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## WHO JUDGES THE JUDGES?

JOHN V. ORTH\*

### QUIS CUSTODIET IPSOS CUSTODES?<sup>1</sup>

In the routine performance of their judicial functions, judges are judged, in the loose sense of the word, by the litigants and by the general public, the latter usually informed through the reports of journalists. These two groups represent the ultimate consumers of the judicial product: the litigants directly as parties to the decision, the public indirectly as parties affected by the precedent established. On the judgment of these two groups over time rests the public reputation of the individual judge; on the cumulative judgment of all the judges rests the public reputation of the judicial branch of government.

In addition, judges are judged (still in the loose sense of the word) by the legal profession: lawyers who practice in their courts and other judges who rely on the precedents established by their decisions. Judges on appellate courts are also judged by law professors and students who study the written opinions that accompany judicial decisions.<sup>2</sup> On these judgments rest the professional reputation of the judges.

In the case of a judicial decision appealed to a higher court, the deciding judge is judged, in a stricter sense, by appellate judges, who have the power to affirm or reverse the decision; occasionally the appellate judges comment on the work of the lower court, expressing praise or blame.<sup>3</sup> Decisions of a final court of appeal cannot be formally reviewed by any other court. As Justice Robert H. Jackson observed of the judges of the U.S. Supreme Court, "We are not final because we are infallible, but we are infallible only because we are fi-

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1. Juvenal, Satires VI, at 347.

2. The inclusion of a judicial opinion in law school teaching materials, such as casebooks, increases a judge's reputation and salience. For a study of the factors that go into making a "leading case," see Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 274-76 (1975). Trial court judges also produce written opinions, but it is rare for one to be included in legal educational materials.

3. It is not only trial judges whose decisions may be appealed; the decisions of appellate judges may be appealed to a still higher court. Judges on an intermediate appellate court also judge one another when a case is reheard by the court en banc. See, e.g., FED. R. APP. P. 35 (providing for rehearing en banc by order of a majority of the circuit judges in regular service whether on the suggestion of a party or not). The North Carolina Court of Appeals may be the only multimember appellate court in the United States without provision for rehearing en banc. See generally John V. Orth, *Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc*, 75 N.C. L. REV. 1981 (1997).

nal.”<sup>4</sup> Of course, a later Supreme Court may criticize the judges’ reasoning in a prior case and overturn the precedent the case established, and judges, even on the highest court, may express contemporaneous judgments on their fellow judges in concurring or dissenting opinions.

Aside from these ordinary judgments on their day-to-day decisionmaking, judges are judged, in the strictest sense of the word, in cases of allegations of misconduct.<sup>5</sup> Punishment for misbehavior ranges from relatively mild sanctions by a “judicial conduct commission” to impeachment and removal from office.<sup>6</sup> Itself a legal proceeding, impeachment is governed by strict standards. The U.S. Constitution, for example, lists as impeachable offenses treason, bribery, and other high crimes and misdemeanors<sup>7</sup> and provides for trial by the Senate, with removal from office by vote of two-thirds of the Senators present.<sup>8</sup>

Formal procedures for judicial impeachment and removal are the necessary corollary of the security of judicial tenure. Judges are not guaranteed employment, only protection against improper discharge. When judges served “at pleasure,”<sup>9</sup> as in colonial America or in England before 1700, judges who misbehaved—however that was defined—were simply removed by the sovereign without the need to show cause. Once judicial tenure was made secure by the English Act of Settlement<sup>10</sup> and American constitutions,<sup>11</sup> judges served during “good behavior” and were removable only for good cause shown.

4. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

5. To preserve their independence, judges are generally immune from civil liability for their official acts. *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978). *But see Pulliam v. Allen*, 466 U.S. 522 (1984) (holding judicial immunity does not apply to prospective injunctive relief or to the award of attorney fees under the Civil Rights Act).

6. Punishment for official misconduct may include disqualification from holding further office. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 7; N.C. CONST. art. IV, § 4.

7. U.S. CONST. art. II, § 4.

8. *See id.* art. I, § 3, cl. 6.

9. *Durante bene placito*, “during the good pleasure,” were the Latin words that originally described a common law judge’s term of office. DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 384 (1980). An office held by this tenure resembles a tenancy at will in the law of real property, terminable by either party at any time.

10. 12 & 13 Will. 3, c. 2, § 3 (1701) (“Judges['] commission[s] shall] be made *quamdiu se bene gesserint* [so long as they shall behave themselves well], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them.”). This Act applied to common law judges in England, but not to judges in the colonies. For the later history of judicial tenure in England, see David Lemmings, *The Independence of the Judiciary in Eighteenth-Century England*, in *THE LIFE OF THE LAW: PROCEEDINGS OF THE TENTH BRITISH LEGAL HISTORY CONFERENCE* 125 (Peter Birks ed., 1993). For the years after 1880, see ROBERT STEVENS, *THE INDEPENDENCE OF THE JUDICIARY: THE VIEW FROM THE LORD CHANCELLOR’S OFFICE* (1993).

11. *See, e.g.*, U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .”); MASS. CONST. of 1780, pt. 2, ch. III, art. I (“All judicial officers, duly appointed, commissioned and sworn, shall hold

A further occasion for judging the judges arises when it becomes necessary to decide on retention if the judge serves for a term of years or promotion if the judge is not already on the highest court.<sup>12</sup> Common law judges were traditionally appointed for indefinite terms, as federal judges and the judges of a few state courts still are. Terms of indefinite duration began when judges were removable at will; they became of greater significance when judicial tenure was made more secure.<sup>13</sup> Departing from the common law and federal precedent, most American states now provide for fixed terms for judges, usually of long duration.<sup>14</sup>

In many states, judges are chosen by popular election rather than appointed by the executive.<sup>15</sup> Deciding whether to reelect a judge who has completed a term of office is a political decision, similar to deciding on candidates seeking their first judicial office. If party labels are allowed and judicial elections are contested, partisan considerations may preponderate, notwithstanding judicial qualifications that will

their offices during good behaviour . . . ."); N.C. CONST. of 1776, § XIII ("Judges . . . shall . . . hold their Offices during good Behaviour.").

12. Judicial performance may also be considered when there is a proposal to increase judicial salaries. Because of constitutional guarantees, it is generally not permissible to reduce judges' salaries during their term of office. *See, e.g.*, U.S. CONST. art. III, § 1 ("The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); N.C. CONST. art. IV, § 21 ("[T]he salaries of Judges shall not be diminished during their continuance in office.").

13. The effect of making judges with an indefinite term of office removable only for cause was to give them what is loosely referred to as "lifetime tenure." In the language of property law, the tenancy at will had become a life estate, albeit a life estate on condition subsequent. There is no necessary connection between termination only for cause and lifetime tenure. A judge could hold office for a term and still be subject to removal for cause; indeed, that is the tenure by which many American state judges hold their offices. To continue the property metaphor, they have a term of years subject to condition subsequent.

14. *See, e.g.*, N.C. CONST. art. IV, § 16 ("Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court . . . shall hold office for terms of eight years and until their successors are elected and qualified."). It is, of course, possible to provide for appointment for an initial fixed term with subsequent reappointment for an indefinite term. *See* N.J. CONST. art. VI, § VI, ¶ 3 (amended 1983) ("The Justices of the Supreme Court and the Judges of the Superior Court shall hold their offices for initial terms of 7 years and upon reappointment shall hold their offices during good behavior . . . ."). Judges in New Jersey are appointed by the governor with the advice and consent of the state senate. *Id.* ¶ 1. Recently it has been suggested that United States Supreme Court Justices serve for a nonrenewable term of years. *See* STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 199-201* (1994).

In addition to fixed terms for judicial office, states may by constitution or statute require mandatory retirement of judges at a certain age. *See, e.g.*, N.J. CONST. art. VI, § VI, ¶ 3 (amended 1983) ("[J]ustices and judges shall be retired upon attaining the age of 70 years."); N.C. CONST. art. IV, § 8 (amended 1997) ("The General Assembly shall . . . prescribe maximum age limits for service as a Justice or Judge."), *as implemented by* N.C. GEN. STAT. § 7A-4.20 (2004) (requiring retirement at age 72).

15. *See, e.g.*, N.C. CONST. art. IV, § 16 ("Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters . . . ."). It has been proposed that United States Supreme Court Justices also be popularly elected. *See* CARTER, *supra* note 14, at 201-03.

also be a factor. With sitting judges, it is past judicial performance that is judged; with first-time candidates, it is past performance as a member of the legal profession, assuming the selection of judges is limited to lawyers.<sup>16</sup>

When judges are chosen by direct election, a judge serving on a lower court may become a candidate for a position on a higher court; in contested elections, the opposing candidate may be a higher court judge seeking reelection. When judges are chosen by appointment rather than direct election, the appointing authority may have the opportunity to promote a judge from a lower to a higher court.<sup>17</sup> The U.S. Constitution empowers the President to nominate judges to the Supreme Court and to appoint them “with the Advice and Consent of the Senate.”<sup>18</sup> Before the President would nominate a judge on a lower court for promotion to the Supreme Court, it is inevitable that some judgment would be made concerning the judge’s prior judicial

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16. The U.S. Constitution prescribes minimum age and citizenship qualifications for Congressmen, Senators, and Presidents, U.S. CONST. art. I, § 2, cl. 2 (Representatives); *id.* § 3, cl. 3 (Senators); *id.* art. II, § 1, cl. 4 (Presidents), but imposes no particular qualifications for federal judges. State constitutions at first did not require professional qualifications for judges, and in the early national period nonlawyers served on state supreme courts. *See, e.g.*, JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* 22 (2004) (explaining that two of the three members of the New Hampshire Supreme Court in 1798 “had been trained for the ministry and had no education in law”). In many states a requirement of professional training was added later. *See, e.g.*, N.C. CONST. art. IV, § 22 (amended 1980) (“Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of District Court.”); *see also* JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* 118 (1993). Legal practice for a specific number of years may be a constitutional requirement for judicial office. *E.g.*, N.J. CONST. art. VI, § VI, ¶ 2 (amended 1978) (“The justices of the Supreme Court and the judges of the Superior Court shall each prior to his appointment have been admitted to the practice of law in this State for at least 10 years.”).

17. Even when judges are chosen by direct election, vacancies between elections may be filled by appointment. *See, e.g.*, N.C. CONST. art. IV, § 19 (amended 1985) (authorizing appointment by the governor). As Professor Hurst cannily observed, “Especially where the term of office on the supreme court was a long one, vacancies by death or retirement from illness were frequent, for men were usually already of mature years when they came to the highest court.” JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 134 (1950). In addition, a judge planning not to seek reelection might resign before the end of the term of office in order to allow the appointment of a successor, who could then run for election as an incumbent. In case of a vacancy on a higher court, it is of course possible that a judge serving on a lower court would be appointed.

18. U.S. CONST. art. II, § 2, cl. 2.

performance.<sup>19</sup> The Senate, too, would inevitably consider a nominee's prior service before confirmation.<sup>20</sup>

Judging the judges is necessary for the integrity of the judicial branch, but it risks interfering with the proper discharge of the judicial function. Judges should decide cases according to the law and without fear of retribution. Over the long history of the common law, a balance has been sought between holding the judges accountable for proper performance and protecting them from improper interference. To protect them from harassment by private plaintiffs, judges have been immune from civil actions since at least the early seventeenth century.<sup>21</sup> Increased security of judicial tenure—substituting service “during good behavior” for service “at pleasure”—was a response to perceived executive abuse. The English had insisted upon it, at least as to the judges at the center of the British Empire, in the constitutional settlement that followed the Glorious Revolution of 1688.<sup>22</sup> The American colonists viewed the continuing appointment of their judges under the old form as a cause for separation. Among the grievances against King George III listed in the American Declaration of Independence was that “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”<sup>23</sup> The constitutions of the newly independent states and eventually of the United States remedied the omission.<sup>24</sup>

Starting in the middle of the nineteenth century, states began to provide for direct election of judges.<sup>25</sup> Direct election was part of the

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19. During the presidency of Ronald Reagan, for example, the Justice Department is reported to have screened prospective judicial nominees. “If a candidate had previous judicial experience, that person’s record would be carefully examined.” Sheldon Goldman, *Reagan’s Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319 (1989).

20. For example, the nominations of John J. Parker in 1930 and Clement F. Haynsworth Jr. in 1969 were rejected by the Senate, at least in part, because of prior decisions in which they had participated as court of appeals judges. JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 56-59, 72-74 (1995).

21. See *Floyd v. Barker*, 12 Co. Rep. 23, 77 Eng. Rep. 1305, 1307 (Star Ch. 1607) (stating that without immunity, “those [judges] who are the most sincere, would not be free from continual calumniation”).

22. See *supra* note 10.

23. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776). The grievance may have been not so much that colonial judges were removable at the King’s will as that they were not removable at all by the colonial assemblies. HURST, *supra* note 17, at 123.

24. See *supra* notes 10-11.

25. Although Vermont led the way with direct election of some judges from 1777, the first state to provide for the direct election of all judges was Mississippi in 1832; New York followed in 1846. HURST, *supra* note 17, at 122. “Within ten years fifteen of the twenty-nine states which then made up the Union had followed New York. Every state which entered the Union after 1846 stipulated the popular election of all or most of its judges.” *Id.* On the origin of the North Carolina provision for the direct election of judges, see John V.

Jacksonian impulse toward greater democracy, but it also reflected a recognition of the lawmaking role of common law judges.<sup>26</sup> Although powers were separated in the new constitutions and legislative power was conferred on an elected legislature, judicial power—at least in a common law system—included a residual role in lawmaking. Common law judges not only resolved disputes, but they also established precedents to guide later decisions. True in England as in the United States, judicial lawmaking became more obvious and self-conscious in the circumstances of the New World. “The common law of England,” Justice Joseph Story once observed, “is not to be taken in all respects to be that of America.”<sup>27</sup> American judges, state and federal, decided what parts of the common law to accept and in some cases changed the received common law.<sup>28</sup> As it became apparent that common law

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Orth, *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges*, 70 N.C. L. REV. 1825 (1992).

Recently the trend has reversed:

A growing number of states have begun to back off from the pure elective principle. In the twentieth century, some states have adopted the so-called Missouri plan. Under this scheme the governor appoints judges, but his choice is restricted. A commission made up of lawyers and citizens draws up a list of names and gives it to the governor. The governor must choose from the list. The judge serves until the next election, then runs for reelection on his or her record. That is, the judge does not run against anybody; the public is simply asked to vote yes or no.

LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 85 (2d ed. 1998).

26. See Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 207-10 (1993). Although Nelson emphasizes popular concern about the power of judges to interpret legislation and to refuse to enforce unconstitutional statutes, the lawmaking power of common law judges was also great; indeed, in antebellum America, state judges relied on the common law in reaching their decisions at least as much as on statutes and much more than on constitutions.

27. *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829). Judge Thurman of the Ohio Supreme Court elaborated on this point:

The English common law, so far as it is reasonable in itself, suitable to the condition and business of our people, and consistent with the letter and spirit of our federal and state constitutions and statutes, has been and is followed by our courts, and may be said to constitute a part of the common law of Ohio. But wherever it has been found wanting in either of these requisites, our courts have not hesitated to modify it to suit our circumstances, or, if necessary, to wholly depart from it.

*Bloom v. Richards*, 2 Ohio St. 387, 390 (1853). The process continues. See *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1056-59 (Mass. 2004) (discarding common law rule concerning relocation of easements).

28. A state reception statute might provide broad guidance to the judges. For instance, North Carolina’s statute receives

so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete.

N.C. GEN. STAT. § 4-1 (2004). By contrast, the legislature was far more specific in determining which British statutes to accept. See sources cited *infra* note 31.

judges were lawmakers, judicial election was an obvious response to increase democratic accountability.<sup>29</sup>

Individual common law rules could be altered by statute, but a more comprehensive response to judicial lawmaking, much discussed in the nineteenth century, was to eliminate judicial discretion insofar as possible by legislation codifying the law.<sup>30</sup> This was, perhaps, more properly a judgment on the common law rather than on the common law judges. By means of a code, the legislature could decide for itself what parts of English common law to receive and when and whether to alter any of the received law—just as the legislature, rather than the courts, had decided which of the historic English statutes to recognize as so fundamental to the legal system as to be still in effect after independence.<sup>31</sup> Unlike judicial election, codification met with only limited success in American states, due to professional hostility and legislative indifference.<sup>32</sup>

29. Alan Watson has explained that

[f]or persons who believe in the sovereignty of the people, an independent judiciary presents a genuine problem: judges, once appointed with security of tenure may, even deliberately, frustrate the will of the people. One solution widespread in the United States is to have judges popularly elected and holding office only for a limited term.

ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 155 (1981). Nations with a civil law system, such as France, attempt to solve the problem with a system of separate administrative tribunals, which makes the judges of those courts members of the executive branch of government. *Id.*

In fact, direct election of judges did little to increase democratic accountability: “[P]opular election of judges became almost wholly a matter of form” due to the rise of political parties, which controlled the nomination process, and to the practice of executive appointment to fill vacancies. HURST, *supra* note 17, at 128-34.

30. “By ‘code’ is meant here primarily a written work that is intended to set out authoritatively at least the principles and basic rules of a wide field of law, such as the whole of private law, commercial law, or criminal law, or of criminal or civil procedure.” WATSON, *supra* note 29, at 100. “With codification, law becomes basically and primarily statute law . . . . The systematic and comprehensive nature of the code with supporting legislation makes law statute-oriented to an extent that is otherwise impossible . . . .” *Id.* at 168; *see also* J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 312 (1992) (describing the “leading idea” of the authors of the French Civil Code as an intent “to reduce as far as possible the interpretative and creative function of judges”). In the second half of the twentieth century, the contrast “between the civil-law judge, bound to the text of [the] code, and the common-law judge, free to construct new solutions for new cases,” was put in question. *Id.* at 407.

31. *See, e.g.*, STATUTES AND PARTS OF STATUTES OF GREAT BRITAIN, REPORTED AS BEING IN FORCE IN THIS STATE, BY THE COMMISSIONERS APPOINTED UNDER THE ACT OF 1817, ENTITLED, “AN ACT FOR THE REVISION OF THE ACTS OF THE GENERAL ASSEMBLY,” in 1 LAWS OF THE STATE OF NORTH CAROLINA 85 (Henry Potter ed., 1821). *See generally* ELIZABETH GASPAR BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776-1836* (1964).

32. *See* Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 414-18 (1996); CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1981), *reviewed by* Robert W. Gordon, Book Review, 36 VAND. L. REV. 431 (1983). Only Louisiana, influenced by its colonial experience under French and Spanish rule, adopted a comprehensive civil code. *See* GEORGE DARGO, *JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS*



Raising the stakes immeasurably in America was the emergence of the doctrine of judicial review. At least since the landmark decision in *Marbury v. Madison*<sup>33</sup> in 1803, the U.S. Supreme Court has been the final arbiter of the constitutionality of the work of the other branches of government. Inevitably this has drawn the court away from the traditional judicial function of adjudication and into the political arena. Already in the 1830s, Alexis de Tocqueville recognized that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”<sup>34</sup> After the Judges Bill of 1925 made certiorari virtually the only route to the Supreme Court,<sup>35</sup> the policymaking, as opposed to the more limited dispute-resolving, role of the court became increasingly obvious.

Once the judges had become removable only for cause, negative judgments on sitting judges—other than allegations of impeachable offenses—could not be formally expressed.<sup>36</sup> In extreme cases, political dissatisfaction with particular decisions resulted in constitutional amendments.<sup>37</sup> Or the legislature could attempt to preclude or reverse undesirable judicial decisions by adjusting the size of the court, reducing it as vacancies occurred or, more commonly, increasing the

105-53 (1975). Louisiana today is a mixed civil and common law jurisdiction. *See generally* LOUISIANA: MICROCOSM OF A MIXED JURISDICTION (Vernon Valentine Palmer ed., 1999).

33. 5 U.S. (1 Cranch) 137, 180 (1803). Earlier instances of judicial review have been recognized in United States Supreme Court decisions. *See* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 6-9, 20-23, 29-30, 37-41, 51-54 (1985).

34. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed. & Francis Bowen trans., Alfred A. Knopf 1945) (1835). It is true that “political questions” are presented to the courts only after reformulation as “judicial questions” that are resolvable only by judicial means.

35. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 939; *see* ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 351-53 (2d ed. 2002).

36. There had been an effort in the early years, fortunately unsuccessful, to make impeachment a means for the political branches to correct perceived errors by the judiciary. For example, Senator William B. Giles made the following remarks at the impeachment trial of Supreme Court Justice Samuel Chase:

A trial and removal of a judge upon impeachment need not imply any criminality or corruption in him. Congress had no power over the person, but only over the office. And a removal by impeachment was nothing more than a declaration by Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. *We want your offices*, for the purpose of giving them to men who will fill them better.

HURST, *supra* note 17, at 136.

37. The Eleventh Amendment, for example, was adopted in response to the Supreme Court’s decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *See* JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 12-29 (1987). In a speech on February 29, 1912, Theodore Roosevelt proposed that state supreme court decisions of unconstitutionality should be subject to reversal by popular referendum, a proposal that generated national debate. *See generally* Stephen Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 AM. J. LEGAL HIST. 257, 257-59 (1980).

number of judges to allow for new appointments.<sup>38</sup> In addition, a legislature could alter the jurisdiction of the court<sup>39</sup> or regulate its time of operation.<sup>40</sup>

The greater the difficulty of removing a judge, the greater the care exercised in judicial selection. On the part of the U.S. Senate, the consequence has been ever more careful scrutiny of nominees to the Supreme Court, which has led to the highest rejection rate for any appointive office requiring senatorial confirmation.<sup>41</sup> Beginning in 1868, presidential nominations to all federal judgeships have been routinely referred to the Judiciary Committee for report to the full Senate.<sup>42</sup> Public hearings began with the nomination of Louis D. Brandeis in 1916.<sup>43</sup> Harlan Fiske Stone, nominated to the Supreme Court in 1925, was the first candidate-Justice to answer questions in person before the committee.<sup>44</sup> Although undoubtedly fortuitous, the coincidence in 1925 of Stone's confirmation hearings and passage of the Judges Bill giving the Supreme Court almost complete control over its docket is highly suggestive of the connection between increased Supreme Court power and heightened senatorial scrutiny of judicial nominees. Testifying by nominees has become routine since 1955.<sup>45</sup>

Judges are judged by many different groups and for many different reasons. The public, generally, is concerned about the quality of justice. Lawyers are concerned on behalf of their clients; judges are concerned for the integrity of the judicial system. Academic commentators have made professional reputations a matter of serious study,<sup>46</sup> while also occasionally engaging in the scholarly parlor game of listing the "greatest judges."<sup>47</sup> But the recent call by legal academ-

38. See generally John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?*, 19 CONST. COMMENT. 681 (2002).

39. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513-15 (1868) (holding that Congress has power pursuant to the Constitution to eliminate Supreme Court jurisdiction in certain cases).

40. To delay the Court's decision in *Marbury*, Congress canceled the 1802 Term of the Supreme Court. See Act of Apr. 29, 1802, ch. 31, §§ 1-2, 2 Stat. 156.

41. MALTESE, *supra* note 20, at 2 (citing a 19.5% rejection rate).

42. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 770-71 (Kermit L. Hall et al. eds., 1992).

43. MALTESE, *supra* note 20, at 88.

44. See ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 194-99 (1956). The questioning was actually at Stone's request, to respond to critics who were concerned that his prior legal practice would make him too favorable to business interests. See *id.* at 194-95.

45. MALTESE, *supra* note 20, at 5, 109.

46. See, e.g., RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990); G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576 (1995).

47. See, e.g., Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 93-94 (1995) (beginning with the quotation: "The human animal differs from the lesser primates in his passion for lists of Ten Best." (quoting DAVID

ics for empirical measures of judicial performance has not been motivated by merely scholarly interest in judicial reputations. Nor has it been designed to assist all those empowered to reelect or reappoint judges or to promote sitting judges to higher courts. Instead, it has been narrowly focused on the judgment of only one group, fellow judges, concerning judicial performance expressed in only one form, published judicial opinions, and for only one purpose, appointment to the U.S. Supreme Court.<sup>48</sup>

Assuming a norm of promoting to the Supreme Court a judge already serving on one of the federal courts of appeals, the new evaluators have focused their attention on the small cadre of judges thought to constitute the likely candidates.<sup>49</sup> Use of the published opinions of these judges by other judges is treated as an indicator of positive judicial performance.<sup>50</sup> The measures are intended as a means of guiding the President and the Senate in the exercise of their appointment power. Nominating and confirming a judge with a “low score” on the chosen measure would be open to criticism and perhaps rendered more difficult. What are wanted, in other words, are not so much empirical measures of judicial performance as empirical measures of political performance in the choice of Supreme Court Justices.

The search is supposedly for predictors of success as a Supreme Court Justice. The difficulty is not only that no other court is quite like the U.S. Supreme Court but also that success as a Supreme Court Justice is not easily quantifiable. Judges, or at least legally trained persons, may indeed be the best qualified to evaluate ordinary judicial performance. A form of legal connoisseurship is required that is not common knowledge.<sup>51</sup> For this reason, common law

WALLECHINSKY ET AL., *THE PEOPLE'S ALMANAC PRESENTS THE BOOK OF LISTS* xvii (1977) (internal quotation marks omitted). For the most famous list of the “ten judges who must be ranked first in American judicial history,” see ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4, 30 n.2 (1938). The game has even been played in reverse. See David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 466-68 (1983).

Political scientists have long assembled empirical data on judges, including data on judicial selection. See, e.g., CHARLES H. SHELDON, *A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT* (1988), reviewed by John V. Orth, Book Review, 95 AM. HIST. REV. 290 (1990).

48. See Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 305-13 (2004).

49. Such a norm would exclude other sources of recruitment that have in the past provided many notable Justices: state supreme courts (William J. Brennan), successful practice (Lewis F. Powell, Jr.), elective office (Hugo L. Black), government service (Robert H. Jackson), even law school teaching (Felix Frankfurter).

50. Judicial opinions are the characteristic work product of appellate judges. Other than federal court of appeals judges, the only other candidate class that could be considered under such a standard would be state appellate court judges.

51. Sir Edward Coke said as much hundreds of years ago when he lectured King James I: “[C]auses which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of

judges were routinely chosen from the legal profession. But what is true of ordinary dispute resolution and precedent-setting is not necessarily true of the policymaking demanded of a modern Supreme Court Justice.<sup>52</sup> For that, other appellate judges are not necessarily the only, or indeed the best, judges. The judgment required may well be called political.

Proposals to institutionalize new measures for judging the judges must be situated in the context of the historic balance between protecting the judges from improper interference and holding them accountable for proper performance. Judging the judges has always been closely connected with judicial independence. The first formal process for removing judges from office, impeachment, was a necessary complement of “good behavior” tenure.<sup>53</sup> Empirical measures of judicial performance relying on the judgment of other judges, if institutionalized, will necessarily affect the constitutional balance.

On the one hand, such measures will seemingly increase judicial independence by constraining the appointing powers in their decisions on judicial promotion. The judiciary would, *de facto*, become a party to the appointment process. While the politicians are unlikely to concede readily the implied loss of power, the general public, too, may well be loath to reduce political control of the judicial point of entry.<sup>54</sup> The effectiveness of the judicial branch is largely dependent upon public acceptance of its legitimacy.

Furthermore, reliance on the judgment of judicial peers in judging the qualifications of potential Supreme Court Justices risks the stultification of the judiciary by promoting, in effect, consensus candidates. It would be ironic if a system that celebrates “great dissenters,” whose decisions later—sometimes years later—gain acceptance, would place a premium for promotion on the judgment of a majority

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law, which . . . requires long study and experience, before that a man can attain to the cognizance of it . . . .” Prohibitions del Roy, 21 Co. Rep. 63, 77 Eng. Rep. 1342, 1343 (K.B. 1608).

52. As policymaking comes to predominate over decisionmaking, there may even come a day when legal training is no longer necessary for Supreme Court service. In Coke’s words, “natural reason” may come to be as useful as the “artificial reason” of the law. Professional training is certainly not required by the U.S. Constitution. *See supra* note 16. Indeed, Justice Antonin Scalia has suggested that “law-profession culture” with its tendency to “carry things to their logical conclusion” is actually a handicap in the development of constitutional law, which should be guided by “history and tradition.” *Lawrence v. Texas*, 539 U.S. 558, 601-05 (2003) (Scalia, J., dissenting).

53. *See supra* notes 10-14 and accompanying text.

54. The Supreme Court appointment process is “ever more grounded in public opinion.” MALTESE, *supra* note 20, at 131. Public hearings on nominees are “the public’s only opportunity to influence the process.” *Id.* at 148.

of contemporary judges. Metrics also smacks of formalism, which is reminiscent of the derided concept of “mechanical jurisprudence.”<sup>55</sup>

On the other hand, empirical measures relying on the judgment of other judges will risk decreasing judicial independence by suggesting means for ambitious judges to increase the likelihood of promotion or for fellow judges to grant or withhold recognition in hopes of affecting the result. For more than half the history of the United States, the President refrained from promoting an Associate Justice to Chief Justice, in part, to avoid competition among the Justices for the President’s favor.<sup>56</sup> At the time, it was thought that this would threaten to disrupt the normal functioning of the Court. In a more politicized environment, it could encourage ambitious judges to emphasize their agreement with the President’s policies—or disagreement, if the judge anticipates a change of leadership.

Emphasis on published judicial opinions is typical of law school lawyers; since the days of Dean C.C. Langdell at Harvard, American legal education has been centered on the judicial opinion.<sup>57</sup> But however useful opinions are for pedagogic purposes, they are markers of judicial excellence only if they justify the right result. The *decision* rather than the *opinion* is the essential judicial function; what is decided is more important than what is said in explanation thereof. Subsequent judicial opinions may cite a prior opinion and may follow rather than reverse it; legal academics may include an opinion in casebooks and refer to it in scholarly articles; but if it explains, however elegantly, the wrong result, its author is not worthy of promotion—indeed, the opposite is true.<sup>58</sup>

Reliance on the published opinion of the individual judge also threatens the collegial character of the judiciary. While not quite the invention of Chief Justice John Marshall, the unitary opinion of the

55. See generally Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

56. Edward Douglass White was the first Associate Justice of the U.S. Supreme Court to be “promoted” to Chief Justice, on the nomination of President William Howard Taft in 1910. Taft had forcefully rejected a suggestion that he nominate the senior Associate Justice, John Marshall Harlan: “I’ll do no such damned thing. I won’t make the position of chief justice a blue ribbon for the final years of any member of the court.” WALTER F. PRATT JR., *THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE, 1910-1921*, at 15 (1999) (internal quotation marks omitted).

57. C.C. Langdell was dean of the Harvard Law School from 1870-1895. He compiled the first casebook and established the case method of legal instruction. For a brief summary of Langdell’s “new legal world,” see BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 346-53 (1993).

58. For an earlier discussion of this point, see John V. Orth, *Judging the Tournament*, *Jurist*, at <http://jurist.law.pitt.edu/forum/symposium-jc/choi-gulati-orth-taha-printer.php> (Apr. 15, 2004).

court owes its prevalence to him.<sup>59</sup> From the first organization of the U.S. Supreme Court in 1790 until Marshall's appointment as its head in 1801, the Justices conformed to English practice and delivered their opinions seriatim, one after the other. Under Marshall's headship, the Court literally found a new voice, usually his own, and typically issued only one opinion. The opinion of the court was an institutional triumph, a "secret source" of judicial power.<sup>60</sup> Emphasis on the personality of the author will lessen the weight of the judicial institution and likely encourage more frequent concurrences and dissents.

Judges have been judged since time immemorial. The Bible reports the case of the "unjust judge" who "feared not God, neither regarded man," but who finally did justice to a poor widow because of her constant petitioning.<sup>61</sup> Empirical measures that privilege the opinion over the decision it explains are not safe guides in the timeless search for a just judge. And privileging the judgment of the judges over that of the public at large and their elected leaders risks losing sight of the policymaking role of the modern Supreme Court.

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59. See JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 282-95 (1996); see also John V. Orth, *John Marshall and the Rule of Law*, 49 S.C. L. REV. 633, 639-40 (1998) (reviewing various books on John Marshall).

60. See John V. Orth, *The Secret Sources of Judicial Power*, 50 LOY. L. REV. 529 (2004).

61. *Luke* 18:2-6 (King James). The candid opinion accompanying this decision, whether or not it expresses the motivation of other judges, is unlikely to be widely cited: "Though I fear not God, nor regard man; yet because this widow troubleth me, I will avenge her, lest by her continual coming she weary me." *Id.* 18:4-5.