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An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia

*Alex B. Long**

More than mountains separate Virginia from West Virginia. Despite sharing a common history and a common name, the two states have deep cultural differences. Virginia and West Virginia nevertheless share at least one common cultural bond – namely, a rising dissatisfaction in some quarters as to how their judges are selected.

Within the span of six months in 1999 and 2000, the West Virginia Supreme Court of Appeals was called upon to resolve two major constitutional crises. Although the main issues in both cases ostensibly centered around constitutional interpretation, the question of the continued vitality of West Virginia's system of selecting its judges through popular election ended up almost taking center stage in both decisions. In the first matter, the court had to decide whether Governor Cecil Underwood's appointment of Robert Kiss, Speaker of the West Virginia House of Delegates, to fill a vacant seat on the court violated the Emoluments Clause of the West Virginia Constitution.[1] In the second, the court addressed whether the state constitution prohibited sitting Justice Warren R. McGraw from running for a twelve-year term of office while already serving the remainder of a four-year term to which he had previously been elected.[2]

The issue in *State ex rel. Rist v. Underwood* centered on the meaning of the Emoluments Clause in the West Virginia Constitution. In relevant part, the clause provides that "[n]o senator or delegate, during the term for which he shall have been elected, shall be elected or appointed to any civil office of profit under this State, . . . the emoluments of which have been increased during such term, *except offices to be filled by election by the people.*"[3] At the time of his appointment by the governor to the West Virginia Supreme Court of Appeals, Kiss had been a member of the

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[1] *See* State ex rel. Rist v. Underwood, 524 S.E.2d 179 (W. Va. 1999).

[2] *See* State ex rel. Carenbauer v. Hechler, 542 S.E.2d 405 (W. Va. 2000).

[3] W. VA. CONST., art. VI, § 15 (1872) (emphasis added).

legislature, which, during the term in which Kiss had been appointed, enacted a pay increase for all judicial offices.[4] As the position of justice of the West Virginia Supreme Court of Appeals is an *elective* position, but Kiss had been *appointed* to fill a vacancy, the issue was whether Speaker Kiss had been appointed to an "office[] to be filled by election by the people."[5] The majority opinion concluded that the clause renders a member of the legislature ineligible to be appointed to a civil office for profit, the emoluments of which have been increased during the legislator's term of office, unless the legislator is *actually elected* to the office.[6] Writing separately, Justices Elliot Maynard and Larry V. Starcher engaged in a public debate concerning the future of elected judges in the state in their dissenting and concurring opinions. In his dissent, Justice Maynard warned of the "far-reaching and long-lasting consequences for the entire judicial branch of government in West Virginia" as a result of the court having "thumb[ed] its nose at the other branches of government" by "stripp[ing] the Governor of his power of appointment and den[ying] members of the Legislature their right to hold certain public offices."[7] Maynard warned of "radical changes" in the judicial selection process as a result of the court's decision, including the possibility of merit selection, non-partisan elections, or legislative appointment of judges.[8] In his concurring opinion, Justice Starcher responded to Maynard's criticisms of the majority opinion and warnings of wholesale changes to the judicial branch with a ringing endorsement of West Virginia's current method of judicial selection. Starcher's concurrence spent little time defending the majority's reasoning or articulating Starcher's own basis for voting to exclude Speaker Kiss. Instead, he used his concurrence almost entirely to extol the virtues of popular election of judges.[9] In a footnote noteworthy for its candor, Starcher argued that

> [t]he forces of money and power are always opposed to the popular election of judges. These forces fund so-

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[4] *Underwood*, 524 S.E.2d at 181.

[5] *Id.* at 184-85.

[6] *Id.* at 194-95.

[7] *Id.* at 195 (Maynard, J., dissenting).

[8] *Id.* at 196 (Maynard, J., dissenting).

[9] *Id.* at 198-208 (Starcher, J., concurring). Starcher took the unusual step of attaching to his opinion a copy of an article he had written on the subject of popular election of judges as an appendix.

> called "good government" campaigns against the popular electoral system for judicial selection. . . . "Good government" arguments against the popular election of judges are in large measure a rhetorical cover-up for the fact that it is easier for the rich and powerful (who are a numerical electoral minority) to affect and control who does and does not become a judge, when the selection is by means other than popular election.[10]

Popular election, Starcher argued, is the appropriate means of preventing "back-room swap[s], trade[s], or deal[s] . . . in the governor's office or in the Legislature."[11] Therefore, the restrictions contained in the Emoluments Clause must be given the strictest possible reading in order to limit the unfairness that could potentially flow from bestowing the benefits inherent in judicial incumbency on one who has not earned such benefits in an election.[12]

In *State ex rel. Carenbauer v. Hechler,* the issue facing the court was even more directly related to the State's method of selecting its judges than in *Underwood.* In *Hechler,* the court prevented Justice McGraw's attempt to trade up from a four-year term to a twelve-year term while still retaining the original seat to which he had been elected.[13] Critical to the majority's conclusion was its belief that McGraw's actions had "both undermined the integrity of this judicial institution and cast upon it a pernicious cloak of aspersion."[14] By running for a judicial post while at the same time occupying one, McGraw was potentially creating a "contrived judicial vacanc[y]," which would necessarily require gubernatorial appointment of a replacement.[15] The result would be a circumvention of the electoral process.[16] According to the majority, the State had a compelling interest in "assuring the independence and impartiality of the judiciary and minimizing the involvement of the

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[10] *Id.* at 199 n.2 (Starcher, J., concurring).

[11] *Id.* at 199 (Starcher, J., concurring).

[12] *Id.* at 200 (Starcher, J., concurring).

[13] *Hechler,* 542 S.E.2d at 407.

[14] *Id.* at 407.

[15] *Id.* at 420.

[16] *See id.*

judiciary in the political process."[17] "Judges," warned the majority, "have to guard against the public perception that involvement in the political process subjects them to the influences of those who help secure their elections."[18] This statement raises the question of how best to achieve that end in a state that requires its judges to be actively involved in the political process. The court seemed to recognize this tension by noting that the judiciary should be separated from politics, but adding the proviso "*other than as may be required for the purposes of elections.*"[19]

For Justice Starcher, this explanation would not suffice. In a scathing dissent, Starcher mocked the majority's professed concerns about public perception and denounced as "poppycock" the idea that courts can remain above the fray of politics.[20] While criticizing the majority for "creating out of whole cloth" a public policy rationale for preventing Justice McGraw from running for office where nothing in West Virginia law prohibited such action, Starcher was clearly disturbed that the decision not to allow Justice McGraw to stand for election was being made by four justices who themselves had not been elected. In this case, several of the justices had recused themselves.[21] As a result, none of the four justices who voted against Justice McGraw had been chosen for the task by the voters – a fact that did not go unnoticed by Justice Starcher.[22] Central to Justice Starcher's dissent was the idea that in ruling against Justice McGraw, the majority had usurped the function of the elected legislature and created law where none existed; as a result, the court had stolen the right to choose who would sit on the bench from the voters.[23]

For members of the West Virginia Bar, this was hardly the first time that such issues had been debated. What was surprising was the candor with which the justices spoke from the bench on the issue. Over the years, attorneys within the state have engaged in a public debate as to the wisdom of continuing with the state's practice of popularly electing its judges. A 1999 survey of West Virginia State Bar members revealed that fifty-nine percent of respondents felt that West Virginia's current method of selecting both inferior and appellate judges through partisan

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[17] *Id.* at 419.

[18] *Id.*

[19] *Id.* (emphasis added).

[20] *Id.* at 428 (Starcher, J., dissenting).

[21] *Id.* at 423-24, 431 (Starcher, J., dissenting).

[22] *Id.* at 431 n.4 (Starcher, J., dissenting).

[23] *Id.* at 431 (Starcher, J., dissenting).

elections should be changed.[24] Seventy percent of those in favor of change favored some form of merit selection, with gubernatorial appointment of judges finishing a distant second.[25] Several years earlier, the minority opinion of The Final Report of the Commission on the Future of the West Virginia Judiciary recommended the merit selection of judges.[26] Leaders in the bar have written forcefully on the subject, arguing that the current system discourages qualified candidates from running, demeans those who run, and damages the reputation of the state's judiciary.[27] Instead, they argue, West Virginia should amend its current system to provide for appointment or merit selection.[28] Others, such as Justice Starcher, have defended popular election, arguing that it produces a judiciary every bit as qualified as those in appointive or merit systems and that it ensures the accountability, independence, and legitimacy of the judicial branch.[29] To take the selection of judges out of the hands of the voters, Justice Starcher argues, would be to confer selection power to "the large law firms and other politicians."[30] As Starcher wryly observed, "I like to say that I am for 'merit selection' of judges, only I prefer to let the electorate decide on the merit, not a few politicians."[31] Given the widespread public attention received by *State ex rel. Rist* and *State ex rel. Carenbauer*, it seems safe to conclude that the popular election of judges will remain a topic of conversation in West Virginia for some time to come.[32]

The Commonwealth of Virginia has endured similar controversy in recent years. Virginia is the only state in the nation in which the

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[24] *See* Thomas R. Tinder, *Important Issues*, W. VA. LAW., Apr. 2000, at 38.

[25] *See id.*

[26] *See* COMMISSION ON THE FUTURE OF THE WEST VIRGINIA JUDICIARY – FINAL REPORT, *at* http://www.statevs/wvsca/future/report/contents.htm (June 27, 2001).

[27] *See* Elliot G. Hicks, *Get Our Judges Off the Election Treadmill*, W. VA. LAW., July 1998, at 4; Charles McElwee, *Merit Selection of Judges*, W. VA. LAW., Mar. 1995, at 21-23.

[28] *See* Hicks, *supra* note 27, at 4; McElwee, *supra* note 27, at 23; *see also Judicial Selections Problematic*, CHARLESTON GAZETTE, Dec. 29, 1999, at A4 (calling for merit selection of judges in West Virginia).

[29] Larry V. Starcher, *Choosing West Virginia's Judges*, W. VA. LAW., Oct. 1998, at 18.

[30] Diane Slaughter Hamilton, *Chief Justice Starcher – An Unexpected Man*, W. VA. LAW., Jan. 1999, at 18 (quoting Starcher).

[31] *Id.*

[32] Both cases received extensive media coverage in West Virginia. For an account of some of the behind scenes maneuverings in both cases, see Paul Owens, *Court Acts Too Political*, CHARLESTON GAZETTE, Mar. 2, 2000, at 1C (detailing attempts in the McGraw case by both sides to have various justices recuse themselves in the matter); Karin Fischer, *Threatened Lawsuit Speaker Puts off Departure Pending Matter's Resolution Keeps Kiss in House*, CHARLESTON GAZETTE, Jan. 1, 1999, at 1A.

legislature is solely responsible for the selection of judges at both the trial and appellate levels.[33] Because Democrats dominated both houses of the General Assembly for the better part of the twentieth century, state Republicans had little influence on the selection of judges.[34] This rather cloistered method of judicial selection, in which the public at large and a large segment of elected representatives were virtually shut out of the decision-making process, led to charges that the selection process was rife with partisan politics and cronyism.[35]

These charges came to a boil in 1997 when Justice Roscoe B. Stephenson, Jr. decided to step down from the Virginia Supreme Court. In years past, the fate of Stephenson's would-be successor would largely have been in the hands of Democrats in the General Assembly. In 1996, however, Republicans made dramatic gains within the General Assembly, resulting in an even mix of Republicans and Democrats in the Senate and a much more narrow Democratic majority in the House of Delegates.[36] This newfound parity in the General Assembly produced a stalemate in the selection process. Democrats and Republicans in the Senate were unable to agree on a nominee, and the Democrat-controlled House was unwilling to back away from its insistence that Stephenson's replacement be a Democrat.[37] At one point, a compromise was suggested in which Democrats would select a judge on the intermediate court of appeals and leave the selection of the Supreme Court Justice to the Republicans.[38] Republicans, however, perhaps emboldened by their newfound clout and the knowledge that

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[33] In South Carolina, Rhode Island, Connecticut, and Virginia, the legislature is responsible for judicial appointment. *The Case for Judicial Appointments*, 22 U. TOL. L. REV. 353, 360 (2002) [hereinafter *Judicial Appointments*]. In South Carolina, the legislature selects judges based on a list of judicial candidates supplied by the Judicial Merit Selection Commission. Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1231 (1998). In Rhode Island, the legislature only appoints members of the supreme court. *Judicial Appointments*, *supra* at 360. In Connecticut, the governor recommends candidates for judicial office to the legislature whose names have been submitted by a nominating commission. *Id.*

[34] *See* Ledyard King, *Judge Retires Early as GOP Seeks More Say on Appointments*, VIRGINIAN-PILOT & LEDGER STAR, Dec. 5, 1998, at B1.

[35] *See Judge-Picking; Toward Merit Selection: GOP Reformers Want a Better Appointment Process – Stressing Qualifications*, VIRGINIAN-PILOT & LEDGER STAR, Jan. 15, 2000, at B6; Larry O'Dell, *Want to Become a Virginia Judge?*, ASSOCIATED PRESS POL. SERV., Aug. 22, 1998, *available at* 1998 WL 7439216; Tyler Whitley, *GOP Likes Way of Picking Judges, Wants its Chance*, RICH. TIMES-DISPATCH, Oct. 3, 1998, at B5.

[36] *See* Andrew Cain, *Judgeship Spat May Force OT On Assembly*, WASH. TIMES, Feb. 16, 1997, at A8.

[37] *See* Robert Little, *Party Poopers Stall Pick; Partisanship Keeps Judgeship Vacant*, ROANOKE TIMES & WORLD NEWS, Feb. 22, 1997, at A1.

[38] *See id.*

the selection would fall to Republican Governor George Allen if no consensus could be reached, rejected the compromise.[39] In the end, no candidate was able to garner the approval of the General Assembly before the session came to a close.[40] As a result, Governor Allen made the appointment himself in May 1997.[41]

The spectacle of this "pointless game of political chicken"[42] did little to shake public perception that judicial selection in Virginia was, in the words of the executive vice president of the Virginia Bar Association, "fueled by partisanship on both sides."[43] In 1998, the Republican Party gained control of the Senate and began to take tentative steps toward revising the process of judicial selection in Virginia. The Republican majority helped to create an informal fourteen-member Joint Judicial Advisory Committee to screen candidates for the supreme court and court of appeals.[44] In 2000, the Advisory Committee, consisting of a number of former leaders of both parties, made recommendations to fill vacancies on the benches of Virginia's two highest courts after conducting interviews and obtaining background information, financial disclosure reports, and writing samples of prospective judges.[45] Also, several cities and counties in Virginia established a citizen-based review process to screen judicial candidates before the General Assembly considers them.[46] In addition, a joint resolution of the two houses of the General Assembly requested that the Supreme Court of Virginia develop evaluation criteria to aid the General Assembly in selecting members of the judiciary.[47] Under the proposed plan, attorneys and jurors who have

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[39] *Id.*

[40] *Id.*

[41] Governor Allen appointed United States Magistrate Cynthia D. Kinser to the bench. Laurence Hammack, *Allen Appoints Woman to VA Supreme Court*, ROANOKE TIMES & WORLD NEWS, May 3, 1997, at A1.

[42] *See* Little, *supra* note 37, at A1 (quoting Del. Clifton "Chip" Woodrum).

[43] O'Dell, *supra* note 35; *Virginia Judges; Put Merit First*, VIRGINIAN-PILOT & LEDGER STAR, Dec. 29, 1999, at B10.

[44] *See* Margaret Edds, *Picking Judges; You Can't Take Rice out of Rice Pudding*, VIRGINIAN-PILOT & LEDGER STAR, Mar. 5, 2000, at J5.

[45] *Id.*; Ruth S. Intress, *Republicans Present 14 Finalists for Judgeships*, RICH. TIMES-DISPATCH, Feb. 23, 2000, at A8.

[46] *See* Matthew Dolan, *State Looks at Ways to Judge the Judges*, VIRGINIAN-PILOT & LEDGER STAR, Jan. 29, 2001, at A1.

[47] *See* H.J.R. 212, Gen Assem. (Va. 2000).

observed a judge's performance would complete surveys concerning the judge that would then be made available to the General Assembly.[48]

Despite these changes, there is still controversy surrounding the selection of judges in Virginia. Some have expressed reservations about the proposed evaluation program prepared by the Supreme Court of Virginia, arguing that it could threaten judicial independence.[49] Representatives from southwestern Virginia, an area of the state that often feels neglected by the rest of the Commonwealth, cried foul over the absence of anyone from that region on the Advisory Committee's list of recommendations in 2000 to fill vacancies on the appellate courts.[50] Charges of partisanship also still remain. For example, some Democrats have complained that the Advisory Committee consists "mostly of Republicans or GOP-leaning people" hand-picked by the Republican Speaker of the House of Delegates.[51]

Moreover, in 2001, the decisions by several Republican lawmakers not to reappoint two trial court judges in Roanoke and Norfolk touched off a new firestorm in the General Assembly. Republican lawmakers from the two districts, who effectively control the nominations for reappointment for their districts, refused to reappoint two judges about whom the lawmakers had questions concerning the judges' temperament.[52] Democrats expressed outrage over the decisions, claiming to have been shut out of the appointment process.[53] In one of the cases, critics charged that politics explained the decision not to renominate[54] and accused the Republicans of attempting to create a

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[48] *See Virginia's Judicial System: Public Hearing Notice, Judicial Performance Evaluation Task Force*, (Feb. 23, 2001), http://www.courts.state.va.us/public_hearings.html.

[49] *See* Dolan, *supra* note 46, at A1.

[50] *See* Edds, *supra* note 44, at J5.

[51] *See* Laurence Hammack, *Lawyer Wins Judgeship on Merits of His Case*, ROANOKE TIMES & WORLD NEWS, May 30, 2000, at B1.

[52] *See* Michael Sluss, *Salem Lawmaker Pulls Judge Off Bench*, ROANOKE TIMES & WORLD NEWS, Jan. 27, 2001, at A1 (detailing the decision by Delegate Morgan Griffith not to re-nominate Roanoke County Circuit Court Judge Roy Willett); Matthew Dolan, *Democrats Turn Up Heat on Candidate for Judgeship*, VIRGINIAN-PILOT & LEDGER STAR, Feb. 21, 2001, at B1 (detailing the decision by Delegate Thelma S. Drake and Senator Nick Rerras to block the re-nomination of Norfolk General District Court Judge Katherine Howe Jones).

[53] *See* Michael Sluss, *Judge's Plight Sparks Debate*, ROANOKE TIMES & WORLD NEWS, Feb. 17, 2001, at A1; Michael Sluss & Laurence Hammack, *Griffith to Solicit a Variety of Input to Nominate Judge*, ROANOKE TIMES & WORLD NEWS, Feb. 1, 2001, at B1.

[54] *See* Cindy Clayton & Matthew Dolan, *Former Deputy Prosecutor in Line for Norfolk Bench*, VIRGINIAN-PILOT & LEDGER STAR, Feb. 20, 2001, at B1.

vacancy on the court.[55] In both cases, critics raised concerns about the potentially damaging effects on judicial independence that such "intemperate encroachment into the manners and internal policies" of the judiciary could have.[56]

As this Article demonstrates, this type of conflict is hardly new. People in Virginia and West Virginia have been debating the best means to select judges since before West Virginia severed its ties with Virginia. This Article provides some helpful and necessary historical context for the ongoing debate. It also attempts to provide some insight into how the political and social realities within Virginia and West Virginia helped to shape the states' systems of judicial selection.

One scholar has stated that "[b]etween 1846 and 1860 a wave of constitution making rolled over the United States."[57] This wave of constitution making brought with it a rapid and dramatic growth in the number of state constitutions that mandated the popular election of appellate and inferior courts.[58] Citizens of Virginia and West Virginia were in the thick of the national trend and debated these same issues during their respective constitutional conventions in the nineteenth and early part of the twentieth century. The delegates to these conventions used an almost identical mix of intellectual and emotional arguments in support of their positions as occurs in the twenty-first century. This Article explains some of the history of those debates and provides a basis by which modern-day debaters of the subject can measure whether the predictions of supporters of popular election, as well as those of legislative appointment, have come to pass.

The traditional historical explanation for the sudden growth in elected benches in the nineteenth century is that the trend was born from emotion, rather than reason.[59] According to this view, Jacksonian Democrats, resentful of the political elites who controlled the judicial

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[55] *See* Christina Nuckols, *Judge Won't Get Hearing, Say Two Key Lawmakers; Stolle Joins Critics, Saying Courtroom Press Conference Was Sign of Indiscretion*, VIRGINIAN-PILOT & LEDGER STAR, Feb. 16, 2001, at B4.

[56] Jack B. Coulter, *Judge Willett's Removal is a Blow to Judicial Integrity; Unfair, Unjust and Uncalled For*, ROANOKE TIMES & WORLD NEWS, Feb. 11, 2001, Horizon section, at 3; *see also* Cindy Clayton, *Community Leaders Come to Judge's Aid; Republican Efforts to Block Jones' Reappointment Are Called "Undignified" and "Partisan,"* VIRGINIAN-PILOT & LEDGER STAR, Feb. 15, 2001, at B3.

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

[58] *See id.*

[59] *See infra* notes 174 – 184 and accompanying text.

appointment process, were attempting to place the power of the ballot in the hands of the common man or to place more Democrats on the bench. Over the past two decades, however, there has been a re-examination of this school of thought. The more modern school of thought, although recognizing that emotion did play a role in the trend toward an elected bench, attributes the sudden shift, in part, to a more reasoned desire to restore judicial accountability.[60] The constitutional debates in nineteenth century Virginia and West Virginia offer support for both viewpoints.

Although some commentators have alluded to the possibility that internal political and cultural forces within the individual states may have helped shape the method of judicial selection in the nineteenth century,[61] much of the legal scholarship has focused on the switch to an elective judiciary during the nineteenth century in a way that obscures differences between the states. In recounting the debates of the state constitutional conventions, scholars frequently characterize the arguments of supporters and opponents of popular election of judges in a manner that transcends state lines. Such sweeping classifications are hardly surprising given the fact that between 1846 and 1912 every new state that entered the Union provided for popular election of judges and nearly all of the existing states that held constitutional conventions during this time made the switch to popular elections.[62]

Given the national character of this overwhelming trend, it seems only natural to classify the arguments for and against popular election during this period in a way that blurs any distinctions concerning those arguments within individual states. Yet, differences did exist. The subject of popular election generated less discussion in territorial statehood conventions than in settled states.[63] The conventions in some settled states devoted substantial time to the issue, whereas others spent far less time on the matter.[64] Some settled states did not hold

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[60] *See infra* notes 191 – 207 and accompanying text.

[61] *See* FRANCIS R. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES 173 n.76 (1940); *cf.* Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 225-29 (2000) (discussing the differences among the states in the nineteenth century regarding a judge's ability to comment on evidence and explaining some of these differences in terms of the cultures of the states).

[62] *See* Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190 (1993).

[63] *See* Hall, *supra* note 57, at 339.

[64] *See id.* at 342.

constitutional conventions during this period and never switched to an elective system.[65] Further, the delegates of two states, Massachusetts and New Hampshire, bucked the national trend and rejected a system of popular election.[66] Finally, Virginia, for its part, briefly fell in line with the national trend, only to revert back to an appointive system less than twenty years later.[67] This decision was made at a time when voters in at least one state expressly rejected such a switch back to an appointive system.[68] These types of differences in the level of discussion on the subject and the departures from the national trend suggest that the internal workings of individual states may have played a larger role in the decisions on the popular election of judges than is often acknowledged.

The internal politics and social realities of Virginia and West Virginia during the nineteenth century help to account for the decisions made by these states with respect to the popular election of judges. In many ways, the radically different approaches toward the selection of judges that exist in Virginia and West Virginia are representative of the overall differences between the two states. Virginia, steeped in history and tradition, has, with one brief interruption, always had one of the most conservative methods of selecting its judges. In contrast, West Virginia, with its populist and rebellious roots, has, since its inception, always provided for participation by the masses in the selection process. In this respect, the history of judicial selection in Virginia and West Virginia also serves as a good illustration of the current national debate over the best method of selecting judges.

Part II of this Article provides a modern-day overview of the debates over popularly-elected judges that currently grip many states. Part III details the historical development of the judicial selection methods from pre-colonial times through the rise of the elected judiciary during the state constitutional conventions of the early and mid-nineteenth century. Part IV continues the scholarly reexamination of the causes underlying the shift toward elective judiciaries in the nineteenth century. Specifically, Part IV focuses on the constitutional conventions

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[65] *See* Nelson, *supra* note 62, at 190, 198, & 198 n.58.

[66] *See* Hall, *supra* note 57, at 337-38. In both states, voters rejected the constitutions that came out of the conventions. *See id.* at 338.

[67] *See infra* notes 394 & 414 and accompanying text.

[68] *See* Nelson, *supra* note 62, at 202 (mentioning that in 1873 New York voters rejected a return to an appointive system in a landslide).

of Virginia and West Virginia from 1829 to 1902 and the debates that took place on the subject of popular election of judges versus an appointive system. Throughout these debates, delegates raised many of the same arguments both for and against popular election that are heard today. Indeed, some of the arguments were every bit as sophisticated and thoughtful, if not more so, as what transpires today, thus undercutting the conclusions of earlier scholars. Despite the intellectual appeal of the arguments made by some delegates, there was most certainly a strong strain of emotion present in the debates that, in a sense, is reflective of the split between Virginia and West Virginia. In the end, the current judicial selection methods in Virginia and West Virginia embody the historical development and traditional political ethos of both states.

II. THE CURRENT NATIONAL DEBATE OVER THE POPULAR ELECTION OF JUDGES

The controversy over how judges should be selected is, of course, hardly unique to Virginia or West Virginia. Other states across the country are embroiled in similar controversies.[69] States employ an array of methods for placing judges on the bench. For example, some states employ a mixture of appointment or merit systems in conjunction with popular election.[70] As such, it is difficult to classify some states as having

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[69]*See* Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339 (1996); Charles Bleil, *Can a Twenty-First Century Texas Tolerate Its Nineteenth Century Judicial Selection Process?*, 26 ST. MARY'S L.J. 1089 (1995); Justice Robert L. Brown, *From Whence Cometh Our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L.J. 313 (1998); David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1 (1992); Honorable Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315 (1997); Driggers, *supra* note 33; Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise? Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1 (1994); Rick A. Swanson & Albert P. Melone, *The Partisan Factor and Judicial Behavior in the Illinois Supreme Court*, 19 S. ILL. U. L.J. 303 (1995); Samuel Latham Grimes, Comment, *"Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. REV. 2266 (1998); Glenn C. Noe, Comment, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215 (1997); Stacie L. Sanders, Note, *Kissing Babies, Shaking Hands, and Campaign Contributions: Is This the Proper Role for the Kansas Judiciary?*, 34 WASHBURN L.J. 573 (1995).

[70]For example, court of appeals judges in New York are appointed by the governor with the consent of the senate, while all other judges are chosen through partisan election. *See* Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1203 (2000). Depending on the source consulted and the classifications used, different numbers

a "pure" form of one or the other types of selection processes. With that said, West Virginia is one of approximately nine states that selects all or most of its judges on the bench through election on a partisan ballot.[71] Thirteen states elect all or most of their judges on non-partisan ballots.[72] In four states, the governor appoints judges without using any type of nominating committee.[73] Twenty-three states use some type of merit selection process whereby judges are selected (often by the governor) from a list provided by a nominating committee and are then subject to non-competitive retention elections.[74] Virginia stands alone as the only state where the legislature appoints all of its judges without the aid of a formal merit commission.[75]

Given the increasingly divisive nature of American politics and the growth in the movement for campaign finance reform, it is hardly surprising that the election of state judges has been the subject of increased media and scholarly attention in the past decade. High-profile cases in which judges have been defeated in particularly nasty campaigns or have had a disproportionate amount of their campaign war chests stocked by particular contributors have helped to spawn greater discussion about the issue of popular election.[76] The arguments advanced by supporters and opponents of an elective judiciary are not unique to Virginia and West Virginia. Most of the criticisms surrounding the popular election of judges center around the perceived

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describing the number of judges that are appointed as opposed to elected can be generated. *See, e.g., id.* at 1202-03.

[71] *See Frontline: Justice for Sale: What's Happening in My State?*, *at* http://www.pbs.org/wgbh/pages/frontline/shows/justice/que/maptext.html (last visited Sept. 7, 2002). Other states include Alabama, Arkansas, Illinois, Louisiana, New York, North Carolina, Pennsylvania, and Texas. *Id.*

[72] *Id.* These states include Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin.

[73] *Id.* These states include California, Maine, New Jersey, and New Hampshire.

[74] *Id.* These states include Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Wyoming.

[75] *See supra* note 33 and accompanying text.

[76] *See, e.g.*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 329-330 (1997). One of the more notorious examples is that of the Republican Party in Tennessee to defeat sitting Justice Penny White, who was one of three justices to vote in favor of setting aside the death sentence of a convicted rapist. There was an organized effort to oust White, including mailing out a brochure urging voters to "vote for capital punishment" by "just saying no" to White. *See* Richard Locker, *Judge Vote Caught in Glare of Death Penalty, Politics*, COMMERCIAL APPEAL (Memphis, Tenn.), July 26, 1996, at A1.

threat to judicial independence that popular elections pose. Although the phrase "judicial independence" is sometimes used haphazardly, it has two distinct components. The lesser-used meaning of the phrase deals with institutional independence, which is the notion that as a separate branch of government, the judiciary must be free from control from the other two branches.[77] This conception of judicial independence finds form in the Federal Constitution's requirement that a judge's salary may not be decreased by the executive or legislative branches.[78] The second and more common use of the phrase "judicial independence" is typically used as shorthand for the principle that judges should decide cases based upon the facts and law of a case and their own conscience, without fear of reprisal from other branches or the public at large. As the United States Supreme Court stated in *Bradley v. Fisher*[79] more than a century ago, judicial independence is the principle that "a judicial officer, in exercising judicial authority, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."[80] Although many view institutional independence as a prerequisite to this type of decisional independence,[81] critics of popular elections contend that elections primarily pose a threat to decisional independence.

For critics of popular elections, a judge occupies a position entirely different than that of other elected officials. A judge is a neutral, detached observer who is bound only by the existing law and facts of a case. Sometimes the application of the law to a particular set of facts may yield a result distasteful to both the judge and the public at large. Yet, such is the outcome necessitated by the facts and law of the case. Any system of selecting judges that permits political or popular influence to sway a judge's decision necessarily impinges on judicial independence.

Further, critics contend that the popular election of judges opens judges to charges of influence buying of the sort normally associated with the legislative branch. The escalating costs of mounting an effective campaign invite contributions from competing interests who,

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[77] *See* JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON LONG RANGE PLANNING, LONG RANGE PLAN FOR THE FEDERAL COURTS 8 (1995).

[78] U.S. CONST., art. III, §1.

[79] 80 U.S. (13 Wall.) 335 (1871).

[80] *Id.* at 347.

[81] *See* Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence* 72 S. CAL. L. REV. 625, 628 (1999) (summarizing the position of supporters of this view).

presumably, have an axe to grind. Thus, for some critics, political contributions amount to attempts to "buy justice."[82] Indeed, some have purported to show a correlation between judicial decisions and the source of campaign funds.[83]

These critics, however, do not limit their concerns over judicial favoritism to the effects of campaign contributions. They also charge that judges may act as they do to curry favor with the electorate. If a particular judge is forced to second-guess himself on tough issues for fear of losing his job, the independence of the judiciary, which is already the most neglected and dependent of the branches of government, is threatened.[84] As others have argued, this concern is heightened since one of the foundational principles of democratic constitutionalism is that the judiciary exists in part to protect minority rights from attack by the majority.[85] If the majoritarian pressures of popular election do indeed influence judicial decision making, then the ability of the courts to serve as defenders of unpopular, but constitutionally protected, rights is undermined.[86]

Others charge that popular election results in "home cooking" in favor of in-state plaintiffs. One recent study purports to show a pattern of jury verdicts against out-of-state corporations that is markedly higher than against in-state corporations and asserts that this pattern is more pronounced in states where judges are chosen through partisan elections than in states where judges are not elected.[87] One explanation offered by the authors is that defendants are often out-of-state nonvoters while plaintiffs are typically in-state voters.[88] Therefore, the study's

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[82] *See* Stephen J. Ware, *Money, Politics and Judicial Decision: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 652 (1999).

[83] *See id.* at 646.

[84] *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 759-60 (1995) (arguing that judicial independence is threatened when judges must decide capital cases when faced with election campaigns); 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, 1133-35 (1997) (warning of the threat to judicial independence when judges run in retention campaigns while having to decide cases involving such contentious issues as the death penalty, abortion, and ballot measures).

[85] *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694-697 (1995).

[86] *See id.*

[87] *See* Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 161-63 (1999).

[88] *Id.* at 157. Another possible explanation offered by the authors is that the "realities of

authors conclude that, when possible, elected judges redistribute wealth from out-of- state businesses to in-state plaintiffs.[89]

Even if it is virtually impossible to demonstrate conclusively that a particular judge's vote has been influenced by fear of defeat at the ballot or by political contributions, critics of popular election assert that the mere belief among the public that such is the case damages the credibility of the bench. For instance, a 1999 survey by the National Center for State Courts found that eighty-one percent of those surveyed believed that judges' decisions are influenced by political considerations and seventy-eight percent agreed with the statement that elected judges "are influenced by having to raise campaign funds."[90] Perhaps more than either the executive or legislative branches, the judiciary's continued vitality depends upon respect from those who stand before it. As Justice Frankfurter noted, "[t]he Court's authority–possessed of neither the purse nor the sword–ultimately rests on sustained public confidence in its moral sanction."[91] This concern seemed to have been shared by the West Virginia Supreme Court of Appeals in *State ex rel. Carenbauer* when it remarked that "it is not only the accuracy of an allegation of impropriety that warrants concern, but, significantly, it is even the mere appearance of impropriety that has the capability of signaling disastrous results for the judiciary as an institution."[92]

Another common argument for appointment, even though it is not often voiced in public, is that appointment of judges produces a more

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campaign financing require judges to seek and accept campaign funding from trial lawyers, who uniformly are interested in larger awards." *Id.* The authors further hypothesize that such awards are larger in states with greater poverty. *Id.*

[89] *Id.* This finding may have a ring of truth to it for those West Virginians who remember the words of former West Virginia Supreme Court of Appeals Justice Richard Neely:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

Id. (quoting RICHARD NEELY, THE PRODUCT LIABILITY MESS 4 (1988)).

[90] *See Races Divided in Opinion on Courts Survey: Blacks Have Less Confidence in Judiciary than Whites, Poll Finds. Most Believe Courts Protect Rights but Think Judges May Be Swayed by Politics*, L.A. TIMES, May 15, 1999, at A11.

[91] Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); *see also* J. Clark Kelso, *A Report on the Independence of the Judiciary*, 66 S. CAL. L. REV. 2209, 2209 (1993) ("The judiciary cannot be a self-sustaining entity; it depends critically upon the support of the other branches of government and upon the trust of the people for its sustenance.").

[92] 542 S.E.2d 405, 419-20 (W. Va. 2000).

highly qualified bench and/or that popular elections discourage qualified candidates from running for the bench. In an article in the *West Virginia Lawyer*, one member of the bar argued that the rigors of a campaign, including the task of soliciting donations, dissuade many of those who are best suited to be a judge from running.[93] Justice Anthony Kennedy has echoed a similar thought, questioning whether "a jurist, a scholarly, detached neutral person" can effectively operate within the "raucous, hurly-burly, rough-and-tumble" process of a political campaign."[94]

As far back as 1913, Judge Learned Hand observed that the appointed federal judges "have generally, in most parts of the country, a somewhat better reputation with the bar for ability than the state judges. Probably the greatest state courts have been in states which appointed their judges."[95] Although many attorneys are reluctant to voice their opinions publicly, there is still a feeling among some members of the bar that federal judges are, on the whole, "better" than their state counterparts.[96] Critics of the elective system argue that this may have something to do with the fact that the public, as a whole, lacks any meaningful basis for comparison between competing would-be judges. Statewide judicial elections rarely attract the same attention as do congressional or gubernatorial races.[97] As such, there is simply less information about judicial candidates available to the public. Further, judges are prohibited by the Code of Judicial Conduct from making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.[98] As such, in states that employ a partisan election system, most lay voters are left with little more to go on than party labels in making decisions as to who would make the better judge in a given contest. As a result, critics charge,

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[93] *See* McElwee, *supra* note 27, at 22.

[94] *Frontline: Justice for Sale: Justices Stephen Breyer and Anthony Kennedy, at* http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html (last visited Aug. 10, 2000).

[95] Learned Hand, *The Elective and Appointive Methods of Selection of Judges*, 3 PROC. ACAD. POL. SCI. N.Y. 82, 83 (1913).

[96] *See* EDWARD LAZARUS, CLOSED CHAMBERS 503 (1998) ("As practicing lawyers know, in aggregate, state court judges are just not as good as federal court judges.").

[97] *See* McElwee, *supra* note 27, at 22.

[98] *See* ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(1998). *But see* Minnesota Republican Party v. White, 122 S. Ct. 2528 (2002) (declaring unconstitutional the provision in Minnesota's code that provided that a judicial candidate shall not "announce his or her views on disputed legal and political issues.").

uninformed voters base their decisions on either party affiliation or name recognition.[99] In non-partisan elections, voters do not have even party labels to help them in their decisions. This relative ignorance makes incumbent judges who cast an unpopular, but entirely defensible or even correct, decision based on the law easy marks for attack ads and sound bites sponsored by opposing interest groups.[100]

Supporters of popular election dismiss the criticisms of popular elections as either elitist or ignorant of reality. Missing from the arguments of those opposed to an elected judiciary, supporters argue, is any consideration of the other competing goal that is equally important in the composition of the bench, namely accountability.[101] Although the function of a judge is to decide a case based on the law and facts, the reality is that judges cannot help but shape policy from the bench. In the course of shaping the common law and interpreting statutes and regulations, judges are forced to weigh competing policy interests. The policy choices judges make necessarily benefit one group or another; as such, they are inherently political.[102] Moreover, the notion that judges can divorce themselves from their deeply rooted political philosophies and life experiences when weighing policy interests is, in the words of Justice Starcher, "utterly absurd."[103] As such, voters have a right to know how policy may be shaped by those on the bench and to have a say in who they want exercising the discretion to make such policy.[104] Party labels help voters make such decisions.[105] In short, as policy makers, judges "should be accountable to the people in a representative political system."[106] This is particularly true at the state level where the matters

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[99] *See* McElwee, *supra* note 27, at 22.

[100] *See* Locker, *supra* note 76, at A1 (detailing campaign by Republican Party in Tennessee to defeat Justice Penny White).

[101] *See* Philip L. Dubois, *Accountability, Independence and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 32 (1986); *see generally* PHILIP L. DUBOIS, FROM BALLOT TO BENCH 28-35 (1980) (arguing in favor of partisan election of judges).

[102] *See* DUBOIS, *supra* note 101, at 23.

[103] Hechler, 542 S.E.2d at 430 (Starcher, J., dissenting).

[104] *See* David Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 768.

[105] *See* Dubois, *supra* note 101, at 44 ("The availability of the party label both prompts voters to exercise a choice, thereby increasing the percentage of the eligible electorate participating in the election, and results in the expression in the aggregate of the voters' preferences for the direction of judicial policy.").

[106] *See* Adamany & Dubois, *supra* note 104, at 768.

decided by state courts have a greater impact on the daily lives of citizens than at the federal level.[107]

Thus, for supporters of popular election, the primary focus is on judicial accountability rather than judicial independence. The two concepts are inherently at odds.[108] Champions of judicial independence argue that the role of a judge mandates that he be accountable only to the law and facts of a case and to his own conscience.[109] Judicial accountability, by definition, mandates that someone have the ability to review the decisions of a particular judge and to hold that judge accountable if he does not perform his duties as that someone believes he should.

For supporters of an elected judiciary, the selection of judges for the bench is inherently a political process.[110] They assert that whether one rises to the bench by the appointment of a governor or on a wave of popular sentiment at the ballot, politics is inextricably tied to the selection of judges. To deny this is to deny reality. It is better that the decision be made by those who may someday have their cases decided by a particular judge than by the bar or by politicians seeking to repay a political debt or to stack the bench in their favor through the appointment process.[111] Thus, the issue for those in favor of popular election of judges is to whom judges should be accountable and from whom they should be independent. Supporters of popular election argue that judges should be accountable to the people whose cases they decide and independent from those in the other two branches of government.

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[107] *See* Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles?*, 49 U. MIAMI L. REV. 127, 129 (1994).

[108] *See id.* at 131.

[109] *See supra* notes 79 - 81 and accompanying text.

[110] *See* LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 128-30 (3d ed. 1994) (arguing that merit selection of judges has not removed politics from the process of selecting judges); Dorothy W. Nelson, *Variations on a Theme–Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 32-33 (1962); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 3 n.9 (1995) ("The process of picking a person to be a judge is woven into the political fabric and is, by any definition, a political process.") (quoting Daniel J. Meador, *Some Yins and Yangs of Our Judicial System*, 66 A.B.A. J. 122, 122 (1980)).

[111] *See* Bierman, *supra* note 69, at 357 ("The adoption of merit selection for the New York Court of Appeals can be attributed to the political leadership and organized bar seeking to maintain their longstanding influence in selecting judges when confronted with losing that role because of independent popular impulses in an electoral system."); *see generally* Starcher, *supra* note 29, at 19 ("I disfavor a politics that gives the choice of judges to a select few, behind closed doors.").

Supporters also argue that the popular election of judges increases the likelihood of a bench that is more representative of the electorate than under an appointive system.[112] Elections open the selection process to "new and challenging people and ideas,"[113] and increase the likelihood of the existence of "opposition, vigorous criticism of those in power, and effective presentation of alternative policies."[114] Supporters argue that it is virtually impossible to say with certainty that one system produces better quality judges than another, which is a fact that Hand himself recognized.[115] Some studies have found little, if any, difference in the quality of judges from appointed benches as opposed to elected ones.[116] Indeed, supporters argue, there is ample evidence that, if anything, elections provide for a "vigorous and often inspiring" judiciary that is lacking in states with appointive systems.[117]

Regarding the concerns of those who fear that the best judges are ill-suited for the "rough-and-tumble" nature of the election process, supporters of an elected bench argue that a candidate's interaction with the public during a campaign actually helps make that candidate a better judge.[118] Jurists are not so fragile as to need protection from the rigors of political campaigning. Further, supporters argue, the electorate is no more ignorant about what constitutes good judging than it is of "governmental budgeting, or of foreign policy," yet we trust it with making decisions affecting these interests as well.[119]

Despite the wealth of attention devoted to the issue, there is no real consensus among the states as to the most appropriate method of

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[112]For a discussion about the reality of this assertion, see Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997).

[113]*See* Starcher, *supra* note 29, at 18.

[114]*See* Adamany & Dubois, *supra* note 104, at 774.

[115]*See* Hand, *supra* note 95, at 84.

[116]*See* Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 235 (1987) ("[W]e find that selection systems have no important impact on selecting judges with different or superior credentials for office . . . .").

[117]*See* DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY 135 (1995) (concluding that "the decisions from the legislatively selected benches are laconic, prosaic, and sterile. Contrariwise, those from the elected courts (especially West Virginia's) are vigorous and often inspiring.").

[118]*See* Starcher, *supra* note 29, at 20; Tyrie A. Boyer, *Erosion of Democracy* 49 U. MIAMI L. REV. 139, 143 (1994) ("Anyone who feels that it is beneath his or her dignity to shake a hand and request a vote is apt to exhibit the same feelings of superiority while presiding in the courtroom, and such a person may become arrogant and abusive.").

[119]*See* Starcher, *supra* note 29, at 20; *see also* Boyer, *supra* note 118, at 140.

judicial selection. Indeed, the best that can be said is that over the last century, there has been an increased clamor for and a slight trend toward the adoption of merit systems.[120]

III. THE RISE OF POPULARLY ELECTED JUDGES IN NINETEENTH CENTURY AMERICA

A. The Colonial Period

Colonists were acutely aware of the concept of judicial independence. Prior to the turn of the eighteenth century, English judges generally held office during the pleasure of the monarch.[121] By the turn of the eighteenth century, however, Parliament had been able to wrest from the monarch this unfettered control over the courts, and English judges served during good behavior.[122] Although a measure of independence had been restored to the judiciary in England by 1700, judges in the colonies still served at the pleasure of the monarch or that of the Royal Governor. Thus, judges in England served during good behavior, whereas English judges in the colonies could be removed at the initiative of the governor or upon warrant from the Crown.[123] This disparity produced considerable protest from several of the colonies, which argued that the practice allowed for the governor and the Crown to exert too great an influence over colonial judges.[124] In their list of grievances in the Declaration of Independence, the colonists specifically noted that the king "has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[125]

Following the American Revolution, the new state constitutions specifically provided for judicial tenure during good behavior, and all of the plans for a national judiciary submitted during the Constitutional

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[120] *See supra* note 69.

[121] Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1105-09 (1976).

[122] *Id.* at 1110.

[123] *Id.* at 1112. The reasons for this difference are somewhat strange. According to Smith, judicial tenure during good behavior was established by the Act of Settlement in 1701. As the Act did not on its face apply to the colonies and as judicial tenure had originally been at the pleasure of the monarch, tenure during good behavior was not part of the common law of England that colonists could claim either by birthright or by virtue of their right under colonial patents. *Id.* at 1111.

[124] *See id.* at 1119-52.

[125] THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

Convention of 1787 contained similar provisions.[126] In particular, ten of the original thirteen states, including Virginia, provided for life tenure.[127] Eight of the original thirteen states placed the control over judicial selection in the hands of the legislature.[128] In the remaining states, the governor held the power of appointment alone or shared it jointly with his council.[129] None entrusted the electorate with the task.[130]

On the federal level, it is clear that the framers of the Constitution placed a higher premium on the notion of judicial independence than judicial accountability. James Madison's admonitions about the dangers of faction apply with equal force to the judiciary as to the other branches of government.[131] For the Federalists, an independent judiciary, capable of deliberation free from the prevailing passions of the majority, was an essential ingredient of the new republic. In *Federalist No. 78,* Alexander Hamilton argued that an independent judiciary was "an essential safeguard against the effects of occasional ill humours in the society."[132] If judicial selection was entrusted to the electorate, "there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws."[133] In order to preserve a judge's ability to consult nothing but the Constitution and the laws, lifetime tenure was necessary:

> Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either . . . .[134]

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[126] *See* Smith *supra* note 121, at 1153-55.

[127] Laurance M. Hyde, *Judges: Their Selection and Tenure,* 22 N.Y.U. L. Q. REV. 389, 391 (1947).

[128] Kurt E. Scheuerman, *Rethinking Judicial Elections,* 72 OR. L. REV. 459, 465 n.53 (1993).

[129] *Id.* at 465 & n.54.

[130] *Id.* at 465.

[131] *See generally* THE FEDERALIST NO. 10 (James Madison).

[132] THE FEDERALIST NO. 78 (Alexander Hamilton).

[133] *Id.*

[134] *Id.*

Representatives at the Constitutional Convention of 1787 debated how judges were to be selected under a federal system. For some, such as James Wilson of Pennsylvania, the power of judicial appointment should reside in the hands of the president. Selection by the legislature would necessarily result in "intrigue, partiality, and concealment."[135] Others were concerned that vesting such power in the hands of one person would actually increase the likelihood of corrupt nominations by the executive.[136] The solution, according to James Madison, was to bestow the power of appointment upon the executive, thus ensuring a measure of accountability for good and bad appointments alike, while subjecting such appointments to the advice and consent of the legislature.[137]

Thus, heading into the eighteenth century, the American judiciary was distinctively countermajoritarian. On the federal level, the framers made a conscious decision to have the judiciary serve as a bulwark against the potential tyranny of the majority. On the state level, the countermajoritarian aspect of the judiciary was somewhat weakened since the judges in most states were appointed by popularly-elected legislatures. Thus, as Lawrence Friedman has pointed out, the electorate retained at least an indirect voice in selecting judges.[138] On a practical level, however, most citizens in various states had little say in who sat on the bench.

B. The Post-American Revolution Judiciary

By the turn of the eighteenth century, there were already grumblings over the largely appointed state and federal judiciaries. Prior to *Marbury v. Madison*,[139] Thomas Jefferson had supported life tenure of judges; however, his rebuke in *Marbury* at the hands of John Marshall led Jefferson to have a change of heart and to suggest the possibility that judges should be subject to popular election and should hold fixed terms of office.[140] The theme of Jeffersonian Republicans that the

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[135]Notes of Debates in the Federal Convention of 1787, Reported by James Madison, June 5, 1787 (statement of James Wilson) (cited in Mordecai Rosenfeld, *Reproducing Federal Judges*, N.Y.L.J., July 6, 1994, at 2).

[136]*See id.* at July 18 (statement of Roger Sherman) (cited in Rosenfeld, *supra* note 135, at 2).

[137]*See id.* at July 18 (statement of Nathanial Gorham (with James Madison agreeing)) (cited in Rosenfeld, *supra* note 135, at 2).

[138]LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 127 (2d ed. 1985).

[139]5 U.S. (1 Cranch) 137 (1803).

[140]*See* Croley, *supra* note 85, at 715.

popular election of government officials should be expanded was adopted by the Jacksonian Democrats.[141] By the time Andrew Jackson was elected in 1828, there was a strong distrust of the judiciary and a rising trend in favor of popular election of judges. The complaints of reformers centered primarily around abuses in the appointment system, the perceived bias of the judiciary toward creditors, and deficiencies in the administration of justice. Critics charged that the power of appointment to the bench had become one of the spoils of power and that such appointments were based more on party loyalty than on actual ability.[142] For critics, the result was twofold. First, the overall competence of the judiciary was damaged as party hacks, rather than capable jurists, sat on the bench. Second, as those such as Jefferson argued, judges "obeyed the President rather than the law, and made their reason subservient to their passion."[143] As most of the judicial appointees came from the aristocratic, landowning class, the perception existed that justice was biased against the debtor and non-slaveholding class.[144] Finally, the daily operations of the judicial branch in many states left much to be desired. By the end of the eighteenth century, the number of notorious non-lawyer judges had begun to dwindle.[145] Numerous problems, however, remained in the administration of justice, most notably the slow pace at which it operated as a result of the increase in the American population.[146]

In some ways, the perceived problems in the judicial branch were a function of the weak position that the judiciary occupied following the American Revolution.[147] In some states, the legislature retained an inordinate amount of control over the judiciary, including power over appellate jurisdiction and the ability to award new trials after judgment.[148] In others, judges were paid so poorly by the legislature that it was difficult to attract qualified lawyers to serve.[149] As a result of

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[141] *See generally* Hall, *supra* note 57, at 338-39.

[142] *See* FRIEDMAN, *supra* note 138, at 137; AUMANN, *supra* note 61, at 173.

[143] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 191 (1923).

[144] *See* Hall, *supra* note 57, at 348.

[145] *See* FRIEDMAN, *supra* note 138, at 126.

[146] *See* Hall, *supra* note 57, at 343-44.

[147] *See* AUMANN, *supra* note 61, at 161.

[148] *See id.* at 164.

[149] *See id.* at 167. Aumann cites as an example the fact that the Chief Justice of the New Hampshire Supreme Court was paid only $100 a year–less than one-third of what he had made in practice. *Id.*

these kinds of problems, the perception existed by the first half of the eighteenth century in some quarters that too many judges were too dependent on the other branches of government and that the citizenry suffered as a whole.

C. The Judiciary In Colonial and Post-Colonial Virginia

As the site of the first permanent English settlement in America, Virginia's institutions were deeply rooted by the time of the American Revolution. Since its colonization, the traditional source of political power in Virginia had been the legislature.[150] The House of Burgesses essentially dominated the other two branches throughout the colonial period.[151] When Virginia devised its own system of government in 1776, it retained many of the traditional institutions and practices of the colonial government.[152] Many of these institutions were so deeply rooted that they remained a part of Virginia government well into the nineteenth century.[153]

The fact that the institutions and practices were deeply rooted did not mean, however, that Virginia's first constitution in 1776 was without controversy. James Madison, for one, voiced the oft-expressed concern that the new constitution did not adequately provide for the separation of powers and that both the executive and judicial branches remained too dependent upon the legislative branch.[154] Under the 1776 constitution, the legislature appointed the governor and his council, judges to the supreme court of Appeals, judges in chancery and admiralty, and the attorney general.[155]

One of the chief criticisms of the judicial system in Virginia following independence was its disorganized and inefficient nature. The Virginia Constitution of 1776 was vague in its description of the organization of the judiciary. The constitution provided only that the legislature was to "appoint judges of the supreme court of appeals, and general court, judges in chancery, judges of admiralty, secretary, and the attorney

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[150] *See* ROBERT P. SUTTON, REVOLUTION TO SECESSION: CONSTITUTION MAKING IN THE OLD DOMINION 3-4 (1989).

[151] *See id.*

[152] *See* George Brown Oliver, A Constitutional History of Virginia 1776-1860, 371 (1959) (unpublished Ph.D. dissertation, Duke University) (on file with author).

[153] *See id.* at 3.

[154] *Id.* at 60 (citing Madison).

[155] SUTTON, *supra* note 150, at 46.

general . . . ."[156] Most of the details as to how such courts would be filled and what their respective duties would be were left to the General Assembly.[157] For a variety of reasons, the General Assembly did little to fill in the blanks left by the constitution and for nearly ten years the Virginia judiciary operated in something of a makeshift fashion.[158] Eventually, the General Assembly established a more permanent framework for the judiciary, but there remained serious problems of delay in the administration of justice heading into the nineteenth century. Much of the criticism over delay in hearing cases and crowded dockets was directed at the supreme court of appeals.[159] The court had appellate jurisdiction over facts as well as law, a situation that critics charged slowed the pace of justice.[160] In 1810, Governor Tyler decried "'the unfortunate practice of quoting lengthy and numerous British cases[,]'" which resulted in a great deal of time "'being taken up in reconciling absurd and contradictory opinions of foreign judges, which certainly can be no part of an American Judge's duty.'"[161] The General Assembly attempted to reform the workings of the court of appeals, but there also existed problems in the lower courts, most notably the inability of the General Assembly to unite the common law and chancery in the same courts.[162]

By contemporary standards, the most remarkable aspect of the court system in Virginia during this period was the county court. The county court system perhaps best embodied the flaws that reformers in Virginia and other states saw in the judicial branch. The scope of the county court's duties at the time are astounding by modern standards. St. George Tucker described the exact scope of the power of the county courts:

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[156]VA. CONST. para. 13 (1776).

[157]Oliver, *supra* note 152, at 284.

[158]*See id.* at 291. A detailed description of the development of the Virginia judiciary is beyond the scope of this Article. For a detailed account, see *id.* at 283-368.

[159]*See id.* at 297.

[160]*See id.* at 300.

[161]*Id.* at 300-01 (quoting Tyler). Members of the bar also complained that "the Appeals judges sat for too brief a time; that they did not decide all questions presented in each case; that they allowed long and unnecessary arguments; that too much unnecessary documentary evidence was admitted, and that it was too easy for 'litigious spirits' to gain an appeal." *Id.* at 297-98.

[162]*See id.* at 303-04.

> As *justices of the county courts,* they are judges in all cases of life and death where a slave is to be tried; and all offences under the grade of felony at common law, of which a free person may be accused. They constitute an examining court, whenever a free person is brought before one of their number, accused of any crime, amounting to a felony at common law, and may remand him for a final trial to the district court, or discharge him as they think proper. They are judges without appeal, in all civil cases, where the matter in controversy is under ten dollars, and perhaps, where it is under twenty dollars. They are also judges in all other civil cases arising within their county (whatever be the amount) both at common law, and in equity. They recommend militia officers under the rank of brigadier, and nominate all sheriffs, and coroners, the former out of their own body. They open roads, build bridges, erect courthouses and prisons, and levy the expense thereof upon the county; and lastly, they recommend to the executive, the persons whom they wish to admit into their own body. They may be at one and at the same time, members of the general assembly (or of congress), judges of the county courts, and militia officers of any rank, whatever.[163]

In addition to Tucker's laundry list of powers, the county courts received the proof of deeds and probated wills; had the power to appoint inspectors of tobacco, flour, and hemp; had the power to license taverns; and had the power of issuing attachments against absconding debtors, which was a power denied to any of the judges of the superior courts.[164]

Understandably, critics had numerous concerns about such a system. The county courts, quite obviously, made a mockery of the notion of separation of powers.[165] In addition, the county courts were charged

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[163] 1 BLACKSTONE'S COMMENTARIES, Appendix, 115-16 (St. George Tucker ed., 1803) (quoted in Oliver, *supra* note 152, at 356).

[164] *See* Oliver, *supra* note 152, at 360.

[165] *See* SUTTON, *supra* note 150, at 5.

with being slow to administer justice.[166] Another alarming aspect of the county court system was the courts' power of appointment, both of sheriffs and of other members of the court. The county courts had the power to recommend three nominees for the position of sheriff to the governor. Although the choice among the three was nominally up to the governor, the county court was free to determine that the person selected by the governor was unqualified and could not serve.[167] Also, as Tucker noted, the justices themselves recommended to the executive who they wished to fill vacancies on the court. Tucker warned that the likely result would be "an hereditary aristocracy in every county."[168] For Jefferson, this method of self-appointment produced a 'Cabal' and 'the most afflicting of tyrannies.'[169]

Thus, if there existed a likely candidate for wholesale reform of the judiciary among the states, Virginia would have been at the top of the list. The criticisms concerning the judiciary that existed in other states were present in Virginia as well and, in many instances, were even more pronounced. The conservative nature of the Virginia judiciary, which placed great power in the hands of unelected judges and produced a backlog of cases, resulted in widespread frustration. For champions of democratic reform, the Virginia system of government, including its judiciary, was oligarchical and aristocratic in nature and in desperate need of reform.

D. The Nationwide Rise of Elective Judiciaries in the Nineteenth Century

In 1832, Mississippi became the first state to elect all of its judges.[170] Despite the fact that a former member of Mississippi's highest court viewed the new constitutionally-created method of electing judges as "mobocracy,"[171] Mississippi's decision helped to open the floodgates of popular election of the judiciary in the nineteenth century. Between the

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[166] *See* OLIVER, *supra* note 152, at 358.

[167] *Id.* at 360.

[168] *Id.* at 356.

[169] *Id.* at 357 (quoting Jefferson); *see also* FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENTS IN THE SOUTH ATLANTIC STATES, 1776-1860 190 (Leonard W. Levy ed., 1971) (1930) ("The county courts of Virginia were attacked as aristocratic and monarchical . . . by the mass of the people."). For an interesting account of some of the criticisms and of the day-to-day operations of the county courts, see A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS, 1680-1810, at 112-137 (1981).

[170] *See The Case for Partisan Judicial Elections*, 22 U. TOL. L. REV. 393, 394 (2002).

[171] Nelson, *supra* note 62, at 190 (quoting a Mississippi justice).

years 1846 and 1860, no less than nineteen of the twenty-one constitutional conventions held among the states approved constitutions that allowed citizens to elect their judges.[172] The trend toward an elective judiciary continued throughout the remainder of the century, as every state that entered the Union between 1846 and 1912 provided for judicial elections.[173]

Scholars have offered several theories to explain the rise in elective judiciaries. The earliest explanation attributed the trend of popular election to the Jacksonian revolution of popular government.[174] Beginning with the election of 1800, Thomas Jefferson and his followers began agitating for democratic reform on both the state and federal levels with the idea of altering the aristocratic nature of government as it then existed.[175] The Jeffersonians argued that the emphasis on wealth and property in the organization of state governments had resulted in a situation in which a wealthy minority was able to impose its will on the majority.[176] For the Jeffersonians, one of the chief goals was increased political participation by the average citizens.[177] This sentiment found full voice with the rise of Andrew Jackson and his followers. The result, according to early scholars, was a radical system of democratic reform motivated less by reason than by a desire to restore power to the people at virtually every level of government. For Dorman B. Eaton and others, the move toward an elective judiciary was a "rash experiment"[178] "based on emotion rather than on a deliberate evaluation of experience under the appointive system . . . ."[179] For these scholars, the rise in elected judiciaries was "a logical extension of the prevailing theory of democracy [which] seemed to require the popular election of all possible officers of government. . . ."[180]

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[172] Hall, *supra* note 57, at 337 & n.2. These states include California, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Maryland, Minnesota, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Wisconsin. *Id.*

[173] Nelson, *supra* note 62, at 190.

[174] *See id.* at 191.

[175] *See* GREEN, *supra* note 169, at 172.

[176] *See id.*

[177] *See id.* at 175.

[178] DORMAN B. EATON, SHOULD JUDGES BE ELECTED? OR THE EXPERIMENT OF AN ELECTED JUDICIARY IN NEW YORK 5 (1873).

[179] JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW 140 (1950).

[180] James Parker Hall, *The Selection, Tenure and Retirement of Judges*, 37 PROC. OHIO ST. B. ASS'N 139, 150 (1916).

Another closely related theory suggested that the rise of elective judiciaries was a partisan movement by Democrats to oust Whig judges.[181] This theme was a carryover from the days of Thomas Jefferson, who, upon his election as president, was outraged to be faced with a judiciary dominated by Federalists, some of whom had been appointed in the final days of the Adams administration.[182] For the Jeffersonians, this successful attempt by the Federalists to thwart the will of the people by packing the judiciary with members of the opposition party was an outrageous example of partisanship. The state constitutional conventions of the nineteenth century provided the political descendants of Jefferson with a method of stripping opponents of the power of appointment to the bench.[183]

As more modern scholars have noted, there is certainly evidence that emotion, rather than reason, played a large part in the thinking of some representatives to the state conventions.[184] Although the reformers proposed radical changes in the manner in which judges were selected, not all reformers based their proposals on emotion alone. If there is some truth to the criticisms that the bench consisted in large measure of party loyalists and aristocrats hostile to the claims of debtors, then the calls for an elective judiciary may indeed have been a reasoned response. That is not to say it was the correct response or that it was not in large measure a byproduct of the Jacksonian mindset, but it certainly had its basis in reason. Rather than accepting the Hamiltonian notion of the primacy of judicial independence, some of the reformers simply chose to make judicial accountability and fairer representation their priorities.

If, for example, there was any truth to the rhetoric of some in favor of elective judiciaries that judges had become "'little aristocrats' who 'legislated judicially despite the wishes of the people,'"[185] then holding judges accountable through popular election is not necessarily an exclusively emotional response to the problem. Similarly, if the allegations of critics of the existing system were accurate, there is nothing inherently unreasonable about objecting to an appointive

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[181] *See* Nelson, *supra* note 62, at 193 (citing AUMANN, *supra* note 61, at187-89).

[182] *See* GEORGE LEE HASKINS & HERBET, 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER, JOHN MARSHALL 1801-15, at 108 (1981).

[183] *See* Hall, *supra* note 57, at 339 (summarizing this position).

[184] *See infra* notes 189-207 and accompanying text.

[185] *See id.* at 348 (quoting 1 DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-51, at 585 [hereinafter DEBATES AND PROCEEDINGS]).

system that produced a judiciary that engaged in judicial activism that worked to the detriment of debtors and fugitive slaves.[186] If the inferior courts in a state had indeed "fallen under the domination of 'local elites and men of wealth and power'" who perpetuated their own economic interests at the expense of the lower classes,[187] then instituting a system of popular election was a rational response to combat such evils. Emotion may have helped to influence the perception that such conditions existed in the first place and the rhetoric used to describe the perceived situation may in some instances have been inflammatory, but it does not necessarily follow that the increase in the number of elected judiciaries came about as a result of emotion, rather than reason.

Similarly, more recent scholars have questioned how strongly partisan politics may have influenced the shift toward elective judiciaries. As Caleb Nelson has pointed out, states in which Whigs controlled the other branches of government were almost as likely to switch to the elective method as were states dominated by Democrats.[188] Furthermore, as Nelson suggests, if Democrats were so certain that the electorate would elect Democratic judges, they should have been equally certain that the electorate would elect Democratic governors and legislatures, which, in turn, could be certain to appoint Democratic judges.[189]

Instead, modern scholars have argued that the rise of the elective judiciary in the nineteenth century involved a more reasoned response to the problems in the judicial branch than earlier scholars had noted.[190] Nelson has argued that while reform of the judiciary in the nineteenth century was inextricably linked with Jacksonian Democracy, the reformers were "hardly simple-minded democrats."[191] According to Nelson, the proponents of the popular election of judges were the intellectual descendants of Jefferson and the Anti-Federalists, and their views naturally reflected their distrust of a government too far removed from the people.[192] As such, the move to an elective judiciary was part of

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[186] *See* Hall, *supra* note 57, at 348.

[187] *See id.* (quoting DEBATES AND PROCEEDINGS, *supra* note 186, at 679.).

[188] Nelson, *supra* note 62, at 198.

[189] *Id.*

[190] *See, e.g.*, GREEN, *supra* note 169, at 300 ("It was not so much the general movement for democracy as the reform of particular abuses that was demanded.").

[191] Nelson, *supra* note 62, at 224.

[192] *Id.* at 222-24.

an overall effort to "decrease official power as a whole."[193] In Nelson's view, popular election of judges was designed to work in conjunction with other reforms to limit the ability of judges and other elected officials to act independently of the people.[194]

Kermit L. Hall has argued that the constitutional conventions, which were comprised in large measure of attorneys, had chief among their concerns the strengthening of the judiciary.[195] According to Hall, the reform conventions consisted of radical, conservative, and moderate elements. In contrast to the more radical delegates at the conventions, the conservatives were, in general, wary of opening up the electoral system. Conservatives feared the effects on judicial independence if judges were forced to stand for election. Judges would be subjected "to the whim of the people and the manipulation of party leaders" if popular election were to be adopted.[196] The effect would be increased contempt for the judicial process, the return of non-lawyers to the bench, and a weakening of the court system as a whole.[197]

For Hall, the move toward elective judiciaries in the mid-nineteenth century was a movement by moderate members of the Whig and Democratic parties "to ensure that state judges would command more rather than less power and prestige."[198] The moderates, while agreeing with the conservatives about the harmful effects of politics on the judiciary, believed that politics was already having a harmful effect on the judiciary.[199] Some delegates concluded that "[c]liques and circles of a few politicians" controlled the appointment process and that popular election would help to reduce such dominance.[200] Popular election, therefore, would help to enhance public perception of the judiciary.[201] In addition to improving public perception of the judiciary, moderates hoped that holding judges accountable at the ballot would eliminate long delays in the administration of justice and stimulate greater

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[193] *Id.* at 203.

[194] *Id.* at 224.

[195] Hall, *supra* note 57, at 339-44.

[196] *Id.* at 341.

[197] *Id.* at 341, 345.

[198] *Id.* at 354.

[199] *See id.* at 343.

[200] Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345, 348 (quoting a delegate to the 1850 Massachusetts convention).

[201] *See* Hall, *supra* note 57, at 345.

productivity on the part of judges, because judges could be held accountable to the electorate for failing to clear the docket.[202]

According to Hall, moderates also took pains to reduce the influence the other elected branches had over the judiciary. Popular election, they believed, would strengthen courts by making them less reliant on legislatures.[203] According to one delegate from Illinois, popular election would help to make the judiciary less dependent on the governor and the legislature, and dependent on the people for support against the other branches of government.[204] Other delegates expressed similar concerns over insuring separation between the branches. Another delegate from Illinois opined that he would "'rather see judges the weather cocks of public sentiment'" than see them "'the instruments of power, . . . registering the mandates of the Legislature, and the edicts of the Governor.'"[205] In an effort to prevent undue influence by the other branches of government *and* the electorate, however, many of the constitutions that came out of the conventions created fairly long terms of tenure, staggered terms, fixed terms during good behavior, and required circuit-wide, rather than statewide, elections.[206]

IV. THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA AND WEST VIRGINIA

In 1863, Virginia would be divided into two states. Before the cleavage took place, however, the citizens of what would become West Virginia forced radical changes in the structure of Virginia's government, including its judiciary. These changes took place against the backdrop of democratic reform taking place across the nation at large. The demand for reform was particularly strong within the western portions of many of the southern states, including Virginia.[207] Although most of the reforms were targeted at reforming the entire system of state government, several of the state constitutional conventions that were held prior to 1860 devoted substantial time and consideration to

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[202] *Id.* at 344.

[203] *Id.* at 350-51.

[204] Nelson, *supra* note 62, at 206 (quoting Archibald Williams, CONSTITUTIONAL DEBATES OF 1847 [Illinois] at 466 (Arthur Charles Cole ed., 1919)).

[205] *Id.* (quoting CONSTITUTIONAL DEBATES OF 1847 [Illinois], at 462 (Arthur Charles Cole ed., 1919)).

[206] *See* Hall, *supra* note 57, at 352; Nelson, *supra* note 62, at 196.

[207] GREEN, *supra* note 169, at 300.

reforming the judiciary.[208] Virginia was one of those states.[209] In nearly every case, one of the results of these reform conventions was a system of elective judiciaries; Virginia, despite its conservative nature, was briefly part of this sweeping trend.

A. The Roots of Discontent in Virginia

The divisions that produced the split between Virginia and West Virginia in 1861 did not occur overnight. Tension between the two halves of the state had been brewing for quite some time. Indeed, given the vast differences between the eastern and western halves of Virginia, a split may have been inevitable even without the push given by the onset of the Civil War. But before the citizens of West Virginia severed their ties with Virginia, they attempted and in some respects succeeded in bringing about major changes in the governance of Virginia.

Prior to the nineteenth century, Virginia enjoyed exceptional stability. The landed gentry that had largely controlled Virginia government since its inception maintained control throughout the eighteenth century. According to historian Robert P. Sutton, the ruling class of Virginia was a "homogenous group of adult white men of closely related families" who comprised probably no more than five percent of the population.[210] The House of Burgesses, the pre-Revolutionary War source of power in Virginia, consisted overwhelmingly of large planters and slaveholders from this ruling class.[211] These men saw themselves as the natural leaders of Virginia, a "breed apart" upon whom the stability of the state depended.[212] Despite such feelings and despite the disproportionate power enjoyed by the ruling class, the citizens from the lower classes willingly accepted the leadership of the elite.[213] As such, Virginia was largely free from the class rivalries that infected other colonies.[214]

The relative tranquility that Virginia enjoyed throughout the colonial period became threatened around the turn of the nineteenth century. As settlement of the western section of the state increased, so too did

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[208] *See* Hall, *supra* note 57, at 342.

[209] *Id.*; *see also* GREEN, *supra* note 169, at 293.

[210] SUTTON, *supra* note 150, at 1.

[211] *Id.* at 5.

[212] DICKSON D. BRUCE, JR., THE RHETORIC OF CONSERVATISM (1982).

[213] SUTTON, *supra* note 150, at 2.

[214] *Id.*

sectional tension.[215] The most obvious source of separation between the citizens of Virginia was physical. The Blue Ridge Mountains served as a natural barrier that limited contact between the two sections of the state.[216] The mountainous terrain of the western half of the state not only limited contact with the eastern half, but also made transportation within the western half difficult.[217] As a result, it was natural that the residents of the Tidewater area of Virginia, blessed with level land, adequate roads, and deep rivers, would have difficulty understanding the need for costly internal improvements demanded by their western neighbors.[218] As such, the eastern-controlled legislature consistently opposed state-funded internal improvements.[219] The question over the need for internal improvements and how such improvements were to be paid for was a major source of conflict between the two sections of the state until the final schism.[220]

There also existed simple cultural differences between the two regions. The East, the home of Jamestown, was populated mainly by those of English descent. The West consisted of large numbers of Scotch-Irish, Germans, Welsh, and Irish immigrants.[221] As the nineteenth century progressed, migrants from other American states tended to settle in the West due to the greater economic opportunities presented there than in the more settled areas of the East.[222] Economic opportunities were more plentiful in the West due to the section's more diverse economy. Blessed with an abundance of natural resources, a number of different industries began to take hold in the western section of the state by the turn of the nineteenth century, including the manufacture of salt, iron mills, glass plants, and, of course, coal.[223] The

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[215] *See id.* at 52.

[216] Michael P. Riccards, *Lincoln and the Political Question: The Creation of the State of West Virginia*, 29 PRESIDENTIAL STUD. Q. 549, 549 (1997).

[217] *See* Oliver, *supra* note 152, at 443. Anyone who has traveled in some of the more remote parts of West Virginia can attest to the fact that, even with twenty-first century technology, transportation can still be difficult.

[218] *See id.* at 442-43.

[219] *See id.* at 443.

[220] *See id.*

[221] *See* RICHARD ORR CURRY, A HOUSE DIVIDED: A STUDY OF STATEHOOD POLITICS AND THE COPPERHEAD MOVEMENT IN WEST VIRGINIA 24 (1964).

[222] *See id.* at 23-24.

[223] *Id.*

East's economy had always been agricultural in nature.[224] Land was valuable in the East and the wealthy landowners of the East, who dominated the legislature, were resistant to change that might adversely affect their interests.[225] Central to the preservation of their interests was the preservation of slavery. Although the western portion of the state was not without its slaves, the institution of slavery did not play as fundamental a role in the economy of the western section of the state.[226] These differences in the daily lives of the citizens of the different sections of the state also produced different mindsets. Eastern Virginia placed a greater emphasis on status and tradition, whereas westerners were of a more democratic bent.[227]

These differences soon began to manifest themselves in tangible ways. Tension between the two sections of the state began to rise following the onset of the American Revolution. Virginia's Constitution of 1776 strengthened the hold of the eastern elite on government.[228] Some in the West believed the Revolution had not fulfilled its democratic promise.[229] During the Virginia debates on the Federal Constitution, some western delegates expressed their opposition to what they perceived as the anti-democratic nature of the Constitution.[230]

Indeed, the question of representation was probably the chief sore spot for westerners until the formal split that occurred between the two sections in 1863.[231] Problems of representation had plagued Virginia since the colonial days. While Virginia was still under monarchical control, the formation of new counties was made extremely difficult as a result of a highly restrictive royal instruction.[232] After 1634, the House of Burgesses was organized around counties with a fixed number of

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[224] *See* SUTTON, *supra* note 150, at 56.

[225] *See* Oliver, *supra* note 152, at 443..

[226] *See* CURRY, *supra* note 221, at 20, 23.

[227] BRUCE, *supra* note 212, at 7.

[228] *Id.* at 11.

[229] *See id.* at 7.

[230] *Id.*

[231] *See* Oliver, *supra* note 152, at 372.

[232] According to George Mason, under the directive, the governor could not assent "'to any law for erecting new counties, unless a clause was inserted to deprive such new counties of the right of representation in the legislature.'" *Id.* at 370 (quoting Mason). The directive, according to Mason, was an attempt "'to maintain an undue influence of the crown in our General Assembly.'" *Id.* at 370-71.

representatives from each county.[233] The Virginia colonists, however, made no attempt to devise a system in which each Burgess would represent a certain number of constituents.[234] As a result, by the time of the first constitutional convention in 1776, there were only a handful of western counties organized and the delegates from these western counties were greatly outnumbered by their eastern counterparts.[235]

This system of legislative apportionment on the basis of counties, rather than population, helped to insure that the East, with its older, established counties, retained control of state government in the face of increased population in the West.[236] According to one source, the number of counties in Virginia had increased by more than one-third between 1776 and 1816, but as new western counties were added, they were included in the senatorial district of which the parent county was a part.[237] As a result, three or four eastern counties often would make up one senatorial district, while a senatorial district in the West would consist of five or more counties.[238] Of the twenty-four senatorial districts, twelve were almost entirely in the Tidewater region.[239] The result was a system in which eastern counties with relatively small white populations had greater representation in the legislature than did western counties with larger white populations.[240]

The issue of slavery was central to the question of representation. According to historian Richard Orr Curry, in 1860, present-day West Virginia had a white population of nearly 360,000 and an African-American-slave population of approximately 16,000.[241] In many eastern counties, slaves constituted around half the total population.[242] The number of slaves in the eastern section of the state mattered greatly

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[233] *See Id.* at 369.

[234] *Id.* at 370.

[235] *See id.*

[236] *See* BRUCE, *supra* note 212, at 2.

[237] Oliver, *supra* note 152, at 375.

[238] *See id.* at 376-377.

[239] *Id.* at 377.

[240] *See* SUTTON, *supra* note 150, at 63. For example, according to one account in 1816, one eastern senatorial district had only 6575 white people and a population of 15,758 based on the federal numbers. One western district had 77,111 white citizens and a federal numbers account of 87,963. Oliver, *supra* note 152, at 376. None of the Tidewater districts had more than 17,430 free whites or populations of more than 47,916 in terms of the federal numbers. *Id.* at 377.

[241] CURRY, *supra* note 221, at 147-49.

[242] *See* SAM BOWERS HILLIARD, ATLAS OF ANTEBELLUM SOUTHERN AGRICULTURE 31-33 (1984).

because it potentially had direct bearing on how the citizens of Virginia were represented in the legislature. Virginia was deeply divided over if and how slaves should be taken into account in determining the number of representatives in a particular county or senatorial district. Westerners wanted a system of representation based on white citizens alone.[243] If representation was to be based on population, easterners wanted slaves to be taken into consideration in some form. Many easterners insisted on the system of representation adopted by the federal government (the "federal numbers"), which took into account the white population plus three-fifths of the slave population.[244] Both systems of representation were clearly to the advantage of the party proposing them.

Consistent with the trend in other parts of the country, Jeffersonians also pointed to the freehold qualifications for voting as another factor promoting inequality.[245] Under the constitution of 1776, only white males who owned a specific acreage of land were given the vote.[246] This suffrage restriction disfranchised more citizens in the West than in the East and further helped to concentrate political power in the hands of the gentlemen farmers of the East.[247] The freehold requirement, critics charged, was a relic from the past that promoted a system in which wealthy landowners in the East were able to maintain a grip on the politics of the state.[248]

The disagreements over representation and suffrage highlight one of the key differences between conservatives in the East and reformers in the West. Westerners argued along the line of ideals and principles of democratic equality while eastern arguments focused on practicality and experience. Easterners argued that, as a practical matter, property owners had the greatest interest in government; thus, it was only natural that they have a dominant voice in government.[249] They disputed the claim that the West was under-represented by pointing out that, as most of the wealth in the state was in the East, the East bore the greater tax

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[243] Oliver, *supra* note 152, at 374.

[244] *See id.*; *See also id.* at 374 n.8.

[245] *See* GREEN, *supra* note 169, at 190-93.

[246] BRUCE, *supra* note 212, at 2.

[247] *See id.*

[248] *See id.*; DAVID L. PULLIAM, THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME 64 (1901).

[249] *See* GREEN, *supra* note 169, at 182.

burden.[250] Further, even if one assumed that the West was under-represented as a theoretical matter, conservatives in the East argued that the existing system had not resulted in any specific abuses.[251] For conservatives, any changes to the existing constitution based on principles whose effects were uncertain was unwise in the face of existing stability and the absence of any tangible detriment to the West. After the turn of the nineteenth century, westerners pushed for changes to equalize representation in the General Assembly but often saw their measures defeated by eastern forces.[252]

These deep divisions prompted calls for a new constitutional convention. Beginning in 1816, western counties began holding conventions to discuss and to voice their displeasure with the current state of affairs. Delegates from eleven counties met in a mass meeting in Winchester in 1816 and published an address that characterized the current constitution as an "absolute mockery of free government."[253] Another meeting in Staunton in that same year voiced the frequent complaint that the current system of representation gave political control to a minority of the people.[254] The Staunton convention called for a new constitution which would provide for greater separation of powers and which would preserve the independence of the judiciary.[255] In 1816, the General Assembly reorganized the senatorial districts and gave the West nine senators instead of its previous four and the East fifteen instead of its previous twenty; however, calls for reform continued.[256] In 1824, twenty-three out of twenty-eight counties polled voted in favor of calling a constitutional convention.[257] Numerous quarters voiced the concern that Virginia was run by an oligarchy and "a landed aristocracy which is most odious to all"[258] that had diminished Virginia's standing among the other states.[259] Ultimately, the calls for reform became too loud to ignore. In 1828, the General Assembly

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[250] *See id.* at 219.

[251] *See id.* at 182; BRUCE, *supra* note 212, at 87; Oliver, *supra* note 152, at 381.

[252] *See* Oliver, *supra* note 152, at 374 (discussing a failed bill introduced in the General Assembly in the 1802-03 session to equalize representation).

[253] GREEN, *supra* note 169, at 173.

[254] *Id.*

[255] *Id.* at 189.

[256] *Id.* at 174.

[257] *Id.*

[258] *Id.* at 173 (quoting a column appearing in an 1824 edition of the RICHMOND WHIG).

[259] *Id.* (citing results from an Ohio County meeting in 1827).

passed a measure for taking the sense of the voters on the question of the need for a constitutional convention and the voters of Virginia indicated their desire for such a convention.[260]

B. The Constitutional Conventions of Virginia and West Virginia, 1829-1902

The constitutional conventions that took place in Virginia and, to a lesser extent, West Virginia between 1829 and 1902 pitted the forces of reform against more conservative elements. Although much of the focus of the early conventions was on the subject of representation, questions concerning the judiciary played a prominent role in most of the conventions. Indeed, many of the attempts to reform the existing system of representation were closely linked with overall efforts to reform all three branches of government, including the judiciary. Although demands for more equal representation in the legislature were aimed at altering the distribution of power, they were by nature also linked to holding those in power accountable for their actions. Thus, the reformist efforts to devise a more equitable system of representation had much in common with the goals behind the ultimate creation of an elective judiciary in the 1850-51 convention. The changes in Virginia's judiciary that took place in later conventions, most notably the abolition of the county court system, were also linked closely with efforts to reform other areas of government. For their part, the West Virginia constitutional conventions held during the nineteenth century largely continued the attempts to democratize the judiciary begun while the representatives were still citizens of Virginia.

1. The Virginia Convention of 1829-1830

According to historian George Brown Oliver's history of constitutional development in Virginia, the convention of 1829-30 "was a battle fought in the wake of the Jacksonian triumph of 1828."[261] As Sutton has noted, from the beginning the debates "focused upon the issue of aristocracy or democracy: would Virginia continue to be ruled by a propertied slaveholding minority, or would it be governed by the popular will alone?"[262] This central question was also necessarily tied to a sectional struggle for power on most constitutional questions,[263] with

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[260]PULLIAM, *supra* note 248, at 64.

[261]Oliver, *supra* note 152, at 100.

[262]SUTTON, *supra* note 150, at 81.

[263]*See id.* at 59.

the "propertied slaveholding minority" in the East attempting to have a greater say on matters affecting the interests of all Virginians. Although the "aristocracy versus democracy" theme was quite prevalent in the debates on the judiciary, the central conflict was as much a sectional division over the value of judicial independence as it was a sectional struggle for power. Despite the rising tide of Jacksonianism, the conservatives in the East still possessed the power and resolve to turn back the reformist tide of the West.

Delegates from across the state gathered in Richmond on October 5, 1829. The composition of the delegates was impressive, including former presidents James Madison and James Monroe as well as future president John Tyler.[264] Both United States Senators and most of Virginia's Representatives in the House of Representatives were also on hand. Chief Justice John Marshall was selected as chairman of the Committee on the Judiciary.[265] The makeup of the convention delegates mirrored the deep sectional divisions within the state. Delegates from the eastern counties outnumbered their western counterparts sixty to thirty-six.[266] All but two of the eastern delegates were slaveholding farmers, lawyers, or both. In contrast, only ten percent of Shenandoah delegates and 14.5% of Allegheny delegates were farmers or farmer-lawyers. Instead, western delegates included manufacturers, merchants, bankers, physicians, prison wardens, and evangelists.[267]

The dominant issue at the convention was representation.[268] Westerners relied on a mix of the theoretical and the practical in calling for a system of representation based solely on the white population. For many western delegates, the people were the source of all power and wealthy interests in the East had frustrated the will of the majority of free men in the state for too long.[269] Easterners, fearing a system of unfair taxation that would promote internal improvements in the West at the

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[264] *See id.* at 73.

[265] *See id.* at 78.

[266] *See* Oliver, *supra* note 152, at 92. There were four delegates from each senatorial district. *Id.*

[267] *See* SUTTON, *supra* note 150, at 75-76. The composition of the delegates mirrored the composition of their constituents in other ways as well. Eastern delegates were better educated, with fifty-five percent possessing bachelor's degrees, as opposed to twenty-two percent of western delegates. *See id.* at 76. Eighty-three percent of eastern delegates were of British stock, while forty percent of western delegates were Scotch and Scotch-Irish. *See id.* at 76-77.

[268] According to Oliver, discussions on representation totally or partially consumed thirty-three days of debate. *See* Oliver, *supra* note 152, at 383.

[269] *See id.* at 384-86.

expense of the East, argued that the practical realities of Virginia necessitated a system in which those who had the most at stake in government should have the greatest voice.[270] Rejecting a system based on the "tyranny of numbers," easterners called for a system of representation based on white population and taxation combined.[271] After a series of heated debates, failed compromises, and outright references to civil war,[272] the convention ultimately settled on "a compromise proposal based on no principle whatever" to resolve the dispute.[273] The convention adopted a completely arbitrary system of apportionment by which the East would have a majority of four in the Senate and a majority of twenty in the House, with reapportionment authorized in 1841 and every ten years thereafter.[274] Although the West did gain in representation, the compromise represented a defeat for those in the West who hoped to transform the system of representation. Despite the compromise, the representation issue would raise its head repeatedly in the ensuing years.

Another closely related source of debate was the suffrage issue. By 1829, Virginia was one of only two of the twenty-four states not to have adopted universal white male suffrage.[275] The East, with its valuable land, wanted suffrage to be based on a monetary evaluation of a freehold.[276] Some in the West, with its abundance of land, opposed any freehold requirement while others wanted any freehold qualification to be based on acreage.[277] The convention produced some impressive debates on both sides on the issue of suffrage as a natural right,[278] thus undercutting the arguments of earlier historians that the reform conventions of the nineteenth century were based on emotion, rather than reason.[279] In the end, however, the two camps were able only to produce an extremely complicated compromise, which, while slightly

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[270] *See id.*; *See also* SUTTON, *supra* note 150, at 87.

[271] *See* SUTTON, *supra* note 150, at 84; Oliver, *supra* note 152, at 384-86.

[272] *See* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830 556-57 (statement of John Randolph) [hereinafter PROCEEDINGS AND DEBATES 1829-1830].

[273] *See* Oliver, *supra* note 152, at 105.

[274] *See id.* at 105, 387-88.

[275] *See* SUTTON, *supra* note 150, at 92. North Carolina was the other. *Id.*

[276] *See* Oliver, *supra* note 152, at 425.

[277] *See id.* at 425-27.

[278] *See id.* at 425-28 (recounting debates on the issue).

[279] *See supra* notes 178-84 and accompanying text.

extending suffrage, proved to be almost unworkable in the years that followed.[280]

Although the main focus of the convention was on representation and suffrage, reform of the judiciary also prompted much debate. Conservatives advanced arguments similar to those they advanced in opposition to reform measures concerning representation and suffrage. Harkening back to the rhetoric of the Federalist Papers, conservatives argued that, if left unchecked, human nature would act in ways contrary to the best interests of society.[281] To conservatives, the passionate nature of man all but guaranteed that the majority, if left unchecked, would use its power to the disadvantage of the minority.[282] On the questions of representation and suffrage, such arguments worked quite nicely for conservatives, who, by and large, were in the minority and already controlled state political power. Conservatives also made such arguments in their efforts to prevent a variety of changes to Virginia's judiciary. In opposition to attempts to democratize Virginia's judiciary, conservatives also advanced the view widely held among colonial Virginia's eastern elites that they were "men who had a special fitness to govern"[283] and that the power to select the best men for the bench resided where it naturally belonged—in the legislature. As they had in the debates on representation and suffrage, reformist delegates, the majority of whom were from the West,[284] pushed for measures that would improve democratic accountability in the judiciary.

The establishment of an elected judiciary was still years away, but there were rumblings throughout the convention regarding popular election in *all* branches of government. Delegates from the West had pushed for popular election of the governor, arguing that direct participation by the electorate would insure greater accountability.[285]

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[280]Oliver, *supra* note 152, at 429. According to Green,

> [t]he suffrage was given to all those who qualified under the old constitution by owning 25 settled, or 50 unsettled acres of land; and in addition to all white male citizens 21 years of age who owned land worth $25, leased land for five years at an annual rental of $20, or were housekeepers or heads of families and had paid tax in the district where they resided for one year.

GREEN, *supra* note 169, at 222.

[281]*See* BRUCE, *supra* note 212, at 73.

[282]*See id.* at 80.

[283]*Id.* at xv.

[284]*Id.* at 38.

[285]*See* GREEN, *supra* note 169, at 220.

Predictably, eastern delegates rejected such a scheme, arguing that the legislature was in a better position to evaluate the qualifications of candidates for the position.[286] Western delegates, however, enjoyed a small measure of success regarding their goal of insuring greater accountability in the judiciary. Originally, the committee on the judiciary recommended that judges of the major courts be elected by a concurrent vote of the two houses of the General Assembly. Instead, Eugenius M. Wilson, a reformist delegate from Monongalia, successfully argued that the vote should be by joint ballot.[287] That way, if the two houses differed as to the selection, the House of Delegates, "being the direct representatives of the people annually elected," should prevail.[288]

Reform of the county court system prompted considerable debate. As the symbol of aristocratic control of Virginia, it was only logical that the county courts would come under attack from forces in the West bent on promoting democratic reforms. The report from the committee on the judiciary recommended giving the county courts constitutional stature and separating them from other lower courts. According to the committee report, judicial power should be vested "'in a Court of Appeals, in such Inferior Courts, as the Legislature shall from time to time ordain and establish, and in the County Courts.'"[289] In essence, the county courts were not simply "such Inferior Courts" as could be abolished by the Legislature by a simple vote; they were imbedded within the framework of the constitution.

Predictably, some reform-minded delegates cried foul. Thomas M. Bayly, a moderate from the Eastern Shore who voted with the reformists on questions concerning suffrage,[290] moved to strike the reference to the county courts, thus placing the courts on par with "other Inferior Courts."[291] Bayly stated that he failed to see why the county courts, which were "so inferior in every requisite qualification to exalt a tribunal of justice, shall be held too sacred ever to be changed."[292] In support of his arguments, Bayly introduced two letters written by Thomas Jefferson,

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[286] *See id.*

[287] *See* PROCEEDINGS AND DEBATES OF 1829-1830, *supra* note 272, at 602-03.

[288] *Id.* at 602.

[289] *Id.* at 502.

[290] *See* BRUCE, *supra* note 212, at 35. Bayly tended to vote with the conservatives on apportionment issues and with reformers on suffrage issues. *Id.*

[291] PROCEEDINGS AND DEBATES OF 1829-1830, *supra* note 272, at 502.

[292] *Id.*

which attacked the courts for their aristocratic nature and suggested the establishment of a township system that would have justices of the peace chosen by the people.[293]

Reformers of the judiciary centered their attacks concerning the county courts on two major fronts. First, they attacked the overall quality of the courts. Reformers charged that the dockets were so overcrowded and the pace of justice so slow that it sometimes was not worth a party's time and effort to press his case before the courts.[294] In addition, the justices of the peace on such courts were of an inferior quality and largely lacked "the ability to discharge [their] duties correctly."[295] Second, reformers charged that the current method of appointment of such courts violated the principle of separation of powers.[296] Bayly argued that since the county courts "lay all the taxes for county purposes," the fact that the justices of the peace were appointed violated the principles that the branches of government should be separate "and that a freeman ought not to be taxed without his consent, expressed by himself or his representative."[297]

Alexander Campbell, a reformer from the West, went even further. Campbell renewed the charge that, given their broad scope of powers, the county courts were anti-democratic in nature, that the citizens had no control over the courts, and that the courts were not responsible to the citizens.[298] Like Bayly, Campbell argued that the method of appointing the justices must be changed, or the courts "will not be worthy of the confidence of the people."[299] Apparently for Campbell and some others from the West, the preferred method of appointment should be direct election by the people.[300] According to Campbell,

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[293] *See id.* at 507-08 (citing Jefferson's letters to Samuel Kerchival, July 12, 1816, and to Col. John Taylor, July 21, 1816).

[294] *See id.* at 504 (statement of Bayly).

[295] *Id.* (statement of Bayly); *See also id.* at 523 (statement of Richard Henderson, a reformer from Leesburg).

[296] *See id.* at 503 (statement of Bayly); *See also id.* at 527-28 (statement of Alexander Campbell, a reformer from Brooke).

[297] *Id.* at 503 (statement of Bayly); *See also id.* at 527-28 (statement of Campbell, arguing along the same lines).

[298] *Id.* at 526.

[299] *Id.* at 503 (statement of Bayly).

[300] *See id.* at 530 (statement of Campbell); *Id.* at 627 (statement of Lewis Summers of Kanawha).

> the counties ought to elect their own magistrates, because they can know them better than any persons living out of the counties; and the recommendation of a whole ward of qualified voters, is better evidence to the chief Executive of their competency, than is the recommendation of a few, *perhaps* interested magistrates.[301]

To conservatives and some moderates, Bayly's amendment to eliminate the constitutional stature of the county courts and the arguments in favor of the amendment smacked of an attempt to destroy the county courts.[302] To Governor William Giles, the adoption of Bayly's amendment would be "giving a very broad hint to the Legislature that they shall destroy" the county courts.[303] For conservatives, the county court system "was in truth the only important colonial institution[ ] that was preserved wholly unchanged" after 1776 and any change was unwise.[304] In response to the charges of reformers, defenders of the county courts argued that the courts were composed of men of natural ability and that any change to the existing system would upset the stability Virginia had long enjoyed. John Marshall rose to opine that "no State in the Union[ ] has hitherto enjoyed more complete internal quiet than Virginia" and that "this state of things is mainly to be ascribed to the practical operation of our County Courts."[305] Philip P. Barbour, a conservative from Orange who would later become a justice on the United States Supreme Court, disputed the claims of reformers about the quality of such courts, stating that there "never has been a tribunal under the Sun, where more substantial practical justice is administered" and that "only our most intelligent and respectable citizens" served on the bench.[306]

Chapman Johnson, a moderate from Augusta, expressed concern about the unknown and possibly "pernicious consequences" that might

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[301] *Id.* at 530 (statement of Campbell).

[302] *See id.* at 504-05 (statement of John Marshall); *Id.* at 509 (statement of Governor William Giles of Amelia); *Id.* at 512 (statement of Chapman Johnson of Augusta).

[303] *Id.* at 509.

[304] Oliver, *supra* note 152, at 361 (quoting conservative Benjamin Watkins Leigh of Chesterfield). Leigh was one of the chief spokesmen for the conservative side throughout the convention. *See* BRUCE, *supra* note 212, at 34.

[305] PROCEEDINGS AND DEBATES OF 1829-1830, *supra* note 272, at 505.

[306] *Id.* at 507.

follow from striking the clause concerning the county courts from the constitution.[307] Conservative John Randolph mocked the reformers' reliance on Jefferson's opposition to such courts,[308] and, alluding to the excesses of the French Revolution, warned against abolishing the county courts: "If gentlemen succeed in introducing the newest, theoretical, pure, defecated Jacobinism into this Commonwealth, . . . they will have inflicted a deeper wound on Republican Government[ ] than it ever experienced before."[309]

The defenders of the status quo carried the day. Although the county courts were stripped of the power to recommend men to be military officers, their essential powers, and method of selection, were left unchanged.[310] As one historian summed up the situation, "[t]he conservatives were still in control and not ready to surrender the most conservative institution of Virginia government."[311]

The judiciary, however, was not left wholly untouched. The convention adopted several measures affecting the organization of the judiciary, some of which gave the legislature more involvement in the affairs of the judiciary and some of which gave less. In a blow for judicial independence, the convention adopted a provision mandating that a judge's salary could not be decreased.[312] But the new constitution also provided for a more direct method of impeachment of judicial officers.[313] Over the objection of some who feared the effects on judicial independence, the new constitution also made judges subject to removal by a two-thirds concurrent vote of the two houses of the legislature for reasons apart from those listed as grounds for impeachment.[314]

It was the question of the power of the legislature to abolish existing courts and hence remove judges from office that prompted some of the

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[307] *Id.* at 512.

[308] *Id.* at 533.

[309] *Id.*

[310] *See* GREEN, *supra* note 169, at 223; PROCEEDINGS AND DEBATES OF 1829-1830, *supra* note 272, at 530.

[311] *See* Oliver, *supra* note 152, at 363-64.

[312] VA. CONST. of 1830, art. V, § 5; GREEN, *supra* note 169, at 223.

[313] *See* GREEN, *supra* note 169, at 223.

[314] VA. CONST. of 1830, art. V, § 6; *see* PROCEEDINGS AND DEBATES OF 1829-1830, *supra* note 272, at 613 (statement of Chapman Johnson) (stating that "he would never give his vote for this provision, which went to remove Judges by a vote of two-thirds of both branches of the Legislature, without any crime having been proved against them."). Marshall seemed to view the purpose of this provision as to allow the legislature to remove a judge when the judge was "useless," i.e., when "the number of Judges is too great." *Id.* at 612.

most heated debates on the judiciary. The report of the judiciary committee, headed by John Marshall, provided that all judges would "hold their offices during good behaviour or until removed in the manner prescribed in the constitution."[315] The committee report also contained the following, more controversial provision: "No modification or abolition of any Court, shall be construed to deprive any Judge thereof of his office; but such Judge shall perform any judicial duties which the Legislature shall assign him."[316] Thus, the abolition of a court by the legislature would not abolish the office or result in the judge's removal. For opponents, the provision amounted to the creation of a "band of judicial pensioners."[317]

Although judicial independence was certainly not first and foremost on the minds of Virginia conservatives when they gathered for the convention, Marshall's defense of the proposal highlights his difference of opinion with the reformists in the state on the issue of judicial independence. In 1816, Jefferson had questioned why, in a government founded on popular will, it was necessary that judges be independent of that will.[318] For Marshall, such independence was essential. In defending the committee's proposal, Marshall argued that it was imperative that a judge remain free from entanglements with the other branches so that he was "rendered perfectly and completely independent, with nothing to influence or controul him but God and his conscience."[319] In one of the most oft-cited expressions of judicial independence, Marshall opined that "the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."[320]

To a certain extent, Marshall's defense of the committee's report also harkened back to an earlier battle between the supporters of John Adams and those of Jefferson. In 1802, the Republican Congress abolished numerous circuit courts (filled with Federalist judges)

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[315]PROCEEDINGS AND DEBATES OF 1829-1830, *supra* note 272, at 33.

[316]*Id.*

[317]*Id.* at 618 (statement of Littleton Tazewell). Tazewell was an eastern conservative who broke ranks with conservatives on this issue. *See* BRUCE, *supra* note 213, at 34.

[318]A.E. Dick Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 891 (1968) (citing Jefferson's 1816 letter to Samuel Kercheval).

[319]PROCEEDINGS AND DEBATES OF 1829-1830, *supra* note 272, at 616.

[320]*Id.* at 619.

established by the Federalist Congress of 1801.[321] Federalists cried foul, charging that by depriving judges of their office, the Act violated the provision in Article III, Section 1 of the Constitution, which allows judges to hold their offices during good behavior.[322] On a more practical level, Federalists were offended by the political overtones inherent in the decision to undo the appointments of these "midnight judges" appointed by Adams in the waning hours of his administration, whom Jefferson believed to be among his "most ardent political enemies, from whom no faithful cooperation could ever be expected."[323] Eventually, the Supreme Court, with John Marshall as Chief Justice, heard the case of *Stuart v. Laird*,[324] which challenged the constitutionality of the Judiciary Act of 1802. The Court, however, never squarely addressed the issue of whether Congress' constitutional power to create federal courts also carried with it the power to abolish them, thus depriving judges of their office.[325] Interestingly, by virtue of the Act, Chief Justice Marshall had been assigned as a circuit judge in the matter below, and thus expressed no opinion on the case when it reached the Supreme Court on appeal.[326]

Now, over twenty-five years later, Virginia delegates confronted the issue left unresolved by *Stuart v. Laird*. This time, Marshall was willing to offer an opinion on the general subject, if not on the constitutionality of the Judiciary Act of 1802 itself. According to Marshall, "abolition of a Court is not the abolition of the office of the Judge."[327] Marshall argued that a judge's continuation in office, even after the court in which he served had been abolished, was essential to preserving an independent judiciary. If the legislature were free to remove a judge from office

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[321]Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

[322]U.S. CONST. art. III, § 1.

[323]Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 BYU L. REV. 873, 886 (quoting THOMAS JEFFERSON, WRITINGS 1145 (1984)).

[324]5 U.S. (1 Cranch) 299 (1803).

[325]Litigation testing the Act instead focused on its second main feature, which directed members of the Supreme Court "to sit on circuit courts conducting trials in cases not falling within the categories of original jurisdiction assigned by article III to the Supreme Court." Louis H. Pollak, Book Review, *Marshall and the "Campaign of History,"* 131 U. PA. L. REV. 475, 478 (1982). This was one of the chief issues when the Act's constitutionality reached the Supreme Court. *See Stuart*, 5 U.S. (1 Cranch) at 309.

[326]*Stuart*, 5 U.S. (1 Cranch) at 299.

[327]PROCEEDINGS AND DEBATES OF 1829-1830, *supra* note 272, at 611.

simply by abolishing the judge's court, the judge's decisions would be too easily affected by the fear of loss of tenure.[328]

Other moderates and conservatives invoked similar arguments in support of the idea that abolishment of a court should not deprive the judge of his office. Removal of the phrase from the committee report would, argued moderate Chapman Johnson, "put every Judge in the land entirely at the discretion of the Legislature" and would threaten to influence judges' decision making.[329] Several conservatives offered almost identical arguments.[330] John Scott of Fauquier expressed concern that if the abolition of a court could deprive a judge of his office, the judiciary would become too dependent upon the legislature and its independence would be threatened.[331] For Scott, it was crucial that the judiciary, the protector of "the weak against the strong," remain independent in order to fulfill its function.[332]

In an apparent effort to shore up support for the basic thrust of the committee report, Scott offered an amendment that provided that the abolition of a court would not deprive a judge of his office unless two-thirds of the General Assembly concurred.[333] Without such a check on the legislature, "a dominant faction can, by a simple repeal of a law, sweep every Judge from the bench."[334] Other conservatives, such as John Randolph and John Coalter of King George, sounded similar themes. For Randolph, the two-thirds vote requirement to remove a judge whose office had been abolished was a necessary means of allowing the legislature to abolish courts (and hence remove judges) that no longer served a useful purpose, while preventing the legislature from abolishing a court "for the purpose of getting rid of the Judge who presided in it," an action which Randolph saw as a direct threat to judicial independence.[335] Coalter mocked the notion that a judge could remain free to follow his conscience and his view of the law when he "will know

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[328] *See id.* at 616.

[329] *Id.* at 613.

[330] *See id.* at 609 (statement of Richard N. Venable); *id.* at 610 (statement of Robert Stanard).

[331] *See id.* at 871.

[332] *Id.*

[333] *Id.* at 876.

[334] *Id.* at 871; *see also id.* at 876.

[335] *Id.* at 877.

and feel" that he runs the risk of alienating members of the bar and the legislature to the point that his office may be abolished.[336]

Opponents charged that the provision worked "to make the office of a Judge continue against the will of the Legislature and of the people."[337] Eastern conservative Littleton Tazewell broke ranks with the conservatives and argued that he could see no reason for drawing a distinction between "office" and "judge."[338] Governor William B. Giles, who had previously sided with Marshall in the debates concerning the county courts, argued that judges derived their salaries for the duties they performed, not their good behavior, and that the effect of the committee report and Scott's amendment would be to insure that a judge continued to receive a salary even after his official duties ceased.[339] Ridiculing Marshall's argument, Giles stated, "I cannot for my life find out how it is that an office should exist in a court, while the court itself does not exist . . . ."[340] For Giles, such a notion "is not independence; it is privilege."[341]

Reformer Benjamin W.S. Cabell of Pittsylvania proposed a counter-amendment to Scott's. Under Cabell's proposal, the abolition of a court would not deprive a judge of his office, but if the legislature did not assign any duties to him, the judge would receive "no salary by virtue of his office."[342] To Cabell, it was "carrying the idea of Judicial independence, to a most pernicious extreme" to allow a judge who no longer had a court or any duties to retain his salary under the fiction that his office had not been abolished.[343] Such a view "betrays the want of a just confidence in the wisdom and integrity of the representatives of the people."[344]

Ultimately, Scott's proposal to amend the committee report to insure that the abolishment of a court would not result in the removal of a judge unless two-thirds of the General Assembly concurred passed by a

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[336] *See id.* at 878-79.

[337] *Id.* at 609 (statement of Philip P. Barbour). Barbour actually voted with conservatives on most issues, but voted with the reformists on this issue. *See id.* at 880; BRUCE, *supra* note 212, at 36.

[338] *See* PROCEEDINGS AND DEBATES OF 1829-1830, *supra* note 272, at 614.

[339] *Id.* at 872-73; *see also id.* at 614 (statement of Tazewell).

[340] *Id.* at 872.

[341] *Id.* at 876.

[342] *Id.* at 875.

[343] *Id.* at 874.

[344] *Id.* at 874-75.

vote of fifty-three to forty-two.[345] As was the case with representation and suffrage issues, the vote was largely along sectional lines. A few conservative and conservative-leaning moderate delegates defected to the reform side on the question; however, delegates from the Tidewater area overwhelmingly voted in favor of Scott's amendment and delegates from the Trans-Allegheny region were almost unanimously opposed.[346]

Although westerners made some strides, the convention was largely a disappointment for the reformers. Most of their major concerns regarding apportionment and suffrage had not been squarely addressed, and the legislature still remained dominant over the other branches. In the end, both the convention vote and the popular vote on the question of the ratification of the constitution were largely along geographic lines. Only one delegate from west of the Blue Ridge voted in favor of the constitution.[347] The final popular vote was 26,055 to ratify and 15,563 opposed.[348] Of the 15,000 plus votes against ratification, over 11,000 came from west of the Alleghenies and another 2000 plus came from the region between the Alleghenies and the Blue Ridge. No county in what would later become West Virginia voted for ratification.[349] In sum, Virginia remained as divided after the convention as it had been before.

2. The Virginia Convention of 1850-51

The 1830 constitution did little to quell rising discontent in Virginia. Westerners continued to feel aggrieved and continued to agitate for change. Their demands were once again almost identical to the demands they had made during the previous convention: equalization of representation, reform of suffrage requirements, and the popular election of the governor and other officials.[350] Unlike in 1829-30, however, the West had both the numbers and a nationwide reformist trend on its side to effectuate the changes it had sought earlier by the time a new constitutional convention convened in Richmond in October of 1850.

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[345] *See id.* at 880-81.

[346] *See id.*

[347] GREEN, *supra* note 169, at 221.

[348] BRUCE, *supra* note 212, at 67-68.

[349] *Id.*

[350] GREEN, *supra* note 169, at 288-89; PULLIAM, *supra* note 248, at 87.

By 1850, the West had grown in terms of both population and wealth. While the East had a clear majority of white citizens in 1830, the 1850 census gave the West a majority of 90,392.[351] Although the East still possessed the more valuable land, by 1850 the West had begun to narrow the gap.[352] Hence, two of the East's chief justifications for rebuffing the West's demands during the 1829-30 convention were now weakened.[353] Further weakening the East's position was the fact that the promised reapportionment of representation which was to take place in 1841 failed to materialize due to the old divisions over the basis of representation. Despite the fact that the two regions were of roughly equal numbers in terms of overall population, the West continued to have fewer senators and fewer representatives in the General Assembly.[354]

Following the failed reapportionment bid, many in the West began pushing for a new convention. They were joined by some easterners who hoped to limit the damaging effects of growing sectionalism in the state.[355] The calls for reform, however, were not isolated to Virginia. By 1850, the nationwide "reform convention" movement was well underway and westerners in Virginia could point to the changes adopted by these conventions in support of their arguments.[356]

Against this backdrop of sectional distrust and a nationwide democratic reform movement, the representatives from Virginia gathered in Richmond in 1850 to rehash the issues raised, but left unresolved, twenty years earlier. The makeup of the delegates reflected the changing face of Virginia at that time. Gone were the Madisons, the Marshalls, and many of the leaders of the wealthy, aristocratic class of the East. In their place were delegates from the middle class.[357] Although the sectional split remained among the delegates, more easterners than before were willing to go along with reforms proposed during this convention.

One of the first priorities of the reformers was to establish a system that allowed for greater direct participation in the affairs of government.

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[351] GREEN, *supra* note 169, at 287.

[352] *Id.*

[353] *See id.*

[354] *See id.*

[355] *See id.* at 288.

[356] *See supra* notes 170–173 and accompanying text.

[357] GREEN, *supra* note 169, at 289.

The rumblings in this regard that had taken place during the previous convention now found full voice. The Committee on the Executive recommended direct popular election of the governor, thus significantly weakening the legislature's control over the executive.[358] Despite opposition from some eastern delegates, Virginia became the next to last state to abandon legislative appointment of the governor.[359]

Reformers also successfully pushed for popular election of judges throughout the judiciary. In light of the trend toward elective judiciaries that was taking place in other state constitutional conventions, it was clear even before the delegates met in Richmond that the subject would be up for debate. By this time, Mississippi and several other states had already switched to elective systems.[360] Prior to the convention, several candidates expressed their views as to the proper method of judicial selection.[361] Some convention candidates publicly scoffed at the idea that "the same people who appoint very bad representatives would appoint very good judges."[362] Others expressed concern that if judges were elected only for a single term that the quality of candidates would likely be poor and that the decisions of those elected would occasion numerous appeals. For example, one candidate expressed the prophetic concern that if a judge were subjected to reelection, the judge would devote too much time to getting reelected and that talented men would be reluctant to leave lucrative practices for the uncertainty of a position on the bench.[363] Despite such concerns, debate about the judiciary centered around the appropriate method of selecting judges and the tenure of judges.

Before the Committee on the Judiciary issued its report, John Janney of Loudoun proposed that circuit court judges be chosen through popular election and that supreme court judges be elected by a joint vote of the houses of the General Assembly.[364] Thus, Janney's plan addressed both the concerns of reformers, who wanted greater direct

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[358] *See* SUTTON, *supra* note 150, at 124.

[359] *Id.* at 125 (quoting A. E. Dick Howard). The death of legislative appointment of the governor also brought with it the demise of the governor's council. *See* GREEN, *supra* note 169, at 295.

[360] *See supra* notes 170-73 and accompanying text.

[361] *See* Oliver, *supra* note 152, at 316-18.

[362] *Id.* at 317 (quoting Conway Robinson, *Letter from "One of the People,"* RICH. WHIG, June 25, 1850).

[363] *Id.* at 317-18.

[364] *Id.* at 318.

participation on a local level, and the concerns of the conservatives, who were fearful of allowing for too much participation without giving either side complete victory. Janney's plan also seemed to reflect the concerns of those who feared the consequences of short terms of office. Under his plan, elected circuit court judges would enjoy tenure until the age of sixty-eight.[365] The committee report ultimately adopted the basic thrust of Janney's plan, but set the tenure of supreme court judges at fifteen years and circuit court judges at ten years.[366]

Democratic sentiment among the delegates at large, however, was apparently even stronger than in the committee. Several substitutes to the committee's proposal were offered, including one from a Richmond delegate that would have placed the power of appointment of supreme court judges in the hands of the governor.[367] But nearly all of the substitutes offered provided for popular election of the inferior courts.[368] Ultimately, the convention adopted the proposal of R.E. Scott of Fauquier, who proposed direct election of *all* judges and recommended twelve-year terms for the judges of the supreme court and eight-year terms for inferior court judges.[369] Scott's plan also redesigned the supreme court of appeals so that it was composed of five judges – one from each of five judicial sections consisting of two districts apiece.[370] Thus, the legislature lost control of judicial appointments, and judges in Virginia would henceforth be subject to reelection and fixed terms of office.

It bears mentioning that although the new constitution certainly democratized the judiciary, the delegates' ultimate changes reflected

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[365] *Id.* at 319.

[366] *Id.*; JOURNAL, ACTS AND PROCEEDINGS OF A GENERAL CONVENTION OF THE STATE OF VIRGINIA (1850), Report of the Committee on the Judiciary [hereinafter JOURNAL, 1850-1851 CONVENTION OF VIRGINIA].

[367] *See* JOURNAL, 1850-1851 CONVENTION OF VIRGINIA, Plan of Mr. Lyons for the Organization of the Judicial Department.

[368] *Id.* James Lyons of Richmond proposed gubernatorial appointment of members of the supreme court of appeals and popular election of circuit court judges. *See id.* The proposal of Lemuel J. Bowden of Williamsburg essentially mirrored the committee report's method of selection. *See* Substitute Proposed by Mr. Bowden to the Report of the Committee of the Judiciary. Daniel Hoge of Montgomery and John R. Chambliss of Greensville both proposed popular election of all judges in the state. *See id.*, Substitute Proposed by Mr. Hoge to the Report of the Committee of the Judiciary, and Amendments Proposed by Mr. Chambliss to the Report of the Committee on the Judiciary.

[369] *See* Oliver, *supra* note 152, at 320; JOURNAL, 1850-51 CONVENTION OF VIRGINIA, Plan for the Judicial Department, Submitted by Mr. Scott, of Fauquier.

[370] SUTTON, *supra* note 150, at 126.

some moderate tendencies. Like their counterparts in other states, delegates took steps to lessen some of the potentially damaging effects of democratizing the bench.[371] Although those who placed a premium on judicial independence would have certainly preferred life tenure for judges, the new constitution established a fairly lengthy term of office, thus, to some extent, insulating judges from the passions of the public and shielding them from the distractions of constantly running for reelection. Also, Scott's plan of selecting supreme court judges from five separate districts was in keeping with the practice of other states, which provided for circuit-wide, rather than statewide, elections.[372] Finally, the delegates at least appeared to be aware of some of the potential dangers associated with popular election of judges. Before Scott proposed his plan, the committee, in an apparent effort to insulate judicial candidates from electoral and party passions, recommended that judicial elections be held at least thirty days before or after any general election.[373] Ultimately, however, this proposal did not make its way into the constitution approved by the convention.[374]

In light of the move toward greater accountability in elected officials, changes to the county court system were inevitable. The anti-democratic nature of the county court system had remained under attack since the previous convention. By 1850, however, opposition to the courts was strong in both the East and the West.[375] Critics continued to object to the life tenure of the justices and the tendency for court positions to be hereditary in nature. The result often was that a single party could remain in power regardless of the party affiliation of the majority of the residents of a particular county.[376] In his speech to the General Assembly in 1849, Governor John B. Floyd had attacked the aristocratic nature of the county courts, arguing that the power conferred to the justices "should be entrusted to officers directly responsible to the

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[371] *See supra* notes 203-07 and accompanying text (discussing proposals adopted at other conventions including lengthy terms of office, staggered elections, and circuit-wide, rather than statewide, elections).

[372] *See supra* note 206 and accompanying text.

[373] *See* Oliver, *supra* note 152, at 319.

[374] *See* VA. CONST. of 1851, art. VI, §16.

[375] SUTTON, *supra* note 150, at 119.

[376] Oliver, *supra* note 152, at 365. Oliver cites as an example the situation in King and Queen County where, although the majority of citizens were Democrats, the Whigs held thirty-seven of the forty-three county offices and twenty-five of the twenty-nine positions on the county court. *Id.*

people."[377] Some conservatives continued to defend the institution along previous grounds by arguing that the true purpose of the reformers was to "convert the courts into party machines."[378] Increasingly though, conservatives found it more difficult to defend the courts on efficiency grounds, as by now the growth in population had made it substantially harder for the courts to perform their numerous duties in a timely manner.[379]

Although there was clearly dissatisfaction with the county court system, the delegates were not prepared to adopt the proposal of Delegate Waitman Wiley of Morgantown to eliminate the courts altogether and to transfer their powers to the circuit courts.[380] Instead, the delegates dramatically changed the organization and selection method to allow for more direct participation by the residents of each county. In a symbolic and substantive victory for the reformers, justices of the county courts would now be subject to popular election.[381] In addition, the delegates divided the counties into units, called districts, with one justice for each district.[382] All county officers were required to reside in their respective counties.[383] The delegates also took up the task of improving the slow speed of justice and clearing the overburdened dockets of the courts. Again, the work of the convention in this respect undercuts the argument of earlier historians who asserted that the changes to the judiciary in the reform conventions of the nineteenth century were the result of emotion over reason. As was the case in most state conventions, the overwhelming majority of delegates at the 1851 Convention were attorneys who faced daily the problems associated with the administration of justice.[384] In the decades following the previous convention, the docket of Virginia's highest court had become increasingly crowded.[385] After much delay, the General Assembly finally took measures in 1848 to alleviate some of the overcrowding by creating

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[377] *Id.* at 366.

[378] *Id.*

[379] SUTTON, *supra* note 150, at 126.

[380] *Id.*

[381] *Id.*; Oliver, *supra* note 152, at 368.

[382] SUTTON, *supra* note 150, at 126.

[383] *Id.* at 127.

[384] GREEN, *supra* note 169, at 289.

[385] Oliver, *supra* note 152, at 311. For example, during the 1838-39 legislative session, Delegate Arthur Smith of the Isle of Wight estimated that it would take more than four years to try all of the suits currently pending before the supreme court of appeals. *Id.* at 312.

an intermediate court of appeals.[386] In 1831, the legislature had established circuit courts of law and chancery that met twice a year in each county. The delegates at the convention added to these measures by giving the circuit courts greater power and increasing the total number of such courts. In addition, the delegates established ten district courts.[387]

Reformist forces saw similar victories at the convention on their other two main topics of concern, suffrage and representation. The suffrage question produced little debate and universal white male suffrage was adopted.[388] As a result, the number of qualified voters increased by more than sixty percent.[389] The increased numbers of voters, however, produced little concern, apparently because, as the *Richmond Enquirer* noted, "[t]here is still an overpowering conservative residium . . . which will effectively prevent the abuse of the right by those who exercise it."[390] The representation question was a different story. On this issue, the East dug in its heels and resisted attempts by the West to equalize representation. Both sides again rehashed the arguments raised during the 1829-30 convention.[391] After several threats of secession from western forces, a compromise was finally reached that gave the West a majority in the House of Delegates and gave the East a majority in the Senate.[392]

At the end of the day, the Reform Convention of 1851 had produced dramatic changes to Virginia's judiciary. All judges, clerks, attorneys general, and justices of the peace were now to be elected. Instead of life tenure, judges now served fixed terms.[393] In sum, the forces of reform and accountability had carried the day regarding the judiciary. Conservatives were left to brood about what the *Richmond Whig* called the "Reform (!) Convention – a Convention which should stink in the nostrils of all patriotic, intelligent and honest men to the last syllable of recorded time."[394] Virginia's experiment with an elected judiciary would

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[386] *Id.* at 314.

[387] *See* SUTTON, *supra* note 150, at 126.

[388] *See id.* at 134-35; Oliver, *supra* note 152, at 441.

[389] Oliver, *supra* note 152, at 441.

[390] SUTTON, *supra* note 150, at 135 (quoting RICH. ENQUIRER, Aug. 15 1851).

[391] *See id.* at 128-32; Oliver, *supra* note 152, at 396.

[392] *See* SUTTON, *supra* note 150, at 134.

[393] GREEN, *supra* note 169, at 296.

[394] Oliver, *supra* note 152, at 322 (quoting Editorial, RICH. WHIG, Feb. 10, 1857).

not last long, however, as forces beyond the Old Dominion's borders soon irrevocably altered the composition of the Commonwealth.

3. The West Virginia Convention of 1861-63

The outbreak of the Civil War finally severed the tenuous threads connecting the eastern and western sections of the state. When the Virginia General Assembly voted on April 17, 1861, to approve the Ordinance of Secession, roughly two-thirds of the delegates from what is now West Virginia voted against it.[395] When the people of Virginia ratified the ordinance over the objection of the West, delegates from the West soon formed the "Re-Organized Government of Virginia" and selected representatives for what was to be West Virginia's first constitutional convention.

When the delegates gathered in Wheeling on November 26, 1861, they set out to establish a constitution that addressed many of the perceived injustices the West felt it had suffered at the hands of the East. The delegates apportioned representation on the basis of white population and carried over the practice established in the Virginia Constitution of 1851 of giving the vote to adult white males.[396] The delegates also carried over some of the changes from the 1851 constitution that affected the Virginia judiciary, but made several changes of their own. Not surprisingly, the constitution retained the system of popular election of all judges in the state.[397] Indeed, the only real debate on the subject of the selection of judges involved not whether judges should be elected, but for how long.[398] The supreme court of appeals was to include three judges elected for staggered terms of twelve years.[399] Circuit court judges were to be elected for six-year terms.[400] Also not surprisingly, the delegates did away with the old county court system.[401] In keeping with the West's long-standing desire to maximize democracy, the delegates established a township system,

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[395] ROBERT M. BASTRESS, THE WEST VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 9 (1995).

[396] *See id.* at 11.

[397] W. VA. CONST. of 1863, art. VI, §§ 4, 7.

[398] *See, e.g.*, 2 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA, 802-06 (1862) (Statement of Benjamin H. Smith) (expressing his dislike of popular election of judges, but arguing in favor of long terms of tenure).

[399] W. VA. CONST. of 1863, art. VI, § 7.

[400] *Id.* at art. VI, § 4.

[401] *Id.* at art. VI, § 2; *see also* BASTRESS, *supra* note 395, at 11.

whereby each county was divided into townships in which voters could decide local matters.[402] Voters of the township gathered in a town meeting and elected one justice of the peace to a four-year term.[403] If the white population exceeded 1200, two justices could be elected.[404]

In short, West Virginia's first constitution reflected many of the democratic impulses that had led the citizens of the state to push for change while still citizens of Virginia. At its first opportunity, the new state pushed those changes a step farther by increasing direct participation by its citizens.

4. The Virginia Convention of 1867-68 and the West Virginia Convention of 1872

The post-war constitutions of Virginia and West Virginia were largely the product of the peculiar and powerful forces of Reconstruction. In Virginia, the longstanding method of doing the work of politics was shaken to its core. In West Virginia, the changes brought about by Reconstruction resulted in a backlash that briefly produced results contrary to the democratic nature of the newly founded state.

Against the backdrop of Radical Reconstruction, many native and conservative Virginians were resigned to the prospect of forced Republican rule when Virginia's constitutional convention was held in December 1867. This despair was perhaps best symbolized by the selection of John C. Underwood, a federal judge who had refused to grant Jefferson Davis bail after Davis had been charged with treason, as president of the convention.[405] Although a majority of the delegates to the "Underwood Convention" were southern whites, the convention was largely controlled by carpetbaggers, radical white southerners, and white and black Radical Republicans.[406]

Not surprisingly, the Radical Coalition considered a number of measures designed to secure Republican hegemony and to limit the

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[402] *Id.* at art. VII, § 1; *see also* BASTRESS, *supra* note 395, at 11.

[403] W. VA. CONST. of 1863, art. VII, § 2.

[404] *Id.*; *see also* CLAUDE J. DAVIS, JUDICIAL SELECTION IN WEST VIRGINIA 4 (1959).

[405] Richard L. Hume, *The Membership of the Virginia Constitutional Convention of 1867-1868: A Study of the Beginning of Congressional Reconstruction in the Upper South*, 86 VA. MAG. OF HIST. & BIOGRAPHY 461, 463 (1978).

[406] *See id.* at 478; WYTHE HOLT, VIRGINIA'S CONSTITUTIONAL CONVENTION OF 1901-1902 1 (1990). There were only fourteen native-born white Virginians at the convention. J. N. BRENAMAN, A HISTORY OF VIRGINIA CONVENTIONS 73 (1902). The convention's president was a New Yorker and the secretary and sergeant-at-arms were both Marylanders. *Id.*

political power of former Confederates who could be expected to vote Democratic.[407] Chief among the measures was the "test oath," which required future public officials to swear that they had never voluntarily aided the Confederacy.[408] Another successful attempt to disfranchise Confederate sympathizers was a provision that disfranchised every public official who had aided the Confederacy.[409] Another measure, which disfranchised all former Confederate officers, was passed but subsequently repealed by the convention at the suggestion of Republican leaders in Washington who feared that such measures could hurt the party nationally.[410] Still another measure that would have disfranchised those who had voted for secessionist delegates to Virginia's secession convention was defeated.[411]

The constitution that was ultimately produced also contained a number of progressive reforms. The constitution outlawed slavery, provided for a state-funded system of free schools, and established townships "to increase the number of local elective offices and to put citizens closer to their government."[412] What is somewhat puzzling was the convention's decision to abolish the system of popular election of the judiciary adopted during the 1850-51 convention and to return to a system of legislative appointment. For a body that was effectively devoid of the conservative element that had so dominated prior conventions and that had congregated in large measure to open up the political process to the previously disfranchised, the move is surprising in retrospect. Under the new constitution, justices of the supreme court of appeals and circuit court judges were once again to be chosen by a joint vote of the two houses of the General Assembly.[413] Moreover, the convention breathed new life into the most cherished of Virginia's judicial institutions, the county court system, by doing away with popular election of county court judges and placing the responsibility of their selection in the hands of the General Assembly.[414]

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[407] *See* Hume, *supra* note 405, at 467-68, 475.

[408] *Id.* at 467. When the constitution was ultimately ratified in 1869, this provision was voted on separately, defeated, and removed. *Id.* at 468 n.19.

[409] *See id.* at 466.

[410] *Id.* at 467.

[411] *Id.*

[412] HOLT, *supra* note 406, at 1.

[413] VA. CONST. of 1869, art. VI, §§ 5, 11.

[414] *Id.* art. VI, § 13.

The relatively brief debate (three days) on the judiciary offers little explanation for the switch back to legislative appointment. One plausible explanation for the return to the appointive system is that the debates on the judiciary occurred during the same three-week period toward the end of the convention when Republican forces were meeting with mixed success in their attempts to disfranchise many southern whites.[415] The debates on the judiciary transpired at a time when it was not all that clear how many former Confederates and Confederate sympathizers would be permitted to vote or hold office. The Republican-led convention ultimately apportioned representation in a manner that might help secure a Republican majority in the General Assembly.[416] Thus, it is possible that Republicans believed that instead of providing for popular election of judges in the midst of uncertainty, they could insure Republican control of the judiciary more easily by providing for legislative appointment.[417]

The forces of Reconstruction also played a significant part in the development of West Virginia. Fearful that returning Confederate soldiers would repopulate the Democratic Party, Radical Republicans in the legislature passed their own version of the test oath.[418] Republicans initiated a number of other measures designed to lessen the influence of former Confederates and Confederate sympathizers, including requiring the oath of litigants, attorneys, and public school teachers and taxing disproportionately counties with Confederate loyalties.[419] Republicans also required all registered voters to take the test oath and placed the power of enforcement in the hands of township registrars. If registrars did not enforce the oath to the liking of the county board of

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[415]The provisions to disfranchise former Confederate officers and public officials who had aided the Confederacy were introduced on March 6, 1868 and repealed on March 13. *See* Hume, *supra* note 405, at 466-67. The debates on the judiciary took place on March 19, 21, and 23. James Douglas Smith, *The Virginia Constitutional Convention of 1867-1868*, 123 n.21 (1956) (unpublished M.A. thesis, University of Virginia) (on file with the University of Virginia Special Collections Library). The "test oath" was passed on March 24. Hume, *supra* note 405, at 467. The provision to disfranchise those who had voted for secessionist delegates was defeated on March 26. *Id.*

[416]*See* Smith, *supra* note 415, at 132-34.

[417]*See generally* DEBATES OF THE CONSTITUTIONAL CONVENTION OF VIRGINIA 1901-1902, 1385 (Dec. 4, 1901) (statement of D.C. O'Flaherty) (arguing that the decision of the 1867-68 Convention to provide for legislative appointment of judges was made because Republicans believed that they could ensure a Republican bench more easily through legislative appointment than by popular election).

[418]BASTRESS, *supra* note 395, at 15.

[419]*Id.* at 16.

registrations, they were frequently removed from office. Although a decision by the township registrar to refuse registration was, at least in theory, appealable to the county board of registration, the board almost always sustained the registrar.[420] Eventually, even the Republicans came to recognize the obvious injustices of these measures and, through a combination of legislation and court decisions, the political rights of many Democrats were restored. The result was that the Democrats swept to power in the 1870 elections and promptly called for a new constitutional convention to take place in 1872.[421]

Most of the significant changes to the constitution were responses to Reconstruction abuses or "reversions to previously discarded notions from ante-bellum Virginia."[422] The only significant change concerning the judiciary involved the township system, which the delegates abolished, partially because of the registration abuses. In its place, the delegates revived the old Virginia county court system.[423] The anomaly of retaining one of the most anti-democratic institutions from Virginia in a state founded in large measure on strongly democratic principles did not last long, however. In 1880, a constitutional amendment stripped the county courts of most of their judicial powers and placed those powers in the hands of elected circuit court judges.[424]

5. *The Virginia Convention of 1901-02*

"If the corporations of this State wanted to put a man on the Supreme Court bench, all they would have to do would be to look after the Legislature."

- D.C. O'Flaherty, delegate to Virginia Constitutional Convention, 1901[425]

"If you want your judges picked by primarily lawyers from the large law firms and other politicians and political appointees . . . then you would be in favor of appointment."

- Justice Larry V. Starcher, West Virginia Supreme Court of Appeals

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[420] *Id.*

[421] *See id.* at 17-18.

[422] *Id.* at 19.

[423] *Id.* at 20-21.

[424] *Id.* at 22.

[425] DEBATES OF THE CONSTITUTIONAL CONVENTION OF VIRGINIA 1901-1902, *supra* note 417, at 1388.

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Virginia's first constitutional convention of the twentieth century took on a decidedly more modern tone with regard to the issue of popular election of judges. By the turn of the twentieth century, the Jacksonian "wave of constitution-making" that produced an expansion in the number of elective judiciaries on the state level had subsided. Although most states continued to employ an elective system, popular election had not proven to be the cure for the ills of the judiciary that many had believed. In some areas, public participation in judicial elections was low.[427] Moreover, the belief of many in the mid-nineteenth century that appointed judges were beholden to those who appointed them had begun to give way to the view that a different, but equally troubling, form of manipulation of the judiciary was occurring: control by political parties.[428] The public perception soon became that judicial nominations went to party activists and, thus, that many judicial candidates were simply party-controlled hacks.[429] As such, the fear was that judges were accountable to their party leaders, not to the electorate.[430] As a result, by 1927, twelve states had turned away from the partisan-elective judiciary model and began employing non-partisan election schemes.[431] The idea of merit-selection systems, in which judges were initially appointed by merit commissions and later stood for retention elections, was also born shortly after the turn of the century.[432]

By 1901, Virginia's conservative and aristocratic nature had mellowed with age. In addition, most of the western radicals of the past had now been citizens of another state for the better part of forty years. As a result, the sectionalism that had plagued earlier constitutional

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[426]Hamilton, *supra* note 30, at 20 (quoting Starcher).

[427]*See* Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345, 352-53 (noting that only ten percent of Tennessee's eligible voters went to the polls for the 1855 supreme court election); CITIZENS FOR INDEPENDENT COURTS, UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 108 (2000) [hereinafter UNCERTAIN JUSTICE].

[428]UNCERTAIN JUSTICE, *supra* note 427, at 108.

[429]John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 841-42 (1990).

[430]*See* Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 91 (1998); *see also* Roll, *supra* note 429, at 842; UNCERTAIN JUSTICE, *supra* note 427, at 108.

[431]Francis R. Aumann, *The Selection, Tenure, Retirement and Compensation of Judges in Ohio*, 5 U. CIN. L. REV. 408, 412 n.11 (1931).

[432]Roll, *supra* note 429, at 842-43.

conventions and had helped to create a system of popular election of judges in 1851 was largely missing from the convention of 1901-1902. In its place, however, was a split between proponents of the status quo and more progressive elements that were in fashion nationwide. This split produced the same basic difference in philosophy regarding the proper degree of popular participation in the election process. Although the debates concerning judicial selection between these two forces took place one hundred years ago, they sound familiar to those arguing about the same judicial selection issues today.

In the years following Virginia's prior convention, the election process had become a controversial issue. Some Virginians were concerned about "hordes of ignorant and worthless men marching to the polls" and negating the reasoned judgment of others.[433] Although the Reconstruction Era had at least offered the promise of participation in the political process by black citizens, Virginia instituted a poll tax in the late 1870s to limit the effects of votes cast by the "ignorant hordes" and to counteract the "Negro domination" of government.[434] Elections were a concern for far less reactionary reasons as well. Electoral fraud, which had been on the rise immediately following the Civil War, became more widespread toward the end of the nineteenth century as party politics began to take on greater importance.[435] The Democratic Party in particular, which had risen to power after Reconstruction, was divided by faction and was widely seen as corrupt and under the control of bosses and corporate interests.[436]

The chief impetus behind the call for the Convention of 1901-02 was to effectuate two goals, which some delegates saw as related – reform and the disenfranchisement of black voters.[437] Against this backdrop of fraud, party machinery, and racist sentiments, Progressives were in the majority when the delegates gathered in May 1901.[438] The traditional terms used to describe party allegiance and ideology, however, such as "Democrat," "Progressive," or "Republican," do not adequately reflect

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[433]HOLT, *supra* note 406, at 25 (quoting Carter Glass, a delegate to the 1901-02 convention).

[434]*See id.* at 5-42 (discussing obstacles to voter participation in Virginia following the Civil War).

[435]*Id.* at 59; Wythe Holt, Jr., *The Virginia Constitutional Convention of 1901-02: A Reform Movement Which Lacked Substance*, 76 VA. MAG. OF HIST. & BIOGRAPHY 67, 76 (1968).

[436]Holt, *supra* note 435, at 67.

[437]*Id.* at 67, 76-77. According to Holt, "[t]he occasion for this corruption was nearly universally conceived to be the presence of Negro voters, whom it was 'right' to disfranchise by any means." *Id.* at 76-77.

[438]*Id.* at 77.

the deep internal division present within the convention.[439] Within the Democratic Party, for example, there were "organization" Democrats, who were aligned with the Democratic machine that was perceived as corrupt, and "Independent Democrats," who were more reformist in nature.[440] There were "liberal Progressives," who favored greater political participation by the electorate and were steadfastly opposed to machine politics; "conservative Progressives," who were opposed to the machine politics of the time but had fears that the electorate had not been sufficiently "cleansed" of corruption to the point where it should be trusted to select members of the judiciary; and conservatives, who believed they were better able to decide who was qualified for some public offices than the electorate.[441] In sum, the ideological makeup of the delegates mirrored the deep political divisions within Virginia at the time. Although "Progressives" may have been in the majority, the views of the Progressive delegates were diverse and were shaped by the political realities of the time. As such, the disparate nature of the delegates to the convention prohibits easy categorization. Despite the strong reformist sentiment present among the delegates, the changes to the constitution produced by the convention did little to weaken machine control over politics in the state.[442]

During the constitutional convention, Progressive Democrats and Republicans met with mixed success in their attempts at reforming and democratizing the judiciary. The Progressive and Republican forces were successful in finally killing off the county court system. In the years following the 1868 constitution, the county court system had fallen further into disfavor as it increasingly became subject to control by party machines.[443] As the General Assembly was in control of the appointment process, "courthouse rings," groups of local officials closely tied to county judges, exerted their power to influence appointments in the General Assembly and distributed many of the spoils of local appointment possessed by the courts themselves.[444] Virginia, with its unusual institution of local justice, was in something of an interesting situation in this regard. In much of the rest of the country, the view was

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[439] *See id.* at 81 n.51.

[440] *See id.* at 74, 75 (using these terms).

[441] *See id.* at 80-82.

[442] *See id.* at 68.

[443] HOLT, *supra* note 406, at 190-91.

[444] *Id.*

that democratizing the bench had resulted in a system nearly as bad as that which had preceded it; instead of judges being beholden to a handful of elites in the governor's office, in the legislature, or in business, the concern now was that judges were beholden to the leaders of party machines for their appointments. Virginia had a similar problem, but for entirely different reasons. At the convention, the Committee on the Judiciary recommended abolishing the county courts.[445]

The reasons behind the abolition of the county courts are debatable. During the debates, Eugene Withers of Danville, an ardent supporter of popular election, claimed several times to "know nothing about" the reality of whether county judges led their own courthouse rings.[446] Despite such protestations, Withers stated that he was opposed to the continued existence of the county courts because "the representative from a county practically names the county judge," thus making judges dependent on their local representatives.[447] Withers further hinted at machine control, noting that a local judge was "more or less connected with the appointing powers of his county."[448] While admitting that some machines did exist, Judge W.G. Robertson of Roanoke, a supporter of the county courts, challenged the idea that corruption was as bad as alleged and argued that the courts were time-tested institutions that still served a useful purpose.[449] Robertson further scoffed at the idea that politics could ever be completely removed from the process of the selection of judges: "Whenever you hear of a fellow trying to get away from politics it means that he is trying to get up a little political machine of his own. He wants to get away from another fellow's politics."[450] Despite Robertson's appeals, his proposal to retain the county courts was overwhelmingly defeated.[451] After years of attack and attempted reform, the county court system was laid to rest.

Progressive and Republican delegates were less successful in their attempts to reestablish an elective supreme court of appeals and circuit courts. The Judiciary Committee's report recommended retaining

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[445] DEBATES OF VIRGINIA CONSTITUTIONAL CONVENTION 1901-1902, *supra* note 425, at 1308.

[446] *Id.* at 1334.

[447] *Id.* at 1332.

[448] *Id.* at 1334.

[449] *Id.* at 1321-22.

[450] *Id.* at 1321.

[451] *Id.* at 1340.

Virginia's current system of legislative appointment of judges. Progressives in Virginia were slightly behind the national curve in opposing the measure. Although partisan election of judges was still the norm by the beginning of the twentieth century, there was growing concern about the perceived weaknesses of partisan election of judges.[452] In Virginia, however, Progressives were refighting the earlier battles fought by reformists before the split with West Virginia over an elective judiciary. The difference this time was that the debates took place after the development of more modern political parties and political machinery and after numerous nationwide experiments with popular elections. As a result, the debates on the judiciary were more practical, less theoretical, and decidedly more modern in tone.

Led by Eugene Withers, supporters of an elective judiciary asserted a variety of arguments in favor of popular election. As in previous conventions, supporters relied heavily on the rhetoric of judicial accountability in support of their cause. Withers introduced his amendment to provide for election of judges of the supreme court of appeals by proclaiming that it was the right of the people to say who their judges should be.[453] To take the power of selection out of the hands of voters, argued C. V. Meredith of Richmond, would be to separate judges "from the great mass of the people and surround them by cliques and classes[.]"[454] Judges must know that "while we do not expect of them anything unjust or unfair, [we] want them to feel that there is some connection between them and the people[.]"[455] According to Meredith, the lack of such a connection may not affect the independence of judges, but it "does endanger their fairness."[456] D.C. O'Flaherty of Warren County brushed aside the concerns of opponents of judicial election that elected judges would be fearful of the consequences of unpopular decisions. According to O'Flaherty, "I do not believe any just judge will ever fear to do his duty because he may be 'turned down' at the polls. I say that any man who would decide a case because of fear does not deserve to be on the bench."[457] Other delegates sounded similar themes, citing the need for all departments of

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[452] *See supra* notes 427-33 and accompanying text.

[453] DEBATES OF VIRGINIA CONSTITUTIONAL CONVENTION 1901-1902, *supra* note 425, at 1375.

[454] *Id.* at 1396 (statement of C. V. Meredith).

[455] *Id.* at 1397 (statement of C. V. Meredith).

[456] *Id.* (statement of C. V. Meredith).

[457] *Id.* at 1388 (statement of D.C. O'Flaherty).

government to be responsive to the will of the people.[458] As Julian Quarles, an Independent Democrat, summed up the position of those in favor of popular election, "I would have the judges independent, – independent, so far as possible, of corrupting influences, but not independent of the people. I would have them feel their dependence upon the people, and thus subject to that moral sense of rectitude and wholesome restraint which belongs to public opinion."[459]

Citing Thomas Jefferson, supporters of an elective judiciary also challenged the notion that voters were incapable of selecting quality judges.[460] To O'Flaherty, it was illogical for opponents of popular election to argue that the people were qualified to select those in the legislative and executive departments, but not in the judiciary.[461] O'Flaherty and others challenged the idea that voters were not capable of selecting competent judges by arguing that Virginia's past experiment with an elective judiciary proved the fallacy in such a position.[462]

Although supporters of popular election by and large took great pains not to charge current members of the General Assembly with being under the influence of special interests, they expressed concern over the potential that "syndicates, trusts and corporations" would one day "control and dictate" the appointment of judges.[463] O'Flaherty and Withers both cited the influence of corporations on the legislature as a reason for placing the selection of judges in the hands of the people.[464] Withers charged that legislative appointment made judges dependent on the favor of the legislature and that the opportunities for influence-peddling were "certainly greater in any legislative body than they are among the people at large."[465] "I want to know," asked Withers, "who is demanding that the judges be not elected by the people. Is it the people or is it the corporations?"[466]

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[458] *Id.* at 1414 (statement of Quarles); *id.* at 1419 (statement of John S. Barbour).

[459] *Id.* at 1414.

[460] *Id.* at 1426 (statement of Pollard).

[461] *Id.* at 1372.

[462] *Id.* at 1373 (statement of O'Flaherty); *see id.* at 1383 (statement of O'Flaherty); *see id.* at 1414 (statement of Julian Quarles).

[463] *Id.* at 1411-12 (statement of Quarles).

[464] *See supra* note 426 and accompanying text (quoting O'Flaherty); DEBATES OF VIRGINIA CONSTITUTIONAL CONVENTION 1901-02, *supra* note 425, at 1375 (statement of Withers).

[465] DEBATES OF VIRGINIA CONSTITUTIONAL CONVENTION 1901-02, *supra* note 425, at 1373.

[466] *Id.* at 1375.

Supporters of popular election argued that, while any method of judicial selection was political by nature and carried with it the possibility of corruption, an elective system was actually less susceptible to unseemly influences on the judiciary than an appointive system. O'Flaherty charged that it would be easier to corrupt the legislature than the public at large:

> [T]he corporations can more easily control a few men than many. They cannot go out into the mountain fastnesses, the fields, and the factories, and see the individuals and buy them up. But under the present system all they have to do is to send their representatives, with their kid-gloves and their gold-headed canes, to stay at the portals of the Legislature, and if there is a possibility of purchase, it can be done right there.[467]

C. V. Meredith argued that politics was inextricably linked to the selection of judges and that it is better that judges be made to feel "the needs and the wants of the people," than "the influences and effects of classes and cliques."[468] Opponents of legislative appointment also charged that the process of appointment resulted too often in vote swapping and logrolling, situations in which the qualifications of a prospective judge were simply an afterthought.[469]

Finally, supporters of popular election attacked legislative appointment as an outdated relic from Virginia's past. Reformists mocked opponents of an elective judiciary for clinging to the old system of legislative appointment "simply because it is old."[470] In light of the radical changes to Virginia since its founding and the overwhelming number of other states to have adopted popular election, the time had come to place the power of selection back into the hands of the people.[471]

Opponents of the popular election of supreme court judges based most of their arguments on judicial independence and the corruption

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[467] *Id.* at 1388.

[468] *Id.* at 1397 (statement of Meredith).

[469] *See id.* at 1387 (statement of O'Flaherty); *see id.* at 1427 (statement of John Garland Pollard); *see id.* at 1541 (statement of Carter Glass, who favored appointment by the governor); *see id.* at 1546 (statement of O'Flaherty).

[470] *Id.* at 1427 (statement of Pollard).

[471] *See id.* at 1381, 1386 (statements of O'Flaherty).

that currently existed among the electorate. Although the supporters of popular election may have mocked them for clinging to the past, opponents were determined to stand, "as Virginia has always stood, by the system which has given us a judiciary able and pure and upright[.]"[472] Opponents of popular election frequently employed the rhetoric of judicial independence in support of the committee report's decision to retain legislative appointment. Responding to the statements of Quarles and Meredith that judges should be dependent upon the people, Alfred P. Thom, a railroad attorney from Norfolk, remarked, "I had never supposed I would hear from any source in this State a question that the true principle of government, the foundation rock of the safety of our liberties, is that our judiciary must be independent of everybody and dependent upon nobody."[473] Thom effectively summarized the views of modern advocates of judicial independence by commenting upon the different functions of the legislative and judicial branches:

> The very underlying principle that necessitates the election of the legislative department by the people is that the Legislature shall reflect the views and wishes of the people . . . who elect them. It is to make their official action respond to the wishes of the people; while the whole theory of a judicial system is that the men upon the bench shall respond to nothing except truth and justice; that they shall simply declare the law as it is, and that they shall make no law. . . .As I understand the function of a judge, it is to reflect nobody's views, nobody's wishes, nobody's theories in his decisions. The fundamental principle upon which our judicial system is founded is that there shall be absolute independence of every consideration except to find out what is the truth and to declare it.[474]

Opponents of popular election argued that no good could come of having judges subject to the will of those over whose cases they

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[472] *Id.* at 1379 (statement of Hill Carter).

[473] *Id.* at 1397.

[474] *Id.* at 1399.

presided.[475] For one, judges are human, and, no matter how pure of heart they might be, as humans they are susceptible of fear of the consequences that may follow from deciding a particular way in a given case.[476] For another, as Hill Carter of Hanover argued, the judiciary was conceived as the protector of minority rights, and to subject judges to election at the hands of the majority would be to lose a valuable safeguard of those rights.[477] Judges who are placed in positions where they are forced to fear the consequences of an unpopular decision they deem to be just based on the contrary view of the majority are unable to perform the function for which the judiciary was established.[478] As Thom argued, the result of placing judges in such positions "would be to serve notice upon the next court . . . elected that 'you must keep your ear to the ground to listen to the swell of popular thought and popular sentiment [and] you must make no decision, except such a decision as will strengthen the ticket on which you aspire to a place.'"[479]

Opponents of popular election raised a number of related arguments as well. Some alluded to the prospect that popular election would bring about distrust of the judiciary because citizens who had lost in front of a particular judge would suspect corrupt motives behind the judge's decision.[480] Others took up the challenge of O'Flaherty and asserted that the great mass of people were simply not as qualified as legislators to select the best judges.[481] Carter argued that because few citizens have cases in court, most citizens knew "little or nothing about" a particular judge's decisions.[482] Accordingly, a judge who was reluctant to engage in the rigors of a campaign was likely to be defeated by a candidate who was willing to "pat you on the back and play marbles and play the fiddle and talk with you."[483] Still others argued that the deep divisions within the parties in the state made popular election undesirable. Addressing the concerns of supporters of popular election that legislative

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[475] *See id.* (statement of Thom); *id.* at 1407 (statement of Rev. W.F. Dunaway); *id.* at 1416-17 (statement of Tucker Brooke).

[476] *See id.* at 1407 (statement of Dunaway); *id.* at 1416-17.

[477] *Id.* at 1376 (statement of Carter); *see id.* at 1399 (statement of Thom).

[478] *Id.* at 1400 (statement of Thom).

[479] *Id.*

[480] *Id.* at 1378 (statement of Carter).

[481] *See id.* at 1376, 1379 (statements of Carter); *see also id.* at 1418 (statement of Brooke).

[482] *Id.* at 1377.

[483] *Id.* (statement of Carter).

appointments were often the result of trades between legislators, R.S. Parks responded that the trading would be worse if the political parties were permitted to select candidates:

> What man who has ever dabbled in politics will say that there is no trading in a political convention, and that fitness is the only thing considered in the selection of candidates? We all know the candidates are frequently selected simply because of their relative position to other candidates upon the tickets, so far as the geography of the State is concerned.[484]

A.C. Braxton, an Independent Democrat from Staunton, argued along similar lines, suggesting that "[i]f the people could really, without manipulation, select their own judges, it would be an ideal thing to do."[485] The candidates who presented themselves, however, "are generally controlled by party machinery and political bosses."[486]

Underlying the discussion concerning party machinery was the concern over existing corruption within the state. Some argued that, given the current corrupt state of the electorate and the political parties, the system of popular election that existed following the 1850-51 convention was ill-advised.[487] For example, William E. Cameron, an Independent Democrat, argued that at the time of the 1850-51 Convention, "[t]he Whig and the Democrat were friends and neighbors" who fairly and good-naturedly opposed each other's positions.[488] In 1901, Cameron felt that the competing parties were "armies drawn up in phalanx of war" whose motives were not to be trusted in the selection of judicial nominees.[489] Regarding the composition of the electorate, Parks argued that, given the corrupt state of the electorate, it would "take years to secure such an electorate as we had between 1851 and 1865."[490]

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[484] *Id.* at 1556.

[485] HOLT, *supra* note 406, at 196 (quoting letter from Braxton to R. D. Haislip, Dec. 14, 1901, Braxton papers).

[486] *Id.*

[487] *See* DEBATES OF VIRGINIA CONSTITUTIONAL CONVENTION 1901-1902, *supra* note 417, at 1391 (statement of John Ingram); *id.* at 1406-07 (statement of Dunaway); *id.* at 1421-23 (statement of Cameron).

[488] *Id.* at 1423.

[489] *Id.*

[490] *Id.* at 1557.

John Ingram of Chesterfield argued that the electorate, which existed at the time of the 1850-51 Convention, was superior to the electorate of 1901.[491] In some cases, statements such as Ingram's appear to have been code for supporters of the movement to disfranchise black voters; in other cases, the meaning was self-evident.[492]

After vigorous debate, Eugene Withers' amendment to the committee report to provide for popular election of supreme court judges was defeated by a vote of forty to twenty-seven.[493] After losing on this issue, John Garland Pollard of Richmond immediately proposed that supreme court judges be appointed by the governor, subject to the advice and consent of the General Assembly.[494] For some supporters of Pollard's amendment, popular election of judges was still the preferred method of selection, but if it was not to be, gubernatorial appointment was the best alternative to the current system.[495] Chairman of the Legislative Committee R. Walton Moore, for example, argued that politics was less likely to control the governor's selection than the legislature's because the governor would be aware that "his appointment would be subject to review by the Legislature."[496]

Not all of the supporters of Pollard's amendment were supporters of popular election, however, and not all supporters of popular election were supporters of Pollard's amendment. Carter Glass, an Independent newspaper editor from the Lynchburg area, took the position that gubernatorial appointment was the best of the three options presented because it was the most likely to eliminate political bargains in the selection process. Glass was vehemently opposed to both popular election and legislative appointment.[497] According to Glass, the General Assembly was merely a "bargain-counter," although "[t]hat particular bargain-counter is better than the selection of judges by the

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[491] *Id.* at 1391.

[492] Ingram, like many of his counterparts, was candid in his opinion that the former slaves were to blame for the current condition. *See id.* ("And since that time, by a cruel decree of the Federal government, . . . their places have been taken not alone by their sons and their sons' sons, but by their former slaves."). *See also* Holt, *supra* note 435, at 94 ("It should be reasonably clear to the most casual reader of the *Debates* that the pervading issue at the Convention was disfranchisement of the Negro.").

[493] DEBATES OF VIRGINIA CONSTITUTIONAL CONVENTION 1901-1902, *supra* note 417, at 1425.

[494] *Id.* at 1426-27.

[495] *Id.* at 1427 (statement of Pollard); *id.* at 1531 (statement of R. Walton Moore).

[496] *Id.* at 1534.

[497] *Id.* at 1540 (statement of Glass).

manipulations of party conventions, because that is another bargain-counter of a different sort and a worse description."[498] With gubernatorial appointment, however, Glass did not anticipate "one one-thousandth part of the danger or abuse in the nomination of judges of the Court of Appeals by the Governor . . . as would ensue from the selection by the General Assembly, as now conducted."[499] Withers, one of the leading advocates of popular election, was unwilling to settle for executive appointment and argued that the danger of Pollard's amendment was that it threatened to pit the executive and legislative branches against each other.[500]

Eppa Hunton, Jr., chairman of the judiciary committee, opposed gubernatorial appointment on the grounds that it placed too much power in the hands of the governor.[501] To Hunton, the legislature was closer and more responsive to the will of the people than the governor. In contrast, the governor, by law, could only serve one four-year term of office. As such, placing the power of appointment in the hands of the governor would be taking power away from the people.[502]

The divisions within the Progressive ranks doomed the Pollard amendment to failure.[503] Not to be deterred by the defeat of the Pollard amendment, D.C. O'Flaherty promptly moved to have the circuit court judges elected by the people. For O'Flaherty, the consequences of permitting the General Assembly to continue to appoint circuit court judges were grim: if his measure did not pass, "local self-government must die."[504] The circuit courts were "closer to the people" than other courts, yet, under the plan of the judiciary committee, the people would be denied a voice in selecting their judges.[505] As important, under the proposed constitution, pending an election, circuit court judges would have sweeping appointive powers to fill vacancies in local offices, including those of sheriff, commissioner of the revenue, and county

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[498] *Id.*

[499] *Id.* at 1541.

[500] *Id.* at 1542. D.C. O'Flaherty also refused to support the Pollard amendment, believing that "if you are between the devil and the deep, blue sea, you had better take to the woods." *Id.* at 1545-46.

[501] *Id.* at 1539.

[502] *Id.*

[503] *See* Holt, *supra* note 435, at 82.

[504] DEBATES OF VIRGINIA CONSTITUTIONAL CONVENTION 1901-1902, *supra* note 425, at 1544.

[505] *Id.* at 1545 (statement of O'Flaherty).

board of supervisors.[506] Although the county courts, which had previously held such powers, had been abolished, their powers of appointments were given to the circuit courts under the proposed constitution. Thus, the same dangers of "courthouse rings" and party machinery would still exist.[507] O'Flaherty also took aim at the quality of circuit judges that existed under the current appointive system. He pointed out that his examination of appellate cases showed that sixty-three out of 105 cases from the circuit courts had been reversed by the supreme court of appeals.[508] Although O'Flaherty did not place all of the blame for the high reversal rate on the circuit courts, he argued "that Virginia has not been particularly blessed with judges who could agree with the Supreme Court of the State, at least. Something is wrong. Either we are not getting the best men for circuit judges or we are not getting the best men for the Supreme Court judges."[509]

After little debate, O'Flaherty's proposal also was defeated. By the end of the day, the Progressives suffered more defeats in their attempts to reform the judiciary than they achieved victories. Although there was widespread agreement that the time had come for the county courts to go, circuit courts would retain many of their powers. More importantly, despite repeated attempts to divest the legislature of control of the selection process, the General Assembly would remain in control of the selection of judges, as it does through today.

V. CONCLUSION

The experiments with legislative appointment and popular election of judges in Virginia and West Virginia suggest that the more modern scholars are essentially correct in their conclusions that the reasons behind the shift to elective judiciaries in the nineteenth century are more complex than originally thought. Although emotion and partisan politics almost certainly played roles in the debates concerning the popular election of judges, the constitutional conventions held in Virginia and West Virginia during the nineteenth century and earliest part of the twentieth century demonstrate that much more was at play. The delegates to these conventions considered a host of arguments –

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[506]HOLT, *supra* note 406, at 190-91.

[507]*Id.* at 189-91.

[508]DEBATES OF VIRGINIA CONSTITUTIONAL CONVENTION 1901-1902, *supra* note 425, at 1546.

[509]*Id.*

some theoretical and some practical – regarding the selection of judges. The debates also illustrate, however, that the trend toward elective judiciaries in the nineteenth century cannot be fully evaluated without some inquiry into the internal realities of the states that were caught up in the controversy. Based on the historical evolution of judicial selection methods in Virginia and West Virginia, it is reasonable to conclude that the current systems in both states are largely products of the times that spawned them. To a great extent, the current systems reflect the history and culture of both states.

The history of Virginia is essentially conservative. From their earliest days, citizens of Virginia were more or less content to allow a designated class to conduct the state's affairs. Although this was undoubtedly true for many of the early colonies, Virginia stands out for the degree to which these elites controlled government.[510] Virginia was one of the last states to provide for universal white male suffrage and popular election of the governor. Until well into the nineteenth century, the legislature, comprised mainly of landowning elites, was the source of power in Virginia and possessed considerable sway over the executive branch. Its powers over the purse and appointments gave the legislature a certain amount of control over the judiciary, but the members of the courts themselves largely came from the same class as the legislature. For nearly 250 years, conservatives in the East fought, for reasons both ideological and practical, to limit direct representation and popular participation. As the years have passed and the memories of the founding of Jamestown have faded, much of the conservatism associated with Virginia has faded as well. Virginia is no longer the bastion of elite-controlled government that it once was, but the historical roots of Virginia run deep and the state retains some of its distinctive aristocratic and conservative flair.

In contrast, the culture of modern-day West Virginia is much the same as it was at its inception. The history of West Virginia is essentially democratic. Born out of the Civil War, West Virginia struggled for nearly fifty years prior to the onset of the war to obtain a greater and more direct voice in the governance of Virginia. Lacking the same type of historical landed elite as its eastern neighbor, West Virginia evolved along a more democratic path.

Despite the foregoing, it would be an oversimplification to characterize the current judicial selection methods and controversies in

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[510] *See* SUTTON, *supra* note 150, at 1.

Virginia and West Virginia solely in terms of history or in terms of the elites versus the populists (or as Justice Larry V. Starcher of the West Virginia Supreme Court of Appeals has suggested "the Hilton Head/Lincoln Navigator crowd" versus "the Myrtle Beach/pickup truck folks"[511]). The history of both states and the issue of judicial selection are too complex. One is not necessarily an elitist for having reservations about some of the harmful consequences of subjecting judges to popular election, and one is not necessarily a wild-eyed populist for seeing problems in excluding citizens from the process of deciding who decides questions of law affecting their everyday lives. Moreover, there are simply too many cultural, economic, and historical forces at play to make sweeping generalizations about entire states. Nor is it possible to paint a black and white picture in which easterners in Virginia's early constitutional conventions were the noble defenders of judicial independence and westerners were the idealistic proponents of judicial accountability. Clearly, both sides offered theoretical justifications for their competing positions, but the simple practical desire for power in government also played a large role.

Still, one cannot escape the conclusion that the current selection methods in place in both states do, to a large measure, reflect the history and culture of both states. As one historian has stated, "[t]he history of constitutional conventions in the Old Dominion between the Revolution and the Civil War . . . is a story of a sectional struggle over whether or not its fundamental law should rest upon and be responsive to the will of the people."[512] Throughout the colonial period and up to the 1850-51 convention, a distinct minority in the East controlled the political power in Virginia. Not surprisingly, easterners were reluctant to give up their elite status.[513] The democratic reforms pushed by westerners during these conventions directly threatened easterners' grip on that power.

The arguments advanced by Virginia conservatives during the 1829-30 and 1850-51 conventions appear to contain a mixture of self-

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[511]State ex rel. Carenbauer v. Hechler, 542 S.E.2d 405, 431 (W. Va. 2000) (Starcher, J., dissenting). Justice Starcher's comments were in reference to a remark made by Chief Justice Elliot Maynard to the effect that a recent decision by the court would provide a windfall to plaintiffs, which could be spent on pickup trucks and Myrtle Beach vacations. *Id.* at 431 n.5. In his dissent to the majority decision prohibiting Justice McGraw's attempt to run for a twelve-year term on the bench while still retaining the original seat to which he had been elected, Justice Starcher stated the majority decision "successfully assisted the Hilton Head/Lincoln Navigator crowd in hijacking an election from the Myrtle Beach/pickup truck folks." *Id.* at 431.

[512]SUTTON, *supra* note 150, at 154.

[513]*See* BRUCE, *supra* note 212, at xiii.

preservatory instinct and political theory. It is debatable whether the conservatives' arguments about the "tyranny of numbers" and the dangers in letting the majority trample the rights of the minority reflected deeply held principles of government or were transparent rhetorical devices advanced to preserve eastern power. In the battles over representation and suffrage, such arguments were essential to allowing easterners to maintain control of the legislature; the only way the West could see its goals of internal improvements and other tangible measures met was by having an increased presence in the legislature.[514] Although democratic reforms to the judiciary would unquestionably have weakened the control of the legislature (largely controlled by easterners) over the judiciary, such measures were unlikely to have the same sort of tangible consequences for the East as would expanded suffrage and more equitable representation in the legislature. Thus, while questions over the selection, composition, and removal of judges may have involved a power struggle between easterners and westerners, it is difficult to discount completely the sincerity of the arguments in favor of judicial independence advanced by some conservatives.

Whatever the case, the arguments that were most vocally advanced in opposition to efforts to equalize representation and to expand suffrage were very much in keeping with the arguments in favor of judicial independence promoted by some conservatives. For conservatives, any reforms of the judiciary that brought the judiciary into closer contact with the people or their elected representatives risked making judges dependent upon the will of the majority. In a similar vein, conservatives argued that democratizing the judiciary meant risking the stability of the state that had been maintained in no small part by those who had a "special fitness" to govern.

Although the forces of history had weakened conservatives' grip on power by the Civil War, some of their guiding principles still found form in Virginia's post-war constitutional convention debates. With the power to select judges once again back in the hands of the legislature following the Underwood Convention of 1867-68, Virginia conservatives were loathe to place that power back in the hands of the electorate. In opposing attempts to provide for popular election, delegates to Virginia's 1901-02 convention who were of a more conservative bent advanced many of the arguments that had been advanced during the prior conventions. Namely, the more conservative delegates wanted to

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[514] *See* SUTTON, *supra* note 150, at 59.

insulate the courts from the whims of the majority and provide elected representatives, not ordinary citizens, with the authority to select the judges. Compounding the difficulty of reformers during the 1901-02 convention was the fact that political parties were now viewed as having a harmful effect on the judicial selection process. Thus, opponents of popular election were able to summon the voices of John Marshall and other proponents of judicial independence and combine them with new arguments against the perils of entrusting the electorate with the task of selecting judges.

Although political considerations cannot be discounted, conservatives so frequently cited the theme of judicial independence during the debates that one is forced to conclude that at least some of the professed desire for judicial independence was genuine. The emphasis conservatives placed on life tenure during the 1829-30 convention and their opposition to any attempts to weaken the judiciary's position relative to the other branches was consistent with the strongly pro-judicial independence views of Hamilton on the federal level. Many of the delegates at the 1901-02 convention again sounded the theme of judicial independence in response to what they perceived as the dangers of a larger, less-informed electorate and a more corrupt and divisive political system than had previously existed in Virginia. In short, the dominant view in Virginia was that a more independent and more qualified judiciary could be selected if the selection process were kept away from political parties and in the hands of those with more experience and more knowledge about matters of law and government.

In the ensuing 100 years, the memories of the ruling elite in colonial Virginia and their philosophies have faded. Virginia, however, still retains some of its conservative flair. It has proven to be a difficult task to convince those in power to relinquish some of that power, particularly when the practice in question has such deep historical roots. Thus, it is hardly surprising that the forces of history and governmental theory have combined to ensure that the power to select judges in Virginia still resides with the legislature.

In contrast, as the arguments of the largely western reformist delegates during the conventions of 1829-30 and 1850-51 and the subsequent West Virginia constitutional conventions illustrate, West Virginia was founded on the notion of greater direct participation and more equal representation in the affairs of government by the citizens. Undoubtedly, some of the calls for the popular election of judges during the 1829-30 and 1850-51 conventions can be closely linked to the West's

attempts to redistribute political power within Virginia. However, the attempts of western reformists to provide for popular election were also part of a nationwide trend toward increased accountability in the judiciary; thus, they were probably not exclusively the product of a naked power struggle with the East. It was perhaps the strongly anti-democratic nature of Virginia government up until the mid-nineteenth century that prompted such emphatic feelings about the need for democratic reform of the judiciary. The West Virginia Constitutional Conventions that followed the Reform Convention of 1850-51 solidified these egalitarian tendencies. To take the power of judicial selection away from the people would be to go against over 150 years of history.

Aside from the blips in constitutional development brought about by the powerful forces of Reconstruction, the history of judicial selection in both states after the Civil War has remained fairly constant and consistent with the two states' positions prior to that struggle. These deep historical roots help to explain the relative stability in the methods of judicial selection in both states during the twentieth century when other states experimented with new methods. In both states, it has been over 130 years since major changes in the selection process have been made. In that time, non-partisan elections gained favor throughout the country and the concept of merit selection was born.[515] During that time, several states have experimented with some, or all four, of the primary methods of judicial selection.[516] At the time of the last serious debates as to judicial selection in Virginia and West Virginia, the non-partisan election and merit selection options were not widely in place.[517]

History, however, can only explain so much. For example, history has obviously been quite hard on old Virginia's theories on suffrage and

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[515] *See supra* notes 431 & 432 and accompanying text.

[516] *See, e.g.*, Handberg, *supra* note 107, at 128 (noting Florida's experiments with non-partisan elections, gubernatorial appointments, and merit selection).

[517] Virginia can lay claim to having a hand in inspiring the major judicial reform movement of the twentieth century. The idea of merit selection first gained exposure through the creation of the American Judicature Society (AJS) in 1913. *See* Daughtery, *supra* note 69, at 318. Merit selection was originally conceived as a compromise between the elective and appointive systems of selection. *See id.* The AJS was based on the model established by the Short Ballot Organization, an election reform organization consisting of, among others, Woodrow Wilson and Columbia professor Charles Beard. *See* Michael R. Belknap, *From Pound to Harley, the Founding of AJS*, 72 JUDICATURE 78, 81 (1988). Among other reform measures, the Short Ballot Organization championed the idea of the city manager form of government, a system in which voters elected a small city council, which, in turn, appointed a professional administrator to run the city. *See id.* The city manager system was first pioneered by the city of Staunton, Virginia, *see id.*, which, in 1816, was the site of one of the earliest protests and calls for judicial elections. *See supra* note 255 and accompanying text.

representation, and, although "new Virginia" still retains some ties to "old Virginia," the old notions of a landed elite controlling government is a distant memory. Although the historical roots of formation and early development are strong in both Virginia and West Virginia, they cannot be so strong as to prevent any future consideration of the question of judicial selection. The problems associated with a larger electorate and the growth in the importance of political parties that the delegates to the Virginia Convention of 1901-02 wrestled with have only grown in the ensuing years. Moreover, the dangers of influence-peddling by special interests in the appointment and election processes are every bit as great as they were at the beginning of the twentieth century. Similarly, the power of modern courts to shape policy on matters of great importance to many citizens' daily lives provides a parallel to the broad powers entrusted to the old appointed county courts in Virginia. These kinds of issues naturally implicate the questions of whether to place greater value on the goal of judicial independence or the goal of judicial accountability. Thus, it is only natural that Virginia and West Virginia have been caught up in the national debate as to whether to elect their judges, whether to have them appointed by another branch, or whether to adopt a merit plan. As this Article illustrates, the modern arguments advanced in support of these competing visions draw heavily from the combatants on this same subject over 100 years ago.

Despite, and perhaps because of, their inertia on the subject over the last century and a half, Virginia and West Virginia are at an appropriate point in their development to undertake such a re-examination. The arguments advanced by both sides during the debates of the past still carry much of their original force. In light of the complexities of the issue and the growing public concern over the issue, it is time for both states to look to the future.