JUDICIAL SELECTION: A VIEW FROM OUTSIDE

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The qualifications of a good judiciary are that they must be learned in the law, wise to apply it, independent, honest, and fearless to enforce it even against the people upon some occasions.
— William B. Rodman (1868)

There is only one reason why I should be included in the group of distinguished contributors to this symposium on an independent judiciary in Michigan, and that reason is expressed by the old joke that an expert is someone from out of town. I am not an authority on judicial selection. I am not myself a judge. I am not even from Michigan. Nor do I have an opinion about how judges should be selected—at least not one I am going to express in this comment. I am instead an author of books and articles on constitutional and legal history (and on property law, but that is beside the point). To the extent that I have focused on one state, that state has been North Carolina, where I have taught law for over thirty years.

What an outsider has to offer—for what it is worth—is a different perspective, a view from outside. To begin as far outside as I can get, I will start with a view from the continent of Europe. European lawyers would agree with many at this symposium that popular election is not the best way to pick a judge. Actually, they would probably go further and say that judicial election is a ridiculous idea, as ridiculous as the thought of electing a surgeon or a meteorologist. In Europe, where the legal systems are based on Roman law, judging is for experts. Judges qualify by passing a competitive examination, after which they become lifetime civil servants, rising up through the hierarchy of courts on the basis of seniority and merit.[1] There is something to be said for this arrangement, but one thing that cannot be said about it is that there is any chance it would be adopted in Michigan—or anywhere else in America, for that matter.

Americans received their legal system from England, where the common law developed more or less apart from the traditions of ancient

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1. *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 103-04 (3d ed. 2007).

Rome. English judges were chosen by the king, at first from among senior churchmen or university graduates, and then—as law and procedure became too complicated for educated laymen to handle—from among practicing lawyers.[2] By the time of the settlement of British colonies in North America, the English had learned from bitter experience the importance of an independent judiciary and the risk of interference in the work of the courts by the powers that be. They had seen it happen during the reign of the Stuarts. The English chose not to alter the process of judicial selection—the practice was too ingrained and the patronage too important—but instead to increase judicial job security.

As part of the constitutional settlement that followed the Glorious Revolution of 1688, the wording of judicial commissions was changed. Instead of serving *durante bene placito* ("during good pleasure"), the traditional formula of judicial commissions,[3] English judges would henceforth hold their offices *quamdiu se bene gesserint* (literally, "so long as they shall behave themselves well," now more familiarly translated "during good behavior").[4] The effect of this change was—to use familiar property law terms—to convert what had been a tenancy at will into a life estate determinable.[5] But the change did not extend to colonial judges, who still held their offices "at pleasure," and American colonists viewed the continuing use of the old form as cause for revolution.[6] One of the grievances against King George III in the 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."[7]

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2. *See* S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 4 (2003).

3. *See* DAVID M. WALKER, THE OXFORD COMPANION TO LAW 384 (1980).

4. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § 3 (Eng.) ("[J]udges' commissions [shall] be made quamdiu se bene gesserint, and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them."). I assume the name for the powerful order of sisters, the Bene Gesserit, in Frank Herbert's classic science fiction novel *Dune* (1965) was suggested by this legal formula.

5. "So long as" and "during" are words used to create an estate in fee simple determinable. RESTATEMENT OF PROP. § 44 cmt. l (1936). Although a judge's life estate terminates automatically on failure to behave well, the fact of bad behavior must be proved at a trial on impeachment, giving the judge considerable security of office—and making the term of office functionally a life estate subject to condition subsequent.

6. It has been suggested that the grievance was 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. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 123 (1950).

7. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776). Andrew Hamilton, the "Philadelphia lawyer" of popular fame, once reminded a royal appointee in open court that holding office at pleasure was "a disagreeable tenure to any officer, but a dangerous

Once they had won their independence, the American states had the opportunity to put things right. As an early North Carolina judge put it: "[A]t the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority."[8] Sovereignty, once vested in the British Crown, had passed to the people. The North Carolina Constitution of 1776 recognized the new reality: "[A]ll political power is vested in and derived from the people only."[9]

The first American state constitutions agreed in giving judges security of tenure "during good behavior"—behavior spelled the British way, with a "u"[10]—although just how secure that was, was not always clear.[11] Without a King to choose their judges for them, the new states assigned the task of judicial selection to the governor[12] or to the

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one in the case of a judge." JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 84 (Stanley Nider Katz ed. 1963) (arguing for the defendant).

8. Bayard v. Singleton, 1 N.C. 5 (1787). *Bayard*, one of the first instances of judicial review in America, revealed the risks judges ran when they declared a statute unconstitutional: in retaliation the North Carolina General Assembly repeatedly postponed consideration of an increase in judicial salaries needed to offset inflation. *See* WILLIS W. WHICHARD, JUSTICE JAMES IREDELL 13 (2000) (Iredell, later a U.S. Supreme Court justice, was counsel for the plaintiff in *Bayard*).

9. N.C. CONST. of 1776, Declaration of Rights § 1; *cf.* VA. CONST. OF 1776, Declaration of Rights § 2 ("All power is vested in, and consequently derived from, the people....").

10. *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. II, ch. III, art. 1 ("All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behaviour."); N.C. CONST. of 1776, § 13 ("[J]udges...shall... hold their offices during good behaviour.").

11. Although the drafters of the [New Hampshire] Constitution of 1784 established tenure during good behavior, they weakened much of the potential for independence—as implied in the words 'good behavior'—by vesting the legislative and executive branches with power to remove judges by address without cause, no matter their behavior. And, although the drafters of the Constitution of 1792 readopted the good-behavior provision, they weakened it further by doing nothing to end the established legislative practice of annually voting fluctuating salaries, sometimes even decreasing salaries that the constitution mandated should be 'permanent.'

JOHN PHILLIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 116-17 (2009).

12. *E.g.*, MD. CONST. of 1776, § 48 ("[T]he Governor, for the time being, with the advice and consent of the Council, may appoint the Chancellor, and all Judges and Justices..."); PA. CONST. of 1776, § 20 ("The president [of the Commonwealth], and in his absence the vice-president, with the council, five of whom shall be a quorum, shall have power to appoint and commissionate [sic] judges....").

legislature.[13] The first North Carolina Constitution was fairly typical of the latter arrangement:

> [T]he general assembly shall, by joint ballot of both houses, appoint judges of the supreme courts of law and equity, judges of admiralty and attorney-general, who shall be commissioned by the governor, and hold their offices during good behaviour.[14]

North Carolinians' experience with colonial governors had not been happy,[15] and in consequence the governor's office was deliberately vested with little real power. So long lasting was the suspicion of the executive that North Carolina's governor was the last in the nation to be granted veto power, and that not until near the end of the twentieth century.[16] This concentration of power in the General Assembly drew the criticism of James Madison in the *Federalist Papers:*

> The constitution of North Carolina, which declares "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.[17]

Election of American judges by the people—defined as the qualified voters—began in 1777 with lower court judges in Vermont.[18] In 1832, the newly admitted state of Mississippi became the first to provide for

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13. *E.g.*, VA. CONST. of 1776 ("The two Houses of Assembly shall, by joint ballot of both houses, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office during good behaviour.").

14. N.C. CONST. of 1776, § 13. Judges in Admiralty were appointed by the General Assembly from 1776 until 1790, when the federal Judiciary Act conferred exclusive jurisdiction over admiralty cases on the federal district courts. Judiciary Act of 1784, ch. 20, § 9, 1 Stat. 73, 77. The tenure of the attorney general was changed to a four-year term by amendment in 1835. N.C. CONST. of 1776, art. III, § 4. Actions at law and suits in equity were merged in 1868 into a single form of civil action. N.C. CONST. of 1868, art. IV, § 1.

15. "One governor was impeached, another driven away, another threatened with force if he tried to enter the colony, and finally the last royal governor, fearful for his life, fled." WILLIAM S. POWELL, NORTH CAROLINA THROUGH FOUR CENTURIES 160 (1989).

16. N.C. CONST., art. II, § 22 (amended Nov. 5, 1996).

17. THE FEDERALIST No. 47, at 327-30 (J. Cooke ed., 1961) (quoting N.C. CONST. of 1776, Declaration of Rights § 4).

18. VT. CONST. of 1777, § 27 ("[T]he freemen in each county shall have the liberty of choosing the judges of inferior court of common pleas....").

the election of all judges,[19] and New York adopted the plan in its 1846 Constitution.[20] Thereafter every new state admitted to the Union provided for the popular election of all or most of its judges. By the outbreak of the Civil War, more than half the states had elective judiciaries.[21]

Nonetheless, there is little reason to believe that North Carolina would have joined the national trend had not defeat in the Civil War led to a dramatic break in the state's political history and the drafting of a new state constitution. As required by the federal Reconstruction Acts, North Carolina convened a constitutional convention of delegates chosen not by the traditional electorate of white men[22] but by all the state's male citizens. At its session on Tuesday, February 11, 1868, the convention debated the means of judicial selection.[23] The Committee on the Judicial Department split three ways on the issue, some in favor of retaining appointment by the General Assembly, some in favor of gubernatorial appointment subject to approval by the state Senate, some favoring direct election.

Three committee members ably presented the benefits of each alternative. Defending the status quo was E.W. Jones.[24] As might be expected, he put the burden of proof on the opposition: "[T]he objection to a system that has worked well should show that the change contemplated would work better."[25] The state's antebellum judiciary had

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19. MISS. CONST. of 1832, art. IV, § 2 ("The high court of errors and appeals shall consist of three judges, any two of whom shall form a quorum. The legislature shall divide the State into three districts, and the qualified electors of each district shall elect one of the said judges for the term of six years.").

20. N.Y. CONST. of 1846, art. VI, § 12 ("The judges of the court of appeals shall be elected by the electors of the State, and the justices of the supreme court by the electors of the several judicial districts, at such times as may be prescribed by law.").

21. HURST, *supra* note 6, at 122.

22. Immediately prior to the Civil War, the North Carolina electorate was composed of tax-paying white males twenty-one years of age and older. *See* JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 9-11 (1993).

23. *See* John V. Orth, *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges*, 70 N.C. L. REV. 1825 (1992) (collecting newspaper accounts of the debate).

24. E.W. Jones of Washington County, N.C., seems to have taken no part in public life other than service in the 1868 Constitutional Convention. *See* NORTH CAROLINA GOVERNMENT, 1585-1979, at 846 (John L. Cheney, Jr. ed., 1981).

25. Orth, *supra* note 23, at 1841. The argument in favor of retaining appointment by the General Assembly appealed to those delegates who resented the influence of newcomers, the notorious "carpetbaggers." *Id.* at 1845-46 (statement of Joseph H. King) ("[A]ll opposition to the present system came from men *not natives of this State* . . . .") (emphasis in original); *see also, id.* at 1846-47 (statement of J.W. Graham) ("[I]t is only

indeed been professionally distinguished. North Carolina Chief Justice Thomas Ruffin[26] had gained a national reputation that years later earned him a place on Harvard Law School Dean Roscoe Pound's list of the ten greatest American judges,[27] although his strident pro-slavery opinions probably led the state's newly enfranchised black voters to conclude that the system that produced him had not worked so well after all.[28]

Expounding the advantages of executive nomination with senatorial confirmation, William B. Rodman[29] presciently explained the difficulty with popular election: "The great mass of the people are unacquainted with those whose qualifications are superior for such exalted positions."[30] As a practical matter, he predicted that "if the election be left to the people, the candidates will be nominated by party conventions."[31] As a matter of political theory, Rodman pointed out that the judges were not representatives: "It was not intended for them to reflect the wishes of the people, but merely to administer that justice which the State owes to every citizen."[32] There existed, he reminded the convention, the ever-present risk revealed by the fact that "not infrequent popular clamor has denounced an honest Judge for the fearless enforcement of the law."[33] It seemed to him on reflection that "the best mode was that indicated by the U.S. Constitution, which allowed the President to nominate and the Senate to confirm,"[34] although again black voters might question the wisdom of an arrangement that had resulted in the pro-slavery Supreme Court presided over by Chief Justice Roger B.

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necessary that a part of our Constitution should be especially dear to our people to secure its destruction by this Convention.").

26. Thomas Ruffin (1787-1870) served as a superior court judge (1816-18; 1825-28), state supreme court reporter (1820-21), and president of the state bank (1828-29) before he was appointed to the N.C. Supreme Court in 1829. In 1833 he became chief justice, a post he held until 1852. BLACKWELL P. ROBINSON, 5 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 266-67 (William S. Powell ed., 1994).

27. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 4, 30 (1938).

28. *See, e.g.*, State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829) ("The power of the master must be absolute to render the submission of the slave perfect."); *see also* John V. Orth, *When Analogy Fails: The Common Law and* State v. Mann, 87 N.C. L. REV. 979 (2009). On Ruffin's reputation today, see generally *Symposium, Thomas Ruffin & the Perils of Public Homage*, 87 N.C. L. REV. 669 (2009).

29. William B. Rodman (1817-93) was elected a justice of the N.C. Supreme Court in 1868 and served for ten years. ROBINSON, *supra* note 26, at 243-44.

30. Orth, *supra* note 23, at 1838.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

Taney.[35] Rodman summed up his remarks with as succinct a description of the qualifications of good judges as is likely to be found: "[T]hey must be learned in the law, wise to apply it, independent, honest, and fearless to enforce it even against the people upon some occasions."[36]

Finally, speaking in favor of joining the national trend, Albion W. Tourgée[37] explained the rationale of direct election: "If the people were competent [to] choose officers to make and execute the laws..., they were competent to choose officers to interpret the laws."[38] Corruption of the process of judicial selection was always a risk, he acknowledged, but it was easier to corrupt a governor or a representative body than to corrupt the mass of the people. "If the people are corrupt all the departments of government are even more corrupt than they are."[39]

After a brief debate, the convention voted by a large majority for direct election. The North Carolina Constitution of 1868 stated:

> The Justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The Judges of the Superior Courts shall be elected in like manner, and shall hold their offices for eight years....[40]

Adopted in 1868, direct election has been the rule in North Carolina ever since.[41] Contested judicial elections did not long survive Reconstruction, however, as the state soon slipped into one-party rule, all-white, thanks at first to night-riding by the Ku Klux Klan and later to

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35. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 407 (1856) (stating that at the time of the adoption of the Declaration of Independence, members of the "negro African race" were regarded as "beings of an inferior order...; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.").

36. Orth, *supra* note 23, at 1838.

37. Albion W. Tourgée (pronounced Toor-ZHAY) (1838-1905), was born in Ohio and settled in North Carolina after the Civil War. In 1868 he was elected a Superior Court judge. After leaving North Carolina, he became famous for his novel about Reconstruction, A FOOL'S ERRAND BY ONE OF THE FOOLS (1879). He later represented Homer Plessy, the losing plaintiff in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See generally* RICHARD NELSON CURRENT, THOSE TERRIBLE CARPETBAGGERS (1988).

38. Orth, *supra* note 23, at 1839.

39. *Id.*

40. N.C. CONST. OF 1868, art. IV, § 26. Separate votes had been taken for the election of justices of the Supreme Court and judges of the superior courts. *See* Orth, *supra* note 23, at 1850.

41. The provision for judicial election in the 1868 Constitution was carried forward largely unchanged in the 1971 Constitution. N.C. CONST. art. IV, § 16 (1971).

the poll tax and literacy test.[42] As Rodman foresaw, the effect was judicial selection by party conventions, qualified only by the use of strategic judicial resignations that allowed the governor to make interim appointments.[43]

As political and social realignments caused by racial desegregation and large scale migration into North Carolina in the last decades of the twentieth century led to the development of a competitive two-party system, partisan judicial elections reappeared. The waning power of political leaders to control judicial selection and the increasing sophistication of political advertising created an opportunity for wealthy contributors to influence the outcome of elections. In reaction, the state made judicial elections nonpartisan[44] and provided optional public funding.[45]

Over the course of its history, North Carolina has tried two of the three methods of judicial selection. First, in reaction to perceived overreaching by colonial governors, power was concentrated in the General Assembly, including the power to appoint judges. Then, after North Carolina's white elite led the state to defeat in the Civil War, the appointment power was taken from the legislature and vested in the people. Latterly, the perception has grown that popular election of judges is too subject to abuse, leading to modifications in the manner of election—and renewed calls for gubernatorial appointment.[46] History offers no obvious answer to the perennial question of how to reconcile judicial accountability with judicial independence. The debate that took place at the North Carolina constitutional convention 150 years ago

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42. *See* POWELL, *supra* note 15, at 397-98, 438-39; ORTH, *supra* note 22, at 18.

43. The same was true nationally: "[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 6, at 129-34.

44. N.C. GEN. STAT. § 163-322 (1996).

45. *See id.* § 163-278.61 (2002). For contrasting evaluations of the changes, compare Jesse Rutledge, Public Financing and Other Campaign Reforms in this Symposium (positive) with Brian P. Troutman, Comment, *Party Over? The Politics of North Carolina's "Nonpartisan" Judicial Elections*, 86 N.C. L. REV. 1762 (2008) (negative).

46. *See, e.g.*, Philip Craft, *U.S. Supreme Court Justice (ret.) Sandra Day O'Connor Urges Change in North Carolina's System for Selecting Judges at Elon Law Forum*, (Mar. 9, 2010), www.elon.edu/e-net/Note.aspx?id=943841. (Justice O'Connor stated that judicial election is "not a good way to go.... I know you have some public funding of elections, and it's nonpartisan, but that doesn't do enough.") For a comment on the modern debate concerning the process for selecting federal judges, see John V. Orth, *Judging the Tournament*, JURIST (Apr. 15, 2004), *available at* http://jurist.law.pitt.edu/forum/symposium-jc/choi-gulati-orth-taha.php.

could be repeated today—or, probably, a hundred and fifty years from now.

Before leaving this subject, I would like to ask the ultimate outsider question: Why does it matter how we select our judges? The answer, I presume, is because we want a system that is more likely than not to produce good judges. American constitutions offer remarkably little guidance about professional qualifications for the judiciary. The U.S. Constitution is altogether silent on the subject, not even including age and citizenship requirements, as it does for the president and members of Congress.[47] Early state constitutions were similarly silent, and at first, some states appointed non-lawyers to the bench.[48] The North Carolina Constitution only added the requirement of a law license in 1980.[49] As mentioned earlier, it is hard to imagine that Michigan or any other state will adopt competitive judicial examinations *à la* Europe, so we will have to continue to rely for a judiciary "learned in the law" on law schools, bar exams, and a record in practice (or, occasionally, law teaching) as a demonstration of legal competence.

What is even more remarkable is that American constitutions have so little to say about what we are entitled to expect from our judges. The Bill of Rights does not include the right to an impartial judge among the

47. U.S. CONST. art. I, § 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* § 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *id.* art. II, § 1 ("No Person except a natural born Citizen, or a Citizen of the United States, at the Time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.").

48. *See, e.g.*, JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 22 (2004) (referring to two of the three members of the New Hampshire Supreme Court in 1798 who "had been trained for the ministry and had no education in law"); D. KURT GRAHAM, TO BRING LAW HOME: THE FEDERAL JUDICIARY IN EARLY NATIONAL RHODE ISLAND 29 (2010) ("Even the justices of the [Rhode Island] Supreme Judicial Court did not necessarily have legal training before 1827.").

49. N.C. CONST. art. IV, § 22 (as amended in 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* ORTH, *supra* note 22, at 118; *cf.* N.J. CONST. art. VI, § VI (2) ("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.").

expressly enumerated rights[50]—the way, for instance, it guarantees the right to "an impartial jury."[51] In his famous dicta in the case of *Calder v. Bull*, U.S. Supreme Court Justice Samuel Chase felt he had to argue from "first principles," rather than from the text, to demonstrate that "a law that makes a man a Judge in his own cause" is unconstitutional.[52] Eventually, of course, a textual home for the prohibition of judicial conflicts of interest was found in the Due Process Clause.[53] So we will have to continue to rely on "judicial conduct commissions" or the cumbersome process of impeachment to discipline misbehaving judges.[54]

Beyond impartiality and knowledge of the law, we expect something more from our judges: wisdom. This, it seems to me, is the heart of the problem concerning judicial selection. The common-law judicial system has always been about more than deciding disputes, though deciding disputes is important. It has always included an element of lawmaking: distinguishing or extending precedent, interpreting and filling gaps in statutes. Adapting English common law to its new environment in America only made the creative element more obvious. As Justice Joseph Story observed on behalf of the U.S. Supreme Court in 1829: "The common law of England is not to be taken in all respects to be that of America."[55] It was to be determined by the judges on a case-by-case basis. The Frenchman Alexis de Tocqueville famously reminded Americans a few years later that "scarcely any political question arises in

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50. For the suggestion that this was not an oversight by the Founders, *see* John V. Orth, *The Enumeration of Rights: "Let Me Count the Ways,"* 9 U. PA. J. CONST. L. 281 (2006).

51. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....."); *see also id.* art. III, § 2, cl. 3 ("The trial of all Crimes, except in Cases of Impeachment, shall be by jury."); id. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

52. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). For a discussion of Chase's views, see JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 33-44 (2003).

53. *See* Tumey v. Ohio, 273 U.S. 510, 528 (1927) (holding that there is a right under the Fourteenth Amendment to be tried by an impartial judge, one with no "direct, personal, substantial, pecuniary interest" in the outcome of the case). A state constitution may include, in addition to an express right to due process, a specific prohibition of trial by a judge with a pecuniary interest in the outcome of the case. *See, e.g.*, N.C. CONST. art. IV, § 21 ("In no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs."); *see also* ORTH, *supra* note 22, at 117-18.

54. For a review of the means of evaluating judicial performance, see John V. Orth, *Who Judges the Judges?* 32 FLA. ST. U. L. REV. 1245 (2005).

55. Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829).

the United States that is not resolved, sooner or later, into a judicial question."[56] It is probably no accident that dawning public recognition of the creative role of the judiciary coincided with the move to an elected judiciary.[57]

In America, judges are lawmakers, whatever the constitutions say about separation of powers. And judicial review, the necessary concomitant of written constitutions, gives them a veto on legislation. We do not expect our judges to be mere learned bureaucrats, as they are in Europe, and there are no magic mirrors for determining who is the wisest of them all. Since the Revolution, sovereignty resides in the people and all power comes from them, including the power of judicial selection. The question is how it shall be exercised—directly by election, or indirectly by appointment by one or another of the people's representatives. What we want is a process that will produce, more often than not, a good judiciary. What we want from our judges is good judgment—literally. Let's hope we can find it.

56. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (Phillips Bradley ed., Henry Reeve trans., Vintage Books 1945) (1835).

57. *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).