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ARTICLE

WHOSE BRIGHT IDEA WAS THIS ANYWAY? THE ORIGINS OF JUDICIAL ELECTIONS IN MARYLAND

By: Yosef Kuperman¹

This paper describes how Maryland switched from the life-tenured appointed judiciary under its original Constitution to an elected judiciary. It traces the history of judicial selection from the appointments after 1776 through the Ripper Bills of the early nineteenth century to the eventual adoption of judicial elections in 1850. It finds that the supporters of judicial elections had numerous complex motives that boiled down to trying to make the Judiciary less political but more publically accountable. At the end of the day, Marylanders trusted elections more than politicians.

I. INTRODUCTION

Nobody likes electing judges these days; it produces bad results. After Baltimore County Circuit Court Judge Alexander Wright infamously lost his seat in a contested primary election in 2000, for example, the Baltimore Sun blamed “ballot position and dirty tricks.”² The Sun understandably called for reform.³ After Wright, reappointed to the bench within weeks of his defeat, lost again in 2002, the Baltimore Sun cited various explanations — racism, dirty politics, bad campaigning, and voter ignorance.⁴ Not one of these possible explanations reflects well on judicial elections.

¹ Yosef Kuperman is a Maryland attorney and a fan of history. Yosef would like to thank the Honorable Frederic N. Smalkin (retired), whose advice considerably improved this paper, and the many other people who proofread, edited, commented on, and cite checked this. Yosef accepts sole credit only for the mistakes.

² Editorial, *An Ugly Process*, BALT. SUN, Mar. 9, 2000, at 20A. The Baltimore Sun ascribed Judge Wright’s defeat not to racism, but to the fact that “Wright” appears last on alphabetical lists and to dirty tricks. (Judge Wright would have been the first African American judge elected in Baltimore County.) Judge Robert Dugan, whom the Sun had accused of playing the dirty tricks, wrote a letter to the editor denying those allegations. The Honorable Robert Dugan, *Letter to the Editor*, BALTIMORE SUN, Mar. 25, 2000, at 12A.

³ Editorial, *supra* note 2, at 20A.

⁴ Jonathan Rockoff & Stephanie Hanes, *Judge’s Loss Spurs Questions of Racism*, BALT. SUN, Nov. 7, 2002, at 1B. Judge Wright himself declined to ascribe his defeat to racism. *Id.* University of Baltimore School of Law Professor Byron Warnken,

Calls for reform abound. Numerous writers have devoted countless articles and books to fixing the system.⁵ To highlight a local example, Dana Levitz and Ephraim Siff recently published an article explaining how Maryland should change the election of circuit court judges.⁶ So far, voters remain unpersuaded.⁷

Although reform remains a current topic, people rarely ask why Maryland adopted judicial elections in the first place. Whose bright idea was this anyway? On reflection, judicial elections do not make much sense. They deliberately politicize a branch of government whose legitimacy depends precisely on being apolitical. They are not just another historical left-over like the Electoral College. Maryland originally used life-tenure and executive appointments like the United States Constitution.⁸ In fact, judicial elections are not even part of the wider common law tradition. “Almost no one else in the world has ever experimented with the popular election of judges.”⁹ However, Maryland seems set on keeping them.

Maryland originally adopted judicial elections as part of a larger judicial reform aimed at making judges less political and at the same time more answerable. Marylanders simultaneously switched from life-tenured appointed judges to elected, term-limited judges because Marylanders wanted judges to answer to the people, not the politicians. This change did not take place suddenly, or in a vacuum. Maryland had a long and troubled history with life-tenure. Introduced after the revolution, it received little respect. Maryland in fact fired its entire judiciary between 1801 and 1806

interviewed at the time, felt that “what really happens for the vast, vast majority of voters is they have no idea who the candidates are.” *Id.* The controversy attracted enough attention at the time to generate a series of letters to the editor. *See Letters to the Editor*, BALT. SUN, Nov. 13, 2002, at 14A; *Letters to the Editor*, BALT. SUN, Nov. 19, 2002, at 14A.

⁵ *See, e.g.*, JED SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012).

⁶ Dana Levitz & Ephraim Siff, *The Selection and Election of Circuit Judges in Maryland: A Time for Change*, 40 U. BALT. L.F. 39 (2009).

⁷ 81.9% of state appellate judges and 87% of state trial judges must still stand for election. ABA, Report No. 2 of the Task Force on Lawyer’s Political Contributions, Part 2, Attachment B. (1998) *But see* Roy A. Schotland, *Comment*, LAW & CONTEMP. PROBS., Summer 1998, at 149, 154, which puts the numbers at 87% for both.

⁸ U.S. CONST. art. III, § 1. The Constitution adopted life-tenure because the British had adopted it to prevent the King from sacking judges who ruled against him. *See* Shugerman, *supra* note 4, at 15-18. They thought it would protect judicial Independence against a tyrant. *Id.*

⁹ Shugerman, *supra* note 5, at 5. This needs some qualifiers. Parliament, for example, originally had a judicial component to it, as did some colonial assemblies. *Id.* at 14-15. Some relics of this persist until modern times. Massachusetts’s legislature remains the “General Court” even today, and Britain’s highest court of appeals was technically a committee of the House of Lords until 2009.

after the Jeffersonians drove the Federalists from office. Complaints about hyper-partisan judges were still present in 1850, when Maryland adopted judicial elections. Marylanders believed that judicial elections would cure those problems by making the judges answerable directly to the people, instead of the corrupt politicians.

II. REVIEW OF LITERATURE

Early historians of judicial elections thought that judicial elections emerged from the trend towards popular rule during the Age of Jackson. Viscount James Bryce, for example, discussed judicial elections when trying to explain American democracy to a British audience.¹⁰ Bryce ascribed judicial elections to “a wave of democratic sentiment” that “swept over the nation” during the Jacksonian period.¹¹ To Bryce, judicial elections were a terrible idea to which Americans stuck out of “obedience to a so-called [democratic] principle.”¹² Learned Hand similarly attributed judicial elections to “a burst of democratic enthusiasm” and “the full tide of Jacksonian democracy.”¹³ Some historians interpreted this movement as an attempt to bring the judiciary to heel by making them responsible to the people; others saw it as a partisan move by Jacksonian political outsiders

¹⁰ James Bryce, 1st Viscount Bryce OM, GCVO, PC, FRS, FBA was a British jurist, historian, and politician. He served as British Ambassador to the United States from 1907 to 1913. Bryce based his observations on a Tocqueville-esque tour of the United States.

¹¹ JAMES BRYCE, 2 MODERN DEMOCRACIES 63 (1921). Bryce interestingly ascribed the related American drive for direct legislation, in part, to a popular belief in “a sort of mystical sanctity not susceptible of delegation [that] dwells in the Whole People,” although he also credited anger at special interests and “a deep-rooted distrust of State Legislatures.” *Id.* at 93.

¹² *Id.* at 93.

¹³ Learned Hand, *The Elective and Appointive Methods of Selection of Judges*, in 3 PROC. ACA. POL. SCI. N. Y. 130, 130-31. (Henry Musey, ed., 1913).

aimed at seizing judicial power.¹⁴ Both of these explanations — as later historians demonstrate — are simply wrong.¹⁵

Modern historians challenged this interpretation beginning with Kermit Hall in 1983. Hall argued that judicial elections were a lawyerly attempt to enhance judicial power and prestige by tying judicial office to the ultimate source of legitimacy — the ballot box.¹⁶ According to Hall, politically moderate lawyers dominated the constitutional conventions that adopted judicial elections.¹⁷ They thought that judicial elections would lead to faster, more prestigious, more independent, and less political courts.¹⁸ Elections would allow judges “a regular opportunity to have their power confirmed in the same way as governors and legislators.”¹⁹ Elections would give judges the political legitimacy to curb the legislature and create “judicial legislation.”²⁰

Ten years later, Caleb Nelson rejected Kermit Hall’s theory.²¹ If judicial elections were merely a lawyerly plot, they would not have received enthusiastic popular support.²² Although many lawyers at the conventions supported judicial elections, that support simply reflected the enormous

¹⁴ See generally Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 338-39 (1983) (summarizing existing literature on the subject). Interestingly, much previous scholarship obsesses about New York’s seminal role in starting the ball rolling in 1846. See, e.g., Russell Niles, *The Popular Election of Judges in Historical Perspective*, 21 Rec. Ass’n B. City N. Y. 523, 523 (1966) (claiming that if not for New York’s experience, “we might not now have elected judges . . . in the United States.”) Hall discards this theory as erroneous based on studying the debates from the constitutional conventions that allegedly followed New York’s lead. Hall, *supra* note 14, at 340, n. 14. This author’s own perusal of Maryland’s debates convinces him that Hall is correct.

¹⁵ See Caleb Nelson, *A Reevaluation of the Scholarly Explanations for the Rise of the Elective Judiciary in Ante-Bellum America*, 37 Am. J. Legal Hist. 190, 193-99 (1993) (rebutting the “partisan” explanation of the origins of judicial elections with cold hard facts.) See also Hall, *supra* note 14, (rebutting the “judicial leash” theory with cold hard facts.)

¹⁶ Hall, *supra* note 14, at 354.

¹⁷ *Id.* at 342-43. The only exception was Massachusetts.

¹⁸ *Id.* at 343; see Kermit Hall, *The “Route to Hell” Retraced: The Impact of Popular Election on the Southern Judiciary, 1832-1920*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 229, 230 (David Bodenhamer & James Ely, eds., 1984).

¹⁹ Hall, *supra* note 14, at 350.

²⁰ *Id.* at 350-51.

²¹ Nelson, *supra* note 15, at 203. Strangely, Nelson seems to misread Hall’s work. He claims that Hall “is wrong to suggest that [moderate reformers] identified legislatures with popular majorities.” *Id.* Hall simply does not say that. In that light, Nelson’s theory does not refute Hall’s theory, but rather expands on it.

²² *Id.*

popularity of judicial elections.²³ In fact, even after lawyers soured on the idea during the Progressive Era, judicial elections remained (and remain) popular.²⁴

Rather, Nelson suggested that judicial elections “arose from the people’s profound distrust of their own government.”²⁵ The conventions that instituted judicial elections wanted the elected judiciary to restrain not only majorities, but also the entire government.²⁶ Judges had to protect the people against their corrupt legislatures and governors.²⁷ To protect the people from the government, the judges had to be independent of the government. Practically, that meant direct elections. But the conventions did not trust the judges any more than the legislatures. Judicial elections were “part of a coherent program to rein in not just the legislatures, but all the people’s agents.”²⁸

In February, 2012, Jed Shugerman expanded on Nelson’s theory. Writing about the history of judicial independence, Shugerman observed that judicial elections arose from widely held beliefs in judicial independence and the separation of powers.²⁹ Advocates of judicial elections always claimed that the elections would promote “judicial independence and constitutional protections.”³⁰ They hoped that an elected judiciary would provide a “less partisan and less politicized bench” that could check the other branches of government.³¹

Shugerman placed judicial elections firmly in their historical context. Judicial elections appeared in response not only to “ideas about judicial independence, parties, and democratic politics” but also to “interest groups and economics.”³² The conventions that adopted judicial elections during the antebellum period did so as part of a larger response to economic panics in the 1830s and 40s.³³ Those conventions blamed their economic woes on “legislative overspending on internal improvements.”³⁴ They therefore attempted to limit legislative power by various means, including by creating a stronger and more independent judiciary.³⁵

None of these theories properly describes what happened in the Maryland Convention or address Maryland’s unique history leading up to change.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Nelson, *supra* note 15, at 205.

²⁷ *Id.* at 206.

²⁸ *Id.* at 207.

²⁹ SHUGERMAN, *supra* note 5, at 6-9.

³⁰ *Id.* at 6.

³¹ *Id.*

³² *Id.* at 8.

³³ *Id.* at 10.

³⁴ SHUGERMAN, *supra* note 5, at 10.

³⁵ *Id.*

Judicial elections, at least according to the men who advocated for them on the convention floor, did not aim to keep the legislature from squandering money. Rather, the elections were intended to reduce political corruption and secure a more honest judiciary by taking the power to appoint judges away from venial public servants.

III. COLONIAL – 1801

Early Maryland efforts to improve the judiciary never contemplated judicial elections. Before 1776, Maryland had no judicial elections and preserved its judiciary largely unchanged through the American Revolution. When Maryland finally implemented major judicial reforms in the 1790s and early 1800s, it did not implement elections. Instead, the reforms attempted to improve the judiciary by implementing a professional, life-tenured system based on gubernatorial appointments.

Maryland's Judiciary during the colonial period resembled England's during the same period. Justices of the peace and county courts heard small matters locally.³⁶ More important matters and appeals from the county courts came before the "Provincial Court" in Annapolis, the equivalent of England's King's Bench.³⁷ Disappointed litigants in the Provincial Court could appeal to a "Court of Appeals," which consisted of the Governor and Council, but few did.³⁸ From there, truly aggrieved litigants could appeal to the King's Privy Council in England, but even fewer bothered.³⁹ Lacking professional judges, Maryland staffed the courts with justices of the peace.⁴⁰ Every judge

³⁶ CARROLL BOND, *THE COURT OF APPEALS OF MARYLAND: A HISTORY* 4 (1928), available at <http://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000368/html/am368p--1.html>. Carroll Bond served as Chief Judge of the Court of Appeals from 1924 until 1943, and chaired the "Bond Commission" for reforming the Court of Appeals of Maryland.

³⁷ *Id.*

³⁸ *Id.* at 53. The "Court of Appeals" was actually a side-job of the governor and his council, and not an important side job at that. *Id.* In May Term, 1776, for example, Bond reports that the Court had all of seven appeals docketed for the term. *Id.*

³⁹ *Id.* at 42-43. Due to travel costs, appeals to the British privy council were apparently impractical for most litigants. The privy council still exists and still hears appeals from (among other things) some Commonwealth countries, the Court of Admiralty of the Cinque Ports, and the Disciplinary Committee of the Royal College of Veterinary Surgeons. *Role of the JCPC*, JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, <http://www.jcpc.gov.uk/about/role-of-the-jcpc.html>, (last visited Jan. 24, 2013).

⁴⁰ BOND, *supra* note 36, at 8-11. Bond points out that although the judges were laymen, laymen in the colonial period knew far more law than layman today. These laymen also used young lawyers as clerks and could refer difficult questions to the Maryland Bar. *Id.* at 11-15. Also, some lawyers found their way onto Governor's council, so the court system was not entirely bereft of trained legal minds. *Id.* at 44-45.

and justice of the peace served at the pleasure of the governor, although by the middle of the eighteenth century, judges customarily sat until voluntary retirement.⁴¹

Maryland adopted a more modern-looking court system in its post-Revolutionary Declaration of Rights and Constitution.⁴² The governor and council lost their judicial functions.⁴³ Instead, the Constitution established a new Court of Appeals, “composed of persons of integrity and sound judgment in the law,” to supervise the entire judicial system.⁴⁴ The Provincial Court, its membership set at three lawyers, became the “General Court.”⁴⁵ The county courts, however, continued to be lawyer-free.⁴⁶ For the most part, the personnel, except in the Court of Appeals, remained the same.⁴⁷ The judges at every level held their position with life-tenure after gubernatorial appointment.⁴⁸

Maryland’s new Court of Appeals had trouble getting off the ground for want of qualified personnel. At the first session of the General Assembly in February, 1777, the House of Delegates sent the Senate a list of nominees for every office in the new Constitution.⁴⁹ But the Delegates had trouble finding anyone suitable for the Court of Appeals.⁵⁰ Due to the low workload and low salary, the seats on the court were not a full time job, but the judges could not take other legal work.⁵¹ The Delegates finally nominated and the Senate finally appointed the five judges to the Court of Appeals in January, 1779.⁵²

⁴¹ *Id.* at 55. The American colonies used appointed judges and justices of the peace everywhere except Rhode Island and Connecticut. RICHARD ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 6 (1971).

⁴² *See, e.g.*, MARYLAND DECLARATION OF RIGHTS OF 1776, art. VI (embracing separation of powers in principal).

⁴³ *Id.* at art. LVI.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at art. XL, XLVIII.

⁴⁷ BOND, *supra* note 36, at 62.

⁴⁸ MD CONST. OF 1776, art. XL, XLVIII.

⁴⁹ VOTES AND PROCEEDINGS OF THE HOUSE OF DELEGATES OF THE STATE OF MARYLAND, H.D. FEB. 1777 1st. Sess., at 58-60 (1777).

⁵⁰ *Id.* at 60; BOND, *supra* note 36, at 61-62.

⁵¹ BOND, *supra* note 36, at 64-65.

⁵² VOTES AND PROCEEDINGS OF THE HOUSE OF DELEGATES OF THE STATE OF MARYLAND, H. D. OCT. 1778, 1st. Sess. at 64-65 (1778). BOND, *supra* note 36, at 63. The General Assembly chose to name five judges because five judges had formed a quorum when the colonial Court of Appeals met without the governor or the president of the council. *Id.* at 62. The House of Delegates had originally wanted to name three judges and have the remaining two seats filled by the chief judges of the three lower courts (i.e. the Chancellor, the Judge of the Admiralty Court, and the Chief Judge of the General Court) —the chief judge of the originating court would recuse himself. *Id.* at 61. Although this may have mitigated the personnel problems

Even then, the court did not hear cases until after the Revolution because the judges were busy with the war effort.⁵³ The Court of Appeals received its first transcripts in October, 1780 and heard its first case in May, 1783.⁵⁴ Staffing problems proved endemic. Although one judge left the bench in 1783 and another died in 1792, Maryland did not replace them until the Jeffersonians took power in 1801.⁵⁵ Apparently nobody wanted the job.⁵⁶

The lower courts, meanwhile, were slowly decentralizing to improve efficiency. In 1785, Maryland enlarged the jurisdiction of the county courts. To get into the General Court, a case needed to be worth at least “one hundred pounds of current money.”⁵⁷ Nevertheless, the system remained “attended with great inconvenience, delay and expense, to suits, witnesses and jurymen” and a lack of “uniformity of legal decisions.”⁵⁸ In 1790, Maryland (imitating the Federal Judiciary Act of 1789) implemented a new system of five judicial districts to cover the state.⁵⁹ Each district consisted of one chief justice, with legal training, and two associate justices, without legal training, in each county.⁶⁰ These new judges, unlike the justices of the peace whom they replaced, held life-tenure.⁶¹

This system developed its own problems. Declaring that “uniformity of legal decisions ought to be obtained as far as the circumstances will permit,” Maryland passed another judicial reform in 1796.⁶² The law expanded the powers of the new justices. They could now handle bail, acknowledge deeds, and compel discovery of documents in actions at law using chancery court procedures.⁶³ Maryland also banned various practices. Justices on the new district courts could no longer “act as an attorney or solicitor in any court of law or equity” while in office.⁶⁴ Plaintiffs in suits to collect debts could no longer arrest defendants outside of the county in which the suit took

on the Court, the Senate rejected the plan because it would entangle the appellate judiciary and the trial courts. *Id.*

⁵³ BOND, *supra* note 36, at 72-74.

⁵⁴ *Id.* at 69-70, 74.

⁵⁵ *Id.* at 78.

⁵⁶ *Id.*

⁵⁷ 1785 Md. Laws 142.

⁵⁸ 1790 Md. Laws 496.

⁵⁹ 1790 Md. Laws 497 (each district contained multiple counties).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 1795 Md. Laws 221.

⁶³ *Id.* at 222. At common law, actions had no discovery. In Equity, however, actions did. This bill allowed (among other things) county judges to issue bills of discovery to compel the disclosure of books or writings in the possession of the litigant.

⁶⁴ *Id.*

place.⁶⁵ Lawsuits could not continue beyond “the end of the first court after the imparlance court” without mutual consent or the discretion of the court.⁶⁶

The reforms did not prove a panacea. One observer in 1802 felt that creation of judicial districts had allowed “all the mischiefs and inconveniences that could possibly result from a combination of ignorance, prejudice, and partiality.”⁶⁷ The associate justices “labour[ed] under an invincible ignorance” and sat “mute as alabaster busts” while the chief justice dictated the law “as the Pope among the Cardinals . . . infallible.”⁶⁸

IV. 1800-1805: THE JEFFERSONIAN REVOLUTION

Maryland’s judiciary reforms grew extremely political once power changed hands. When the Jeffersonians won control of the Maryland House of Delegates in 1800, they reformed the judiciary. Again, they made no mention of judicial elections. The initial judicial reforms were not real reforms at all. The Jeffersonians implemented them to steal patronage positions from defeated Federalists despite the life-tenure provisions. They used a series of “ripper acts” to fire the Federalist judges despite life-tenure and succeeded in completely replacing the entire judiciary within half a decade.⁶⁹

⁶⁵ *Id.*

⁶⁶ *Id.* at 223. The “imparlance” court is the court that takes the pleadings in a case. The wording of 1795 Md. Laws 221 Section 11 is simply confusing. “Unless by the consent of parties, at the discretion of the court,” or good legal cause.

⁶⁷ JOHN LEEDS BOZMAN, A NEW ARRANGEMENT OF THE COURTS OF JUSTICE OF THE STATE OF MARYLAND PROPOSED 28 (1802). Many sources, including a biography of Bozman from 1888 and library catalogs, ascribe this work to John Leeds Bozman. See SAMUEL HARRISON, A MEMOIR OF JOHN LEEDS BOZMAN: THE FIRST HISTORIAN OF MARYLAND 38 (1888). Harrison claimed he had “excellent authority,” but after the custom of the nineteenth century, declined to provide it. *Id.* Ellis also attributes the pamphlet to Bozman, although without noting that it does not bear the author’s name. ELLIS, *supra* note 41, at 333, n. 32. Ellis, incidentally, relies on the pamphlet to show that the reforms in 1806 intended to “keep the courts under the control of the legal profession.” *Id.* This writer can find no evidence that anyone took this pamphlet seriously at all. Its proposed reforms did not become law. To claim it shows early evidence of a lawyerly plot to retain control of the judiciary seems a rather large stretch. At most, it shows that Bozman (and by extension others) wanted more lawyers on the bench.

⁶⁸ BOZMAN, *supra* note 67, at 33-34.

⁶⁹ A “ripper bill” or “ripper act” means, in modern parlance, “a statute that gives a government’s chief executive broad powers to appoint and remove department heads or other subordinate officials.” *Ripper Act*, BLACK’S LAW DICTIONARY 1442 (9th ed. 2009). That is close to the sense used here, although the bill left the governor no discretion on unseating judges. Shugerman uses the term to refer to a law that strips appointed judges of their life-tenure offices, and this author follows his usage here. SHUGERMAN, *supra* note 5, at 37.

By way of background, the defeated Federalists had not been bi-partisan in their judicial appointments. They had filled the court positions created in 1790 with party loyalists, breeding resentment among the minority Jeffersonians. In fact, those appointees apparently abused their power to appoint election judges.⁷⁰ That said, the Federalists (perhaps accidentally) left the Jeffersonians two open seats on the Court of Appeals.⁷¹

Things came to a head in 1800 when the Jeffersonians finally defeated the Federalists and took control of the Maryland legislature by a margin of 40-37, with three independents.⁷² Over the next five years, the Jeffersonians widened their lead as Federalist efforts dwindled to “little more than a rear guard action to stop their enemy’s growth.”⁷³ In 1801, for example, the Jeffersonians won by an even larger majority. They took forty-five seats to the Federalist’s twenty-eight, with five delegates in the center.⁷⁴

The Jeffersonians promptly implemented a judicial ripper act.⁷⁵ The law abolished the existing courts by repealing the 1796 statute that created

Ripper bills constitutionally functioned by abolishing the old court and creating an identical new one.

⁷⁰ NORMAN RISJORD, *CHESAPEAKE POLITICS, 1781-1800*, at 477 (1978). At any rate, the Jeffersonians saw the need to remove that function immediately.

⁷¹ BOND, *supra* note 36, at 78. Bond, studiously ignoring the politics involved, ascribed the failure to fill the seat to a lack of qualified candidates. Shugerman, however, feels the Federalists “botched their appointments to the Court of Appeals.” SHUGERMAN, *supra* note 5, at 44. This seems unlikely. The 1800 election produced a divided government that elected a Federalist governor. MARX RENZULLI, *MARYLAND: THE FEDERALIST YEARS 217* (1973). Even if the Federalists had somehow forgotten to fill the positions while anticipating defeat in the 1800 election, they had an additional year before they lost the governorship. The Jeffersonians cemented their position on the Court of Appeals by mandating that vacancies would remain unfilled until the Court shrunk to three judges. 1801 Md. Laws 73. Shugerman believes that this kicked two judges off the bench. SHUGERMAN, *supra* note 5, at 44. He follows Risjord’s interpretation of the statute, although Risjord believes there were only four justices on the bench at the time, so only one lost their seat. RISJORD, *supra* note 70, at 477. That reading of the 1801 Bill contradicts the explicit text of the Statute. It also contradicts Maryland’s official list. *Historical List: Maryland Court of Appeals Judges, 1778-*, ARCHIVES OF MARYLAND, <http://msa.maryland.gov/msa/speccol/sc2600/sc2685/html/ctappj.html> (last visited Dec. 27, 2012).

⁷² RENZULLI, *supra* note 71, at 215. Although the independents mostly voted Republican, they voted Federalist often enough to elect a Federalist governor and U.S. Senator. *Id.*

⁷³ *Id.* at 227-28.

⁷⁴ RISJORD, *supra* note 70, at 565.

⁷⁵ RENZULLI, *supra* note 71 at 215, 227; SHUGERMAN, *supra* note 5, at 37.

For a blow by blow account of the procedural maneuvers to pass the bill, including a Suspension of the Rules and an analysis of voting patterns showing hyper-partisanship, see RISJORD, *supra* note 70, at 477-78.

them.⁷⁶ The same ripper act also created “new” courts by incorporating the text of that same 1796 statute.⁷⁷ The law made some changes. The levy courts, composed of Justices of the Peace appointed to one-year terms, would name the election judges, not the life-tenure county judges.⁷⁸ Practically, however, this law fired every judge in the district courts notwithstanding their life-tenure. The Jeffersonians then filled the seats with their own appointments.

The Federalist incumbents sued.⁷⁹ The General Court, equally vulnerable to a ripper bill, declined to intervene.⁸⁰ Instead, it pulled a reverse *Marbury v. Madison*; the court held that it could have stricken the bill down, had it been unconstitutional.⁸¹ This holding did nothing for the ousted judges.

The Jeffersonians did not stop there. They promptly passed another reform bill aimed at the General Court and the Court of Appeals in 1802.⁸² (As a Constitutional Amendment, the bill needed to pass twice in consecutive sessions before taking effect.⁸³) This bill abolished the General Court and created a two-tiered judiciary. Two lawyer District Justices in each of five districts would sit in each county court within their district alongside a non-

⁷⁶ 1801 Md. Laws 66.

⁷⁷ The 1801 Law is substantially identical to the old law. For example, the 1790 Law established that the governor and council would appoint the justices of the County Courts. 1790 Md. Laws 497. The 1796 Law repealed all of the 1790 Law except Section 4, which it adopted directly. 1796 Md. Laws 221. The 1801 Law contains the same language as the 1796 law until it reaches the incorporation. Even though it later explicitly repeals the 1790 Law, 1801 Md. Laws 76, it replaces the incorporation of the 1790 Law with the exact language of the 1790 Act. Although the laws were not identical, most differences are hard to spot. Those differences relate to particular details of application not relevant to the present discussion. For example, Section Four of the 1801 Act is Section Five of the 1796 Act, except for a small three line clause at the end preventing the clause from effecting the powers of “the court of oyer and terminer and gaol delivery for Baltimore County or giving the county court of Baltimore criminal jurisdiction.” 1801 Md. Laws 67. While this may have made all the differences to some people back then, they are largely irrelevant to the question at hand.

⁷⁸ 1801 Md. Laws 70.

⁷⁹ *Whittington v. Polk*, 1 H. & J. 236 (Md. 1802). *Whittington* enjoyed the spotlight in its day because it did not happen in a vacuum. The decision largely foreshadowed *Marbury v. Madison* by a few months. The author of the opinion, Jeremiah Townley Chase, was the cousin and close friend of Supreme Court Justice Samuel Chase, and political observers closely watched *Whittington* to see the reaction of a Federalist Judiciary. SHUGERMAN, *supra* note 5, at 38.

⁸⁰ See *Whittington v. Polk*, 1 H. & J. 236.

⁸¹ *Id.* Like the Supreme Court in *Marbury v. Madison*, the *Whittington* Court spent several pages extolling judicial review in dicta before *not* stopping the law. *Id.* at 242-245.

⁸² 1802 Md. Laws 63.

⁸³ MD CONST. OF 1776, art. LIX.

lawyer Associate Justice from the county.⁸⁴ The bill also fired the sitting Court of Appeals judges just as the previous bill had fired the old district judges.⁸⁵

Then politics reshuffled. The confirmation bill failed in 1803 because moderate Republicans and Federalists united against it.⁸⁶ The next year, the new centrist coalition passed its own reform bill.⁸⁷ This new law implemented massive court reform. It divided the state into six judicial districts.⁸⁸ Three lawyerly district judges would sit on each county court in a district.⁸⁹ The abolished General Court was folded into a new Court of Appeals, composed of the Chief Judges of the new Districts.⁹⁰ Like the previous legislation, however, this act also fired every judge in the state. Unlike the fate of its predecessor, the bill's backers held together and enacted it. The confirmation bill passed the following year.⁹¹

Although the bill "ripped" the Court of Appeals and General Court, it did not produce a complete personnel change, or even a partisan one.⁹² The new coalition rehired two out of the three judges of the General Court as Chief Judges and retained many of the judges of the district courts.⁹³ Many of the

⁸⁴ 1802 Md. Laws 64.

⁸⁵ *Id.*

⁸⁶ Ellis claims that moderate Republicans and Federalists allied against the Bill because it "endanger the independence of the judiciary and would allow the courts to come under the control of people untrained in the law." ELLIS, *supra* note 41, at 244. This seems unlikely. First, the bill would have given lawyers a majority on the bench to outvote non-lawyers for the first time, so it could hardly put laymen in charge of the courts. If anything, it did the opposite. Second, it seems rather late in the day for lawmakers to develop scruples about judicial independence. Rather, it seems more likely based on the final version of the bill eventually passed by this coalition, 1804 Md. Laws 45, that it did not do enough to professionalize the courts. Based on their appointments, it seems that the new coalition adopted bipartisanship.

⁸⁷ ELLIS, *supra* note 41, at 244.

⁸⁸ 1804 Md. Laws 45.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 8. Strangely, Shugerman believes that *Whittington v. Polk* gave the General Court sufficient political cover to withstand the movement to abolish it.

SHUGERMAN, *supra* note 5, at 33. He is simply mistaken.

⁹² BOND, *supra* note 36, at 97-98.

⁹³ BOND, *supra* note 36, at 99-104. Bond lists two judges of the General Court and two of the District Courts whom the Governor offered Chief Judgeships. Judge Jeremiah Chase, both a Federalist and Samuel Chase's cousin and friend, wound up Chief Judge of the Court of Appeals. *Id.*; SHUGERMAN, *supra* note 5, at 38. The third General Court Judge, John Done, wound up as an Associate Judge in the Fourth District and was eventually promoted to Chief Judge in 1814. *John Done (ca. 1747-1831)*, ARCHIVES OF MARYLAND, <http://msa.maryland.gov/msa/speccol/sc3500/sc3520/000300/000353/html/msa00353.html> (last visited Dec. 27, 2012).

Interestingly, Judge James Tilghman, whom John Leeds Bozman positively hated, kept his seat as Chief Judge of the Second District. BOND, *supra* note 36, at 99-104.

new judges, including the new Chief Justice of the Court of Appeals, were Federalists.⁹⁴ But the new leadership declined to rehire any of the Justices of the Court of Appeals as Chief Judges of the district courts.⁹⁵ The leadership offered two incumbent judges —both seventy-one years old— seats as associate judges, and only one accepted.⁹⁶ The others lost their jobs, life-tenure notwithstanding.

V. 1806-1850: LEAD UP TO THE CONSTITUTIONAL CONVENTION

Reform in Maryland moved slowly, although similar concerns appeared elsewhere. Beginning in 1833, for example, states began switching to judicial elections to disempower their respective legislatures.⁹⁷ The calls for reform first gathered strength because Democrats —victims of a historic gerrymander— did not let a crisis go to waste. While the major focus of the crisis was economic and political, judicial reform was also present.⁹⁸ It merely did not take the front seat.

Maryland's road toward judicial elections began in early 1836. Supporters of internal improvements promised “certain and immediate” returns to persuade Maryland to fund their projects with “millions upon millions of public debts.”⁹⁹ Not surprisingly, this proved too good to be true and Maryland quickly went bankrupt.¹⁰⁰ Marylanders promptly sought major political reform.¹⁰¹

This call for reform exposed already existing complaints about apportionment of the Legislature. In an effort to balance sectional interests, Maryland had watered down Baltimore's votes. This caused gross mal-

Bozman caricatured Tilghman in his pamphlet arguing for reform, spending three pages on a prolonged (although anonymous) character assassination against a Chief Judge of a District in Maryland. BOZMAN, *supra* note 67, at 31-33. Harrison insists that what Bozman presents as caricature is in fact portrait. HARRISON, *supra* note 67, at 39-40. The Governor of Maryland and his council apparently disagreed with Bozman's assessment.

⁹⁴ BOND, *supra* note 36, at 99-104.

⁹⁵ *Id.* at 97; *Historical List: Maryland Court of Appeals Judges, 1778-*, ARCHIVES OF MARYLAND, <http://msa.maryland.gov/msa/speccol/sc2600/sc2685/html/ctappj.html> (last visited Apr. 3, 2016).

⁹⁶ BOND, *supra* note 36, at 97-98; *see also Historical List: Maryland Court of Appeals Judges, supra* note 95.

⁹⁷ *See* SHUGERMAN, *supra* note 5, at 10.

⁹⁸ *See* JAMES WARNER HARRY, *THE MARYLAND CONSTITUTION OF 1851* 18-19, 47 (1902).

⁹⁹ *Id.*

¹⁰⁰ *See id.*; SHUGERMAN, *supra* note 5, at 85 (Maryland was not alone; nine States folded as a result of the ensuing Panics. The recession lasted until 1843.).

¹⁰¹ *See* HARRY, *supra* note 98, at 17.

apportionment.¹⁰² Maryland watered down Baltimore's votes. Baltimore, a city of 80,000, both had two senators and two delegates as Annapolis, "normally a quiet town of several thousand."¹⁰³ Maryland's sparsely populated counties, by way of comparison, received four delegates each regardless of population.¹⁰⁴

In the 1836 elections, the Whigs won a 21-19 majority in the Maryland Senate's Electoral College despite losing the election by about three thousand popular votes.¹⁰⁵ A political crisis erupted when the Democrats refused to attend the convention to elect the Senate, denying it a quorum.¹⁰⁶ Without a Senate, Maryland's government could not function. Although the Democrats eventually caved, the Whig-dominated General Assembly decided to pass a Reform Bill.¹⁰⁷ Although activists wanted a wide variety of judicial reforms, including the abolition of gubernatorial appointments and life-tenure, the resulting Reform Bill in 1837 did not change the judiciary.¹⁰⁸

Demands for judicial reform resurfaced in 1844. As a result, the General Assembly created an investigatory committee focused on judicial reform.¹⁰⁹ People wanted broad reform because of "the necessity of all practical economy in the expenditures of government" and "the embarrassed condition of the finances of our State."¹¹⁰ In simpler terms, Maryland was broke. The Committee, however, feared that reforming the judiciary "solely with a view to its *cheapness*" would be "false and suicidal economy."¹¹¹ The Committee instead recommended other reforms, including firing the life-tenured Chancellor and one life-tenured associate judge in each district.¹¹² But the reforms to come in 1850 were already under discussion. The Committee already felt it needed to advocate retaining life-tenure.¹¹³ The Committee reported reform bills towards the end of the session in early March, but they failed to pass.¹¹⁴

¹⁰² See ROBERT BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT 228 (1988).

¹⁰³ For the relative sizes of Baltimore and Annapolis, see *id.* at 228.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 229. Maryland chose its Senate via an electoral college, similar to the method by which America elects the President of the United States.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ HARRY, *supra* note 98, at 18-19, 47. 1836 Md. Laws 190.

¹⁰⁹ REPORT OF THE COMMITTEE ON GRIEVANCES AND COURTS OF JUSTICE TO WHOM WERE REFERRED THREE ORDERS OF THE HOUSE OF DELEGATES RELATIVE TO THE JUDICIARY 2 (1844). Proposals included switching to six judicial circuits, each paying \$2000, shrinking the Court of Appeals to three seats, and a special court system for Baltimore.

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.*

¹¹² *Id.* at 8.

¹¹³ *Id.* at 9.

¹¹⁴ *Id.* at 1. The Committee delivered its reports on March 5th. No mention appears in the Session Laws of the year.

Political agitation for reform continued. After a Stamp Tax popularly known as the “British Stamp Act” went into effect in 1845, Maryland public opinion wanted a convention to rein in the Legislature.¹¹⁵ After an 1845 bill calling for a convention failed by a tie vote, the legislature took up the issue again in the next session in 1847.¹¹⁶ It did not call for a political convention because doing so while the state was “involved in financial embarrassment of the most serious character” would hurt Maryland’s credit.¹¹⁷ But the calls continued. The Democratic candidate, running on a reform platform, carried the next gubernatorial election by all of 709 votes.¹¹⁸ The overwhelming agitation in 1850 led the Governor to warn the General Assembly that if it did not call a convention, “the sanction of the [L]egislature would not much longer be invoked.”¹¹⁹ So the General Assembly called a referendum on a Convention, which the pro-Convention faction won.

VI. THE CONVENTION OF 1850

Scholars give various reasons for the 1850 convention. Bond ascribes the convention to reapportionment.¹²⁰ Brugger ascribes it to the same Baltimorean discontent regarding apportionment and high taxes used to pay off the State debt.¹²¹ Evitts ascribes it to the same, as well as to the “universal appeal” of judicial reform.¹²² Harry lists four causes: the mal-apportionment of the Legislature, anger at legislative constitutional amendments, dislike of life-tenure in the judiciary, and the “lack of constitutional check upon the legislature in the expenditures of the public money.”¹²³

The Convention dedicated an enormous amount of time to debating judicial reforms. The debates spanned approximately 350 pages of the Convention’s written record.¹²⁴ But surprisingly, judicial election was only a

¹¹⁵ HARRY, *supra* note 98, at 22.

¹¹⁶ *Id.* at 22-23.

¹¹⁷ *Id.* at 23-24.

¹¹⁸ *Id.* at 24.

¹¹⁹ HARRY, *supra* note 98, at 29.

¹²⁰ BOND, *supra* note 36, at 146.

¹²¹ BRUGGER, *supra* note 103, at 258. The State spent a fortune paying for its debts, and had indeed suspended payment on bonds between 1841 and 1848. *Id.* at 232.

¹²² WILLIAM EVITTS, A MATTER OF ALLEGIANCES: MARYLAND FROM 1850 TO 1861, at 34 (1974).

¹²³ HARRY, *supra* note 98, at 25.

¹²⁴ The debates on the judiciary committee of the convention begin midway through the second volume. 2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 460 (1851) [hereinafter DEBATES]. They end on page 803 of the same volume. *Id.* at 803. Although the Convention discussed other matters during the intervening 343 pages, they spent the vast majority of their time fighting about the judiciary.

small part of a larger battle over the judiciary. It was not even the most important part. Bowie, the chairman of the Judiciary Committee, deemed it a dismal failure to consider bringing about “a mere change in the mode of appointment” as the only reform.¹²⁵ Chambers, Bowie’s main opponent, thought that the main issue was life-tenure.¹²⁶

Supporters of judicial elections controlled the Convention’s committee on the subject.¹²⁷ They endorsed a wide range of reforms. Their agenda prominently featured term limits and judicial elections.¹²⁸ Their reforms would also “rip” the existing judges out of their seats.¹²⁹

The dissenters shared a different vision. They did not rip the existing judiciary.¹³⁰ In fact, Chambers, one of the leading opponents of judicial reform at the Convention, served as Chief Judge of the Court of Appeals.¹³¹ The dissenters’ report retained both life-tenure and gubernatorial appointments.¹³² But that report did not speak for all opinions. One delegate, for example, wanted to pick judges by “joint ballot of the two Houses of the General Assembly.”¹³³

Supporters of almost every conceivable position claimed popular support. According to Bowie, judicial elections alone had led Southern Maryland and the Eastern Shore to support the Convention despite the risk of reapportionment.¹³⁴ But Bowie later admitted that he “never attended a political meeting in [his] own county,” and had in fact been nominated *in absentia*. He had no first-hand knowledge of what the people wanted.¹³⁵

¹²⁵ *Id.* For Mr. Bowie’s role as chairman of the judiciary committee, see 1 DEBATES, *supra* note 126, at 239.

¹²⁶ When Judge Chambers published his speech, he titled it the “Speech on the Judicial Tenure,” indicating what he thought the major issue was. EZEKIEL CHAMBERS, SPEECH ON THE JUDICIAL TENURE IN THE MARYLAND CONVENTION, APRIL 1851 (1851).

¹²⁷ 2 DEBATES, *supra* note 126, at 460. There were only three or four dissenters.

¹²⁸ 1 DEBATES, *supra* note 126, at 239-43.

¹²⁹ *Id.* at 239-43.

¹³⁰ *Id.* at 516-19. To be clear, they explicitly continued the previous judiciary in office. They did not merely want to re-hire all sitting justices.

¹³¹ For Judge Chambers’ biography, see *Ezekiel Forman Chambers*, ARCHIVES OF MARYLAND, <http://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/034600/034613/html/034613bio.html> (last visited Feb. 15, 2016). Chambers, termed “Chambers of Kent” to distinguish him from the other Mr. Chambers, spoke repeatedly on the Judiciary.

¹³² 2 DEBATES, *supra* note 126, at 516-17.

¹³³ *Id.* at 460.

¹³⁴ *Id.* at 460-61. Maryland’s constitution had an incredible apportionment gerrymander that guaranteed Southern Maryland and the Eastern Shore disproportionate population relative to Baltimore.

¹³⁵ *Id.* at 501. Although nobody actually sent the convention a petition about the topic, Mr. Bowie claimed that only one petition had been received, which was “in reference to the sale of ardent spirits.” *Id.* at 461. Mr. Bowie—as pointed out there

Tuck, a delegate from the same county, had not canvassed the county either, but firmly believed that the people favored life-tenure.¹³⁶ Chambers, advocating for gubernatorial appointment and life-tenure, claimed his district supported his position.¹³⁷ Spencer, advocating for gubernatorial appointment and term limits, claimed that his public support was “immutable and as fixed as the mountains” and had been so “for the last twenty years.”¹³⁸ Merrick claimed that everyone in Carroll County supported judicial elections, but Phelps, his colleague from the same district, claimed he had won after running against judicial elections.¹³⁹ Others simply admitted that their voters were largely ignorant. Hicks’s constituents in Dorchester County primarily wanted their taxes cut.¹⁴⁰ One had “thought [Dorchester County was] exclusively ill-treated because the Convention was not there.”¹⁴¹ This constituent had “cursed the man; he had never seen him, and if Mr. Convention would not show himself among the people, he would not vote for him.”¹⁴²

Supporters of judicial elections rested their beliefs on Jacksonian political theory. They believed that since “all power emanates from the people,” the people are sovereign.¹⁴³ Appointing judges is a “necessary incident to sovereignty itself.”¹⁴⁴ To these supporters, this was no innovation; their principles were those of 1776.¹⁴⁵ The people had simply delegated the power to appoint judges to their elected representatives, the politicians.¹⁴⁶

Reformers believed that those politicians had turned judicial appointments into “a mere political machine in the hands of the Governor and his

and as reading the debates easily shows— was simply mistaken. The Convention received numerous sundry petitions. This author has no idea what Mr. Bowie meant.

¹³⁶ *Id.* at 520.

¹³⁷ 2 DEBATES, *supra* note 126, at 467.

¹³⁸ *Id.* at 491.

¹³⁹ *Id.* at 501.

Mr. Merrick had served in the United States Senate from 1837 to 1845. *Historical List of United States Senators*, ARCHIVES OF MARYLAND, <http://msa.maryland.gov/msa/speccol/sc2600/sc2685/html/fedsenmems.html> (last visited Jan. 17, 2013.)

¹⁴⁰ 2 DEBATES, *supra* note 126, at 502.

Mr. Hicks went on to become governor of Maryland from 1858 to 1862. He kept Maryland in the Union. See *Thomas Holiday Hicks (1798-1865)*, ARCHIVES OF MARYLAND, <http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001400/001462/html/1462extbio.html> (last visited Jan. 17, 2013).

¹⁴¹ 2 DEBATES, *supra* note 126, at 502.

¹⁴² *Id.* at 502. Mr. Hicks apparently did not disabuse the man of this notion, for he relates the person indeed refused to vote for Mr. Convention. And indeed, Mr. Convention lost in Dorchester, 251-399. HARRY, *supra* note 98, at 85.

¹⁴³ 2 DEBATES, *supra* note 126, at 462.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 563.

¹⁴⁶ *Id.* at 463.

friends. . . by which the interests of . . . the State have been sacrificed.”¹⁴⁷ Past governors had neither looked for “legal attainments and uprightness” nor for “integrity of character . . . honesty” and “capability.”¹⁴⁸ Rather, they had selected “mere partisan adherents to certain political creeds . . . old and infirm men, not fit, either mentally or physically” for the bench.¹⁴⁹ In fact, Bowie could not recall a single instance since 1776 where the politicians “have not made the appointment depend more or less on the political complexion of the applicant.”¹⁵⁰ Spencer even charged that some judges had “been nominated by political conventions.”¹⁵¹

Indeed, Bowie felt that the people could “do quite as well as [the Legislature]” at appointing judges.¹⁵² If the people might make bad choices or follow partisan considerations, politicians “have done the same thing, have always done so, and will. . . always do so.”¹⁵³ That said, Bowie did not think the people would actually select bad judges. He thought that they would “generally vote for the most trustworthy” candidate.¹⁵⁴ Or at least they might.¹⁵⁵ The Governor and Senate, meanwhile, “never have and never will, from now until the day of judgment.”¹⁵⁶ Not all supporters thought it would end happily though. Merrick felt that if the people elected bad judges, “they will and they should suffer by it.”¹⁵⁷

Supporters of judicial elections directly addressed concerns about judicial independence.¹⁵⁸ Bowie agreed that judges should be independent of

¹⁴⁷ *Id.* Fascinatingly, Chambers denied that any appointments to the bench had been partisan. *Id.* at 467-68. The debates are unclear if anyone believed him, but nobody acted like he denied the obvious.

¹⁴⁸ 2 DEBATES, *supra* note 126, at 463.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* In Pennsylvania, Samuel Smucker made the charge more bluntly. He claimed that in Pennsylvania, judgeships went to “the relations—the brothers, the cousins, the sons-in-law” of the sitting governor. SAMUEL SMUCKER, ARGUMENTS IN FAVOR OF A POPULAR JUDICIARY 4 (1850). If no relatives could take the seat, the appointments then devolved to the Governor’s political cronies. *Id.*

¹⁵¹ 2 DEBATES, *supra* note 126, at 490. Maryland did not complain alone. One delegate in Pennsylvania’s comparable convention alleged that appointments as Justices of the Peace had become “a sort of small coin, to pay small partisans in the war of elections.” JOSEPH HOPKINSON, SPEECHES OF JOSEPH HOPKINSON AND CHARLES CHAUNCEY ON THE JUDICIAL TENURE DELIVERED IN THE CONVENTION OF PENNSYLVANIA FOR REVISING THE CONSTITUTION 9 (1838). Apparently, Pennsylvanian governors had begun to issue “hundreds of them” in the last weeks of their lame duck terms. *Id.*

¹⁵² 2 DEBATES, *supra* note 126, at 463.

¹⁵³ *Id.* at 464.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 501.

¹⁵⁸ 2 DEBATES, *supra* note 126, at 464.

“improper bias —independent of all impressions. . . made upon their minds by wicked, artful and treacherous practices.”¹⁵⁹ But he believed that judges should never become “independent of the people.”¹⁶⁰ In fact, public opinion possessed a “wholesome restraint and moral sense” worthy of obedience.¹⁶¹ That said, Bowie considered some judicial independence necessary and thought that long terms would obtain that.¹⁶²

Additionally, these supporters also favored term limits. Bowie, for example, hated life-tenure. In fact, he thought that “any term of years” would be better “than the present life-tenure.”¹⁶³ He suggested that life-tenure “leads to great abuses” because judges “become independent of public opinion, independent of the people, independent of every wholesome restraint.”¹⁶⁴ This concentrates power “in the hands of a certain class of lawyers” who practice before the Court of Appeals of Maryland, giving them “utterly” uncontrollable influence over the court.¹⁶⁵ Regular turnover would keep judges responsive and honest.

Other speakers gave different reasons for supporting term limits. Spencer thought that “a limited tenure is the main and chief security of an efficient and wise judiciary.”¹⁶⁶ Life-tenure made judges omnipotent because it let them “forget their individuality and look at themselves as something more than judges.”¹⁶⁷ Elections would let the people keep judges humble.¹⁶⁸ Spencer did not believe that regular elections would tempt judges to “pander to the public appetite” though. If a judge did so, he would “sink himself to all infamy and oblivion” and never win another election.¹⁶⁹

In fact, some writers on the subject suggested that removing life-tenure would speed up the court system.¹⁷⁰ It would “simplify. . . legal process, and thereby promote the ends of justice.”¹⁷¹ According to Samuel Smucker, all delay stemmed from “perfectly irresponsible” judges. Smucker believed that the judges were irresponsible because of their life-tenure.¹⁷² In fact, Smucker believed that all life-tenure was merely part of an “immense mass of corruption,” that had built up over time and which needed to go.¹⁷³

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 464-65.

¹⁶¹ *Id.*

¹⁶² *Id.* at 465-66.

¹⁶³ *Id.* at 466.

¹⁶⁴ 2 DEBATES, *supra* note 126, at 466.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 488.

¹⁶⁷ *Id.* at 488 and 490.

¹⁶⁸ *Id.* at 490.

¹⁶⁹ 2 DEBATES, *supra* note 126, at 488.

¹⁷⁰ SMUCKER, *supra* note 152, at 8.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

Smucker also thought that requiring judges to campaign would in turn force them to develop a record to run on.¹⁷⁴ He recognized that electioneering would be embarrassing for judges, but did not care. For example, he thought an election bill that ran “Vote for Judge Snapdragon! He overruled Binks vs. Jenks, quashed the writ in Gerrymander’s case, and delivered the great dissenting opinion in *in re Dishwater*” would be a probable and favorable result of allowing judicial elections.¹⁷⁵ Judges would probably hate having to campaign, but the judges would want to win reelection. This would require them to develop a good track record as judge to campaign on.¹⁷⁶

Supporters of judicial elections did not fear mob rule.¹⁷⁷ In event of revolution, truly independent judges would not stop the unrest. Even the best judges would be mere “ropes of sand,” unable to restrain an angry mob.¹⁷⁸ Those worried about mob rule thought that appointed judges would be just as bad. Mr. Gwinn recalled judicial abuses perpetrated by appointed judges obeying tyrants, like Judge Jeffreys’ “terrible campaign” and “the trial of Queen Caroline.”¹⁷⁹

For many supporters, political parties provided part of the solution. Although Mr. Hicks distrusted “the influence of party spirit over the people,” he thought that open partisanship would reduce corruption.¹⁸⁰ If the parties nominated the judges, at least someone took responsibility for the appointment.¹⁸¹ Under the status-quo system before 1850, “those who recommend [judges] ... are enveloped in a dark cloud, are in obscurity, and are never known.”¹⁸² Others thought that the fickle nature of party politics

¹⁷⁴ *Id.* at 9.

¹⁷⁵ SMUCKER, *supra* note 152, at 9.

¹⁷⁶ *Id.*

¹⁷⁷ 2 DEBATES, *supra* note 126, at 490.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* George Jeffreys, 1st Baron Jeffreys of Wem PC (1645-1689), was best known as the original “hanging judge” for his propensity for mercilessly administering a cruel brand of justice. William W. Berry III, *Eighth Amendment Presumptions a Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67, n. 139 (2015). During the Blood Assizes trials, Jeffreys led the commission responsible for convicting, sentencing and executing between 150 to 200 prisoners in less than one month. Arthur W. Machen, Jr., *The Bloody Judge Sir George Jeffreys (1645 – 1689)*, 11-SUM Experience 38, 39-40 (2001). Justice Antonin Scalia even referred to him as “dread Lord Jeffreys.” *Crawford v. Washington*, 541 U.S. 36, 67 (2004). Queen Caroline’s Case, 129 Eng. Rep. 976, 2 B & B 284 (1820) was the O.J. Simpson case of its time. King George IV (a philanderer if there ever was one) attempted to divorce his unwanted wife, Queen Caroline, by accusing her of adultery. The proceedings in the trial were so infamous they produced the “Rule in Queen Caroline’s Case,” only repealed by FED. R. EVID. 613(a).

Mr. Gwinn was a prominent lawyer. HARRY, *supra* note 98, at 35-36.

¹⁸⁰ 2 DEBATES, *supra* note 126, at 530.

¹⁸¹ *Id.*

¹⁸² *Id.*

would keep judges in line.¹⁸³ Hyper-partisan judges knew that their jobs were at risk whenever the political winds changed.¹⁸⁴ This would keep them honest.¹⁸⁵ A third set of delegates believed that no party would actually nominate a corrupt judge because “[t]hat would be to impugn the purity of the parties of this country, and to assume that their purpose is an abuse of power.”¹⁸⁶ If partisan judges began ignoring precedent to appease political whims, “it would be too offensive, too outrageous, to be tolerated in any community in the State.”¹⁸⁷ In fact, it would be counter-productive. People would not vote for men guilty of such shameless conduct.¹⁸⁸

Even supporters of judicial elections disagreed over the issue of “re-eligibility.”¹⁸⁹ Some loved the idea. Buchanan wanted to be able to congratulate “faithful servants,” but wanted unfaithful ones to “depart into outer darkness.”¹⁹⁰ Tuck thought that if judges could not be re-elected, good candidates would never take the bench in the first place.¹⁹¹ Bowie thought that re-eligibility would allow judges to remain in their positions while preventing them from cultivating political allies in hopes of securing a job after leaving the bench.¹⁹² Brent thought that re-eligibility would incentivize good behavior from judges who wanted re-election.¹⁹³ Merrick thought that without re-eligibility, taking the bench “would be fiscal suicide for “any competent lawyer.”¹⁹⁴ But others disagreed. Howard thought it would “increase the number of temptations” for bad judges looking for their next job.¹⁹⁵ Chambers thought re-eligibility would encourage pandering to the majority.¹⁹⁶ Supporters of re-eligibility acknowledged this concern but could live it. Merrick, for example, did not fear pandering.¹⁹⁷ He thought that if Maryland were “so corrupt, so regardless of [its] own best interests, God help the Republic —God help all chance or hope of security.”¹⁹⁸

¹⁸³ *Id.* at 488-89.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ 2 DEBATES, *supra* note 126, at 488-89.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Re-eligibility means the ability of a judge to run for re-election.

¹⁹⁰ *Id.* at 535.

¹⁹¹ *Id.* at 520.

¹⁹² 2 DEBATES, *supra* note 126, at 523.

¹⁹³ *Id.* at 525.

¹⁹⁴ *Id.* at 534. Brent pointed out that while a Baltimore Judge earned only \$3000, all told, a good lawyer could earn “\$8000, or even \$8500 per year.” *Id.* Only a “nabob or a Croesus, or perhaps a man ready to go on it for any thing [sic] at all” would take the job. *Id.* at 555. While Maryland has experienced some inflation since then, this author is assured the basic realities remain the same.

¹⁹⁵ *Id.* at 530.

¹⁹⁶ *Id.* at 525.

¹⁹⁷ 2 DEBATES, *supra* note 126, at 534.

¹⁹⁸ *Id.*

Opponents of judicial elections had a radically different narrative centered on judicial independence and minority rights. Chambers focused heavily on “the independence of the judiciary...and as necessary to that independence, the tenure as we know have it ... during good behavior.”¹⁹⁹ He wanted judicial independence to protect “the humble, the obscure, and the impotent ... the minority,” not to rubberstamp majority rule.²⁰⁰ But the method of selection was a sideshow. For opponents of judicial elections, the main issue was the “judicial tenure.”²⁰¹

The two sides directly disagreed about Jacksonian political theory. Chambers thought that Jacksonianism led to an absurd result. The “direct and legitimate result of such a theory” would “require a dissolution of all society into an absolute, unqualified, unmixed democracy” fit only for “a community composed of some few families of men.”²⁰² The theory’s logical conclusion was that “the people are not to elect a Judge. No, sir, they—that is, a majority of the people— must act as judge.”²⁰³ By allowing the people to “execute (in mass) the duties and officers created by the government”, the doctrine would “impeach every act and measure of the government not only of Maryland, but of every other State in this union; yes sir, of every civilized government that has ever existed!”²⁰⁴ The people would do what they wanted, “and neither Constitution nor law could resist or oppose their sovereign will!”²⁰⁵

Unlike Bowie, Chambers thought that judges ought to be independent of the people because the people themselves could turn tyrant as well as any king.²⁰⁶ Judges needed professional freedom to do their duty, freedom they did not have “when their very existence [as judges] depends upon doing otherwise.”²⁰⁷ Chambers even darkly reminded the convention that they had “heard of Lynch law.”²⁰⁸

Judicial elections, according to Chambers, would destroy judicial independence. An independent judge possessed “a freedom from all motive

¹⁹⁹ *Id.* at 466.

Bond considered Chambers’ speech the best of the convention, and one still worthy of note. BOND, *supra* note 36, at 149. After the convention, someone had it printed in Baltimore. CHAMBERS, *supra* note 128.

²⁰⁰ 2 DEBATES, *supra* note 126, at 469.

²⁰¹ When Judge Chambers published his speech, he titled it the “Speech on the Judicial Tenure,” indicating what he thought the major issue was. CHAMBERS, *supra* note 128.

²⁰² 2 DEBATES, *supra* note 126, at 469.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 469-70.

²⁰⁶ *Id.* at 473-74.

²⁰⁷ 2 DEBATES, *supra* note 126, at 475.

²⁰⁸ *Id.* at 477. Ironically, Chambers spent much time and effort defending slavery.

to do wrong; an exemption from all fear to right.”²⁰⁹ Judicial elections gave judges an incentive to corrupt justice in favor of the powerful and popular.²¹⁰ Although some judges would be honest, not “every man was a Saint, or a Hero.”²¹¹ Chambers, in short, trusted potential candidates about as far as he could throw them.

Nor did opponents think that judicial elections would even fix the problems at hand. Chambers did not believe that judicial elections would cure partisanship.²¹² Every candidate “will belong to one political family, or the other.”²¹³ If the people insisted on someone without political affiliations, they would be “obliged to select from a class of persons, who are below the ordinary grade of intellect.”²¹⁴ Others feared that good judges would not seek the bench, leaving the elections to party nominees.²¹⁵ And “by what magic can the people select one good man out of two bad ones?”²¹⁶

Some delegates at the convention supported retaining gubernatorial appointments because they thought that other reforms would solve the problems. Spencer believed that all partisan appointments happened because governors controlled “the entire patronage of the State.”²¹⁷ The Convention stripped the governors of these appointments, mainly by making judges elected.²¹⁸ If judges were the only gubernatorial appointment, no governor would possess “the temerity ... to select a judge because he belongs to one party or the other.”²¹⁹

Not all arguments against judicial elections centered on policy. Many opponents of judicial elections opposed radical reforms on principal. Chambers advocated caution because he thought a lot was at stake. Judicial elections were “a step proposed, which can never be retraced.”²²⁰ At stake were “the rights of persons, the rights of property and of reputations. ... All we hold dear.”²²¹ This was about more than party politics.²²² It was about “the poor, the injured, the oppressed, the helpless—the orphan, the desolate

²⁰⁹ *Id.* at 471.

²¹⁰ *Id.* at 472.

²¹¹ *Id.* at 473.

²¹² *Id.* at 477.

²¹³ 2 DEBATES, *supra* note 126, at 478.

²¹⁴ *Id.* at 478.

²¹⁵ *Id.* at 516.

²¹⁶ *Id.*

²¹⁷ *Id.* at 491.

²¹⁸ *Id.*

²¹⁹ 2 DEBATES, *supra* note 126, at 491.

²²⁰ *Id.* at 479. With historic hindsight, Chambers was entirely correct on this point.

²²¹ *Id.*

²²² *Id.*

widow.”²²³ If the Convention failed now, “the neglect can be repaired by no human power.”²²⁴

Opponents pointed to tradition to justify their anti-change stance. Chambers appealed to the Founding Fathers.²²⁵ He claimed that Jefferson was the only Founding Father to support judicial elections, and that John Adams, a most reliable source on Jefferson, had told Chambers that Jefferson only favored judicial elections “apparently with the feelings of a partisan, and under the influences which his best friends will most regret.”²²⁶ This alleged sentiment displayed the American roots of judicial independence and life-tenure.²²⁷

Unlike supporters of judicial elections, Chambers actively feared that elected judges would obey the fickle mob. He invoked the French Revolution and Robespierre to exemplify the evils of judicial elections.²²⁸ Indeed, he believed such a madness was already gripping the nation — Abolition.²²⁹ That “phrenzied [sic] impulse has made havoc of every sense of duty [abolitionists] owe to their country and its laws.” Chambers warned that during frenzies like Abolition, elected judges would feel compelled to vote for abolition.²³⁰ This would be —for Chambers, at any rate— a horrible result. After all, according to Chambers, angry mobs had coerced Pontius Pilate to sentence Jesus Christ to death in an apparently similar manner.²³¹

Many individual delegates gave idiosyncratic reasons for their positions. Hicks wanted a permanent and independent judiciary for practical reasons — elections were disruptive, and nobody in his district cared that much anyway.²³² Others feared that elections would create the appearance of

²²³ *Id.*

²²⁴ *Id.*

²²⁵ 2 DEBATES, *supra* note 126, at 479.

²²⁶ *Id.* at 480. According to Chambers, Jefferson opposed life-tenure to get rid of Samuel Chase, but abandoned the plan to stick it to Mr. Randolph, the House Manager of the impeachment. *Id.* Mr. Spencer, speaking to rebut Chambers, directly challenged Chambers’ account of the facts, leading to sharp words on the Convention floor. *Id.* at 489.

²²⁷ *Id.* at 478-79.

²²⁸ *Id.* at 481. Chambers’ opponents on rebuttal called out and attacked the Robespierre reference. Perhaps it was the equivalent of calling someone a “communist” today. 2 DEBATES, *supra* note 126, at 489. One even accused Chambers of dwelling “upon the bloody work of the guillotine, as if to excite us to some horror of the system we proposed.” *Id.* at 497-98. To supporters of Judicial Elections, the problem was not evil elections, but evil elected officials. *Id.* at 498.

²²⁹ *Id.* at 481. Chambers was deeply committed to slavery. He thought abolition was “a condition, not of idiotcy [sic] but of lunacy” from which the North would hopefully recover. It was the kind of mob rule he opposed.

²³⁰ *Id.*

²³¹ *Id.* at 482. Chambers’ delivered his remarks on Good Friday, so the allusion was topical if also extreme.

²³² 2 DEBATES, *supra* note 126, at 503.

corruption.²³³ Judges would know who “abused [the judge’s] character to lowest point of infamy, and who have praised him as if he were a god.”²³⁴ If a judge ever ruled against the former or for the later, it would look like corruption.²³⁵ Still others thought it would endanger “the independence of the bar” by giving judges a way to reward their supporters and punish their opponents.²³⁶

The Convention had no shortage of other ideas. Spencer, for example, wanted gubernatorial appointments like Chambers, but ten-year terms like Bowie.²³⁷ Phelps wanted to pick judges by joint ballot of the legislature, but that idea received a quick and overwhelming negative vote.²³⁸ Donaldson wanted the Legislature to recommend three men to the governor, who would then pick.²³⁹ Sollers spent the first part of the debate opposing every change, regardless of merit, on principle; he wanted to leave the judiciary entirely alone.²⁴⁰

The Convention resolved some issues much more quickly than others. Terms beat life-tenure early on by substantial margins.²⁴¹ Mr. Crisfield, the sponsor of the life-tenure amendment, quickly conceded the point.²⁴² A vote to strike judicial elections quickly came; judicial elections prevailed handily.²⁴³ The anti-re-eligibility amendment also failed comfortably.²⁴⁴

The final Constitution of 1850 “pleased nobody” in either the public or the convention.²⁴⁵ It could not get a majority in the Convention, so its sponsors used procedural gimmicks to insure it did not come up for a yes-no vote.²⁴⁶ One commentator suggested that the document cost about “\$1.50 per word, which, considering the quality of the goods, made it about the

²³³ *Id.* at 516.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 499.

²³⁷ *Id.* at 486.

²³⁸ 2 DEBATES, *supra* note 126, at 487. It lost 17-53.

²³⁹ *Id.* at 492. Donaldson believed that the legislature would never send one real pick and two duds because the Governor might nominate a dud to teach them not to do this. *Id.* at 518. The plan received a quick negative vote, 23-45. *Id.* at 503.

²⁴⁰ *Id.* at 505, 513-14. The proposal failed, 15-50.

²⁴¹ *Id.* at 492. It lost 23-49.

²⁴² 2 DEBATES, *supra* note 126, at 501.

Mr. Crisfield was a leading member of the Maryland Bar, and went on to become a member of the United States House of Representatives. HARRY, *supra* note 98, at 35; *Historical List of United States Representatives*, ARCHIVES OF MARYLAND, 11, 13, <http://msa.maryland.gov/msa/speccol/sc2600/sc2685/html/fedrepmems.html> (last visited on Jan. 17, 2013.)

²⁴³ 2 DEBATES, *supra* note 126, at 512. The motion to strike judicial elections failed 18-45.

²⁴⁴ *Id.* at 536. It lost 25-45.

²⁴⁵ HARRY, *supra* note 98, at 68.

²⁴⁶ *Id.* at 66.

hardest bargain of modern times.”²⁴⁷ Many people opposed it precisely because of the judicial reforms.²⁴⁸ But it passed, for better or worse, with a ten thousand vote majority.²⁴⁹

VII. CONCLUSION

The Maryland debates revealed a deeply divided body politic. The main reason for switching to term-limited judicial elections was not the Jacksonian ideology cited by the supporters, although that certainly inspired them. No evidence supports Hall’s lawyerly plot. In fact, delegates often traded accusations about how some delegates loved lawyers “a little better than the people” and were multiplying judicial offices for them —accusations always vehemently denied.²⁵⁰ Maryland’s leading lawyers —men like Chambers— in fact opposed judicial elections. No evidence, in short, indicates that lawyers conspired at all. But it was not an attempt to disempower the legislature or cut expenses either. The Convention clearly wanted to do both those things, but electing judges and limiting terms did neither.

Rather, judicial elections and term limits seem to be an assault on the spoils system. Maryland had a long history of highly partisan judicial appointments. The new Constitution marked the third “ripper act” in Maryland’s relatively short history. By electing judges, Maryland hoped to reduce political corruption by removing the Governor’s patronage. Supporters of judicial elections and term limits thought their reforms would depoliticize the judiciary and allow the people to choose good judges. Opponents feared it would make judges kowtow to the popular will and do more harm than good. Popular anger at the Legislature over bad fiscal policies and high taxes surely helped shape public opinion in what amounted to a no-confidence vote on the probity of politicians, but that did not cause judicial elections. Political corruption did.

Maryland is still grappling with judicial elections two constitutions, a major constitutional rewrite, and a hundred and sixty-six years later.²⁵¹ There are at least three bills presently pending in the House of Delegates to change the present system for judicial elections. HB 388 (presently in its first reading) proposes to allow the governor to appoint judges subject to retention

²⁴⁷ *Id.* at 71 (quoting Editorial, BALT. AMERICAN, June 3, 1851).

²⁴⁸ HARRY, *supra* note 98, at 70 (quoting Editorial, BALT. AMERICAN, June 2, 1851).

²⁴⁹ HARRY, *supra* note 98, at 86. It did, however, lose in several counties. *Id.*

²⁵⁰ 2 DEBATES, *supra* note 126, at 536, 567, 597.

²⁵¹ Maryland scrapped the 1850 Constitution in 1864 as a result of the Civil War. It scrapped that Constitution after the next election in 1867. The 1867 Constitution is still in force today, albeit with major changes. The most recent prominent change occurred in the 1960’s and 70’s as ideas from proposed-but-rejected Constitution of 1968 were adopted piecemeal. For a brief history of Maryland’s Constitution after 1850, see DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE, 6-10 (2006).

amendments in the manner used for appellate judges —retention votes at the next election and every ten years thereafter.²⁵² HB 224 appears to be a slightly older version of HB 388. The HB 388 version does a better job editing other related constitutional provisions to remove language inconsistent with its revisions and cuts the judicial term on the circuit court from 15 years to 10 years to make it consistent with the appellate courts.²⁵³ This is not a new idea. It has been floating around Annapolis since at least 2003.²⁵⁴

As a practical matter, retention elections “virtually guarantee[]” that judges will keep their seats.²⁵⁵ According to one study of states holding retention elections between 1964 and 2006, out of 6306 retention elections held, only 56 judges lost their seats.²⁵⁶ Maryland will likely follow the same pattern. In Maryland’s experience, retention elections for appellate judges have produced lopsided pro-retention votes. The average retention vote in Maryland, counting from the start of retention elections until 2006, was 87.3%.²⁵⁷

HB 223 (also in its first reading at time of writing) has a different idea. It proposes that circuit court judges be appointed by the Governor and confirmed by the Senate to fifteen year terms in office, but that all circuit court judges confirmed by less than 80% of the Senate stand in a contested election (as they do now).²⁵⁸ This would add a step to the selection process since circuit court judges presently do not need to be confirmed by the Senate. This method would also allow the minority party to force elections.

²⁵² H.D. 388, 2016 Reg. Sess. (Md. 2016).

²⁵³ H.D. 224, 2016 Reg. Sess. (Md. 2016); H.D. 388. It, like HB 38, has history. It was introduced in as HB 548 in 2015. The present (i.e. First-Reading) versions of the bills may be found <http://mgaleg.maryland.gov/2016RS/bills/hb/hb0224f.pdf> and <http://mgaleg.maryland.gov/2016RS/bills/hb/hb0388f.pdf> respectively.

²⁵⁴ According to the Department of Legislative Services’ Fiscal and Policy Notes on 2015 versions of the bill (HB 548 and HB 1071 of 2015), “similar bills” appeared in at least 2013, 2011, 2010, 2008, 2007, 2005, 2004, and 2003. The bills never got out of committee. H.D. 548, 2015 Reg. Sess. (Md. 2015) ; H.D. 1071, 2015 Reg. Sess. (Md. 2015).

²⁵⁵ G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING, 94 (1st ed. 1994). Tarr suggests that because voters only oppose judges for a reason. This, combined with rampant voter ignorance, de facto guarantees that incumbent judges win retention. [To Staff Editors: There is a sixth edition, available on google. <https://books.google.com/books?isbn=1285545958>. You may want to update the edition.]

²⁵⁶ See Larry Aspin, *Judicial Retention Election Trends: 1964-2006*, 90 JUDICATURE 208, 210 (2007). This study is based on a subset of the Judicial Retention Project’s database of retention elections for purposes of cross time comparison. Of interest is that 29 of the defeated judges from Illinois, which requires a 60% retention vote. Only one of those judges got below 50% of the vote.

²⁵⁷ *Id.*

²⁵⁸ H.D. 223, 2016 Reg. Sess. (Md. 2016).

Since the Maryland Senate has 47 seats, an 80% threshold means judges would require 38 votes to avoid the election. That practically means that only bi-partisan nominees would evade the ballot box.

These bills share a common theme. They aim to reduce the odds of a judge losing his or her seat. HB 388 and HB 224 do this by switching to a system where incumbents have historically enjoyed an over 99% retention rate. HB 223 would allow a judge to retain his or her seat by holding elections only when the judge receives substantial opposition in the Senate. Neither bill proposes to outright abandon judicial elections though, despite all the academic criticism of it. Like the rest of America, Marylanders apparently like voting for judges.²⁵⁹

²⁵⁹ See *supra* note 6. The vast majority of judges in America are elected.