

JUDICIAL SELECTION RECONSIDERED: A PLEA FOR RADICAL MODERATION

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The judicial selection debate features a formidable list of seemingly unrelated issues that obscures the pivotal disagreement at the core of the dispute.¹ Proponents of contested elec-

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1. Such issues include: Which system selects judges who are more credentialed, more experienced, more diverse, or less likely to be disciplined? Are voters competent, informed, and interested enough to cast meaningful ballots in judicial races? Do impending elections affect the decisions judges make, and, if so, is that a good thing? Is it helpful, hurtful, or impossible to take partisanship out of the equation through nonpartisan elections? Do “merit-selection” systems make choices based on merit or politics? Do retention elections serve their purpose, or fail either because they do not engage voters or because incumbents are defense-

tions ultimately proceed from a simple premise: Judges, like legislators, are policymakers who, in a representative democracy, should be accountable to the people they serve.² Within this camp, some make the point with irritation: Judges should exercise restraint and avoid policymaking but often do not.³ Others are untroubled by judicial policymaking, which they regard as inevitable.⁴ Either way, the argument against an appointed judiciary and for an elected one follows naturally and can be expressed as a syllogism: Unelected judges are unaccountable policymakers; unaccountable policymakers flout the rule of law and the will of the people; therefore, unelected judges flout the rule of law and the will of the people. Conclusion: Judges should be elected.

Proponents of appointed judiciaries proceed similarly, but from an opposing premise: Judges uphold the rule of law and, therefore, they need to be independent of those—including voters—who would interfere with their impartial judgment.⁵ Judges are thus fundamentally different from policymakers in

less against stealth opposition campaigns? Are judges influenced by their campaign supporters or opponents, and, if so, can (or should) campaign finance reform diminish that influence? Is the public's confidence in the judiciary damaged by fractious partisan appointment battles, contentious election campaigns, the perceived influence of campaign support, and public statements of judicial aspirants who precommit themselves to deciding future cases from the campaign stump or in appointment proceedings? And to what extent do answers to any of these questions vary depending on whether we are discussing supreme courts, intermediate appellate courts, or trial courts?

2. See, e.g., CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 2 (2009); Julius Uehlein & David H. Wilderman, *Opinion: Why Merit Selection Is Inconsistent with Democracy*, 106 DICK. L. REV. 769, 769, 772 (2002); Dennis B. Wilson, *Electing Federal Judges and Justices: Should the Supra-Legislators Be Accountable to the Voters?*, 39 CREIGHTON L. REV. 695, 732 (2006).

3. See, e.g., Craig Huey, JUDGE VOTER GUIDE, <http://www.judgevoterguide.com/> (last visited Feb. 1, 2012) (recommending certain judicial candidates in an effort to help prevent voters from electing judicial activists); Tom Parker, *Elect Judges So They Can Be Held Accountable*, THE IOWA REPUBLICAN (Aug. 20, 2010) <http://theiowarepublican.com/2010/elect-judges-so-they-can-be-held-accountable/> (Alabama Supreme Court Justice Tom Parker advocating for judicial elections as a solution to stop judicial activists); Bruce Walker, *Should We Elect Judges?*, AM. THINKER (May 23, 2011), http://www.americanthinker.com/2011/05/should_we_elect_judges.html (advocating a constitutional amendment requiring the election of federal judges and justices as a solution to judicial activism).

4. See, e.g., Alan B. Morrison, *Judges and Politics: What to Do and Not Do About Some Inevitable Problems*, 28 JUST. SYS. J. 283 (2007).

5. See, e.g., AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 70–71 (2003); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 49 (2003).

the “political branches” of government: They do not make rules of law but impartially apply rules made by the other branches. From there, the argument against an elected judiciary and for an appointed one is reducible to a competing syllogism: Judges must be independent of the electorate to uphold the rule of law and fulfill their constitutional role; elected judges are not independent of the electorate; therefore, elected judges do not uphold the rule of law and fulfill their constitutional role. Conclusion: Judges should be appointed.

In this Essay, I argue that it is no longer credible to contend that judges simply declare what the law *is* without regard to what they think the law *should be*. In difficult cases, judicial decisionmaking requires discretion that inevitably brings legal and extralegal considerations to bear. Conceding that judges are “policymakers” in some sense of the term, however, does not mean that judges are undeserving of independence denied public officials in the political branches. What judges do is different from what other public officials do in ways that justify a measure of autonomy for a quasi-legal, quasi-political judiciary. The net effect of these differences is to make the judge a unique kind of occasional policymaker, who does not represent a constituency in the same way as elected officials in the other branches.

Whether those differences warrant independence from the electorate in periodic elections is context-dependent, which helps explain why debate over the optimal system of judicial selection is inevitable, perpetual, and, in the minds of some, hopeless. Thinking about judicial selection with reference to the justifications for judicial independence developed here enables us to get past unproductive, all-or-nothing arguments about whether judges should be elected or appointed and instead isolate three core threats to independence so as to focus the debate: judicial re-selection, real or perceived dependence on campaign supporters, and candidate precommitments. I conclude with some thoughts on how to remedy these problems incrementally, without resorting to all-or-nothing arguments.

I. RETHINKING JUDICIAL INDEPENDENCE FOR COURTS INFLUENCED BY LAW AND POLITICS

I have argued elsewhere that the legal establishment has painted itself into a corner by defending the need for judicial independence with almost exclusive reference to an implausi-

ble claim—reminiscent of rigid nineteenth-century formalism—that independent judges do not make rules of law but merely follow them.⁶ The public likes to hear judges say that they are like umpires with discretion constrained by rules akin to a strike zone,⁷ and so judges oblige.⁸ Even though the public might be heartened by judges who profess allegiance to the rule of law, survey data reveal that the public believes what social science research confirms: Judicial decisionmaking involves an exercise of discretion subject to legal and extralegal influences, including ideology.⁹ Thus, when the legal establishment argues that judges should be insulated from external controls because such controls will contort the rule of law that independent judges are singlemindedly committed to upholding, it forces the judiciary to defend its independence with counterfactual claims that the public does not accept.

It is thus unsurprising that most people favor judicial elections,¹⁰ presumably as a way to guard against judges running amok. There are three more plausible justifications for judicial independence that are not grounded in the somewhat otherworldly premise that independent judges make rulings of law unsullied by extralegal influences.

First, independent judges are better situated to respect the dictates of due process. The Fourteenth Amendment demands that judicial rulings be produced in a fundamentally fair process that includes notice and an opportunity to be heard before

6. See Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. (forthcoming 2012).

7. Umpires themselves liken the strike zone to the Constitution. BRUCE WEBER, AS THEY SEE 'EM: A FAN'S TRAVELS IN THE LAND OF UMPIRES 172 (2009) ("It's like the Constitution," [one umpire] said to me. "The strike zone is a living, breathing document.").

8. John Roberts's confirmation proceedings provide an apt example of this phenomenon. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 31 (2005) (statement of Jeff Sessions, Senator from Alabama).

9. See, e.g., Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9, 24 (Stephen B. Burbank & Barry Friedman eds., 2002); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 779–83 (2005); AM. BAR ASS'N, *supra* note 5, at 17–18 (describing public attitudes toward the judiciary).

10. Debra Cassens Weiss, *55% of Potential Voters Support Judicial Elections for State Judges*, ABAJOURNAL (Oct. 21, 2008 11:08 AM), http://www.abajournal.com/news/article/55_of_potential_voters_support_judicial_elections.

an impartial judge.¹¹ Tom Tyler and others have found that if litigants perceive the process as fair, they will more readily accept adverse outcomes in judicial proceedings.¹² Further, litigants will be more likely to perceive the process as fair if their proceeding includes an independent judge who is not subject to the control of outside forces that could contort the judicial process to achieve particular results.¹³ That remains true irrespective of whether the independent judge's ruling involves an exercise of discretion influenced by what she regards as sound legal or public policy.¹⁴

Second, independent judges are better situated to administer justice on a case-by-case basis. Richard Posner and others have argued that most judges are pragmatists,¹⁵ meaning that they seek the best results in a given case, informed by applicable law, facts, and policy.¹⁶ Seeking justice in this commonsense way requires a familiarity with, and sensitivity to, case-specific information that presiding judges possess and interested outsiders lack. This information asymmetry between judges and interested outsiders justifies judicial independence from such outsiders to the extent necessary for judges to administer pragmatic justice—even though the pragmatic choices judges make can implicate a kind of judicial policymaking.

11. U.S. CONST. amend. V, VI, XIV, § 1; *see also In re Stuhl*, 233 S.E.2d 562, 568 (N.C. 1977) (“A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.”); JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS 2–23 (4th ed. 2007) (“Litigants have a right to expect . . . that the case will be heard in a public forum before an impartial judge or jury with representatives of both sides present.”); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 31 (2d ed. 2007) (“[B]oth the United States Constitution and those of the various states, guarantee that litigants will receive ‘due process of law’, which entitles a person to an impartial tribunal in both civil and criminal cases.”).

12. Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 117 (1988).

13. *See, e.g.*, Edward L. Rubin, *Independence as a Governing Mechanism*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 9, at 56, 69 (“[T]he overriding concern [in adjudications between private parties or between a private party and the government] is that the matter be decided fairly, which means that the court must apply established legal rules to the dispute.”).

14. *See id.* at 69–70.

15. RICHARD A. POSNER, HOW JUDGES THINK 230 (2008).

16. *See* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 137–38 (1998).

Third, independent judges remain better able to uphold the law. Even though scholars are preoccupied with hotly contested issues in the small percentage of cases decided by courts of last resort, in the vast majority of cases the applicable law is relatively easy to parse. In such cases, the role of judicial policymaking is greatly circumscribed. Accordingly, the accompanying need for judges to be independent from external sources of interference that could contort otherwise clear applications of the law is more obvious.¹⁷ Even in difficult cases, questions of law do not cease to be questions of law merely because they cannot be answered with mathematical precision or because liberals and conservatives think differently about the answers. Although judges' policy preferences might influence their legal reasoning, judges generally appear to be sincere when they say they are following the law as they understand it to be written.¹⁸ In this context, independence enables judges to give their best assessment of what the law is. We can concede that judges are influenced by their policy preferences and are thus "policy-makers" in some sense of the term and still conclude that judges are a special kind of policymaker. They are special in that they are trained in law (in state systems, judges—unlike officeholders in the political branches—must be lawyers¹⁹), they are acculturated to the legal process from law school and years of practice, and they make decisions bounded by law as they understand it, even if that understanding is subject to ideological influence. Insulating judges from the influence of outsiders, who are unversed in law and indifferent to the law as long as they obtain preferred outcomes, thus promotes the rule of law, broadly defined.

In short, judges and legislators make policy in different ways.²⁰ When judges make policy-laden choices, they do so in

17. See POSNER, *supra* note 15, at 45–46.

18. See, e.g., EILEEN BRAMAN, LAW, POLITICS, & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 23–25 (2009); C. K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 147–48 (1996).

19. Geyh, *supra* note 5, at 59 & n.71 (2003).

20. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2349 (2011) (acknowledging the differences between legislative voting and judicial rulings); see also *id.* at 2353 (Kennedy, J., concurring) (discussing how the differing roles of the legislative, executive, and judicial bodies "may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them").

the process of administering justice in cases where they have access to dispute-specific details the public lacks, their choices are constrained by applicable law, and they have an understanding of the relationship of the rights of parties relative to the public at large. Unlike legislators, judges do not represent the voting public as a single, clearly defined constituency. Rather, judges must be mindful of multiple and sometimes conflicting constituencies, which renders the term unhelpful and misleading when applied to judges. Those “constituents” include the people who appear before the judge as parties and whose rights are at stake, the people who ordained and established the constitutions judges uphold, the people who elect the legislators who write laws judges interpret, the people who are subject to laws judges interpret, and, in jurisdictions with elected judiciaries, the people who vote the judge into office. Moreover, unlike legislators, who are rightly partial to public preferences, judges swear to be *impartial* and are under an ethical duty to disregard “public clamor.”²¹

II. THE IMPLICATIONS OF RETHINKING JUDICIAL INDEPENDENCE FOR JUDICIAL SELECTION

Thinking about judicial selection as a way to manage the independence and accountability of judges as a unique species of decisionmaker influenced by law and policy (among other factors) moves the debate away from the extremes. Categorical claims that judges should be insulated from electoral accountability because independent judges uphold the law understate the role of judges as policymakers. When it comes to the common law (which implicates the judicial campaign pot-boiler: tort liability and reform), the role of judge as policymaker is indisputable, and in close questions of constitutional interpretation social science data offer compelling evidence that judges on courts of last resort are influenced by their policy predilections.²² Conversely, categorical claims that judges should be subject to electoral accountability because they are no different

21. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.4(A) (2007) (“A judge shall not be swayed by public clamor”); *see also* 28 U.S.C. § 453 (2006) (requiring judges to take oath to “faithfully and impartially discharge and perform” the duties of office).

22. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 17, 62–63 (1993).

from elected policymakers in the political branches are overstated. Judges *are* different. Though judges forge public policy, they do so in a unique context where law continues to operate as a decision-making constraint (even if it is a less robust constraint than the legal establishment contends), and judges operate pursuant to a process where a measure of detachment from external sources of influence is necessary and desirable.

Between these extremes, the operative question becomes whether the need for popular constraints on judicial policymaking trumps the need for judicial independence from popular interference with judicial decisionmaking. The answer logically turns on which selection option under consideration optimizes “good” independence that enables judges to follow due process, administer pragmatic justice, and uphold the rule of law, while minimizing “bad” independence that liberates judges to disregard these same three objectives. How selection options are viewed is context-dependent: The extent of the perceived need for popular constraints on judicial policymaking in a given jurisdiction will vary depending on that jurisdiction’s history, political traditions, and current political culture; the nature and extent of the particular judiciary’s policymaking role; recent events fueling public suspicions of an unaccountable judiciary run amok or an honorable judiciary under siege; and which tier of court is under scrutiny. Three consequences follow: First, variations in selection systems among states are unavoidable and perhaps desirable, as different states assess their relative need for independence and accountability in different ways. Second, a state’s selection system is subject to change over time as circumstances affecting the independence-accountability balance change. Third, in states where systems of selection are entrenched, incremental measures may be the only viable means of reform.

The last point bears particular emphasis: With exceptions, sweeping changes in selection systems—from appointive systems to partisan elections in the mid-nineteenth century, to nonpartisan elections at the turn of the twentieth century, to merit selection in the mid-twentieth century—have come in movements of relatively short duration.²³ When, as now, the latest movement has run its course and the political will for fundamental change is ab-

23. See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1261–62 (2008).

sent, incremental reform can be the most practical means to lessen some of the baleful effects of independence-threatening accountability or accountability-threatening independence.²⁴

III. ISOLATING CORE INDEPENDENCE PROBLEMS AND MARGINALIZING DISTRACTIONS

In short, it makes sense to think about judicial selection generally, and judicial elections in particular, in terms of promoting and constraining the independence of judges who are subject to legal and extralegal influences, to further the objectives of protecting due process, administering pragmatic justice, and upholding the rule of law. Doing so makes it easier to isolate problems and marginalize distractions. Three recent election experiences offer a useful context for such analysis: partisan elections in West Virginia, nonpartisan elections in Wisconsin, and retention elections in the merit selection state of Iowa.

In a 2004 partisan election campaign in West Virginia that pitted incumbent Justice Warren McGraw against challenger Brent Benjamin, Massey Coal Company CEO Don Blankenship, whose company was then a defendant poised to appeal a \$50-million judgment against it, launched a \$3-million independent campaign to defeat McGraw.²⁵ Although Blankenship candidly explained that McGraw “votes almost every time for plaintiffs and against job providers,” the principle thrust of the advertising campaign he underwrote accused McGraw of being “soft on crime” because of a vote he cast in a sex offender case.²⁶ Plaintiffs’ lawyers formed an organization of their own that spent \$1 million attacking Benjamin as a puppet of big business because of Blankenship’s support.²⁷ Benjamin won the election, refused to recuse himself from the Massey case on the basis that he was not actually biased and that appearances should not guide disqualification determinations, and cast the decid-

24. Cf. James Sample, Caperton: *Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 302 (2010).

25. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).

26. Toby Coleman, *Massey CEO gives \$1.7 Million to anti-Warren McGraw group*, W. VA. CITIZEN ACTION GROUP (Oct. 15, 2004), http://www.wvcag.org/news/fair_use/2004/10_15a.htm.

27. See *id.*

ing vote in favor of Massey and Blankenship.²⁸ Meanwhile, West Virginia Chief Justice Spike Maynard was photographed vacationing with Blankenship, while Associate Justice Larry Starcher publicly referred to Blankenship as “a clown.”²⁹ Maynard and Starcher recused themselves from rehearing the Massey appeal, but Benjamin did not and again cast the court’s deciding vote for Massey³⁰—only to have the decision reversed by the Supreme Court in 2009 on due process grounds.³¹

After a brief period of calm, another West Virginia Supreme Court justice was in the news. As a candidate in 2008, Menis Ketchum was asked about an act limiting tort liability for medical professionals. Ketchum declared, “I will not vote to overturn it. I will not vote to change it. I will not vote to modify it.”³² Ketchum was elected and later declined to disqualify himself from the case in which the constitutionality of the act was at issue, explaining that his “predisposition [did] not equate to an actual bias.”³³ The next week, Ketchum reversed course and recused himself. He accused the lawyers who sought his disqualification of “attempting to create a ‘firestorm,’” and explained that he did not “want our Court to be publicly maligned,” but added that his campaign statements were protected by the First Amendment, and that he “strongly believe[d] that there [was] absolutely no legal basis for [his] disqualification.”³⁴

In 2009, the Iowa Supreme Court unanimously ruled that a statutory ban on same-sex marriage violated the Iowa Constitution.³⁵ The next year, three members of the court’s seven justices stood for retention election and were defeated following a

28. See *Caperton v. A.T. Massey Coal, Co.*, 679 S.E.2d 223, 292–93 (W. Va. 2008) (Benjamin, C.J., concurring).

29. Chris Dickerson, *Attorney had prior notice of Monaco photos*, W. VA. RECORD, May 8, 2008, <http://www.wvrecord.com/news/212130-attorney-had-prior-notice-of-monaco-photos>.

30. *Caperton*, 129 S. Ct. at 2258.

31. See *id.* at 2265–67.

32. Jessica M. Karmasek, *Ketchum refuses to recuse himself from case*, W.VA. RECORD, Sept. 27, 2010, <http://www.wvrecord.com/news/229987-ketchum-refuses-to-recuse-himself-from-case>.

33. See *id.*

34. Jessica M. Karmasek, *Ketchum reverses course, recuses himself*, W. VA. RECORD, Sept. 28, 2010, <http://www.wvrecord.com/news/230005-ketchum-reverses-course-recuses-himself>.

35. *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009).

campaign in which opponents of gay marriage spent more than \$1 million and the incumbents raised no money at all but were defended by a group of lawyers and former public officials.³⁶ Meanwhile, attorney James Bopp filed suit challenging the constitutionality of Iowa's merit selection system, arguing that the disproportionate representation of lawyers on the state's nominating commission violated the equal protection principle of "one person one vote."³⁷

In Wisconsin's February 2011 nonpartisan primary election, Justice David Prosser and challenger JoAnne Kloppenburg were chosen to face each other in the general election, with Prosser receiving 55% of the primary vote to Kloppenburg's 25%.³⁸ That same month Wisconsin Republican Governor Scott Walker proposed a budget repair bill that drew fire from public employees' unions and morphed the supreme court election into a referendum on the governor's program given the anticipated legal challenges to the bill.³⁹ Neither candidate took a position on the budget bill, but during the previous December Prosser's campaign manager stated that Prosser would offer a "common-sense complement" to the Walker administration—a statement Prosser later disavowed.⁴⁰ An anti-Prosser campaign claimed that "Prosser = Walker," given his decisions across a series of cases.⁴¹ Associate Justice Michael Gableman endorsed Prosser and accused Kloppenburg of "hitch[ing] her wagon to the partisan star by deliberately fostering the idea that she will work against everything that Scott Walker proposes . . ."⁴² In the midst of the campaign, the press reported that the previous

36. David Pitt & Michael J. Crumb, *3 Iowa justices ousted, rulings likely slowed*, WASH. POST, Nov. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110300948.html>.

37. Rachel Caufield, *Keeping Courts Free from Political Pressure*, AM. JUDICATURE SOC'Y (Jan. 2011), http://www.ajs.org/ajs/publications/judicatories/2011/jan/feature_iacourts.asp; see also Nelson Lund, *May Lawyers be Given the Power to Elect Those who Choose Our Judges? "Merit Selection" and Constitutional Law*, 34 HARV. J.L. & PUB. POL'Y 1043 (2011).

38. Monica Davey, *Wisconsin Election Is Referendum on Governor*, N.Y. TIMES, Apr. 4, 2011, at A13.

39. See *id.*

40. Tom Kertscher, *Greater Wisconsin Committee says state Supreme Court Justice David Prosser equals Gov. Scott Walker*, POLITIFACT WIS. (March 31, 2011, 9:00 AM), <http://www.politifact.com/wisconsin/statements/2011/mar/31/greater-wisconsin-committee/greater-wisconsin-committee-says-state-supreme-cou/>.

41. *Id.*

42. Davey, *supra* note 38.

year Prosser had screamed at the Chief Justice, “calling her a ‘bitch’ and threatening to ‘destroy’ her,” leading Prosser to acknowledge, “I probably overreacted, but I think it was entirely warranted”⁴³ Nearly 1.5 million ballots were cast at the conclusion of a \$5.4-million campaign, in which independent organizations spent \$4.5 million (\$2.7 million on behalf of Prosser, and \$1.8 million on behalf of Kloppenburg).⁴⁴ Election night results showed that Kloppenburg had won by 200 votes, but the next day a county clerk announced that she had discovered 14,000 uncounted ballots and Prosser was declared the winner by more than 7000 votes.⁴⁵

Analyzing these events with reference to the tripartite justification for judicial independence and accountability makes it possible to isolate three recurring problems.

A. *The Re-Selection Problem*

Justice McGraw’s defeat in West Virginia was partially attributable to a vote he cast as a sitting judge in a criminal case.⁴⁶ The three Iowa justices lost because of their votes in the same-sex marriage case.⁴⁷ If we accept the proposition that judges must be independent enough to respect the due process rights of parties, administer justice in situation-specific contexts, and apply the law as they understand it to be written, then putting judges at risk of losing their jobs for making a choice in an isolated case summarized for voters in advertising campaigns is troublesome.

The Wisconsin campaign stood on slightly different footing. There, the core concern related to Prosser’s likely vote in a future case given his ideological alignment with the governor, as revealed by his voting record as a judge and as a former Republican Speaker of the state House.⁴⁸ Similarly, in West Virginia,

43. Patrick Marley, *Supreme Court tensions boil over*, JSONLINE, Mar. 19, 2011, <http://www.jsonline.com/news/statepolitics/118310479.html>.

44. Patrick Marley, *Spending on high court race topped \$5 million*, JSONLINE, Apr. 19, 2011, <http://www.jsonline.com/blogs/news/120207389.html?page=5&viewAll=1>; Patrick Marley et. al., *State Supreme Court race headed for likely recount*, JSONLINE, Apr. 6, 2011, <http://www.jsonline.com/news/statepolitics/119308059.html>.

45. Todd Richmond, *Recount ends, gives Prosser the win in Supreme Court race*, WIS. ST. J., May 21, 2011, http://host.madison.com/wsj/news/local/govt-and-politics/elections/article_344fd65e-8337-11e0-93c3-001cc4c002e0.html?mode=story.

46. See Coleman, *supra* note 26.

47. See Pitt & Crumb, *supra* note 36.

48. See Kertscher, *supra* note 40.

McGraw's allegedly pro-plaintiff bias went more to his general ideological leanings across cases than his vote in a specific case.⁴⁹

Thus, although each of these judges was attacked for his decisions as a judge, the point was to attack each judge for his general ideological orientation rather than for his previous vote in a given case. Even though such a strategy arguably impinged on the judge's independence by punishing him for construing the law as he conceived it to be written, it likewise arguably targeted a judge who needed to be held accountable for his judicial philosophy across a body of work.

Some have rejoined that in Iowa, too, the retention elections merely curbed bad independence with electoral accountability,⁵⁰ but the argument is less persuasive. First, one ruling in a multi-year term is weak evidence of a "justice gone rogue." Second, the gay marriage case was decided by a unanimous court comprised of justices appointed by governors from both political parties,⁵¹ undercutting arguments that it was an ideologically motivated usurpation of power. Third, post-election focus groups confirmed the intuitive suspicion that many voters were animated by their aversion to gay marriage, not by their assessment of the justices' constitutional analysis.⁵²

49. See Coleman, *supra* note 26.

50. See A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/03/us/politics/03judges.html> ("The close vote concluded an unusually aggressive ouster campaign in the typically sleepy state judicial retention elections that pitted concerns about judicial overreaching against concerns about judicial independence. After years of grumbling about 'robed masters,' conservatives demonstrated their ability to target and remove judges who issue opinions they disagree with."); see also Mike Malloy, *On the November ballot: Judicial retention*, AMES NEWS ONLINE (Sept. 30, 2010, 3:30 PM), <http://amesnewsonline.com/category/news/government/november-ballot-judicial-retention> ("[Through retention elections,] many groups are working to change the court's lineup. 'Judges have gone way past their bounds,' said Ryan Rhodes, chair of the Iowa Tea Party Patriots and former state legislature candidate in Ames. 'It's not based on one decision it's the over-arching idea of how they handle their job as justices, believing that they get to make law.'").

51. See U.S. CHAMBER INST. FOR LEGAL REFORM, *Iowa Justice System: Detailed Information*, <http://www.instituteforlegalreform.org/states/data/iowa-justice-system-detailed-information> (last visited Feb. 1, 2011) (showing that Chief Justice Ternus and Justice Cady were appointed by Gov. Terry Branstad, a Republican, and Justices Striet, Wiggins, Hect, and Appel were appointed by Gov. Tom Vilsack, a Democrat.).

52. Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. REV. 118, 123 (2011) ("[P]ost-election gatherings in Iowa have looked back on the election usefully. In December, two focus groups met to discuss the election. According to one observer's report: We heard a lot of 'It may

B. *The Campaign Finance Problem*

The financial support Justice Benjamin received from Blankenship created a widespread suspicion that it would influence his judgment in *Caperton*—a suspicion heightened by Benjamin's vote.⁵³ With legislators, one might worry about campaign supporters buying access or otherwise exerting disproportionate influence on officeholders, but there is nothing inherently problematic about the basic notion that legislators listen to, and are influenced by, members of the public who support them. With judges, however, that basic notion is anathema: Due process seeks to minimize such influences by guaranteeing an impartial adjudicator and excluding public opinion from evidence admissible in judicial proceedings, and the rule of law interposes legal text between the choices judges make and public preferences.

C. *The Precommitment Problem*

Justice Ketchum committed himself to decide a future tort reform case in a specified way.⁵⁴ There is a difference between a judge who makes clear his general orientation on questions of legal policy and judicial philosophy through a public announcement of his views and the judge who promises voters that he will rule a particular way in a future case—even though that difference can be blurred at the margins. It is the difference between honestly acknowledging the relevance of ideological predilections in judicial decisionmaking, and entitling judicial candidates to let those predilections enslave them.

Legislators who promise to take specified action if elected create an interdependent relationship with voters that epitomize

have been the 'right' decision based on the Constitution, but I just don't like it. So I voted them out.'").

53. See, e.g., Robert Barnes, *Case May Define When a Judge Must Recuse Self*, WASH. POST, Mar. 2, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/03/01/AR2009030102265_3.html ("Caperton has drawn lopsided support in the case from legal and business groups, as well as those who worry about the role money now plays in judicial elections. Wal-Mart joined with Lockheed Martin, Pepsi and other corporations on Caperton's side, telling the court in a brief that requiring Benjamin's recusal 'would signal to businesses and the general public that judicial decisions cannot be bought and sold.'"); Joan Biskupic, *Supreme Court case with the feel of a best seller*, USATODAY.COM, Feb. 16, 2009, http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm ("More than 40 groups, including the American Bar Association, have weighed in with 11 'friend of the court' briefs supporting Caperton.").

54. See Karmasek, *supra* note 32, and accompanying text.

mizes representative democracy in action. With judicial candidates, however, the electorate—or whoever selects them in appointive systems—is not their constituency in the same sense. Rather, judicial precommitments amount to an *Alice in Wonderland* embrace of “sentence first, verdict afterwards” in which the judge promises to reach a result in exchange for his selection, without regard to the principle that judicial decisions must be based on information constrained by due process and applicable law, or the principle that decisions must be tailored to administer justice in the context of specific cases, the facts of which are adduced in litigation.

The Wisconsin experience is distinguishable: Although a critical issue concerned how the candidates would rule in a future case, the answer turned on their ideological predilections, not precommitments. To say that Prosser’s views “complement” the governor’s elucidates his leanings without binding him to specific outcomes. The tactic remains problematic in that it constrains the judge’s independence by complicating his ability to follow the law and rule against the governor without looking duplicitous (which may be why Prosser distanced himself from the statement), but it is arguably oriented more toward constraining bad independence than good, by holding judges prospectively accountable to the electorate for their extralegal preferences.

Apart from these three core issues, there are distractions. In Iowa (and other states where Bopp has filed claims), the argument that lawyers must not be overrepresented on merit selection commissions relative to the general population⁵⁵ proceeds from the wrong-headed premise that judges “represent” citizens as legislators do. Once we acknowledge the unique role that judicial decisionmakers play, the special relevance of legal expertise in assessing judicial (as compared to legislative) merit becomes obvious. There are excellent reasons to increase non-lawyer membership on nominating commissions—it increases public participation in judicial selection, empowers the public to hold judges prospectively accountable, and might enhance public confidence in judges so selected—but spurious claims that the Constitution requires states to regulate the selection of judges as if they were legislators is not one of them.

55. See *supra* note 37, and accompanying text.

Another distraction is the generalized concern that judicial elections are nasty or politicized. In a post-realist age, the ideological orientation of judicial aspirants matters. Quarrels over ideological predilection have become routine in state appellate races and federal judicial appointments, and it might be only a matter of time before they become more common on nominating commissions in merit selection states. As much as the legal establishment might prefer that judicial selection be an apolitical, low-key affair, the times are changing—and not inevitably for the worse. In Wisconsin, for example, some were appalled by the acrimonious campaign that degenerated to leaking memos about court infighting,⁵⁶ but ironically, the issue of Justice Prosser's temperament, civility, and collegiality probably had greater bearing on his fitness to serve than his likely vote in an isolated public employee union case.

IV. LOOKING FORWARD

Ending judicial elections would arguably lessen the three core problems discussed above. Without elections, re-selection becomes irrelevant (unless one adopts a Virginia or South Carolina model, with legislative reappointment⁵⁷), there are no campaigns to finance, and campaign promises become unnecessary. However, each of these claims is overstated. The primary alternative to contested elections is merit selection, and there is no political will to adopt merit selection without retention elections—a form of re-selection that brought us the Iowa debacle. Although campaign finance problems are of greatest concern in contested elections, the million-dollar campaign in the recent Iowa retention elections and the formidable sums spent by interest groups in U.S. Supreme Court confirmation proceedings broaden that concern. And candidates in contested elections are not the only judicial aspirants who might feel pressure to precommit themselves; incumbents completing interest group questionnaires in advance of retention elections

56. See Marley, *supra* note 43; see also Todd Richmond, *Wis. Gov: State Supreme Court Infighting Needs to Stop*, KOMONEWS.COM (June 27, 2011), <http://www.komonews.com/news/national/124612629.html>.

57. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS 3, 9–10 (2011) http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

and candidates answering questions in appointment proceedings may feel likewise.

More fundamentally, insofar as these problems are exacerbated by elections, they have not reenergized the anti-election movement.⁵⁸ If the public remains convinced that judicial elections do more good than harm, then seeking to diminish the harm through incremental reform becomes the one viable alternative.

A. *Re-Selection Reform*

As compared to initial election, the threat to decisional independence posed by re-election is more acute. Re-selection puts incumbents at risk of losing their tenure for making decisions they should have the independence to make without fear of reprisal—a threat inapplicable to first-time candidates. Traditionally, retention elections in merit selection states have diminished re-selection risk by making re-selection a low-salience event, in which voters retain judges because they have confidence in the courts generally and no information that leads them to oppose a given judge specifically.⁵⁹ The irony, however, is that retention elections “work” only when they do not. When an energetic opposition campaign surfaces and a retention election becomes a high-salience event, incumbents are ill-equipped to defend themselves. In some states, incumbents may campaign only after opposition surfaces,⁶⁰ which can occur too late in the election cycle for incumbents to respond effectively. Moreover, incumbents have no opponent to which they can compare themselves. The recent experience in Iowa (and elsewhere) is likely to embolden opposition campaigns in other jurisdictions, which suggests the possibility that the days of sleepy, uneventful retention elections are numbered.

58. See Geyh, *supra* note 23, at 1262 (“More recently, the merit selection movement has stalled.”).

59. See Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 165, 177 (Matthew J. Streb ed., 2007) (“[R]etention elections are the least likely to result in electoral defeat, while partisan elections are the most likely. In fact, defeats in retention elections are quite unlikely.”).

60. *E.g.*, COLO. CODE OF JUDICIAL CONDUCT R. 4.3(a) (2010), available at http://www.courts.state.co.us/userfiles/file/Code_of_Judicial_Conduct.pdf (“A judge who is a candidate for retention in office should abstain from any campaign activity in connection with the judge’s own candidacy unless there is active opposition to his or her retention in office.”).

If re-election poses a threat to judicial independence, and contested elections are necessary to preserve public confidence, then one alternative is to elect judges for single lengthy terms, with no possibility of re-selection.⁶¹ States seeking to preserve merit selection could limit the candidate pool to those qualified by a commission. In jurisdictions with no appetite for an overhaul of their selection systems, lengthening judicial terms to reduce the frequency of re-selection could work a meaningful improvement.⁶²

B. Campaign Finance Reform

The campaign finance problem has attracted a number of thoughtful proposals, including preventative and remedial steps. On the preventative side, contribution limits and disclosure requirements are an obvious place to start, but those reforms do nothing to curb the influence of independent campaigns (which accounted for the vast majority of spending in West Virginia and Wisconsin, and all spending in Iowa).⁶³ Public financing of judicial campaigns is superficially appealing, but is costly and struggles to counter the impact of independent campaigns.⁶⁴ James Sample argues that the unique need for judicial impartiality justifies spending limits on direct and independent expenditures in judicial campaigns that would be unconstitutional if imposed in political branch races.⁶⁵ His argument relies on the Supreme Court's opinion in *Caperton*, and its characterization of independent expenditures in West Virginia's McGraw-

61. See Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 451-52 (2008); G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1466 (2003).

62. Cf. National Summit on Improving Judicial Selection, *Call to Action*, 34 LOY. L.A. L. REV. 1353, 1355 (2001) ("States with relatively short judicial terms of office should consider increasing the length of those terms. Term limits, whatever their merits for representative positions, are not appropriate for judicial office.").

63. See *Caperton*, 129 S. Ct. at 2257; Marley, *supra* note 44; Richmond, *supra* note 45.

64. See AM. BAR ASS'N STANDING COMM. ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 28 (2002) ("Even if the election fund were sufficient to underwrite the grants contemplated by the program, however, candidates would still raise 55% of the dollars needed to fund their campaigns from private contributions; and in cases where one candidate declines to accept public money, all limits are off.").

65. See generally James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727 (2011).

Benjamin race as “contributions,” which the Court has long held can be regulated more freely than spending.⁶⁶

On the remedial side, the American Bar Association has included a rule in the Model Code of Judicial Conduct that requires judges to disqualify themselves if they receive direct contributions in excess of a specified dollar amount.⁶⁷ Independent expenditures are unaddressed, but in the aftermath of *Caperton*, rules have been drafted that propose multifactor analyses to determine when independent expenditures on a candidate’s behalf might require his subsequent disqualification.⁶⁸ Disqualification rules, however, are only as good as the judges who interpret them. Under West Virginia ethics rules, Justice Benjamin was required to disqualify himself if his “impartiality might reasonably be questioned”—meaning, if the justice might *appear* partial to a reasonable observer.⁶⁹ Justice Benjamin ignored the obvious appearance problem created by deciding his benefactor’s case, disregarding the appearance-based disqualification standard to which he was subject, in favor of applying an actual bias standard. If disqualification reform is to succeed, it must include procedural reform in which a judge’s impartiality is evaluated by someone in lieu of or addition to the judge whose impartiality is at issue.

C. Precommitment Reform

The precommitment problem can be managed in three ways. First, judicial conduct organizations can police candidate precommitments more aggressively.⁷⁰ With lower courts divided on whether *White* guarantees candidates a “right” to precommit themselves,⁷¹ judicial conduct organizations are likely to

66. *Id.* at 772–73, 778–79.

67. ABA MODEL CODE OF JUDICIAL CONDUCT, *supra* note 21, at R. 2.11(A)(4).

68. See Letter from Harold D. Melton, Justice, Supreme Court of Georgia, to Lester Tate, Attorney, Akin & Tate P.C. (Jul. 16, 2010), available at http://www.gabar.org/public/pdf/news/Recusal_AM10.pdf.

69. W. VA. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1994), available at <http://www.state.wv.us/wvsca/JIC/codejc.htm>.

70. ABA MODEL CODE OF JUDICIAL CONDUCT, *supra* note 21, at R. 4.1(A)(13) (“Except as permitted by law . . . a judge or a judicial candidate shall not . . . in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”).

71. Charles Gardner Geyh, *The Criticism and Speech of Judges in the United States*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 257, 271 (H.P. Lee ed., 2011) (“Some

remain tentative unless and until the United States Supreme Court decides the question in the negative. Second, even if judges have a right to precommit themselves, the legal establishment might, through judicial education, perpetuate longstanding norms against candidates exercising such a right, on the grounds that precommitments undermine confidence in the impartiality and independence of the courts among parties who appear before precommitted judges.⁷² Third, precommitted judges should be subject to disqualification regardless of whether they have a First Amendment right to precommit themselves—a point Justice Ketchum seems to have missed.⁷³ A judge's First Amendment right to criticize his neighbor's wrongdoing does not subsume a corresponding right to adjudicate such wrongdoing.⁷⁴ Similarly, disqualification prevents judges from acting on their precommitments, but does not punish them for making precommitments any more than it punishes them for criticizing the neighbors. In each instance, disqualification does not retaliate against the speaker, but protects the integrity of the judiciary and the rights of litigants.

CONCLUSION

Moderation is dreary by design, as evidenced by the pervasive use of the pop culture prefix "extreme" to infuse excitement into pretty much everything. When it comes to judicial elections, staking out strident positions at the poles is entertaining and comparatively easy.⁷⁵ It is not, however, especially productive when selection systems are broken but sweeping reform is infeasible. During such times, tabling overstated, all-or-nothing arguments in favor of incremental reform that can make bad situations better is the preferable approach.

courts have invalidated rules barring judges from making pledges, promises or commitments . . . others have upheld them.") (citations omitted).

72. See Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in *BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA* 21, 21–22 (Keith J. Bybee ed., 2007).

73. ABA MODEL CODE OF JUDICIAL CONDUCT, *supra* note 21, at R. 2.11(A)(5) (requiring disqualification if "[t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy").

74. See *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2348–49 (2011).

75. Witness my own contribution. Geyh, *supra* note 5.