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Why the Judicial Elections Debate Matters Less Than You Think: Retention as the Cornerstone of Independence and Accountability

Layne S. Keele

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**WHY THE JUDICIAL ELECTIONS DEBATE MATTERS
LESS THAN YOU THINK: RETENTION AS THE
CORNERSTONE OF INDEPENDENCE AND
ACCOUNTABILITY**

*Layne S. Keele**

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I. INTRODUCTION

It is often said that one of the advantages of federalism is that states serve as laboratories for novel social and political experiments without risk to the country as a whole.¹ Nowhere are the state laboratories harder at work than in judicial selection and retention—there are almost as many systems in place to select and retain judges as there are states in the union, and tweaks to the various systems are constantly being proposed.

This diversity of state selection and retention methods reflects a disagreement about the normative role of judges and about the proper balance between the instrumental goods of judicial independence and judicial accountability. For example, California subjects its high-court judges to periodic retention elections. In 1986, Chief Justice Bird was voted out of office after she had voted to overturn the death sentence in each of the fifty-nine capital cases that she heard after 1978.² For states that provide for lifetime appointments for judges, this kind of ouster presents an intolerable threat to judicial independence. But, for the people of California, this may exemplify precisely the kind of accountability that motivated their use of retention elections.³ Similarly, concern that the Texas Supreme Court was too plaintiff-friendly drove

1. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).

2. *Voters and Judges*, BILL OF RIGHTS IN ACTION (Constitutional Rights Foundation, Los Angeles, Cal.), Spring 1998, at 2, available at http://www.crf-usa.org/bria/bria14_2.html.

3. See G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1447-48 (2003).

the electorate to replace many Democratic judges with Republican judges, and it is widely agreed that this change substantially altered the trajectory of the court.⁴ Again, some would decry this as an impermissible intrusion on judicial independence, while others would laud this as a victory for accountability.

Although disagreement about the proper balance between judicial independence and accountability forms the heart of the debate about judicial elections, those engaged on both sides of the debate often end up talking past each other. This is because elections are usually thought of as a method of “judicial selection,”⁵ but judicial elections’ greatest threat to judicial independence comes, not when elections are used to *select* judges, but instead when they are used to *retain* judges. As I hope to make clear in this Article, the core concerns raised on both sides of the elections debate—judicial independence and judicial accountability—have much less to do with judicial selection than they do with judicial *re*-selection, or judicial retention.

Many commentators discussing judicial elections have used “selection” when referring to “retention,”⁶ and scholars tend to blur together three different, though sometimes overlapping, categories of arguments: (1) arguments attacking elections as a selection method; (2) arguments attacking elections as a retention method; and (3) arguments

4. Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 912-16 (2001); George Parker Young et al., “A Rough Sense of Justice” or “Practical Politics”? *Recent Texas Supreme Court Opinions on Causation*, 46 THE ADVOC. (TEX.) 1, 2 (2009).

5. See, e.g., CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 4 (Routledge 2009); Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 850, 849 n.47 (1972); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 31 (1986); Kyle Cheek, *Reconciling Normative and Empirical Approaches to Judicial Selection Reform: Lessons from a Bellwether State*, 68 ALB. L. REV. 577, 577 (2005).

6. See, e.g., BONNEAU & HALL, *supra* note 5, at 10 (stating that “Table 1.2 displays several of these important features for the thirty-eight states using some form of elections to select their supreme courts” when, in reality, Table 1.2 shows the thirty-eight states using some form of election to *retain* their supreme court judges); Robert F. Drinan, S.J., *Judicial Appointments for Life by the Executive Branch of Government: Reflections on the Massachusetts Experience*, 44 TEX. L. REV. 1103, 1111 (1966) (“The defenders of some element of popular election in the process of judicial selection see in an election the machinery by which, in what is hopefully the unusual or exceptional case, a judge may be removed.”); Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 135 (2007) (“[T]he Justice Bird situation begins to look like the kind of accountability that many believe judicial selection systems should foster: the ability of the public to remove judges from office who, although they may not have violated a judicial canon or engaged in conduct that would result in impeachment, have displayed a continuous course of conduct that shows a disregard for precedence and law.”).

against any retention at all (that is, arguments that posit that judges must have life tenure or serve for only a single term).⁷ These distinctions matter because many states that select judges by appointment retain them by popular election. Moreover, some commentators seem to assume that, if a state abandons judicial elections, the state will inevitably embrace life-tenured judges,⁸ when, in fact, most states that do not hold judicial elections still subject their judges to some form of periodic retention evaluation (usually one in which the judges must be reappointed by the executive or reconfirmed by the legislature).⁹

This Article attempts to reframe the age-old judicial election arguments into a discussion about the importance of the retention decision, in order to draw out the areas of true disagreement in the judicial independence/judicial accountability debate. I argue that the core difficulties in balancing the desire for judicial independence with the desire for judicial accountability stem primarily from the judicial retention decision, regardless of whether retention is obtained by some form of reelection or through a form of reappointment. I then propose a two-term system for putting judges on state high courts, in which (1) high court judges sit for an initial term of relatively short duration (for example, five or six years); and (2) following the initial term, those judges are eligible for a longer, final term (for example, ten or twelve years), after which the judge would be ineligible for further retention. I argue that this proposed system would better balance judicial accountability and judicial independence than the systems currently in place.

Part II of this Article briefly surveys the various systems currently

7. See, e.g., BONNEAU & HALL, *supra* note 5, at 4 (“Interestingly, selection schemes in which judges are appointed are being touted in today’s political dialogue as promoting independence from the electorate and other political actors. As the argument goes, judges should be free to make decisions independent of as many constraints and political factors as possible.”); Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 724 (2010) (“The majoritarian difficulty is not simply an unfortunate byproduct of judicial elections; it is intrinsic to voting judges into office.”); but see Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL. REV. 301, 350-51 (2003) (“With the concept of reelection, however, there was an additional threat to independence that was (and is) absent from the federal system and all systems giving judges life tenure.”).

8. Professor Geyh has written that, “[w]ithout elections, re-selection becomes irrelevant (unless one adopts a Virginia or South Carolina model, with legislative reappointment).” Charles Gardner Geyh, *Judicial Selection Reconsidered: A Plea for Radical Moderation*, 35 HARV. J.L. & PUB. POL’Y 623, 638 (2012).

9. Only three states grant their high court judges some form of life tenure. Nine states retain judges by a method other than popular election. For a further breakdown, see Table 1 in the Appendix.

in place for selection and retention of state high court judges. Part III examines the most common and enduring arguments raised in the judicial elections debate—arguments related to the dueling instrumental goods of independence and accountability—to distinguish those arguments directed toward judicial selection from those arguments directed toward judicial retention.

Building on Part III, Part IV will identify retention-related considerations other than elections that play an important role in a judge's independence and accountability. Specifically, Part IV will suggest that term length and term limits are as important to the accountability/independence dynamic as the mechanism used to retain judges and can be used to increase desirable independence in those jurisdictions where judges periodically stand for re-election.¹⁰ Finally, Part V will offer a specific proposal for using term length and tenure limits to enhance independence even where elections are used to retain judges.

II. AN OVERVIEW OF SELECTION AND RETENTION SYSTEMS

A brief overview of the various systems for selecting and retaining judges on state high courts is necessary before we proceed further. In theory, one could mix and match any selection method with any retention method (e.g., an appointive selection mechanism with retention through partisan elections, or selection through partisan elections with lifetime tenure), but in practice some selection methods are uniformly associated with a particular retention method.

Five selection mechanisms are used to put judges on the bench.¹¹ First, judges in eight states undergo partisan public elections.¹² Judges

10. State lawmakers have taken a recent interest in judicial term limits. See Okla. S.B. 1729, available at <http://newslb.lsb.state.ok.us/BillInfo.aspx?Bill=SB1729&Session=1200>; Ballot History, <http://www.leg.state.co.us/lcs/ballothistory.nsf/835d2ada8de735e787256ffe0074333d/8a5ecf47562a57e9872571e9005a9059?OpenDocument>. The discussion of term length or limits has also received some attention at the federal level, with several calls for changing life-tenure on the Supreme Court to a single fixed term. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL. 769 (2006); Paul D. Carrington, *Bring the Justices Back to Earth*, N.Y. TIMES, Apr. 9, 2012, <http://www.nytimes.com/2012/04/10/opinion/bring-the-justices-back-to-earth.html>.

11. A breakdown of the various states' systems can be found in Table 1 in the Appendix. The table is compiled from data using the 2012 Book of the States. See 44 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 204-15 (2012).

12. This group includes Alabama, Illinois, Louisiana, New Mexico, Ohio, Pennsylvania, Texas, and West Virginia. *Id.* Ohio is unique, in that its candidates are chosen through partisan primary nominations, but the party affiliations do not appear on the general election ballot. Thus, Ohio is a hybrid of partisan and nonpartisan elections.

in fourteen states stand in non-partisan public elections, in which the candidates' party affiliations are not identified on the ballot.¹³ Fourteen states fill spots on their high courts through "merit selection,"¹⁴ in which a committee consisting of both legal professionals and laypersons assembles a slate of judicial candidates from whom the governor must select. Another eight states use a merit selection system in which the selected judges must receive legislative or other consent.¹⁵ Four states use gubernatorial appointment, either alone or combined with legislative consent.¹⁶ Finally, two states use legislative appointment to select their high court judges.¹⁷ In addition, where vacancies must be filled in the middle of a judge's term, the state may use a different selection method than is used to fill a vacancy following an expired term. For example, most states that use elective selection methods fill mid-term vacancies through gubernatorial appointment.¹⁸

Retention methods can also be broken down into five categories: (1) three states have no retention method (lifetime appointment or its equivalent);¹⁹ (2) eight states retain judges by reappointment by legislative or gubernatorial reappointment,²⁰ and one state through reappointment by the judicial nominating commission;²¹ (3) nineteen states hold retention elections;²² (4) fourteen states hold non-partisan elections to retain their high court judges;²³ and (5) five states use partisan elections.²⁴ Within the various retention systems, term length ranges anywhere from six years to life tenure. One state—New Jersey—

13. These states are Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin. *Id.*

14. These merit selection states are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, Rhode Island, South Dakota, Tennessee, and Wyoming. *Id.*

15. "Other" consent refers to those states that require the consent of an elected executive council. *See id.* These states are Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New York, Utah, and Vermont. *Id.*

16. California, Maine, New Hampshire, and New Jersey use this selection method. *Id.*

17. These are South Carolina and Virginia. *Id.*

18. *See id.*

19. Rhode Island grants its high-court judges life tenure. Massachusetts and New Hampshire grant their high-court judges tenure through age 70. *See id.*

20. These states are Connecticut, Delaware, Maine, New Jersey, New York, South Carolina, Vermont, and Virginia. *Id.*

21. Hawaii is the only state to retain judges through reappointment solely by the JNC. *Id.*

22. These states include Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming. *Id.*

23. These are Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin. *Id.*

24. This category comprises Alabama, Louisiana, Ohio, Texas, and West Virginia. *See id.*

gives high court judges an initial seven-year term followed by tenure to age 70 if reappointed and reconfirmed. Indiana has a two-year initial term followed by subsequent ten-year terms. On average, states using elections to retain judges have shorter terms than states with re-appointive retention mechanisms. The mean term length is about 9.6 years for re-appointing states, about 8.6 years for retention-election states, about 7.4 years for non-partisan election states, and 8 years for partisan-election states.²⁵

III. JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY: THE CRUX OF THE JUDICIAL ELECTION DEBATE

A number of attacks on judicial elections have been launched by commentators, including arguments that elections result in lower-quality judges, a less diverse bench, and uninformed and apathetic voters. The empirical data on these arguments is mixed—any quality disparity (to the extent it can be empirically measured) between elected and appointed benches looks to be minimal,²⁶ there does not appear to be a difference in diversity,²⁷ and voter interest and participation appear to be on the uptick.²⁸ Regardless of the merits of these arguments, and though

25. See Table 1, Appendix.

26. It is no small feat to measure judicial quality, given its multi-dimensional nature and the difficulty of empirically establishing that one person is a “better” judge than another. Proxies that have been used to empirically study judicial quality include U.S. News rankings of educational institutions attended, citations to opinions by out-of-state courts, years of prior judicial experience or other legal experience, frequency and severity of judicial discipline, productivity as measured by number of opinions issued, and surveys among legal professionals. Early studies showed no significant distinction between elective and appointed systems in terms of judicial quality. See Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J. L. & P. 691, 710 (2002) (“Some studies have found little, if any, difference in the quality of judges from appointed benches as opposed to elected ones.”). More recent studies using some of these proxies suggest a slight edge to non-elective systems. Damon Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226, 229 (2007) (summarizing prior studies in both directions and presenting survey results). In a recent study, Stephen Choi, Mitu Gulati, and Eric Posner found that appointed judges tend to garner more out-of-state citations per opinion than elected judges, but that elected judges author substantially more opinions than their appointed counterparts. Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J. L. ECON. & ORG. 290, 326-27 (2009).

27. Chris W. Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, FEDERALIST SOC’Y 12 (March 2012), available at http://www.fed-soc.org/doclib/20120316_Bonneau2012WP.pdf (collecting studies and finding “no relationship between diversity and the method of selection”).

28. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 296-97 (2008); G. Alan Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, in BENCH PRESS 53 (Keith J. Bybee, ed., 2007) (describing the “hyper-politicization” of judicial

the arguments are relevant and important in their own right, the vast majority of legal scholars agree that the central issue in the elections debate is the interplay between judicial accountability and judicial independence.²⁹

This Part argues that the concerns commonly voiced in the judicial elections debate are retention-centric rather than selection-centric, and that commentators who focus on selection in attempting to balance accountability and independence are looking in the wrong place. In this Part, I will first offer an overview of independence and accountability. Next, I will examine three “core independence problems” identified by Professor Charles Geyh in a recent article. I will argue that all three of these core independence problems turn on retention rather than initial selection. Finally, I will examine the accountability arguments typically raised in the debate.

A. Overview of Judicial Accountability and Independence

Broadly speaking, both accountability and independence are desirable instrumental goods for our judicial system—each plays an important role in ensuring the rule of law and the impartial administration of justice. Imagine a system with no accountability of any kind: judges might accept bribes for favorable decisions, they might render wholly arbitrary decisions (for example, by basing all of their decisions on their own political preferences or whims), or they might ignore or expressly disregard precedent or statutory language.³⁰ On the other hand, in a system with no independence, judges might never exercise judicial review to strike down a statute as unconstitutional (without insulation from the legislature), might never decide a case against the executive branch (absent independence from the executive),

selection in recent years); BONNEAU & HALL, *supra* note 5, at 3.

29. See, e.g., Geyh, *supra* note 8, at 623-25 (recognizing accountability and independence as “the pivotal disagreement at the core of the dispute”); Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others that Have Been Tried*, 32 N. KY. L. REV. 267, 277 (2005); Pozen, *supra* note 28, at 271 (“Often, the debate over judicial selection methods is distilled to a single tradeoff: independence versus accountability.”); Richard L. Hasen, *High Court Wrongly Elected*, 75 N.C. L. REV. 1305, 1307 (1997) (“The debate pits judicial accountability, ostensibly promoted by judicial elections, against judicial independence, ostensibly promoted by judicial appointment.”).

30. Accountability comes in many forms and varying degrees. The norm of written opinions, press or public reactions to decisions, the desire for promotion to a higher court, and reselection are a few examples of decisional accountability. There are also means of holding judges accountable for behaviors, without holding them accountable for decisions, such as judicial backlog lists and judicial disciplinary procedures.

or might be forced to conform all decisions to ever-evolving majority preferences,³¹ resulting in, as Alexis de Tocqueville once worried, the tyranny of the majority.³² Thus, both independence and accountability are instrumental goods directed toward a fair and impartial judiciary.³³

But judicial independence and accountability are not “abstract concepts with fixed meanings over time;” instead, they “depend on context, and they have evolved in the flow of events and crises.”³⁴ Before we can search for a balance of independence and accountability, we must know what these terms mean. From whom should the judiciary be independent? For what, and to whom, should judges be accountable? The answers to these critical questions inform the interplay between—and the potential compatibility of—*independence and accountability*.

B. *Judicial Independence*

Those opposed to judicial elections rest their case primarily on judicial independence.³⁵ Everyone agrees that judges should not be completely independent; certainly, they should not be independent of, for example, the rule of law, or binding precedent.³⁶ On the other hand, we want judges who are independent enough to follow the law even where it might create enemies of the litigants or of interest groups. In other words, we want judges who are independent from *improper*

31. A hypothetical judge with no decisional independence would presumably be subject to retention following every decision—term length is one way that judges get some measure of independence.

32. ALEXIS DE TOCQUEVILLE, 2 *DEMOCRACY IN AMERICA* 103-109 (Stephen D. Grant, transl. 2000) (describing the “tyranny of the majority” and noting that, “[i]n several states, the law gave the judicial power over to election by the majority”). Tocqueville predicted that elected judiciaries would “sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself.” *Id.*

33. See Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 451, 455 (2008) (“In short, we seek to protect the rule of law and simultaneously avoid both pure majority rule and the [arbitrary] rule of judges.”); Pozen, *supra* note 28, at 272.

34. JED SHUGERMAN, *THE PEOPLE’S COURTS* 5 (2012).

35. See generally Geyh, *supra* note 8; Shira J. Goodman et al., *What’s More Important: Electing Judges or Judicial Independence?*, 48 *DUQ. L. REV.* 859 (2010); Meryl J. Chertoff, *Trends in Judicial Selection in the States*, 42 *MCGEORGE L. REV.* 47 (2010); Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 *WILLAMETTE L. REV.* 367 (2002). Jed Shugerman, recounting the history of judicial elections in America, notes that “[c]ountless scholars describe judicial elections as a ‘threat to independence,’” and then posits that the story of judicial elections is “really to story of the ongoing pursuit of judicial independence, and the changing understandings of what judicial independence means.” SHUGERMAN, *supra* note 34, at 5.

36. See Hon. Alex Kozinski, *The Many Faces of Judicial Independence*, 14 *GA. ST. U. L. REV.* 861, 863 (1998).

decisional motivators—anything that would cause a judge to be partial or otherwise unjust.³⁷ As Charles Geyh, a prominent judicial elections expert, has put it, we want to maximize “good” independence and minimize “bad” independence.³⁸ But this largely begs the question, because one of the foundational issues in the elections debate is whether the will of the majority should have any decisional influence, or whether upholding the rule of law inevitably requires judges to disregard majority preferences in every case.³⁹

I start here with the uncontroversial premise that the primary independence concern in the elections debate relates to the potential effect that elections could have on a judge’s judicial decisions (that is, decisional independence).⁴⁰ But even this concern can be subdivided further—the concern could be about either (1) selection-related independence (that is, concerns that judges will include improper factors in the decisional calculus by looking backward to events surrounding their initial selection); or (2) retention-related independence (that is, concerns that judges will base their decisions on improper factors because they are considering the likely effect of decisions on their chances of retaining their seats on the bench). Selection-related independence looks retrospectively to the impact of prior events on a judge’s decisional calculus; retention-related independence looks prospectively toward contingent future events.⁴¹

In a recent article, Charles Geyh identified three “recurring” and

37. Judge Kozinski argues that even proper decisional motivators can become improper where they are assigned too much weight in the decisional calculus. *See id.* at 864 (“We have to recognize that any of these areas of influence—politics, case law, morals, standards, personal experience—may be perfectly fine areas for a judge to consider in making case decisions. The question becomes how much?”).

38. Geyh, *supra* note 8, at 630.

39. This is not to suggest that virtuous judges would inevitably succumb to majoritarian pressures in election states, or that they would inevitably legislate their own policy preferences from the bench in life-tenure states. It only suggests that we should think about the normative role of the judiciary in assessing the merits of various retention plans. *See, e.g.*, Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 186-87 (describing as a “judicial vice” a judge’s deciding a case based on fear of the loss of office or loss of opportunity to gain promotion).

40. Some threats to decisional independence are not created by, or obviously enhanced or diminished by, judicial elections. For example, a judge’s friendship with a lawyer on a case, a judge’s indirect financial interest in a party, or a judge’s desire for promotion to a higher judgeship all pose threats to the judge’s ability to decide a case without improper considerations. Even in life-tenure states, public opinion likely impacts judicial decisions. *See generally* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2131 (2010).

41. Prospective independence concerns are not limited to retention—judicial discipline, media scrutiny, and public opinion may detract from prospective judicial independence outside of retention.

“core” independence concerns related to judicial elections, contending that the other arguments raised in the debate are largely “distractions.”⁴² The three “core threats to independence” identified by Geyh are: precommitments, campaign finance, and judicial re-selection (what is termed in this Article as “retention”).⁴³ I argue here that all three of these core independence concerns are really “the re-selection problem,” or, put differently, that Geyh’s (and likeminded scholars’) concerns about precommitments and campaign finance in electoral systems are driven more by concerns about retention than by concerns about selection. Both the precommitment problem and the campaign finance problem have analogues in appointive systems, but these concerns are exacerbated when judges are forced to undergo periodic re-elections.

1. Campaign Promises – The Precommitment Problem

The precommitment problem worries that statements made by judicial candidates on the campaign trail limit the candidate’s judicial independence. At the heart of the concern is the point at which a position statement threatens independence by becoming a precommitment to decide a particular case in a particular way.⁴⁴

Before we can probe the relative influences of selection systems and retention systems on the precommitment concern, we must ask the preliminary question of why precommitments should worry us at all. There are at least four possibilities. We might be concerned about judges (1) *having* general views on disputed legal issues; (2) *announcing* general views on disputed legal issues; (3) *having* a commitment to decide a likely case in a particular way, or (4) *announcing* a commitment to decide a likely case in a particular way.

We expect—and even want—judges to have considered views on disputed legal issues. As Justice Rehnquist once said in denying a motion for recusal, “[p]roof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”⁴⁵ In *Republican Party of Minnesota v. White*,⁴⁶ in which the

42. Geyh, *supra* note 8, at 631-38.

43. *Id.* at 625.

44. *Id.* at 636-37.

45. *Laird v. Tatum*, 409 U.S. 824, 835 (1972). “In terms of propriety, rather than disqualification,” Justice Rehnquist distinguished between statements made prior to nomination and those made after nomination, positing that “[f]or the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or

Court held Minnesota's "announce clause"⁴⁷ to be an unconstitutional speech restriction, the Court addressed the state's asserted compelling interest—preserving impartiality—by rejecting a definition of impartiality that meant "lack of preconception in favor of or against a particular legal view," because all judicial candidates could be expected to have such views.⁴⁸ Geyh agrees that this is not the precommitment concern at issue—he referred to this as the Court's "straw man."⁴⁹

In a more recent article, Geyh posits that a judicial candidate's promise to decide a case in a particular way threatens judicial independence.⁵⁰ He is right that we should not tolerate judges promising to decide disputed legal issues in a particular way, but not because such a promise limits a judge's decisional independence (that is, not because such a promise injects additional improper decisional pressures into the judge's decisional calculus). The reason we should not tolerate this kind of promise is because judges should not have even an *internal* predetermination to decide particular cases in a particular way.

Judicial disputes are "laden with all manner of supplemental claims, factual particularities, procedural histories, jurisdictional complexities, and doctrinal precedents that shape and constrain their judicial task."⁵¹ When a judicial candidate makes a statement that crosses the line from a general view to a precommitment to decide a case a particular way, the candidate so fundamentally misapprehends the endeavor of judging that he should not be selected. If the candidate is selected, the new judge should recuse himself in the cases in which he promised to rule a certain way, but not because the precommitment creates additional improper

argument, how he would decide a particular question that might come before him as a judge." *Id.* at 836 n.5.

46. 536 U.S. 765 (2002).

47. The announce clause prohibited a candidate from "announc[ing] his or her views on disputed legal or political issues." White, 536 U.S. at 768.

48. Dimino, *supra* note 29, at 283 ("Judges often approach cases with an inclination about the proper resolution. That inclination may have been gleaned from years of practice, from scholarly examination of a related question, or simply a philosophical feeling . . . that the case should be resolved one way or another.").

49. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 65-66 (2003).

50. Geyh, *supra* note 8, at 636.

51. Pozen, *supra* note 40, at 2121. In this way, the judicial function differs from the legislative function, which decides laws in the abstract. Thus, we might expect legislative candidates to promise certain votes if elected. Some state courts have constitutional directives to issue advisory opinions in certain situations, such as when requested by the legislature. See Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1651 (2010). But even this is context-specific—the question will be, "Does law X violate clause Y of the constitution?" Without the particulars of the law, a meaningful decision cannot be reached.

decisional pressures. The reason the new judge should recuse himself is that his prior precommitment demonstrates the judge's refusal—at least for this particular case—to include in the decisional calculus all *proper* judicial considerations and constraints (such as the arguments actually raised, the particular facts, the procedural history, and the standard of review). In other words, a promise (or even an internal commitment) to decide a prospective case in a particular way suggests the judge views his role with *too much* independence, or at least with bad independence—independence from legitimate constraints inherent to the judicial role.

Having eliminated precommitment concerns that hinge on *having* a view of disputed legal issues, and recognizing that precommitments that constitute a promise or even an internal commitment to decide a particular case in a particular way, though improper, do not substantially threaten independence, we are left with potential concerns related to *announcing* a general view that a judge properly holds. There are two potential reasons that the announcement of a properly held general view could be viewed as problematic. The first reason, which is easily dismissed, is that the public ought to believe that judges come into every case as a blank slate, upon which the parties' arguments hold complete sway. A theory that turns on public deception cannot hold water and, in any event, the public recognizes that judges, like everyone else, have opinions on disputed issues—that is one reason for the insistence on judicial elections.

The second basis for worrying that the announcement of a properly held general view is problematic relates to the effect of the announcement on the judge's future decision-making. This theory turns on the argument that announcing a legitimately held view solidifies the view in a way that would prevent the judge from reconsidering the announced view (or, perhaps, from ruling in a way that might even be *perceived* as reconsidering the previously announced view).⁵² We might call this version of the precommitment problem “open-mindedness.” This view—and only this view—creates a true independence concern, in the sense that we might worry that improper decisional motivators (including, for example, the judge's desire to save face, live up to expectations, and appear consistent) are at work in the judge's decisional calculus.

52. See Geyh, *supra* note 49, at 65-66. This was Justice Stevens' concern in *Republican Party of Minnesota v. White*. See *Repub. Party of Minn. v. White*, 536 U.S. 765, 797-803 (2002) (Stevens, J., dissenting).

In *White*, the Court held that Minnesota's announce clause could not be sustained under a definition of impartiality that meant "open-mindedness," because the announce clause was "so woefully underinclusive as to render belief in that purpose a challenge to the credulous."⁵³ Geyh, criticizing *White*, has argued that the announce clause does serve open-mindedness. Geyh notes that Supreme Court nominees, citing impartiality, have long refused to answer questions on issues that may come before the Court, even where those nominees' views were already known through pre-nomination statements.⁵⁴ He argues that "efforts to preserve judicial impartiality may be seriously compromised" by the Supreme Court's holding, which effectively allows candidates to give their views "on disputed legal or political issues."⁵⁵ Independence is compromised in this case, according to Geyh, because candidates who announce views "may well feel an obligation to abide by their earlier representations."⁵⁶

But it is "purely speculative whether the judge, having expressed views, is more likely to decide based on them than if the judge has the same views but had not voiced them."⁵⁷ Perhaps the judge will recognize the importance of the judicial role in such a way as to decide the case strictly on the merits. Regardless, it seems most likely that the judge would "usually do exactly the same thing whether or not there was a prior expression of the position."⁵⁸ But, even if one accepts the implausible premise that announcement of a considered general view creates some level of entrenchment that invites independence concerns, it is far from clear that, on the front end, elected judges face more pressure to precommit in this manner than do judges standing for confirmation in the senate. Similarly, there is no obvious reason to think that elected judges improperly precommit on a significantly greater basis

53. *White*, 536 U.S. at 779-80.

54. Geyh, *supra* note 49, at 66-67.

55. *Id.* at 64. It may be that Professor Geyh is less troubled by issue-based statements than he once was. In a more recent article, Geyh recognizes "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." Geyh, *supra* note 8, at 636. The difficulty, as Professor Geyh recognizes, is found in statements that lie between these two extremes. *Id.* Judge Kozinski has also discussed the difficulty of determining what kinds of statements during the selection process might improperly impinge on judicial independence. Kozinski, *supra* note 36, at 865-66.

56. Geyh, *supra* note 49, at 68.

57. Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 744 (2002).

58. *Id.*

than do appointees.⁵⁹ Indeed, as Judith Reznik has worried, in the current federal confirmation process “[b]oth the people and the ideas become caricatures, and the peculiar decision-making processes of adjudication, with its fact-full specificity, become lost.”⁶⁰

Presidents routinely explore potential nominees’ views on debated legal issues, and “[e]very President in American history, to a greater or lesser extent, has chosen federal judges, in part, based on their ideology.”⁶¹ For example, President Clinton vowed to “appoint judges to the Supreme Court who believe in the constitutional right to privacy, including the right to choose.”⁶² Nominees are routinely questioned in confirmation hearings about their positions on any number of issues, and all Supreme Court nominees since Robert Bork have been extensively questioned about their positions on the right to privacy and, more specifically, *Roe v. Wade*.⁶³ Presidents or their high-level advisors interview all potential Supreme Court nominees.⁶⁴ Thus, the potential for precommitment infects all judicial selection methods.⁶⁵ For the most part, it appears that judges generally have been able to draw “some line between general questions, which they will answer, and questions that may come before them as judges, which they will not.”⁶⁶

Although the precommitment-as-entrenchment concern applies to both appointed and elective judiciaries,⁶⁷ the precommitment concern is

59. See Dimino, *supra* note 29, at 284. No judicial candidate had ever been found to have violated the announce clause at issue in *White*. See *id.* Professor Geyh recently discussed the precommitment concern raised by elections, and he raised a single illustrative anecdote involving a judicial candidate who, by almost all accounts, made an improper precommitment, but who ultimately recused himself after pressure to do so. Geyh, *supra* note 8, at 632.

60. Judith Reznik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 589 (2005). Professor Reznik does not decry the politicization of the confirmation process generally, however. See *id.* at 631.

61. Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 620-21 (2003) (defining ideology as the “views of a judicial candidate that influence his or her likely decisions as a judge).

62. Thomas L. Friedman, *Clinton Expected to Pick Moderate for High Court*, N.Y. TIMES, Mar. 20, 1993, <http://www.nytimes.com/1993/03/20/us/the-supreme-court-clinton-expected-to-pick-moderate-for-high-court.html>.

63. Rebecca Wilhelm, *Giving Public Opinion the Process That Is Due: What the Supreme Court Can Learn from Its Eighth Amendment Jurisprudence*, 38 HOFSTRA L. REV. 367, 375 (2009).

64. John Szmer & Donald R. Songer, *The Effects of Information on the Accuracy of Presidential Assessments of Supreme Court Nominee Preferences*, 58 POL. RES. Q. 151, 152 (2005).

65. See Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 982-83 (2007) (noting the concern that federal nominees “who indicate how they would rule with respect to pressing legal issues . . . will be unable to maintain the appearance or actuality of impartiality and open-mindedness”).

66. *Id.* at 1003 (describing this dichotomy in the federal appointment context).

67. A “merit selection” plan, in which a judicial nominating commission narrows the pool of candidates for appointment, may diminish the precommitment risk, or it may simply make potential

greater with judges who will have to face retention. If these judges do not decide cases in the way that they indicated during their campaign, they may be labeled liars and removed from the bench at the next election cycle. In addition, they may believe that, because they made this commitment and then were selected to the judiciary, this issue—and the judge’s position on this issue—is important to the electorate, making the judge more likely to adhere to the announced view to increase retention chances. This concern drove Justice Ginsburg’s dissent in *White*.⁶⁸ She worried that a judge who made campaign commitments may be unduly influenced to decide later cases based on those commitments because “she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election.”⁶⁹ The precommitment problem, to the extent there is one at the selection stage, exists in an appointment selection system. But the problem may be exacerbated by judicial retention in an independence-threatening way. Thus, the real concern behind the precommitment problem as an argument against judicial elections is retention-driven.

2. Campaign Support and Opposition – The “Campaign Finance” Problem

The second “core independence problem” is campaign finance—the concern that judicial candidates must rely on third-party donors. The concern that I am addressing here is not the potential drain on the elected judge’s time or that fundraising pulls the judge away from judicial duties; perhaps surprisingly, re-elected judges are more productive on the whole than appointed ones.⁷⁰ Instead, the concern at issue here relates to decisional independence—that third-party donors may expect preferential treatment in litigation before a given judge, or the judge may

precommitments less public, as an appointment system may do (when the appointing executive has a private interview with the candidate). Merit selection systems have been criticized in that the process is more opaque to the public than other selection methods.

68. See *White*, 536 U.S. at 815 (noting that a judge’s impermissible interest in a case “may stem . . . from the judge’s knowledge that his success and tenure in office depend on certain outcomes”).

69. *Id.* at 816. Erwin Chemerinsky doubts that retention processes enhance the precommitment concern—he argues that elected judges would jettison prior positions if the precommitted position were no longer politically popular. Chemerinsky, *supra* note 57, at 744-45. But the campaign-conscious judge must also account for the political cost that inheres in waffling, especially if the issue itself is relatively minor. The public may not elect a judge who appears wishy-washy or who cannot be trusted to keep his word, even if the public disagreed with the substance of the statements made.

70. See Choi et al., *supra* note 26, at 326-27.

be tempted, even subconsciously, to give preferential treatment to a big donor. Even if neither of these is true, the public or the litigants may perceive a threat to impartiality from such an arrangement.

The campaign-finance problem may be prospective, retrospective, or both. If it is retrospective, it would center on worries that judges will feel a debt of gratitude to large donors or campaign supporters, and that this debt of gratitude may improperly influence the judges' decisions. To the extent this argument holds, it is a selection argument—even life-tenured elected judges could be subject to this debt of gratitude. On the other hand, the concern could be forward-looking—that judges' decisions will favor large donors or campaign supporters because they want to receive similar support at the next election.

I posit, perhaps somewhat counter-intuitively, that the campaign finance problem is driven more by forward-looking, retention-related concerns than by backward-looking selection related concerns. To see why this is so, it will be helpful to examine the issue in the context of the quintessential campaign-finance case: *Caperton v. A.T. Massey Coal Co.*⁷¹ But first, I will overview the empirical research directed to this issue, to see whether the evidence supports a campaign-finance concern at all.

a. Empirical Research

The empirical research on the campaign-finance issue is mixed. Some researchers have concluded that judges do in fact demonstrate bias in favor of campaign donors, while others have both attacked these conclusions and presented research suggesting no demonstrable bias in favor of campaign donors.⁷² The mixed results are due, at least in part, to the difficulty of assigning causation to a particular decision, even where correlation is present.⁷³ For example, a defense-oriented law firm may donate to the campaign of a judge who has defense-firm experience and who favors defense-oriented policies. If the judge is elected, the firm may be successful in most of its appearances before the judge, but the judge's proclivities would have caused the campaign donation, not the other way around. Thus, we might expect some link between campaign donations and favorable decisions, but that by itself does not

71. 556 U.S. 868 (2009).

72. See Damon M. Cann et al., *Campaign Contributions and Judicial Decisions in Partisan and Nonpartisan Elections*, in *NEW DIRECTIONS IN JUDICIAL POLITICS* 39-41 (Kevin T. McGuire, ed. 2012).

73. Damon Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 *ST. POL. POL'Y Q.* 281, 284 (2007).

suggest that the donation created bias.

But, even with the uncertainty of the empirical evidence, there is also a public-perception component to this criticism of elections. Even if campaign donations do not result in demonstrable bias in favor of donors, large donations may leave the public with the perception that justice has been perverted.⁷⁴ This would detract from the public's perception of the legitimacy—the institutional integrity—of the courts. The evidence generally suggests that the public believes campaign contributions affect judicial decisions to some degree—a result that would seem to undermine the perceived legitimacy of courts as rights-protecting institutions.

Though surveys suggest that the public believes that campaign contributions may impact judges' decision-making processes, it is not clear to what degree the public would hold this same perception in the absence of any retention mechanism (where, for example, the judges were given life tenure). Nor is it clear whether the public perceives judicial bias in favor of appointing administrations (who will almost certainly have more cases in front of a justice than any individual donor will).

In addition, to the extent that the problems created by the public's perception of campaign finance issues are inseparable from judicial elections (so that, to rid ourselves of the campaign finance problem, we must eliminate judicial elections), we must consider the potential legitimizing aspect of elections in addition to the delegitimizing effect of the campaign finance concern. There is empirical evidence suggesting that judicial elections enhance the public's perception of the legitimacy of courts as institutions,⁷⁵ so it is not clear whether the overall effect of judicial elections is to detract from public perception of legitimacy or to enhance it. Finally, to the extent elections are separable from campaign finance issues, then this claimed problem is not so much an argument against judicial elections as it is against the manner in which judicial elections are conducted.⁷⁶

74. Charles Geyh wrote that “[r]oughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive.” Geyh, *supra* note 49, at 52.

75. James Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-based Experiment*, 64 POL. RES. Q. 545, 553 (2011) (concluding, based on Pennsylvania survey, that “[e]lections by themselves seem to generate more support for the judiciary; these data do suggest that courts do in fact profit to some degree from their periodic encounters with voters”).

76. Selection-related campaign finance concerns could be mitigated without eliminating elections, such as through public financing of campaigns, more stringent recusal statutes or a recusal

b. *Caperton* and Appointment Analogues to the Campaign Finance Problem

Regardless of the potential legitimacy-conferring abilities of judicial elections and the legitimacy-detracting impact of campaign contributions, the independence concern driving the campaign finance problem relates more to retention than to initial selection. Again, imagine a state in which judges are elected, but then serve for life. Most people would probably be significantly less worried about this judge hearing a case involving a major campaign contributor than a judge who was up for reelection in eight months.

The Supreme Court recently had reason to examine the campaign finance problem in *Caperton v. A.T. Massey Coal Co.*⁷⁷ In *Caperton*, Massey Coal Co. and its affiliates were hit with a \$50 million judgment. While the trial court was deciding post-judgment motions, Massey's chief executive officer spent roughly \$3 million toward the campaign of West Virginia Supreme Court candidate Brent Benjamin, who was challenging the incumbent justice.⁷⁸ Justice Benjamin won the election by a slight margin. The trial court then denied Massey's post-judgment motions, and the case made its way to the West Virginia Supreme Court. *Caperton* and the other plaintiffs moved to recuse Justice Benjamin from the appeal, but Justice Benjamin denied the motion, concluding that he could be fair and impartial. On appeal, the West Virginia Supreme Court reversed the judgment by a 3-2 vote, with Justice Benjamin in the majority.⁷⁹

On certiorari, the Supreme Court held that the campaign expenditures created "a serious risk of actual bias," such that the Fourteenth Amendment's Due Process clause required Justice Benjamin's recusal from the case.⁸⁰ The Court held that the inquiry

board, or others. Geyh, *supra* note 8, at 640-41. Some states have implemented campaign finance reform and offered public financing of judicial campaigns, with varying degrees of success. BONNEAU & HALL, *supra* note 5, at 105-26 (2009).

77. 556 U.S. 868 (2009).

78. The CEO, Blankenship, contributed the maximum \$1,000 contribution to Benjamin's campaign committee, and then donated almost \$2.5 million to a § 527 organization supporting Benjamin. Blankenship also spent about \$500,000 himself, on things like direct mailings and media advertisements. *Caperton*, 556 U.S. at 873. The Court characterized all of these—even the independent expenditures, as "contributions." See *id.*; see also James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, N.Y.U. ANN. SUV. AM. L. 727, 768-69 (2011).

79. The court later granted rehearing and, with a slightly different composition, again reversed the \$50 million judgment. Again, Justice Benjamin was in the majority and, again, the vote was 3-2. *Caperton*, 556 U.S. at 875.

80. *Id.* at 884.

“centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.”⁸¹ Due process, the Court said, requires an objective inquiry into whether the expenditures “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.”⁸² The Court also focused on the temporal relationship between the expenditures, the election, and the pendency of the case—at the time of the expenditures, it was “reasonably foreseeable” that the case would be before the newly elected justice.⁸³ “Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin’s recusal.”⁸⁴

Was *Caperton* primarily about a “debt of gratitude”⁸⁵ for past financial expenditures, or is there another theme implicitly at work in the decision? What impact would life tenure or a similar term limit have had on the *Caperton* court? Justices Roberts, Scalia, Thomas, and Alito asked this question and many others in dissent.⁸⁶ The dissent also noted other potential “debts of gratitude” that could arise—and mandate recusal under the Due Process Clause—in non-elective schemes: “endorsements by newspapers, interest groups, politicians, or celebrities.”⁸⁷ The dissent also asked which cases are implicated: cases pending at the time of election, or is a reasonably likely case sufficient?⁸⁸ What about an important but unanticipated case?⁸⁹

The Court’s majority never discussed the retention issue, and the petitioners mentioned it only in passing in their brief.⁹⁰ But it seems to me that *Caperton* implicitly turns in large part on retention—that is, on the concern that judges rule in favor of campaign donors in order to curry favor for future campaigns. One reason to believe this is true is

81. *Id.*

82. *Id.* at 885.

83. *Id.* at 886.

84. *Id.*

85. This is the language used by the petitioners in *Caperton*. *Caperton*, 556 U.S. at 882.

86. *Id.* at 894 (Roberts, dissenting).

87. *Id.* at 895.

88. *Id.* at 897.

89. *Id.*

90. Brief for Petitioners at 31, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2008) (No. 08-22), 2008 WL 5433361.

the absence of calls for recusal in similar, though admittedly not perfectly analogous, cases involving appointed justices. Perhaps the most obvious is *Clinton v. Jones*.⁹¹ That case had recently been filed at the time President Clinton nominated Justice Breyer to the United States Supreme Court.⁹² President Clinton's nomination played a more significant, more certain, and more direct role in Justice Breyer's ascension to the Supreme Court than the campaign contributions played in securing Justice Benjamin's seat on the West Virginia Supreme Court. Nevertheless, there was no widespread outcry for Justice Breyer's recusal from the case based on a likely "debt of gratitude" or appearance of partiality, nor, apparently, did due process require Justice Breyer's recusal. Instead, it seems that the independence and insulation that come with life tenure significantly diminish any concern about a debt of gratitude that drove the *Caperton* outcome.

There are some other differences, besides retention concerns, between *Caperton* and *Clinton v. Jones* that may account for the differences in the constitutional recusal mandate.⁹³ Perhaps it just seems "dirtier"—because it is more subtle—to "buy" favor with money than to barter for it through appointments.⁹⁴ But even if that is the case, there

91. 520 U.S. 681 (1997).

92. See *Clinton v. Jones*, 520 U.S. 681, 684 (1997) (noting that case was filed on May 6, 1994); Carl M. Cannon & Lyle Denniston, *Clinton Names Judge Breyer to Supreme Court*, BALTIMORE SUN, May 14, 1994, http://articles.baltimoresun.com/1994-05-14/news/1994134004_1_judge-breyer-chief-judge-appeals-judge.

93. For example, the *Clinton* case had only recently been filed at the time of Justice Breyer's appointment, whereas the jury had already reached a verdict in *Caperton*. In addition, *Caperton* involved the review of a judgment on a large jury verdict, whereas *Clinton* involved primarily the question of whether a civil case against the sitting president must be stayed until the President left office. Finally, the result in *Clinton* was not a one-justice majority, as it was in *Caperton*. Justice Breyer did, however, pen a separate concurrence favorable to the President in *Clinton*, in which he suggested that the trial judge should defer to a sitting president's explanation of a conflict between the ongoing judicial proceeding and the president's ability to fulfill his public duties. *Clinton v. Jones*, 520 U.S. 681, 710-11 (1997).

94. It may be unlikely (though not out of the realm of possibility) that President Clinton nominated Justice Breyer with the foresight to know that his case would reach the Supreme Court. But, as *Caperton* made clear, it is not the motives of the donee (or, by analogy, the appointee) that matter. Instead, it is whether, "under a realistic appraisal of psychological tendencies and human weakness, the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84. In other words, it is the "debt of gratitude" that the judge may feel toward the person who had a hand in putting him on the bench. See *id.* at 882. As Richard Esenberg has noted, "it seems plausible to believe that a 'debt of gratitude' may be owed not only to those who have helped to elect a judge, but to those who have appointed him or helped to secure his appointment in states where that is the route to the bench." Richard M. Esenberg, *If You Speak Up, Must You Stand Down: Caperton and Its Limits*, 45 W.F. L. REV. 1287, 1297 (2010). And certainly appointing presidents expect Court nominees to behave in a certain way—presidents "want Justices on the

may nevertheless be an appointment-system analogue, because special interest groups find it worthwhile to invest significant sums to support or oppose a Supreme Court nomination.⁹⁵ Interest groups spent over \$7.5 million in supporting and opposing the Supreme Court nominations of Chief Justice Roberts, Harriet Miers, and Justice Alito.⁹⁶ And numerous other cases exist in which appointed judges have heard cases involving the appointing officials. As Judge Tatel on the D.C. Circuit explained in denying a motion for recusal in a case against the Clinton Administration, retention method—or, in his case, life tenure—matters:

Hearing a case involving the conduct of the President who appointed me will not ‘create in reasonable minds . . . a perception that [my] ability to carry out judicial responsibilities with integrity, impartiality, and competence [would be] impaired.’ This is particularly true in view of a federal judge’s life-tenured position and oath to ‘faithfully and impartially discharge and perform all duties . . . under the Constitution and laws of the United States.’ Both Justice Ginsburg and Justice Breyer participated in *Clinton v. Jones*. Chief Justice Burger, Justice Blackmun, and Justice Powell, all appointees of President Nixon, participated in *United States v. Nixon*. Judge MacKinnon and Judge Wilkey, also appointees of President Nixon, participated in *Senate Select Comm. v. Nixon* and *Nixon v. Sirica*.⁹⁷

Similarly, one may also ask whether a justice would have to recuse herself from a case involving a vocal or well-known opponent of the judge. Again, the answer is no—at least if the judge is appointed to life-tenure.⁹⁸

An interesting recent empirical study bolsters the argument that retention matters more than selection to the campaign-finance problem. In a recent article presenting the study’s results, the authors first

Court who will vote to decide cases consistent with the president’s policy preferences.” GEORGE L. WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* 58-59 (1995).

95. See generally Geyh, *supra* note 8, at 638 (noting “the formidable sums spent by interest groups in U.S. Supreme Court confirmation proceedings”).

96. See Dorothee Benz & Jesse Rutledge, *Three Nominations Reveal Contrasting Influence of Interest Groups in High Court Nomination Process*, JUSTICE AT STAKE (Jan. 31, 2006).

97. *In re: Executive Office of the President*, 215 F.3d 25, 25-26 (2000) (citations omitted; all alterations except for first in original).

98. See *United States v. Helmsley*, 760 F. Supp. 338 (S.D.N.Y. 1991) (recusal not required where lawyer on case testified against judge’s nomination to court of appeals); Richard Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 408-09 (2003) (concluding that Justice Thomas did not violate the recusal statute by participating in *Bush v. Gore*, even though Gore voted against Justice Thomas’s confirmation to the Court).

conclude that campaign contributions influence elected judges' decisions.⁹⁹ In order to test whether the influence stems from a debt of gratitude or from retention concerns, the authors examined the effects in the three states that select their supreme court judges using partisan elections but retain them through retention elections.¹⁰⁰ The authors also examined the effects of campaign finance on judges facing mandatory retirement.¹⁰¹ In both cases, the judges were no more likely to cast pro-business votes than were judges in the baseline categories. As this study and the above discussion illustrate, the campaign-finance problem is not so much that the judges' campaigns received money in the past, but that the judges expect to need to receive campaign money in the future. In other words, the real independence concern in the campaign finance problem is retention.

3. Retention-Related Independence – The Re-Selection Problem

As shown above, the retention problem is at work beneath the surface in most of the concerns raised regarding judicial elections. The worry behind the retention problem is that judges will tend to decide cases in ways that mollify their retention agents¹⁰²—in the elections context, that those subject to re-election will decide cases in order to please the electorate. The empirical evidence suggests that this is accurate: the policy preferences of judges' retention agents impact the way that judges decide cases, particularly in higher-profile cases.¹⁰³ This is true for all judges that undergo a retention evaluation, regardless of *how* the judge is retained (e.g., by re-election or re-appointment), although the impact appears to be greater in elective systems, with the

99. Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011).

100. *Id.* at 102-03.

101. *Id.* at 103-05.

102. *See, e.g.*, Geyh, *supra* note 49, at 79 (“Simply put, a politicized process for determining whether an individual will become a judge is less threatening to that person’s capacity to be impartial and uphold the rule of law than a politicized process for determining whether that same person will be permitted to remain a judge.”); SHUGERMAN, *supra* note 34, at 12 (“The key to judicial independence is not front-end selection, but rather, back-end retention and job security”); *see also* Alex B. Long, “*Stop Me Before I Vote for this Judge Again*”: *Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1, 15 (2003); Dimino, *supra* note 29, at 455 (“The most significant problems with judicial elections occur not because elections are used as the initial means of choosing judges, but because sitting judges must run in elections to retain their jobs.”).

103. *See, e.g.*, Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169 (2009).

greatest impact in partisan-election systems.¹⁰⁴ But, in legislative retention systems, for example, judges are less likely to exercise judicial review to declare a statute unconstitutional than in election systems (the link, of course, being that the same legislature that passed the statute holds the fate of the judge in its hands), and this effect becomes more pronounced as the judge's retention date approaches.¹⁰⁵

If judges facing retention are pressured to implement their retention agents' preferences, what, if anything, should be done about it? The answer turns on a normative account of judging. Perhaps the only solution is a retention-free system: either life tenure or selection for a single, non-renewable term. But many in the political science field are challenging the long-held notion that judging is fundamentally different from our political branches and that judges ought to be independent of the electorate rather than subject to it. For example, some argue that "judges are political beings who make political decisions,"¹⁰⁶ and "like other public officials, judges have considerable discretion and should be held accountable for their choices, at least at the state level where we would expect a close connection between public preferences and public policy, as well as significant variations in law across the states."¹⁰⁷ In other words, they argue, policy preferences will always influence judges' decisions, and there is no reason to elevate judges' policy preferences over the electorate's.

To some extent, these election advocates are unequivocally correct. Even election opponents acknowledge that judges make policy¹⁰⁸—a premise that legal realism has left largely undeniable as a descriptive, if

104. *Id.*; see also Elisha C. Savchak & A.J. Barghothi, *The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 394, 408 (2007) ("In states where citizen preferences are conservative, judges' decisions become more pro-government as retention elections draw closer, but in states where citizens are more liberal, judges' decisions become more pro-defendant in the face of retention."); Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L. J. 1589, 1625 (2009) (presenting empirical research of appointed judges' strategic voting).

105. See Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1290-94 (1999); see also BONNEAU & HALL, *supra* note 5, at 5 ("Broadly speaking, the willingness of courts to be active participants in the checks and balances system appears to be conditioned by judicial independence from the other branches of government.").

106. BONNEAU & HALL, *supra* note 5, at 138.

107. *Id.* at 2.

108. Geyh, *supra* note 8, at 629 (noting the "indisputable" role of judge as policymaker, and collecting social science data); Pozen, *supra* note 28, at 273 (2008); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1264-65 (2008) (describing "the policy-making role that state supreme courts play when filling gaps in constitutional and statutory law and making common law").

not normative, matter, and that may be particularly true in state courts, where the common law is still prevalent.¹⁰⁹ Similarly, judges have discretion in many of their decisions. And there can be no doubt that judges decide cases against the backdrop of their own ideologies—a fact exemplified by Judge Richard Posner’s acknowledgement that he accepted his nomination to the Seventh Circuit “[p]artly because [he] was enthusiastic about advancing economics-oriented thinking in the judiciary.”¹¹⁰ Regardless of whether ideological-leanings are considered “improper” decision-making influences of which judges’ decision-making processes should be independent, empirical studies repeatedly demonstrate that judges’ ideologies affect their decisions.¹¹¹ To the extent that “independence” means that judges should divorce their decision-making processes from their own ideological background, independence is probably an unascertainable goal.

But it goes too far to suggest that judges are no different from political actors in the other branches.¹¹² What judges do is, in some ways at least, fundamentally different from what the other branches do and, in particular, what the legislative branch does. Legislators enact broadly applicable policies in the abstract, rather than in concrete cases. Appellate judges make policy in the context of concrete facts, and their decisions are constrained in part by the arguments and record before the court in a given case, and are subject to being distinguished in later cases with different facts. State high court judges address cases “laden with all manner of supplemental claims, factual particularities, procedural histories, jurisdictional complexities, and doctrinal precedents that shape and constrain their judicial task.”¹¹³

Relatedly, we might suggest that legislators should always follow their constituents’ wills,¹¹⁴ but we do not expect or desire judges to

109. Devins, *supra* note 51, at 1649-51 (noting that “state courts are common law courts and, as such, have policy-making jurisdiction over a wide range of subjects” and that state courts “play an active policymaking role in ways that would be unimaginable for federal courts”); *see also* Pozen, *supra* note 28, at 326 (noting that state courts do not have the same concerns of federalism, separation of powers, and democratic legitimacy as federal courts, citing articles by Helen Hershkoff).

110. Special Symposium Issue Measuring Judges and Justice: *Interview: A Conversation with Judge Richard A. Posner*, 58 DUKE L.J. 1807, 1811.

111. *See* Choi et al., *supra* note 26, at 294.

112. Long, *supra* note 102, at 15 (“Even the most ardent supporters of the popular election of judges acknowledge that judges are not merely ‘politicians in robes.’”); Dimino, *supra* note 7, at 361 (courts and legislatures “have different areas of institutional competence, which argues for the maintenance of a distinction between their functions”).

113. Pozen, *supra* note 40, at 2121.

114. Some normative accounts of representative behavior suggest that legislators ought to

always follow the will of the “impassioned majority.”¹¹⁵ The concern about decisional independence derives from what Stephen Crowley famously termed “the majoritarian difficulty,”¹¹⁶ which asks “how elected/accountable judges can be justified in a regime committed to constitutionalism.”¹¹⁷ Put differently, if judges have a duty to vindicate fundamental rights identified by the enduring or enlightened majority as constitutional rights against invasion by the temporal or impassioned majority,¹¹⁸ how can we expect judges to fulfill that duty if the

enact their own preferences and, if the public sufficiently disagrees with the legislator, it can vote her out of office. Other normative accounts suggest that legislators ought to follow their constituents’ preferences, even if those preferences deviate from the legislator’s own personal preferences. Also, Professor Geyh has said that, “[u]nlike 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.” Geyh, *supra* note 8, at 629. It is not clear to me that legislators represent the voting public as a single-clearly defined constituency, or that legislators’ constituencies do not conflict. Nor is it clear, once we agree that judges make policy and that their constitutional decisions are swayed significantly by their ideological views, that judges should *never* decide cases in ways that “represent” the policy preferences of their constituencies. This would require a normative account of elective judging that is beyond the scope of this Article. Nevertheless, judges should not *always* bow to majority preferences, whereas legislators *might* be expected to do so.

115. The Supreme Court has issued a number of decisions in which it has used public opinion or suggested that public opinion be used in making certain decisions. Most obviously, the Court has suggested that notions of “cruel and unusual” punishment are guided by public preferences and “objective indicia” of “national consensus.” *See, e.g., Kennedy v. Louisiana*, 554, U.S. 407, 422 (2008); *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). But the Court has also looked to public opinion outside of the Eighth Amendment context. For example, in *Miller v. California*, the Court stated that community values and attitudes should be used in determining obscenity for First Amendment purposes. 413 U.S. 15, 24 (1973). In *Lawrence v. Texas*, the Court cited for Fourteenth Amendment purposes “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” 539 U.S. 558, 572 (2003). *See also* THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 4 (2008) (“At least 123 Rehnquist Court opinions directly mentioned public opinion in a majority, concurring, dissenting, or per curiam opinion—an average of about six to seven opinions per term.”). Moreover, significant empirical research suggests that public opinion plays a role in shaping the Court’s decisions. *See* Laurence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1563 (2010) (describing some of this research); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1020 (2004).

116. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 690 (1995). Croley’s chosen moniker was a play on the “counter-majoritarian difficulty” famously articulated by Alexander Bickel to describe the difficulty in justifying judicial review by unelected judges in a democracy. *Id.* at 693.

117. *Id.* at 694.

118. For present purposes, we need not take sides in the debate over the source of constitutional rights (whether fundamental or positive). But, to the extent that fundamental moral rights are protected by the federal Constitution, this may suggest a decreased need for vigilant rights protection on the part of the states, because those whose fundamental moral rights are violated will have redress available on the federal level. *See generally* Frost & Lindquist, *supra* note 7, at 796-

impassioned majority is able to hold judges accountable for their decisions by removing them from the bench?¹¹⁹

Of course, cases in which public sentiment will be so aroused against a particular party that the public is willing to ignore established rights of a minority may be rare,¹²⁰ and even relatively “independent” courts do not have a perfect record in this area.¹²¹ But these cases might be rare precisely *because* the public knows that courts will protect minority rights from the tyranny of the majority. Most people acknowledge the need, at least to some degree, to have a judiciary that can withstand the ire of the majority.¹²² Even if there is a place in justice for judges to take account of voter preferences as a sort of tiebreaker in difficult cases with unclear law and unquestionable policy implications,¹²³ there is no place for judges to elevate interest-group preferences over their own reading of clear positive law in deciding cases.

The protection of minority rights from majority oppression is not the only reason for retention-related independence. There is a related concern that judges’ decisions will be improperly influenced by concerns about the effect of the decision on their retention prospects, even where the majority would support the decision itself or, more likely, where the public has no obvious interest in the particular case. If

97. On the other hand, such a theory may place too much reliance on the availability of certiorari, and it may undervalue more expansive individual rights recognized in state constitutions.

119. I have so far taken it as a given that it is the role of the courts to protect rights, though this assertion is not without its detractors. Nevertheless, most people would concede that the courts are the best-positioned branch to invalidate unconstitutional legislation and to protect the constitutional rights of the minority from majority oppression in a democratic regime.

120. See Dubois, *supra* note 5, at 31 (“Constitutional decision-making involving alleged deprivations of important fundamental rights and liberties is only a small portion of what state courts are asked to do. State judiciaries are far more preoccupied with common law development, statutory application and interpretation, procedural review, and the supervision of lower courts.” (footnote and quotation omitted)).

121. Consider, for example, *Korematsu v. United States*, 323 U.S. 214 (1944) and *Plessy v. Ferguson*, 163 U.S. 537 (1896). As an aside related to the decisional independence created by the federal system, I note the unexplained assertion in a recent law review article that, “[s]urely, at a minimum, those Justices who decided the *Dred Scott* case deserved to be impeached and removed.” Calabresi & Lindgren, *supra* note 10, at 810.

122. See Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 699 (2011) (describing arguments against elected judiciaries, including that “elected judges may lack the will to defy the majority in a given case”).

123. Judges “can confine their populism to cases in which the legal answer seems uncertain, while public sentiment seems clear, widespread, and of constitutional dimension (however this is gauged). The people’s views would remain irrelevant to the application of, say, a fixed numeric rule, but they might be consulted in construing a vague standard such as ‘equal protection’ or ‘due process.’” Pozen, *supra* note 40, at 2082.

the decision alienates large donors or other important campaign supporters, it could result in the judge losing an important ally or, creating a vocal enemy in the next election cycle. This is the retention aspect of the campaign finance problem.¹²⁴ Retention-related independence helps to ensure that judges' decision-making processes do not include a self-interested retention-impact evaluation. And this is the core independence concern at work in the judicial elections debate.¹²⁵

C. Judicial Accountability

Proponents of judicial elections largely pin their argument on judicial accountability, but there has been little discussion of—and even less agreement on—what is meant by judicial accountability.¹²⁶ Geyh has suggested a useful taxonomy for judicial accountability, dividing it into three kinds: institutional, behavioral, and decisional.¹²⁷ As this taxonomy makes clear, judicial accountability may take many forms in addition to judicial retention: judicial discipline;¹²⁸ publicity; public sentiment; legislative override; or constitutional amendment all create some level of accountability.¹²⁹ But the most important accountability for election proponents is a backward-looking version that seeks to hold judges accountable for their decisions.

124. See Pozen, *supra* note 40, at 2099 (“In the new era of more vigorous races, there is a growing risk that elected judges will play favorites not only with donors but also with important interest groups (because of their clout with voters), political parties (because even judges in nonpartisan jurisdictions will be aligned more closely with one side), political incumbents (because sitting judges are incumbents, too, who stand to lose from antientrenchment measures), and popular litigants and legal positions generally (because voters will be primed to punish rulings seen as too generous to disfavored groups or causes).”).

125. See SHUGERMAN, *supra* note 34, at 7 (“Judicial independence has different meanings, but at its core, it refers to a judge’s insulation from the political and personal consequences of his or her legal decisions.”).

126. See Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 911-12 (2006); Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation in Trial Court Elections*, 94 JUDICATURE 208, 211 (2011) (“In early work, Dubois argues that electoral accountability is present only when informed voters have the opportunity to choose among multiple candidates at the polls and when judges who are elected in such a system act in a manner that represents voters’ wishes. More recently, Hall defines accountability as ‘a formal institutional mechanism where citizens control who holds office through elections. The primary mechanism for this control is electoral competition.’ Finally, in their book-length treatment of judicial elections, Bonneau and Hall write that ‘accountability is “a product of electoral competition, produced by the willingness of challengers to enter the electoral arena and the propensity of the electorate not to give their full support to incumbents.”’).

127. Geyh, *supra* note 126, at 917.

128. Long, *supra* note 102, at 23.

129. We could call these versions of accountability “indirect accountability.” See Nelson, *supra* note 126, at 209-10.

Because the arguments of most judicial election proponents start with the premise that judges are policy-makers like other elected officials,¹³⁰ the accountability they seek is the kind of accountability that will result in judges' policy-based decisions following the electorate's preferences. In this regard, selection-based accountability can be helpful, but only to the extent that the selectors can (1) correctly anticipate the preferences with which they are concerned; (2) correctly ascertain the judge's preferences; and (3) correctly predict any shifts in the electorate's or judge's preferences within the length of the judge's term. Of course, selectors always act with incomplete information.¹³¹ Because the electorate cannot fully realize any of these three goals—let alone all of them—election proponents rely heavily on retrospective, retention-based decisional accountability to the electorate.¹³²

1. The Potential Meanings of Judicial Accountability

The word “accountability” is sufficiently broad to incorporate any of several meanings in the judicial elections debate. For present purposes, the various meanings of accountability can generally be divided into two main forms, one of which relates to selection and one of which relates to retention.¹³³ The retrospective, retention-related form suggests that judges should be adequately held accountable for their past actions on the bench, including the decisions that they have made, and the best way to do that is to make them subject to removal.¹³⁴ This version of accountability creates pressure on judges to issue decisions

130. See, e.g., BONNEAU & HALL, *supra* note 5, at 138.

131. See Calabresi & Lindgren, *supra* note 10, at 845-46 (noting that “some of our most liberal Justices were appointed by surprised Republican Presidents and some of our more conservative Justices were appointed by surprised Democrats”).

132. By the same token, it may be the selectors' inability to realize these three goals that makes the majoritarian difficulty a back-end retention problem rather than a front-end selection problem.

133. Some accountability mechanisms are post-selection, but do not necessarily involve retention. For example, judicial conduct organizations often have the power to discipline a judge with sanctions less severe than removal, including censure, reprimand, suspension, private admonition, and others. Long, *supra* note 102, at 22. In addition, negative press or social implications may not remove a judge from the bench, but they create some level of accountability. These accountability mechanisms may impact a judge's independence—a judge may hesitate to rule on a case in a way that will get him lambasted in the press—but some of them are inevitable, and most of them are not seen as a sufficient impediment to independence to warrant their abandonment.

134. BONNEAU & HALL, *supra* note 5, at 7 (“[C]ompetitive elections promote accountability: judges, like legislators, must answer to the electorate for their choices.”); Long, *supra* note 102, at 10 (describing a view of accountability in which judges should be responsive to the views of the majority and “should be held accountable for their responsiveness (or lack thereof) by being made to stand for [re]election”).

that conform to majority preferences, and thus runs headlong into the majoritarian difficulty. The other form of accountability is selection-based, prospective accountability,¹³⁵ or “accountability before the fact.”¹³⁶ The goal of prospective accountability is to attempt to ensure that the selectors’ preferred judges are chosen to sit on the court, without regard to retention-based accountability.

Weak, selection-based versions of accountability could mean essentially representation—that the electorate ought to have some voice in naming the occupants of the bench. Direct elections serve this version of accountability, as might gubernatorial appointment, where the people have an indirect voice in the selection of judges.¹³⁷ This representative form of accountability does not conflict with retention-related independence concerns.¹³⁸ In other words, a direct election of judges followed by life tenure or a fixed term would serve one version of accountability and one version of independence without conflict.¹³⁹

Some have discussed an “accountability” that arises with frequent selection opportunities,¹⁴⁰ the implicit notion behind this being that frequent turnover—or at least the opportunity for frequent turnover—will help ensure that the court is in step with current trends, philosophies, and prevailing views rather than being outmoded and aristocratic.¹⁴¹ This kind of accountability is incompatible with one

135. Geyh, *supra* note 8, at 637.

136. Dimino, *supra* note 29, at 469.

137. *But see* Pozen, *supra* note 40, at 2112-13 (“Appointive and merit-selected judiciaries . . . do not hold out the same kind of promise to speak for the people. Their claim to institutional legitimacy depends not upon their responsiveness to the present majority will but instead upon their independence therefrom: They purport to be, not faithful agents or representatives of a constituency, but ‘mere instruments of the law.’”).

138. *See* Comments of Justice Breyer, *Justice for Sale*, FRONTLINE (PBS television broadcast Nov. 23, 1999) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html>) (explaining that the purpose of senate confirmation of federal judges is to inject “some element of public control,” but that “once the person is selected, at that point that person is independent”).

139. This is theoretical—no state has a life-tenured elected judiciary. But, early in its history, Vermont elected some judges to life tenure. SHUGERMAN, *supra* note 34, at 59. Jed Shugerman contends that, at this stage in history, judicial elections were promoted as a means of separation of powers rather than accountability. *Id.* at 58-59. *See also* Dimino, *supra* note 29 (proposing elections followed by a single fixed term).

140. *See* Jackson, *supra* note 65, at 1003; *see also* John L. Dodd et al., *The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 359 (2002) (noting that the Jacksonian era ushered in judicial elections in part because “the judiciary changed much more slowly than the elected branches”).

141. *See* Calabresi & Lindgren, *supra* note 10, at 771 (“[L]ess frequent vacancies on the Court . . . reduce[] the efficacy of the democratic check that the appointment process provides”); Pozen, *supra* note 40, at 2070 (“It should not be surprising to learn, then, that states that use elections have granted their judges significantly shorter terms than states that use

retention-related independence solution—life tenure—because it requires relatively short term lengths. On the other hand, if a judge is ineligible to sit for a term after the judge finishes her current term, retention-related independence could be fully realized in a manner that is perfectly consistent with this version of accountability. So, for example, election of judges to a single relatively short term could realize the dual, and compatible goals, of retention-related independence and turnover-related accountability.¹⁴²

Accountability could also be shorthand for the ability to punish judges for improper behavior on the bench, such as “judicial temperament, courtroom demeanor, and . . . speed and efficiency in deciding cases.”¹⁴³ This version of accountability—which could include removal as well as discipline short of removal, such as censure, reprimand, or fines—is retrospective, because it looks at judges’ past behaviors, but it is not decisional accountability. This kind of accountability is compatible with the retention-related decisional independence concerns, as long as sufficient checks are in place to ensure that the discipline is based on behavior rather than decisions.¹⁴⁴ Of course, at the margins, the distinctions between behavior-based discipline and decision-based discipline could become blurred.¹⁴⁵

Accountability could also mean the ability to remove judges based on displeasure with their judicial philosophies or interpretive methodologies.¹⁴⁶ The retention agent might remove the judge because of disagreement with a judge’s views of the constitution as a living document incorporating a right to privacy or as an originalist, or because

appointments. For the choice to hold elections reflects a commitment to popular accountability that demands continual satisfaction.”). Ward Farnsworth, discussing the Supreme Court, argues against frequent turnover, contending that a court representing outdated views of American politics slows the development of law in a positive way. Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 414-21 (2005).

142. Such a scheme would have other drawbacks, such as, potentially, lower quality judges (because fewer lawyers may be tempted to leave a lucrative private practice for only a single short term), concern that decisional independence could be compromised by a judge’s concern about post-bench activities, and lack of experience.

143. Nelson, *supra* note 125, at 210; *see also* Dubois, *supra* note 5, at 36 (articulating one version of accountability in which “the public was urged to be more concerned with ‘how’ judges had done their jobs rather than with ‘what’ judges had decided”).

144. *See* Long, *supra* note 102, at 27-28.

145. *Id.*

146. Geyh asserts that “unintentional decisional error is [usually] attributable not to incompetence but to honest mistakes [in] difficult and ambiguous issues of law and fact.” Geyh, *supra* note 126, at 923. But it is hard to know exactly how he would define decisional “error”—is it anything overturned by an appellate court, anything that it is inconsistent with a particular judicial philosophy, or merely anything that he (or some group of people) thinks is in error?

of disagreement with a judge's strict textualist methodology for interpreting statutes.¹⁴⁷ Alternatively, one might suggest that judges should be accountable for the "correctness" of their decisions.¹⁴⁸ Under this view, judges should be accountable to the retention agent based on the retention agent's disagreement, not just with the judge's methodologies and judicial philosophies, but also with the judge's decision-impacting ideologies and exercises of discretion.¹⁴⁹ These versions of accountability are at the core of the judicial retention debate, because they are championed by election proponents but are incompatible with retention-related independence.¹⁵⁰

2. Accountability Before the Fact

Some scholars have urged that selection through judicial elections, without retention, would create a form of "prospective accountability,"¹⁵¹ or "accountability before the fact."¹⁵² But this version of accountability before the fact, while it would presumably appease election opponents for the reasons discussed above, is probably not sufficient for most proponents of judicial elections. It is important to election proponents that judicial decisions comport with popular sentiment, at least in the range of unclear or discretionary cases. Thus, for election advocates, pressures to conform policy-based decisions to majority preferences are desirable. As Judge Posner put it, "[a]s long as the populist element in adjudication does not swell to the point where unpopular though innocent people are convicted of crimes, or other gross departures from legality occur, conforming judicial policies to democratic preferences can be regarded as a good thing in a society that prides itself on being the world's leading democracy."¹⁵³ And, because most state high courts maintain discretionary control over the majority of their dockets,¹⁵⁴ accountability becomes a more important concern on

147. Although this kind of accountability is theoretically distinct from accountability for individual decisions, in practice the two are inextricably intertwined.

148. See Long, *supra* note 26, at 709.

149. Pozen, *supra* note 28, at 277.

150. Geyh refers to these kinds of accountability as "direct political accountability for competent and honest judicial decision-making error," although there may be disagreements about theories of judicial "competence" and "error." Geyh, *supra* note 126, at 914-15.

151. Geyh, *supra* note 49, at 77.

152. See generally Dimino, *supra* note 29.

153. RICHARD A. POSNER, HOW JUDGES THINK 136-37 (2008).

154. Dolores K. Sloviter, *Diversity Jurisdiction Through the Lens of Federalism*, 76 JUDICATURE 90, 92 n.25 (1992). Even in those states in which the court lacks discretionary review, self-selection in the appellate process makes it more likely that the cases that reach the high court

those courts and, arguably, independence a somewhat diminished concern.¹⁵⁵

If prospective accountability could satisfy judicial-election proponents, and if, as posited above, retention forms the bulk of the independence concerns raised in opposition to judicial elections, then the solution is simple: elect judges to lifetime appointments through popular elections. If the accountability concern is providing for frequent turnover, that could be addressed as well in a manner that pleases both groups: elect judges to limited terms of a fixed duration.¹⁵⁶ But, because, as discussed below, election-advocates have the much stronger retention related version of accountability in mind,¹⁵⁷ prospective accountability cannot go very far in satisfying election proponents. “The motivating values behind the choice to elect judges—democratic accountability, popular sovereignty, collective self-determination—demand that judges be subject to regular reelection as well.”¹⁵⁸

3. Retrospective, Retention-Based Judicial Accountability

Accountability advocates have often assumed, without significant discussion, that accountability requires “judges initially selected by popular election and subject to popular review after relatively short terms in office.”¹⁵⁹ They argue that judges, as policy-makers, ought to take account of the will of the electorate, and elections both as a

will be the more difficult ones, because the easy or clear-cut cases are generally less likely to be appealed.

155. Dimino, *supra* note 29, at 469 (“[W]here [state] courts’ dockets are discretionary, it is unlikely that they will take a case unless reasonable jurists could disagree as to the meaning of the law. Thus, the most sympathetic case for judicial independence—the judge who is punished at the polls for performing his job in the only way faithful to the law—is rarely present when considering elections for state supreme courts.”).

156. *Id.* (proposing elections followed by a single fixed term).

157. See Pozen, *supra* note 28, at 329 (arguing that the basic rationale for judicial elections is to “ensure public accountability through regular decision points”).

158. Pozen, *supra* note 28, at 286 n.91; see also Long, *supra* note 102, at 11-12 (including in accountability description that, “[o]nce a judge is in office, voters can shape policy by rewarding or punishing the judge for the decisions the judge has made”).

159. Dubois, *supra* note 5, at 35; see also Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE* 166 (2007) (claiming that accountability is a product of competitive elections because they “enhance[] the ability of voters to voice disapproval of incumbents and remove unpopular ones”); Michael R. Dimino, *The Futile Quest for A System of Judicial “Merit” Selection*, 67 *ALB. L. REV.* 803, 806 (2004) (“In making it difficult for voters to remove an unpopular judge, merit selection gives up on the goal of judicial accountability.”); Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 *S. TEX. L. REV.* 1197, 1204 (2000) (“Proponents maintain that judicial elections assure accountability to the people and are the only reliable method for removing judges whose decisions are unacceptable to the populace.”).

selection method and as a retention method help to ensure that judges do this.¹⁶⁰ The selection-related accountability concern—that elections “provide a mechanism for ensuring the popular control over the judiciary that supporters argue is essential”¹⁶¹—largely mirrors the retention-related accountability concern, but retention-related accountability takes it one step farther. Retention-related decisional accountability seeks periodic confirmation that a judge’s ideologies and decisions conform to majority preferences.

Because virtually everyone now agrees that judges make policy, few dispute that a judge’s judicial philosophy and ideological leanings are legitimate grounds for judicial selection.¹⁶² As Laurence Tribe has said in the federal context, “[T]hose who interpret and enforce the Constitution simply cannot avoid choosing among competing social and political visions, and . . . those choices will reflect our values . . . only if we peer closely enough, and probe deeply enough, into the outlooks of those whom our Presidents name to sit on the Supreme Court.”¹⁶³ Assuming, then, that we accept the premise that a judge’s ideological leanings and judicial philosophy are a proper *selection* criterion,¹⁶⁴ surely judges’ ideological leanings are also a proper *retention* criterion. If it is proper to select a judge based on his professed textualism, or originalism, or adherence to the view of a constitution as a living document,¹⁶⁵ why would it be improper to subject the judge to periodic

160. BONNEAU & HALL, *supra* note 5, at 2.

161. Long, *supra* note 102, at 10.

162. Dimino, *supra* note 29, at 463 (“The point here is not that those judges will violate the law, or even that they will consciously shape the law consistent with their policy preferences, but rather that judges decide cases predictably based on their judicial philosophies, and that a wide range of outcomes is consistent with judges’ obligation to decide cases faithfully. There is a tremendous difference between a Brandeis and a Van Devanter, between a Douglas and a Frankfurter, and between a Brennan and a Rehnquist. One may believe that each of those Justices faithfully applied the law as he understood it, and yet their jurisprudential philosophies yielded starkly disparate, and predictable, votes in individual cases.”).

163. LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* xi.

164. “[P]residents from Washington forward have chosen nominees based on their judicial philosophies.” Dimino, *supra* note 7, at 349; *see also* JAN CRAWFORD GREENBURG, *SUPREME COURT CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 223* (2007) (Robert Bork “killed his nomination by articulating narrow views on the right to privacy”); *id.* (“Nominees since Bork have been closely questioned about *Roe*.”); Kozinski, *supra* note 36, at 865 (“I think it’s perfectly fine for the folks who appoint judges, the President or the Justice Department, to find out what the judicial philosophy of the candidate is.”); Chemerinsky, *supra* note 57, at 738. On the other hand, not everyone accepts this premise. Justice Kennedy has stated his belief that judges should be selected not “based on a particular philosophy,” but instead based on “temperament, commitment to judicial neutrality and commitment to other more constant values as to which there is a general consensus.”

165. *See generally* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT

retention procedures in which his adherence to the professed judicial philosophies is evaluated?¹⁶⁶ On a more base level, if everyone knows that judges are policymakers who interpret law in accordance with their own ideological preferences, why shouldn't those preferences be subject to periodic democratic approbation?¹⁶⁷

Absent a retention mechanism, judges could toe the party line in order to be elected without conforming their on-bench behavior to their pre-selection rhetoric.¹⁶⁸ Thus, retention mechanisms ensure popular control over the judiciary better than prospective accountability, because retention mechanisms help to ensure that, once on the bench, judges act in ways consistent with the selectors' expectations.¹⁶⁹ The electorate may not expect all of a judge's decisions to comport with majority preferences, but the judges were selected because, among other things, the public believed that the judges would, at least to some extent, follow a particular ideology, philosophy, or methodology in their decision-making. In other words, they were selected because they would decide cases like a Ginsburg or a Scalia.¹⁷⁰

(Jack N. Rakove, ed., 1990).

166. Obviously, the majoritarian difficulty suggests one reason not to periodically reevaluate judges—on some level, there are some decisions that we want them to be able and willing to make even if we will not support those decisions at the time. But the concern there is over retribution for specific decisions more than concern over judicial philosophies.

167. Croley, *supra* note 116, at 745 (criticizing the suggestion that “ideology should play a role in selecting judges, but once they are confirmed, the need for judicial independence requires that it play no r[ole] in evaluating their performance for retention”).

168. Or, to put it in the somewhat cynical language of Justice Scalia's opinion in *Republican Party of Minnesota v. White*, there is a fear that a judge may take advantage of the fact that “campaign promises are—by long democratic tradition—the least binding form of human commitment.” *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

169. Where the retention agents and the selection agents differ, such as where one governor appoints and another reappoints, or where the political leanings of the voting public have shifted, retention mechanisms go beyond that—they allow the public to remove someone whose ideology no longer corresponds with the public's.

170. Few dispute that Justice Ginsburg is likely to decide many cases differently from Justice Scalia. The majority of cases involve a fairly straightforward application of law to a given set of facts, and even Justices Scalia and Ginsburg would agree in the majority of cases. But, of course, all of the action is in the rest of the cases. More importantly, high courts, many of which have control of their docket through discretionary review, are likely to regularly confront cases that do not involve a straightforward application of law to facts, because these are the more difficult cases. Party cues may generally provide meaningful insights into a judicial candidate's likely decisions, but no cue is as helpful as the judge's prior decisions. See generally Long, *supra* note 26, at 696 (describing Democrat's insistence that new judge be a Democrat in a legislative-appointment state); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999) (describing research showing that “party is a dependable measure of ideology on modern American courts.”); Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOYOLA L.A. L. REV. 1411, 1412 (2001).

But retention-related accountability is not only about the intentionally deceptive judge who would say one thing to be elected and then act inconsistently. Election advocates have three other worries. *First*, the judge may face issues that were unanticipated at the selection stage in which the judge's preferences or ideologies are out of line with majority preferences. Retention-related accountability creates a pressure for that judge to use majority preferences, rather than her own, to the extent necessary to decide the case. And, if the judge does not, retention-related accountability gives the populace a means to remove the judge and replace her with someone who will. *Second*, accountability advocates are concerned about drift—either a judge's ideological drift away from the public or the public's ideological drift away from the judge. Ideological drift is a serious concern for accountability proponents, and empirical evidence shows that ideological drift is significant. The research shows that the ideology of virtually all justices serving since 1937 on the United States Supreme Court shifted during their tenure, and that the shifts have occurred in both political directions.¹⁷¹ And, again, if we assume that ideology is a proper selection criterion, it is not obvious—outside of independence concerns related to the majoritarian difficulty—why ideological drift is not a proper basis for removal of judges. *Third*, and as a corollary to the first two, to the extent election advocates fear their own inability to accurately ascertain the judges' preferences and the judges' propensity to elevate their own ideological preferences over the electorate's preferences in policy-laden cases, election advocates crave the decisional influences—and removal ability—created by periodic retention. Retention opportunities allow the retention agent to review the judge's actual body of work on the relevant court in making a retention decision, providing for a more accurate assessment.

4. Elections as the Chosen Vehicles of Judicial Accountability

Retention-based decisional accountability could be promoted even without elections. For example, gubernatorial reappointments promote this version of accountability. In addition, while “we would expect

171. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1519-20 (2007). Anecdotally, consider Justice Blackmun, who supported the death penalty and then came to oppose it, stating that “when one goes on the Supreme Court of the United States his constitutional philosophy is not fully developed . . . And if one didn't grow and develop down there I would be disappointed in that person as a Justice.” Paul R. Baier, *Mr. Justice Blackmun: Reflections from the Courts Mirabeau*, 43 AM. U. L. REV. 707, 714 (1994).

judges chosen by democratic processes to reflect the political preferences of their states at the time they are chosen,”¹⁷² the same might be true for judges appointed by the governor, given that the governor, an elected official, likely also reflects the prevailing political preferences of the state.¹⁷³ Why, then, do accountability advocates generally champion judicial elections instead of one of the other potential retention procedures? There are three likely answers to this. The first involves current conventions regarding reappointments, the second relates to the common conception of democracy, and the third involves the immediacy of the electorate’s voice to the decision-makers.

First, reelections may be the vehicle of choice for accountability advocates because current conventions surrounding reappointments make them an inadequate accountability mechanism. Most reappointers are expected to reappoint without significant inquiry, and they generally do so.¹⁷⁴ For accountability advocates, retention elections may contain the same flaw—judges are retained over 99 percent of the time, usually in very quiet elections without campaigns.¹⁷⁵ For some, accountability is enhanced only through salient elections with sufficient challengers to the incumbent.¹⁷⁶ These accountability advocates presumably want judges to account for popular will and to elevate the ideology of the populace over that of their own, at least to some extent. For them, then, to the extent that judges believe they are likely to be retained regardless of what they do, there is no accountability.

In addition, elections may be the preferred vehicle of accountability advocates because they are democracy enhancing. In other words, in a democracy, the policy-making branches of government ought to be directly accountable to the public, rather than indirectly accountable through the popularly-elected governor or legislature, or accountable to an unelected judicial nominating commission.¹⁷⁷ That is the essence of

172. BONNEAU & HALL, *supra* note 5, at 7.

173. The same is not true of unelected judicial nominating commissions. Elected judges are almost certainly more likely to reflect the public’s prevailing political preferences than are judges selected through a judicial nominating commission. Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 676, 690, 700 (2009) (suggesting that judicial nominating committees tend to pick judges left of the those chosen by the public or elected officials).

174. See Shepherd, *supra* note 103, at 171 (“[J]udges who are reappointed enjoy the greatest job security.”); Pozen, *supra* note 28, at 319 (noting that the “state political branches have often operated on a strong presumption of reappointment).

175. Larry Aspin, *Judicial Retention Election Trends: 1964-2006*, 90 JUDICATURE 208, 210 (2007).

176. Hall, *supra* note 159, at 166.

177. Dubois, *supra* note 5, at 38 (“[I]n a democratic political system governed not entirely but in the main by the principle of majority rule, judges should be held popularly accountable for their

democracy.¹⁷⁸

Finally, and relatedly, if the goal of accountability is to have judicial decision-makers whose policy-influenced decisions mirror the electorate's policy preferences, then there is a reason to prefer direct retention of judges by the electorate over other retention methods. The more intermediaries that come between the electorate and the judges, the less likely those judges are to hold the preferences desired by the electorate. For example, a governor could get away with picking a judge whom the public might not have elected without significant political repercussions on the governor, because this will be only one of many of the governor's actions upon which the public will base its decision when the governor is up for reelection. The governor may be reelected despite retaining an unfavorable judge because the governor's action in retaining the judge is diluted in the public's evaluation of the governor's performance on the whole. Thus, governors can expect some latitude in selecting and retaining judges before experiencing a significant drain on political capital.

There is a downside to direct electoral retention by the public when it comes to judges implementing policy preferences. If one accepts the earlier-discussed proposition that judging fundamentally differs from legislating because judging is a case-specific, backward-looking endeavor,¹⁷⁹ then the electorate must, at least in some cases, understand the individual nuances of a particular case in order to properly consider whether the judge's policies are in keeping with those of the public. For example, before evaluating a judge's decisions in capital cases, the public should learn about and understand the mitigating factors that the judge considered in imposing the particular sentence. But if the public looks only at the general end result (that the death penalty was or was not imposed), or, if sitting judges think that the public will look only at the general end result, then the boundary between judging (case-specific, backward-looking) and legislating (abstract, forward-looking) may become blurred.

In dissenting from the denial of certiorari in *Woodward v.*

decisions." (footnote omitted).

178. At some point, it becomes infeasible to elect the entire government, and even in a democracy, the people rely on elected officials to make appointments. But it may be important for the citizenry to have a direct electoral connection with at least the top-level members of each branch. See BONNEAU & HALL, *supra* note 5, at 7 ("Of course, the primary motivation for electing judges was the recognition that judges are important political actors and as such should derive their power from the people and not from a co-equal branch of government.").

179. See *supra* notes 112-13 and accompanying text.

Alabama,¹⁸⁰ Justice Sotomayor cited examples of cases in which judges overrode unanimous jury recommendations of life sentences in order to impose the death penalty, and she concluded that the reason for Alabama's relatively high judicial-override rate was because of partisan judicial elections.¹⁸¹ In other words, Justice Sotomayor theorized that judges think that the public supports capital punishment and, if they do not impose the death penalty, they stand to be voted out of office.¹⁸² But if judges actually are considering the impact of their decisions on their retention chances, and if they impose the death penalty *against a unanimous jury recommendation of life imprisonment*, then the judges must believe either (1) the jury does not accurately represent a cross-section of the public (that is, the jury recommendation is contrary to what the general public would want if they had all of the facts) or (2) the electorate will form an overly-general opinion based only on the final result of the case (e.g., this judge will not impose the death penalty), without examining the case-specific factors that went into the result. If it is the latter, and if judges are basing their decisions in individual, fact-intensive cases on their perceptions of what the electorate would want as a general policy matter, I suspect that even election proponents would be troubled.

IV. JUDICIAL RETENTION

A. *Judicial Retention as the Core Disagreement*

As these analyses of independence and accountability show, retention—not selection—is the primary source of disagreement in the judicial elections debate.¹⁸³ Consider this syllogism helpfully set out by Charles Geyh in identifying the most common argument against judicial elections:

Major Premise: “Judges must be independent of the electorate to uphold the rule of law and fulfill their

180. *Woodward v. Alabama*, 134 S. Ct. 405 (2013).

181. *Id.* at 408-10.

182. *Id.*

183. *Compare also* THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing that lifetime tenure during good behavior “is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws,” and that “[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [judges’] necessary independence.”); *with* Robert Yates, *Brutus*, No. XV (Mar. 20, 1788), *reprinted in* THE ANTIFEDERALISTS 350, 350-52 (Cecilia M. Kenyon ed., 1966) (criticizing life tenure as over-insulating the judiciary, entrusting it with too much power, and leaving it largely unaccountable).

constitutional role;”

Minor Premise: “[E]lected judges are not independent of the electorate;”

Conclusion: “[T]herefore, elected judges do not uphold the rule of law and fulfill their constitutional role. Conclusion: Judges should be appointed.”¹⁸⁴

This syllogism is problematic for several reasons. First, I suspect that the minor premise presumes (or alternatively, incorporates into the definition of “independent”) that “elected” judges will be up for re-election. If they are not—for example, if judges were elected to lifetime tenure—both the major and the minor premises would be suspect. Absent retention differences, elected judges may not be significantly less independent than appointed judges, because “[t]here is no such thing as a nondemocratic approach to picking American judges,”¹⁸⁵ and there is no system that fully insulates potential judges from discussing legal issues or receiving assistance in obtaining the bench.

Perhaps more problematic, the “conclusion” within the conclusion (that judges should be appointed) does not follow from the conclusion of the syllogism (that elected judges do not uphold the rule of law and fulfill their constitutional roles). There are two reasons for this. First, the conclusion assumes that the only available methods for selecting or retaining judges are elections or appointments. Second, the syllogism does not address potential shortcomings in appointment systems that interfere with the judges’ abilities to uphold the rule of law or that create other problems not found in elective systems. In other words, appointed judges may also be unable to uphold the rule of law and fulfill their constitutional roles for different reasons (because independence from the electorate is a necessary, but not sufficient condition) or they may suffer from other problems that elected judges do not. For example, Professor Geyh would probably agree that judges must be independent of the other branches to uphold the rule of law and fulfill their constitutional duty, and that judges subject to re-appointment or re-confirmation are not independent of the other branches. The jump is to suggest that this syllogism would lead to the conclusion that judges should not be re-

184. Geyh, *supra* note 8, at 625.

185. See Sutton, *supra* note 122, at 702-03 (“There is no such thing as a nondemocratic approach to picking American judges . . . [Federal] judges still must be selected at the outset by office holders who obtained a majority, not a minority, of votes.”).

appointed or re-confirmed.

It may be useful to construct a syllogism similar to Geyh's but slightly different, that attempts to prove the conclusion within the conclusion:

Major Premise: Judges must not consider the retention impact of a decision if judges are to uphold the rule of law and fulfill their constitutional roles;

Minor Premise: Judges subject to re-election, particularly judges likely to encounter high-salience, competitive elections,¹⁸⁶ are more likely than other judges to consider the retention impact of their decisions;

Conclusion: Therefore, judges subject to re-election are less likely than other judges to uphold the rule of law and fulfill their constitutional roles.

Here again, the syllogism is invalid, because the conclusion does not follow from the premises. There may be different ways that other judges fail to uphold the rule of law and fulfill their constitutional roles—arbitrary decisions or decisions based on the judges' own ideological preferences, for example. But let's put that aside for present purposes.

Even if the argument were valid, it is not necessarily sound, because both the major premise and the minor premise are subject to dispute. Potential attacks against the major premise have been discussed above—accountability advocates suggest that judges who consider the

186. Election opponents have noted with alarm the increasing competitiveness and publicity of judicial elections generally. See Pozen, *supra* note 28, at 267-68, 307-08. Election opponents, who presumably accept the major premise in this syllogism, argue that, as elections become more politicized, the public will lose respect for and confidence in the judiciary. *Id.* at 295. But it is not clear to me that the "new era" of judicial elections is the cause—rather than an effect—of the public's perception of judging as a political action. It may be highly controversial and well-publicized decisions themselves, or controversial publicized federal court appointments, that are leading to the public's new concept of judging, and that are in turn *causing* elections to be more partisan, more politicized, more contested, and more salient. See Croley, *supra* note 116, at 788. In other words, it might be that, as a legal realist concept of judging permeates our culture generally and judging comes to be seen as a largely political enterprise, elections are becoming more salient because voters are becoming less enchanted with judicial decisional independence. If society as a whole is coming to view judging as a political enterprise, then competitive elections are neither the cause of the attack on judicial decisional independence nor the sole vehicle through which decisional independence may be attacked. Reappointments and retention elections provide a vehicle for the attack as well, and we would expect to see these vehicles become increasingly politicized in the decades to come.

retention impact of their decisions are *more* likely, rather than less likely, to fulfill their constitutional roles.¹⁸⁷

But what is often overlooked is that the syllogism's minor premise—that elected judges are more likely to take the retention impact of their decisions into account when deciding cases—may be assailable, too. Empirical data show that judges subject to *any* retention mechanism appear to take account of retention agents' preferences in making decisions. The data also show that the minor premise is accurate, at least for now, inasmuch as judges retained through elections appear to be more influenced by retention-agent preferences than judges retained through other mechanisms.¹⁸⁸ But logic does not demand that this be so. Instead, the reason appears to be more historical and conventional. Accordingly, changing conventions would upset election opponents' presumed preference for reappointment retention systems over elective retention systems.

B. The Current Convention of Retention

Those who champion independence in the selection/retention debate have generally directed their criticisms at judicial elections, despite the potential for reappointment or reconfirmation schemes to intrude on judicial independence in precisely the same way that has drawn the ire of election opponents.¹⁸⁹ Anti-election commentators often make unwarranted assumptions that (1) states that abandon judicial elections will switch to life tenure;¹⁹⁰ and/or (2) judges in states with periodic non-elective retention mechanisms, such as reappointment or reconfirmation, will inevitably retain their seats on the bench.

The first assumption is unwarranted because it simply does not comport with the data. Twenty-eight states use some form of

187. This is the dispute discussed in the prior section in which independence advocates stake their claim on the majoritarian difficulty and accountability advocates rest on judges' roles as policymakers. To the extent that commentators on both sides agree that majority preferences are sometimes, but not always, a legitimate decisional consideration, the battle becomes how to best encourage a proper consideration of majority preferences while limiting the impact of improper consideration of those preferences, and that is the subject of the proposal in the next section.

188. See *supra* notes 95-97.

189. See, e.g., Croley, *supra* note 116, at 743-48 (distinguishing the majoritarian difficulty as applied to elective and appointed judiciaries, apparently without considering that most appointive state judiciaries are not life tenured). In a recent article, David Pozen noted the potential loss of independence from non-elective retention schemes. See Pozen, *supra* note 40, at 2118.

190. See, e.g., Geyh, *supra* note 8, at 638 (“Without elections, re-selection becomes irrelevant (unless one adopts a Virginia or South Carolina model, with legislative reappointment).”).

appointment to select their judges.¹⁹¹ Of those, sixteen retain their judges by popular retention election. Of the remaining twelve that do not use popular elections, nine subject their judges to some other form of periodic retention mechanism—only three give their high court judges a form of life tenure.¹⁹² Historically, then, states that have chosen to select their judges without subjecting them to popular elections have nevertheless required their judges to stand for periodic retention.

The second assumption—that judges who are subject to non-elective retention processes will necessarily retain their seats—is also unwarranted. The assumption rests on the current convention in favor of retention; in other words, most executives or legislatures making retention decisions are predisposed to retain judges up for retention.¹⁹³ But one could easily posit, and indeed one need not look too far back into history to uncover, an era where the conventions on reappointment differed quite dramatically from current conventions—the Declaration of Independence complains that King George “made judges dependent on his Will alone, for the tenure of their offices.”¹⁹⁴ If current reappointment conventions were to change, independence proponents should argue just as vehemently—or perhaps even more vehemently¹⁹⁵—against reappointment retention schemes as they do against judicial elections.

And it may be that current conventions of reappointment are shifting.¹⁹⁶ In New Jersey, for example, Governor Christie has

191. See Appendix. For this figure, I am combining those states who select their high-court judges by “merit selection” with those states that use some other executive or legislative appointment scheme.

192. See *id.*

193. See generally Shepherd, *supra* note 103, at 171 (“[J]udges who are reappointed enjoy the greatest job security.”); Pozen, *supra* note 28, at 319 (noting that the “state political branches have often operated on a strong presumption of reappointment”); see also Dimino, *supra* note 29, at 456-57 (“From an independence perspective, it makes no difference whether the re-selection is done by popular election or reappointment; in both cases, judges are made answerable—accountable—for their decisions to an institution that is concerned with political results far more than with legal principle.”).

194. DECLARATION OF INDEPENDENCE para. 11.

195. Dependence on a single executive or small body for job security presumably threatens independence more than dependence on the public as a whole, because judges would presumably be able to more accurately assess the ideological preferences of a particular individual than they would measure the changing winds of popular opinion.

196. John B. Wefing, *Two Cheers for the Appointment System*, 56 WAYNE L. REV. 583, 605 (2010) (noting that, until recently, no sitting New Jersey Supreme Court member had been denied reappointment since the adoption of the constitution in 1947); Diana B. Henriques, *Top Business Court Under Fire*, N.Y. TIMES, May 23, 1995, at D1 (stating that Delaware governor, in declining to reappoint judge, “broke sharply with a tradition stretching back more than half a century of letting well-regarded judges stay on the bench”).

announced his intention not to reappoint “activist judges.”¹⁹⁷ He has already refused to reappoint two New Jersey Supreme Court justices, the first in a move that was “widely criticized as undermining judicial independence,”¹⁹⁸ and he has hinted that the chief justice’s position may be in jeopardy in June 2014.¹⁹⁹ In Arizona, the senate passed a bill that would have eliminated retention elections in favor of periodic senate reconfirmation, not as a means of *depoliticizing* the retention process (that is, not because retention elections created too much accountability at the cost of independence), but for precisely the opposite reason; the bill’s sponsor said that retention elections resulted in *too few* of the judges being voted off of the court, and hoped that senate reconfirmation would result in more judges losing their seats.²⁰⁰ The presumed preference of election opponents for non-elective retention schemes is not that non-elective retention schemes are *inherently* better or *inherently* less independence-threatening—it is a function of current convention.²⁰¹

The same is true of retention elections. There is a widespread convention of retaining judges in retention elections, currently at about a 99% retention rate.²⁰² Some independence proponents have lauded retention elections as a means of increasing judges’ independence relative to contested elections, while many election advocates have

197. Charles Stile, *Christie Urged to Heed the “Framers,”* THE RECORD L01, May 11, 2010. Of course, Governor Christie’s actions might mark merely an anomaly rather than a convention shift. But the point is not that reappointment conventions necessarily *are* changing, only that, unless there are constraints on the retention agents’ exercise of their power, they *could* change, exposing any argument that reappointments are an inherently better system than electoral retentions.

198. Caroline E. Oks, *Independence in the Interim: The New Jersey Judiciary’s Lost Legacy*, 36 SETON HALL LEGIS. J. 131, 134 (2011); *see also* Richard H. Steen, *Preserving Judicial Independence*, NEW JERSEY LAWYER 5 (Aug. 2010). After Christie declined to reappoint Justice John Wallace, presumably over ideological disagreements, the Democratically-controlled New Jersey Senate rejected two Christie nominees to the court. In August 2013, Christie announced that he would not reappoint a conservative justice to the court because he believed the Democrats on the New Jersey Senate would have denied her reconfirmation. *See* John Schoonejongen, *Fallout Continues from Gov’s Refusal to Renominate Justice*, BRIDGEWATER COURIER NEWS 4 (Aug. 15, 2013). *See also* SHUGERMAN, *supra* note 34, at 4 (noting that “the politics of reappointment . . . can be just as unseemly and corrupt as modern judicial elections,” but that “those pressures are also less visible”).

199. Charles Stile, *Christie Hints He May Not Renominate Chief Justice*, NORTHJERSEY.COM (June 3, 2012), http://www.northjersey.com/news/opinions/156882245_Christie_hints_he_might_not_renominate_chief_justice.html?page=all.

200. Howard Fischer, *Legislators Changing Selection Process for Judges*, YUMA SUN, Mar. 7, 2011, <http://www.yumasun.com/articles/judges-68260-system-gould.html>.

201. *See* Pozen, *supra* note 28, at 284 (“Appointive systems in which the governor or the legislature has the power to retain judges will suffer from the majoritarian difficulty to the extent that judges believe their reappointment odds hinge on the majority’s view of their decisions.”).

202. Aspin, *supra* note 175, at 208, 210

suggested that retention elections do not result in enhanced accountability.²⁰³ But the strong retention convention appears to be weakening.²⁰⁴ And every time a justice is removed through a highly public retention election—for example, Rose Bird,²⁰⁵ Penny White,²⁰⁶ or, more recently, three Iowa Supreme Court justices²⁰⁷—retention elections are heavily criticized as impermissible intrusion on the judiciary’s independence. The irony is that retention elections serve a purpose only to the extent that they can, at least on occasion, allow the public to remove from the bench those judges with whom it is dissatisfied, but that is also the point at which retention elections are most heavily criticized. Or, as Professor Geyh succinctly put it, “retention elections ‘work’ only when they do not.”²⁰⁸

As there are more and more highly public instances of judges being denied reappointment or losing retention elections based on their decisions, judges’ decisional independence is likely to be reduced even if these publicized retention denials are largely anomalies. For those concerned about the independence-threatening effects of retention schemes, what matters is not the likelihood that a judge will *actually* be removed from office, but rather the likelihood that a judge’s concern for being removed from office affects her decision. Retention concerns may enter into the decision calculus of risk averse judges, even if they believe it to be relatively unlikely that they will be denied retention—for example, it is not difficult to imagine that, as a result of Governor Christie’s actions, judges in New Jersey will consider the impact of their decisions on their retention prospects. In addition, highly public anecdotes of judicial removal may lead a judge to believe that her seat is more at risk than it actually is. The more that the judge believes a particular decision is likely to impact retention chances, the more likely the judge is, whether consciously or unconsciously, to include this factor in the decisional analysis.²⁰⁹

203. James Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 399 (2011).

204. See generally *id.*

205. Roger Cossack, *Beyond Politics: Why Supreme Court Justices Are Appointed for Life*, CNN.COM, July 13, 2000, <http://archives.cnn.com/2000/LAW/07/columns/cossack.scotus.07.12/>; *Voters and Judges*, BILL OF RIGHTS IN ACTION (Constitutional Rights Foundation, Los Angeles, Cal.), Spring 1998, at 2, available at http://www.crf-usa.org/bria/bria14_2.html.

206. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 644 (2009).

207. See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/04/us/politics/04judges.html?emc=eta1>.

208. Geyh, *supra* note 8, at 639.

209. Judge Otto Kaus declared that he could not be sure that an upcoming retention election did not influence his decision in a particularly controversial case. He likened the looming prospect

All of this is not to suggest that one opposed to judicial elections must be equally opposed to reappointment retention schemes. Conventions matter, and the judicial elections debate reflects an attempt to balance independence and accountability—when judges gain decisional independence they lose decisional accountability, at least as the terms are most commonly applied in the judicial elections debate. Moreover, judges in a system with a general convention of retention are less likely to perceive that any given decision will result in their non-retention, and it is the judges' perceptions that result in the independence necessary for them to decide cases contrary to majority preferences. Thus, one might conclude that a system with a strong convention for retention, but the potential of non-retention still available, represents the right balance of independence and accountability. But, if one believes that judges' decisions should *never* be based on retention prospects or that position-threatening decisional accountability is *always* bad, then there should not be in place any retention system in which retention may be denied based on judges' decisions. These election opponents should not be opposed merely to judicial elections as a retention system, but should instead be opposed to *any* retention system; for true independence advocates, only life tenure will do.²¹⁰ Focusing the opposition on elective systems rather than on any kind of periodic retention is shortsighted.

C. Other Retention-Related Factors Affecting Independence and Accountability

If the key concerns in the judicial elections debate relate to the impact of judicial retention mechanisms on the judges' independence

of reelection to shaving with an alligator in the bathtub—you try your best to ignore it, but you never forget that it is there. Chemerinsky, *supra* note 57, at 735.

210. One still may desire checks on judicial *behavior*, even with decisional independence. Even independence advocates want to prevent a judge from accepting bribes, for example. But standardless retention, in which the retention agent retains total discretion as to the retention decision, cannot satisfy the one who opposed elections because they cause judges to incorporate retention analysis into the judges' decisional processes. If independence advocates would be unhappy with reappointment decisions like Governor Christie's (and, of course they would), they should advocate life tenure or else specific constraints on the ability of the retention agent to decline retention. See also Reznik, *supra* note 60, at 610 ("A presumption, rather than a promise, of reappointment . . . may mitigate the problems [with excessive independence], but the bases for rebutting that presumption have yet to be clearly articulated."). The same is true for the behind-closed-doors work of a judicial nominating committee who exercises reappointment power or has a role making reappointment recommendations. See, e.g., Henriques, *supra* note 196 (describing nominating commission's decision not to recommend judge for reappointment, noting that judge had ruled against a Skadden Arps client and that a Skadden partner sat on the commission).

and accountability, there are other factors informing the debate. Many factors impact independence and accountability by influencing judges' behavior and decision-making processes on the bench. If we view retention-related independence as the tendency of a judge to incorporate, whether conscious or subconsciously, the likely effect of any given decision on the judge's chances of remaining on the bench, then there are two ways to increase retention-related independence without eliminating elections as a selection or retention mechanism. The first is to lengthen judicial terms, and the second is to impose tenure limits.

1. Term Length

Because the heart of the debate about judicial elections centers on retention, term length is a critical component of the debate.²¹¹ All else being equal, the longer the term length, the more independent the judge will be. At the extremes, this is easy to see—a judge subject to partisan elections with thirty-year terms would likely behave more independently than a judge subject to gubernatorial reappointment every three years, at least on average over the course of the thirty years.

Empirical studies show that judges become more likely to implement the preferences of their retention agents as the time for a retention decision draws nearer. Thus, judges decide cases more independently of their retention agents' policy preferences at the beginning of their terms, and lose some independence as a retention event approaches.²¹² Longer term lengths decrease retention events over any set period and, consequently, longer terms increase judicial independence from retention agent preferences.²¹³

Thus, one way to increase judicial independence while retaining popular judicial elections would be to lengthen judges' terms. Currently, non-elective states tend to have longer term lengths than elective ones,

211. See generally Hasen, *supra* note 29, at 1330 (discussing “the critical issue of the time-frame for renewal” and noting that “the best way to assure judicial independence is to extend the term of judges indefinitely”); Dimino, *supra* note 7, at 349 (noting that the “threat to independence is generated primarily by short judicial tenures”).

212. See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004) (presenting study of Pennsylvania trial court judges subject to retention election, and concluding that the “judges become significantly more punitive the closer they are to standing for reelection”).

213. Brace et al., *supra* note 105, at 1291 (noting that courts with longer term lengths in a gubernatorial/legislative retention system are more likely to hear challenges to abortion statutes than courts with shorter term lengths, indicating, presumably, a positive correlation between term length and independence).

and partisan-elective states have the shortest term lengths.²¹⁴ There is no reason this must be so. Presumably, the reason is because of the retention-related accountability concerns: accountability proponents argue that elected judges should stand for reelection often to guard against ideological drift and to enhance the judges' accountability to the electorate.²¹⁵ But proponents of independence need not focus solely on eradicating judicial elections in order to increase decisional independence (which would, in turn, decrease retention-related accountability). Term length is one area to which election opponents could turn as an alternative.²¹⁶

2. Tenure Limits

Another means of increasing decisional independence without eliminating elections is through tenure limits. Tenure limits would increase judicial decisional independence because a judge ineligible for retention on the bench has no incentive to issue decisions that will please retention agents.²¹⁷ A judge who has life tenure is the most extreme example—the judge has a single term limit. Judges who take office a given number of years away from a mandatory retirement age have an effective, though not explicit, tenure limit. If the mandatory retirement age is 70, and the judge takes the bench at age 50 with five year terms, the judge has an effective four-term limit and, all else being equal, we would expect the judge to behave more independently during her last term than during the previous three terms.

Once again, the empirical data indirectly back up the claim that tenure limits increase independence. Although no states currently use explicit limits on the number of terms a judge may serve, empirical research has shown that judges who are ineligible for retention due to mandatory retirement display no propensity to implement the policy preferences of their states' retention agents.²¹⁸ Thus, judges who know

214. Choi et al., *supra* note 26, at 299.

215. See Dubois, *supra* note 5, at 35.

216. Geyh, *supra* note 8, at 640; National Summit on Improving Judicial Selection, *Call to Action*, 34 LOY. L. A. L. REV. 1353, 1355 (2001). In addition, term length may impact the quality of judges. See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1100 (2007) (“[T]erm length affects who wants to come on the bench and who will stay there.”).

217. See Pozen, *supra* note 28, at 283 n.81.

218. See, e.g., Shepherd, *supra* note 104, at 1625 (presenting empirical research demonstrating that appointed judges tend to vote in ways to curry favor with their retention agents, but that this “strategic voting . . . is almost nonexistent among judges with life tenure or those facing mandatory retirement”); Shepherd, *supra* note 103, at 169 (showing that decisions of judges of all retention methods are influenced, to some degree, by the political stance of retention agents, but, where the

they will not face retention render decisions less influenced by retention agents' preferences than judges subject to retention.

These kinds of limits are not without their detractors. For example, the National Summit on Improving Judicial Selection issued a "Call to Action," in which it recommended that states should increase term lengths, but followed up this recommendation by stating that "[t]erm limits, whatever their merits for representative positions, are not appropriate for judicial office."²¹⁹ The Summit offered no explanation for this assertion, and it very well may have been self-serving—the summit consisted of the chief justices of seventeen states' high courts and others selected by those chief justices.

One commentator has argued that "[t]he major fallacy in the argument in favor of judicial term limits is the assumption that, like state senators and mayors, judges are political officials."²²⁰ He went on to argue that, "[e]ven if [he] agreed that judges should be less independent and more responsive to the will of the majority . . . judicial term limits would not achieve that result."²²¹ But this is exactly the point. The argument for term limits in this Article is that term limits will enhance—not decrease—judicial independence by allowing judges during their final terms to render decisions absent retention-related constraints. Because judges must sometimes reach decisions that may be unpopular, term limits protect them against a retention incentive to avoid such decisions.

V. A PROPOSAL

Having established that retention, rather than selection, is the driving force in the independence/accountability debate, and that term length and term limits can enhance independence even in elected systems, we can propose a system that takes advantage of term length and term limits to minimize the majoritarian difficulty while allowing for retention-related accountability and enough turnover to ensure that the court's ideology is consistent with—or at least follows closely behind—that of the populace. Such a system may serve to better balance the values of each side in the debate. My proposal is to use a

judge is not eligible for retention (has reached mandatory retirement age in the 37 states that impose mandatory retirement), retention agents' politics play no or a very slight role).

219. National Summit, *supra* note 216, at 1355.

220. Marshall A. Snider, *Term Limits for Judges: A Solution in Search of a Problem*, 37 COLO. LAW. 43 (Feb. 2008).

221. *Id.*

two-term system to fill state high courts,²²² in which high court judges sit for an initial term of relatively short duration (for example, five or six years) followed by a longer, final term (for example, ten or twelve years), after which the judge will be ineligible for further retention.

A. Strengths

This proposal reflects an attempt to provide some level of the kind of accountability sought by election proponents while reducing concerns related to the majoritarian difficulty. Relative to a pure contested elective retention system, this proposal offers increased independence to the judiciary to protect the rights of unpopular litigants or to strike down popular legislation. Relative to a lifetime appointment system or a single-term system (both of which offer the potential of prospective accountability, but offer no retention-related accountability), this proposal offers more retention-related decisional accountability. This proposal also offers prospective accountability by allowing for (but not requiring) popular elections, as well as the ability to turn the court over more frequently than in life-tenure or single-term systems, which in turn increases “the political accountability of a branch of the . . . government that has become a major policy-making institution.”²²³

For election advocates, this proposal offers some protection against ideological drift, campaign misrepresentations, or unanticipated issues, and allows the retention agent to more accurately assess the judge’s ideologies by reviewing an actual body of work on the relevant court instead of merely extrapolating from other information.²²⁴ Short single terms could offer some protection against ideological drift while providing relative independence, but the complete absence of any retention-related accountability makes them unlikely to win the support of judicial elections proponents, and short single terms would likely diminish the quality of the judiciary by eliminating experience on the

222. This proposal, like the rest of this Article, is directed toward state high courts. As Jed Shugerman has pointed out, “[a]ppellate courts engage in a combined role of adjudication, lawmaking, and general interpretation, so it makes more sense under democratic theory for these judges to be more accountable to the public.” SHUGERMAN, *supra* note 34, at 60. The policymaking role of the courts is even more pronounced in the highest courts, especially where those courts have discretionary jurisdiction.

223. PAUL D. CARRINGTON & ROGER C. CRAMTON, REFORMING THE COURT 8 (2006) (“The popular will of an electorate that is guaranteed ‘a Republican Form of Government’ is increasingly governed by a non-accountable gerontocracy.”).

224. See Calabresi & Lindgren, *supra* note 10, at 845-46 (noting that “some of our most liberal Justices were appointed by surprised Republican Presidents and some of our more conservative Justices were appointed by surprised Democrats”).

court and discouraging qualified lawyers from seeking judgeships.

Moreover, through properly staggered the terms, this proposal allows states to maintain a majority of the court independent from retention-related pressures, which should reduce concerns about the majoritarian difficulty. Because judges are retained more often than not—the lowest retention rate is in states with partisan elections, and that rate is about 69 percent²²⁵—the terms could be staggered so that, under this system, the court would almost always be composed of a majority of members who are ineligible for retention, giving a majority of the court enhanced retention-related decisional independence.

In sum, the proposal provides election opponents with some of the independence that they seek, election proponents with some of the accountability that they seek, but gives neither side everything that it seeks.

B. Potential Criticisms and Responses

The proposal outlined above is not without potential weaknesses. The most obvious one is the possibility that both sides would be left dissatisfied, with accountability advocates maintaining that it provides insufficient retention-related accountability and independence advocates arguing that it provides insufficient independence from retention-related decisional pressures. This is most likely to be the case between two groups: (1) accountability advocates who argue that decisional independence is not necessary for the courts' rights-protection work or for judicial review, and (2) independence advocates who contend that majority preferences are never, or almost never, appropriate decisional influences at the state supreme court level. For these extreme views, an agreeable balance is impossible, because there is no room for compromise.

There are a few additional potential criticisms of this proposal. First, perhaps fewer candidates would be willing to leave stable, lucrative, or otherwise rewarding practices to take a spot on the bench with a fixed term.²²⁶ But, under this proposal, and depending on the length of terms selected, the average tenure of judges in most elective states may very well remain stable or even increase.²²⁷ Thus, would-be

225. See BONNEAU & HALL, *supra* note 5, at 84.

226. Hamilton thought this would be the case. In THE FEDERALIST NO. 78, he argued that “a temporary duration in office . . . would naturally discourage [qualified lawyers] from quitting a lucrative line of practice to accept a seat on the bench.”

227. If we use the six and twelve year terms used in the example above, if we assume that reelection rates would hold at roughly two-thirds, and if all judges served their full terms, then the

judges in these states are unlikely to be deterred by the inability to serve a third term after, for example, fifteen or eighteen years on the bench. In addition, there is probably sufficient incentive to serve through the additional prestige and reputational enhancement that comes with having served as a justice on the state's highest court.

Another potential drawback is that states may lose some judicial experience.²²⁸ Even in states where the mean tenure is relatively low, there may be a long-tenured judge who is able to provide advice and guidance to newer judges. Under the proposal presented here, no judge would be able to serve for longer than the two-term limit (eighteen years in the six- and twelve- year example used above). Oklahoma's chief justice, discussing term limits on judges, raised this concern, claiming that he was a "better" judge in his eighteenth year than in his tenth.²²⁹ That said, and, again, depending on the length of terms used, the experience may not be significantly different from where it stands now, at least in most states.

There could also be some decline in productivity (and, potentially, a corresponding increase in opinion "quality") in election states. One empirical study found that judges retained by reappointment pen fewer opinions than judges retained through elections, but that those opinions are cited more often by courts outside of the state (which the study used as a proxy for opinion quality).²³⁰ It is not clear whether re-elected judges ineligible for re-election would become less industrious and/or

mean tenure under this proposal would be fourteen years (two judges would serve eighteen years for every one who served six). This is significantly higher than the current mean tenure in partisan elected states. See Choi et al., *supra* note 26, at 294 (showing a mean tenure for *active* judges of 6.7 in partisan election states, 7.1 in non-partisan election states, 9.2 in appointment retention states, and 10.0 in retention election states); see also Todd A. Curry & Mark S. Hurwitz, *Does Risk Vary, Institutional Effects on the Careers of State Supreme Court Justices*, (working paper) available at <http://www.toddacurry.com/data/Risk.pdf> (showing a mean tenure for departed judges of 8.3 years in partisan election systems, 8.7 years in non-partisan election systems, 9.3 years in appointment retention systems, and 11.3 years in retention election systems). Some judges may retire or die prior to their term expiring, so the mean under the proposal would be somewhat less than fourteen years. Nevertheless, it is likely to be higher than the current mean in most systems.

228. In THE FEDERALIST NO. 78, Hamilton offered judicial experience as a secondary reason for life tenure of judges, when he noted that the "precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them."

229. Justice Taylor also claimed that "[j]udging is a craft" and an "art." Barbara Hoberock, *Term Limits for Judges a Bad Idea, Oklahoma's Chief Justice Says*, TULSA WORLD, Feb. 4, 2012, http://www.tulsaworld.com/news/article.aspx?subjectid=336&articleid=20120204_16_A15_CUTLI N246250. If, by "better," Justice Taylor meant more efficient, then few would disagree that this is objectively better. But if Justice Taylor instead meant that his ideologies and interpretive methods had changed over time, this might be exactly the drift that concerns election advocates.

230. Choi et al., *supra* note 26, at 326-27.

more thoughtful in their opinions (that is, could start behaving more like life-tenured judges in this respect), but the possibility exists.

In addition, this proposal may result in marginally less decisional independence than a life-tenure system or a system offering tenure at least through the judge's working years, even for judges who are ineligible for retention. Although the judge will no longer have an incentive to base a decision on the potential effect of the decision on the judge's retention chances, the judge may be concerned about pleasing potential employers after the judge has left the bench. But this risk seems relatively low, for at least two reasons. First, the judge's position on the state's high court makes the judge likely to be highly sought-after in private practice, both by clients and by potential employers. Thus, the judge is unlikely to be very concerned about potentially alienating any particular potential client or employer with a decision or opinion. Second, if the terms added up to eighteen years (a six-year term followed by a twelve-year term), judges who are retained for a second term (the only ones that are at issue for purposes of this concern) are likely to be at or close to retirement age, or at least an age where active full-time employment is not a necessity. Thus, while the proposal would have some detractors, the criticisms seem relatively minor, especially for the gains in independence. Of course, a jurisdiction adopting this system from a short-term partisan-election retention system would lose some retention-related accountability, but it may be worth it to ameliorate—though not completely eliminate—the majoritarian difficulty.

VI. CONCLUSION

The judicial elections debate has raged for many years, and its resolution does not appear imminent. Nevertheless, this Article has endeavored to inform the debate in several ways. First, the Article has attempted to show that the core concerns in the judicial elections debate—*independence and accountability*—relate more to the way judges are retained than the way that they are selected. Building on this, this Article suggests that any system of retention in which the retention agent is able to deny retention to a sitting judge based on the judge's decisions gives rise to the same independence concerns raised by election opponents, though not necessarily to the same degree. Finally, because the thrust of election opponents' arguments go to retention procedures, this Article identifies two additional retention-related considerations, other than the mechanism for retention, that inform the accountability/independence debate: term length and tenure limits. This

Article uses these two additional considerations to propose a new retention system, employing a relatively short initial term followed by a longer, and final, second term, in order to better balance retention-related decisional independence and retention-related accountability.

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**APPENDIX – JUDICIAL SELECTION AND RETENTION METHODS AND
TERM LENGTHS**

State	Selection	Retention	Term
Alabama	PE	PE	6
Alaska	MS - G	RE	10
Arizona	MS - G	RE	6
Arkansas	NPE	NPE	8
California	G	RE	12
Colorado	MS - G	RE	10
Connecticut	MS - GL	MS - GL	8
Delaware	MS - GL	MS - GL	12
Florida	MS - G	RE	6
Georgia	NPE	NPE	6
Hawaii	MS - GL	JNC	10
Idaho	NPE	NPE	6
Illinois	PE	RE	10
Indiana	MS - G	RE	10
Iowa	MS - G	RE	8
Kansas	MS - G	RE	6
Kentucky	NPE	NPE	8
Louisiana	PE	PE	10
Maine	GL	GL	7
Maryland	MS - GL	RE	10
Massachusetts	MS - GE	Tenure - 70	N/A
Michigan	NPE	NPE	8
Minnesota	NPE	NPE	6
Mississippi	NPE	NPE	8
Missouri	MS - G	RE	12
Montana	NPE	NPE	8
Nebraska	MS - G	RE	6
Nevada	NPE	NPE	6
New Hampshire	GE	Tenure - 70	N/A
New Jersey	GL	GL	7

Mean Terms		
Selection	Number	Mean Term
PE	8	8.5
NPE	14	7.428571
MS (Any)	20	8.7
G, L, GE, or GL	5	9.6
	47	
Retention	Number	Mean Term
PE	5	8
NPE	14	7.428571
RE	19	8.631579
MS, G, L, or GL	9	9.555556

New Mexico	PE	RE	8
New York	MS - GL	MS - GL	14
North Carolina	NPE	NPE	8
North Dakota	NPE	NPE	10
Ohio	PE	PE	6
Oklahoma	MS - G	RE	6
Oregon	NPE	NPE	6
Pennsylvania	PE	RE	10
Rhode Island	MS - G	Tenure - Lf	N/A
South Carolina	L	L	10
South Dakota	MS - G	RE	8
Tennessee	MS - G	RE	8
Texas	PE	PE	6
Utah	MS - GL	RE	10
Vermont	MS - GL	L	6
Virginia	L	L	12
Washington	NPE	NPE	6
West Virginia	PE	PE	12
Wisconsin	NPE	NPE	10
Wyoming	MS - G	RE	8

PE = Partisan elections.

NPE = Non-partisan elections.

L = Legislative appointment.

G = Gubernatorial appointment.

RE = Retention elections.

JNC = Judicial nominating commission.

**The idiosyncrasies in some states' systems create categorization difficulties, so that a chart such as this one includes some judgment calls. As one such example, New Jersey's high court justices are reappointed after an initial seven-year term, but once a justice is reappointed, she has tenure until age 70. The chart does not capture this nuance.