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TAILORED JUDICIAL SELECTION

*Dmitry Bam**

I. INTRODUCTION

Since the nation's founding, Americans have experimented with many different methods of judicial selection and retention. We have tried appointment-based systems, including appointment by the president or by the governor, with or without confirmation by the legislature. We have tried election-based models, including partisan elections, non-partisan elections, and elections by the legislature. We have even tried hybrid models that blend appointments and elections, the most famous example known as the Missouri Plan: appointment by the governor (with the aid of a panel), followed by a retention election.¹ Centuries of experimentation have led to some uniquely American methods of choosing judges: neither judicial elections (how most of our state judges are chosen) nor life-tenure (the term of office for our federal judges) have caught on in other parts of world.²

Despite the wide range of selection methods in existence throughout the nation, neither the American people nor legal scholars have given much thought to tailoring the selection method to particular levels of the judiciary. To the contrary, the most common approach to judicial selection in the United States is what I will call a unilocular, "a judge is a judge," approach. For most of our nation's history, all judges within a jurisdiction have been chosen the same way. Proponents of this view see judges at all levels of the judiciary—trial, intermediate appellate, and courts of last resort—as a homogenous group, at least when it comes to how we choose them. Our federal judiciary exemplifies this approach. All Article III judges are appointed by the president and confirmed by the senate. All of them serve for life. We have adopted this unilocular system even though the work of a judge in, say, the Western District of Arkansas is very different from the work of a Justice of the U.S. Supreme Court.

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1. See Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1600 (2009) (describing the various methods of judicial selection and retention used by the states).

2. Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 255 (2004) ("The U.S. choice of life tenure with no age qualification, either at entry or on exit (that is, minimum experience requirements or mandatory retirement ages), is quite unusual.").

Most states have taken a similar tack, with approximately forty states using a uniform selection method for all levels of their state courts.³ For example, in fourteen states all judges are appointed by the governor from a list submitted by a judicial nominating commission.⁴ Another fourteen use nonpartisan elections for all their judges.⁵ Eight more use partisan elections for all their judges.⁶ All in all, once a state chooses a selection and retention method for its judges, it adopts that approach for the whole judiciary.

But it does not have to be this way. In this article, I will suggest that we should at least consider tailoring the judicial selection method to different levels of the judiciary. After all, judges are not a monolithic, homogenous group, and the work of a trial judge differs significantly from the work of an appellate judge.⁷ What I call “tailored judicial selection” can help address some of the concerns raised by the proponents and the opponents of judicial selection.

Of course, both trial and appellate judges are tasked with resolving legal disputes by applying the law to the facts. And both make important decisions that change the direction of the law, not only for the litigants in a specific case, but for the jurisdiction in general. Despite these similarities, trial judges are engaged in significantly more fact-finding and case management, and they perform more case-by-case adjudication and law application. Trial judges also interact more directly with the litigants, supervise the discovery and settlement processes, decide numerous evidentiary motions and other motions *in limine*, and preside over bench and jury trials.⁸ Appellate judges, on the other hand, are generally tasked with resolving the most difficult (and often the most divisive and inconclusive) legal issues in cases, adopting the factual findings made by lower courts. It is no secret that all judges engage in some lawmaking, but appellate judges are significantly more likely to

3. See Ryan Fortson & Kristin S. Knudsen, *A Survey of Studies on Judicial Selection*, 32 ALASKA JUSTICE FORUM 1, 8–9 (2015).

4. *Id.*

5. *Id.* at 8.

6. *Id.*

7. The Honorable Daniel Wathen & Barbara Riegelhaupt, *The Speeches of Frank M. Coffin: A Sideline to Judging*, 63 ME. L. REV. 467, 478 (2011) (“[T]he appellate judge is quite a different animal from the trial judge.”); Jason R. Bent, *P-Values, Priors, and Procedure in Antidiscrimination Law*, 63 BUFF. L. REV. 85, 90 (2015) (contending that trial judges and appellate judges “play different roles in our civil justice system”); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1514 n.179 (2011) (“[A]ppellate judges’ work is quite different from that of trial judges.”).

8. In recent years, the number of trials nationwide has decreased significantly. As a result, trial judges spend significantly more time managing discovery and settlement than presiding over trials. This is particularly true of jury trials, which have largely disappeared from court dockets. See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1259–62 (2005) (discussing the decline in the number of jury trials at the state and federal levels).

make law.⁹ In addition, appellate judges have significantly less direct interaction with the litigants, other than during oral argument, and much of their work consists of legal research and writing.

To the extent that these two groups of judges are qualitatively different, not only serving different judicial roles but requiring a different set of skills,¹⁰ we should at least consider tailoring the selection mechanism to fit the nature of the court in question. Instead, it has been almost universally rejected and the question is rarely, if ever, asked. Judicial selection scholars have given little thought to tailored judicial selection, choosing instead to explore the challenges associated with judicial elections and judicial appointments.¹¹ Constitutional law scholars generally focus their attention on the work of the United States Supreme Court, but even when writing about the judiciary as a whole, these scholars rarely distinguish between different levels of the judiciary.

There are a few states that depart from that trend. For example, in Florida, appellate judges are appointed by the governor, who must select a candidate submitted by a judicial nominating commission, but trial courts of general jurisdiction are filled through nonpartisan elections.¹² In New York and Tennessee, partisan elections are used only for trial court judges, while judicial nominating commissions are used for both states' high court.¹³ But even when states depart from the monolithic approach, little thought is generally given to tailoring the selection method to either the nature of the work performed by the judge or how the purposes of judicial elections (or judicial appointments) are served by the court in question. Rather, the decisions to adopt differential selection methods appear to be the result of an accident, history, or unfounded assumptions.

While I support these states' efforts to tailor judicial selection, this article argues that the states adopting such an approach have chosen to elect (and to appoint) the wrong judges. I will explain why, if we are going to have elections for some judges, it is the justices on the courts of last resort, and not trial judges, who should be accountable to the electorate. It is at the highest levels of the state judiciary where accountability is most lacking, most needed, and most feasible. Trial judges, on the other hand, should be chosen via a merit scheme with significant input from lawyers, litigants, court staff, and the state bar associations. Unlike state courts of last resort,

9. RICHARD POSNER, *HOW JUDGES THINK* (First Harvard Univ. Press ed. 2010).

10. Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1408 (2006) (“[T]he skills that make one a good appellate judge are so different from the skills required of a trial judge.”).

11. See, e.g., David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 278 (2008) (describing the literature critiquing the use of judicial elections).

12. See Fortson & Knudsen, *supra* note 3, at 7.

13. *Id.*

accountability to the electorate is not only most present for state trial judges, but also least necessary and least feasible.

This article offers a few reasons for my unorthodox proposal. First, I argue that accountability is most crucial at the courts of last resort. State supreme court justices are significantly more likely to face controversial constitutional questions and other difficult legal questions that do not offer a legalistic or formalistic solution.¹⁴ Unlike trial judges, who tend to engage in more case management and dispute resolution, supreme court justices tend to engage in more lawmaking.¹⁵

Second, not only is accountability more crucial for state courts of last resort, but it is also most lacking in those courts. The decisions of trial judges are reviewed by one or two levels of appellate courts.¹⁶ The decisions of state supreme court justices are generally either not reviewed (because the United States Supreme Court takes very few cases each year) or unreviewable (because the state high court is the final word on issues of state law). Trial judges cannot overturn state supreme court precedent; state supreme court justices can.

Third, the public is in a much better position to hold state supreme court justices, but not state trial judges, accountable because it is much more likely to understand the nature of their work and more of their work is legislative in nature.¹⁷ In addition, each state only has a few supreme court justices but many trial judges; thus, it is more feasible for the electorate to get to know members of the state high court.

This article proceeds in four parts. In Part II, I examine the different methods for judicial selection used in the states, focusing in particular on the

14. One would expect the easiest legal questions to be filtered out during the lengthy litigation process. John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 354 n. 86 (1986) (predicting that “only the most difficult issues should survive” in appellate cases). Cf. James C. Ho, *The Office of the Solicitor General: Ten Years of Representing Texas Interests*, 21 APP. ADVOC. 104, 104 (2008) (discussing the “challenging constitutional and other legal issues that tend to dominate the most difficult appellate matters.”).

15. Stephen J. Ware, *Originalism, Balanced Legal Realism and Judicial Selection: A Case Study*, 22 KAN. J.L. & PUB. POL’Y 165, 181 (2013).

The political/lawmaking side of judging looms larger, the higher the court. In other words, the extent to which (inevitable) judicial lawmaking allows judges to inject their political views into law rises, the higher the court. Trial judges play less of a lawmaking role than appellate judges, especially supreme court justices, simply because court systems are hierarchical and trial courts are at the bottom.

Id.

16. Most states have an intermediate appellate court and a supreme court that provide for two layers of review of trial court decisions.

17. Ware, *supra* note 15.

purposes of judicial elections and the relationship between judicial elections and the twin towers of judicial independence and judicial accountability. Part III puts forth the reasons states should consider tailoring judicial selection methods and develops a general framework for deciding which judges should be elected and which judges should be appointed. Part IV applies that framework to different levels of the judiciary. This analysis leads to Part V, where I conclude that judicial elections are particularly ill-suited for trial judges, and, if they are to be used at all, are most appropriate for justices on the courts of last resort.

II. THE PURPOSES OF JUDICIAL ELECTIONS

Judicial elections are one of America's most unique democratic inventions. They are virtually unknown throughout the world, and certainly no other nation elects such a large segment of its judiciary.¹⁸ In the United States, nearly ninety percent of state judges, in a total of thirty-nine states, depend on the electorate to obtain, or to retain, their jobs.¹⁹ It was not always so. At the time of the founding, the colonies, and then the states, allowed either the governors or the legislature to select the state judiciary.²⁰ Those judges then served for a term of years, or in some places, for life. Indeed, that is the model that was adopted by the founders for the federal constitution.²¹

The middle of the nineteenth century saw a shift from an appointed to an elected judiciary. Much has been written about this transformation of American courts, and I will not rehash that history or its causes here.²² Rather, I want to focus on the connection between selection methodology and the work of judges. At its core, the struggle between different judicial selection methods has corresponded to a debate about judicial independence and accountability. While most people today link elections to accountability,

18. Throughout much of the world, the judiciary is part of a professional civil service system. To become a judge, law graduates must finish near the top of their class, sometimes attend special "judge school," and perform well on a final examination. Promotions within the judicial branch are typically based on years of service and performance, with judges and judicial selection committees playing prominent roles in promotion decisions. *See, e.g.,* Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353, 395 (2000) ("In Germany and France, exams are required to become a judge and French judges most often come from the Judicial School.").

19. JED SHUGERMAN, *THE PEOPLE'S COURTS* (2012).

20. Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1220 (1998) ("At the country's founding, most states appointed their judiciary.").

21. *See* U.S. CONST. art. III, § 1.

22. The best book on this history is Jed Shugerman's *The People's Court*. *See* SHUGERMAN, *supra* note 19.

judicial elections were intended to create a more accountable *and* a more independent judiciary.²³

Judicial elections are simultaneously terrific and terrible for judicial independence. On the one hand, some argue that judicial elections foster judicial independence by creating a greater separation of powers between the judiciary and the other branches of government.²⁴ This separation gives judges the freedom and the confidence to act as an aggressive check on legislative and executive branches.²⁵ Rather than worrying about what a reappointing governor or legislature may think about a judge's decisions, judges can focus on deciding cases according to the mandates of the law. Others respond that judicial elections threaten judicial independence by stifling the judges' ability to check majoritarian abuses and protect the rights of minorities and unpopular individuals.²⁶ Rather than deciding the cases according to the requirements of the law, elected judges now worry about pleasing the electorate.²⁷

Ironically, judicial elections are also good and bad for judicial accountability. Proponents of judicial elections emphasize the elections' ability to hold judges accountable.²⁸ Like all elections in a democratic society, judicial

23. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1119 (2010) (describing the advent of "judicial elections to foster a more independent, more vigilant judiciary to enforce [limits on the state legislatures] through judicial review.").

24. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1261 (2008).

Although the early impetus for partisan judicial elections may have been a desire for greater accountability, the partisan election movement did not take hold until after the Jacksonians lost influence, led by reformers who argued that elected judges who derived their authority from the people would be more independent-minded than hand-picked friends of governors, or jurists subject to the beck and call of legislatures.

Id.

25. SHUGERMAN, *supra* note 19, at 5 (arguing that states adopted judicial elections to increase judicial independence). Professor Shugerman's research shows that these expectations were realized: elected judges engaged in more judicial review than their appointed brethren. Shugerman, *supra* note 23, at 1097.

26. Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367 (2002).

27. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 691 (1995).

28. Perhaps the leading proponents of judicial elections, Chris Bonneau and Melinda Gann Hall have argued that competitive elections promote accountability to the electorate. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 78-90 (2009); *see also* PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 28 (1980) ("Although elections might serve other functions . . . their role in enabling the public to assert control over the course of judicial policy-making is

elections, at least in theory, promote accountability by offering the people a direct check over one of the three branches of government and the ability to reconstitute the membership of the courts if they are unsatisfied with how judges are doing their jobs.²⁹ Opponents respond that judicial elections ultimately undermine judicial accountability because voters are unable to accurately evaluate judicial candidates, often voting for candidates based on irrelevant traits like their name, perceived ethnicity, and position on the ballot rather than their judicial acumen.³⁰

In this section, I explore the purposes of judicial elections as well as how judicial elections serve those purposes. Understanding those purposes can help us decide whether all or only some – and if some, which – judges should be elected or appointed.

A. Judicial Elections as an Accountability Mechanism

In a constitutional democracy, elections are the primary method of holding elected officials accountable. In a democratic theory, accountability is the reason for elections,³¹ and judicial elections are no different. Judicial elections, just like elections for other local, state, and federal offices, provide a way for the people to impose popular control over the elected institution. By giving ordinary citizens an opportunity to disagree with their judges, and to remove them from office because of that disagreement, the community sends a message that the judiciary serves the people of that community as much as any other elected officials. And when people become unsatisfied with the performance of their judges, the next election is usually right around the corner.³²

Not only are elections a theoretical tool for judicial accountability, but history tells us that judicial elections were at least in part designed to make judges more accountable to the people and to ensure that judicial decisions were more in line with public will. During the early and mid-nineteenth century, judges were perceived as too conservative and too friendly towards

the mainstay of the argument which supports the selection of state judges by election and not by some other method.”); Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 165, 177 (Matthew J. Streb ed., 2007).

29. DUBOIS, *supra* note 28.

30. See David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267 (2008) (“Those who did vote, surveys indicated, often made their selections based on factors such as the candidates’ ethnicity, gender, or name familiarity.”).

31. DUBOIS, *supra* note 28, at 243.

32. Many states that elect their judges also give those judges shorter terms than states that appoint their judges. Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1352 (2010).

corporate interests.³³ Elected judges, the theory went, would be more responsive to public opinion, issuing more debtor-friendly decisions consistent with the wishes of the electorate.³⁴ Elections, therefore, create an important link between the people and their judges.

Mississippi was the first state to elect its judges, and an important reason for its transition to judicial elections was dissatisfaction by the people of that state with the sitting judges.³⁵ And even though Jacksonian democracy does not entirely explain the shift to elected state judiciaries, the desire to make judges more representative of the people is certainly part of the explanation.³⁶ At least in theory, elected judges would be expected to be more majoritarian, and if they weren't, new judges would be chosen in their place.³⁷ This thinking swept the nation, as state after state entered the union with elected rather than appointed judges. Rejecting the federal model of judicial selection, most states that initially adopted an appointive model also made the switch to judicial elections with the hope of creating a more representative and accountable judiciary.³⁸

The reformers' vision continues to this day. As judicial elections have become more competitive in recent years, the people have great opportunity to express their approval or approbation of their state judges. A number of judges have lost their jobs because the electorate disagreed with their decisions.³⁹ While many have criticized this aspect of judicial elections, expressing concern that judges who constantly look over their shoulder cannot decide cases according to the mandates of the law,⁴⁰ there is no denying that elections are the "most potent form of public discipline of all the selection method."⁴¹ When the public becomes dissatisfied with judicial decisions, those decisions "can become rallying cries for an activist and mobilized

33. See SHUGERMAN, *supra* note 19.

34. See Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 341 (1983).

35. SHUGERMAN, *supra* note 19, at 66.

36. Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 100 (1997) ("[M]ost states moved from an appointive to an elective system for judges in the mid-nineteenth century because they wanted state court judges to be more representative of the communities they served.").

37. After all, the purpose of elections is to hold the elected officials more accountable for their decisions. Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 724 (2010) (discussing the majoritarian tendencies of elected judges and arguing that "the very purpose of elections [is] to hold judges accountable to the voters for their decisions.").

38. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 140 (1950).

39. The most high-profile examples are Justice Penny White in Tennessee, and Justices Rose Bird, Cruz Reynoso, and Joseph Grodin in California.

40. Croley, *supra* note 27.

41. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2070 (2010).

citizenry, who seek to resist the constitutional interpretations advanced by judges.”⁴²

Judicial elections encourage accountability by connecting the people to their judges and fostering discussion of legal issues that the citizens rely on in casting their ballots.⁴³ In the course of an election campaign, judicial candidates have the opportunity to discuss the work of the court, as well as past and future judicial decisions.⁴⁴ In a sense, they transform the judiciary into a more political branch of government,⁴⁵ giving elected judges a more democratic pedigree and, arguably, more democratic legitimacy.⁴⁶

Not only are elections a method by which the people can hold judges accountable (at least in theory), but judicial elections create a more representative judiciary. We expect elected judges to consider the views of the electorate in making their decisions and, in a sense, represent those views on the bench. For better or worse, studies have now shown that elected judges do take majority opinions into account when deciding cases.⁴⁷ This measure of accountability has been demonstrated in a variety of contexts. For example, the method of selection appears to make a difference to the outcome of civil⁴⁸ and criminal cases.⁴⁹ In criminal cases in particular, elected judges seem to act differently. They impose harsher criminal sentences and are more likely to uphold death penalty rulings, especially as an election approaches.⁵⁰ Judges themselves have confirmed that trying to ignore voter

42. Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 887 (1999).

43. John L. Warren III, *Holding the Bench Accountable: Judges Qua Representatives*, 6 WASH. U. JURISPRUDENCE REV. 299 (2014).

44. *Republican Party of Minn. v. White*, 536 U.S. 765, 809–10 (2002).

45. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J. ECON. & ORG. 290, 327 (2010) (concluding that elected judges are “more politically involved, more locally connected, and . . . more like politicians and less like professionals.”).

46. Pozen, *supra* note 41.

47. Michael R. Dimino, Sr., *The Worst Way of Selecting Judges-Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 271 (2005) (“It would appear indisputable, though distasteful to many observers, that elected judges do take public opinion into account.”).

48. Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & Econ. 157, 162–70 (1999) (concluding that tort awards are higher in states with elected judiciaries).

49. DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE SUPREME COURT POLICY* (1995) (showing that elected judges are less likely to favor criminal defendants than appointed judges).

50. Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 485–503 (1995) (judges become more conservative in criminal cases as reelection approaches); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004) (judges change their behavior as reelection approaches).

preferences is akin to trying to ignore a crocodile in one's bathtub.⁵¹ That's not surprising because judges, like the rest of us, want to keep their jobs.

Admittedly, every retention method allows for judicial accountability. For example, in states where the governor or the legislature has the power to reappoint judges, the judges are held accountable to those offices, and indirectly, back to the people. But judicial elections allow the people to speak more directly, without relying on their agents and facing all the associated agency problems. That is why elections are so popular among the people, with nearly eighty percent of the public supporting judicial elections despite some misgivings about the impartiality of elected judges.⁵²

Many critics of judicial elections acknowledge their ability to hold judges accountable but denounce such accountability as inconsistent with the judicial role.⁵³ Some have gone so far as to argue that judicial elections are unconstitutional precisely because they create such a majoritarian impulse in judges that they are unable to decide cases fairly.⁵⁴ The link between judicial decision-making and public preferences may sound problematic to us today because we have grown so accustomed to the counter-majoritarian role that we expect our judges to play.⁵⁵ In some ways, the historical understanding of the judicial function is consistent with a more representative, majoritarian judiciary. At the time of the founding, there was little separation between legislatures and judges.⁵⁶ In addition, Federalist No. 78 articulates the primary role of the Supreme Court as a check, on behalf of the people, on the other branches of government.⁵⁷

51. See Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

52. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L. J. 43, 53 (2003).

53. Pozen, *supra* note 11, at 265.

54. Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1, 2 (2014); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 498 (1986) (“[I]n [at least some cases], the use of non-tenured state judges seems to be a clear violation of procedural due process.”).

55. Croley, *supra* note 27, at 694. In its recommendations, the Arkansas Bar Association Task Force itself concluded that the role of the judiciary is to protect the minority.

56. SHUGERMAN, *supra* note 19.

57. Of course, in Federalist No. 78, Hamilton offers another defense of the independent judiciary. Not only do judges act on behalf of the people as a check on abuse by the government, but they also act on behalf of minorities as a check on abuse by majorities. Sylvia Snowiss's (and Larry Kramer's) depiction of judicial review is consistent with the majoritarian, representative role that judicial elections create. See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

Some critics reject the notion that judicial elections truly hold judges accountable. Those critics argued that the people are ignorant of judges and instead cast their ballots in judicial elections on the basis of the candidate's name, ballot position, and other irrelevant factors.⁵⁸ Others argue that campaign ads, which play such an important role in modern judicial elections, are at best useless, and at worst misleading.⁵⁹ Admittedly, these campaign ads generally focus on a single case or a single issue, with little focus on the quality of the judge. Supporters of judicial elections respond that while elections may not be the ideal accountability mechanisms, no system of accountability is perfect and we should not be overly critical of judicial elections without considering other systems.⁶⁰ Judicial performance is notoriously tricky to evaluate, and it is not clear that governors (or merit panels) are better able to evaluate the quality of judicial performance.

B. Judicial Elections as an Independence Mechanism

For many people, accountability is the primary, perhaps the sole, benefit of judicial elections. The judicial selection debate is often characterized as a war between election-based, accountability-enhancing regimes and appointment-based, independence-enhancing regimes.⁶¹ For critics of judicial elections, the biggest concern is that judicial elections undermine judicial independence and judicial impartiality. Elections force judges to engage in majoritarian judging, deciding cases according to majority opinions at the expense of following the law or protecting minority rights.

While there is little question that elected judges do engage in more majoritarian judging,⁶² this alone is insufficient to show that elections undermine judicial independence. After all, judges who are subject to reappointment also engage in strategic judging hoping to satisfy the reappointing agent or agency, usually the governor or the state legislature.⁶³ Because al-

58. Pozen, *supra* note 41, at 2074.

59. Terry Carter, *Mud and Money: Judicial Elections Turn to Big Bucks and Nasty Tactics*, A.B.A. J. (Feb. 2005); Adam R. Long, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False and Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 788–89 (2001).

60. Dimino, *supra* note 47, at 272; Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Elections*, 40 SW. L.J. 31, 32 (1985) (“[N]o method of judicial selection can be evaluated ‘in the abstract’ without regard to the performance of other methods of selection.”).

61. Matthew J. Streb et. al., *Contestation, Competition, and the Potential for Accountability in Intermediate Appellate Court Elections*, 91 JUDICATURE 70 (2007) (“At the heart of the battle surrounding judicial elections are arguments over judicial accountability and judicial independence.”).

62. See Dimino, *supra* note 47.

63. Dimino, *supra* note 47, at 272.

most no state has adopted the federal model of life tenure for its judges, complete and total judicial independence is an unrealistic (and perhaps undesirable) ideal.

When we explore the history of judicial elections, we discover that one of the most important arguments that proponents of judicial elections made in favor of elections was that judicial elections were supposed to increase judicial independence.⁶⁴ The independence that those framers cared about was independence from the other branches of government, and in many states, the legislature in particular.⁶⁵ In the middle of the nineteenth century, when judicial elections became the dominant mode of judicial selection, the people were concerned about cronyism and corruption within the other branches of government, and worried that the judiciary—being insufficiently independent of those branches—would be unable to act as a strong check against such corruption.⁶⁶ In other words, while judicial elections create a stronger link between the people and the judges, they also create a greater separation between the judicial branch and the other two branches of government. And it is precisely that kind of independence— independence from the state legislative and executive branches—that the framers of many state constitutions cared about when they adopted judicial elections.

One may question the sincerity of the argument that judicial elections make for a more, not less, independent judiciary, but history bore out the reformers' expectation. Shortly after the states adopted judicial elections, judges engaged in significantly more judicial review.⁶⁷ No longer dependent on their legislature or the governor for their job, judges were able to stand up to their fellow elected officials. In fact, it was only after the adoption of elections that state judges began striking down statutes passed by the state legislatures.⁶⁸

This rise in judicial review is not surprising. After all, if a judge who must be reelected is conscious of how the people will react to his decisions, a judge who must be reappointed by the governor is also likely to be conscious of how the governor will react to his decisions. Neither judge is completely independent of all external forces. The independence debate is largely about which constituency the judge must be independent from in his or her decision-making. But we would expect an elected judge to be a better check on legislative or executive malfeasance than a judge appointed by the

64. See SHUGERMAN, *supra* note 19.

65. Unlike the Founders of the federal Constitution, which cared about independence from both the other branches of government and from the people themselves. See FEDERALIST NO. 78 (Alexander Hamilton).

66. *Id.*

67. Shugerman, *supra* note 23, at 1115–16 (discussing the rise in judicial review in states that had adopted judicial elections).

68. *Id.*

legislature for at least two reasons. First, having campaigned to the people, the elected judge has a better understanding of the will of the people when it comes to contested legal issues. And second, the elected judge may feel a greater sense of power and legitimacy to defy the legislature. While deference to the legislature may be essential for a judge dependent on the legislature in the next reappointment cycle, the judge may no longer feel compelled to defer to the other elected branches, having been elected to office in the same manner.

In short, the method by which we choose our judges has tremendous influence on the concepts of judicial independence and judicial accountability. Thus, elected judges are no less independent than appointed judges, but the judges are independent from different appointing agents. Both sets of judges are accountable, but once again they are accountable to different people and in different ways. But is one kind of independence or one kind of accountability particularly appropriate for different levels of the judiciary? That is the question to which we now turn.

III. THE ARGUMENT FOR TAILORED JUDICIAL SELECTION

Part I suggests that different selection methods yield different levels of judicial independence and accountability. For most of our history when people have sought to strike the appropriate balance between those two values, they have done so for the entire judicial branch in that jurisdiction. At the federal level, the people have opted for greater independence from the people and the elected officials and less accountability.⁶⁹ In most states, the people have opted for greater independence from elected officials but greater accountability to the people.

If we believe there is an appropriate balance for all judges within a state—that all judges should be equally responsive to the people, or that accountability is equally necessary and possible for all levels of the judiciary within a state—then this unilocular approach makes sense. But in this Part, I

69. See U.S. CONST. art. III. This is not to say that federal judges have no accountability constraints. Even life-tenured federal judges may care about their reputation, promotion opportunities, and other important factors. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 675 (2009).

Systems with permanent tenure would not completely sacrifice accountability for independence. Indeed, an extensive literature on federal judges argues that these judges are accountable to the degree that they are concerned with improving their reputation, being cited by their peers, being promoted, minimizing future reversals, and reducing the possibility of political retribution.

Id. See generally POSNER, *supra* note 9.

will argue that justices on courts of last resort are very different than judges on trial courts of general jurisdiction and that tailoring judicial selection methods to the level of court should at least be considered. In Section A, I will explain why we should consider tailoring selection methodology. In Section B, I will then propose a framework for how we should decide which judges should be elected and which should be appointed.

A. Why Tailoring Makes Sense

Let us assume that judicial election can create a judiciary that is more accountable to the people⁷⁰ and is representative of the people,⁷¹ and that judicial appointments create a judiciary that is more accountable to the governor (if the governor also reappoints judges) or to no one (if the judge is appointed for life). With these variants in mind, the question I turn to next is whether judicial elections are appropriate for all levels of the judiciary. Of course, accountability is an important value for all government officials, but is accountability to the electorate, and responsiveness to the people, particularly well-suited to all state judges or only a subset of those judges?

States have generally given little thought to this question. Instead, some states have decided that judicial elections are inappropriate for any of their judges and allow either the governor or the legislature to appoint, and to reappoint, the state's judges.⁷² A majority of other states accept the benefits of judicial elections for all of their judges.⁷³ Among these states, some use judicial elections as the method of initial selection *and* the method of retention.⁷⁴ Others use an appointment process (sometimes with the aid of merit selection commissions) to initially select their judges but then require those judges to run in a retention election to keep their job.⁷⁵

Despite these differences, there is one constant among these states: they have all adopted an identical selection method for all the judges within

70. As I mentioned earlier, studies seem to confirm that elected judges decide cases according to the preferences of the majority. *See supra* note 47.

71. *See* Chisom v. Roemer, 501 U.S. 380 (1991) (discussing the representative nature of elected judges); John L. Warren III, *Holding the Bench Accountable: Judges Qua Representatives*, 6 WASH. U. JURISPRUDENCE REV. 299 (2014) (arguing that elected judges are representative of the people that elect them).

72. Only Rhode Island follows the federal model of lifetime appointments for its state judges. Massachusetts also has no retention system, instead setting a retirement age for its judges.

73. Thirty-eight states currently use judicial elections to elect or retain at least some of their state judges. L. Jay Jackson, *The Siege on State Courts Legislators and Special Interests Are Making Sure We Get the Judges They Want*, A.B.A. J., at 54, 57 (July 2013).

74. Even as to this subset, there are important differences. For example, some states use partisan judicial elections, while other states have adopted nonpartisan judicial elections.

75. *See supra* note 3.

their judicial system. Under this homogenous approach, either all the judges are appointed or all the judges are elected.⁷⁶ The same is true of our Article III courts. When the framers were creating the judicial branch in the United States Constitution, little consideration was given to methods of judicial selection. In Federalist No. 78, Hamilton devotes a few scant words to selection methodology, merely asserting that judges will be selected the same way as all other federal officers.⁷⁷ The idea of tailoring selection methods to different levels of the judiciary was not even considered.⁷⁸

Some states have tried to have the best of both worlds, seemingly tailoring the selection method to the court in question. The idea behind such a tailored system is the belief that judicial elections are appropriate for some judges but not others, and the idea itself is not new. In fact, the concept of tailoring the selection methodology to the level of the court has been around for a long time. When states began to experiment with judicial elections in the early nineteenth century, they largely adopted a similar approach. In 1812, Georgia became the first state to adopt judicial elections, but only “inferior” court judges were elected.⁷⁹ Four years later, Indiana adopted judicial elections; again, only for its circuit courts.⁸⁰ Even after Mississippi became the first state to elect all its judges in 1832, many states in the following decades adopted judicial elections for only some of their lower court judges, including Georgia, Michigan, Iowa, and Arkansas.⁸¹

However, these decisions were made with little reason or consideration. The historical records contain no discussion about why some judges (usually appellate judges) continued to be appointed while others (usually trial judges) would be elected. Even now, ten states continue to use minor variations on this theme, including three of the most populous states in the nation: New York, Florida, and California.⁸² In all ten states that differentiate judicial selection and retention by level of the judiciary, just as in all the states that experimented with such schemes in the past, vacancies on trial courts of general jurisdiction are filled through partisan or nonpartisan elections, while vacancies on the state’s highest appellate courts are filled

76. Of course, this is a generalization. Even in the federal system, all Article III judges are appointed by the President with the consent of the Senate, but there are a number of other federal judges, including Bankruptcy Judges and Magistrate Judges, who are selected differently.

77. THE FEDERALIST NO. 78 (Alexander Hamilton).

78. *Id.*; In fact, the federal constitution only created one court—the United States Supreme Court—and left the creation of future courts to Congress. See U.S. CONST. art. III.

79. See SHUGERMAN, *supra* note 19, at 276.

80. *Id.*

81. *Id.*

82. The other states using a hybrid selection method are Arizona (some counties), Indiana (partisan elections for trial courts, judicial nominating commissions for intermediate and highest courts), Kansas (some counties), Missouri, Oklahoma, South Dakota, and Tennessee.

through gubernatorial appointment or a judicial nomination commission.⁸³ Recently, Arkansas had been considering a move in the same direction, leaving the long-standing election process in place for trial judges while abandoning it for the justices of the Arkansas Supreme Court.⁸⁴

The theory of tailored selection makes a great deal of sense. It accepts the reality that we are mistaken to view the judiciary as a monolith. Of course, if we are going to tailor judicial selection methodology to particular judges or courts, we must decide the criteria by which we make these decisions. One possible way to differentiate judges is based on the kinds of cases they decide. For example, when judges engage in statutory interpretation, some argue that the judge's role is to act as a "faithful agent" of the legislature.⁸⁵ Of course, this is not the only theory of what the court is doing when interpreting a statute, but if we adopt that approach, then perhaps it makes sense to allow the lawmaker (here, the legislature) to select the judges that will interpret its laws. In interpreting the constitution on the other hand, the judge interprets the law made by the people to check abuses by the legislature and the executive.⁸⁶ If that's true, then perhaps it makes most sense to give people a greater voice in selecting its constitutional judges. Common law is a different creature altogether.

Unfortunately, such a distinction only makes sense if we had highly specialized courts. For example, many nations throughout Europe, including Germany and France, have created constitutional courts.⁸⁷ Those courts are the ultimate authority on those nations' constitutions. Some states have likewise created a panoply of specialized courts, including family courts, business courts, and drug courts.⁸⁸ And sometimes, states have adopted different selection methods for those courts. In Maine for example, the governor appoints most state judges while probate judges are elected.⁸⁹ However, most judges are generalists, and every judge handles a wide range of cases.

83. See *supra* note 3.

84. See TASK FORCE ON MAINTAINING A FAIR AND IMPARTIAL JUDICIARY, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON MAINTAINING A FAIR AND IMPARTIAL JUDICIARY 6 (2016). The proposal was ultimately rejected.

85. John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001) (supporting the position that courts should act as the "faithful agents" of the legislature).

86. See generally KRAMER, *supra* note 57.

87. Justice Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045 (2000) (discussing the European model of constitutional courts).

88. See, e.g., *United States v. Ellefson*, 419 F.3d 859, 868 (8th Cir. 2005) (Lay, J., concurring) (discussing the development of specialized courts in the states).

89. Peter L. Murray, *Maine's Overdue Judicial Reforms*, 62 ME. L. REV. 631, 632–33 (2010) ("[T]he Maine county probate courts with part-time elected judges comprise an embarrassing anomaly in a system otherwise free of judicial elections and part-time judges.").

In one day the judge may decide whether a federal or state statute is constitutional, sentence a criminal defendant, hear a custody proceeding, and preside over a common-law tort case. Thus, any distinction based on the typology of cases is impossible.

There is another natural split within our judiciary, and that is between the levels of the court. All states divide their judges into trial judges and appellate judges. Most scholars and judges recognize that there are significant differences between these two groups. In the words of the late Justice Scalia, “trial judges are fundamentally different from appellate judges.”⁹⁰

B. Creating a Framework for Tailoring

Do the differences between trial judges and supreme court justices merit a different selection method? As mentioned earlier, some states have thought so, choosing to elect trial judges and appoint appellate judges, usually the justices of the highest state court. But as far as I am aware, none of the states that adopted these schemes closely examined which judges should be elected, nor is there any history showing precisely why they chose the regime they did. Perhaps it was intuitive that the highest-level judges in the state should be most independent or most removed from the people. Maybe the states determined that elections make the most sense for lower court judges because these were mostly local courts and the public was more knowledgeable about them than about state supreme court justices.⁹¹ Regardless, without exception, every state that at first glance has adopted a tailored approach to judicial selection has chosen to appoint the higher-court judges and elect lower-court judges.

I believe this is a mistake.⁹² In deciding how to structure the hybrid system, we must consider the purposes of judicial elections⁹³ and use the system that furthers those purposes. What are the key criteria that states should consider in making that decision? I believe there are three factors that we must consider.

First, elections should be used for those courts where accountability to the electorate is most important. Most people would agree that in a democ-

90. ANTONIN SCALIA AND BRYAN A. GARNER, *MAKING YOUR CASE: THE ACT OF PERSUADING JUDGES* 7 (Thomson West 2008).

91. It is not entirely clear that any state consciously considered this factor. Regardless, the rise of modern judicial elections and the growth of the media makes this factor obsolete.

92. I am not the first person to suggest this. For example, at a dinner, Justice Phillips apparently suggested this as “the best judicial selection system.” Symposium, *Improving the Election of Judges, Part II Featuring: Michael Sweeney, William Weisenberg, Seth S. Andersen with Seth D. Kirschenbaum, As Moderator*, 56 *MERCER L. REV.* 859, 864 (2005). Regardless, I have found no scholarship examining this idea in any kind of depth.

93. As discussed above, the purposes relate to judicial accountability and relative judicial independence.

racy, the officials who *make* the law should be accountable to the electorate. That means to the extent we can differentiate judges who engage in law-making and policy-making functions from those judges who engage in law-implementing functions, the former should be elected. The corollary is that appointments are more appropriate for judges who implement the legal and policy judgments made by others, including those made by other courts, and who engage in more individualized case-by-case adjudication where public opinion should play a lesser role.⁹⁴

Second, elections should be used for courts where accountability to the people is most lacking. In other words, accountability is most important for courts where fewer accountability mechanisms are already in place. To the contrary, elections are less important, and therefore appointments are more appropriate, for judges who are already held accountable for their decisions, both by the people and by other judges.⁹⁵

Third, judicial elections make the most sense for positions where the people are in the best position to adequately select judges based on the relevant criteria for the job. After all, accountability to the public makes little sense when the electorate is unable to hold the elected official accountable, either because of ignorance of the judge's role, an inability to assess the judge's performance of that role, or the technical nature of the judge's role. For the judges who engage in more technical and managerial functions that are best evaluated by other members of the legal profession rather than the public as a whole, appointments, or some other system of election and retention, are most appropriate.

IV. WHY ELECTIONS ARE BEST SUITED FOR COURTS OF LAST RESORT, AND LEAST SUITED FOR TRIAL JUDGES

Now that we've established the parameters for choosing between elections and appointments, we can apply this framework to two different levels of the judiciary—the state's trial courts and the state highest court.⁹⁶

94. Of course, the difficulty with this standard is that all judges make and implement law and policy, but as I explain in Part III, below, trial judges engage in more law-implementation while the courts of last resort engage in more law-making.

95. Again, all judges are held accountable to someone, so we are talking about relative levels of accountability.

96. For the purposes of this article, I set aside the question of how to treat the intermediate state courts. In some ways, intermediate courts resemble the state's highest court. In other ways, they resemble trial courts.

A. Where Is Accountability/Representativeness to the People Most Needed?

For decades, legal scholars have disputed the core function of judges in a justice system, contrasting the policy-making and dispute resolution functions of the courts.⁹⁷ Some contend that the role of the court is to resolve concrete, personal, discrete disputes.⁹⁸ Others suggest that dispute resolution is merely a byproduct of the primary judicial function of making policy and defining values.⁹⁹ Under this view, the primary role of the courts is to advance broader, public-regarding aims.¹⁰⁰ Of course, judges do both of these things. They adjudicate individual cases, and through that adjudication they make law and policy. Few people today will deny that judges can make law, even in the fields of statutory and constitutional interpretation.¹⁰¹

While we cannot clearly delineate which judges make law and policy and which judges merely apply those laws and policies to individual cases, there seems to be general agreement that appellate courts engage in more of the former and trial courts in more of the latter.¹⁰² Trial judges engage in more individualized decision-making rather than wholesale, general law-making.¹⁰³ For example, trial judges engage in significantly more fact-finding and case management than deciding pure issues of law.¹⁰⁴ In fact, the academic literature identifies law-making as one of the primary functions of appellate courts, along with its error-correction function. Appellate judges

97. See generally ROBERT MNOOKIN, REFLECTIONS ON THE ENIGMA OF INDETERMINACY IN CHILD-ADVOCACY CASES IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (W.H. Freeman and Co. 1985).

98. See, e.g., Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. Ill. L. Rev. 457, 470 (“The primary purpose for which courts were created . . . is to decide cases according to the substantive law.”).

99. See generally Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 597–602 (1983).

100. Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) (“[C]ourts exist to give meaning to our public values, not to resolve disputes.”).

101. Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. 113 (2010) (In his confirmation hearing, Justice Roberts analogized the role of a judge to the role of a baseball umpire. Roberts explained to the Senate that “[u]mpires don’t make the rules; they apply them.” That analogy has been heavily criticized by scholars and commentators.).

102. Richard Lempert, *The Dynamics of Informal Procedure: The Case of a Public Housing Eviction Board*, 23 LAW & SOC’Y REV. 347, 368 n.36 (1989) (“[T]he courts that do the law making are ordinarily appellate courts rather than trial courts.”).

103. SHUGERMAN, *supra* note 19, at 60.

104. See HERBERT JACOB, JUSTICE IN AMERICA 31 (1965) (distinguishing between the law- and policy-making function of appellate courts and the law-enforcement function of trial courts); John J. Brunetti, *Searching for Methods of Trial Court Fact-Finding and Decision-Making*, 49 HASTINGS L.J. 1491, 1491–92 (1998) (“The process by which a trial judge adjudicates non-jury fact issues should not be confused with the various processes by which appellate courts “make law.”).

decide cases and resolve legal issues that will guide lower courts in their future decisions. Appellate judges thus tend to decide cases “as to ensure that the law created by the lower courts is uniform, and in so doing, often articulate what is, in effect, a novel rule of law.”¹⁰⁵ Because their opinions tend to apply more across the board to the citizens of the state, the appellate opinion has a larger, more important law-making function. As one commentator put it, “[d]istrict courts do not write primarily for precedent.”¹⁰⁶

In the words of Frank Cross, “[t]rial judges tend to confront more ‘easy cases,’ with less ideological contestation, than appellate judges do, and trial judges’ decisions have less precedential impact. As a result, their opinions are somewhat less ideological than those of appellate courts.”¹⁰⁷ There is no denying that trial courts often make law as well, and tend to perceive themselves as lawmakers.¹⁰⁸ Rarely will a judge decide a hard case without engaging in at least some lawmaking. For example, a trial judge’s sentencing decision is laden with policy values, but few people would dispute that their exercise of lawmaking power is less frequent and a less prevalent part of their work.¹⁰⁹

Painting with a broad brush, the work of a trial judge tends to be more technical. Fact-finding is an important part of their job, and trial judges’ factual findings are generally accepted by appellate courts.¹¹⁰ Trial judges also tend to be more specialized. Often, trial judges were successful trial lawyers before joining the bench. Supreme court justices often have similar

105. See William Bunting, Note, *Election-by-Lot as A Judicial Selection Mechanism*, 2 NYU J.L. & LIBERTY 166, 197 (2006) (quoting RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 12 (1985)).

106. Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 950 (1995).

107. Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1481 n.162 (2003) (citing Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 236 tbl.3 (1999)); Ware, *supra* note 15, at 181 (“[T]he extent to which (inevitable) judicial lawmaking allows judges to inject their political views into law rises, the higher the court. Trial judges play less of a lawmaking role than appellate judges, especially supreme court justices, simply because court systems are hierarchical and trial courts are at the bottom.”).

108. Cf. Fred C. Zacharias & Bruce A. Breen, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 139 (2009) (arguing that if professional rules of conduct are tantamount to law, then trial courts must respect them to provide a standardized system of regulation for lawyers).

109. See *id.* at 117 (arguing that trial judges’ “authority to make law is limited, both in when the power to set legal standards arises and in the considerations trial courts may take into account.”).

110. James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795, 804–05 (1995)

training, but because of the more lawmaking nature of their job, it is not unusual to see politicians, academics, and others appointed as justices.¹¹¹

Trial judges are forced to deal with factually complex topics and issues¹¹² without much help. Expertise therefore, becomes a critical trait in a good trial judge, including scientific and technological expertise. Trial judges make the technical decisions that appellate judges not only rely on, but defer to, utilizing standards of review like clear error and abuse of discretion. For someone who is more likely to face technocratic decisions that require high levels of technical skill, “accountability to the people” that underlies judicial elections is perhaps less important than for judges who engage in lawmaking.

Justice Stevens, in his dissent in *Republican Party of Minnesota v. White*,¹¹³ seemed to acknowledge the policy-making role of state supreme court justices and distinguished it from the law-implementing role of lower-level judges. Stevens wrote that:

[e]ven if announcing one’s views in the context of a campaign for the State Supreme Court might be permissible, the same statements are surely less appropriate when one is running for an intermediate or trial court judgeship. Such statements . . . mislead the voters by giving them the false impression that a candidate for the trial court will be able to and should decide cases based on his personal views rather than precedent.¹¹⁴

In other words, Justice Stevens seems to agree that appellate judges have a much greater opportunity to impose their own views on the public because they have a greater capacity to ignore precedent and are more likely to decide issues of policy than trial judges.

Justices on state courts of last resort decide cases with fewer “legal” constraints than state trial judges. In the state high courts, like in the United States Supreme Court, “decisional guidance provided by the orthodox legal materials is weakest.”¹¹⁵ This allows political, ideological, and policy considerations to play a much greater role in judicial decision-making in those courts. Of course, most cases decided by state supreme courts are not as politically charged as those decided by the United States Supreme Court.¹¹⁶ But nonetheless, state courts of last resort are *more likely* to decide cases

111. Nationally, prominent examples include Earl Warren, Sandra Day O’Connor, and Elena Kagan.

112. See RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013).

113. *Republican Party of Minnesota v. White*, 536 U.S. 765, 799 n.2 (2002).

114. *Id.*

115. POSNER, *supra* note 9, at 14.

116. There are many explanations for this, including the nearly complete control that the U.S. Supreme Court has over its own docket. See Joseph F. Weis, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385, 1393 (1992).

where traditional legal methods fail to provide an answer; thus, it is more likely that these courts will resort to ideological or political decision-making.¹¹⁷

B. Where Is Accountability to the People Most Lacking?

Next, let us examine which level of the judiciary is most in need of accountability. Here, I believe elections are more necessary for appellate judges than for trial judges.

Trial judges are already held significantly more accountable for their decisions.¹¹⁸ For trial judges on state courts of general jurisdiction, there is always at least one, and usually two levels of appellate courts that can overturn their decisions.¹¹⁹ Although review of factual determinations by trial judges is generally fairly deferential, there is always another set of eyes that looks at the trial judge's determinations.

In addition, not only are the decisions of trial courts reviewed by appellate courts, but trial judges must follow guidance set out by earlier cases. Appellate courts generally adopt the tests for trial judges to use. Supreme court justices, on the other hand, are free to overturn precedent once they disagree with it. State supreme court justices have no superior authority on issues of state law, and only the United States Supreme Court oversees them on issues of federal law.¹²⁰ And while the United States Supreme Court has theoretical power to review cases or controversies that raise federal questions (or arise in diversity jurisdiction), it exercises that power so infrequently that the state's highest court is almost always that court of last resort in any state court litigation. State supreme court justices operate with little oversight.

There are many other checks on the work of trial judges. For example, trial judges generally use pattern jury instructions to advise the jury of the law rather than being able to craft their own legal standards and principles. In addition, more of their work happens in the public eye. Trials can be tele-

117. Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 209 (2017) (citing Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POLITICAL SCI. 11, 11–31 (2013)). (“[D]istrict court judges follow precedent more so than their own attitudes, whereas appellate judges are free to express their political preferences with only a minimal fear of reversal by the U.S. Supreme Court (which takes few cases).”).

118. Weis, Jr., *supra* note 116, at 1394 (“Trial judges look over their shoulders at the appellate courts, aware that their decisions will be reviewed by appellate judges who may have entirely different leanings.”).

119. Every state has at least one level of appeals, and most states have two.

120. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 361 (2002) (“[S]tate supreme courts are the final expositors of state law.”).

vised, and many of the proceedings happen in open court. At key phases of litigation, lawyers, litigants, and others are present. Contrast that with the work of appellate judges, who deliberate in private and whose interaction with the public is often limited.¹²¹ In fact, the mere presence of the public and of the jury is intended to be a critical check on judicial bias. There is no similar institution at the appellate level. Lay people are rarely present to see the work of a supreme court justice.

C. Where the People Are Most Capable of Holding Judges Accountable

Election law scholars have emphasized that voters rely heavily on heuristics like party labels and endorsements to cast their votes.¹²² This is particularly true of judicial elections where voters are largely ignorant about the candidates.¹²³ After all, no matter what level of the judiciary we are speaking about, much of the work of a judge happens behind closed doors. Other than coverage of a handful of key U.S. Supreme Court decisions, there is little media interest in the work of the judicial branch. State courts in particular receive little attention, and few people can identify any state judges.¹²⁴

While heuristics like party labels may have some important meaning for our understanding of supreme court justices, they have much less meaning for the work of a trial judge. The reason for that is a trial judge's role has become more managerial in nature.¹²⁵ Much of what trial judges do is manage pre-trial motion practice, discovery, and the settlement discussions between the parties. This is particularly true with the expansion of the rules of civil procedure, as well as the rules of evidence.¹²⁶ Cases like *Daubert* and the more recent amendments to Rule 702 have forced "trial judges to become increasingly comfortable with the notion that they can and should

121. In fact, deliberations are actually fairly limited. See POSNER, *supra* note 9, at 1–2. Instead, judges generally make up their minds before they even confer with the panel colleagues and merely present those views to each other. *Id.*

122. See ARTHUR LUPIA & MATTHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 1–2 (1998).

123. See Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 567 (2014) (describing the literature on voter ignorance in judicial elections).

124. Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 6 (2016) ("The lack of attention to state courts means that citizens—who vote to elect or retain judges in thirty-nine states have woefully little information to assist them in making their choices.").

125. Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 73 (1995).

126. Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 41 (2002) ("Adoption of the Federal Rules of Civil Procedure and Federal Rules of Evidence, and modern modifications of those rules, have also served to sacrifice adversarial principles for an expansion of the judicial role in addition to reducing the advocates' ability to direct the proceedings.").

delve much deeper into the scientific and fact-finding process.”¹²⁷ The function of the trial court has shifted “from enforcing the rule of law to pretrial docket management.”¹²⁸

In addition to the expansion of the rules of evidence and civil procedure is the exponential growth of electronic data. In many cases, the discovery process is incredibly intensive because of the volume of electronic data in possession of the parties. This “has caused a shift from a relatively unsophisticated but labor-intensive process, to one requiring specialized technical knowledge.”¹²⁹ “Computerization has made the protection of confidential data increasingly difficult, heightening the need for an impartial discovery manager to safeguard the due process rights of litigants, and to limit the imposition of undue economic burden.”¹³⁰ Often, the trial judge is asked to serve that role.

Can a lay voter evaluate a trial judge’s performance in performing these managerial and highly technical functions? I believe the answer is no. The people are in a much worse position to hold trial judges accountable for their handling of litigation. What’s more, heuristics like party affiliations mean much less at the trial level where little law-making takes place. Instead, the people who are in a much better position to evaluate the work of these judges are lawyers, witnesses, probation officers, and other court personnel.¹³¹

State supreme court justices, on the other hand, have much less frequent interaction with lawyers, litigants, jurors, court personnel, expert witnesses, and other actors within the justice system. Their decisions receive substantially more coverage and attention, especially decisions on controversial legal issues. This gives an average voter at least some information about the politics of the justices and the factors that the justices consider in making their decisions. Judicial elections therefore, make much more sense for state supreme court justices. Admittedly, the public’s knowledge is still fairly limited even when it comes to these judges, but relatively speaking, the public is in the much better place to assess and evaluate their work.

127. Adam J. Siegel, *Setting Limits on Judicial Scientific, Technical, and Other Specialized Fact-Finding in the New Millennium*, 86 CORNELL L. REV. 167, 209 (2000).

128. Sandra F. Gavin, *Managerial Justice in A Post-Daubert World: A Reliability Paradigm*, 234 F.R.D. 196 (2006).

129. Richard H. Agins, *An Argument for Expanding the Application of Rule 53(b) to Facilitate Reference of the Special Master in Electronic Data Discovery*, 23 PACE L. REV. 689 (2003).

130. *Id.*

131. Michael M. O’Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2152 (2010) (discussing the work of a trial judge and the interaction between trial judges and probation officers).

V. CONCLUSION

Judicial elections are designed to give people an ability to hold judges accountable. But as this article shows, accountability to the people is more lacking, more necessary, and more feasible for some judges (state supreme court justices) than others (trial judges). Rather than treating all judges the same way for the purposes of selection methodology, we should consider the differences in the judicial role at different levels of the state judiciary and tailor the selection methods to those differences. This article sketches out the proposal for what such tailoring might look like and the factors that should be considered.