Varying Means of Democratic Selection

by

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Thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts in the Department of Political Science in the Graduate School of Duke University

2015
ABSTRACT

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Abstract

Why in democracies are some positions appointed, while others are elected and yet still others are randomly selected? General academic discourse defines these distinctions as historical, while this paper posits that at the inception of a regime the most important positions are elected. This paper concludes that when a democratic system of government is established, citizens use election for the most powerful positions and other methods for incrementally less critical positions. However, over time, the vicissitudes of electoral politics result in a long-term shift in which appointed positions gain power while elected positions lose power. Thus, early in a democracy, the most powerful positions are filled by election; however, with time, this practice tends to change. This thesis takes a mostly theoretical approach, but looks at data from the United States showing that as elections become more complex and costly there are fewer laws enacted by elected legislatures and more decreed by regulatory agencies. The conclusion to be drawn is that over time officials within a democracy specialize. Over time however, elected positions are filled by people who are good at raising money and running elections. Inversely, appointed positions are filled by those with a desire to draft regulations. Each group wishes to avoid the others’ specialization. Elected officials cannot become unpopular for a regulation
they did not write and appointed officials need not stand for election and thus care little for their popularity. This specialization means that while elected politicians will become more famous, it is their appointed counterparts who actually run a democracy.
## Contents

Abstract.............................................................................................................................................iv

List of Figures ....................................................................................................................................vi

1. Introduction .................................................................................................................................. 1

2. Literature Review ......................................................................................................................... 7

3. Judicial Election Versus Judicial Appointment .......................................................................... 14

4. The Modern Reality of Appointment Versus Election ................................................................. 22

5. Theoretical Problems With Democratic Selection ...................................................................... 32

6. Conclusion .................................................................................................................................... 45

Appendix.......................................................................................................................................... 51

References ..................................................................................................................................... 54
List of Figures

Figure 1: Increase in the length and complexity of the Code of Federal Regulations, 99th through 113th Congress ................................................................. 24

Figure 2: Public laws enacted by each 99th through 113th Congress .................. 24

Figure 3: Difference in scope of regulation between elected and appointed officials in the United States.............................................................. 26

Figure 4: In 10 twentieth-century Presidential elections, winners did not receive a majority of the votes ................................................................. 30

Figure 5: Model of the thesis ............................................................................. 47
1. Introduction

In 2012 the Economist in one of their many efforts of distilling international politics to a simplistic list ranked nations from most democratic to least democratic. Norway came in as most democratic and North Korea as the least democratic.¹ There is nothing inherently surprising about this; Norway is a social democracy with a very high standard of living and extensive transparency. The problem is that the Economist omitted was the formal names of the countries: the Kingdom of Norway and the Democratic People’s Republic of Korea.

Paradoxically, each nation is the inverse of what it purports to be. So if democracy can be tyranny and monarchy can be social democracy, what do these terms even mean?

On the most simplistic level a democratic system is simply one in which dêmos (δῆμος )”people” retain krátos (κράτος) ”power.” Aristocracy by contrast suggests that the aristos (ἄριστος) most closely translated as the “exceptional” or ”excellent” people rule. A cursory review of aristocracy shows that few are excellent people and democracies aspire to choose the excellent to rule them. The Greek word for “election” is “eklektos” (ἐκλεκτός) and in classical politics

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democracy is very distinct from election. While the linguistic subtleties are oft overlooked, it remains that in modern society that democracy and election are not interchangeable. Indeed, most people who wield state power are appointed with a small minority being elected.

As such, the verbiage of government has an Orwellian nature by which little is what it purports to be. The paper that follows seeks to eschew the typical labels of “democratic” and use government in the United States to explain it least some of how “democracy” actually operates.

The paper first sets out the literature review, which generally shows that the bulk of literature on the nature of democratic regimes perceives them as historically derived rather than intentional or naturally occurring. The second aspect of the paper looks at the American judicial system as a microcosm of this as numerous systems of selection exist within that part of government. The final sections examine practical reality of American democracy showing that despite the aspiration of electoral government, very little power flows from elections and that the system of election may in fact have more to do with imparting legitimacy to a regime than actually running a country.

Secondly, the American Judicial emerges as a good example of how differing systems of democratic selection exist in parallel. Within the United States, all three means of democratic selection persist. Some judges are appointed, other are elected and
jurors are randomly selected. While past research has concentrated on what makes one system of judicial selection superior to another or the problems of the jury system in administration of justice, this paper concludes that each imparts different benefits and costs. Hence there is no clearly superior system with an amalgamation perhaps best acting to protect people from the shortcomings of the other systems. As such, the random jury protects people from ornery jurists, appointed judges can serve to prevent popular, but inept people from directing the common law and finally election serves as a check on the judiciary becoming too insular from the population in general.

In the third and fourth sections the paper notes that means of democratic selection exist on a linear continuum from random selection (“sortition”)\(^2\) on one end, appointment in the center, and election on the other end. The primary distinction among these means of democratic selection is the associated transactional cost. Sortition has the lowest associated cost, elections have the highest associated cost, and the cost of appointment lies between the two. The

\(^2\) Sortition is a form of demarchy, that is democracy without election -- e.g. Venice. The Doge of Venice was appointed by a lengthy procedure using alternating rounds of sortition and election. In Book Four of Aristotle's The Politics it is postulated that selection for democratic offices to be assigned by lot. More recently recognizing that financial gain could be achieved through the position of mayor, some parts of Switzerland used random selection from 1640 to 1837. See, Lynn Carson and Brian Martin, \textit{Random Selection in Politics} (Praeger, New York 1999). p. 33.
democratic ideal of an election is reserved for positions of sufficient importance that the cost is marginal compared to the importance of the selection process. Inversely, sortition is favored when the importance of the position is minimal and the deciding factor is speed and cost of selecting the person to make the appointment. The concept of relating means of democratic selection to associated transaction cost differs from other reviews of democratic selection, which define the means of selection as based on historical trends. Ancient Athenians preferred sortition for many offices because they believed that elections tended to favor unethical people. This fear of election was perhaps best typified by the Roman ideals of Cincinnatus and was continued in Venice. Each system of selection has its inherent advantages and shortcomings. Much like the judiciary, there is some evidence to suggest that an amalgamation of different means of selection into one democratic regime creates a balance.

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3 In 2010 Iceland used a randomly selected group of citizens to oversee its new constitution. So in small countries where an election could be costly, this system is sometimes favored as a more efficient means of democracy. Another similar example is the Burgerforum in the Netherlands.

This paper concludes that, in democratic regimes, people tend to favor election for the most powerful positions. Thus, national leaders are elected in the United States and most other democratic countries. However, the vicissitudes of electoral politics have resulted in appointed positions growing in power over time, thus challenging the intent of those who framed the democratic regimes. As a result, many appointed positions have greater authority than their elected counterparts. The most apparent example today is the elected U.S. Representative in Congress; the power of one of 435 voting members pales in comparison to the power of, for example, an appointed Deputy Undersecretary of State, Energy, or Health and Human Services.
2. Literature Review

The literature review illustrates that the typical academic argument regarding selection methods is tautological, as it designates elected positions as "political," and appointed positions as technical or professional in nature. This typical academic distinction fails to account for why the same position may be appointed in one region but elected in another. For instance, while most states elect an Attorney General, 10 jurisdictions and the federal government appoint rather than elect the chief law office of the executive branch.\(^1\) Past distinctions regarding selection methods in a democracy fail on an inherent fallacy or are in essence *ipse dixit* explanations.\(^2\)

\(^1\) Attorneys generals are popularly elected in 43 states and in Guam. In Alaska, Hawaii, New Hampshire, New Jersey and Wyoming, as well as in the other territories, the attorney general is appointed by the governor, while the mayor makes the appointment in the District of Columbia. The attorneys general of Maine and of Tennessee are elected by the Maine Legislature and by the Tennessee Supreme Court respectively. See, About NAAG". National Association of Attorneys General. Retrieved the 24\(^{th}\) of January 2013.

\(^2\) The selection of the Doge of Venice illustrates as an interesting example that is neither appointment nor election. Rather the citizens of Venice integrated elements of random chance with appointment and election in an effort to wash out the influences of powerful families as well as plebian control. See, Horatio Brown, *Venice: An Historical Sketch of the Republic* (Percival & Co. London, England 1893). Generally, Italian city-states of the medieval and Renaissance period employed a myriad of complex means of finding their leaders. This desire to mitigate the power of elites evolved from the Roman system in which freemen, that is former slaves, with no money or familial connection to the elites advised the emperor in an effort to shield the leader from ephemeral considerations. See, H.H. Scullard, *From the Gracchi to Nero: A History of Rome from 133 BC to AD 68*, (Routledge, NY, NY 5th ed.) --Perhaps the most notable of the freemen to
The bulk of literature addressing distinctions between election and appointment analyzes how officials differ depending on their means of receiving

advise the imperial court was Tiberius Claudius Narcissus who as a former slave of the Emperor Claudius was entrusted with all imperial correspondence. It is often speculated that it was Narcissus who betrayed Messalina to Claudius despite her support among the patrician classes. By modern comparison these systems appear quaint, but a closer examination of how and where political leaders emerge shows that all three elements continue to play a role in the American political system today, albeit without the transparency and pageantry of Venice. The failures of democratic voting were manifest well before the Constitutional convention began. First, it is well known that the American Founders were well aware of the apparent Condorcet paradox of electoral voting since some, particularly Jefferson, were actually debating the issues with the Marquis de Condorcet. See, Thomas Jefferson (1743-1826) to M. de Condorcet (1743-1794) Holograph press copy of letter, written August 30th 1791 Manuscript Division Library of Congress. (Granted at the time of the US Constitutional Convention Thomas Jefferson was not present) See also, William V. Gehrlien, Condorcet’s Paradox, (Springer; 2006 2nd ed.). More generally though, the aristocratic tendencies of many of the American founders meant that they were familiar with the inherent conflict between Burkean autonomy and democratic idealism. See, See generally, Edmund Burke, Reflections on the Revolution in France (179) (Penguin Classics, NY/NY 1982 Ed.) See also, Hampsher-Monk, Ian (2005). "Edmund Burke's Changing Justification for Intervention". The Historical Journal (Cambridge University Press) 48 (1): 65–100. The American system of government tried to balance these differing ideals in a system that was not wholly electoral. The historical and social reasoning for this shift between the more democratic Articles of Confederation and the United States Constitution remain as contentious today as they were at the time. See, Herbert J. Storing, What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution (University of Chicago Press, Chicago Illinois, 1981). The concern of the Anti-Federalists was that the monarchic qualities of the government, as envisaged under the United States Constitution, would undermine the ideals set forth in the American Declaration of Independence.

-- On the most superficial level, Americans elect their leaders, but the failure of this election system is apparent in the letters between Thomas Jefferson and the Marquis de Condorcet. Beyond that, it is apparent that almost all people who actually exercise power in the American regime are appointed.
the post and not the underlying decision to appoint, randomly select, or elect. However, even in the case of elected versus appointed jurists, there is no clear consensus on the distinctions. The literature fails to explain the rationale for selection of election or appointment, and there is a clear lack of consistency in the explanations for policy distinctions.

Much of the literature refers to appointed or civil service officials as bureaucrats and elected officials as politicians. For example, Maskin and Tirole (2004), as well as Alesina and Tabellini (2007, 2008), compared the ways by which appointed bureaucrats differ from elected politicians. They concluded that elected officials are more closely tied to the exigencies of being elected and so are more inclined to take a popular course of action, even if it may not be an efficient one. Alesina and Tabellini concluded that, in light of political pressures to which

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4 What these papers overlook though is that many appointed political officers were in elected positions first. Indeed, if you look at senior appointed officials in the US government many started their careers as congressman or state legislators. One question unanswered here is why a congressman would leave office to be the Secretary of the Army. The Secretary of the Army is very often a congressman from the party opposing the president who if appointed to the post will leave office. Thus, historically chief
elected offices are exposed appointment is preferred over election when the public is uninformed about the functions, responsibilities, and powers of a position of great technical importance, such as head of the Environmental Protection Agency or federal judge. However, Alesina and Tabellini’s argument is inherently tautological. The public is uninformed about the position of Chief Judge of the DC Circuit because their opinion is not solicited in the democratic process. As this failure continues, people become rationally ignorant regarding appointment of many officials. Indeed, if the public held elections for all appointed federal officers, they would likely be better informed. Alesina and Tabellini concluded that appointment is preferred in highly technical tasks; however, this overlooks that, within the U.S. Congress, there is a wide range of career skills that would lead to some self-ordering.

executives has strategy selected congressman for this post to remove legislative votes from their opposition in congress. See, Winthrop 2008.


7 Conversely, it could be argued that as most people do not know who their congressman is then there is no functional difference. (See Gallup polls)
A plethora of academic writing concludes that elected and appointed officials act differently. See, Besley and Case (2003). There is even more research delineating how elected judges differ from appointed judges. See, Hanson (2000). Hanson concluded that elected judges tend to have smaller state governments but overlooked that newer states with more progressive Constitutions are likely to have smaller populations. Other distinctions shown in Besseley and Case lead to the conclusion that appointed judiciaries tend to receive fewer complaints, but this fails to account for the fact that there is little reason to complain about an appointed official who cannot be reasonably removed. By contrast, the trend in legal literature (Law Reviews) is that, in some situations, an elected judge who is not a trained lawyer receives a disproportionate number of complaints. This is typified by the recent scandal

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10 Hanson similarly fails to account for the New Hampshire judiciary which is appointed for life, but the state itself has a smaller government. See, Mary E. Brown, (2001). The Impeachment Trial of the New Hampshire Supreme Court chief justice. Lynxfield Publishing.
regarding an elected jurist who “fell asleep during trials, berated her staff and forced her bailiff to massage her feet.”\(^{11}\)

With regard to the virtues of appointed jurists, Choi, Gulati, and Posner examined the literary output of appointed judges versus elected judges.\(^{12}\) They determined that appointed judges wrote more and longer opinions and were more likely to be cited by other judges and in legal literature. They concluded from this that appointed judges are superior. However, they did not account for an academic bias in favor of good law students being more likely to be appointed as clerks and then as judges. Indeed, it would be analogous to concluding that

\(^{11}\) “Nevada to vote on appointment of top judges: Despite some major embarrassments involving elected jurists, many state residents are cool to the idea.” *Los Angeles Times* October 29, 2010, Ashley Powers
-- By contrast life tenure was not an impediment to Alcee Hastings’ corruption scandal or Abe Fortas’ resignations, see respectively, Senate Removes Hastings, *The Washington Post*, October 21, 1989 and Halpern, Charles (February 1, 2008), “ʺEscape From Arnold & Porterʺ, *ABA Journal*.

-- It is notable in this article that Eric Posner, a sitting judge on the 7th Circuit Court of Appeals known for his high literary output and lengthy opinions, is essentially using his own work as a jurist to make an argument that appointed judges such as himself are preferable to elected judges. In this respect, Judge Posner is taking a queue of Hunter S. Thompson by making himself the center of his own paper. What Judge Poser is doing in this analysis is counting the situations in which papers he has written then cited in his opinions get re-cited in other articles by himself. Judge Poser also makes the assumption that a longer opinion is an inherently better opinion without any justification. Indeed, the counter argument that a concise opinion gives greater clarity and reliable has salience to the average lawyer.
people with academic appointments are superior writers to journalists because the former have more academic citations attributed to them.

A very interesting paper that analyzes the extent to which selection of lower-echelon partisan officials is reflected in vote outcomes was written by Atkeson in 2009, showing that Republican appointees were more likely than Democratic appointees (“DNC”) to scrutinize the legitimacy of votes.\footnote{Lonna Rae Atkeson and Kyle L. Saunders. 2007. —The Effect of Election Administration on Voter Confidence: A Local Matter?‖ PS: Political Science and Politics 40 (October): 655-60. See also , Atkeson, Lonna Rae, Lisa Ann Bryant, Thad E. Hall, Kyle L. Saunders, and R. Michael Alvarez. 2009. —A New Barrier to Participation: Heterogeneous Application of Voter Identification Policies,‖ Electoral Studies 29 (1): 66-73.} The presumed reason for this is the historical tendency of the DNC to engage in voter fraud; thus, lower-level party officials essentially acted as gatekeepers for votes and thus became guarantors of their own party’s success. Tokaji in 2009 suggested that the solution was to appoint nonpartisan election officials; however, it was unclear how such people would be selected.\footnote{Daniel P. Tokaji , 2009. —The Future of Election Reform: From Rules to Institutions.‖ Yale Law & Policy Review 28 (1): 125-54} Tokaji made a salient point regarding partisan selection bias and the problems that it creates, noting that trying to use power on a macro level to remove corruption only tends
to increase the power of the entity making the choice and makes that entity more susceptible to corruption.

Burden et al. (2010) examined the policy preferences of appointed and elected officials and concluded that the latter are more likely to promulgate policies that are closely tied to the known preferences of the electorate. This is similar to the conclusion reached by Frederickson and Johnson, who concluded that elected judges, prosecutors, and regulators are more concerned with punitive measures, as opposed to constructive measures, because the electorate is more concerned with punitive measures. These elected officials also tend to be more “consumer oriented” according to Frederickson and Johnson, because the electorate are the consumers of products and consumers outnumber manufacturers.

The overall trend that is apparent in all literature comparing appointment to election is that elected officials are more concerned with current electoral trends and appointed officials, “above the democratic fray,” tend to have more vision and be more concerned with long-term efficiency than with political

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exigency. One cannot help but note a certain academic bias in this analysis.

Academics, who tend to be isolated from ephemeral issues, cast those of a similar ilk more favorably. Thus, a certain elitist trend permeates the literature, decrying the tawdry nature of elected officials while lauding the vision of appointed technocrats. One oversight in all of the literature is that not all elections and appointments are for the same period. Indeed a judge who is appointed to a 2-year term may more accountable than a judge who is elected for a 12-year term.

The underlying question of this paper—why some offices are appointed and some are elected—is absent from the literature.
3. Judicial Election Versus Judicial Appointment

The American judiciary is the most apparent manifestation of the distinction between appointment and election. In no other branch of government are so many various means of democratic selection employed for seemingly fungible positions. Most people simply ascribe these distinctions to randomness and emphasize that the differences allow for better judicial lawmaking in the long run. The differences are not random; they appear so only when looking at the creation of each state’s judicial system. The most important judges were elected; judges in smaller and less critical jurisdictions were appointed. However, differences in how jurisdictions have evolved and how appointed and elected judges differ have obscured this distinction in the past two centuries.

Today, research reported in both popular and legal journals on the topic of the advantages of judicial appointment instead of election dwarfs the literature on the means of selection for other governmental positions. The arguments are fairly straightforward. On one side are those who assert that elected judges are more attuned to the will of a democracy but conversely beholden to those who donate to their campaigns. On the other side, advocates of appointment assert that appointed judges tend to be more impartial and are more likely to be better qualified jurists instead of simply more adroit
politicians.¹ Research shows that appointed judges tend to take fewer cases but write longer and better-researched opinions, while elected judges tend to solve more legal disputes based on more concise opinions of law.²

The question remains regarding why there is not a consistent system in the United States for selection of judges. The most likely explanation is that, like other types of offices where those of the greatest gravitas are elected and the most ministerial are appointed, the courts in the United States, particularly the federal courts, were not initially intended to be as powerful as they are today.³

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² Id.
³ Law in the United States has recently begun to embrace international legal theories. This trend contrasts with the earlier ideal of American exceptionalism, which defined American political thought. Notations of foreign law in United States Courts showed examples of what courts ought not to do. In Lee v. United States the plaintiff’s brief defined the government position as inherently English.⁵ United States v. Lee, Lee v. Kaufmann, 106 U.S. 196 (1882). International law also played a large part in the Prize Cases, though the question of public sentiment wisely defined by other issues in the cases. See, Lee, 67 U.S. 635 91882). To 19th century Americans the fact Europeans/English were doing it was reason enough that it was wrong. In Missouri v. Holland, the federal government, once again, when unable to accomplish its goals under United States law used international law and treaty power to compel the states to submit.( Missouri v. Holland, 252 U.S. 416 (1920), limited by, Reid v. Covert, 354 U.S. 1 (1957) and Medellin v. Texas, 552 U.S. 491 (2008).) More recently in Grutter v. Bollinger Justice Ginsburg’s concurrence was heavily related to international legal theories.( Grutter v. Bollinger, 539 U.S. 306 (2003)) Even Justice Kennedy has become a proponent of injecting international legal ideals into American law.⁶ Jeffrey Toobin, Swing Shift, The New Yorker Online,
The general consensus is that most of the United States Supreme Court’s power comes somewhat *sua sponte* from *Marbury v. Madison,*\(^4\) in which the Court

September 12, 2005.\(^1\) Looking past the opinion in cases like *Deshaney v. Winnebago* adopts a standard not inherently different than the concept of aspirational rights seen in places like South Africa and India since it allows the government to promise a right for political purposes, but does not compel government to adhere to its own laws or promises to its citizens. See, *Deshaney,* 489 U.S. 189 (1989). The general trend when looking at the application of an international legal theory has been that the international law implies a government power that emerges as incongruous with the United States Constitution. In this respect the idea of international law has long been embraced by those who favor a powerful government and looked at with great concern by those who advocate limited federal authority. By this definition, international legal ideals are anathema to the United States Constitution, but a closer examination of very early American cases shows that international law has not always been a progressive tool and was once the basis of restraining federal government power.

\(^4\) Modern federal legislation is by and large based on either commerce power or the 14\(^{th}\) amendment. The result is that these aspects of the Constitution are generally seen as the basis of federal government power. Federal laws if viewed from this perspective have grown exponentially since the nation’s founding, but the recent growth rate is somewhat deceptive. While commerce and the 14\(^{th}\) amendment emerge today as the preferred means of Congressional regulation, the part of Article I §8 which reads “To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations” materialized as the dominant means of federal regulation up to the Civil War. If taken at face value the clause is even more open ended than the commerce power. The clause allows congress to define and punish both piracies and felonies; as such everything from liquor importation to slave trading was at some point classified as piracy during US history. While this power appears limited by international law, such a limitation is difficult to quantify and therefore subjective. (It is curious that the clause reads as it does rather than: “to define and punish, piracies, felonies and offenses against the law of nations on the high seas.” It is not an ablative clause as seen in the bill of rights, the two have very different legal meanings. In an ablative clause the ablative construction has a no bearing on the veracity or function of the absolute clause.) An equally subjective question is where exactly is this place called the “high seas?” These two subjective questions became the purview of federal courts just as the limitations of substantive due process or commerce are today. Moreover, the grant of admiralty and maritime jurisdiction in Article III imparted to federal courts a specific constitutional
engineered its own right to review laws. The growth of admiralty jurisdiction in the early 19th century, followed by growth of commerce clause legislation and an

claim to legislating from the bench in admiralty and maritime law. As such many of the same problems of judicial activism and unbridled Article III power were even more hotly debated in the early years of the American republic than they are today. However, as these debates have no apparent nexus to modern legal or political theories they are generally ignored. American school children are taught about *Marbury v. Madison* early on in their civics classes as if Marshall's construction was novel. (5 U.S. (1 Cranch) 137 (1803). The case is notable because Chief Justice Marshall creates by fiat the idea of judicial review. One looking at law school textbooks might analogize Marshall's opinion to the first line of Genesis. “Let there be judicial review” however, is neither the beginning the beginning the Constitutional law nor judicial review in the strictest sense.) However, Marshall's judicial arrogation of executive and legislative power was first used by Justice James Wilson in *Talbot v. Jansen* in 1794 which explores the extent to which American law must be interpreted in congruence with international laws. Cited as, 3 U.S. 133 (1794). Wilson's ruling rests upon the norms of international law and a number of subjective theories, but the result is to invalidate the acts of the executive and a legislature in much the same way that Marshall did in *Marbury*. The decision in *Talbot v. Jansen* unlike *Marbury* was repeated frequently in federal courts well up into the Taney period. The judicial arrogation in law as applied in *Marbury* did not emerge again until *Dred Scott v. Sandford*, 60 U.S. 393 (1857), but maritime and admiralty cases constantly thwarted the other branches. Today the most noted of these opinion is Justice Marshall's opinion in *The Charming Betsy* which specifically invalidates US law as being inconsistent with international norms in admiralty. The case, which had been argued by Luther Martin against the United States arguably, did the most to limit the authority of executive action of any case for the next century. However many others exist even at the district court level and an improved understanding of these cases has the potential to greatly alter present presumptions about the American legal history and the political interplay between different branches of the American government prior to the Civil War.

5 *Marbury v. Madison*, 5 U.S. 137; 1 Cranch 137; 2 L. Ed. 60 (1803). See also, *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804): "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains..." See also, Rest. 3rd Foreign Relations law § 114, The Charming Betsy and the Marshall Court, Frederick C. Leiner, 45 American Journal of Legal History 1, 2001. Followed by, *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809) a case in which a
exponential increase in federal criminal laws, led to a marked growth in federal judicial power. Inversely, as federal jurisdiction grew, elected state judges, who had initially been more powerful, tended to lose power and prestige.\(^6\)

In this respect, the distinction between appointed and elected judges mirrors the trends seen in other offices but differs because the judiciary is often constrained by juries, in which sortition is added to the mix of democratic control. In only 10 states, Puerto Rico, and the federal system are judges exclusively appointed. In the remaining 40 jurisdictions there is some form of

Pennsylvania jury had awarded prize money to Pennsylvania citizens and its own state legislature to the exclusion of Connecticut citizens who had captured the vessel. Local sentiment on juries also interfered with international diplomacy for the United States. Accordingly, there was a strong need to conform procedures with international custom, and specifically with that followed by the friendly European powers. ***Murray v. The Charming Betsy*** is an oft overlooked early Supreme Court case in which the a US Navy officer captures the wrong ship and destroys property. Under current laws, government actors can essentially never really be held liable (*Bivens* being the very narrow exception) however, to the Marshall Court the laws giving the US government a free hand undermined the spirit of international law and admiralty law. This case is no longer good law and the US Government once again has complete Sovereign Immunity for all its torts.

\(^6\) As a result, in the judiciary appointment, election and random selection coexist. The element of randomly selected people in theory acts to foil the power of the judiciary in a way not seen in either executive or legislative power. Inversely, the elected or technical capabilities of the elected or appointed jurist act to counter any lack of prudence or lack of understanding on the part of a jury. By adding the randomized element the power of judges is decreased and the relevance of how they came to office is diminished.
election, sometimes a pure election, and 16 states have a hybridized system of appointment and retention elections.⁷

At first glance, this patchwork of systems appears to be random.⁸ Legal scholars often like to talk about each system as a “laboratory” in which different legal systems can be tested before gaining wide acceptance. This makes sense for a legal system in which issues such as same-sex marriage or (earlier) interracial marriage moved through different courts in different ways. The differences in how elected and appointed judges perceive divisive social issues are palpable, but these differences are unrelated to why some jurisdictions elect or appoint their legal leaders.

A different trend emerges from a review of the Colonial era. While modern New York State is considered the epitome of a “big state,” in 1776, the colonies of Pennsylvania, North Carolina, Connecticut, and Virginia were bigger than New York.⁹ The trend at that time was for the largest colonies, with courts

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⁷ Of the ten states that appoint judges, only Tennessee is not controlled by the Democratic party, it is unclear if this is relevant, but is an interesting side note.
⁸ While there is a vague trend that it is the older east coast that tend to favor appointment, this would not cover Tennessee or Hawaii. It also fails to account for Pennsylvania, North Carolina, Virginia and Connecticut which respectively have direct election in the first two, representative election and hybridized appointment/election.
⁹ Federal Courts such that existed under the Articles of Confederation are an entirely different issue. They were essentially irrelevant in all but a few areas such as admiralty.
of greater importance, to elect judges and smaller colonies (e.g., New Hampshire, Rhone Island, Delaware, New Jersey) to appoint judges. In the 18th century, federal courts had limited power, as the federal government was not very large and shared power with the states; only with the expansion of federal lawmaking and judicial review, chiefly via *Marbury v. Madison*, did federal courts become relevant. For example, John Jay, the first Chief Justice of the U.S. Supreme Court, stepped down to become a governor, which would be unimaginable in the modern era.\textsuperscript{10} So while the modern patchwork of systems appears random, there was a clear pattern when the system was adopted.

The overall conclusion is that, while modern law reviews and the popular press make ephemeral distinctions between elected and appointed judges, Colonial founders of the democratic system held a jurist to be no different from other political leaders. Thus, historically, elected judges were considered more important but, over time, appointed judges have gained prestige and power.

\textsuperscript{10}Then given that federal court appointees were subject to approval by the US Senate, which unlike today was markedly more democratically accountable body prior to the 17\textsuperscript{th} Amendment, even that was arguably popularly selected. There is extensive confusion about the ramifications of the 17\textsuperscript{th} Amendment to the US Constitution. While some laud it as a democratic revision, it actually per the thesis of this paper acts to increase the transactional costs of election to the US Senate and arguably make it a more elite body than was initially intended. Given the relative ease of winning state office compared to US Senate, by having US Senators selected by state legislatures arguably makes both groups more accountable to voters.
However, the exigencies of running for elections has meant that elected judges must solve current issues while appointed judges, especially those with life tenure, can concentrate on more complex and enduring social and legal issues, which bestows on them a legal legacy that is generally not available to elected jurists.
4. The Modern Reality of Appointment Versus Election

The reviewed literature suggests that appointed positions are technical and thus should be less constrained by whims of popular election.¹ This reasoning is rational; electing the Surgeon General could result in a beautiful charismatic chiropractor being elected over a capable by introverted medial doctor (or a popular “TV judge” being made Chief Justice.)² However, while this reasoning is rational, it proves to be little more than an ex post facto justification. The accuracy of this justification proves correct only with a cursory examination of current trends; it fails if the theory is traced back to the genesis of a particular democratic system.

Examining the initial preference in democratic regimes manifests a different trend: Citizens in a democracy desire to have input regarding the most important positions but are rationally indifferent to less-dominant positions.³ For

¹ The traditional view of most regulatory agencies, e.g. SEC or EPA, the head is appointed because a “technocrat” is required. By most accounts financial regulation and environmental laws have a greater impact, but their apparent complexity makes people rationally indifferent to them.
² For an amusing take on this, see, Christopher Buckley, Supreme Courtship, (Twelve Publishing, New York 2008). In the novel a President unable to get a judicial nominee past the Senate judicial committee appoints a popular TV judge who is charismatic and beautiful to great political effect.
³ A note on sortition: When William the Conqueror set up a judicial system in England to include randomly selected juries, it created a democratically based conflict resolution system separate from the crown in which the lower classes had participation and trust.
instance, Thomas Jefferson was far closer to being George Washington’s secretary than a leader of a large executive department and John Jay left the position of Chief Justice to be a governor. Thus, starting from the initial theory and the underlying history that the lowest-power positions are appointed and then moving forward, it becomes apparent how appointed positions evolved into increasingly complex and technical positions with greater power as a result of popular indifference. The inverse can be seen regarding public laws enacted by elected legislators. While an increase in regulatory law making is taking place, elected politicians are doing less governing (Figures 1 and 2).

At the same time, it had no cost associated with it for the crown as it did not mandate the remuneration and appointment of jurists. So William was not acting altruistically, but rather was acting out of necessity to a create a democratic system of courts that resolved problems he was indifferent to at no cost to him. Today, juries operate in much the same way. They give people a trust in the legal system, but do not necessitate complex and lengthy elections.

----- It is notable that increasingly juries are being removed from legal decisions. For instance when suing the US government in most cases the right to a jury has been legislated away.

----- While in modern society we pretend that the military is not a political entity, the crude reality as Mao pointed out, is that political power flows from the barrel of a gun. As such, armies are the basis of political power and random selection of soldiers through conscription has very different ramifications than professional soldiers who choose their life.

3 Regardless of whether voting is perceived as “sacred right” or “obligation,” the reality remains that going to the polling place takes time and energy – not to mention all the labor some people spend attempting to determine how they are going to vote. All of these costs arguably create no new wealth, but simply make-work for people with little or no utility. Indeed, economists enjoy pointing out the financial costs and statistical futility of any individual voting.

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Figure 1: Increase in the length and complexity of the Code of Federal Regulations, 99th through 113th Congress. (Westlaw online, see appendix)

Figure 2: Public laws enacted by 99th through 113th Congress. (Source: Government Printing Office, Vols. 98–122, see appendix)
Looking at these trends over the past few decades leads to the accurate conclusion that the federal government’s operation and rule making, reflected in the Code of Federal Regulations, are promulgated by unelected leaders. This modern reality emerges as a reflection of the cost-benefit analysis of holding an elected office. While legislation on politically visible topics is extensive, the most salient matters are relegated to executive agencies, which “enact” law by fiat. The original concept that the most lofty and powerful offices would be subject to election has therefore been upended by the exigencies of campaigning. Figure 3 shows the difference in scope between elected and appointed regulation in the United States for the period under consideration.

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4 The result is that elected politicians tend to specialize in raising money. It is no accident that both the GOP and DNC have office space directly across from the Capitol where legislators can engage in fundraising. While no numbers are maintained on how long legislators spend in each office, it is a well-known anecdote in DC that if you are looking for a congressman the Capitol is generally not a good place to look compared to the fundraising offices cattycorner to the Capitol. Most long standing legislators have their campaign offices open perpetually and the result is that the job as a congressman becomes little more than window dressing for the real position of campaigning.
While the intention would be to elect the most important positions, the reality is that, over time, the actual power tends to shift to favor appointed office holders. This reality obscures the original decision to elect or appoint a particular leader. Indeed, had the Federalists foreseen *Marbury v. Madison*, it is possible that they would have specified an *elected* Chief Justice of the Supreme Court in the Constitution, rather than an *appointed* one. The anti-Federalists noted this potential issue, albeit to little effect.\(^5\) Of course, the Chief Justice remains a known figure in a relatively transparent position, in contrast to relatively

anonymous members of the Federal Reserve Board and Assistant Secretaries of cabinet departments.

The decreasing relevance of elected politicians raises the questions of why people bother to vote and the reasons for an expensive election. The desire of people to have a role in democracy via election remains unchanged. In this respect, elections impart legitimacy to a regime. Even the most ardent political junkies concede that the majority of Congressional elections are essentially rigged. Based on selection of electors, most American Congressional districts are totally uncompetitive. However, most American voters have a positive impression of their own Congressional member.\(^6\) The common-sense divide is apparent: Most voters see a distinction between their representative and the other 434.

The election process on a national level is not all that different. Like voting in a Congressional election the vote itself is irrelevant, but the ballot becomes a manifestation of the hopes and dreams of the voter imprinted on the candidate through clever marketing. Part of this modern trend is that elections are simply national marketing campaigns. Much like marketing a Hollywood film or a new

\(^6\) Rani Molla, *Wall Street Journal* “Americans Hate Congress, but Like Their Own Representatives” Oct 15, 2014
car, candidates need extensive budgets and professional marketing firms. The difference is that, eventually, a car must still perform certain basic functions, so it cannot be designed exclusively to be marketed, in contrast to the candidate brand, which can be tailored to election needs.

As voting itself is an economically irrational choice on an individual level, marketing an electoral campaign is particularly difficult. The unvoiced question in every campaign: How do we make the electorate care about this? This is followed by the question: Where does the money come from to sell this concept?

A national election in the 21st century costs millions of dollars to advertise candidates, who become de facto products professionally marketed in much the same way as a new car. The result polarizes the populace on divisive wedge

7 In product marketing, creating a factious problem solved by the product is one way to do this, the most famous was the Listerine advertising campaign which created the fictitious disease Chronic Halitosis. The political corollary to Chronic Halitosis is the wedge issue, candidates select issues which differentiate them from their opponents that have little to do with their elected office.
8 Candidates must spend upwards of $1 billion dollars to get elected on a national ticket. Someone running for election as Secretary of the Treasury would have a very hard time raising money and would be competing for many of the same dollars as the people running for Attorney General or Secretary of State. On a state level the cost in markedly lower.
9 However, this is not the only cost, printing, disseminating and tabulating ballots actually costs more per voter.
issues (e.g., abortion, marriage, gun rights) that are fairly static and not salient.\textsuperscript{10}

This marketing creates massive social friction and does not result in an efficient result.\textsuperscript{11}

As Figure 4 shows, since the advent of marketing elections like commercial products, several Presidential candidates did not garner a majority of the votes cast. This again reflects that voting on an individual level is irrational. The marketing message is somewhat akin to buying a lottery ticket. At first glance, the lottery ticket is a regressive income tax, reapportioning wealth from the poor and foolish to the government-run lottery. The utility of the lottery ticket is not in the average value of the ticket, which is no doubt negative (the probability of winning at a slot machine is several orders of magnitude greater); the real utility is in the dream of wealth imparted to the purchaser.

\footnotesize

\textsuperscript{10} It is notable that increasingly juries are being removed from legal decisions. For instance when suing the US government in most cases the right to a jury has been legislated away.

\textsuperscript{11} Regardless of whether voting is perceived as “sacred right” or “obligation,” the reality remains that going to the polling place takes time and energy – not to mention all the labor some people spend attempting to determine how they are going to vote. All of these costs arguably create no new wealth, but simply make-work for people with little or no utility. Indeed, economists enjoy pointing out the financial costs and statistical futility of any individual voting.
Figure 4: In 10 twentieth-century Presidential elections, winners did not receive a majority of the votes. (See appendix for data set)

A election ballot holds utility similar to that of the lottery ticket; rather than promising riches, the ballot makes the voter feel empowered. Much of the effort aimed at increasing the number of citizens who participate in an election is psychologically intended to make the individual voter feel important. Mottos such as “rock the vote” or “make your voice heard” play on the preposterous idea that an individual can influence an election and make his or her voice heard. More important, beyond individual utility, the idea that a leader or legislator was legitimately elected imparts a degree of legitimacy to the elected person that

\[\text{\footnotesize \cite{12}}\] It is also notable that when people select the losing candidate it can create depression and distrust in the democratic process. This also has an associated phenomenon in which people wish to vote for the person whom they think will win and a related phenomenon that the winning candidate polls better after winning than before because voters like to say they picked the winner.
would be lacking if the office were achieved by appointment or random selection.

It is this impartation of legitimacy that justifies the high transactional costs of an election. Random sampling by polling companies would be less expensive but people would feel cheated if they were not offered the opportunity to make their choice. Thus, the psychological desire to have “your vote counted” is the economic utility that justifies the high cost of an election. The result is that, while the prestige of elected office remains high, the actual influence wielded by elected officials is diminishing while the power of appointed office holders has grown.

13 This value of a democratic election is likely the highest. Elections do not get the most intelligent or most virtuous elected, but in the absence of a population believing their leader was anointed by God, the democratic election imparts the greatest level of legitimacy to a leader. The problems of election, as described in the introduction regarding the Venetians’ use of sortition to selection the Doge are also manifest. With the increasing transactional costs of an election also comes an increase in the probability that corruption will occur.

14 The more dangerous cost associated with electoral politics is that politicians specialize in running elections more than government. Not only is it in the interest of politicians to spend the bulk of their time on election activities, but it also creates a system in which people who are good at getting elected win elections rather than people who are good managers.
5. Theoretical Problems With Democratic Selection

The thesis thus far has been that those who founded this democratic regime intended for elected officials to be powerful but the exigencies of elections have resulted in appointed office holders gaining power over time. This could lead to the belief that election and appointment are inherently different political tracks, in much the same way that architects and engineers both build things but have distinctly different and separate careers. Unlike an aristocracy, in which leaders are selected based on class and dynastic succession, a democracy provides a more open path to leadership. Also, the membership of the electorate is more amorphous than is initially apparent. This can be seen on two levels. First, most electorates are essentially a “stacked deck” in which the outcome is determined by the party selecting the scope and size of the electorate. The second factor is the extent to which people who had been elected previously are given appointed offices out of political expedience.

The purest examples of democratic selection often do not occur within the confines of a state. For example, the captain of a pirate ship is generally elected by the crew, in contrast to a navy or merchant vessel, in which the captain is selected by either the political rulers or the ship’s owners. The second and
Perhaps relevant question of democratic selection is how national parties in the Unites States operate.

On a pirate ship, who selects the electors? The outcome of elections relates more closely to the makeup up of the electorate than to the candidates. Pirates ships functioned on a democratic level to select the captain because, without the external force of law to prohibit mutiny, the captain needed the consent of the crew to operate the ship.¹ This included not only a sense of fairness but also a system of economic allocation that would satisfy the crew.² Unlike a navy or merchant vessel, the pirate captain needs at the very least a majority of the crew to keep order or, perhaps more basically, to avoid being thrown overboard by a malcontented crew.³

¹ See, Charles Johnson (1724), A General History of the Pyrates, p. 398. Note bene, In addition, there is a close similarly to how Norse raiders operated as the chieftain who operated the flotilla was too far departed from law to compel obieience and needed consent. As such, Norse culture included an element of democratic rule in the pre-Christian era.

² There are 5 rational pirates, A, B, C, D and E. They find 100 gold coins. They must decide how to distribute them. The pirates have a strict order of seniority: A is superior to B, who is superior to C, who is superior to D, who is superior to E. The dominant strategy is for A to allocate 98 coins to himself and one coin each to C and E.

³ The majority of pirate ships started out either as merchantmen or as privateers. See, Hayes, P. (2008),'Pirates, Privateers and the Contract Theories of Hobbes and Locke', History of Political Thought 24, 3: 461-84In the case of the former the crew either fell upon hard times and/or mutinied. In the case of privateers, the ships left with the blessing of their host nation with “letters of marque” but once departed from bailiwick of their sovereign the distinctions between different ships often fell by the wayside.³ Regardless
When the ship captain assembles the crew on shore, he must remain attuned to the characteristics of the crew to a much greater extent than a navy captain because selecting sailors who could oppose the captain is a serious risk. In the case of the navy captain, except for certain key officers, he generally has little say about who is assigned to his ship and must rely on the laws of his nation to guard his authority. The navy captain knows that the crew can readily kill him and take the ship but that the nation that he represents will mercilessly hunt down the mutineers. By contrast, the pirate captain must select men (potentially women) whom he can trust implicitly because mutiny does not carry a promise of governmental or divine retribution.4

At the onset of the voyage, crew selection is relatively easy for the captain. But pirating is dangerous and some crew members will not survive. So, in the course of the voyage, new crewmembers join either in ports or from captured of how the crew turned to piracy, the reality remained that they existed within a state of nature with no external force compelling them to act by any artificially created law.

4 Beyond crew selection though and law, the navy captain one essential power. Most critically, only the officers would know how to navigate the ship. Thus, without the aid of the officers who held commissions, the crew could sail the ship, albeit not know the direction they were heading. As such, a navy crew when farthest from port had little choice but to submit to the authority of the officers because they were only people who could get the ship back to land. NB: (1) The famous “Mutiny on the Bounty” was an interesting exception to this because officers mutinied with the crew, as such the crew was able to seize the ship and navigate it. (2) Even modern nuclear submariners, the location of the ship remains a secret to the crew.
ships. In the golden age of piracy, pirate captains recruited slaves and tradesmen from captured ships and these captured passengers perceived the captain as a liberator. Any doubts about the loyalty of new crew members would be met with swift action by the caption: leave them at the next port, set them adrift, or kill them. Thus, the pirate captain replenished his ranks essentially by loading the electorate, of the ship to suit him and ensure that he remained in power.5

The strategies used by American political parties are not as dissimilar to those used by the pirate ship captain as they might seem to be. Rather than a bottom-up means of selection, partisan political leaders generally tend to use their influence and power to pack the lower ranks of party organizations with their supporters.

The average voter is not particularly concerned about delegates or local precinct committeemen who make up the rank and file of the agents of political parties, until enough angry “party apparatchiks” are concerned enough to effect

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5 While the operation of a pirate ship appears inapplicable to society today, the model persists in many social organizations. Many boards of companies or universities are assembled in this manner. The grouping has the appearance therefore as an advisory or oversight board, but in reality is likely rationally indifferent to most of what is going on and inclined to follow the example of the person to whom they owe their position. Granted in a corporation in which board allocations are based on shareholder voting you often actually have a far greater level of honesty. Rather than being selected as a result of a favor, in these situations the people often have a direct financial interest in the corporation that is distinct from the corporations executives.
change. A recent example was the 2010 upset by which conservative-leaning local party workers ousted Republican U.S. Senator Bob Bennett in favor of their candidate, Mike Lee. The episode is an interesting aberration in American politics in that Bennett was not particularly liberal for a Republican and was heavily supported by the Latter Day Saints (LDS) church in Utah. It is quite possible that Bennett had placed undue confidence in the church’s support.\textsuperscript{6}

While no religious organization in the United States is inherently political, the LDS church goes to great lengths to get LDS adherents elected to office (whether Republican or Democrat). Failure of the church to support candidates, particularly in Idaho, Nevada, and Utah, can scuttle a campaign before it starts. Bennett’s undue confidence in church support was a tactical error, and that mistake has not been repeated by subsequent incumbents, who have received challenges from grass-roots candidates.

\textsuperscript{6} (In fact no non-LDS has represented Utah in the US Senate since the US entered WWI, the last being George Sutherland from Utah who left the senate to join the US Supreme Court -- Waskey, A.J.L. "Sutherland, George." In The Encyclopedia of the Supreme Court. David Shultz, ed. New York: Facts on File, 2005, p. 450; Atkinson, David N. Leaving the Bench: Supreme Court Justices at the End. Lawrence, Kan.: University Press of Kansas, 1999, p. 106.)
The typical strategy is for politicians to fill the lower ranks of partisan organizations with allies and supporters. This functions not only as a reward for campaign workers but also as a way to shore up the base of the incumbent.

This strategy conflates the distinction between an election and an appointment. In general, lower party offices are nominally elected; however, the reality is that, since the electorate is “packed” by elected party officials, endorsement by the incumbent politician becomes a *de facto* appointment, even if there is a cursory election. The majority of legislative seats are not competitive in a partisan race and have been designed to favor one party strongly. This effect of such gerrymandering is that in most elections the primary election, not the general election, determines the winner. Primaries have lower turnouts than general elections and the party base is far more critical to the outcome. The appointed party base forms the groundwork for a primary, making it difficult to unseat incumbents and ensuring that parties, rather than voters, control open seats in the majority of districts. This micro view of local politics is not dissimilar to national elections.

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7 Moreover, it is often the case that prior to election people must be nominated and that nomination is only given to one person rendering the election a complete farce.
Lower state offices become a pool from which national party delegates are selected. For example, in 2008, 823.5\(^8\) votes in the DNC convention were from unpledged delegates who had not attained their status as a result of a primary but had been elected at another time (e.g., former Presidents or current Congressmen) or were trusted lower-level partisan office holders.\(^9\) Indeed, while higher-echelon party officials receive status as “superdelegates,” the majority of them were simply people closely tied to the higher-level party officials.\(^10\) The votes of 2,210 delegates ensure the Democratic Presidential nomination, and approximately 37% of those votes need not come from elected delegates. Accordingly, a person could win the Democratic nomination with slightly more than 38% of pledged delegates, with the remaining 61% voting for the losing candidate. This results in unelected delegates having a disproportionate power at

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\(^8\) Half votes are not a typo. In reality some delegates are only entitled to half vote so not all votes are even equal at the DNC convention. Superdelegates from Michigan, Florida, and Democrats Abroad are entitled to half a vote each. Democrats Abroad is an association of Democrats who do not even reside in the United States, but are recognized at the party’s convention.

\(^9\) The unpledged PLEO delegates are: all Democratic members of the United States Congress, Democratic governors, members of the Democratic National Committee, ”[a]ll former Democratic Presidents, all former Democratic Vice Presidents, all former Democratic Leaders of the U.S. Senate, all former Democratic Speakers of the U.S. House of Representatives and Democratic Minority Leaders, as applicable, and all former Chairs of the Democratic National Committee.” There is an exception, however, for otherwise qualified individuals who endorse another party’s candidate for President; under Rule 9.A, they lose their superdelegate status.

\(^10\)
the convention and drawing into serious consideration the electoral validity of
the result. The party governance exerts substantial power over the convention
outcome, regardless of how individual voters cast their ballots. More to the
point, with the nominated candidates potentially receiving as little as 38% of
support from elected delegates, there is little support for the notion that the
nomination processes is an electoral one rather than an appointed one.

Since unelected and unpledged superdelegates are essentially able to
control the convention, upper party management has a de facto appointment
power at the convention. In this respect, the process of selection of nominees
could arguably be said to be appointive rather than elective, with the primary
elections simply a charade to create an illusion of a free democratic electoral
process.

Republicans have a far smaller percentage of unpledged delegates: 123
members of the Republican National Committee, a small fraction of the 823.5
superdelegates at the Democratic convention.\footnote{The size of Republican delegations to the Republican National Convention are determined by Rule 13 of the Republican Party’s rules. These rules delineate that delegates are to be apportioned as follows: “Ten delegates at large from each of the fifty states, The national committeeman, the national committeewoman and the chairman of the state Republican Party of each state, American Samoa, the District of Columbia, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. Three district} However, in a divided primary
election, even a marginal number of delegates could define the outcome of the convention. One potential fear is that grass roots efforts to control a convention with a slim majority could be thwarted by a small number of unpledged delegates.

A large fundraising advantage is created by the Democrats’ large number of unpledged superdelegates. A candidate who receives early support from a large number of superdelegates would have a marked fundraising advantage,

delegates for each member of the United States House of Representatives from each state, sixteen from D.C., twenty from Puerto Rico, and six each from American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. From each state having cast at least a majority of its Electoral College votes for the Republican nominee in the preceding presidential election, four and one-half delegates at large plus a number of the delegates at large equal to 60 percent of the number of electoral votes of that state, rounding any fraction upwards. One additional delegate at large to each state for any and each of the following public officials who is a member of the Republican Party elected in the year of the last preceding presidential election or at any subsequent election held prior to January 1 of the year in which the next national convention is held (this provision rewards those states where the state "Grand Old Party" (GOP) has been successful in electing candidates): one for each GOP governor, at least half of the state’s representatives in the United States House of Representatives are also tallied into the delegate total, then a majority of members of any chamber of the state legislature, if also presided over by a Republican, then a majority of members of all chambers of the state legislature, if also presided over by a Republican, followed by the sum of each Republican United States Senator elected by such state in the six-year period prior to January 1st of the year in which the next national convention is to be held. In addition, if the District of Columbia shall have cast its electoral votes, or a majority thereof, for the Republican nominee for President of the United States in the last preceding presidential election, it shall be permitted four and one half delegates at large plus the number of delegates at large equal to thirty percent (30%) of the 16 delegates at large allotted to the District of Columbia, rounding any fraction upward.”
since large donors want to bundle for the winner of the election, not on ideological grounds. Thus, being able to get early support creates a fundraising “bonanza” for a primary election candidate, leading to greater funding and more electoral support.

The result undermines the electoral legitimacy of the Democratic party on two levels: first, the apparent reality that, even with 61% of the popular vote, a candidate could still fail to secure the nomination; second, and perhaps more important, early “traction with the 37% of the delegates who are unpledged creates a basis to raise money for the party’s favored candidate. Overall, while the system usually creates a clear winner in which superdelegates could not have altered the outcome, the reality of the early financial advantage that the party can give to its preferred candidate means that the Democratic National Convention (DNC) is more a conference for appointment than an election of a candidate.

Given the high value of campaign cash (both hard and soft), it could be argued that the primary elections are a façade that hides the actual underlying appointment of a candidate. Those who would argue against this might assert

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12 Seriously contested primaries more often than not have a candidate who is affluent and able to either self fund or rely on rich friends (or both). Otherwise, the party machine can control the flow of campaign cash in most instances thus controlling the outcome of a primary. The much touted, but very rare permutation is when a candidate
that in 2008, when the issue of the power of the superdelegates at the DNC began
to become well known, Hillary Clinton, not Barack Obama, was the “inside”
candidate. However, despite Clinton’s high profile going into the primary,
people overlook that, while the Clintons as a political dynasty have a decent level
of popular support, a lesser known candidate can shore up delegates’ power.
Thus, in 2008, superdelegates flocked to the Obama side, most likely because
Hilary Clinton had enemies within the DNC.\textsuperscript{13}

The second facet of this system is that most appointed leaders were at one
pointed elected. Seven of the 10 most recent U.S. Secretaries of Defense (30 years)
were serving or had served in Congress.\textsuperscript{14} An even more interesting political
“factoid” is that the most recent U.S. President to have served as Secretary of

\textsuperscript{13} A more amusing explanation offered by some was that Bill Clinton did not want his
estranged wife in the presidency and was enjoying the largess of paid speaking
engagements too much to give it up.

\textsuperscript{14} Caspar Weinberger was a congressman from San Francisco California, Cheney was the
congressman from Wyoming, Les Aspin was a congressman from a place called
Wisconsin, William Cohen was a reprehensive from Maine, Donald Rumsfeld was
elected from Illinois to congress (yes from Illinois to congress), Leon Panetta was a
congressman from California and Chuck Hagel was a senator from Nebraska. Only
Perry, Gates and Carlucci had never won elected office before being confirmed as the
secretary of defense and all of them served relatively short terms at the end of a
presidency. William Howard Talf IV a scion of the Taft political dynasty was never
elected to office, nor was he ever confirmed by the senate and only served as an interim
sectary for 59 days.
State was James Buchanan, even though others have tried.\textsuperscript{15} The trend is that appointment to a cabinet office is generally not a conduit to higher elected office.\textsuperscript{16} Perhaps appointment to cabinet office is the modern equivalent of ennobling a powerful knight as a margrave. This illustrates that, while appointees are not elected, there is an electoral reason for making the appointments. Thus, the most powerful appointed officials are essentially kept out of races to maintain a party’s status quo.

Though it is perhaps a crude analogy, American politics is not dissimilar to the example of the pirate ship. While there are overt elections, only in certain national elections or districts that encompass entire states is the deck not “stacked” and the winner a result of the selection of electors more than the electors’ selection. Similarly, the most dangerous electoral rivals are often set aside into politically contentious positions that, while powerful, are not adventurous from an electoral standpoint. In this respect, election and appointment are very closely connected in the American political system. While

\footnote{The most amusing fashion in recent years is for Presidents to appoint a Secretary of the Army from the opposite party whom they wish to extricate from congress or remove from a contested race, e.g, John O. Marsh.}

\footnote{With the exception of Dick Cheney it is a means to remove the person from a threatening political position.}
elections are nominally open and appointments are nominally based on merit, the reality may be something distinctly different.
6. Conclusion

Churchill has been credited with the saying, “Democracy is the worst form of government except for all the rest.” Contrary to the bulk of the related literature, this paper has suggested that election tends to be favored at the onset of a democratic system for the most powerful positions, with less critical positions filled by appointment. However, the realities of electoral politics mean that elected politicians eventually specialize in election while appointed politicians specialize in governmental operations.

The traditional argument suggests that the difference between elected and appointed positions is simply a function of their historical beginning.¹ This traditional argument holds that, since the U.S. Constitution closely mirrors the English system of government, the same divisions between elected and appointed positions generally persist. However, this is simply an historical

¹ To that end, many would assert that since the king has always appointed the chancellor he is appointed today. For instance, Oliver Cromwell attempted to radically alter the English system of government and the result was that his corpse was posthumously defiled and the prior status quo was restored. Furthermore, there are too many situations in which the same positions are elected and appointed. For instance, in the US state of Arizona, some judges are elected while others are appointed and these judges often have overlapping jurisdictions.

reality, not an explanation.\(^2\) Indeed, defining the nature of political institutions based on their history fails to explain why a given system continues to exist.\(^3\)

The conclusion is that each democratic government, at its inception, conducts a sort of cost-benefit analysis. On one side is the requisite legitimacy of the decision maker and on the other side is the transactional cost of an election. The greater the need for legitimacy in a democratic regime the less pertinent the cost of an election becomes. When cost is a key issue, or when corruption is a concern, positions are selected by sortition. Appointment emerges as the preferred method when a balance of legitimacy and cost is important. Election is reserved for situations in which maximum legitimacy is required. However, this cost-benefit analysis occurs only at the onset of a democratic system of government, and this democratic system inevitably degrades over time.\(^4\)


\(^{3}\) *Id.* The pre-Norman kings of England did not appoint their chancellors; rather it was determined based on family. So trying to explain the system historically runs into the problem of historians simply selecting the examples they like.

-- Tribal politics remains the norm in parts of Africa today, but is declining in the Middle East. However, a system in which different tribes maintained power of certain regions and resources only coming together in times of war was once common.

\(^{4}\) The most apparent problems of democracy are the high chance of a Condorcet paradox occurring, the high chance the winner will not even receive a majority of the vote or simply that the electorate itself is not a true sample of the citizenry or populace. These
Figure 5: Schematic of concept.

The typical academic theory is that appointment is preferred when the position is technical (e.g., jurist or diplomat), while election is preferred when the position is political (e.g., governor or legislator). Sortition is the choice only problems presuppose that a democracy will actually hold an election. The reality however is that democracies do not even bother to elect most of the decision makers. This little talked about reality also conceals the underlying question how decision makers are selected in a democracy.

As noted in the literature review above, the plethora of academic discourse delineates how the policies of elected and non-elected officials differ. However, there is a lack of research on why some officials are elected while others are not elected, e.g. appointed. As such, the answer as to why some positions are appointed while others are elected remains enigmatic.

There is also the possibility that a leader is chosen by consensus. Examples of leaders chosen by consensus are the Secretary General of NATO or the presiding bishops of the
for matters irrelevant on a macro level, such as the guilt of a single criminal. This makes superficial sense that it would be imprudent to have people elect the best lawyer or diplomat for a position because they are not aware of the differences between them; however, lack of knowledge on the part of the electorate relates to the fact that the position is not elected. The secondary issue is that the inherent complexity of some positions (law being the foremost example) is likely “rent seeking” by the profession to exclude outsiders, as professions tend to create their lexicon and culture in an effort to exclude outsiders.

While elected officials may garner more attention than their appointed counterparts, the reality is that it is more efficient for elected politicians to spend their time engaging in inconsequential undertakings or simply raising money for re-election. Congress may occasionally decry the actions of a federal agency but fail to take steps to change the criticized policies. There is in reality a perfect division of labor: the appointee remains nameless in a lifelong job and takes the blame while elected politicians specialize in placating voters and blaming anonymous bureaucrats for issues.

Episcopal Church in the United States of America. In both cases the position hold no actual power. This trend continues with positions determined by consensus. This also fails to explain the British parliamentary system in which ministers are also members of the House of Commons. Though it could be argued that the civil servants in England actually run the ministries.
Elected officials gain votes by taking positions on “wedge issues”: political questions that have high salience to the electorate. In the United States these are generally abortion, gun rights, gay marriage, and immigration. They gain the bulk of their contributions from people who want the elected representatives to supervise appointed staff members to act as the electees’ agents actually run the daily operations of government.

The result is that Congress as a whole does very little actual legislating; the bulk of rules and regulations that govern policy in the United States are promulgated in the Federal Register. Over time, elected representation wanes in power while historically less-critical positions gain power. Similar trends exist in the House of Commons, Parlement Français, the Bundestag, and perhaps most blatantly in the Russian Federal Assembly. While this paper does not examine how this trend applies in nations such as Germany with a divided executive, it appears probable that the same trend persists in those regimes. This paper does not address the situation in nations with a vestigial monarchy, such as the United Kingdom or Norway, where one might expect the nominal Royal Family to detract from the amount of press that appointed and elected officials receive.

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8 This includes both the Assemblée nationale and Sénat
9 Federalnoye Sobraniye
The critical warning in this paper is that citizens should be aware of this trend by appointed officials to undermine or take control from their elected counterparts. While voters may obsess over their Congressman’s positions on *Roe v. Wade* or the Second Amendment, the reality is that the position makes little or no difference; a Deputy Secretary of the Interior is likely to exert far more power and influence over such issues. As populations and their governments grow, the number of appointed positions increases and the proportion of elected office holders decreases. The result is that democratic regimes start to look more and more like their aristocratic antecedents. Moreover, as governments become more distant and complex, citizens become rationally ignorant of the details of the operations of the regime. Currently, the United States appears to be moving into a political system that more closely resembles dynastic succession than democracy. The eventual question: At what point in this evolution does a country cease to be democratic?
Appendix

Table for Figure 1

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![Bar Chart](Image)
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References

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