



**ELECTION-BY-LOT AS A  
JUDICIAL SELECTION MECHANISM**

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**Introduction**

There are not many instances of social decision making by means of an election-by-lot in contemporary Western societies. In the United States, the two major examples are the draft and the selection of jurors. In the past, however, lotteries were much more widely used. The best-known cases are the choice of political representatives by lot in the Greek and Italian city-states. The author of the first full-length treatment of the Athenian election by lot starts his treatise by acknowledging the greatest barrier to scholarly appreciation:

There is no institution of ancient history which is so difficult of comprehension as that of electing officials by lot. We have ourselves no experience of the working of such a system; any proposal to introduce it now would appear so ludicrous that it requires some effort for us to believe that it ever did prevail in a civilized community.<sup>1</sup>

In addition to the lack of firsthand experience, a second barrier to scholarly appreciation likely derives from the fact that the

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<sup>1</sup> JAMES W. HEADLAM, ELECTIONS BY LOT AT ATHENS 1 (2d ed. 1933).

lot has a distinctly religious origin.<sup>2</sup> In fact, the religious aspect of casting lots is so apparent that there is a word for the procedure, “sorcery.” As the Oxford Dictionary of English Etymology testifies, the root of “sorcery” is “sort,” Latin for “lot.”<sup>3</sup> Thus, with respect to its Latin roots, sorcery is a technical term for “divination by lot,” a usage long since forgotten.<sup>4</sup>

The present paper urges the reader to overcome these barriers to scholarly appreciation, to cast to the side any preliminary skepticism toward election-by-lot as a reasonable allocation mechanism, and to take seriously for the moment, the claim that election-by-lot might be usefully employed in allocating certain judicial functions among a pool of potential candidates, the precise contours of which will be more fully defined shortly.

The paper is organized as follows. Section I discusses the normative arguments that have been made for the use of election-by-lot as an allocation mechanism, as well as suggests possible reasons for why, despite these normative justifications, election-by-lot is so rarely employed. The details of how election-by-lot might operate as a judicial selection method are set forth in Section II. Section III applies the arguments explicated in Section I to the proposal as described in Section II and also compares the proposed election-by-lot selection mechanism to current methods, in particular, electoral and merit-based mechanisms. The practical and constitutional limits of election-by-lot are considered in Section IV. The final portion briefly concludes.

## I. Election-by-Lot

### A. Why Election-by-Lot?

This section explores the normative justifications that have been made for the use of election-by-lot as an allocation mechanism

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<sup>2</sup> *Id.* at 11.

<sup>3</sup> OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (1966)

<sup>4</sup> ELAINE PAGELS, THE GNOSTIC GOSPELS 49-51 (1981) (noting that election by lot was practiced by “heretical” Christians and denounced by the orthodox).

in terms of individual rationality, economic efficiency, and social justice.

### 1. Indeterminacy

Indeterminacy is perhaps the principal reason for using lotteries.<sup>5</sup> The simplest form of indeterminacy is equioptimality.<sup>6</sup> When there are several candidates, all of whom are equally and maximally good, drawing lots seems as sensible a way as any other to select one among them. This holds true even where there is equioptimality only insofar as the costs of ranking candidates outweigh the benefits to be gained in choosing the best.<sup>7</sup>

A second kind of indeterminacy arises in the form of incommensurability. In this context, incommensurability means that it is impossible to make comparisons as between two distinct alternatives.<sup>8</sup> As an illustrative example, in social choice theory, a finding of incommensurability is the principal conclusion of Arrow's Impossibility Theorem, which states that it is impossible to assign a social preference relation to a profile of individual rational preference relations such that a couple of intuitively plausible conditions are satisfied.<sup>9</sup> When there are alternatives that cannot be meaningfully compared to one another, election-by-lot appears sensible.

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<sup>5</sup> JON ELSTER SOLOMONIC JUDGMENTS 107 (1989).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 108.

<sup>9</sup> Arrow's Impossibility Theorem can be stated formally as follows. Suppose that the number of alternatives is at least three. Then every social welfare functional  $F: A \rightarrow R$  that is Paretian and satisfies the pairwise independence condition is dictatorial in the following sense: There is an agent  $h$  such that, for any  $\{x, y\}$  in  $X$  and any profile  $(\geq_1, \dots, \geq_l)$  in  $A$ , we have that  $x$  is socially preferred to  $y$ , whenever  $x \succ_h y$ . ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 796 (1995). See generally KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUE (1963).

## 2. Incentive Effects

A second rationale for the use of election-by-lot allocation mechanisms stems from incentive effects. The intrinsic uncertainty associated with election-by-lot procedures impacts individual behavior in two opposing ways. While ignorance of the future may reduce or eliminate certain rent-seeking behavior—namely, expending scarce resources to increase the probability of selection at a cost to society—this uncertainty might also eradicate the incentive to invest in human capital insofar as an individual has no incentive to invest time and effort to qualify himself for a position that is assigned randomly.<sup>10</sup> To the extent that the impact of the former fully counterbalances the impact of the latter, it is possible to make an incentive-effects argument for the use of election-by-lot as a rational allocation mechanism.

## 3. Fairness

A final and frequently cited value of election-by-lot is that of promoting fairness.<sup>11</sup> While the term “fairness” is often only vaguely defined, thus making it difficult to wholly assess the validity of this claim, in most cases, the claim probably reduces to the view that when there exist no relevant differences among the alternatives to be selected, election-by-lot is appropriate because to proceed otherwise, i.e., using irrelevant differences, is to treat the various alternatives unfairly.<sup>12</sup> Fairness, on this conception, means simply that *like cases should be treated alike*, and thus, is essentially equivalent to the principle of horizontal equity.<sup>13</sup>

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<sup>10</sup> *Id.* at 111.

<sup>11</sup> There are two questions that could be asked in this regard; first, when is a lottery fair, and second, when is it fair to use a lottery. With respect to questions of fairness, the focus of the present paper is restricted to this latter inquiry.

<sup>12</sup> ELSTER, *supra* note 5, at 108.

<sup>13</sup> See generally ROBIN W. BOADWAY & NEIL BRUCE, WELFARE ECONOMICS 187 (1984); see also Martin Feldstein, *On the Theory of Tax Reform*, 6 J. PUB. ECON. 77–104 (1976).

## B. Why Not Election-by-Lot?

The previous section presented the arguments typically made in support of the use of election-by-lot. In this section, possible reasons are suggested for why, despite these compelling normative justifications, election-by-lot as an allocation mechanism is so rarely used in practice. Several explanations are presented that all essentially relate to the notion of indeterminacy.

### 1. In Search of Meaning

First, the idea that suffering can strike blindly and randomly is hard for most of us to tolerate. While the most satisfactory belief may be that someone else is to blame for our misfortunes, often, it may be better to blame ourselves than to continue to believe that there is no one out there that can be blamed for our misfortunes.<sup>14</sup> Because human beings are *meaning-seeking* creatures in this regard, uncomfortable with the idea that events experienced are merely “sound and fury, signifying nothing,” they will tend to be disinclined to adopt allocation mechanisms, like election-by-lot, where outcomes cannot be easily mapped back onto particular individual decision-makers.<sup>15</sup>

### 2. In Search of Reason

Second, human beings are *reason-seeking* to the extent that they want to have reasons for what they do.<sup>16</sup> For example, in situations where an individual knows that the benefits from ranking options along the relevant dimension of choice are small relative to the search costs involved, because of what Elster has called an “addiction to reason,” this individual often nevertheless continues to search despite the fact that the consequent search costs exceed the expected benefits of the search itself.<sup>17</sup>

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<sup>14</sup> ELSTER, *supra* note 5, at 56.

<sup>15</sup> WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 2.

<sup>16</sup> ELSTER, *supra* note 5, at 56.

<sup>17</sup> *Id.* at 117.

Moreover, individuals want these reasons for what they do to be as clear and decisive as possible so as to make the relevant decision easy, rather than close.<sup>18</sup> To reduce the tension of making a close decision, individuals will often adjust the weights of the various criteria so as to make one option appear clearly superior to the others.<sup>19</sup> Because the use of an election-by-lot often suggests that a particular decision is close, individuals may be resistant to it, choosing instead to again over-invest in search.

### 3. In Search of Process

Finally, an attachment to process value might serve to explain the general disuse of election-by-lot as a selection mechanism.<sup>20</sup> There are at least two arguments that can be made for attaching importance to such procedural or process values.

First, respecting procedural values in the long run leads to better substantive outcomes, even if, in a particular given case, they do not. This is, in effect, an outcome-oriented, utilitarian justification.<sup>21</sup>

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<sup>18</sup> This cognitive tendency to want to resolve the tension created by pre-decision ambiguity is nicely illustrated in an experiment conducted by Amos Tversky and Eldar Shafir. In this experiment, student-subjects were given a description of two apartments that differed in price and in distance from campus, and were told that they could either choose one of them now or could continue looking at some other apartments that might or might not be available. If they chose the latter option, then they ran the risk of the two apartments becoming unavailable. Before making a decision, subjects reviewed the entire set of options. Some subjects were placed in a high-conflict condition, in which one apartment scored high on the first dimension and low on the second, and vice versa for the other. Both apartments, however, were quite good on both dimensions. Other subjects were placed in a low-conflict condition, in which one apartment scored higher than the other on both dimensions. Here, however, both apartments were relatively poor in both respects. In the first condition, more subjects decided to search further than in the second. The desire to resolve ambiguity and to make a clear-cut decision apparently mattered more than the desire for a good apartment. Amos Tversky & Eldar Shafir, *Choice under Conflict: The Dynamics of Deferred Decision*, 3 PSYCHOL. SCI. 358–61 (1992).

<sup>19</sup> *Id.*

<sup>20</sup> See Greely, *The Equality of Allocation by Lot*, 12 HARV. C.R.-C.L. L. REV. 113 (1977) (positing an argument representative of much of the legal thinking on the subject).

<sup>21</sup> ELSTER, *supra* note 5, at 118.

Second, it could be argued that, even where the outcome is substantially the same (or less good), whether or not these values are respected, they have an independent importance in that “justice must not only be done, but ought also to be seen to be done.”<sup>22</sup> While a full discussion of this important topic lies beyond the scope of this paper, for present purposes, it suffices to adopt as correct the view set forth by Elster that process values are correlated with substantive outcomes in that if current beliefs about procedural values go against substantive justice, while they might be respected in the short-run, the two must become aligned in the long-run, because “no system of justice can work if people do not believe in it.”<sup>23</sup> Under this view, process values can again be defended as outcome-oriented, utilitarian considerations.

Thus, to assert that an attachment to process values is the source of resistance to election-by-lot allocation mechanisms is to assert that such mechanisms are resisted because they consistently generate socially suboptimal outcomes, a statement which, for the reasons given in Part A, can be rejected, *a priori*, as false.

## II. Election-By-Lot and Judicial Selection

The current methods of selection and retention for judges of the state trial courts of general jurisdiction fall under one of the following four general headings: (1) appointment,<sup>24</sup> (2) partisan election,<sup>25</sup> (3) nonpartisan election,<sup>26</sup> and (4) commission selection<sup>27</sup> (commonly referred to as “merit” or “merit-based” selection). There are, however, both variants and hybrids of these methods in use.<sup>28</sup>

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<sup>22</sup> *Id.* at 119.

<sup>23</sup> *Id.* at 121.

<sup>24</sup> New Jersey

<sup>25</sup> Alabama, Illinois, Louisiana, New York, Ohio (where candidates are nominated in partisan primaries but appear on the general election ballot without party affiliation), Pennsylvania, Tennessee, Texas, and West Virginia.

<sup>26</sup> Arkansas, California, Florida, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin.

<sup>27</sup> Connecticut.

<sup>28</sup> In Pennsylvania, for instance, judges are generally initially appointed by the governor to fill an unexpired term, subject to a confirmation vote by the senate. After

Moreover, an individual state will frequently employ different methods for different types of judges.<sup>29</sup>

The present paper suggests an alternative method of selection, namely, election-by-lot over an appropriately defined set of candidates. More specifically, the present paper seeks to justify the claim that, given an entirely plausible specification of social preferences, state court judges should be selected by a process similar to that currently used to select trial juries, where the set of possible candidates is now roughly defined as all members of the state bar. The discussion begins with a broad overview of how such a selection mechanism might operate in practice.

#### A. A Broad Overview

At the start of the year, an election-by-lot will be held over the appropriately defined candidate pool and judges will be selected as needed. If selected, that individual will receive by classified mail a Summons as well as a Certification Form. The Certification Form will include a set of questions intended to give information about that individual's legal background. This information, of course, will not be made publicly available. The Summons, as well as the Certification Form, will be expected to be completed and returned using the envelope attached within 30 days of having received the Summons.

The Summons will explain where and when the individual must attend the selection process. The minimum time before such a process will occur will be one year. This should provide sufficient

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completing the interim term, judges must then seek a 10-year term in a partisan election. Upon completion of the first 10-year term, incumbents stand for retention at 10-year intervals. The electorate is merely asked whether the judge should be retained in office. See Voorhees E. Dunn, Jr., *Judicial Reform in Pennsylvania*, in *JUDICIAL REFORM IN THE STATES* 117 (Anthony Champagne & Judith Haydel eds. 1993).

<sup>29</sup> In Florida, for example, all appellate judges are selected by use of the "merit" plan, and are subject to periodic retention elections. However, all trial judges must stand periodically in contested nonpartisan elections. See SARA MATHIAS, *ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS* 142-43 (1990).

time for the prospective judge to order her affairs accordingly, for instance, to take the steps necessary to ensure that this duty to serve as a judge does not conflict with her duty as a lawyer to represent her current clients “zealously within the bounds of the law.”<sup>30</sup> These panels are summonsed so as to provide a pool of potential judges for upcoming trials. The panel will remain active for up to two months and, as a member of the panel, the individual selected must attend one or two selection processes during that period.

If selected to serve as a judge, that individual will be exempt from similarly serving for five years. Panelists not selected will *not* qualify for this exemption, and, therefore, their names will be placed back in the computer as eligible for further selection.

### 1. The Commission and the Selection Process

Judges will be chosen for each trial scheduled for that month. A Commission will be in charge of matching panelists to scheduled cases, using as a basis for this decision the information about legal background and individual preference provided in each panelist’s Certification Form. The process will continue until a judge has been selected for each scheduled trial. All remaining panelists will then be dismissed. The selection process should, if possible, take no more than one business day.

The Commission plays a crucially important role in our hypothetical selection process, raising the important question of how this administrative body is selected in the first place. Because the Commission (as will be discussed in more detail below) will behave in some, *but not all*, respects exactly as would a state trial court judge, it is sufficient for the purposes of this paper to assert that the members of the Commission will be chosen by the selection

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<sup>30</sup> MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1969). Conflicts with the duty to zealously represent clients may be particularly likely to arise in geographical areas with smaller bars, where the odds of being selected to sit on the bench would be relatively high. In such areas, it may be necessary to shorten the length of service or to allow continued representation of current clients in a limited capacity.

process presently used to select state trial court judges in the jurisdiction at issue.

## **B. The Candidate Pool**

The election-by-lot will be held over the appropriately defined candidate pool, the precise contours of which are more fully defined in this subsection.

### **1. Basic Qualifications**

To qualify for service as a judge in a state court, the prospective judge must be a member of the state bar when selected. Furthermore, the prospective judge must have been a member of the bar for at least five years (not necessarily consecutive) when selected. Membership to the state bar guarantees, by implication, that several other important basic qualifications will also be satisfied,<sup>31</sup> in addition to serving as a screen for the most egregious sorts of offenses; for example, several states mandate disbarment for all felony convictions.<sup>32</sup>

### **2. Excuses**

While satisfying these basic qualifications, certain individuals, nevertheless, may be excused from mandatory service as a judge. Whether one of the following excuses will be granted will be considered on a case-by-case basis by the Commission.

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<sup>31</sup> For example, to be eligible for admission to practice law in the state of Minnesota one must be at least 18 years of age and establish to the satisfaction of the State Board of Law Examiners good character and fitness. MINN. STAT. § 52 (2004).

<sup>32</sup> *E.g.*, *Mitchell v. Ass'n of Bar of the City of New York*, 351 N.E.2d 743, 746 (N.Y. 1976) (allowing disbarment of former Attorney General John Mitchell following federal felony conviction). One kind of conduct that seems increasingly likely to invite disciplinary action is domestic violence or violence toward persons with whom the lawyer is in an intimate relationship. *See, e.g., In re Magid*, 655 A.2d 916, 919 (N.J. 1995) (cautioning that court will suspend attorney who is convicted of act of domestic violence); *Attorney Grievance Comm'n of Md. v. Painter*, 739 A.2d 24, 32 (Md. 1999) (holding that suspension is appropriate sanction absent aggravated assault, which can result in disbarment); *People v. Musick*, 960 P.2d 89, 93 (Colo. 1998) (upholding one-year suspension where attorney physically assaulted his girlfriend, although the assaults resulted in no serious injuries).

Specifically, an excuse might be granted for either one of the following two reasons: (1) physical or mental disability or impairment, or (2) personal obligation of care for another.<sup>33</sup>

### 3. Judicial Conduct

Finally, to be included among those entitled to serve in a trial, a prospective judge must be able to conduct herself in a manner consistent with the Model Code of Judicial Conduct as promulgated by the American Bar Association (“ABA”).<sup>34</sup> In this regard, the present paper will focus on two broad issues in the behavior of judges: (1) judicial conflicts of interest and (2) judicial bias or prejudice, and will suggest certain measures that could be adopted such that these concerns might be substantially mitigated or eliminated altogether.

#### a. Judicial Conflicts of Interest

In matching prospective judges to particular trials, several steps will be taken to ensure that there are no judicial conflict of interests that would violate either the Due Process Clause<sup>35</sup> or 28 U.S.C. § 455, where the latter is essentially equivalent to the standards set forth in the Model Code of Judicial Conduct.

First, the Certification Form will ask that the prospective judge provide certain facts which are a matter of public record; for

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<sup>33</sup> There is nothing particularly special about these two excuses and they are chosen only to the extent that they appear most reasonable among those commonly recognized by the states. While each state’s excuse rules are unique, the excuses normally cluster around two forms of undue hardship: (1) undue hardship to the summoned citizen or to another person for whom he/she is responsible and (2) undue hardship to the public. As an illustrative example, consult rule 860(d) of the California Rules of Court, which covers most of the bases of undue hardship that exist in most states.

<sup>34</sup> MODEL CODE OF JUD. CONDUCT (1990). Nearly every state, the District of Columbia, and the U.S. Judicial Conference have adopted judicial conduct codes based on the ABA models. In the federal system, the relevant statutes are 28 U.S.C. § 144 and § 455. The latter is more detailed and more important. Its language is similar to that found in the Model Code.

<sup>35</sup> U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

example, the prospective judge might be asked to provide information about prior professional affiliations as well as make available certain financial disclosure forms. In matching judges to scheduled trials, the Commission will then use this information, as well as the basic facts of the relevant case, to avoid assigning a prospective judge to a trial where she will have obvious conflicts of interest.

Second, because certain facts such as financial or other interests of close relatives most likely cannot be included in such a form, she will be under a duty to disclose, on the record, any and all information that she believes the Commission might consider relevant to the question of disqualification. She must do this after carefully reviewing the facts of the trial to which the prospective judge has been assigned, even if she believes that there is no actual basis for disqualification.<sup>36</sup> After having matched judges to cases, this duty to disclose serves as an additional safeguard against judicial conflicts of interest.

Finally, as part of a more general effort to minimize judicial conflicts, the prospective judge will be shielded from personal liability for taxes that might be used to impair her judicial independence for a period of one year immediately following her service as judge. This immunity from tax liability will additionally serve to provide a powerful inducement for members of the state bar to enthusiastically participate in this newly formed civic duty. It is a carrot that might be usefully supplemented with the stick of judicial malpractice liability in that the prospective judge would no longer enjoy the protection of absolute judicial immunity, but be held to the "good faith" standard generally adopted in the case of lawsuits brought against court officials other than judges.<sup>37</sup>

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<sup>36</sup> This closely follows the approach set forth in the commentaries to Section 3(E) of the Model Code. MODEL CODE OF JUD. CONDUCT § 3(E) cmt. (2004).

<sup>37</sup> In *Bradley v. Fisher*, the Supreme Court declared that judges cannot be sued for damages according to the doctrine of judicial immunity, and that their immunity is absolute. 80 U.S. (13 Wall.) 335 (1871) (citing as a rationale for this holding that a

**b. Judicial Bias or Prejudice**

Two steps, in particular, will be taken to ensure that the proceedings are not infected with judicial bias or prejudice, and that the Due Process rights of litigants are thereby not infringed.

First, after having been assigned to a particular trial, the prospective judge will be asked if she has any reason to doubt whether she will be able to perform her judicial duties without bias or prejudice.<sup>38</sup> If the prospective judge answers this question in the negative, the response will immediately become a part of her permanent public record. The damaging effects to her reputation that would likely emanate from such a response, coupled with the increased expected liability for unlawful, discriminatory conduct, should provide sufficient incentives for a prospective judge to answer the question truthfully.

Second, the Certification Form will ask the prospective judge whether she holds membership in any organization that practices invidious discrimination on the basis of the same set of attributes enumerated in note 42 and will be disqualified as a result if she does.<sup>39</sup> The possible First Amendment implications of this disqualification are explored in greater depth in Section IV.

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judge "shall be free to act upon his own convictions, without apprehension personal consequences to himself").

<sup>38</sup> In particular, the prospective judge will be asked whether she can perform her judicial duties such that, in the performance of those duties, she does not, by words or conduct, manifest bias or prejudice, including, but not limited to, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. This closely follows the approach set forth in Section 3(B)(5) of the Model Code. MODEL CODE OF JUD. CONDUCT § 3(B) (5) (2004).

<sup>39</sup>A definition of "invidious discrimination" can be found in the commentaries to Section 2(C). MODEL CODE OF JUD. CONDUCT § 2(C) cmt. (2004) (stating that "an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership." An organization does not invidiously discriminate, however, if it is "dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members," or if it is "in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.").

#### 4. Competency Tests

Although the selection of judges through election-by-lot certainly raises questions of judicial competency, there will be no competency tests. That an individual is capable of serving as a judge in certain trial court proceedings will be inferred from her admission to the state bar.<sup>40</sup> While a competency test would help to screen grossly incompetent prospective judges, it is unclear whether the costs of providing such an inexpensive means by which to circumvent entirely this mandatory service requirement, by intentionally failing the competency test, are exceeded by its benefits as a screening mechanism. The negative reputational effects in this instance, as opposed to those associated with disclosing certain kinds of bias or prejudice, are unlikely to be sufficiently large to render the test a reliable indicator of prospective judicial competence.

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<sup>40</sup> In some sense, this is the most controversial claim put forth in the present paper. While one could very easily imagine a world in which law schools make it a point to prepare each student for trial work, and attorneys make it a point to maintain sufficient trial knowledge (which could be achieved through a narrowing and restructuring of state CLE requirements), that world, however, is *not* the one in which we currently live. It is unlikely that an attorney whose practice for 25 years has consisted solely of tax work is in any way comparable in trial competency to an experienced (or even inexperienced) litigator. Given this variance in trial competency, extending election-by-lot to the *entire* state bar effectively precludes any of the positive self-selection effects that arguably exist under other judicial selection mechanisms. Because many practicing lawyers have neither interest in nor knowledge of the litigation process, the proposal as set forth would, therefore, likely require a significant investment of social resources to bring these lawyers up to speed. If such investment costs prove to be prohibitively high, then, as an alternative, so as to help minimize these costs, the candidate pool might be further restricted to those members of the state bar who can be correctly characterized as being actively involved in the litigation process. While this is certainly an eminently reasonable modification of the proposal as set forth, the present paper argues for the inclusion of the entire state bar so as to maximize the force of the positive incentive effects enumerated in Section IV.

### III. In Support of Election-By-Lot

#### A. Why Election-by-Lot as a Judicial Selection Mechanism?

In this subsection, the normative justifications for election-by-lot introduced in Section I are applied directly to the proposal as set forth above in Section II.

##### 1. Indeterminacy

First, in advocating for an election-by-lot allocation mechanism, the proposal can be viewed as positing indeterminacy among prospective judges to the extent that each is assumed equally able to serve as judge.<sup>41</sup> In making this assumption the proposal thus sends the very important expressive message that each and every member of the bar is, in the eyes of the State, no better than any other, at least along this particular dimension.<sup>42</sup> This conception of each and every individual as equally qualified is not, however, the current view ascribed to in selecting judges, especially not in the federal court system, where serving as judge is considered a great privilege, reserved only for those select few at

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<sup>41</sup> This is not the view normally espoused. Sharon Dolovich, Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027, 2041 (1998) (“During this [clerkship] process, the gulf separating the students who performed well on first-year exams or made the Law Review and those who did not becomes most evident. Yet again, no one talks about it, or if they do, it is with the hushed tones of conveying a confidence, of admitting a failing, of voicing a source of humiliation. Because a clear hierarchy of judges and courts signals to the student and others exactly where this student fits into the rigid pecking order of the legal community, even those students who do secure clerkships can experience the process as ego-bruising if they found themselves passed over by the most prestigious judges.”).

<sup>42</sup> The importance of expressive messages is powerfully expressed by Chief Justice Warren in *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954) (“To separate them [minority children] from others of similar age and qualifications solely because of their race generates a *feeling of inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”) (emphasis added). Though sensitive not to undermine the terrible injustice wrought by separate but equal, to institute a system of merit wherein one must attend a top-ranked law school to be eligible to participate meaningfully in the judiciary might create in law students not at such law schools a feeling of inferiority that has important and significant consequences in the long-run.

the very top of the legal profession.<sup>43</sup> The present proposal, by suggesting that the right to serve as a judge, at least at the lowest levels of the state judiciary, is a privilege that *all* members of the state bar ought to have an equal chance to enjoy, seeks to introduce a counterweight to the current culture of hierarchy.<sup>44</sup>

## 2. Incentive Effects

Second, in addition to its positive expressive message, selecting judges by lot generates positive incentive effects for both prospective judges, as well as for several other non-judicial institutional entities. Consider first its impact on prospective judges.

### a. Prospective Judges

The randomization of the selection of judges attenuates certain *rent-seeking* expenditures made at a cost to society.<sup>45</sup> “The most benign form of such rent-seeking occurs when favors are sought by prospective judges from governmental decision-makers through direct bribes.” In this instance, “rent-seeking expenditures are pure transfers, and the cost of rent-seeking is the opportunity cost of these rent-seeking prospective judges directing their

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<sup>43</sup> Letter from Stephen Tober, Chair of Standing Committee on Federal Judiciary of the American Bar Association, to Arlen Specter, Chairman of the Senate Committee on the Judiciary 3 (Sept. 14, 2005) (“To merit the Standing Committee’s evaluation of ‘Well Qualified’ or ‘Qualified,’ [a] Supreme Court nominee must be at the top of the legal profession.” She must have “outstanding legal ability and exceptional breadth of experience and meet the highest standards of integrity, professional competence, and judicial temperament.”) , available at <http://www.abanews.org/docs/Roberts-SCFJletter.pdf>.

<sup>44</sup> See Dolovich, *supra* note 41, at 2041–42.

<sup>45</sup> See generally Alan A. Lockard, *Decision by Sortition: A Means to Reduce Rent-Seeking*, 116 PUB. CHOICE 435 (2003) (presenting a formal model that shows how a randomized decision mechanism — sortition or, equivalently, election-by-lot—“ can be expected to reduce the intensity of self-interested activity by rent-seeking factions within democracies.”). See also Charles Rowley, *Rent-Seeking in Constitutional Perspective*, in THE POLITICAL ECONOMY OF RENT-SEEKING 447 (Charles K. Rowley et al. eds., 1988); Gordon Tullock, *Efficient Rent-Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 97 (James M. Buchanan et al. eds. 1980).

activities towards the pursuit of transfers instead of engaging in wealth-producing activities.”<sup>46</sup>

“Rent-seeking costs may manifest themselves in non-monetary ways as well.”<sup>47</sup> Judicial elections, for example, are rent-seeking contests almost by definition. Expenses are incurred (advertisements) in pursuit of a pre-existing scarce resource (judgeship). Since there are rents to be captured in becoming a judge, for example monopoly rents where a judgeship is characterized as a grant of monopoly power in the market for legal outcomes,<sup>48</sup> then they will be pursued so long as the *ex ante* expected value of such rents exceeds the expected costs of successfully obtaining them.<sup>49</sup>

Under election-by-lot, however, because each prospective judge enjoys an equal probability of being selected, regardless of the level of rent-seeking expenditures, there should be a significant reduction in the total level of such expenditures. This reduction enhances social welfare insofar as the increased uncertainty with respect to the expected return on rent-seeking expenditures should induce the marginal rent-seeking prospective judge to substitute

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<sup>46</sup> Lockard, *supra* note 47, at 436.

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., Gordon Tullock, *Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1966).

<sup>49</sup> For example, while judicial elections used to be a relatively neglected enterprise, change began in 1978 when the “Los Angeles County deputy district attorneys literally advertised to find candidates to oppose unchallenged incumbent trial judges, and they defeated an unprecedented number of them.” Roy Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1405 (2003). The record for money spent in a judicial election “was set in 1986, when California’s Chief Justice Rose Bird and two of her colleagues were denied retention — the total spent was \$11.5 million (approximately \$18,000,000 inflation-adjusted), with massive grass-roots fundraising against the justices and well-funded independent committees (not political parties) supporting the justices.” *Id.* at 1406. “In 2000, when twenty states had Supreme Court races, candidates’ funds rose to \$45,495,420, a 61% rise over the prior peak, setting records in ten states. In addition, independent interest groups spent about \$16,000,000 in the five most hotly contested state elections: those in Alabama, Illinois, Michigan, Mississippi, and Ohio.” *Id.* at 1405.

her efforts to wealth-creation, a now relatively less risky source of income.<sup>50</sup>

**b. Other Non-Judicial Institutional Entities**

The randomization of the selection of judges likely affects, not only the behavior of the judiciary, but that of two other non-judicial institutional entities as well: (1) law schools and (2) law students.<sup>51</sup>

First, the prospect that any member of the state bar could be selected to serve as judge in a case heard before a state court will create a powerful incentive for law schools to adopt a system of education that seeks to maximize some minimum level of competency among students.<sup>52</sup> It has been suggested that randomly switching babies among families at birth, although clearly unacceptable because of the implied violation of family autonomy, would have the positive effect of ensuring equality of opportunity.<sup>53</sup> Similarly, the randomization of the selection of judges will encourage law schools to ensure, at least along this important dimension, that *all* students are equipped with the legal skills necessary to adequately serve in this civic capacity. That is, knowing that any one of its students might be asked to decide the next *Palsgraf v. Long Island Railroad Company*,<sup>54</sup> law schools would have an incentive to structure law school education so as to ensure

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<sup>50</sup> Lockard, *supra* note 47, at 439.

<sup>51</sup> For this discussion it is assumed that a law degree is a necessary condition for admittance to the state bar.

<sup>52</sup> See generally JOHN RAWLS, A THEORY OF JUSTICE (1999); JOHN E. ROEMER, EQUALITY OF OPPORTUNITY (1998).

<sup>53</sup> See generally JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983).

<sup>54</sup> 162 N.E. 99 (N.Y. 1928).

that each and every student, no matter the class rank, attains a minimal threshold level of competency.<sup>55</sup>

Second, while modifying the way in which law schools approach legal education, it seems equally valid to assert that allowing for full participation in the judiciary would similarly change the way in which law students approach their own legal education. In particular, students assured of some probability of serving as a state court judge in the future would have that responsibility as additional motivation to become as competent and capable a lawyer as possible. While this might require that the student enroll in classes that she would not have ordinarily taken, such as evidence law or trial advocacy, the typical law school curriculum, particularly in the second and third years, is sufficiently flexible so as to allow for this additional coursework. Indeed, a bit more structure might actually be welcomed by law students in what can often be a difficult two years spent adrift.<sup>56</sup>

### 3. Fairness

Finally, the election-by-lot proposal implies an allocation of civic duty that is, in a certain sense, fairer than that under the current system. In ten states,<sup>57</sup> attorneys are automatically exempted from jury duty. Often the rationale for such exclusions is that total social welfare is increased when attorneys are permitted to continue to engage in the socially valuable activity of providing

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<sup>55</sup> Election-by-lot thus adds an incentive to law schools to maximize the minimum level of competence among the student body. In fact, it is not hard to imagine that currently many law schools' optimal strategy is a contrary approach wherein the school attempts to make the top 10% of its student body as competitively capable as possible, while, in effect, wholly ignoring the remaining 90%.

<sup>56</sup> See Dolovich, *supra* note 41, at 2042 ("[B]y the middle of 2L year, a remarkably high proportion of the class has 'checked-out,' disengaged from the law school, and is just marking time.").

<sup>57</sup> Hawaii, Maine, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, and Virginia. Bureau of Justice Statistics, *State Court Organization* 1998, 269-72, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf>. (last visited October 24, 2005).

legal services, rather than serving as jurors.<sup>58</sup> However, exempting these attorneys violates the principle of horizontal equity: by instituting blanket exemptions to jury service for a distinct subset of the citizenry—those presently admitted to the state bar—the state is now treating citizens unequally.

Currently, however, the trend among States is to recognize occupational exemptions to jury service as elitist and unnecessary, and, moreover, that such exemptions place an unfair burden on those who do not qualify for this special treatment.<sup>59</sup> In particular, as of 2005, approximately two-thirds of the states have now taken the positive step of repealing broad occupational exemptions to jury service.<sup>60</sup> Though this paper generally approves of these measures as they reduce a pernicious sort of elitism and remedy what appear to be the consequent effects of special interest politics,<sup>61</sup> the normative arguments in support of the proposition—that lawyers should *not* be required to serve on juries—militate against extending the repeal of occupational exemptions to attorneys.

There are several normative rationales that justify exempting attorneys from jury duty. To start, because of their legal training, attorneys may exert a disproportionate degree of influence in a jury's deliberations.<sup>62</sup> In addition, attorneys might be impliedly biased because of their professional relationship with the judicial system.<sup>63</sup> An attorney's "knowledge of courtroom procedure may affect his ability to view evidence impartially. He may be more

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<sup>58</sup> See *Rawlins v. Georgia*, 201 U.S. 638, 640 (1906) (holding that "if the state law itself should exclude certain classes on the *bona fide* ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the 14<sup>th</sup> Amendment to prevent it.").

<sup>59</sup> See STANDARDS RELATING TO JUROR USE AND MANAGEMENT 661 (1983).

<sup>60</sup> For example, in 1995, the New York legislature, upon the recommendation of a Citizens Jury Project under the leadership of Chief Judge Judith Kaye, eliminated all occupational exemptions. See Julia Vitullo-Martin et al., *Five Years of Jury Reform: What Jurors are Saying, Final Report on Juror Concerns to the Unified Court System*, 2, 10 (2000), available at [http://www.vera.org/publication\\_pdf/juryfinal.pdf](http://www.vera.org/publication_pdf/juryfinal.pdf).

<sup>61</sup> See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

<sup>62</sup> *State v. Williams*, 659 S.W.2d 778, 781 (1983).

<sup>63</sup> *Id.*

likely to know the attorneys arguing the case before him and his knowledge of their reputations and abilities may color his judgment,"<sup>64</sup> especially in a geographical area where the bar is small.

However, "even if these factors are discounted, and granting that lawyers may be as objective and impartial as any other juror, nevertheless, confidence in the integrity of the jury system is better maintained if lawyers are excluded from service."<sup>65</sup> Specifically, "it is a common misconception that most lawyers regularly appear in the courts and are, therefore, 'insiders' in the judicial system."<sup>66</sup> Since it is also a commonly held belief that insiders should not serve on juries, and attorneys are indeed perceived as such, they should not be allowed to serve as jurors.<sup>67</sup>

Having argued that lawyers should not—and in some states actually cannot—participate as jurors in trial court proceedings, we are left with a troubling violation of horizontal equity. The present paper addresses this violation by setting forth an alternative approach, wherein all members of the state bar are still exempted from jury duty, but they are instead obligated to perform a different civic duty. Insofar as these two civic duties are relatively similar, horizontal equity is thereby restored.

Horizontal inequality may still exist under this proposal, however, in that more is being asked of members of the bar than is being asked of the ordinary citizen. But this inequality is surely preferable to the inequality created when the state decides that, because of attorneys' specialized knowledge of the law, their time is

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<sup>64</sup> *Id.*

<sup>65</sup> *Commonwealth v. Kloch*, 327 A.2d 375, 388 (Pa. Sup. 1974); *see also Williams*, 659 S.W.2d at 781.

<sup>66</sup> *Kloch*, 327 A.2d at 388.

<sup>67</sup> *Id.* *See also Harrison v. State*, 106 N.E.2d 912, 919-20 (1952) ("While attorneys at law are not public officials such as sheriffs, prosecutors and police officers, they are so much a part of the court in which cases are to be tried that they may justifiably be excluded upon the same ground as police officers, or any other person who might have a public interest in the case.").

so much more valuable than that of, say, the nurse practitioner that they should therefore, be obligated to perform one *fewer* civic duty.

## **B. Election-by-Lot Compared to the Current Judicial Selection Mechanisms**

Although it has never been used in the context of judicial selection, election-by-lot enjoys several advantages over both electoral and merit-based selection mechanisms. While these advantages do not imply that election-by-lot is always rationally or morally superior, they do illustrate, that, depending on the weights given by society to the various arguments offered below, election-by-lot might very well result in a higher social welfare.

### **1. Electoral Selection Mechanisms**

Presently, a majority of states use some form of election to choose the judges who sit on their trial, appellate, and supreme courts.<sup>68</sup> This approach appears to be the direction in which the Supreme Court is moving regarding judicial selection, explicitly characterizing elected judges as lawmakers<sup>69</sup> and representatives.<sup>70</sup> The Court has insisted that the categorical distinction between elected judges and other representatives cannot be maintained.<sup>71</sup> For instance, in *Republican Party of Minnesota v. White*, Justice Scalia argued that judges are not categorically different from other elected officials.<sup>72</sup> He suggested that different judges invariably bring

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<sup>68</sup> All forms are sufficiently similar to be considered together and contrasted with the election-by-lot procedure.

<sup>69</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (“Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitution as well ...[w]hich is precisely why the election of state judges became popular.”).

<sup>70</sup> See *Chisom v. Roemer*, 501 U.S. 380, 399 (1991) (“If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered ‘representatives’ simply because they are chosen by popular election, then the same reasoning should apply to elected judges.”).

<sup>71</sup> *Gregory v. Ashcroft*, 501 U.S. 451, 466-67 (observing that judges do engage in “policymaking at some level”).

<sup>72</sup> 536 U.S. at 784.

different theories of jurisprudence to the bench<sup>73</sup> and that the voter, therefore, has a real interest in deciding who will shape the law in his or her district.

**a. Advantages of Election-by-Lot as Compared to Electoral Selection Mechanisms**

Election-by-lot has a number of advantages over judicial election. For instance, whereas election-by-lot is free of the corrosive effects of money and political campaigning, judicial elections are not, thereby eroding public confidence in the judiciary.<sup>74</sup> In addition, judicial elections can lead to a weakening of the principles of *stare decisis*<sup>75</sup> to the extent that judges are tempted to decide cases in accordance with what result will garner the most support among the electorate and produce the least degree of impassioned response by a future campaign opponent.<sup>76</sup> This push to appeal to the whims of a mostly uninformed electorate, as opposed to adhering to the

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<sup>73</sup> See *id.* at 776–77 (holding that a fair judge is not a *tabula rasa*, but an opinionated jurist who must, nonetheless, apply the law – as she sees it – equally in each case).

<sup>74</sup> Polls commissioned for the National Center for State Court’s initiative on Public Trust and Confidence in the Courts, for instance, reveal that about three-fourths of Americans believe that judicial outcomes are affected by campaign contributions. *Nat’l Ctr. for State Courts, How the Public Views the State Courts: A 1999 National Survey* 3 (1999), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicViewCrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf) (finding that 78% of respondents agree that “[e]lected judges are influenced by having to raise campaign funds.”).

<sup>75</sup> The Federalist Society, *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 391–92 (2002) (“[I]n any state with partisan judicial elections, *stare decisis* can be less significant than implementing a politically-favored policy, and reforms sustained are subject to future frustration.”); see also Tillman J. Finley, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 57 n.105 (2003).

<sup>76</sup> 536 U.S. at 788–89 (O’Connor, J., concurring) (“[I]f judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case.”). For example, in 1967, Wisconsin Supreme Court Justice George Currie was defeated in his re-election campaign largely as a result of his vote in a 1965 case allowing Milwaukee’s major league baseball team, the Braves, to move to Atlanta. Michael Koehler, *Baseball, Apple Pie, and Judicial Elections: An Analysis of the 1967 Wisconsin Supreme Court Race*, 85 MARQ. L. REV. 223, 223–24 (2001).

strict dictates of law is, of course, not present under an election-by-lot system.

Finally, it could be argued that the “democratic process” of selecting state court judges is of such a poor quality that society as a whole would be better-off if it were to simply select lawyers at random to serve as state court judges. New York City serves as a particularly illustrative example of a troubling judicial election process. From 1999 through 2003, for instance, in NY County, the Republican Party did not place a single delegate candidate on the ballot in any election for judicial delegate.<sup>77</sup> During that same period, the Democratic Party selected over 80 percent (i.e., 1625 out of 2026) of its judicial delegates in New York City without actually having to place any of them on the ballot.<sup>78</sup> Not only have studies demonstrated that the electoral process is flawed in many important ways, but such studies tend to find that voter interest, as well as voter knowledge, is low,<sup>79</sup> which, not surprisingly, leads many voters to abstain from voting in most judicial elections.<sup>80</sup>

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<sup>77</sup> Lopez Torres v. New York State Board of Elections, 16, n. 11, 04 CV 1129 (JG).

<sup>78</sup> *Id.* at 16-17 n. 11. The relatively high absentee rate for these judicial delegates at conventions further reflects the extent to which delegates are selected simply to place a rubber stamp on the county party leadership’s selection of candidates rather than to evaluate and vote for candidates independently. Within New York City, in 1999 and 2000, the absentee rate for Democratic Party judicial conventions was 24.5 percent; for the three Republican Party conventions between 1999 and 2002, the average absentee rate was 69.1 percent. *Id.* at 11 n. 8. The brevity of the conventions also dramatically illustrates the absence of real decision-making at the conventions. In Kings County, for example, the average length of the eight conventions from 1994 through 2002 for which data are available was 25.3 minutes. The longest convention in Brooklyn during this period ran 45 minutes, while the shortest took only a mere 11 minutes. *See id.* at 30 n. 25.

<sup>79</sup> Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 290 (2002) (“Voter turnout repeatedly demonstrates the public’s lack of interest in judicial elections.”).

<sup>80</sup> Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791 (2004). In particular, the “roll-off” effect (declining to cast a vote for any other races other than that at the top of the ballot) is substantial in judicial elections. *See* Lawrence Baum, *Judicial Elections and Judicial Independence, The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 19 (2003) (“Roll-off is an enduring reality in judicial elections.”). In the 2002 elections for Civil Court

### b. The Virtues of Electoral Selection Mechanisms

In certain respects, however, electoral selection mechanisms may be preferable to election-by-lot. In particular, to the extent that judges are, and should be, policy-makers, electoral methods should be favored over election-by-lot mechanisms. In contrast to Justice Ginsburg, who has asserted that “judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public,”<sup>81</sup> there are those who see judges primarily as policy-makers and believe that courts have used those “individual cases” to formulate policy affecting far more people.<sup>82</sup> They argue forcibly that the judiciary has both the capacity and the will to engage in policy-making that often can be as important as legislative policy-making. Furthermore, the public should not be locked out of this policy-making process, as would be the case under election-by-lot, but rather be entitled to vote for the judge who will implement their preferred policies.<sup>83</sup> Moreover, under this view, by providing the public with the opportunity to choose the judges, before whom they might appear, judicial elections, in stark contrast to election-by-lot, promote democratic accountability.

In order to legitimize the unaccountability that exists under the election-by-lot system, judges must invalidate the popular will only when the Constitution demands such invalidation.<sup>84</sup> However,

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judgeships, for example, there were 353,092 valid votes for Governor cast in New York County (35% of the register voters; 28% of those eligible to vote). There were 186,659 valid votes cast for Civil Court judge in Manhattan (19% of the registered voters; 15% of those eligible to vote). Roll-off was thus present in approximately 50% of valid votes cast in this election. New York State Board of Elections, November 8, 2002.

<sup>81</sup> 536 U.S. at 806.

<sup>82</sup> See generally Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982) (explaining that contemporary litigation is forward-looking and concerns policy, not merely two business litigants and a contract dispute).

<sup>83</sup> See Peter Paul Olszewski, Sr., *Who's Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems*, 109 PENN ST. L. REV. 1, 9 (2004).

<sup>84</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803); *The Federalist* No. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Nor does

if judges apply their own values to strike down legislation, instead of the Constitution, judicial review presents a particular form of the countermajoritarian problem.<sup>85</sup> Societal demands for judicial accountability, which are satisfied by judicial election, can thus be characterized as the “predictable, natural, and appropriate responses to judges who exceed their authority.” These demands must necessarily go unmet under election-by-lot, where the judge as policy-maker is isolated from any such form of public accountability.<sup>86</sup>

## 2. Merit-Based Selection Mechanisms

Though courts may be willing to view elected judges as being no different than any other elected officials, they are generally reluctant to view elected judges as mere political figures.<sup>87</sup> As even the majority in *Republican Party v. White* acknowledged, there exist legitimate arguments against the use of a popular election as a judicial selection mechanism.<sup>88</sup> The alternative normally suggested is merit selection.

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[judicial review] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . .”).

<sup>85</sup> See Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 14 (1992) (“[C]ourts give up their defense against the charge that law is nothing more than politics when they explain their decisions as a choice of social policy with little effort to attribute that choice to any law.”). While the impact of this particular form of the countermajoritarian problem would be substantial were the entire judiciary chosen by lot, it is certainly not as important under the proposal as set forth in the present paper, where it is argued that election-by-lot should be confined to the selection of judges at the trial court level and not be extended to the appellate judiciary.

<sup>86</sup> Michael R. Dimino, *The Worst Way of Selecting Judges – Except All the Other That Have Been Tried*, 32 N. KY. L. REV. 267, 278–80 (2005).

<sup>87</sup> See, e.g., *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff’d*, 409 U.S. 1095 (1973) (holding that judges do not conduct ‘governmental functions’ within the meaning of *Hadley v. Junior College District*, 397 U.S. 50, 56 (1970)); *Cox v. Katz*, 30 A.D.2d 432 (N.Y. App. Div. 1968), *aff’d*, 22 N.Y.2d 903, 905 (N.Y. 1968) (“The function of judges . . . is to apply the law, not to represent or champion the cause of a particular constituency.”); *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964) (holding that judges, elected or not, are required “to administer the law, not to espouse the cause of a particular constituency.”).

<sup>88</sup> See 536 U.S. at 787–88 (describing the concerns over the independence of an elected judiciary and noting that these concerns led to the creation of constitutional protections for Article III Federal judges).

**a. Advantages of Election-by-Lot as Compared to Merit-Based Selection Mechanisms**

Election-by-lot has a number of advantages over merit-based selection mechanisms. First, the claim that merit-based systems reduce the influence of politics in judicial selection is untrue as the organized bar and segments of the political elite are simply pushing the politics out of the public light of popular elections and into the back rooms of small commissions.<sup>89</sup> The process is, as one Missouri state court judge put it, “too secretive, undemocratic, not representative, too political, and not accountable or responsive to the public.”<sup>90</sup> Thus, if the desire is to separate politics from judicial selection, election-by-lot is superior to merit-based selection mechanisms in that it can guarantee this separation.

Second, racial and ethnic minority organizations and leaders, and some women’s groups, have argued that merit-based appointive systems provide less opportunities for candidates of color and female candidates to reach the bench than do other existing methods.<sup>91</sup> While these arguments are not always supported by the available data,<sup>92</sup> they have resonated with an increasingly diverse electorate. Election-by-lot, on the other hand, can resolve this dilemma as it can promise a wholly representative

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<sup>89</sup> For example, in 1984, the governor of Missouri allegedly collaborated with the state’s judicial nominating commission to manipulate the selection process and appoint his Chief-of-Staff, who had no judicial experience, to the Missouri Supreme Court. 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, 328 (1997).

<sup>90</sup> *Id.* at 341.

<sup>91</sup> Seth S. Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 797 (2004).

<sup>92</sup> Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, in RESEARCH ON JUDICIAL SELECTION 8–10 (1999) (noting the lack of “substantive or significant differences in the rate at which different selection systems promote women or minority jurists”).

and diverse bench (to the extent, of course, that the state bar accurately reflects the demographics of the total population).

Finally, the method in which the merit of a particular judge would be defined and quantified is surely to be a highly subjective enterprise.<sup>93</sup> Indeed, the central problems behind the judicial selection controversy are the disagreement over what the law is and what methods should be employed to ascertain what the law is.<sup>94</sup> For example, it has been argued that “[t]he movement to constrain elections [by looking to merit] . . . is motivated by the belief . . . that ‘an elite cadre of philosopher-kings’ must limit democracy in order to save the people from themselves.”<sup>95</sup> But, there is no reason to believe that this is true.

Perhaps, the best judges, the judges who most faithfully represent the “true” law, are the ones that most accurately reflect the preferences of ordinary voters. Or, quite possibly, the law is nothing more than the straightforward application of legislatively enacted rules, easily interpretable by those with even a minimal level of legal training, which suggests no reason why those empowered to implement such rules should be anything other than a random sample of those individuals with the requisite legal training. In other words, election-by-lot endorses an idea about the power to judge that is neither the opportunity to engage in unfettered legislative-style policy-making nor the exclusive privilege to discern meaning from legal rules. Rather, election-by-lot creates a concept of *civic duty*, where each and every individual to whom the State has granted the right to practice law is allowed to participate in the enforcement of a set of legal rules that they are assumed to know and fully understand.

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<sup>93</sup> Certainly literacy, sanity, and the ability to articulate complex thoughts in clear prose are all essential, fairly objective qualities for a good judge to possess.

<sup>94</sup> Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 815 (2004).

<sup>95</sup> *Id.* at 815–16 (quoting W. Bradley Wendel, *The Ideology of Judging and the First Amendment in Judicial Election Campaigns*, 43 S. TEX. L. REV. 73, 105 (2001)).

**b. The Virtues of Merit-Based Selection Mechanisms**

None of the preceding, however, implies that election-by-lot is necessarily preferable to merit-based systems. In fact, the argument that merit selection is likely to result in a judiciary that operates more efficiently might counterbalance the aforementioned arguments in support of choosing judges by lot.

Under a merit-based selection mechanism, only the most highly qualified are considered for nomination to the bench.<sup>96</sup> Thus, prospective judges have an incentive to invest in becoming as competent a judge as possible, an incentive that would not exist under election-by-lot where an individual has no real incentive to invest time and effort to qualify himself for a position that is assigned randomly.<sup>97</sup>

In addition, suppose that judges chosen on the basis of merit serve longer terms than those chosen by lot.<sup>98</sup> The job of a judge is to decide cases and, presumably, they derive some measure of utility from doing so.<sup>99</sup> For example, they may derive utility from using legal reasoning to decide cases in accordance with precedent.<sup>100</sup> Under this view, the judge's reasoning utility is

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<sup>96</sup> Finley, *supra* note 75, at 57. *But see* Malia Reddick, *Symposium: Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 741-42 (2002) (researching the qualifications of judges chosen under the Missouri Plan and finding no support for claims that merit selection candidates were better educated than elected judges, more open-minded than elected judges, or had more judicial experience than elected judges).

<sup>97</sup> ELSTER, *supra* note 5, at 111.

<sup>98</sup> The preceding arguments are not, however, distinct virtues of merit selection, but rather are virtues that extend to *all* current selection systems, including, in particular, elected judges insofar as these judges also typically serve longer terms than would judges chosen by lot.

<sup>99</sup> According to Posner, "judges, like other people, seek to maximize a utility function that includes both monetary and non-monetary elements (the latter including deciding the case, leisure, prestige, power, and aversion to reversal)." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 505 (1986); *see also* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14-15 (1993).

<sup>100</sup> *Compare* Posner, *supra* note 101, at 15-19 (analogizing judges to spectators at a play or voters in a political election and arguing that judges derive consumption value

greater when she decides the case correctly, given the governing precedent.<sup>101</sup> Hence, the judge has an incentive to invest effort to increase the rate at which she can decide future such cases correctly. By reducing the time available for any one particular judge to make such investment, election-by-lot will thus result in judges that, on average, have invested less in human capital than would be the case under a merit-based selection mechanism.

Furthermore, the longer terms associated with merit selection also promote beneficial learning-by-doing effects that are distinguishable from investment expenditures in human capital. The basic idea is that as judges hear cases over time they inevitably manufacture ways of improving the adjudicative process.<sup>102</sup> That is, the accumulation of judicial knowledge occurs in part, not as a result of deliberate investment efforts, but as a consequent side-effect of simply hearing cases.

However, these human capital and learning-by-doing effects may be offset by the fact that judicial experience is positively correlated with age and that the effect of age on deciding cases correctly might cut the other way. For example, because some judges become less healthy or energetic as they age, older judges may be relatively less likely to exert the effort required to arrive at the right result, because getting the case right in most instances likely requires more effort.<sup>103</sup> In addition, as their judicial career comes to an end and retirement nears, older judges may be more

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from the act of voting), with Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 49 (1994) (asserting that judges trade-off “private utility” – their “personal view of how a case should be decided” – and “reputational utility” – their “expectation of how [a] decision would be viewed by observers of the legal process”).

<sup>101</sup> See THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 172 (1994) (explaining that judges “are very independent, highly motivated, individual decisionmakers who feel a great responsibility to ‘get it right’”).

<sup>102</sup> See generally Kenneth Arrow, *The Economic Implications of Learning by Doing*, 29 REV. OF ECON. STUD. 155 (1962).

<sup>103</sup> Ahmed E. Taha, *Publish or Perish? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 11 (2004).

interested in adding to their legacy and thus may choose to decide cases on the basis of some particular ideology instead of by what precedent would strictly dictate.<sup>104</sup> Finally, because older judges often have less opportunity for advancement, reversal rates might increase with age, assuming that frequent reversals hurt a judge's actual prospects for promotion.<sup>105</sup>

#### IV. The Practical and Constitutional Limits of Election-By-Lot

##### A. Applying Election-by-Lot to Appellate Courts

The literature generally identifies two principal functions served by an appeals process: (1) to correct errors by the initial decision-maker and (2) law-making.

Under the first view, trial courts make mistakes, and appellate courts, because of their greater expertise, lesser time pressures, or some other reason, correct those mistakes.<sup>106</sup> It could be that under election-by-lot, judges so selected will make fewer mistakes.<sup>107</sup> However, this seems unlikely. Conceding that a greater

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<sup>104</sup> *Id.* See also Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 970-81 (1995) (examining "three types of incentives that together may explain a fair amount of judicial behavior: (1) incentives (such as reputation among and relations with professionals) to follow professional norms; (2) incentives (such as maintaining favorable standing with important political actors) to reach particular outcomes irrespective of their satisfaction of professional norms; and (3) concerns internal to (or already fully internalized by) the judge."); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1053-58 (1995) (identifying two generally accepted components of judicial decision-making: "craft," meaning "the well-reasoned application of doctrine to the circumstances of the particular case" and "outcome," that is, "focus[ing] on the result in a given case and its implications for the parties and society as a whole").

<sup>105</sup> See Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 135 (1980).

<sup>106</sup> See, e.g., Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 381-82 (1995) (arguing that an appeals process for correcting errors is superior to the alternatives of improving the quality of trial courts to prevent errors, because it requires the expenditure of resources only in cases in which the party bringing the appeal has determined that trial court error was likely).

<sup>107</sup> Alternatively, suppose that, in any given trial, the severity of mistakes  $M$  is a continuous random variable whose probability distribution function is given by  $p(\bullet)$ . Denote the expected value of  $M$  by  $E[M]$  and the variance by  $\text{Var}[M]$ . The variance in

number of mistakes will be made, election-by-lot is thus restricted to the trial court level, with the increased number of mistakes left to be corrected by a more robust appellate judiciary, selected through a process uniformly less likely, as compared to election-by-lot, to yield a given number of mistakes.

Under the second view, trial courts are characterized as law-implementing, and appellate courts as law-making.<sup>108</sup> At least in common law countries, appellate judges decide cases that provide precedents to guide decisions in future cases. These appellate judges will tend to resolve controversies so as to ensure that the law created by the lower courts is uniform, and, in so doing, often articulate what is, in effect, a novel rule of law.<sup>109</sup> The lack of an appeals process in commercial arbitration, for example, has sometimes been cited as support for the proposition that the principal value of appellate proceedings is “not to correct errors at the trial level, but to formulate rules of law.”<sup>110</sup>

The present paper, however, has resisted extending election-by-lot to such legislative-style rule-making, content to extol its virtues in the limited context of rule-implementation. As to rule-making, it is readily conceded that such is better left to individuals chosen either by popular election or on the basis of perceived merit.

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the severity of mistake  $\text{Var}_E[M]$  under election-by-lot will most likely be greater than the variance  $\text{Var}_C[M]$  that exists under current methods. If the expected values are, nevertheless, approximately equal, i.e.,  $E_C[M] \approx E_E[M]$ , then current selection methods are superior with respect to the severity of mistakes insofar as that they are less likely to yield, in a given trial, truly egregious sorts of errors.

<sup>108</sup> See HERBERT JACOB, *JUSTICE IN AMERICA* 31 (1965) (distinguishing between the policy-making function of appellate courts and the norm-enforcement function of trial courts).

<sup>109</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 12 (1985).

<sup>110</sup> William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 252 (1979). Because the benefits of lawmaking by judges are largely external to the parties involved in a particular case, the authors argue that the parties to an arbitration agreement have little incentive to provide for an appeals process and pay the appeals tribunal to engage in lawmaking. *Id.* at 238.

## B. Applying Election-by-Lot to Complex and Lengthy Trials

Although election by lot is a workable method for selecting judges for trials, it should not be used to select judges for *all* trials. In particular, it should not be used to select judges for (1) trials heard in a specialized state court or (2) trials likely to last over three months.

### 1. Specialized State Courts

Election-by-lot should not be used to select judges for specialized state courts. Judges selected through election-by-lot will not be well suited for the adjudication of particularly difficult or complex legal issues or factual disputes that are typically decided by specialized courts of limited jurisdiction. With caseloads that span a broad range of fields of law, the likelihood of a generalist judge developing a technical expertise in any particular field of law or complex subject matter is remote. Insofar as the legal issues and the factual disputes reflected in these judges' caseloads span a broad array of unrelated areas in the law with which it is impossible for judges to remain wholly conversant, the expertise of a generalist judge, in any particular case, should not differ significantly from that of a generally competent attorney chosen by lot.

Judges in the specialized state courts of limited jurisdiction, by contrast, are repeatedly confronted with the same legal issues and similar factual disputes, allowing such judges to develop the expertise necessary to adjudicate these disputes much more efficiently and expeditiously than could a generalist judge. Moreover, because of this expertise, legal costs are reduced to the extent that litigants are not required to expend resources educating judges on complex and difficult matters.<sup>111</sup> This important, efficiency-enhancing expertise simply cannot be replicated with attorneys, no matter how competent, chosen by lot.

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<sup>111</sup> Central European and Eurasian Law Initiative, *Specialized Courts: A Concept Paper* 11 (1996), available at [http://www.abanet.org/ceeli/publications/conceptpapers/speccourts/specialized\\_courts.pdf](http://www.abanet.org/ceeli/publications/conceptpapers/speccourts/specialized_courts.pdf).

## 2. Lengthy Trials

The mandatory judicial service requirement under the proposal as set forth will be for a period of ten weeks. Requiring that attorneys serve for any period of time longer than this would most likely be objected to as unduly burdensome. Because the expected length of service is limited to ten weeks, prospective judges should not, therefore, be assigned to trials that would extend beyond this given time period.

As to pre-trial judicial activities, under an election-by-lot selection mechanism, the trial and preliminary work completed prior thereto most likely must be conducted by two distinct entities; that is, these two different judicial tasks can no longer be performed by the same judicial entity. Each must be handled by a separate adjudicative body. The rationale is that the percentage of cases for which the duration of the litigation does not extend beyond ten weeks is small enough that the scope of the election-by-lot mechanism as proposed will be so narrow as to render its final impact negligible.<sup>112</sup> While this disconnect will result in obvious

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<sup>112</sup> Consider the federal judiciary. The average duration of a civil case from filing to trial has steadily increased from 19.5 months in 1998 to 22.5 months in 2003. U.S. Courts, Federal Court Management Statistics, Judicial Caseload Profile Report 2003, at <http://www.uscourts.gov/cgi-bin/cmsd2003.pl> (this is a real-time report run for 2003 data in all federal districts). The driving factor in the increase is the fact that long cases are becoming even longer. Between 1994 and 1999, 7.2% of civil cases were pending for three years or longer. Office of Judges Programs, Analytical Services Office, Judicial Facts and Figures, Table 2.4, at <http://www.uscourts.gov/judicialfactsfigures/table2.04.pdf> (last visited Oct. 8, 2005). Between 2000 and 2003 that figure increased to 13.0%. *Id.* An increase in complex products liability actions such as breast implant, asbestos litigation, and drug cases largely explains the significant increase in long duration cases. *Id.* (noting the particular influence of breast implant cases on case duration statistics). Federal criminal case durations have also been on the increase in recent years. For each year between 1988 and 1994, the median duration—from filing to disposition—of a criminal bench trial was less than one month. Office of Judges Programs, Analytical Services Office, Judicial Facts and Figures, Table 4.7, at <http://www.uscourts.gov/judicialfactsfigures/table4.07.pdf> (last visited Oct. 8, 2005). With the exception of 1998 and 2000, each year from 1995 to 2004 has seen a median criminal bench trial duration above one month. *Id.* For 2001, 2002 and 2003, the median durations were 2.3, 3.0, and 2.6 months, respectively. *Id.*

efficiency losses due to the added fixed costs of having a second judge familiarize herself with the pre-trial proceedings, such losses may be offset by the gains in equity resulting from the elimination of what we denote as *rejection bias*.<sup>113</sup>

### C. The Constitutionality of Election-by-Lot as a Judicial Selection Mechanism

Although critics might raise several obvious constitutional objections to election-by-lot as a judicial selection mechanism, these objections lack merit.

#### 1. The Establishment Clause Argument

As noted above, that the judicial bias requirement excludes certain individuals on the basis of group membership may be challenged as violative of the First Amendment of the United States, as applied to the states through the Fourteenth Amendment, which provides, in relevant part, that “Congress shall make no law respecting an establishment of religion.”<sup>114</sup> Because eligibility to serve as a trial court judge may correctly be conceptualized as a government benefit, serious First Amendment concerns would be

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By contrast, the median length of all trials heard in federal district court in 2004 was 2 days for civil cases and 3 days for criminal cases. *See* Leonidas R. Mecham, *Judicial Business of the United States Courts* 171 (2004), available at <http://www.uscourts.gov/judbus2004/appendices/c8.pdf>.

<sup>113</sup> For example, suppose that X implies that judicial-actor  $\Theta$  will be required to serve as judge in a trial and, similarly, that Y implies that  $\Theta$  will not be required to so serve. A decision by  $\Theta$  is said to have been influenced by rejection bias if  $\Theta$  chooses Y, and not X, where, *had* Y implied that  $\Theta$  must serve as judge in a trial as does X,  $\Theta$  would have chosen X, and not Y. Notions of justice and fair play would seem to dictate that decisions made by  $\Theta$  as between X and Y should *not* be correlated with whether  $\Theta$  or some other judge  $\Theta'$  will be required to serve as judge at some later point in time. For instance, it would seem to be a gross injustice for a judge, due to an unwillingness to further interact with a particularly grating litigant, to grant a motion for summary judgment, where she would not have granted this motion had she been somehow assured that the trial itself would be assigned to another judge. Thus, to the extent that pre-trial judicial decision-making is actually influenced by these kinds of biases, the proposed severance of pre-trial and at-trial decision-making increases certain equitable principles at the expense of certain long-run cost efficiency principles.

<sup>114</sup> U.S. CONST. amend. I.

raised by any program that consciously excluded members of groups based on viewpoint alone, including, in particular, religious viewpoint.<sup>115</sup>

To amplify, suppose a Ku Klux Klan member wanted to be eligible to serve as a judge, but was denied such an opportunity under the judicial bias requirement. The argument that this prospective judge would make is that the state cannot claim that participation by members of other religious organizations does not offend the Establishment Clause because merely permitting such members to serve as judges does not constitute the imprimatur of the state, and, on the other hand, claim that entanglement with a hate group would not allow for the state to properly engage in the fair and unbiased administration of justice.

This argument fails, however, in that a convincing distinction can, in fact, be drawn. The Supreme Court's public forum cases hold that the generalized fears of entanglement that arise in deciding whether to exclude a religious group do not rise to the level of an Establishment Clause violation.<sup>116</sup> The constitutional command "is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."<sup>117</sup>

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<sup>115</sup> See, e.g., *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995) (holding that, in a case in which a student organization that published a newspaper with Christian editorial viewpoints was denied funding by the university solely because of its religious perspective, the denial of funding amounted to viewpoint discrimination that violated the free speech provisions of the First Amendment); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down a Tennessee law barring ministers of the Gospel or priests of any denomination from serving as constitutional convention delegates on grounds that such provision discriminated against religion and conditioned the free exercise of his religion on the surrender of the right to seek office).

<sup>116</sup> See, e.g., *Rosenberger*, 515 U.S. 819; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); see also *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring in part and concurring in judgment) ("We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship.").

<sup>117</sup> *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 248 (1990).

In other words, the State has no free-standing, case-specific reason not to allow members of widely accepted religious organization to serve as trial court judges.

By contrast, the state in seeking to exclude a Ku Klux Klan member from serving as a trial judge could make the sincere argument that any association between the judiciary and such a hate group would run so counter to the values of racial tolerance and human dignity fostered by this country's justice system that inclusion of a member of such a group would defeat the very purposes of civic responsibility and good citizenship for which allowing attorneys to serve as judges was designed to promote. The state would argue that judgeships are not "public forums" in the conventional First Amendment sense, but rather are adjuncts to the state's mission to fairly administer justice. A hate group, whose charter was devoted to advancing interests in racism, anti-Semitism, and even genocide, hardly qualifies as a worthy repository of the state's trust, and thus, consequently ought to be legitimately excludable.

## 2. The Takings Clause Argument

The Taking Clause argument is premised on the theory that a taking of private property for public use without just compensation occurs when attorneys are required to provide legal services for payment less than they could be earning otherwise.<sup>118</sup> There are several counterarguments.

First, to make such an argument, it must be established that professional services qualifies as private property under the Fifth Amendment. Following *Penn Central Transportation Co. v. New York*,<sup>119</sup> a court, in making such a determination, will look to see whether the attorney had a "reasonable expectation" that her services were for her private use only. Given that the Supreme

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<sup>118</sup> U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

<sup>119</sup> 438 U.S. 104, 123-28 (1978).

Court held in *United States v. Dillon*<sup>120</sup> that an attorney has no reasonable expectation that she will never be called upon to represent an indigent civil litigant without compensation, successfully arguing that such an expectation exists (especially were the proposal to be widely adopted by the States) appears unlikely.

Second, assuming, *arguendo*, that the personal services of an attorney constitute private property, it is doubtful that the financial loss would reach the exacting threshold required to establish a taking.<sup>121</sup> Alternatively, because it has been held that no taking occurs where there is an “average reciprocity of advantage” between the alleged injury caused by the specific government action and the benefit to the individual from the overall regulatory scheme,<sup>122</sup> the mandatory service requirement would likely not constitute a taking in that, though burdened by the state bar in being required to comply with such a service requirement, attorneys, nonetheless, do enjoy a consequent benefit from the state bar in the form of a monopoly grant in the right to practice law.

### 3. The Involuntary Servitude Argument

The mandatory service requirement may be challenged as a form of involuntary servitude which thereby violates the Thirteenth Amendment.<sup>123</sup> Again there are several counterarguments.

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<sup>120</sup> 346 F.2d 633, 635 (9th Cir. 1965) (holding that courts can compel *pro bono* because attorneys have a traditional obligation to the courts and because the taking clause is not implicated when an attorney is being required to fulfill a commitment), *cert. denied*, 382 U.S. 978 (1966).

<sup>121</sup> *See, e.g.,* *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 317 (1987) (holding that a taking “must cause irreparable and permanent injury and destroy [the property’s] value entirely”).

<sup>122</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (citing *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914)).

<sup>123</sup> U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States.”). Involuntary servitude is defined as: “The condition of one who is compelled by force, coercion, or imprisonment, and against his will, to labor for another, whether he is paid or not.” BLACK’S LAW DICTIONARY 828 (6th ed. 1990).

First, the argument fails, because the term involuntary servitude was intended to “cover those forms of compulsory labor akin to African slavery.”<sup>124</sup> Courts have long recognized a public service exception in that “those duties which individuals owe to the State, such as services in the army, militia, [or] on the jury” are excluded from the scope of the Thirteenth Amendment.<sup>125</sup> Assuming that attorneys owe a duty to the public to provide judicial services, mandating attorneys to provide such services would, therefore, not lie within the scope of the Thirteenth Amendment.

Second, in the alternative, the argument fails because, under the proposal as set forth, an attorney’s physical liberty would not be impaired by the mandatory service requirement. That is, in determining the existence of involuntary servitude, courts have generally looked to see whether “the victim’s only choice [was] between performing the labor on the one hand and physical or legal sanctions on the other.”<sup>126</sup> Hence, despite the fact that an attorney would be confronted with financially damaging threats and sanctions for failure to comply with the mandatory judicial service requirement, such as suspension or disbarment, the requirement, nevertheless, would not be considered involuntary servitude because the choice is between the provision of services and, not physical or legal sanctions, but rather, at worse, the termination of a legal career.

#### 4. The Equal Protection Clause Argument

The Fourteenth Amendment’s guarantee of equal protection of the laws applies by its terms to states<sup>127</sup> and has been held to apply to the federal government as a component of the Fifth

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<sup>124</sup> *Butler v. Perry*, 240 U.S. 328, 332 (1915).

<sup>125</sup> *Id.* at 333.

<sup>126</sup> *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 999 (3rd Cir. 1993) (citing *United States v. Kozminski*, 487 U.S. 931, 943 (1988)).

<sup>127</sup> U.S. CONST. amend. XIV, § 1 (“[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws.”).

Amendment's Due Process Clause.<sup>128</sup> Under traditional equal protection analysis, a legislative classification must be sustained "if the classification itself is rationally related to a legitimate interest."<sup>129</sup> Thus, the equal protection claim in this particular context is that the classification of attorneys as a group eligible to serve as trial court judges, where no such other profession is similarly eligible, is *not* rationally related to the state's legitimate interest in the fair and unbiased administration of justice.

Though, perhaps, a legitimate equal protection objection, it is of limited practicability because of the relatively low constitutional threshold required to satisfy the rational relationship test.<sup>130</sup> Courts have consistently held that the states have a "wide discretion" in formulating such classifications,<sup>131</sup> and thus, it is quite likely that, were a state to implement election-by-lot as a judicial selection mechanism, classifying attorneys as uniquely eligible to serve as judges, a court would find that the specialized knowledge of the law distinctive to this group is reasonably related to the state's legitimate interest in conducting fair, rationally-structured trial court proceedings.

## 5. The Due Process Clause Argument

Unlike in the preceding arguments, the likely advocate of the Due Process Clause argument is not the attorney required to serve as a judge, but the recipient of such judicial services.<sup>132</sup> Specifically, the argument would be that the judicial conduct and judicial bias safeguards as set forth above do not satisfy due process

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<sup>128</sup> See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>129</sup> *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

<sup>130</sup> See *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (holding that states are permitted to make classifications that are "reasonable, not arbitrary, and ... rest upon some ground of difference having a fair and substantial relation to the object of the legislation"); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.").

<sup>131</sup> *F.S. Royster Guano Co.*, 253 U.S. at 415.

<sup>132</sup> U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

of law. On this question, the leading case is *Aetna Life Insurance v. Lavoie*.<sup>133</sup> In this case, the Court concluded that, though the Due Process Clause may sometimes bar trial by a judge with “no actual bias” and who would do their “very best to weigh the scales of justice equally between contending parties,” to perform as is best, “justice must satisfy the *appearance of justice*.”<sup>134</sup> The argument, then, is that these safeguards do not satisfy the requisite appearance of justice.

The response to this claim is that, not only is it rare for the Supreme Court to grant relief on the grounds that a judge’s conflict of interest or bias violated due process, but that *Aetna* has its limits, as revealed in several lower court opinions<sup>135</sup> and that the safeguards built into the proposal place it safely beyond those limits. The multiple checks for judicial conflicts of interest and judicial bias or prejudice effectively ensure that each and every litigant is, afforded due process of law. In other words, the appearance of justice does not abruptly vanish where judges are

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<sup>133</sup> 475 U.S. 813, 825 (1986) (invoking the Due Process Clause to invalidate state appellate judgment in a civil matter where one of the participating state judges [Justice Embry] had a direct financial interest in the outcome).

<sup>134</sup> *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (emphasis added). *But see* *Bracy v. Gramley*, 520 U.S. 899, 909 (1995) (emphasizing that while the judge was shown to be thoroughly steeped in corruption through his public trial and conviction, the petitioner “supports his discovery request by pointing not only to [judge’s] conviction for bribe taking in other cases, but also to additional evidence . . . that lends support to his [due process] claim that [judge] was *actually biased* in petitioner’s own case”) (emphasis added).

<sup>135</sup> *See, e.g.*, *Bradshaw v. McCotter*, 796 F.2d 100, 101 (5th Cir. 1986) (denying, on rehearing, relief for claim that petitioner’s due process rights were violated because the judge had actually participated in the prosecution personally on the grounds that the judge’s vote was not necessary for the result); *Barry v. United States*, 528 F.2d 1094, 1099 (7th Cir. 1976) (holding that a judge’s decision to preside at trial in prosecution of an alleged police extortion ring did not violate due process despite a contention which was disputed, that when the U.S. Attorney, the judge had made the initial decision to combat the extortion ring); *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1380 (7th Cir. 1994) (en banc) (holding that it was not a due process violation for a state judge to preside in a capital case where the judge had prosecuted the same defendant for a different murder 14 years earlier); *Fero v. Kerby*, 39 F.3d 1462, 1473 (10th Cir. 1994) (finding no denial of due process where judge’s law student son worked on murder prosecution and judge’s brother-in-law represented victim’s family in civil suit against defendant on same facts).

chosen by lot so long as each and every prospective judge is appropriately screened for the applicable due process evils.

### **Conclusion**

A great many theoretical as well as logistical issues remain to be explored regarding election-by-lot as a judicial selection mechanism. One paper could not hope to satisfactorily address them all; the present paper is intended only as a first word on a subject that deserves far more attention. While it may be true that, after objective consideration, many will reject the proposal as set forth as a defective or unworkable system in practice, the present paper argues that the election-by-lot model as proposed can, nevertheless, serve as an instructive heuristic device. That is, by challenging many of our most deeply held assumptions about judicial selection, the election-by-lot thought experiment can deepen our understanding of what methods should be employed to discover or manufacture what the law is and can suggest new approaches to the age-old problem of deciding who in our society should be entrusted with the power to judge.