case*, CHANGE.ORG, <https://www.change.org/p/california-state-house-impeach-judge-aaron-persky>.

22. Jazmine Ulloa, *Spurred by Brock Turner Case, Gov. Jerry Brown Signs Laws to Toughen Laws Against Rape*, L.A. TIMES, (Sept. 30, 2016), <http://www.latimes.com/politics/la-pol-sac-california-sex-crimes-stanford-cosby-bills-20160930-snap-htmlstory.html>.

23. Emanuella Grinberg & Dan Simon, *Brock Turner Judge to No Longer Hear Criminal Cases*, CNN (Aug. 26, 2016), <http://edition.cnn.com/2016/08/25/us/brock-turner-aaron-persky-judge-reassigned/>.

24. *Aaron Persky Recall, Santa Clara County, California (2018)*, BALLOTEDIA, [https://ballotpedia.org/Aaron\\_Persky\\_recall,\\_Santa\\_Clara\\_County,\\_California\\_\(2018\)](https://ballotpedia.org/Aaron_Persky_recall,_Santa_Clara_County,_California_(2018)).

25. COMM’N ON JUDICIAL PERFORMANCE, COMMISSION ON JUDICIAL PERFORMANCE CLOSES INVESTIGATION OF JUDGE AARON PERSKY (Dec. 19, 2016), [https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky\\_Explanatory\\_Statement\\_12-19-16.pdf](https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky_Explanatory_Statement_12-19-16.pdf).

Clara Registrar of Voters reported that a Judge Aaron Persky recall petition qualified for the June 5, 2018, statewide primary ballot.<sup>26</sup> In that election, voters did in fact recall Judge Persky (the first California judge to be successfully recalled in eighty-six years).<sup>27</sup>

The underlying, unspoken narrative of Judge Persky's public excoriation seemed to be one of a community frustrated that it could not easily, immediately, and effectively punish Judge Persky. That is a frustration with some irony. Judge Persky stood for reelection just six days after handing down the Brock Turner sentence.<sup>28</sup> But the ballot had long been closed, and Judge Persky was unopposed.<sup>29</sup> That left the public with less obvious options to respond to what was generally perceived as a failure of justice.

Judge Persky administered justice as he saw it, but in a deeply unpopular way. Ultimately, he lost his job.<sup>30</sup> He suffered consequences which could influence, by way of example, the judicial decision-making of other judges.<sup>31</sup> Aspects of this saga reflected both judicial independence and judicial accountability. So, is this an example of a broken system or one behaving as it should?<sup>32</sup>

No matter where one stands on the election-or-appointment divide, or the independence-or-accountability divide, the Judge Persky saga is frustrating. How could he have thought this was acceptable? Who are we to second-guess a conclusion having not

26. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>.

27. *Id.*

28. John Bacon, *Judge Under Fire in Stanford Rape Case Gets New Term*, USA TODAY, (June 7, 2016), <https://www.usatoday.com/story/news/nation/2016/06/07/judge-stanford-sex-assault-case-draws-outrage/85548204/>.

29. Associated Press, *Northern California Judge Run Unopposed for Re-election*, SAN DIEGO UNION-TRIBUNE, (June 8, 2016), <http://www.sandiegouniontribune.com/sdut-northern-california-judge-run-unopposed-for-re-2016jun08-story.html>.

30. Astor, *supra* note 26.

31. See Mark Joseph Stern, *This Is How Mass Incarceration Happens*, SLATE (Jan. 16, 2018), [https://slate.com/news-and-politics/2018/01/the-dangerous-misguided-campaign-to-recall-the-judge-who-sentenced-brock-turner.html?via=recirc\\_recent](https://slate.com/news-and-politics/2018/01/the-dangerous-misguided-campaign-to-recall-the-judge-who-sentenced-brock-turner.html?via=recirc_recent) (arguing that the recall of Judge Persky may have been well-intentioned, but could pressure judges to play it safe by sentencing others harshly).

32. One must be careful to not overinterpret the example. For instance, perhaps the "dilemma" of Judge Persky reflects biases turning on gender and privilege. Consider the contrast of the reaction to the Brock Turner sentencing with *The Times* newspaper in London reporting positively on the likelihood that a female Oxford student aspiring to be a heart surgeon might be spared any jail time for stabbing her boyfriend in the leg. Frances Gibb & Jonathan Ames, *'Extraordinary' Student Could Be Spared Jail for Stabbing Boyfriend*, THE TIMES (May 17, 2017), <https://www.thetimes.co.uk/article/extraordinary-student-could-be-spared-jail-for-stabbing-boyfriend-jmmb372vm>.



seen the full set of evidence and witnesses? If he was still a fully qualified judge, then why did he have to abandon presiding over criminal trials? What the story of Judge Persky seems to illustrate is that the way one thinks about judges, elections, appointments, and removal neither creates consensus nor even progress toward a satisfactory solution.

Professor James L. Gibson writes, “When people know that they have the power to turn out judges who perform poorly, they are more willing to accept the decisions of those judges.”<sup>33</sup> But as the Brock Turner saga exposes, people often do *not* actually have the power to turn out judges who perform poorly, at least not easily, which makes people angry.

Further, if the end goal is legitimacy, then the “willingness” Gibson describes is emblematic of *illegitimacy*, not of legitimacy. The central tenet of “Legitimacy Theory” is that a legitimate institution enjoys support even when society disagrees with the institution’s specific acts.<sup>34</sup>

What then is the lesson of the provocative example of the Brock Turner trial and the public reaction to its presiding judge, Aaron Persky? One explanation is that a methodology of judicial selection—even an intricate, thoughtful, hybrid method—is not what infuses a judiciary with legitimacy. In other words, the current literature on judicial selection—which is almost entirely focused on choosing between judicial election or judicial appointment—may frame a debate incapable of resolution.

This Article revisits the extant literature on judicial selection and legitimacy, and proposes an alternative interpretation. This Article proposes that what the literature consistently describes is an institution that needs to derive legitimacy at a different process juncture—determining who is *eligible* to be a judge. Selecting among an extant list of possible judges—and debating the manner of selection—is a step too late.

The solution proposed by this Article is that any judicial aspirant be screened by a civil-service-like, objective merit

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33. JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 131 (2012).

34. Craig Deegan, *Legitimacy Theory*, in *METHODOLOGICAL ISSUES IN ACCOUNTING RESEARCH: THEORIES, METHODS AND ISSUES* 161 (Zahirul Hoque ed. 2006); *see also*, DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 278–80 (1965) (explaining that institutional legitimacy can lead to individuals’ support of authority, even in the face of specific failures by those institutions).

system. Political processes would be limited to then selecting a judge from the list of qualified candidates that emerge. The idea is to not focus on who precisely Judge Persky is and what precisely he did (or on any other individual judge or decision), but to focus on a requirement that any judge must, by definition, be found appropriately and exceptionally qualified as determined by an apolitical system. Then, perhaps, a community might react to a result such as the sentence of Brock Turner by recognizing that the judge perhaps knew something that the press did not report, and accepting that decision. That is legitimacy.

Part I of this Article reviews the extant literature on the role in a democracy of legitimacy in general, and judicial legitimacy specifically. Part II addresses the literature on the conflicting goals of judicial accountability and judicial independence, which paints a confounding picture of the impact of judicial selection methods in serving either or both goals. Part III offers a reinterpretation of the judicial selection literature, proposing that it consistently describes a different solution—a more aggressive merit screening of judicial aspirants. And Part IV seeks to untie the apparent Gordian knot of removing politics from judicial selection while retaining a democratic element in the judicial branch.

## I. THE RELATIONSHIP BETWEEN DEMOCRACY, JUDICIAL SELECTION, AND LEGITIMACY

### *A. Democracy*

In the book, *Sapiens: A Brief History of Humankind*, Yuval Harari describes how humans have overcome the limitations of small clans of individuals by adopting the construct of “common myths that exist only in [human] imagination.”<sup>35</sup> Harari argues that these common myths are the basis of almost all recorded human history, beginning with the agricultural revolution and threading through the development of religion and economic systems and government.

True democracy itself is one such “common myth.” For much of human history, the dominant organizing principle in world governance was “might makes right.” As Thomas Hobbes put it,

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35. YUVAL NOAH HARARI, *SAPIENS: A BRIEF HISTORY OF HUMANKIND* 27 (2014).

life is “nasty, brutish, and short.”<sup>36</sup> Sheer power—the threat to one’s continued corporeal existence and the avoidance of pain and suffering—undoubtedly was an effective method to enforce adherence to shared myths, such as the infallibility and supremacy of a monarch.

In his book, *The Cave and the Light*, Arthur Herman traces the gradual emergence of the view that rulers do not properly derive power from force of arms, but from the people, who both may chose and remove rulers.<sup>37</sup> The idea began with William Ockham, was part of the philosophical underpinning of the “Catholic Schism” (the only instance before recent times when a Pope voluntarily relinquished office), was famously developed by John Locke, and was memorialized by Thomas Jefferson in the Declaration of Independence.<sup>38</sup>

While the great western philosophers of the Renaissance disagreed about whether “common myth” advanced or hindered individual rights, all saw it as the only option in the absence of governance through force. Thomas Aquinas and his followers posited that in the natural state, man was totally free and utterly unsafe. Thinkers such as Hobbes saw government as existing to regulate brutishness—an agreement to trade some degree of natural rights for some degree of civil rights.<sup>39</sup> John Locke argued that liberty was protected, not hindered, by the social contract: proper government was not a restraint on natural liberty, but an expansion of it by providing a framework for protecting and nurturing it. In the view of Locke, therefore, government by popular consent was “what separates a society of free men from a society of slaves.”<sup>40</sup>

When the North American British Colonies declared independence from the Crown—not long after the death of Locke—modern democracy, a form of government explicitly based on social contract, was born. The second sentence of the Declaration of Independence asserted, “Governments are instituted among Men, deriving their just powers from the consent

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36. THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL* 84 (Alfred R. Waller ed., Cambridge Univ. Press 1904) (1651).

37. ARTHUR HERMAN, *THE CAVE AND THE LIGHT* 357–58 (2013).

38. *Id.* at 252–56. William Ockham famously conceived of the logical construct of Ockham’s Razor—the simplest solution likely is the correct one.

39. *Id.* at 358–359.

40. *Id.* at 359–60.

of the governed. . . .”<sup>41</sup> The Declaration of Independence rejected “might makes right,” explicitly adopting a principle of shared, voluntary self-governance.

Democracy is, of course, a myth. It is a collective acceptance among dispersed strangers—most of whom will never have occasion to communicate with each other even once—that they will somehow believe and accept an amorphously-identified common intention and accord their individual conduct within a presumed, but never actually negotiated, social contract.

### *B. Judicial Selection and Judicial Legitimacy in Democracies*

Early on, the Founders of the United States saw the connection between, and conundrum of, democracy and how individuals got to be judges. As Stephen Croley summarizes,

In Federalist 78, Alexander Hamilton argued that permanence of tenure, which he considered to be a great virtue of the proposed federal judiciary, would avoid many ills associated with subjecting judges to political pressures. According to Hamilton, an independent judiciary constituted the “citadel of the public justice and the public security.” His argument is uncompromising: “Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the judiciary’s] necessary independence.” Half of a century later, Alexis de Tocqueville joined Hamilton by suggesting that some states’ then-emergent practice of subjecting judges to periodic elections was tantamount to an attack on “the democratic republic itself.”<sup>42</sup>

Yet, as quoted above, Jefferson thought that making judges “dependent on none but themselves” ran counter to the principle of “government founded on the public will.”<sup>43</sup>

That debate has yet to wane. For example, in 2015, in *Williams-Yulee v. Florida Bar*,<sup>44</sup> Justice Ginsburg wrote, “Unlike politicians, judges are not ‘expected to be responsive to [the] concerns’ of constituents. Instead, ‘it is the business of judges to be indifferent to popularity.’”<sup>45</sup> Justice Scalia responded that,

41. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

42. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694–95 (1995) (citations omitted).

43. 12 THE WORKS OF THOMAS JEFFERSON 5 (Paul Leicester Ford ed., 1905).

44. 135 S. Ct. 1656 (2015).

45. *Id.* at 1674 (Ginsburg, J., concurring) (first quoting *McCutcheon v. Federal Election Comm’n*, 134 S. Ct. 1434, 1441 (2014); then quoting *Chisom v. Roemer*, 501 U.S.

A free society, accustomed to electing its rulers, does not much care whether the rulers operate through statute and executive order, or through judicial distortion of statute, executive order, and constitution. The prescription that judges be elected probably springs from the people's realization that their judges can become their rulers—and (it must be said) from just a deep-down feeling that members of the Third Branch will profit from a hearty helping of humble pie, and from a severe reduction of their great remove from the (ugh!) People.<sup>46</sup>

Academics and philosophers chew on the same concepts. Aristotle's *Rhetoric* describes the three modes of persuasion as logos, ethos, and pathos.<sup>47</sup> Logos is an appeal based on logic.<sup>48</sup> Ethos is an appeal based on the credibility of the speaker.<sup>49</sup> Pathos is an appeal based on emotion.<sup>50</sup> Contemporary social scientists, beginning with David Easton, implicitly describe how a nonviolent society requires its institutions have all three—logos, ethos, and pathos.

This is a conversation about legitimacy. Easton describes “the inculcation of a sense of legitimacy” as “probably the single most effective device for regulating the flow of diffuse support in favor both of the authorities and of the regime.”<sup>51</sup> Easton posits the question whether a political system could survive without “feelings of legitimacy,” and answers that such convictions are “helpful and perhaps even necessary.”<sup>52</sup>

If the constant threat of living on a precipice of disorder is to be avoided, at a minimum the authorities require some assurance . . . they can expect regularly to obtain compliance. . . . The belief in the legitimacy of the authorities and regimes provides such a stable connection. Regardless of what the members may feel about the wisdom of the action of authorities, obedience may flow from some rudimentary convictions [that the authorities] . . . are legitimate.<sup>53</sup>

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380, 401, n.29 (1991)).

46. *Id.* at 1681–82 (Scalia, J., dissenting).

47. Christoff Rapp, *Aristotle's Rhetoric*, STAN. ENCYC. OF PHIL. (Feb. 1, 2010), <https://plato.stanford.edu/entries/aristotle-rhetoric/>.

48. *Using Rhetorical Strategies for Persuasion*, PURDUE ONLINE WRITING LAB, [https://owl.purdue.edu/owl/general\\_writing/academic\\_writing/establishing\\_arguments/rhetorical\\_strategies.html](https://owl.purdue.edu/owl/general_writing/academic_writing/establishing_arguments/rhetorical_strategies.html).

49. *Id.*

50. *Id.*

51. EASTON, *supra* note 34, at 278.

52. *Id.* at 278–79.

53. *Id.* at 279–80.

Easton's work introduced the label of "Legitimacy Theory," or that which "gives explicit consideration to the expectations of society . . . and [to] whether an organization appears to be complying with the expectations of the societies within which it operates."<sup>54</sup> Institutions with diffuse, rather than specific, support are said to be legitimate, meaning the institution enjoys support even when society disagrees with the institution's specific acts.<sup>55</sup>

Harari, Easton, Herman, Locke, Scalia, Ginsburg, De Tocqueville, Hamilton, Jefferson, and scores of others all grasp the same core concept: legitimacy—including judicial legitimacy—is essential to democracy. An acceptance of a government institution—including its courts—acting in a way a constituent disagrees with is the glue of a healthy, nonviolent, democratic society.

### *C. Legitimacy and the Judiciary in Democracies*

The U.S. Supreme Court from time to time explicitly acknowledges the centrality of legitimacy to the judiciary's own viability and the sometimes ill-fitting relationship between legitimacy, democracy, and the judiciary. In *Taylor v. Louisiana*,<sup>56</sup> the Court wrote that "[c]ommunity participation in the administration of the criminal law . . . is . . . critical to public confidence in the criminal justice system."<sup>57</sup> In his dissent in *Bush v. Gore*,<sup>58</sup> Justice Stevens famously wrote that the opinion undermined the "public treasure" of "the public's confidence in the Court itself" and thus "was a wound that may harm . . . the Nation."<sup>59</sup> In *Press-Enterprise Co. v. Superior Court*,<sup>60</sup> the Court wrote,

The open trial thus plays [an] important a role in the administration of justice. . . . The value of openness lies in the fact that people not actually attending trials can have confidence

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54. Deegan, *supra* note 34, at 201.

55. *Id.* at 161; EASTON, *supra* note 34, at 273.

56. 419 U.S. 522 (1975).

57. *Id.* at 530; *see also* *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (prohibiting race-based peremptory strikes of jurors will strengthen "public respect for our criminal justice system"); *U.S. v. Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.").

58. 531 U.S. 98 (2000).

59. *Id.* at 157–58 (Stevens, J., dissenting).

60. 464 U.S. 501 (1984).

that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>61</sup>

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>62</sup> Justice O'Connor wrote,

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.<sup>63</sup>

Scholars agree. Leslie Ellis and Shari Siedman Diamond, summarizing the work of several social scientists, wrote,

[P]eople are more willing to accept decisions and to adhere to agreements over time when they perceive those decisions as having been produced by fair procedures. Moreover, the authority and perceived legitimacy of the institutions that produce the decisions are enhanced when the procedures used to produce the decisions are viewed as fair, even when those decisions involved unfavorable outcomes. The comfort and positive reactions of litigants are of course important in and of themselves. But building perceptions of procedural justice has an additional important payoff: enhanced authority and legitimacy increase the likelihood that the parties will accept the jury's finding. The more legitimate the process is perceived to be, the more likely participants are to accept the outcome, positive or negative.<sup>64</sup>

Yet social scientists have been slow to comprehensively and specifically apply Legitimacy Theory to the judicial branch. Much of the scholarly work applying Legitimacy Theory to the justice

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61. *Id.* at 508.

62. 505 U.S. 833 (1992).

63. *Id.* at 865.

64. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHICAGO-KENT L. REV. 1033, 1040 (2003).

system focuses the U.S. Supreme Court and concludes that the Court has a deep reservoir of legitimacy.<sup>65</sup> But in 2008, Cann and Yates found that “[d]espite the policy import of state courts, only a relatively small number of studies have examined citizen support for state courts, and nearly all of these have analyzed only a single city or state’s citizens’ views toward its courts.”<sup>66</sup>

Within this small number of studies, Gibson’s 2012 book, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy*, stands out.<sup>67</sup> Gibson did precise, deep analysis of the 2006 Kentucky judicial elections.<sup>68</sup> He concluded that “it seems that somewhere around three-fourths of the American people extend legitimacy to their state judicial institutions.”<sup>69</sup>

How important is the legitimacy of the judiciary to a democracy? The recent example of Poland provides a provocative insight. On July 22, 2017, Poland’s Parliament passed “new laws to give it more control over the country’s courts.”<sup>70</sup> The laws “would force all current Supreme Court judges to resign, replacing them with jurists chosen by the governing party’s minister of justice.”<sup>71</sup> The public reacted with “[t]housands of people” protesting in “dozens of cities across Poland.”<sup>72</sup> Two days later, the President of Poland decided to veto the bill, stating the new laws “would not strengthen the sense of justice in society.”<sup>73</sup> Amnesty International was more blunt, saying the veto decision “pulled Poland back from the brink of all-out assault on the rule of law.”<sup>74</sup> Yet the same events repeated a year later.<sup>75</sup>

65. See Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 AM. POL. RES. 297, 297–300 (2008) (“A wealth of scholarship exists on the topic of public support of and views toward the United States Supreme Court.”).

66. *Id.* at 300 (citations omitted); accord GIBSON, *supra* note 33, at 7 (“In-depth research on public attitudes toward courts other than the U.S. Supreme Court is sparse, but far from non-existent.”).

67. GIBSON, *supra* note 33.

68. *Id.* at 17–20.

69. *Id.* at 130.

70. Rick Lyman, *Poland Hope to Sway President from Curtailing Court’s Independence*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/2017/07/22/world/europe/poland-courts-andrzej-duda-law-and-justice.html>.

71. *Id.*

72. *Id.*

73. Willa Frej, *Poland’s President Decides to Veto Controversial Judicial Reform Bills*, HUFFINGTON POST (July 24, 2017), [http://www.huffingtonpost.com/entry/poland-president-veto-judiciary\\_us\\_5975ea1de4b00e4363e0d09f7z&ncid=inblnkushpimg00000009](http://www.huffingtonpost.com/entry/poland-president-veto-judiciary_us_5975ea1de4b00e4363e0d09f7z&ncid=inblnkushpimg00000009).

74. *Id.*

75. Marc Santora, *Poland Purges Its Supreme Court, and Protesters Take to the Streets*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/world/europe/poland-supreme-court-protest.html>.



Or consider one aspect of the political chaos that was North Carolina in 2017.<sup>76</sup> In October 2017, following the loss of the executive house, the (majority Republican) North Carolina legislature sought to enact a court reform plan that had been dormant for years.<sup>77</sup> Despite this being squarely within their legislative power, the course of action evoked accusations of political bias due to its timing. Whether or not this was the intent, this is a prime example of the sensitive balance legislatures must consider when taking actions that might affect judicial legitimacy.<sup>78</sup>

In the end, the challenge is not identifying the importance of judicial legitimacy to democracy, but identifying how to foster and protect it.<sup>79</sup> As Gibson finds, while the U.S. Supreme Court is one of the most trusted government institutions in the world, even its legitimacy can erode, and “what we do *not* know . . . is whether/why/how/under what conditions changes take place.”<sup>80</sup> Put another way, precisely *how*—if at all—can one structure a judiciary simultaneously to be accountable, independent, and legitimate in a democracy?

Important in this task is keeping straight the difference between legitimacy and trust. As a general matter, one intuitively trusts judges who make decisions they agree with and mistrusts—even seeks to remove—judges who makes decisions they disagree with. But if the judiciary has legitimacy, then one trusts a judge that they *disagree* with. This is a critical distinction, and one that even legitimacy scholars lose track of from time to time.

## II. THE CONFOUNDING LITERATURE ON WHICH IS MORE IMPORTANT—JUDICIAL ACCOUNTABILITY (ELECTED JUDGES) OR JUDICIAL INDEPENDENCE (APPOINTED JUDGES)—IN A DEMOCRACY

The term “legitimacy” is a recent addition to the conversation weighing accountability and independence, but the conversation

76. Trip Gabriel, *In North Carolina, Republicans Stung by Court Rulings Aim to Change the Judges*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/us/north-carolina-republicans-gerrymander-judges.html>.

77. *Id.*

78. *Major NC Judicial District Reshuffling Moves Forward*, CAROLINA PUBL. PRESS (Sept. 22, 2017), <https://carolinapublicpress.org/27479/major-judicial-district-reshuffling-moves-forward/>.

79. See generally Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 488–93 (2018) (suggesting that the “most urgent challenge . . . is to find ways to rehabilitate the ethical commitments that our political and judicial institutions need in order to operate successfully”).

80. GIBSON, *supra* note 33, at 7–8.

has been going on for quite a long time.<sup>81</sup> There is a lot of literature—indirectly and increasingly directly—considering the big question: How can one structure a judiciary to be accountable, independent, and legitimate in a democracy?

Any hope that the work has pointed to an answer is misplaced. The work is a mess. As Professor Lee Epstein summarized in 2013,

For decades now, many law professors, judges, institutes, and professional associations (including the American Judicature Society), have been leveling an assault on judicial elections. Their attack is multi-pronged but usually the words “special interests,” “judicial independence,” “impartiality,” and “legitimacy” appear somewhere in their articles and speeches, and on their websites. Now the assaulters are under assault. The counter-attackers are mostly social scientists, with a sprinkling of law professors. Armed with vast amounts of data, their point isn’t to show that judicial elections aren’t as bad as we’ve been led to believe; it is to demonstrate that forcing judges to face the electorate has substantial benefits.<sup>82</sup>

For example, Bickel proposes and develops,

When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of . . . the actual people . . . it exercises control, not [o]n behalf of the prevailing majority, but against it. . . . and it is the reason the charge can be made that judicial review is undemocratic.<sup>83</sup>

Croley responds that “[e]lective judiciaries are illegitimate and should be dismantled forthwith.”<sup>84</sup>

Senior Hoover Institute Fellow Barry Weingast argues that a democracy cannot survive without counter-majoritarian provisions,<sup>85</sup> and goes so far as to assert that “the U.S. Constitution is highly undemocratic.”<sup>86</sup> Michael Dimino recognizes that “judicial independence is a foundational principle—perhaps the foundational principle—of Article III” of the Constitution.<sup>87</sup> But

81. See, e.g., Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 576–79 (2014) (tracing the history and debate of judicial independence).

82. Lee Epstein, *Electoral Benefits: The Assault on the Assaulters of Judicial Elections*, 96 JUDICATURE 218, 219 (2013).

83. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (Yale, 2d ed. 1986).

84. Croley, *supra* note 42, at 789.

85. Barry R. Weingast, *Capitalism, Democracy, and Counter-majoritarian Institutions*, 23 SUP. CT. ECON. REV. 255, 267–69 (2015).

86. *Id.* at 256.

87. Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the*

Dimino argues that “the governmental interests in maintaining an independent, impartial judiciary and in protecting the appearance of the judiciary as independent and impartial” cannot “provide justification for the suppression of speech, where such suppression would be held impermissible in elections for other offices.”<sup>88</sup> And Jacintha Webster observes,

The election of judges was not something fundamental to the structure of our nation. In fact, at the time of the founding, there were very few, if any, elected judges. Judges were almost always appointed by the executive or legislature. It was not until the Jacksonian Era that people began to elect judges.<sup>89</sup>

At that time, the idea was to “ensure that state judges would command more rather than less power and prestige.”<sup>90</sup> Bam adds,

A favorite pastime of judicial selection scholars is critiquing judicial elections. . . . And the academics are not alone. . . . the American Bar Association has called on states to end the practice of electing judges entirely. . . . Justice Sandra Day O’Connor has also been the public face of the campaign against judicial elections. . . . But one group overwhelmingly favors judicial elections, and it is the one group that matters most: the people themselves. Despite their concerns about biased elected judges, approximately 80% of the public supports judicial elections.<sup>91</sup>

Judges chime in too. For example, the Court repeatedly asserts that public confidence in judicial integrity is a “state interest of the highest order.”<sup>92</sup> And the Honorable David F. Hamilton, a judge on the United States Court of Appeals for the Seventh Circuit, characterizes the federal judiciary as “admired across the globe for its combination of independence, competence, and fairness.”<sup>93</sup>

*First Amendment, and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301, 306–10 (2003).

88. *Id.* at 303.

89. Jacintha M. Webster, *An Impossible Balance: Judicial Elections and the Constitution*, 9 ALB. GOV’T L. REV. 384, 387–88 (2016); see also Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 337–41 (1983) (tracing the history of the elected judiciary among the various states).

90. Hall, *supra* note 89, at 354.

91. Dmitry Bam, *Restoring the Civil Jury in a World Without Trials*, 94 NEB. L. REV. 862, 883–84 (2016) (citations omitted); see also Raymond J. McKoski, *Living With Judicial Elections*, 39 U. ARK. LITTLE ROCK L. REV. 491, 491 (2017) (“Some of the most educated and respected jurists, journalists, and scholars describe judicial elections in very unflattering terms such as awful, unconstitutional, idiotic, scary, unwise, demagogic, and doomed. Those more olfactorily oriented complain that judicial elections smell and stink.”).

92. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009); *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J. concurring).

93. David F. Hamilton, *Federal Courts and Partisan Conflict*, 50 IND. L. REV. 127, 129

But appointing judges is not necessarily a panacea either.<sup>94</sup> There are dramatic historical examples of the dangers of unregulated judicial officers.<sup>95</sup> And, “[a]lthough [life-tenured schemes] are designed to induce judicial independence, once the appointing regime changes, they can produce the opposite effect.”<sup>96</sup> Indeed, some scholars argue, “[I]f we define judicial independence as the ability to behave sincerely, that is, in line with truly-held preferences, then non-renewable terms may be a better mechanism for inducing such behavior than life tenure.”<sup>97</sup>

Perhaps “ideally public opinion should be irrelevant to the judge’s role because the judge often is called upon to disregard, or even to defy, popular sentiment.”<sup>98</sup> But no judge is totally independent; independence resides on a continuum.<sup>99</sup> So, as Kang and Shepard write, “[T]he usual problem with elected judges, as critics of judicial elections would put it, is not that judges are responsive at all to political incentives, but that they are excessively so.”<sup>100</sup>

It all can be a confounding theoretical debate.<sup>101</sup> Empiricists have not made the answer any clearer.<sup>102</sup>

(2016).

94. See generally STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 124–33, 51–54, 159–60 (1991) (discussing the issues surrounding federal judicial appointments in light of the failed Robert Bork nomination to the Supreme Court).

95. See generally Joseph W. Bellacosa, *Devils and Angels of Judicial Integrity*, 90 ST. JOHN’S L. REV. 1, 3–9, 13–15 (2016).

96. Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2054 (2016).

97. Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 35 (2001).

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

99. Gilbert, *supra* note 81, at 583.

100. Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 939–40 (2016); accord Gilbert, *supra* note 81, at 596–97 (arguing that the “thorny” issue of independence versus accountability can be resolved by more precisely defining an optimal level of judicial independence); see also Charles Garner Geyh, *The Dimension of Judicial Impartiality*, 65 FLA. L. REV. 493, 497, 513–14 (2013) (seeking to resituate judicial impartiality as a political and jurisprudential concept).

101. See, e.g., Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1573 (1988) (“The attempt to reconcile judicial independence with democratic premises has preoccupied several generations of political theorists and academic lawyers.”).

102. See, e.g., Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J. L. ECON. & ORGAN. 290, 328 (2010) (“We began this project with the assumption that the data would demonstrate that appointed judges are better than elected judges. Our results suggest a more complicated story. It may be that elected judges are, indeed, superior to appointed judges. Or it may be that elected judges are superior to appointed judges in small states only and not necessarily in large states. At a minimum, the conventional wisdom needs to be reexamined.”); see also Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial*

Kang and Shepard “examined the general relationship between television campaign advertising and judicial decision-making” and “found that the more television ads aired during state supreme court judicial elections in a state, the less likely justices are to vote in favor of criminal defendants.”<sup>103</sup> Lee Epstein found “when judges in the United States know that they must face the electorate to keep their jobs, the judges engage in sophisticated behavior, such as ruling for in-state plaintiffs and against criminal defendants.”<sup>104</sup> And as Michael Gilbert describes,

In 2009, the Supreme Court of Iowa unanimously held that same-sex couples have a right to marry under the state constitution. A year later, Iowans voted out of office three justices who joined that opinion. In the months leading up to the vote, out-of-state groups spent nearly one million dollars on political ads targeting the justices.<sup>105</sup>

Nownes and Glennan write, “Empirical studies confirm that elected judges do indeed behave differently on the bench, and that this redounds to the detriment of vulnerable citizens.”<sup>106</sup> Or maybe not—Cann found the opposite.<sup>107</sup> And a more nuanced conclusion was reached by Gibson, who found that in judicial elections “policy pronouncements by candidates do not undermine legitimacy, while policy promises do.”<sup>108</sup>

Focusing in particular on legitimacy, Benesh found partisan judicial elections undermine legitimacy.<sup>109</sup> Kang and Shepard agreed: “[T]he influence of campaign contributions on judicial decisions is limited almost exclusively to judges facing partisan elections.”<sup>110</sup> Further, not all money is of equal dignity—Nelson

*Reform*, 95 AM. POL. SCI. REV. 315, 321, 324–27 (2001) (discussing empirical findings from a study of state supreme court elections and asserting that the data provided some clear conclusions as well as more nuanced information).

103. Kang & Shepherd, *supra* note 100, at 930.

104. Epstein, *supra* note 96, at 2054.

105. Gilbert, *supra* note 81, at 576–77.

106. Anthony J. Nownes & Colin Glennon, *An Experimental Investigation of How Judicial Elections Affect Public Faith in the Judicial System*, 41 LAW & SOC. INQUIRY 37, 40 (2016); see also Bam, *supra* note 91, at 870–81 (analyzing empirical studies showing bias in elected judges).

107. See Damon M. Cann, *Campaign Contributions and Judicial Behavior*, 23 AM. REV. POL. 261, 265, 271–72 (2002) (concluding, based on a study of Wisconsin Supreme Court case decisions and judicial elections, that judicial elections “cannot be dismissed as a poor method of judicial selection on the grounds of campaign finance corruption”).

108. James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 LAW & SOC’Y REV. 899, 899 (2008).

109. Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 696, 701–02 (2006).

110. Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical*

found “dark money” election support undermines judicial legitimacy less than direct or independent support from litigants.<sup>111</sup> And all of this work to some degree begs the questions, unless appointing judges insulates the judges from the influences of partisanship. Kang and Shepard found it did not—partisanship infects appointed judges as well.<sup>112</sup>

As part of his “Axiom of 80,” Geyh reviewed a collection of public polling data and concluded, “Eighty percent of the public believes that financial contributions to judicial election campaigns buy influence.”<sup>113</sup> Kang and Shepherd empirically confirmed that campaign contributions effect judicial decisions by elected judges in favor of the contributors.<sup>114</sup> They further contended that “this influence extends to a wide range of cases beyond the primary policy interests of the contributors themselves.”<sup>115</sup> Yet, Melinda Gann Hall’s work concluded that aggressive election advertising has little effect on judicial behavior.<sup>116</sup>

The American Bar Association found that isolated issues of intense political interest are increasingly the focus of judicial election campaigns.<sup>117</sup> But to what effect? Ansolabehere and Iyengar found that negative ads depressed voter turnout.<sup>118</sup> Finkel and Geer disagreed.<sup>119</sup>

Public polling is equally unilluminating:

Eighty percent of surveyed citizens believe that judges in their state should be elected, and 70 percent report being convinced

*Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 107 (2011).

111. Michael J. Nelson, *Is There a Silver Lining? Dark Money and Support for the State Courts*, 67 DEPAUL L. REV. 187, 188 (2018).

112. See generally Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1414–18 (2016).

113. Charles G. Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54–55 (2003).

114. Kang & Shepherd, *supra* note 110, at 128; see also Kang & Sheppard, *supra* note 100, at 930 (asserting that television attack ads vilifying perceived judicial leniency toward criminal defendants are associated with increased judicial hostility to criminal defendants).

115. Michael S. Kang & Joanna M. Shepherd, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices’ Decisions in Criminal Cases*, AM. CONST. SOC’Y, <https://www.acslaw.org/analysis/reports/skewed-justice/>.

116. MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* 176 (2015).

117. AM. BAR ASS’N, *JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON 21ST CENTURY JUDICIARY* 18–22 (July 2003), [https://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/rep\\_or.athcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/rep_or.athcheckdam.pdf).

118. STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE* 109 (1995).

119. Stephen Finkel & John Geer, *A Spot Check: Casting Doubt on the Demobilizing Effect of Attack Advertising*, 42 AM. J. POL. SCI. 573, 577 (1998).

that “public criticism of judges makes judges more accountable and leads to better decisions.” . . . [yet] 81 percent of respondents agree that “Courts are unique institutions that should be free of political and public pressure.”<sup>120</sup>

Charles Geyh reviewed the available data and found appointing judges to be essential to public acceptance of judges who decided cases the public disagreed with.<sup>121</sup> Binder and Maltzman found that the politicization of the confirmation process delegitimized those judges.<sup>122</sup> But Bonneau and Hall, as well as Gibson, concluded that many of the various intuitively troublesome aspects of electing judges do not degrade legitimacy.<sup>123</sup>

Nownes and Glennon summarized the work of their predecessors by noting,

While previous studies have unquestionably improved our understanding of elections and their effects on judicial legitimacy, we believe that one general question remains under addressed. That question is this: Does the method by which judges acquire their positions affect public perceptions of judicial legitimacy? Though it may seem at first glance that some do, none of the studies we cite above address this precise question directly.<sup>124</sup>

Nownes and Glennon concluded that while the public does not trust elected judges, the public trusts appointed judges less: “Does electing state supreme court justices negatively affect levels of diffuse support for the state supreme court? Our findings suggest that the answer to this question is ‘No.’”<sup>125</sup>

In an equally nuanced and complex conclusion, Sara Benesh’s work seems to find the opposite:

What kinds of individuals are most and least likely to support the courts in their communities, then? Considering the results of the analysis overall, it seems that a highly educated individual with experience as a juror and a strong understanding of the court system, who has a high level of baseline confidence in the institutions of government, and who lives in a state where judges

120. Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections are Changing*, 38 AKRON L. REV. 625, 642 (2005).

121. Geyh, *supra* note 113, at 78–79.

122. SARAH A. BINDER & FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* 136–42 (2009).

123. *E.g.*, CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009); GIBSON, *supra* note 33, at 132.

124. Nownes & Glennon, *supra* note 106, at 40–41 (emphasis omitted).

125. *Id.* at 56.

are appointed and the crime rate is low will demonstrate the highest levels of confidence in state courts. On the other hand, a person without much formal education, who had been a defendant at least once in his or her life and does not consider him or herself to be informed about courts, who does not much trust the institutions of government and happens to live in a state with elected judges and a high crime rate will have the lowest levels.<sup>126</sup>

This all is just a small—albeit representative—fraction of the literature on legitimacy and judicial selection. In the world of legitimacy, accountability, and independence, finding reputable work on both sides of any question is easy. Both theorists and empiricists have studied the issues *ad nauseam*, and the results are vexing.<sup>127</sup>

### III. REINTERPRETING THE DATA ON LEGITIMACY AND JUDICIAL SELECTION

#### A. *How to Read the Judicial Selection Literature as Consistent Rather than Inconsistent*

So how can one explain the seemingly oxymoronic literature on judicial selection methods and legitimacy? One interpretation is that the work is flawed, since it cannot be consistently replicated to support the same conclusion. But an alternative explanation is that the work is exactly correct—what the literature is describing is that *all* methods of judicial selection are overly politicized in ways that undermine legitimacy.

*All* judges—even appointed, life-tenured judges—can be and are subject to the same sort of implicit biases that one fears might infect nonprofessional decision-makers.<sup>128</sup> For judges selected by politicians, unsurprisingly, that implicit bias lines up politically; thus, for example, U.S. Supreme Court Justices appointed by Democrats apparently are more liberal than their Republican-appointed counterparts.<sup>129</sup> And that is potentially problematic,

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126. Benesh, *supra* note 109, at 696.

127. See generally Lawrence Baum, *Supreme Court Elections: How Much They Have Changed, Why They Changed, and What Difference It Makes*, 42 LAW & SOC. INQUIRY 900, 903–04, 916–19 (2017) (concluding from four recent studies of state judicial elections that the implications from these studies are mixed and complex).

128. See generally Holger Spamann & Lars Klöhn, *Justice is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255, 256, 259–62, 268–73 (2016).

129. Richard L. Hansen, *Polarization and the Judiciary*, ANNUAL REV. POLI. SCI. (forthcoming 2019) (manuscript at 9–11) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3132088](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132088)) (arguing that Supreme Court justices are increasingly partisan and vote fairly consistently with the party ideology



because all of the judicial selection systems in the United States “give central roles in the selection process to people in the political sector (the Chief Executive, legislators, and the general public) as distinguished from the legal sector (lawyers and judges).”<sup>130</sup>

It is not inevitably problematic. Political actors—presidents, governors, legislators, and voters—do not *have* to politicize their judicial selection decisions. There used to be little campaigning in judicial elections.<sup>131</sup> There used to not be live hearings for confirmation of federal judges, much less highly politically-charged hearings.<sup>132</sup> But whatever dignity, neutrality, civility, and meritocracy there ever was in judicial selection, it seems long gone. Sound empirical work finds the politics of judicial elections is worsening,<sup>133</sup> as is the politicization of judicial appointments.<sup>134</sup>

The players in the legal system all feel what is going on. Federal judges who have been through the appointment and confirmation process describe it as already partisan and getting more so.<sup>135</sup> At the ABA’s 2017 midyear meeting, ABA President Linda Klein felt compelled to reaffirm, “It is vital that our

of the nominating president).

130. Baum, *supra* note 127, at 901. Professor Charles Black suggested (almost 50 years ago) that it was the obligation of Senators to take political considerations into account in the discharge of “advise and consent.” Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 658–60 (1970).

131. Joseph Tanfani, *Judicial Elections Getting More Political with New Campaign Spending*, L.A. TIMES (Nov. 23, 2014), <http://www.latimes.com/nation/politics/la-na-judicial-elections-20141123-story.html>.

132. Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994).

133. Kang & Shepherd, *supra* note 110, at 81 (“[J]udicial elections have become increasingly politicized, more competitive, and have created new electoral pressures for judges. By 2000, 75% of nonpartisan elections were contested, up from 44% in 1990. Similarly, a staggering 95% of partisan elections were contested in 2000, up from 68% in 1990.”).

134. See, e.g., Aimee Brown, *Judicial Confirmation Through the Lens of Constitutional Interpretive Theory*, 80 ALB. L. REV. 807, 807–08, 813–14 (2017) (discussing the Senate confirmation process for Supreme Court nominees and suggesting that, despite efforts, it has not improved or become less contentious); John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POLY 181, 182–88 (2003) (providing examples of Senate filibuster used to block judicial nominees who possessed both bipartisan support and the highest possible ABA rating); Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L.J. 287, 288, 290–97 (2012) (tracing the evolution of confirmation-process flaws, including obstruction and delay of judicial nominees’ confirmations); see also Jennifer Williams-Alvarez, *Ruth Bader Ginsburg Wants Parties More United in High Court Confirmation Process*, N.Y. L.J. (Feb. 6, 2018), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/02/06/ruth-bader-ginsburg-wants-parties-more-united-in-high-court-confirmation-process/> (noting Justice Ginsburg’s urging more civility and bipartisanship in the confirmation process).

135. David F. Hamilton, *Federal Courts and Partisan Conflict*, 50 IND. L. REV. 127, 132–34 (2016).

judiciary remains independent and free from political pressure—independent from party politics, independent from Congress and independent from the President of the United States himself.<sup>136</sup> Obviously, she was concerned the opposite was emerging. Professor Roy Schotland writes, “Vulnerability is obvious for judges facing election.”<sup>137</sup> Judge David Hamilton writes, “We have a nomination and confirmation process that is threatening to become dysfunctional.”<sup>138</sup> Famously, former California Supreme Court Justice Otto Kaus said that ignoring the potential impact of one’s judicial decisions on one’s likelihood of winning a retention election was “like ignoring a crocodile in your bathtub.”<sup>139</sup>

Politicization undermines legitimacy. Gibson, for example, finds that the legitimacy of courts is undermined by political ads that “portray courts as ‘just another political institution,’” and in fact, “research has uncovered some evidence that extremely politicized campaign ads have negative consequences.”<sup>140</sup>

There is eroding public confidence in the judiciary, and it all tracks back to politics.<sup>141</sup> And it corresponds to attempts to censure or remove judges in response to unpopular decisions.<sup>142</sup>

### *B. Why Current Judicial Selection Methods Fail*

It may remain true that the judiciary generally enjoys greater legitimacy than other branches of government.<sup>143</sup> But in a time when the President of the United States casually says about the judicial branch, “what we have right now is a joke and it’s a

136. *ABA President Affirms Judicial Independence, President-elect Nominee Looks Forward*, ABA NEWS (February 6, 2017), [http://www.americanbar.org/news/abanews/aba-news-archives/2017/02/aba\\_president\\_the.html](http://www.americanbar.org/news/abanews/aba-news-archives/2017/02/aba_president_the.html); accord, William T. Robinson, *Justice In Jeopardy: The ABA Perspective*, 46 IND. L. REV. 7, 10 (2013) (“The American Bar Association’s goal . . . is to preserve our Founding Fathers’ vision of the judiciary as the third, non-political branch.”).

137. Roy A. Scotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1078 (2007).

138. Hamilton, *supra* note 135, at 132.

139. Maura Dolan, *Otto Kaus Dies; Former Justice on State High Court*, L.A. TIMES (Jan. 13, 1996), [http://articles.latimes.com/1996-01-13/local/me-24215\\_1\\_state-high-court](http://articles.latimes.com/1996-01-13/local/me-24215_1_state-high-court).

140. GIBSON, *supra* note 33, at 133–34.

141. Geyh, *supra* note 113, at 45.

142. *Id.* at 45–50.

143. See Christine A. Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government*, 60 POL. RES. Q. 707, 713 (2007) (finding that the U.S Supreme Court enjoys the highest perception of legitimacy out of all federal and state governmental institutions, while state courts are only subordinate to the state executive branch in the level of public confidence they enjoy).

laughing stock,”<sup>144</sup> this relative evaluation seems to stand for little. If objective rather than relativistic judicial legitimacy not only is a laudable goal but also is a central pillar holding up communal civility in a democracy, then something needs to be done.

If politics are the problem, then electing judges plainly is not the solution. But simply biasing toward appointment and confirmation rather than elections to select and retain judges apparently is not the answer either.<sup>145</sup>

The federal judicial nomination and confirmation process does have both a formal and informal merit-selection screening process. The President and the Senate do formal merit reviews. The American Bar Association does an informal review. In recent times, neither seem to count for as much as one would hope.

Consider, for example, the 2017 nomination of Matthew Petersen to be a United States District Court judge. On September 7, 2017, President Trump nominated Mr. Petersen to the federal bench.<sup>146</sup> He was rated as “qualified” by the American Bar Association.<sup>147</sup> Mr. Petersen’s Senate confirmation hearing became a “viral” sensation when he struggled to identify basic litigation terminology.<sup>148</sup>

Or consider Brett Talley. When nominated, the thirty-six-year-old Talley had practiced law for three years, had never tried a case, and was rated “unqualified” by the ABA.<sup>149</sup> On November 12, 2017, the Senate Judiciary Committee approved his nomination.<sup>150</sup>

144. Rebecca Savransky, *Trump: US Justice System A 'Laughing Stock,' 'Joke'*, HILL (Nov. 1, 2017), <http://thehill.com/homenews/administration/358275-trump-us-justice-system-a-laughing-stock-joke>.

145. See generally Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 97–110, 111–18 (2017) (analyzing the history and politicization of the federal courts’ appointment and confirmation process).

146. *President Donald J. Trump Announces Seventh Wave of Judicial Candidates*, WHITE HOUSE, (Sept. 7, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-donald-j-trump-announces-seventh-wave-judicial-candidates/>.

147. Debra Cassens Weiss, *Federal Judicial Nominee Who Couldn’t Define ‘Motion In Limine’ Withdraws*, ABA J. (Dec. 18, 2017), [http://www.abajournal.com/news/article/federal\\_judicial\\_nominee\\_who\\_couldnt\\_define\\_motion\\_in\\_limine\\_withdraws\\_ackn](http://www.abajournal.com/news/article/federal_judicial_nominee_who_couldnt_define_motion_in_limine_withdraws_ackn).

148. *Id.*

149. Steve Benen, *Senate GOP Keeps Endorsing Trump’s Unqualified Judicial Nominees*, MSNBC (November 10, 2017), <http://www.msnbc.com/rachel-maddow-show/senate-gop-keeps-endorsing-trumps-unqualified-judicial-nominees>.

150. *Id.* Talley later withdrew his name from consideration. David Savage, *Embattled Trump Judicial Nominee Brett Talley Withdraws*, L.A. TIMES (Dec. 13, 2017), <http://www.latimes.com/politics/washington/la-na-pol-essential-washington-updates-embattled-trump-judge-nominee-withdraws-1513192192.htmlstory.html>.

Or consider that on January 8, 2018, President Trump resubmitted two nominations for federal judgeships of persons—Charles Goodwin and Holly Teeter—that the ABA rated “not qualified.”<sup>151</sup> These are not necessarily quixotic nominations—the Senate confirmed L. Steven Gras as a Justice of the United States Court of Appeals for the Eighth Circuit, despite the ABA rating Gras “not qualified.”<sup>152</sup>

Multiple presidents have nominated multiple judicial aspirants to the federal bench whom the ABA rated “unqualified.”<sup>153</sup> The point here is not that President Trump is doing so, or that any other president has done so, but that there is simply no consistently, generally agreed upon set of judicial qualifications, even informal, simply by virtue of judges being appointed rather than elected.

Nor does adding the layer of a prenomination, merit-selection commission *perforce* solve the legitimacy conundrum. The contemporary public face of advocacy for merit selection of judges is retired U.S. Supreme Court Justice Sandra Day O’Connor.<sup>154</sup> In promotion of an independent, apolitical judiciary, Justice O’Connor promotes widespread adoption of the “Missouri Plan”—the essentials of which are the governor appointing a judge from an aspirant list identified by a nonpartisan commission, with the judge after a period of time thereafter standing for retention election.<sup>155</sup> The Justice explicitly links merit selection with legitimacy:

The legitimacy of the judicial branch rests entirely on its promise to be fair and impartial. If the public loses faith in that—if they believe that judges are just politicians in robes—then there is no reason to prefer their interpretation of the law

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151. Jennifer Bendery, *Donald Trump Renominates Court Picks Rated ‘Not Qualified’ To Serve*, HUFFINGTON POST (Jan. 18, 2018), [https://www.huffingtonpost.com/entry/donald-trump-judicial-nominees-not-qualified\\_us\\_5a4fc2cae4b01e1a4b14e51d?ncid=inblnkushpmg00000009](https://www.huffingtonpost.com/entry/donald-trump-judicial-nominees-not-qualified_us_5a4fc2cae4b01e1a4b14e51d?ncid=inblnkushpmg00000009).

152. KJ McElrath, *Another Unqualified, Extremist Judge Confirmed, THE RING OF FIRE NETWORK* (Dec. 18, 2017), <https://trofire.com/2017/12/18/another-unqualified-extremist-judge-confirmed/>.

153. Phillip Bump, *How Unusual Are Trump’s ‘Not Qualified’ Judicial Nominations?*, WASH. POST (Dec. 15, 2017), [https://www.washingtonpost.com/news/politics/wp/2017/11/10/how-unusual-are-trumps-not-qualified-judicial-nominations/?utm\\_term=.1de25c6150db](https://www.washingtonpost.com/news/politics/wp/2017/11/10/how-unusual-are-trumps-not-qualified-judicial-nominations/?utm_term=.1de25c6150db).

154. See, e.g., Sandra Day O’Connor, *Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 479 (2009) (“The question of how we choose our judges, whom we entrust to uphold and interpret our laws, speaks to foundational principles of our judiciary and, indeed, our nation.”).

155. *Id.* at 485–86.

or Constitution over the opinions of the real politicians representing the electorate. Judges rely on the other branches of government to enforce our orders. With the executive wielding the power of the sword and the legislature the power of the purse, you could say that courts wield the power of the quill. The judicial power lies in the force of reason and the willingness of others to listen to that reason. After all, a quill is nothing more than a feather that, by itself, is harmless.<sup>156</sup>

O'Connor explains that while acceptance of unpopular judicial decisions was not always the case in the United States, it notably is today, and it is this legitimacy—the currency of the courts—that she fears for if politics are not minimized in judicial selection.<sup>157</sup>

But some evidence suggests that O'Connor's prenomination merit-selection commission may be at best an imperfect solution. While merit-selected judges may be more independent, they are not perceived as more legitimate.<sup>158</sup> To the contrary, while a number of states have a variant of the Missouri Plan, the legitimacy of the judiciary continues to erode.

Consider Rhode Island. Common Cause of Rhode Island (CCRI)—the primary lobbyist and architect of Rhode Island's current merit-selection system, a Missouri Plan—recounts that roughly twenty-five years ago the Rhode Island judiciary was to at least some material degree corrupt, and the people knew it.<sup>159</sup> CCRI tried to change the way judges were selected in order to fix the problem, and the Rhode Island Legislature adopted a version of the proposal.<sup>160</sup>

Fifteen years into the experience, Professor Michael Yelnosky studied Rhode Island's judiciary to see if Rhode Island's move to a merit selection of judges resulted in more meritorious judges.<sup>161</sup> Yelnosky concluded that with the exception of slight increases in racial diversity and gender diversity, the only measurable way that merit selection changed who were Rhode Island's judges were not meaningful—matters like a change in the prevalence of graduates from Providence College, or the number of judges who previously

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156. *Id.* at 489.

157. *Id.* at 486–90.

158. See BONNEAU & HALL, *supra* note 123, at 137–38 (discussing public perceptions of merit-selected judges).

159. Email from John Marion, Exec. Dir., Common Cause Rhode Island to Kenneth Klein, Professor of Law, Ca. W. Sch. of Law (October 20, 2017) (on file with author).

160. *Id.*

161. Michael J. Yelnosky, *The Impact of "Merit Selection" on the Characteristics of Rhode Island Judges*, 15 ROGER WILLIAMS U. L. REV. 649, 649–50 (2010).

were state employees in some other capacity.<sup>162</sup> Yelnosky further noted that his conclusions were “consistent with most of the literature on the impact of merit selection.”<sup>163</sup> For example, Bonneau and Hall found that, in fact, Missouri Plan states do not produce a more qualified judiciary than that found in states that have partisan, elected judiciaries.<sup>164</sup> And more to the point, CCRI reports that in Rhode Island the public still does not think highly of the Rhode Island judiciary.<sup>165</sup>

Merit selection in and of itself is not a generic, consistent solution to eroding judicial legitimacy—a conclusion in harmony with the conclusions more broadly of some scholars who are deeply critical of the effectiveness of the Missouri Plan approach to judicial selection.<sup>166</sup> As Michael Dimino writes, “all this effort to marginalize the public has had little effect on the supposed dangers of judicial elections, including the partisan pressures, increased expense, personal invective, and threats to independence posed by recent judicial elections.”<sup>167</sup> Geyh writes,

As to the relationship between merit selection and partisanship, critics note that governors do not make apolitical nominations in merit selection states; rather, they typically pick favored partisans from the pool of candidates that the selection commission deems qualified. Merit selection thus does not eliminate the influence of partisanship and interest-group politics from judicial selection, but merely moves it from the point at which judges are elected to the point at which they are appointed.<sup>168</sup>

### *C. A Proposed Better Merit-Selection Model*

The legitimacy literature is in harmony with the Rhode Island experience, simply opting for appointment and confirmation, appointment from a menu of merit-screened aspirants, or appointment followed by retention elections is not the way to

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162. *Id.* at 655–57.

163. *Id.* at 656.

164. See BONNEAU & HALL, *supra* note 123, at 135–37 (analyzing the differences between states with a Missouri Plan and states with judicial elections).

165. Marion, *supra* note 159.

166. See, e.g., Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 805 (2004) (“Merit selection hopes to limit the pressure on incumbents to rule in particular ways by ensuring that there will be no candidate opposing the incumbent, and therefore less chance that the public will be alerted to those instances where the judge has flouted the popular will.”).

167. *Id.* at 808 (citations omitted).

168. Geyh, *supra* note 113, at 56.

depoliticize and thus relegitimize the judiciary. What is failing? The problem is what Yelnosky and CCRI describe—even a Missouri Plan-style merit-selection commission applies amorphous qualifications criteria, and so the process does not change who emerges as a possible judge. This apparently is not lost on the public at large, and so there is no reason to expect the public to have any more respect for a judge that emerges from a Missouri Plan system than from any other system.

To state the problem, however, is to understand the potential solution, which is to have a very different merit-selection system—one that applies concrete, objective, specific, apolitical qualifications that produce a different set of aspirants—a set that *prima facie* is professional, qualified, and not screened on any political criteria.

There is no constitutional barrier to such a system. The Constitution sets forth no requirements to be a judge.<sup>169</sup> The Constitution sets forth requirements to be President.<sup>170</sup> The Constitution sets forth requirements to be a Senator.<sup>171</sup> The Founders recognized and robustly debated who was best positioned—between the President and the Senate—to pick a judge.<sup>172</sup> But the Constitution is silent on who might be qualified to be picked as a judge or what those qualifications could be.<sup>173</sup> There is no legal impediment to saying that in order to be on a ballot, or be on a list of potential appointees, an aspiring judge must emerge from a correctly structured qualification screening.

There are two templates one could look to for such a system. The first is Europe, and the second is the system of administrative judges in the United States.

An example of such a system comes from Europe. The perceived need for neutral, apolitical, independent judges is not a perception unique to the United States. As Professor Mary Volcansek writes, across the globe the question “[w]ho are these judges and how did they attain their powerful positions . . . is asked, not only in the United States, but also in democracies around the world.”<sup>174</sup>

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169. See Epstein et al., *supra* note 97, at 16–17 (showing the Framers were silent when it came to requirements for judges, as opposed to requirements for elected officials).

170. U.S. CONST., art. II, § 1.

171. U.S. CONST., art. I, § 3.

172. Teter, *supra* note 134, at 288, 309–14.

173. Epstein et al., *supra* note 97, at 7–8.

174. Volcansek, *supra* note 3, at 363.

Austria, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, and Sweden all are examples of judicial selection through a civil-service model.<sup>175</sup> The hallmarks of such a system—designed to result in an independent, apolitical judiciary—are a separate educational program for aspiring judges, who then enter the judiciary at an entry or internship level based on results of objective, competitive examinations, and then advance internally up the ranks of the judiciary.<sup>176</sup>

That legitimacy concerns are not routinely raised in these nations is itself notable—typically scholars reflecting on the strengths and weaknesses of civil-service judiciaries seem to focus on different concerns.<sup>177</sup> But it is not dispositive. The lack of academic recognition of legitimacy concerns in Europe does not establish the absence of the concerns. But it is suggestive, and so in a sense encouraging.

There is a system of courts and “judges” in the United States that already is civil-service selected—Administrative Law Judges (ALJs).<sup>178</sup> Aspiring federal ALJs,

Must be licensed attorneys with at least seven years’ experience and pass an examination that tests their ability to draft a decision and analyze relevant legal issues. Military veterans receive five to ten preference points. Based on their experiences, examination scores, and veteran statuses, the highest-scoring candidates are placed on a list. Agencies, under what is known as the ‘Rule of Three,’ may then select from the three highest-ranking candidates.<sup>179</sup>

There are important differences that exist between the two kinds of judges—administrative and traditional. Typical administrative courts and their judges often differ from typical traditional courts and their judges in that, among other things,

175. *Id.* at 372.

176. *Id.* at 370–76.

177. See, e.g., Kate Malleson, *Rethinking the Merit Principle in Judicial Selection*, 33 J. L. & SOC’Y 126, 126–30 (2006) (analyzing the lack of diversity in the makeup of the English and Welch courts); Volcker G. Heinz, Berlin Rechtsanwalt and London barrister-at-law, Speech at the 1998 Australian Bar Association Conference in London: The Appointment of Judges in Germany (July 4, 1998), <http://www.heinzlegal.com/sites/default/files/AppointOfJudgesInGermany.pdf> (discussing concerns over citizenship requirements for judges and bias against minority religions because of the requirements).

178. I put “judges” in quotes because, as Professor Moliterno details, ALJs are *not* judges in many material respects. James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1196–99 (2006).

179. Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 804–05 (2013).



administrative courts are organized within specific agencies in order to promote ALJs with appropriate, specific subject-matter expertise, but with the cost that due to agency oversight, ALJs lack independence.<sup>180</sup> As currently constituted, ALJs are not themselves independent.<sup>181</sup> But that is an issue of being subject to the direction and employment censure of a broader agency,<sup>182</sup> which is *not* a feature of Article III judges. As Professor Kent Barnett quips, “ALJs are equal to Article III judges, except for the Article III part.”<sup>183</sup>

Put another way, ALJs are less insulated from politics than Article III judges.<sup>184</sup> ALJs perceive that while there are many positives to their jobs, an overarching negative is that ALJs are in a position that structurally is more politicized than that of a traditional judge.<sup>185</sup>

Politics are the enemy of legitimacy. So, there is reason to think that an ALJ-like selection system for traditional judges—in other words, civil-service selected, politically independent—could be the best of both worlds. Which is why it is not surprising that there is at least one writer who argues that a Continental-like judicial selection approach is necessary to the legitimacy of the judiciary in the United States.<sup>186</sup>

As with the European civil-service system, the example of ALJs is suggestive and encouraging, albeit not necessarily clear. Thomas Mans describes how the Administrative Procedure Act implemented merit selection of ALJs intentionally to imbue ALJs

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180. *Id.* at 806–07; Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana’s Administrative Procedure Act*, 59 LA. L. REV. 431, 441–45 (1999) (discussing Louisiana’s change to a central panel system to increase ALJs’ independence); see generally Arthur Fried & Robert G. Bernoski, *Panel Discussion of Independence and the Federal ALJ*, 18 J. NAT’L ASS’N ADMIN. L. JUDGES 47, 47–50 (1998) (discussing ALJs’ lack of independence within the Social Security Administration).

181. Debra Cassens Moss, *Judges Under Fire: ALJ Independence at Issue*, 77 ABA J. 56, 56 (1991).

182. *Id.*

183. Barnett, *supra* note 179, at 799. This is not of necessity. An administrative judiciary that looks a great deal like a civil-service judiciary can be found in Louisiana, where for structural reasons ALJs are merit-selected, independent, and *not* subject matter experts. Bybee, *supra* note 180, at 431–33.

184. Michel Levant, *Pointing the Way to ALJ Independence*, 24 JUDGES J. 37, 40–41, 43 (1985).

185. See Moliterno, *supra* note 178, at 1211. Even opponents of the “central panel” structure do not contest either that current structure is too politicized or that central panels make progress toward resolving that concern. Barnett, *supra* note 179, at 827–30.

186. See Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 FORDHAM URBAN L.J. 387, 391–95 (2006) (arguing that the United States can take as a model for a nationwide appointment process the recent reforms in England and Wales).

with legitimacy.<sup>187</sup> But that intention is a far cry from concluding that the APA succeeded in this goal. There isn't a lot—frankly, almost anything—evaluating the actual legitimacy (or illegitimacy) of ALJs. Perhaps this is because their legitimacy is unquestionable. Or perhaps it is because, as captive agency judges, it is assumed that ALJs are illegitimate. One scholar in administrative law asserts that an ALJs' legitimacy is entirely derivative of whatever legitimacy—or not—that their agency and agency head enjoys.<sup>188</sup> Administrative Law Judge Ann Marshall Young makes the case that ALJs are perceived as illegitimate and that the solution, in part, is to try to recapture legitimacy by mimicking the true judicial independence of Article III judges.<sup>189</sup> But in the end the work simply has not been done yet—we do not know whether ALJs enjoy (or do not) legitimacy, and if so then why.

Where this leaves matters is the intriguing, but as yet only suggestive, possibility that if aspiring traditional judges went through a civil-service-like screening like ALJs and many European judges, then that might, but not necessarily, stem the erosion of judicial legitimacy. But what the empirical work on judicial selection and legitimacy does establish with some clarity is that absent doing something different from what now is being done, traditional judges—whether elected or appointed—are experiencing increasing politicization and decreasing legitimacy.

To summarize, the goal of merit selection is noble, but the weakness is a variant of the conundrum, who watches the watchmen? So long as humans apply subjective factors to decide who is a potential judge, those factors will be applied in ways that reflect the subjective preferences and biases (explicit or implicit) of the decision makers. This is why law school exams are graded blind; this is why auditions for a chair in a symphony orchestra are held behind a screen. An alternative way to interpret the legitimacy literature is to understand it as a call for a judicial selection mythology—a system of screening aspirants that breeds confidence that by definition there is a professional, qualified, apolitical judiciary.<sup>190</sup>

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187. Thomas C. Mans, *Selecting the 'Hidden Judiciary': How the Merit Process Works in Choosing Administrative Law Judges (Part I)*, 63 JUDICATURE 60, 64–65 (1979).

188. Jim Rossi, *ALJ Final Orders on Appeal: Balancing Independence with Accountability*, 19:2 J. NAT'L ASSOC. ADMIN. L. JUDGES 1, 18–19 (1999).

189. Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17:1 J. NAT'L ASSOC. ADMIN. L. JUDGES 1, 3–9, 12–13, 13 n.17 (1997).

190. It does not bear a lengthy discursive in this Article, but a colorful, concrete

What might this look like concretely? There are occasional suggestions for improving judicial selection by means other than choosing binomially between election and appointment. Geyh argues for the increased “professionalizing” of the judiciary through increased judicial training, increased judicial continuing education, and the public review of the credentials of any judicial aspirant.<sup>191</sup> Teter proposes a nomination and confirmation process that mimics the process of deciding what military bases to close.<sup>192</sup> Schotland argues for lengthier judicial terms, greater voter education, stricter election regulation, and more aggressive recusal rules.<sup>193</sup> None of these proposals achieve the structure the literature suggests is necessary—an apolitical, specific, intentional, objective merit screening of judicial aspirants that precedes either an electoral or nomination and confirmation consideration.

The focus should be on two process aspects: qualification and assessment. As a starting point, it is embarrassing that more specialized training is necessary to be a barber than to be judge. Perhaps it is unimaginable that the United States comprehensively would create (like some nations in Europe) an entire educational program that currently does not exist—a separate legal training track for aspiring judges. But that is not the only viable training requirement. In the Czech Republic, for example, a law degree is the generic minimum educational requirement, but one still cannot become a judge unless they train for a minimum of three years within the court system.<sup>194</sup> Still too much? Then how about a minimum number of years and experiences before becoming a judge? For example, U.S. Supreme Court Rule 5 provides in part: “To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period

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example of how confidence in process can solve skepticism in individual actors is the story of “The Ceremony” as the method of the private currency, Z-Coin, in addressing perceived problems in the private currency, Bitcoin. Morgan Peck, *The Crazy Security Behind the Birth of Zcash, the Inside Story*, IEEE SPECTRUM (Dec. 2, 2016), <https://spectrum.ieee.org/tech-talk/computing/networks/the-crazy-security-behind-the-birth-of-zcash>; Zooko Wilcox, *The Design of the Ceremony*, ZCASH BLOG (Oct. 26, 2016), <https://z.cash/blog/the-design-of-the-ceremony.html>.

191. Geyh, *supra* note 113, at 74–75.

192. Teter, *supra* note 134, at 303–04.

193. Roy A. Scotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1099–103 (2007).

194. Zákon o soudech [Judge Act], Zákon č. 6/2002 Sb. (Czech).

of at least three years immediately before the date of application.”<sup>195</sup> How is it possible that the Justices the lawyer appears before do not have at least the same requirement?

These kinds of qualifications are necessary but insufficient. Every level of secondary, graduate, and post-graduate education identifies specific knowledge and skills necessary to succeed in that field—that’s what the SAT, ACT, LSAT, GRE, MCAT, and other tests seek to measure. Every licensure profession requires that one pass a test of appropriate skills and knowledge—that’s what the Bar Exam, Medical Boards, Real Estate Exam, CPA Exam, and others all are. Plainly it is within a community’s ability to identify a specific set of knowledge and skills necessary to be qualified to be a judge, and to test for it, just as we do for an accountant, a barber, a masseuse, a truck driver, and a nurse.

Further, for each of these fields where testing is a threshold for entry, great attention is paid to the test being objective and to the grading being unbiased. Again, it is not so hard to do.

And there are some unintuitive upsides of such testing. “Everyone, including every judge, is a conglomerate enterprise whose values and judgments derive from a mysterious jumble of experiences since childhood.”<sup>196</sup> For example, demographic characteristics of labor arbitrators correlate to arbitration outcomes.<sup>197</sup> But through correctly structured testing, implicit bias can be identified, and so at least through the step of recognition some attempt can be made at amelioration.

Finally, many professions distinguish between its juniors and its seniors. There is no reason that entry into all levels of the judiciary be equivalent. What would be so bad about saying that to be a trial judge one first must be a magistrate or a commissioner; to be an appellate judge one first must be a trial judge; or to be a Supreme Court Justice one first must be an intermediate appellate judge?

At the risk of sounding trite, this is not rocket science. Process can imbue legitimacy. Perhaps the instinctive trust of doctors derives in part because—due to process requirements—it is really hard to be a doctor, and one has to be quite smart and know a lot

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195. SUP. CT. R. 5.

196. Alexander M Sanders, Jr., *Everything You Always Wanted to Know About Judges but Were Afraid to Ask*, 49 S.C. L. REV. 343, 346 (1998).

197. See generally Laura J. Cooper et al., *What’s the Relationship Between Labor Arbitrators’ Backgrounds and Outcomes of Discipline and Discharge Awards? An Empirical Analysis*, 31 ABA J. LAB. & EMP. L. 433, 435, 437–41, 443–45 (2016).

about medicine in order to be one. This same attention to process can bolster the legitimacy of judges.

#### IV. BUT . . . DEMOCRACY?

In thinking about a system of governance, democracy and legitimacy were not inevitably values at odds with each other. But arguably they are now.

A threshold question is whether the judicial branch is even intended to be democratic. Robert Dahl details seven “undemocratic elements” in the Constitution.<sup>198</sup> But Dahl sees this as a matter of ignorance rather than intention.<sup>199</sup> Dahl argues that when the Supreme Court acts as “an unelected legislative body,” the Court is invading “the proper province of elected officials.”<sup>200</sup> Professor Sanford Levinson agrees with Dahl, sympathizing with those who see life tenure for Supreme Court Justices as pernicious, and then somewhat more softly asserting that it is “an idea whose time has passed.”<sup>201</sup>

Other scholars would be less troubled. Weingast, for example, argues the Constitution does not treat democracy as its prime directive, but rather must and does counterbalance majority will with antidemocratic structures.<sup>202</sup>

It is an interesting theoretical debate, but one the Constitution and the Founders seem to have resolved. Juries are provided *three times* in the Constitution—through the protections of juries in Article III, Section 2 (“The trial of all crimes, except in cases of impeachment, shall be by jury”<sup>203</sup>), the Sixth Amendment (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”<sup>204</sup>), and the Seventh Amendment (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States”<sup>205</sup>).

198. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 15–20 (2001). The sixth of these is “judicial power,” by which Dahl is describing judicial decisions that legislate or make policy. *Id.* at 18–19.

199. *Id.* at 7–10.

200. *Id.* at 153–54.

201. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 7, 123–39 (2006).

202. Barry R. Weingast, *Capitalism, Democracy, and Counter-majoritarian Institutions*, 23 SUP. CT. ECON. REV. 255, 256, 267–69 (2015).

203. U.S. CONST. art. III, § 2, cl. 3.

204. U.S. CONST. amend. VI.

205. U.S. CONST. amend. VII.

Why are juries so prevalent in the constitutional text? The Founders saw juries as a form of democratic self-governance.<sup>206</sup> As jurors, citizens would be part of “making and executing laws.”<sup>207</sup> Through jury service, citizens could change the nature of their government.<sup>208</sup> One Anti-Federalist wrote, “It is essential . . . that the common people should have a part and share of influence, in the judicial branch. . . . Trial by jury in the judicial department . . . have procured for them . . . their true proportion of influence.”<sup>209</sup> Thomas Jefferson wrote, “Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”<sup>210</sup>

For pragmatic rather than theoretical reasons, Levinson, while concerned about the antidemocratic nature of life-tenured Supreme Court Justices, is “not concerned about the life tenure of ‘inferior’ judges”; Levinson simply does not see trial courts as places where laws or policies are made.<sup>211</sup> The irony is that the Founders were most concerned that juries serve as a check on government power.<sup>212</sup> Trial courts arguably were considered the most democratic of institutions in the United States.<sup>213</sup> And of course, over time, trial courts became yet more democratic, as judges more frequently were chosen by popular election.

Today, however, juries have all but disappeared.<sup>214</sup> That is a problem. Democracy in the courts evinced both through juries and through judicial elections. With juries gone, the best

206. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995).

207. Letters from the Federal Farmer (XV), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (Herbert V. Storing ed., 1981).

208. *Id.* at 315.

209. Letters from the Federal Farmer (IV), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 249–50 (Herbert V. Storing ed., 1981).

210. Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 283 (1950).

211. LEVINSON, *supra* note 201, at 173.

212. See Ilya Somin, Opinion, *Rethinking Jury Nullification*, WASH. POST (Aug. 7, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/07/rethinking-jury-nullification/?utm\\_term=.b124e7c1de16](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/07/rethinking-jury-nullification/?utm_term=.b124e7c1de16) (arguing that the Founders considered jury nullification a “vital check on government power” and that nullification is “supported by longstanding Anglo-American legal tradition”).

213. *Why Jury Trials Are Important to a Democratic Society*, NAT’L JUDICIAL COLLEGE, <https://www.judges.org/uploads/jury/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf> (tracing the historical and constitutional significance assigned to the jury trial as part of American democracy).

214. See generally SUJA A. THOMAS, THE MISSING AMERICAN JURY 1–8 (2016).

expression of democracy in the judicial branch is judicial elections. Juries are collateral to the legitimacy of judges. But of course, judicial elections are not. So now a democratic judicial function and a legitimate judiciary are at odds.

And these are not the only core values in play. As detailed by Shugerman, among many others, judicial elections directly and increasingly undermine judicial independence.<sup>215</sup> The United Nations sees electing judges as a threat to human rights.

The United Nations Office of the High Commissioner for Human Rights finds, “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.”<sup>216</sup> The OCHCR Training Manual adds, “[I]rrespective of the method of selection of judges, candidates’ professional qualifications and their personal integrity must constitute the sole criteria for selection.”<sup>217</sup> In 1995 the Human Rights Committee of the United Nations reported about the system of electing judges in many states in the United States, stating that,

The Committee is concerned about the impact . . . election of judges may . . . have . . . on the implementation of . . . rights [ ] provided under article 14 of the Covenant. . . It is also concerned about the fact that in many rural areas justice is administered by unqualified and untrained persons. . . The Committee recommends . . . elections be reconsidered with a view to its replacement by a system of appointment on merit by an independent body.<sup>218</sup>

The “Covenant” referred to is the International Covenant on Civil and Political Rights, article 14 of which provides in pertinent part, “[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.”<sup>219</sup>

215. JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS* 266–73 (2012).

216. Seventh U.N. Congress on the Prevention of Crime and Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, U.N. Doc. A/Conf.121/22/Rev.1, at 61 (1985), <https://digitallibrary.un.org/record/114498/files/a-conf-121-22-rev-1-e.pdf>.

217. HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 4.5.1, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS IN COOPERATION WITH THE INT’L BAR ASS’N (2003), [file:///C:/Users/katie/Downloads/Human\\_Rights\\_Training\\_Manual.pdf](file:///C:/Users/katie/Downloads/Human_Rights_Training_Manual.pdf).

218. Human Rights Comm., Nineteenth Annual Rep., ¶¶ 288, 301, U.N. Doc A/50/40 (1995), [www.un.org/documents/ga/docs/50/plenary/a50-40.htm](http://www.un.org/documents/ga/docs/50/plenary/a50-40.htm).

219. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966), [www.ohchr.org/en/professionalinterest/pages/ccpr.aspx](http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx).

The United States is a democracy, and fundamentally an appointed judiciary is less democratic than an elected judiciary.<sup>220</sup> A life-tenured judge is less democratic than a judge subject to retention election or reelection or even reappointment. And certainly, a judge selected by application of apolitical, objective criteria—and who then is promoted internally within the judiciary—is a structure of the judicial branch that is less democratic even than our current structure under Article III.

So how can one promote judicial legitimacy while not ignoring the constitutional intention that the judicial branch be a democratic institution? One answer—either the simplest or the most complex, or perhaps both—is the one offered by Suja Thomas: recognize all of the ways that through procedural reform the jury has disappeared from the courts and then resurrect the jury to reclaim its constitutional prerogative.<sup>221</sup> If we were to revive the constitutional role of juries, the civil service judicial selection method would be constitutionally viable due to an existing check on judicial power.

But the attractiveness of that solution may fray upon closer inspection. Trials are long and expensive—both strong disincentives to litigants who otherwise need justice—and jury trials are worse. So, returning to a robust jury system makes seeking justice slower, pricier, and, as a result, probably less frequent. Under such a system passion is not enough to obtain justice—it takes vast resources. One could postulate that it actually undermines the legitimacy of the judiciary to make the availability of judicially administered justice seem more distant and elitist.

Another possible way through the woods may lie in the hope that a civil-service screening of judicial aspirants will, in and of itself, help restore legitimacy. The solution can be illustrated by a case that was on the 2018 docket of the U.S. Supreme Court—*Lucia v. Securities and Exchange Commission*.<sup>222</sup> The case was factually mundane—after a hearing before an administrative law judge, the Securities and Exchange Commission imposed sanctions against Raymond Lucia

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220. Bonneau and Hall provocatively concluded, however, that nonpartisan judicial elections arguably are more politicized than partisan judicial elections. BONNEAU & HALL, *supra* note 123 at 131–32.

221. Thomas, *supra* note 214, at 147–86.

222. 868 F.3d. 1021, (D.C. Cir. 2017), *cert granted*, 138 S. Ct. 736 (Jan. 12, 2018) (No. 17-130).



and his companies for misleading advertising.<sup>223</sup> The issue in front of the Court—one which the Circuit Court declined to review *en banc* because it was equally divided<sup>224</sup>—was whether the Securities and Exchange Commission’s use of administrative law judges as hearing officers in administrative proceedings violates constitutional limitations on “Officers of the United States.”<sup>225</sup> The Constitution requires officers of the United States to be nominated by the President and confirmed through the Senate’s “advice and consent.”<sup>226</sup> The purpose of the clause is to hold such officers “accountable to political force and the will of the people.”<sup>227</sup>

The debate in *Lucia* was whether an SEC ALJ is an officer of the United States. All parties to the case agreed that if an SEC ALJ is an officer, then they must go through the nomination and advice-and-consent process.<sup>228</sup> Because, as *Freytag* explains, that is how the democratic power of the people manifests.<sup>229</sup> Or, put another way, all parties agreed that an ALJ hired through the civil-service merit-selection process and acting as a judicial officer would unambiguously meet the Constitution’s systemic definition of democracy if the ALJ ultimately is nominated by the President subject to the Senate’s advice and consent.

In oral argument the questions of the Justices referenced the need of ALJs to be both independent and accountable.<sup>230</sup> The Court held that ALJs are inferior officers and so could not be appointed by staff, but rather only by the President, courts of law, or department heads.<sup>231</sup>

223. Raymond L. Lucia Cos. v. SEC, 832 F.3d 277, 280–83 (D.C. Cir. 2017).

224. Raymond L. Lucia Cos. v. SEC, 868 F.3d 1021 (D.C. Cir. 2017).

225. U.S. CONST. art. II § 2, cl. 2.

226. *Id.*

227. *Freytag v. Comm’r*, 501 U.S. 868, 883–84 (1991).

228. Brief for Respondent, Raymond L. Lucia Cos. v. SEC (2017) (No. 17-30), 2017 WL 5899983, at \*11; Petition for a Writ of Certiorari, Raymond L. Lucia Cos. v. SEC (2017) (No. 17-30), 2017 WL 3189046, at \*10.

229. An entirely different discussion is precisely what form the Constitution describes through the phrase “advise and consent.” Compare David Strauss & Cass Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1491–94, 1514 (1992) (asserting that the Senate should have a more independent and less deferential role in the confirmation process, including serving in an advisory role to the President in advance of his or her nomination of a candidate), with John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 634–38 (1993) (arguing that the Appointments Clause concentrates power over judicial appointments with the President and mandates that the Senate “should only reject nominees for weighty and publicly compelling reasons”).

230. Transcript of Oral Argument, Raymond L. Lucia v. SEC, 138 S. Ct. 2044, at 13–14, 30–31, 51–52 (2018) (No. 17-130).

231. Raymond L. Lucia Cos. v. SEC, 138 S. Ct. 2044, 2051, 2053–54 (2018).

Of course, all federal judges are nominated by the President and confirmed subject to the Senate's advice and consent. In other words, the proposal of this Article—a civil-service-like merit-selection screening of judicial aspirants who, once hired, then would promote from within—does not offend the Constitution's vision of democracy so long as the initial hiring decision from the list of qualifying aspirants is made by elected public officials.<sup>232</sup>

## V. CONCLUSION

This Article started with the example of Judge Aaron Persky—a well-educated jurist who certainly would have emerged from any merit-selection screening system. The example of Aaron Persky is both direct and allegorical.

Judge Persky may, by way of direct object lesson, seem to undermine the thesis that carefully structured judicial merit-selection systems can promote judicial legitimacy. But one also could posit that the experience of Judge Persky actually bolsters the thesis. A judiciary with legitimacy insulates all judges in the system. A judiciary without legitimacy exposes all judges. The issue neither is whether the judge actually is qualified nor is whether the judge made the right decision, but how instinctively emboldened or reticent the public is to try to remove any judge who rules in a way the public disagrees with. This points to the allegorical lesson. Geyh writes,

When it comes to judicial elections staking out strident positions at the poles is entertaining and comparatively easy. It is not, however, especially productive when selection systems are broken but sweeping reform is infeasible. During such times, tabling overstated, all-or-nothing arguments in favor of incremental reform that can make bad situations better is the preferable approach.<sup>233</sup>

No matter what one's personal view on Judge Persky, the outcome is vaguely unsatisfactory. The questions posited about him at the start of this Article do and will linger unresolved. So too is the attempt to fashion a clean and wholly satisfactory system to have an independent, accountable, and legitimate judiciary. But that does not make the effort fruitless.

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232. Academics and other political and legal theorists may (at least some certainly would) virulently dispute that this is adequate democracy.

233. Charles Garner Geyh, *Judicial Selection Reconsidered: A Plea for Radical Moderation*, 35 HARV. J. L. & PUB. POL'Y 623, 642 (2012).

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