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# Judicial Selection and the Search for Middle Ground

Charles G. Geyh

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# JUDICIAL SELECTION AND THE SEARCH FOR MIDDLE GROUND

*Charles Gardner Geyh\**

## INTRODUCTION

This Article seeks to transcend perennial election versus appointment debates—including debates over campaign finance and the impact of “dark money”—by taking a closer look at why judicial selection is a contentious mess and discussing how it might be fixed. First, I present the case for elective and appointive systems. Second, I show that the arguments for each system are exaggerated or flawed. Third, I explore why it has been hard for proponents of each system to perceive and acknowledge those exaggerations and flaws, and propose ways to narrow the divide. Although the divide can and should be narrowed, I conclude that it cannot be eliminated altogether. Ultimately, which system is “best” will unavoidably turn on which selection system’s core values take precedence in a given state at a given time.

## I. THE ARGUMENTS

There are at least five selection systems that states employ (not counting sub-variations): gubernatorial appointment; legislative appointment; partisan contested election; non-partisan contested election; and merit selection, with or without retention elections.<sup>1</sup> There are perennial skirmishes over the relative merits of these five systems, but the entrenched battle line is drawn between elections and appointments, and whether contested popular elections ought to be the primary means by which judges are chosen. In effect, that pits gubernatorial appointment and merit selection systems against partisan and non-partisan election systems (with the two states that still

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\* John F. Kimberling Professor of Law, Indiana University Maurer School of Law. I would like to thank Priya Purohit for her research assistance and Rita Eads for her administrative support.

1. Merit selection systems feature a nominating commission that screens the pool of judicial aspirants and presents the governor with a short list of nominees, from which the judge makes an appointment. In many jurisdictions, judges so selected subsequently run unopposed in periodic retention elections, and are permitted to serve for an additional term if they garner majority (or in some states, supermajority) support.

employ legislative appointment processes making infrequent bids to join the fracas).

### A. *The Role of the Judge in American Government*

#### 1. *The Brief for Appointed Judiciaries*

The American form of litigation, in which adversaries square off against each other in front of a judge who officiates the contest by applying a preexisting body of rules to the end of declaring a victor, conjures an obvious sports analogy. The American Bar Association's Division on Public Education explains that "[j]udges are like umpires in baseball or referees in football or basketball."<sup>2</sup> "Like the ump," the ABA elaborates, judges "call 'em as they see 'em, according to the facts and law—without regard to which side is popular (no home field advantage), without regard to who is 'favored,' without regard for what the spectators want, and without regard to whether the judge agrees with the law."<sup>3</sup> In his 2005 Senate confirmation testimony, Chief Justice John Roberts likewise analogized judges to umpires, for the purpose of highlighting the limited role judges play in adjudication. "Umpires don't make the rules," then-Judge Roberts cautioned; rather, "they apply them."<sup>4</sup> Thus, in his view, "The role of umpire and judge is critical," because "[t]hey make sure everybody plays by the rules, but it is a limited role."<sup>5</sup>

If judges are like umpires, then subjecting judges to popular election is incompatible with their role. In 1996, U.S. Supreme Court Justice John Paul Stevens gave a speech in which he likened the practice of electing judges to "allowing football fans to elect referees"—a practice that he condemned as "profoundly unwise."<sup>6</sup> If we want umpires to "call 'em as they see 'em," then letting the fans decide whether an ump keeps his job is a bad idea because it will motivate umpires to make popular calls, rather than correct ones. The same logic applies to judges. If we want judges to "make sure everybody plays by the rules," then subjecting judges to popular election is a bad idea because it will motivate them to disregard the rules to avoid unpopular out-

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2. *How Courts Work*, ABA, [http://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/judge\\_role.html](http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/judge_role.html).

3. *Id.*

4. *Chief Justice Roberts Statement—Nomination Process*, UNITED STATES COURTS, <http://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process>.

5. *Id.*

6. *Justice Stevens Criticizes Election of Judges*, WASH. POST (Aug. 4, 1996), [https://www.washingtonpost.com/archive/politics/1996/08/04/justice-stevens-criticizes-election-of-judges/e2d1eb58-75c2-4165-bec9-e4a6b680c2cc/?utm\\_term=.4cdf31eeeb07](https://www.washingtonpost.com/archive/politics/1996/08/04/justice-stevens-criticizes-election-of-judges/e2d1eb58-75c2-4165-bec9-e4a6b680c2cc/?utm_term=.4cdf31eeeb07).

comes that could jeopardize the judges' tenures. Social science data support the conclusion that impending elections influence the decisions judges make. One Pennsylvania study found that judges running for reelection imposed sentences on criminal defendants that were, on average, several months longer than at other times.<sup>7</sup>

## 2. *The Brief For Elected Judiciaries*

Eighteenth century civics imagined independent judges aloft on benches and clothed in ermine robes symbolizing their purity of purpose, who issued crystalline divinations of law that sparkled unobscured by baser influences that cloud the thinking of mere mortals. We have learned some things in the intervening centuries that cast doubt upon this idea.

First, American judges are not above the political fray, but part of it. They are powerful people, whose decisions are fraught with policy implications that affect our lives, liberty, and property. Judges breathe meaning into ambiguously worded laws. In the areas of torts, contracts, and property, they make the common law. Their interpretations of legislative enactments can take statutes in directions their makers never intended. Their interpretations of constitutions can obliterate the validity of statutes altogether. Their decisions have prompted vituperative partisan debate, sparked generations of political protest, and catalyzed the Civil War.

Second, the law is not mathematics, in which case outcomes are dictated by mechanistic application of clear rules to known facts. The reason parties litigate cases all the way to the Supreme Court is because the relevant facts and law are uncertain enough to support differing results. Hence, the rulings judges issue in difficult cases and the resulting legal policies judges make, are not science, but art, that require the exercise of discretion and judgment.

Third, judges are people, who have varying perspectives on the world that they develop—perspectives that guide their moral compass, inform their conception of justice, and fuel their ideological inclinations. Those perspectives are influenced by their upbringing, education, life experience, religion, race, gender, ethnicity, and political affiliation. The evidence is overwhelming that the policy perspectives unelected judges cultivate inform the discretion and judgment they exercise when deciding cases. Bluntly put, independent judges are policy-makers in robes. Political scientists who have generated

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7. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?* 48 AM. J. POLI. SCI. 247, 248 (2004).

and reviewed the data have coined the phrase “myth of legality” to characterize stubborn and persistent adherence to the debunked proposition that independent judges disregard extralegal influences and follow the law.<sup>8</sup> Additionally, many of the same political scientists have developed an “attitudinal model” to show that the rulings judges make are better explained with reference to a judge’s ideological attitudes than operative law.<sup>9</sup> Chris Bonneau and Melinda Gann Hall punctuate the point concisely, “Although it is the modern equivalent of declaring that the emperor has no clothes to say so, politically astute observers fully recognize that the basic political preferences of judges influence their votes.”<sup>10</sup>

Given the inevitability of ideological and other extralegal influences on judicial decision-making, independence from electoral accountability does not free judges to uphold the law; it untethers them to do whatever they please. Insofar as the law has intrinsic meaning, appointed judges are liberated to disregard that meaning and act upon their personal feelings and ideological preferences. Insofar as the law lacks intrinsic meaning, appointive systems dictate that the eye of the elites trumps the eye of the electorate, which is antithetical to the principles of a representative democracy.

Social science data reveal that judges decide cases differently in the shadow of impending elections, which shows that judicial elections work as intended. The specter of future elections influences judges to exercise their judgment and discretion with reference to the policy preferences of the electorate, instead of their own idiosyncratic ideological biases. This state of affairs, in which judges check their own impulses and take the views of their voters into account when making legal policy is democracy in action, and wholly compatible with the rule of law. As Bonneau and Hall conclude:

We think it far better for justices to draw upon public perceptions and the prevailing state political climate when resolving difficult disputes than to engage in the unfettered pursuit of their own personal preferences. In fact, strategic contingencies should bring justices into line with the rule of law rather than negate it.<sup>11</sup>

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8. John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2000).

9. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 73 (1993).

10. CHRIS BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* 14 (2009).

11. *Id.* at 15.

*B. The Particular Merits and Demerits of Elective  
and Appointive Systems*

*1. The Brief for Appointed Judiciaries*

Beyond the core problem that subjecting judges to electoral accountability undermines the umpire-judge's ability to make independent, impartial, and sometimes unpopular calls consistent with the operative facts and law, is the related concern that voters lack the capacity to hold judges accountable in acceptable ways. There are three related problems.

The first problem is competence. Judges parse relevant language in constitutions, statutes, ordinances, administrative rules, and case precedent, to determine, as impartially as possible, what the law requires before applying that law to resolve disputes between parties. That requires specialized legal training and experience. Every state establishes the minimum qualifications necessary for judicial officers and requires that judges of general jurisdiction be lawyers. Without specialized training, voters lack the competence to assess whether judges are doing their jobs well.

A second problem is ignorance. Without legal training to make an independent assessment of whether judicial candidates exhibit the skills necessary to interpret and apply the law competently, voters must rely on their general knowledge of courts and judges, and the more specific information they can glean about a given race. Their general state of knowledge is woeful. One author has summarized the litany of deplorables in an article about voter ignorance in judicial elections:<sup>12</sup> Fewer than fifty percent of Americans could name the three branches of government—fewer, one infamous survey reported, than could name the Three Stooges; two-thirds of the public could not identify a single member of the U.S. Supreme Court and fewer than three percent of American teenagers could identify the Chief Justice; most survey respondents were unable to identify any state judge at any level of their court system; and a majority was unaware that their state even had a constitution.<sup>13</sup>

A third capacity-related problem is apathy. Highly motivated voters might inform themselves sufficiently to overcome incompetence and ignorance barriers, but “highly motivated” does not describe the average voter in judicial races. There is a well-documented “roll-off,” in which an average of twenty-five percent of the voters who appear at

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12. *Id.* at 13.

13. *Id.*

the polls do not cast a ballot in the judicial races.<sup>14</sup> One explanation is “ballot fatigue,” which is a polite way of saying that after standing in the booth for two minutes, voters do not regard the judicial races as important enough to merit an additional thirty seconds of their lives. A second explanation is that voters forego participating in judicial races because they have not acquired enough information about the candidates to make an intelligent choice. Either way, the result is the same; a majority of eligible voters rarely summons the enthusiasm to vote in judicial races.

Insofar as highly competitive judicial races, replete with big money and attack advertising, have the potential to grab voter attention and diminish roll-off, they do so at the expense of the judiciary’s legitimacy. Former U.S. Supreme Court Justice Sandra Day O’Connor has described judicial elections in the modern era as “tawdry and embarrassing,”<sup>15</sup> and has warned that “[t]he public is growing increasingly skeptical of elected judges in particular,” whom it has come to regard as “just politicians in robes.”<sup>16</sup> Justice O’Connor added that this bodes ill for the legitimacy of the judiciary generally, because “[d]istrust of the judiciary in any jurisdiction becomes distrust of the judiciary in all jurisdictions.”<sup>17</sup>

Campaign finance exacerbates underlying legitimacy problems. Competitive elections are bankrolled by campaign contributions and independent expenditures from individuals and groups with a vested interest in the outcomes of cases that the candidates will decide as judges. There is a widely documented correlation between the campaign support judicial candidates receive and the decisions they later make. One study of 470 justices spanning 28,000 cases across multiple states found that for “judges elected in partisan elections, contributions from various interest groups have a statistically significant relationship with the probability that judges vote for litigants that the interest groups favor.”<sup>18</sup> Other studies have replicated these results in states that select judges via partisan and non-partisan elections, including Alabama, Georgia, Kentucky, Louisiana, Michigan, Montana,

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14. Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OH. ST. L.J. 13, 19 (2003) (discussing data from unpublished paper by Melinda Gann Hall).

15. John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES (Dec. 23, 2009), <http://www.nytimes.com/2009/12/24/us/24judges.html>.

16. James Podgers, *O’Connor on Judicial Elections: ‘They’re Awful. I Hate Them.’* ABA JOURNAL (May 9, 2009), [http://www.abajournal.com/news/article/oconnorv\\_chemerinsky\\_sound\\_warnings\\_at\\_aba\\_conference\\_about\\_the\\_dangers\\_of\\_sl/](http://www.abajournal.com/news/article/oconnorv_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_sl/).

17. *Id.*

18. Joanna Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 669 (2009).

Ohio, Pennsylvania, Texas, and Wisconsin.<sup>19</sup> One researcher described the correlation he found as “remarkably close”;<sup>20</sup> another concluded that the contributions judges receive “directly affect judicial decisionmaking”;<sup>21</sup> and two more inferred a “quid pro quo relationship between contributors and votes.”<sup>22</sup>

When interest groups give candidates piles of money to win elections, and those candidates later cast votes in favor of their benefactors, one need not be pathologically suspicious to think that something fishy is going on. Seventy-six percent of the public and a surprising forty-six percent of judges “believe that campaign contributions have at least some influence on judges’ decisions.”<sup>23</sup> As Justice O’Connor has warned, “This crisis of confidence in the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold.”<sup>24</sup> It is telling, that in the aftermath of a bruising, \$9 million Illinois Supreme

19. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583 (2002) (Alabama); Eric Waltenburg & Charles Lopeman, *Tort Decisions and Campaign Dollars*, 28 SOUTHEASTERN POL. REV. 241 (2000) (Alabama, Kentucky, Ohio); Matias Iaryczower & Matthew Shum, *Money in Judicial Politics: Individual Contributions and Collective Decisions* (2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1998895](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998895) (Alabama, Louisiana, Michigan, Montana, Ohio, Pennsylvania, Texas, Wisconsin); Daman M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 STATE POLITICS & POL’Y Q. 281 (2007) (Georgia); Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors* (2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1721665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721665) (Louisiana); Chris M. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking* (2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1337668](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337668) (Michigan, Texas); Amon McLeod, *Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385 (2008) (Michigan); Adam Liptak & Janet Roberts, *Tilting the Scales?: The Ohio Experience; Campaign Cash Mirrors a High Court Ruling*, N.Y. TIMES (Oct. 1, 2006), <http://query.nytimes.com/gst/fullpage.html?res=9A06E7D81730F932A35753C1A9609C8B63&pagewanted=all> (Ohio); Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994-1997*, 31 POL. & POL’Y 314 (2003) (Texas); Mondhavi McCall & Michael McCall, *Campaign Contributions, Judicial Decisions, and the Texas Supreme Court*, 90 JUDICATURE 214 (2007) (Texas) (A Nevada study found no correlation, and studies in Wisconsin reached mixed results.).

20. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002) (Alabama).

21. Daman M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 STATE POLITICS & POL’Y Q. 281 (2007) (Georgia).

22. Bonneau & Cann, *supra* note 19.

23. JOANNA SHEPARD, JUSTICE AT RISK: AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS, AMERICAN CONSTITUTION SOCIETY FOR LAW & POLICY 1 (June 2013), [https://www.acslaw.org/ACS%20Justice%20at%20Risk%20\(FINAL\)%206\\_10\\_13.pdf](https://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf).

24. Justice Sandra Day O’Connor, *Foreword*, in James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change*, Justice at Stake Campaign (Aug. 2010), [http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE\\_8E7FD3FEB83E3.pdf](http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf).



Court race, the victor himself commented that the money spent was “obscene for a judicial race” and questioned “[h]ow can people have faith in the system?”<sup>25</sup>

In my first article on judicial selection, entitled “Why Judicial Elections Stink,” I sought to distill the litany of problems associated with judicial elections down to their essence, in four-parts—“the Axiom of 80.”<sup>26</sup> Up to 80% of registered voters do not vote in judicial elections.<sup>27</sup> Up to 80% of the public that does vote in judicial elections cannot identify the candidates for whom they voted.<sup>28</sup> At least 80% of the public think that the campaign contributions in elections influence judicial decision-making.<sup>29</sup> And yet around 80% of the public still supports judicial elections.<sup>30</sup> On the last point, however, I predicted that the legitimacy-threatening features of judicial elections would cause public support to erode over time.<sup>31</sup>

This profusion of problems with elected judiciaries disappears if judges are appointed. Once appointed, judges retain the independence necessary to call balls and strikes without fear of reprisal for making unpopular decisions. The task of appointing judges is vested in the hands of elected officials or commissions with the time, interest, and expertise to select capable and qualified people for the job. And without judicial races to bankroll, interest groups are denied the opportunity to peddle influence via campaign contributions.

## 2. *The Brief for Elected Judiciaries*

A significant majority of the American public favors an elected judiciary because it promotes judicial accountability. Political scientist James Gibson has shown that elections enhance the judiciary’s legitimacy because the public is more likely to accept judicial decisions with which it disagrees if those decisions are made by elected judges.<sup>32</sup> Conversely, research has revealed that appointment processes can damage the judiciary’s legitimacy. In the federal system, fractious

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25. *Tort Reformers Score Victories in Judicial Races*, INSURANCE J., (Nov. 22, 2004), <http://www.insurancejournal.com/magazines/features/2004/11/22/49934.htm>.

26. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OH. ST. L.J. 43 (2003).

27. *Id.* at 52.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. JAMES GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* 3 (2012).

confirmation battles diminish public respect for the courts to the extent that they cast judicial nominees as naked political actors.<sup>33</sup>

The new politics of judicial elections has enabled judicial races to realize their potential more fully. Demographic changes, most notably the decline and fall of Democratic Party control in southern states, have created new opportunities for interparty competition. State courts have become forums of choice for litigating contentious social issues. Changes in appellate structure have limited state supreme court dockets to fewer, often more controversial cases.<sup>34</sup> The trial bar and business community have made state courts a battlefield in their struggle to control tort liability and reform.<sup>35</sup> These developments, when coupled with the role of courts in helping or hindering the “war on crime,”<sup>36</sup> have elevated the political profile of state courts and the cases they decide. That, in turn, has heightened political interest in judicial races, which has generated more competition for judicial seats, which has funneled more money into judicial races, which has bought more advertising to better inform the electorate about the races, which has piqued voter interest, which has decreased voter roll-off at the polls.<sup>37</sup> These benefits all weigh in favor of judicial elections. Moreover, research reveals that voters draw relatively sophisticated distinctions between candidates, by favoring quality candidates with prior judicial experience in races for open seats (where support for the more experienced candidate cannot be attributed to the advantages of incumbency).<sup>38</sup>

When it comes to judicial elections and the role they play in promoting democracy, partisan systems deserve special mention. Party affiliation conveys information about the candidates’ philosophies and

33. JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 2 (2009).

34. Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 751 (2001); G. Alan Tarr, *State Judicial Selection and Judicial Independence*, App. D at 6–7, in AM. BAR ASSN., *JUSTICE IN JEOPARDY: REPORT OF THE COMM’N ON THE 21ST CENTURY JUDICIARY* (2003).

35. Emily Heller & Mark Ballard, *Hard-Fought, Big Money Judicial Races: U.S. Chamber of Commerce Enters Fray with Ad Money*, NAT’L L.J. (Nov. 6, 2000), at 42.

36. Traci V. Reid, *The Politicalization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70–74 (1999); Amanda Frost & Stefanie Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 749 (2010) (“An incumbent judge’s decisions in criminal cases are easy targets for his opponents in the next election cycle, who can use almost any decision favorable to a criminal defendant, no matter how legally defensible, as grounds for portraying the incumbent as ‘soft on crime.’”).

37. BONNEAU & HALL, *supra* note 10. This is essentially a one-sentence summary of Bonneau and Hall’s argument in defense of judicial elections—an argument they support with extensive reference to the social science literature, much of which they have authored.

38. *Id.* at 98.

ideological orientations that assist voters in making informed choices and reduces roll-off relative to non-partisan races. Partisan races tend to be more competitive, with fewer uncontested seats, and a higher rate of incumbent turnover, which are hallmarks of a healthy democratic process. Non-partisan races do not serve their intended purpose of eliminating political party control over judicial selection; rather, they are often non-partisan in name only and subject to partisan influence and control behind the scenes. As a consequence, stripping candidates of party identifiers serves only to disable candidates from differentiating themselves in the eyes of the voters.<sup>39</sup>

Appointive systems, in contrast, fail at every turn. First, and perhaps foremost, so-called “merit selection” systems do not produce judges who are more meritorious. One study from the 1980s found no discernible differences in the quality of judges chosen by different selection systems.<sup>40</sup> In a more recent and extensive study of the subject, Greg Goelzhauser reached a similar conclusion: “Election underperforms merit selection and appointment on certain measures of educational quality and performance,” but overall, “the empirical results suggest that selections yield similarly qualified state supreme court justices.”<sup>41</sup> One study conducted by a trio of distinguished law professors made an “uncertain empirical case,” but a case nevertheless, for elected judiciaries that rested on data leading the authors to conclude that elected judges were more productive and independent than their appointed counterparts.<sup>42</sup> Accordingly, Bonneau and Hall concluded from this study, “judges chosen in elections, particularly in partisan elections, are *better* than judges chosen by other methods.”<sup>43</sup>

Second, appointive systems generally, and merit selection systems in particular, have failed to keep the politics out of judicial selection. As Bonneau and Hall argue, one need look no further than the U.S. Supreme Court appointments process to debunk the notion that judicial appointments are apolitical events.<sup>44</sup> Merit selection systems delegate to unaccountable commissions the task of creating a candidate pool from which governors select judges. The commissions are

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39. See generally CHRIS W. BONNEAU & DAMON M. CANN, *VOTERS' VERDICTS: CITIZENS, CAMPAIGNS, AND INSTITUTIONS IN STATE SUPREME COURT ELECTIONS* (2015).

40. Henry R. Glick et al., *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 235 (1987).

41. GREG GOELZHAUSER, *CHOOSING STATE SUPREME COURT JUSTICES: MERIT SELECTION AND THE CONSEQUENCES OF INSTITUTIONAL REFORM* 110 (2016).

42. Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2010).

43. BONNEAU & HALL, *supra* note 10, at 137.

44. *Id.* at 137–38.

typically dominated by lawyers and judges, who deliberate in black boxes impervious to public scrutiny.<sup>45</sup> Researchers have found that these commissions are subject to a variety of political influences. An early study found evidence of “panel-stacking,” in which commissions forced the governor’s hand by creating candidate pools limited to one viable choice, and “logrolling,” in which commissioners traded their support for a fellow-commissioner’s preferred candidate in exchange for reciprocal favors.<sup>46</sup> A substantial minority of commissioners has reported that their commissions were sometimes subject to political influences,<sup>47</sup> and a majority of commission chairs have indicated that politics entered into their deliberations at least “infrequently.”<sup>48</sup> One study has shown that lawyer-controlled nominating commissions exhibit a selection bias in favor of liberal judicial applicants, which the author attributes to the liberal-leaning predilections of the bar.<sup>49</sup>

Third, to the extent that merit selection systems seek to preserve the pretense of accountability with periodic retention elections, it is no more than that—a pretense. Retention elections are dreary by design. Who wants to go to the racetrack to watch a solitary horse run a time trial to see whether it qualifies to do it again next year? Nobody. And in the context of retention elections, that means nobody is energized enough to jeopardize incumbency. As a consequence, voter roll-off in retention elections is substantially higher than in contested elections.<sup>50</sup> Additionally, the average support incumbents receive in retention elections is a whopping 75%—far more than the 55-60% that would qualify as competitive enough to promote accountability.<sup>51</sup>

### C. Arguments for Incremental Reform

Although most disputants in the judicial selection debate align themselves with arguments for appointive or elective systems, some advocate incremental reform of elective systems. One subset of incrementalists is averse to judicial elections, but regards them as inevita-

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45. Michael DeBow et al., *The Case for Partisan Judicial Elections*, FEDERALIST SOC’Y (Jan. 1, 2003), <https://fedsoc.org/commentary/publications/the-case-for-partisan-judicial-elections> (criticizing merit selection as “a somewhat subterranean process of bar and bench politics, in which there is little popular control”).

46. RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF BENCH AND BAR* 107–11 (1969).

47. ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 75 (1974).

48. JOANNE MARTIN, *MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY?* 20–22 (1993).

49. Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 *MO. L. REV.* 675, 676 (2009).

50. BONNEAU & HALL, *supra* note 10, at 26–28.

51. *Id.* at 80–81.

ble, and so focuses on ways to make an undesirable system better. A second subset regards judicial elections with ambivalence, agnosticism, or favor, but see room for improvement. To these ends, three proposals have gained at least some traction.

First, several states have experimented with systems for publicly financing supreme court elections to diminish the delegitimizing if not corrupting influence of special interest money. Judicial candidates have a First Amendment right to solicit financial support from groups and individuals in privately funded campaigns, but candidates may agree to refuse campaign contributions from private sources in exchange for public monies with which to campaign. The American Bar Association's Commission on Public Financing of Judicial Campaigns endorsed public financing, concluding that "[t]he more money judges receive from public sources, the less they will have to raise from private groups and individuals who are interested in the outcomes of cases the judges decide, which will reduce the potential for campaign contributions to influence judicial behavior and address the public perception" of such influence.<sup>52</sup>

Second, many states have sought to address concerns over the real or perceived influence of campaign contributions on judicial decision-making by imposing campaign contribution limits and disclosure requirements.<sup>53</sup> Modest campaign contributions in amounts too low to create a reasonable suspicion of influence peddling are harmless, and serve no purpose beyond showing support for the candidate and the judiciary of which the candidate is or may become part. Contribution limits restrict campaign finance to these innocuous displays of support. Disclosure requirements, in turn, dull the blade of influence peddling by keeping voters apprised of who is contributing to which candidates, so that voters might hold candidates accountable when the risk of influence becomes unacceptable.

Third, all states have recusal or disqualification rules that can require judges to withdraw from cases for campaign-related bias. Disqualification rules can alleviate problems that arise when campaign-related events compromise a judge's impartiality in later cases, by forcing the judge to withdraw from those cases. One such problem has arisen when an issue comes before the court that the judge, as a judicial candidate, pre-committed to decide in a particular way.

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52. REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS, AMERICAN BAR ASSOCIATION 30 (Feb. 2002).

53. For a state by state summary of contribution limits in judicial campaigns, see *Judicial Campaigns and Elections*, NAT'L CENTER FOR STATE COURTS, [http://www.judicialselection.us/judicial\\_selection/campaigns\\_and\\_elections/campaign\\_financing.cfm?state](http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state).

For example, in 2010, a West Virginia Supreme Court justice disqualified himself (albeit after adverse publicity and angrily) from a case that challenged the constitutionality of tort reform legislation. As a judicial candidate, when asked for his views on the legislation, he declared, "I will not vote to overturn it. I will not vote to change it. I will not vote to modify it."<sup>54</sup> The justice may have felt that he could be impartial notwithstanding his prior statements. However, it seems unlikely that a party challenging the law could receive an impartial decision from a judge who had committed himself to rejecting the claim before it had even been filed. Hence, the American Bar Association's Model Code of Judicial Conduct provides that if a judge, while a candidate, "commits or appears to commit . . . to reach a particular result or rule in a particular way," the judge is later disqualified from hearing that case when it comes before the court.<sup>55</sup>

A second problem that disqualification addresses has arisen when judges are assigned to hear cases in which a party, or someone closely affiliated with a party, has given significant financial support to the judge's election campaign. In *Caperton v. A.T. Massey Coal Company*,<sup>56</sup> the U.S. Supreme Court ruled that a West Virginia Supreme Court justice violated a party's constitutional right to due process of law when he refused to disqualify himself from a case in which the justice had received campaign support from one party's CEO in amounts sufficient to create a probability of bias. The Court emphasized that states could avoid due process problems through the simple expedient of establishing their own disqualification rules that subjected judges to recusal before problems reach constitutional magnitude.<sup>57</sup> Virtually every state, including West Virginia, has done just that, by adopting rules requiring judges to disqualify themselves when their "impartiality might reasonably be questioned."<sup>58</sup> A number of states have gone further and crafted specific disqualification rules applicable to judges who receive campaign support from parties or their lawyers in amounts and under circumstances that cast doubt on the judge's impartiality.

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54. Tony Mauro, *New Recusal Controversy in West Virginia High Court*, BLOG LEGAL TIMES (Sept. 24, 2010), <http://legaltimes.typepad.com/blt/2010/09/new-recusal-controversy-in-west-virginia-high-court.html>.

55. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(5) (2007).

56. 556 U.S. 868, 885 (2009).

57. *Id.* at 889-90.

58. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

## II. EVERYONE IS WRONG

Having described the arguments in Part I, my ambition here is to show how all sides rely on arguments that are exaggerated or wrong.

A. *Elections, Appointments, and the Role of the Judge*

Proponents of appointive systems who claim categorically that independent judges apply the law like umpires call balls and strikes usually do not encumber their arguments with recourse to facts. Like Chief Justice John Roberts, they are stating principles; they are quoting *The Federalist* papers; they are quoting each other. The inconvenient facts reveal that these claims are overstated. The so-called “legal model,” which proceeds on the premise that independent judges set extralegal influences aside and apply the law, has been tested in studies of the U.S. Supreme Court and has not fared well. Research shows what an overwhelming majority of the public already believes: Supreme Court justices are profoundly influenced by their ideological predilections. In a fascinating study of man versus machine, researchers pitted a computer model against a battery of legal experts and challenged them both to predict the outcomes of cases in the Supreme Court’s upcoming term.<sup>59</sup> Armed with a handful of factors aimed primarily at assessing the ideological tilt of the cases, without regard to the specific legal issue at stake, the computer predicted seventy-five percent of case outcomes correctly, as compared to fifty-nine percent for the experts.<sup>60</sup>

Ironically, judges may well be like umpires, but not in the way that Chief Justice Roberts had in mind. In easy cases, such as, when a wild pitch hits the batboy, there is no room for discretion or disagreement and the pitch will be called a ball, which may help to explain why nearly half of the cases before the Supreme Court are decided by unanimous vote. But in close cases (and the Supreme Court’s docket is top heavy with them), when pitchers seek to paint the corners of the plate, the game demands that umpires make judgment calls. In those situations, calling balls and strikes is, as one major league umpire put it, “like [interpreting] the Constitution. The strike zone is a living, breathing document.”<sup>61</sup>

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59. Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1151 (2004).

60. *Id.* at 1151–52.

61. WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE 85 (Charles Gardner Geyh ed., 2011) (quoting Bruce Weber, *Umpires v. Judges*, N.Y. TIMES (July 11, 2009), <http://www.nytimes.com/2009/07/12/weekinreview/12weber.html>).

Insofar as independent judges exercise discretion influenced by their policy preferences, it lends credence to the argument of election proponents that judges are policymakers in robes who, like policymakers in other branches of government, should be constrained by the people they serve. Election opponents point to data showing that state judges decide differently when elections approach, as if that is a flaw of elective systems, when it may be a feature. Who is to say that the rule of law is not better served when elections are impending and judges are motivated to set their idiosyncratic, ideological predilections aside and allow the views of the many to inform the views of the one?

But this pro-election argument is overstated too. First, it proceeds based on the problematic assumption that we can generalize from studies of U.S. Supreme Court justices to conclude that appointed judges categorically are driven by their ideological predilections and unconstrained by law.<sup>62</sup> Unlike U.S. Supreme Court justices, most appointed judges occupy “lower courts.” As such, they are foot soldiers constrained by the precedent of the U.S. Supreme Court itself. Not surprisingly, researchers have found that the influence of ideology on judicial decision-making is significantly less for federal circuit judges than for justices on the U.S. Supreme Court.<sup>63</sup> Another study has found that state supreme courts followed binding U.S. Supreme Court precedent less frequently than federal circuit court judges, and attributed the difference to state courts making choices “less likely to garner public disapproval.”<sup>64</sup>

Simply summarized, judges are neither umpires nor politicians in robes and they are both. With exceptions, disputants in the binary judicial selection debate have opted against coming to terms with such complexity. They have chosen instead to characterize judges as cartoonish balloons in the service of arguments that are easy to inflate and puncture. That has yielded conversations both colorful and festive, but results that are not especially durable.

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62. BONNEAU & HALL, *supra* note 10, at 14–15 (relying on U.S. Supreme Court studies to support the conclusion that unelected state supreme court justices “engage in the unfettered pursuit of their own personal preferences”).

63. FRANK B. CROSS, *DECISION-MAKING IN THE U.S. COURT OF APPEALS* 17–18 (2007).

64. Sara C. Benesh & Wendy L. Martinek, *Context and Compliance: A Comparison of State Supreme Courts and the Circuits*, 93 MARQ. L. REV. 795, 815–16 (2009).



B. The Particular Merits and Demerits of Elective  
and Appointive Systems

Beyond the foundational question of whether judges are more like umpires who should be protected from intimidation by the fans or politicians who should be accountable to their constituents, is a cluster of more specific arguments relevant to elections. Is the electorate too incompetent, ignorant, and apathetic to hold judges accountable in desirable ways? Does the electoral process undermine the judiciary's legitimacy, when judicial candidates are forced to campaign like ordinary politicians, take positions on issues they will decide as judges, and raise money from individuals and organizations with business before the courts? Team appointments shouts "yes!" Team elections bellow "no!"

Once again, the disputants exaggerate their claims. When arguing that voters are too unknowledgeable to hold judges accountable in meaningful ways, opponents of judicial elections rely on studies that distort the extent of voter ignorance, with a one-two punch. First, those studies often ask open-ended questions that require respondents to recall information from memory, which is much more difficult than closed-ended questions that ask respondents to recall information from a list of options.<sup>65</sup> Second, researchers can be unduly exacting in the criteria they impose for a "correct" answer. Thus, for example, one study, which found that only ten percent of the public knew that William Rehnquist was the Chief Justice of the United States, coded as "incorrect," responses that identified him as the "main guy" or "head honcho" on the Supreme Court.<sup>66</sup> When these methodological flaws are corrected the results change. For example, one study found that solid majorities of the American public know that Supreme Court justices are appointed; that they serve life terms; and that they exercise the power of judicial review.<sup>67</sup> These findings led the authors to conclude that the public knows "far more" about the Supreme Court than is typically supposed, and that "the American people may in fact know enough about law and courts to be able to perform their assigned function as constituents of the contemporary judicial system in the United States."<sup>68</sup>

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65. James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 431-33 (2009).

66. *Id.* at 432.

67. *Id.* at 433 (The researchers phrased the judicial review question in terms of whether the Court had the "last say" on the Constitution.).

68. *Id.* at 433, 439.

Studies of voting patterns in state supreme court elections challenge claims (I, among others, have made) that voters are too ignorant to make intelligent choices. Chris Bonneau and Melinda Gann Hall found that in judicial races for open seats (where neither candidate possessed an incumbency advantage), candidates with prior judicial experience performed “almost five percent better than their inexperienced counterparts,” leading them to conclude that “voters in state supreme court elections make fairly sophisticated candidate-based evaluations.”<sup>69</sup>

These comparatively optimistic assessments of voter knowledge and acumen, however, are exaggerated too. The basic fact that the U.S. Supreme Court is comprised of life appointed judges who exercise judicial review is foundational, and constitutes about as little as one can know about the Supreme Court and claim to know anything. When knowledge of that fact is tested by vivisectioning the question into three subparts<sup>70</sup> a majority of respondents can answer each subpart correctly, but only forty-four percent of respondents correctly answer all three. I do not begrudge the authors’ optimistic “glass is forty-four percent full” conclusion, but there is room to argue that this result falls short of repudiating concerns about voter ignorance.

Studies testing the public’s knowledge of the U.S. Supreme Court tell us nothing about their knowledge of state courts, which are the only courts relevant to a study of judicial elections. When one of the researchers who authored the U.S. Supreme Court study asked respondents the same three questions about their state supreme court, he found that twenty-four percent knew their state supreme court justices were elected; thirty-three percent knew that the justices served fixed terms; forty-six percent knew that the court exercised judicial review; and just over seven percent knew the answer to all three—figures the author acknowledges are “dismally low.”<sup>71</sup>

Pervasive public ignorance of basic facts about state court systems does not necessarily mean that voters are ignorant of issues relevant to judicial races. This counterpoint is corroborated by Bonneau and Hall’s study, which shows that the electorate favors “quality” candidates with prior judicial experience. But they climb out onto a limb of data too slender to support the weight of their conclusions. Their finding that judicial candidates with prior judicial experience garner

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69. BONNEAU & HALL, *supra* note 10, at 133.

70. Are the justices appointed? Do they receive life tenure? Do they exercise judicial review?

71. James L. Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in *WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE* 293 (Charles Gardner Geyh ed., 2011).

nearly five percent more voter support than those without, negates assertions that voter choices are random. But whether that finding supports the conclusion that voters make “fairly sophisticated, evaluations” of candidate quality is another matter. We do not know whether voters are even aware that the candidates they prefer have prior judicial experience. They may vote for those candidates simply because voters recognize the candidates’ names,<sup>72</sup> or because those candidates are more accomplished campaigners by virtue of having run and won judicial races in the past. Neither of these considerations have anything to do with the candidate’s judicial qualifications. Of those who are aware of the candidates’ prior judicial experience, some may mistakenly assume or be misled into thinking that they are incumbents with work experience more relevant than is the case.<sup>73</sup> We know that candidates with prior judicial experience receive more voter support. Whether that is because voters make “fairly sophisticated” choices based on candidate quality, or because candidates with prior judicial experience enjoy other tactical advantages irrelevant to their qualifications, we do not know.

Exaggerated claims likewise color the public discussion of voter apathy and indifference. A claim I made in another article, that as much as 80% of the public lacks the enthusiasm to vote in judicial elections, is technically true in some races if one combines the percentage of eligible voters who appear at the polls but do not cast ballots in judicial races with the much higher percentage of eligible voters who do not show up at all. Conflating voter apathy generally with voter apathy in judicial races specifically yields a flashy data point that overstates the apathy for which judicial races can fairly be held responsible. The more relevant figure is the 25% average roll-off in judicial races, but even that is misleading insofar as it homogenizes dramatic variations in roll-off across the states by combining the data from partisan, non-partisan, and retention election states. In partisan races, roll-off averages only 11.2%,<sup>74</sup> which reveals the intuitive truth that voter apathy declines if election campaigns are more interesting. Of course, expensive, hotly contested, partisan races make election campaigns more interesting.

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72. This explanation is consonant with the impetus for the merit selection movement, which was premised in part on the concern that name recognition, rather than qualifications influenced voter decision-making in contested judicial elections.

73. Candidates with prior judicial experience can mislead voters by identifying themselves as judges which invites the false inference that they are incumbents. CHARLES GARDNER GEYH ET AL., *JUDICIAL CONDUCT AND ETHICS* §11.09[2] (5th ed. 2013).

74. BONNEAU & HALL, *supra* note 10, at 98.

Before we declare the apathy problem solved, it is worth noting that the healing powers of the partisan election elixir have been over-hyped. First, the energizing effects of contested partisan elections are not felt categorically, but are confined to state supreme courts; roll-off appears to be relatively incurable in lower court races, where candidates struggle to attract voter attention.<sup>75</sup> Second, a significant number of states provide for straight party ticket voting, whereby voters can cast their vote for all the Republicans or all the Democrats on the ballot by pulling a single lever. In states with partisan judicial elections, the straight-ticket option decreases roll-off for reasons having nothing to do with diminished voter apathy in relation to the judicial races.<sup>76</sup> Conversely, in states with non-partisan and retention elections, the straight-ticket option increases roll-off by enabling voters to leave the booth after pulling the master lever before voting in the nonpartisan races,<sup>77</sup> which exaggerates the extent to which partisan elections diminish voter apathy relative to other systems. Third, partisan elections decrease but do not eliminate roll-off. Voter apathy thus remains a legitimate although diminished concern, and raises the question of whether the benefits of the partial cure to voter apathy that fractious, partisan elections offer, outweigh other costs that partisan elections incur.

Finally, claims relating to the impact of judicial elections on court legitimacy have also been skewed. The pervasive rant that the new politics of judicial elections undermines public confidence in the courts has, for the most part, been based on unsupported speculation that the impact of noisier and costlier judicial elections on public support for the courts cannot be good. But these data-free observations often overlook an important and intuitively sensible point that research confirms: people have more confidence in governmental institutions over which they exert a measure of control. Hence, judicial elections enhance legitimacy. Although public confidence in the judiciary can be shaken by attack advertising and the perception that campaign contributions buy influence, a body of research reveals that those concerns diminish but do not override the legitimizing effects of elections.<sup>78</sup>

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75. Matthew Streb & Brian Frederick, *When Money Can't Encourage Participation: Campaign Spending and Roll-off in Low Visibility Judicial Elections*, 33 *POLITICAL BEHAVIOR* 665 (2011).

76. Herbert M. Kritzer, *Roll-Off in State Court Elections: The Impact of the Straight-Ticket Voting Option*, 4 *J.L. & CTS.* 409, 410 (2016).

77. Chris Bonneau & Eric Loepf, *Getting Things Straight: The Effects of Ballot Design and Electoral Structure on Voter Participation*, 34 *ELECTORAL STUDIES* 119, 122 (2014).

78. GIBSON, *supra* note 32.

On the flip side, the body of research to which I alluded in the previous paragraph may have made too much of too little and overstated its conclusions as a consequence. That research was generalized from studies in Kentucky and Pennsylvania.<sup>79</sup> A more recent, nationwide study has found that when judicial races become too contentious, the delegitimizing costs of elections can exceed the legitimizing benefits, relative to appointive systems.<sup>80</sup>

In addition to the issues encircling the relative merits and demerits of elective systems, there are three additional issues specific to appointive systems in general and merit selection systems in particular: (1) Do appointive systems (including merit selection) produce more qualified judges?, (2) Is merit selection a less politicized alternative to contested elections?, and (3) Are the retention elections that merit selection systems employ preferable to contested elections? Proponents of appointive systems say “yes,” while proponents of elective systems say “no.” Once again, the arguments on both sides are overstated, unsupported, and sometimes simply wrong.

The essential argument for merit selection systems is that judges are selected on the basis of “merit,” and are therefore more qualified than their elected counterparts. The historical basis for this claim is that judges chosen by expert commissions dedicated to identifying the best candidates will yield better qualified judges than elective systems, where undiscerning voters choose between candidates who made their way onto the ballot for reasons that have more to do with their skills as politicians than their credentials as jurists. However, social science has exposed such claims as grossly overstated, if not false. The best evidence shows that, with insignificant exceptions, elected and appointed judges are comparably credentialed.<sup>81</sup>

That said, election proponents may overplay their hand when they reference this empirical evidence to support the more sweeping conclusion that “schemes other than partisan elections fail to improve the quality of the bench.”<sup>82</sup> First, research indicates that merit selection systems do a better job than contested election systems of producing a barrel with fewer bad apples, by screening out the least qualified judi-

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79. Benjamin Woodson, *The Two Opposing Effects of Judicial Elections on Legitimacy Perceptions*, 17 *STATE POLITICS & POL'Y Q.* 24, 28 (2016).

80. *Id.* at 26–27.

81. GREG GOELZHAUSER, *CHOOSING STATE SUPREME COURT JUSTICES: MERIT SELECTION AND THE CONSEQUENCES OF INSTITUTIONAL REFORM* 110 (2016).

82. BONNEAU & HALL, *supra* note 10, at 137.

cial candidates.<sup>83</sup> Second, comparing resumes may be a convenient way to measure the “quality” of the bench in some sense, but does not capture the intangibles of judicial temperament essential to good judging. Codes of conduct bar judges from being people-pleasers. Judges “shall not” be “swayed by public clamor or fear of criticism,” “make any public statement” that could affect a pending case, or “make pledges, promises or commitments” concerning their decisions as public officials.<sup>84</sup> Winning elections, however, is all about pleasing people, being responsive to clamor and criticism, maintaining open channels of communication with voters, and making campaign promises. This suggests judicial aspirants who seek office via contested elections may lack the necessary judicial temperament more often than their appointed counterparts. Additionally, there is evidence from states with mixed systems (which appoint some judges and elect others) that elected judges are subject to discipline with greater frequency than their appointed counterparts.<sup>85</sup>

Finally, election proponents go a step too far when they tout an “excellent” study upon which they rely to show that elected judges are “better.”<sup>86</sup> In that study, the authors concluded that elected judges were more “productive” than appointed judges because elected judges wrote more opinions.<sup>87</sup> Additionally, the article asserts the elected judges were more “independent” because they disagreed with “co-partisans” on their courts more frequently.<sup>88</sup> The number of majority opinions justices write depends on how many cases they hear, which is subject to the vagaries of statutory limits on a given court’s discretion

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83. Richard A. Watson & Rondal G. Downing, *The Politics of the Bench and the Bar*, in 33 THE ANNALS OF THE AMERICAN ACADEMY 154 (1969) (fewer merit selected judges rank in lowest quality quartile than elected judges).

84. MODEL CODE OF JUDICIAL CONDUCT R. 2.4, 2.10 (2007).

85. Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline* (2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=27310](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=27310) 18 (merit selected judges disciplined less frequently in six of nine jurisdictions studied).

86. BONNNEAU & HALL, *supra* note 10, at 137 (discussing Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J. LAW & ECON. 290 (2010)).

87. Choi et al., *supra* note 42.

88. *Id.* The authors also found that the opinions of appointed judges were cited more frequently, which led them to conclude that appointed judges were more “skilled.” *Id.* at 316 (“Overall, and particularly compared with Election Partisan judges, the models are consistent with the view that Appointed judges write the best opinions.”). Insofar as the cases cited in judicial opinions are selected by clerks who graduated from law school the year before, relying on those selections as a proxy for the “skill” of the opinion-writers whose cases clerks cite seems a dubious extrapolation. A safer conclusion may be that such findings reflect a tendency to cite courts and opinion-writers perceived as more prestigious, which may or may not be a reflection of skill. David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371, 391 (1999).

to decline review of appeals that litigants file—a factor beyond the justices' control, for which the authors did not account. Moreover, critical to their conclusion that elected judges were more productive was the finding that they wrote more concurring and dissenting opinions.<sup>89</sup> This conclusion is based on the contestable premise that writing fewer concurrences and dissents is the mark of a “lazy” judge,<sup>90</sup> when it is at least as likely the mark of a less quarrelsome judge who strives to govern by consensus on a collegial court.

Measuring judicial independence with reference to whether judges are, in effect, independent from each other is even more problematic.<sup>91</sup> The relevant independence is the independence of judges from those who control judicial selection and retention. When elected judges part company with each other more frequently via concurrences and dissents it is more likely the mark of dependent judges strategically tailoring their views in the shadow of impending elections, to preserve voter support.

In addition to claims that it would select judges with greater “merit,” merit selection was devised as a means to depoliticize judicial selection relative to preexisting methods. In lieu of the bare-knuckle politics of contested elections or the politics of cronyism inherent in traditional appointive systems, merit selection promised a new way: judicial selection by expert, apolitical commissions. The claim that merit selection systems takes the politics out of judicial selection is rooted in the unsupported assumption that a commission of unelected lawyers, judges, and laypeople will make apolitical assessments of applicants for judicial office. What evidence we have shows this assumption is flawed. There have been reports of vote-trading or log-rolling within commissions, and commission manipulation of candidate pools that effectively disempowered the governor by presenting him or her with a list of nominees that include only one viable choice.<sup>92</sup> Moreover, commissioners have reported being subject to political pressure. In an early multistate study of merit selection commissions, forty-nine percent of commissioners reported that political influences or considerations were introduced into commission deliberations at least infrequently.<sup>93</sup>

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89. *Id.* at 296.

90. *Id.*

91. *Id.* at 297.

92. ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 75 (1974); JOANNE MARTIN, *MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY?* 20–22 (1993).

93. ASHMAN & ALFINI, *supra* note 92.

Election proponents expose the weaknesses of claims that merit selection depoliticizes judicial selection, but in so doing take their arguments a step too far. In the most comprehensive and compelling argument to date for partisan election of state supreme court justices, the authors characterize the claim that “appointments schemes take the politics out of judicial selection” as a “myth” and assert that “appointment systems merely relocate politics from the electorate to political elites.”<sup>94</sup> The one modern example they discuss in support of this conclusion is the U.S. Supreme Court.<sup>95</sup> Such an argument proceeds on the dubious assumption that the partisan politics in play when the U.S. Senate confirms a justice to serve on the most visible and powerful court in the nation is comparable to when the Maine Senate confirms a gubernatorial nominee, or the North Dakota governor appoints a justice from the from the commission pool.

Claims that merit selection commissions exhibit partisan bias are likewise suspect. The one significant study purporting to show ideological bias by nominating commissions, proceeded from the premise that lawyers are more liberal than the general population, and found that lawyer-dominated nominating commissions generated short lists of nominees who were more liberal than the general population.<sup>96</sup> It thus concluded that nominating commissions exhibit a liberal bias.<sup>97</sup>

Unfortunately, the study does not compare the ideological make-up of the applicant pool to the ideological make-up of the nominees selected from that pool. If the author’s assumption is correct, that lawyers are more liberal than the general population, then one would expect the applicant pool, comprised entirely of lawyers, to be more liberal than the general population as well. Hypothetically, if fifty-five percent of the applicant pool is liberal, and fifty-five percent of commission nominees are liberal, it does not imply that nominating commissions are playing politics, but implies that politics played no part in commission review. Under these circumstances, one may still fault merit selection systems for failing to nominate a disproportionate percentage of conservative applicants to compensate for ideological imbalance in the applicant pool. If so, however, the fault lies not in merit selection’s failure to take the politics out of judicial selection, but its failure to put the politics back in.

Finally, proponents of merit selection argue that the retention election component included in many merit selection regimes offers the

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94. BONNEAU & HALL, *supra* note 10, at 137–38.

95. *Id.*

96. Fitzpatrick, *supra* note 49.

97. *Id.*



best of both worlds: meaningful accountability to the electorate without meaningful encroachment on judicial independence values. The unsupported claim that retention elections offer meaningful accountability is belied by the data, which show that non-retention events are rare, bordering on apocryphal, with non-retention rates hovering at one percent.<sup>98</sup> At the same time, research reveals that unwarranted fear of non-retention nonetheless compromises judicial independence by leading judges to align their votes with electoral preferences as elections near (albeit to a lesser extent than their counterparts facing contested elections).<sup>99</sup> Hence, retention elections offer the worst of both worlds—dependence without accountability.

So despairing a conclusion, however, may go too far in the opposite direction. A measure of electoral accountability is achieved if the threat of non-retention leads judges to be mindful of the electorate's preferences even if actual non-retention rates are low. While that responsiveness evidences a measure of judicial dependence, it is a lesser measure than in contested elections. To that extent, retention elections are neither heaven nor hell on earth, but limbo.

### C. Arguments Concerning Incremental Reforms

Finally, there are arguments regarding the merits of incremental reforms. Will public-financing, contribution limits, or disclosure requirements diminish the perception, if not the reality, that justice is for sale in judicial elections? Can a rigorous disqualification regime preserve the integrity of the judicial process by forcing judges to withdraw from cases in which campaign-related events call their impartiality into question? Reformers say "yes"; others have their doubts.

#### 1. Public Financing

Public financing proposals can fairly be accused of wishful thinking. Several states have implemented public financing regimes and none have succeeded—North Carolina's experiment being the latest to perish.<sup>100</sup> There is chronic public ambivalence over using tax dollars to sufficiently finance the electioneering of judicial candidates. Moreover, public financing regimes cannot abridge the speech of individuals

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98. *Id.* at 684 (state high court non-retention rates at 1%); Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 *LOY. L.A. L. REV.* 1429 (2001) (trial court non-retention rates at 1%).

99. Elisha Savchak & A.J. Barghothi, *The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking*, 7 *STATE POLITICS & POL'Y Q.* 394, 408 (2007).

100. Tripp Huffstetler, *RIP: The Death of Publicly Funded Judicial Elections in North Carolina*, *CAMPBELL L. OBSERVER*, July 31, 2013, <http://campbelllawobserver.com/rip-the-death-of-publicly-funded-judicial-elections-in-north-carolina/>

and organizations by preventing them from contributing to independent campaigns in support of candidates. For example, in *Caperton v. A.H. Massey Coal Company*, the defendant company's CEO contributed a modest sum to a West Virginia Supreme Court candidate's campaign committee while the company had a case pending before the West Virginia Supreme Court.<sup>101</sup> Additionally, the company funneled millions of dollars into a successful independent campaign on that candidate's behalf.<sup>102</sup> If West Virginia had a public financing system in place it could have prevented the harmless direct contribution, assuming the candidates agreed to accept public funding in exchange for their promise not to accept private contributions. But public financing could have done nothing to prevent the multi-million-dollar independent campaign that tainted the West Virginia Supreme Court's decision.

As long as the U.S. Supreme Court defines protectable "speech" to include offering financial support to judicial candidates, public financing systems will not reduce the perceived influence of special interest money in judicial races. That said, burying public finance systems may be premature. One recent study of public financing in North Carolina found that supreme court justices aligned their votes with the preferences of interest groups that campaigned independently on their behalf less frequently after public financing was introduced.<sup>103</sup> This implies that public funding creates psychological distance between judges and their supporters that may weaken their bond.

## 2. Disclosure

Disclosure rules promote openness in government by forcing donors to reveal themselves and how much they donated. The utility of disclosure rules, however, is limited in two ways. First, thanks to the vagaries of campaign finance laws, campaign supporters can evade disclosure requirements by organizing themselves as non-profit, social welfare organizations, which are not required to disclose their donors.<sup>104</sup> Second, to the extent such statutory gaps can be filled, it may be unduly optimistic to hope that ordinary voters will become aware

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101. 556 U.S. 868, 873 (2009).

102. *Id.*

103. Morgan L. W. Hazelton et al., *Does Public Financing Affect Judicial Behavior? Evidence From the North Carolina Supreme Court*, 44 AM. POL. RES. 587 (2016). It bears emphasis, however, that the sample size of this study was small, and that the introduction of public financing coincided with the state's move from a partisan to a non-partisan selection system.

104. Paul Blumenthal, *This Dark Money Group is Spending Big on Judicial Elections, and No One Knows Why*, HUFFINGTON POST, Nov. 3, 2016, [http://www.huffingtonpost.com/entry/dark-money-judicial-races-center-for-individual-freedom\\_us\\_581b5234e4b0c43e6c1e740d](http://www.huffingtonpost.com/entry/dark-money-judicial-races-center-for-individual-freedom_us_581b5234e4b0c43e6c1e740d).

of such disclosures in any but the most vigorously contested judicial campaigns, where outrageous expenditures buy attack advertising that trumpets the sources of an opposing candidate's support.

### 3. *Disqualification*

Disqualification, in turn, is no panacea. The ABA Judicial Division has thwarted efforts to amend the Model Code of Judicial Conduct to require disqualification when a judge receives significant independent campaign support from an individual or organization affiliated with a party who appears before that judge.<sup>105</sup> The official explanation is that judges in the Judicial Division regard disqualification under such circumstances a matter of procedure rather than ethics, which has no place in the Model Code. Such a position is difficult to square with the existing Code, which already requires judges to disqualify themselves from cases in which they have received direct contributions from parties or lawyers in excess of amounts that states specify. Regardless of whether support is direct or independent, the ethical problem is essentially the same when judges preside over cases in which a party or lawyer has lent excessive support to the judge's election campaign.

Judges depend on campaign support to win elections, but interested individuals and groups lose their incentive to support the campaigns of like-minded candidates if such support will disqualify those candidates from hearing the cases those individuals and groups want the candidates to decide. However, state supreme courts with hotly contested elections exhibit a continued reluctance to disqualify judges that hear cases of interest to their benefactors.

Moreover, disqualification is a means to address perception problems after they arise and does nothing to prevent those problems from arising in the first place. A pair of scholars has found that disqualification does not restore public confidence in the impartiality of the disqualified judge, which suggests that disqualification does not cure the taint that impartiality-damaging conduct creates.<sup>106</sup>

To show that disqualification is no cure-all, however, is not to show that disqualification is useless. Even if disqualification does not restore public confidence generally, it improves the confidence of par-

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105. For a candid and sometimes acrimonious discussion of the events described in this paragraph, see Charles Geyh et al., *The State of Recusal Reform*, 18 N.Y.U J. LEGIS. & PUB. POL'Y. 515 (2015).

106. James Gibson & Gregory Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Legitimacy of the Courts Be Rescued by Recusal?* 74 J. POL. 1 (2012).

ties and their counsel, who would otherwise have their cases heard by a judge whose impartiality was in doubt.

### III. WHY EVERYONE IS WRONG AND WHAT TO DO ABOUT IT

Part II catalogued the array of flaws and exaggerations made by disputants in the judicial selection debate. Some make arguments premised on factual assumptions that are unsupported by data, and are based instead on anecdotes or the authors' signature blend of what they deem common sense. Others rely on data generated by others, cherry pick the "good" data that supports their claims, and ignore the facts that undercut their position. Still others, who generate their own data, frame their research questions in ways that effectively ensure answers supportive of their arguments. Still other researchers announce conclusions putatively drawn from their data, which are dubious extrapolations of their factual findings molded to fit their preferred policy conclusions.

The economist Ronald Coase has written that "[i]f you torture the data long enough, it will confess."<sup>107</sup> In this Part of the Article, I offer several explanations for why participants in judicial selection show-downs have tortured or disregarded the data in pursuit of their normative agendas. I conclude with some prescriptions to address the problems.

#### A. Explanations

##### 1. Path Dependence and Competing Narratives

Participants in the debates summarized tend to employ one of two distinct narratives. The law narrative claims that judges are different from public officials in the other "political" branches of government. If afforded independence from the electorate, the law narrative posits, judges will make decisions on the basis of operative facts and law, rather than the whims of voters or the preferences of campaign supporters. Hence, appointed judiciaries are best. The politics narrative claims, in contrast, that judges are politicians in robes. If rendered independent from the electorate, the politics narrative asserts that judges will make decisions on the basis of their own political or ideological preferences, rather than operative facts and law or the public's policy preferences. Hence, elected judiciaries are best.

The legal and political science communities both seek to understand and explain the decisions and conduct of judges and other public offi-

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107. RONALD H. COASE, *ESSAYS ON ECONOMICS AND ECONOMISTS* (1994).

cial. Members of the legal community have opted into a culture that takes law seriously and believes law is of central relevance to the choices judges make. Members of the political science community, in contrast, have immersed themselves in a culture that takes politics seriously and conceptualizes judges as political actors whose legal rulings can best be explained in political terms. As a consequence, when it comes to judicial selection, law professors, judges, and lawyers tend to align themselves with the law narrative. Political scientists and public officials without legal backgrounds tend to exhibit greater sympathy for the politics narrative.

The allegiance that disputants show for their preferred narrative may be attributable, at least in part, to what political scientists call “path dependence.” Path dependence proceeds from the premise that “what happens at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time.”<sup>108</sup> Historical practice emerges over time to shape the thinking of decision-makers in ways that structure and limit the conclusions they are willing to reach. In that way, paths of analysis that an institution develops can become ruts that limit their perceived options. Path dependence emerged as a way to explain the constraints under which institutions operate. Two scholars, not coincidentally both law professors and political scientists, have argued that the disciplinary divide between the legal and political science communities is attributable to a form of path dependence, which has complicated the ability of either community to see beyond the confines of their own paths, learn from the other, and seek common ground.<sup>109</sup>

Participants in the judicial selection debate are not limited to members of the law and political science camps. But those camps frame the issues for the public debate, and to that extent perpetuate a false dichotomy that renders consensus elusive.

## 2. *Motivated Reasoning and Assimilation Bias*

Participants in the judicial selection debate may subconsciously interpret and resolve gaps and ambiguities in the applicable facts in favor of whichever system of judicial selection they prefer. To understand how this works, I bring a better-studied analog into play: how judges subconsciously interpret gaps and ambiguities in applicable

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108. William Sewell, *Three Temporalities: Toward an Eventful Sociology*, *THE HISTORIC TURN IN THE SOCIAL SCIENCES* 245, 262–63 (Terrence MacDonald ed., 1996).

109. Eileen Braman & J. Mitchell Pickerill, *Path Dependence in Studies of Legal Decision-Making*, *IN WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 114 (Charles Gardner Geyh ed., 2011).

facts and law to favor case outcomes that align with their ideological preferences.

Political scientists who study judges have developed an “attitudinal model” of judicial decision making, which has shown how judges are influenced by their attitudes or ideological predilections.<sup>110</sup> They have made that showing by coding parties and issues that come before the courts with reference to whether judicial rulings in favor of a given party on a given issue would yield a liberal or conservative outcome. Then, researchers compare those outcomes to the ideological orientation of the deciding judges. In the federal system, where most of this research has been conducted, a judge’s ideological orientation is determined with reference to the party affiliation of the president who nominated them, together with other information available at the time of the judge’s appointment. In the U.S. Supreme Court, which answers to no higher court and has a docket limited to a small number of divisive and often politically charged cases, the influence of a justice’s ideological orientation on case outcomes is profound. The impact of ideological influence declines in the lower courts, but is still significant.

An inference one could draw from this data is that federal judges are politicians in robes, who willfully disregard the law and issue rulings that further their ideological agendas to the extent they can get away with it. But judges emphatically and categorically deny that this is so, and swear allegiance to the rule of law—which means either that judges categorically are bald-faced liars who consciously violate their oaths of office at every opportunity, or something else is going on.

One plausible alternative inference is that judges engage in “motivated reasoning,” by subconsciously favoring legal arguments that resonate with their policy predilections when the operative facts or law are ambiguous enough to render the correct outcome unclear.<sup>111</sup> In easy cases, when the law and facts are clear, ideology plays less of a role, which helps to explain why attitudinal influences are less pronounced in lower courts. In hard cases, however, when the law or facts are ambiguous and the judge is confronted with two plausible legal arguments in support of opposite conclusions, the judge must make a judgment call as to which argument is correct or best. In such cases, the judge must bring her background, education, experience, common sense, and legal philosophy to bear in deciding which argu-

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110. SEGAL & SPAETH, *supra* note 9.

111. For a thorough analysis of motivated reasoning in the context of legal reasoning, see EILEEN BRAMAN, *LAW, POLITICS AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING* (2009).

ment is the winner. Accordingly, that conservative and liberal judges would reach different conclusions in close cases is thus unsurprising and is completely consistent with the proposition that judges give us their best assessment of what the law requires. But there is no denying that ideology influences their assessments in these cases at the margins.

The same may be true of social scientists, law professors, and others who think and write about how judges should be selected. We swear allegiance to facts, data, and science, much as judges swear to uphold the law. Confronted with two plausible judicial selection arguments in opposition, disputants are subconsciously motivated to resolve uncertainties in favor of arguments compatible with their preexisting attitudes. It is akin to what cognitive psychologists call "assimilation bias," in which people are predisposed to assimilate new information in ways that are consistent with their previously held views.<sup>112</sup>

Data shows judges sentence criminal defendants more harshly when elections are impending. Election proponents assimilate this data by thinking of sentencing as a form of policy-making that should take the views of the public into account. Thus, they believe the data shows that elections work magnificently. Election opponents assimilate this same data by thinking of sentencing as a form of legal judgment that is corrupted by voters who pressure judges to make popular choices. Thus, the data shows that elections are an abomination.

Research corroborates the common-sense suspicion that scholars are subject to the influence of biases akin to motivated reasoning.<sup>113</sup> Motivated reasoning may also help explain occasional departures from "path dependence," discussed in the preceding Section. For example, insofar as merit selection systems are suspected to produce more liberal judges than election systems,<sup>114</sup> conservative groups within the legal community may be motivated to support partisan election systems. In a similar vein, judges who prevail in states with contested elections may be predisposed to extol the wisdom of the electorate that selected them and support contested elections. In this way, motivated reasoning can trump the path dependent predisposition of lawyers to embrace the law narrative and the appointive systems that the legal profession otherwise tends to prefer. Conversely,

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112. Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOCIAL PSYCH. 2098 (1979).

113. Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANNUAL REVIEW OF PSYCHOLOGY (1998).

114. See Fitzpatrick, *supra* note 49.

political scientists who value procedural justice and worry about the impact of judicial elections on the litigating public, as distinguished from the voting public, may part ways with the politics narrative that path dependent social scientists are apt to favor.<sup>115</sup>

### 3. *Coping with Cognitive Dissonance*

The persistence of unyielding arguments for judicial appointments and elections in light of evidence that such arguments are exaggerated and wrong may also be the result of a coping mechanism to relieve what psychologists call “cognitive dissonance.”<sup>116</sup> Confronted with new information that contradicts their view on judicial selection, disputants resolve the resulting dissonance by discounting or ignoring the new information and crediting tenuous arguments compatible with their views.

Cognitive dissonance and motivated reasoning are related, in that both are means by which people reconcile competing claims in light of their preexisting perspectives. But motivated reasoning is a finer tool that leads people to analyze legitimate ambiguities between competing factual claims and resolve those ambiguities by subconsciously favoring claims that coincide with whichever method of judicial selection they prefer. Cognitive dissonance is a blunter instrument that leads people to maintain allegiance to their preferred method of selection by disregarding or marginalizing contradictory information.

Thus, for example, when a study produces conclusions that support one side in the judicial selection scum, those conclusions are often accepted uncritically by those whose argument the study helps. That same study creates cognitive dissonance among disputants on the other side and is either ignored or scoured for flaws and rejected out of hand when flaws are identified.

### 4. *Dueling Publics*

Without focusing on it consciously, disputants often view judicial selection from the perspective of different audiences. Election proponents usually take the perspective of the general or voting public, whose confidence in judges is affirmed by democracy-promoting, accountability-enhancing elections. Election opponents, conversely, take the perspective of the litigating public, whose confidence in the judiciary is diminished when judges’ perceived need to remain popular

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115. See, e.g. Robert Hume, *Legitimacy, Yes but at What Cost?*, 96 JUDICATURE 209 (2013).

116. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).



with the electorate is in tension with their duty to make fair and independent decisions under law.

Disagreements arise when disputants confuse or conflate these publics. For example, Justice Sandra Day O'Connor argues that, "elections . . . threaten the public's perception of judicial independence" because "[i]f I [knew] I was litigating before a judge who received . . . money from my opponent, I would not think I was getting a fair shake."<sup>117</sup> Social scientists dismiss O'Connor's concern by pointing to survey research of the general public, which shows that the legitimacy-damaging impact of money in judicial races does not offset the legitimacy-enhancing benefits of judicial elections overall.<sup>118</sup> But this counterpoint misses the mark because O'Connor is speaking about the perceived legitimacy of courts in relation to the litigating public, rather than the voting public. Research finds that litigants accept adverse court rulings as long as they feel they received a fair hearing.<sup>119</sup> These studies give credence to O'Connor's concern that a litigant might doubt the fairness of a proceeding in which the judge received significant campaign support from her opponent—an inference corroborated by survey data showing that 90% of the public thinks that judges should not preside over cases involving their campaign contributors.<sup>120</sup>

By the same token, generalizing about the voting public's perception of judicial elections with reference to the litigating public's perception is likewise ill-advised. For example, the litigating public may look askance at a judge who commits to deciding a case in a particular way while campaigning. The voting public, in contrast, may have no problem with judicial candidates announcing their views on issues they are likely to decide as judges, and regard the practice as a benign and useful means for voters to educate themselves about the candidates.

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117. Elaine E. Bucklo & Jeffrey Cole, *Thoughts on Safeguarding Judicial Independence: An Interview with Justice Sandra Day O'Connor*, 35 LITIG. 6, 8 (2009).

118. GIBSON, *supra* note 32 (finding that judicial elections produce a net gain for legitimacy); Woodson, *supra* note 79 (finding that judicial elections can undermine legitimacy in extreme cases).

119. Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluation of Their Courtroom Experience*, 18 L. & SOC'Y REV. 51, 69–70 (1984); TOM TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 82–83 (1997).

120. ADAM SKAGGS, BRENNAN CENTER FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF CITIZENS UNITED ON JUDICIAL ELECTIONS 4 (2010), <http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1>.

### 5. Prescriptions

The key to reform lies in coming to terms with these chronic impediments to agreement, which turns on a two-fold realization. First, we can approach consensus by taking steps to diminish the influence of these impediments. Cognitive dissonance can be confronted and managed; disputants can be brought to the table and convinced to discard those arguments that are demonstrably counterfactual and wrong. Additionally, one can mitigate the effects of motivated reasoning by being alerted of its presence. Reform agendas can consciously seek to better accommodate law and politics narratives for the benefit of both general and litigating publics. Elective systems can include features that afford greater judicial independence for the benefit of the litigating public and the rule of law. Appointive systems can include features that enhance judicial accountability for the benefit of the general public and the judiciary's political legitimacy.

Second, while we can approach consensus, we can never actually achieve it. States can make accommodations that narrow the divide between elective and appointive systems, but cannot eliminate that divide altogether because a state must ultimately choose to hold its judges accountable to the electorate or not. That choice exposes a conundrum at the core of American government: judicial independence from electoral accountability is simultaneously in tension with and essential to democracy. Independence and accountability are so related that they have rightly been described as "different sides of the same coin."<sup>121</sup> But when it comes to judicial selection and whether to elect or appoint, it is not possible to devise a system in which both sides of that coin turn face up on the same toss.

For these reasons, judicial selection issues should be understood as a chronic condition to be managed, rather than a disease to be cured. The first step toward managing this chronic condition is to pursue a course of deep interdisciplinarity. In an ancient Asian folktale, blind men misdescribe an elephant by generalizing from whichever part of the animal each touch. And so it is with those who study the judicial selection elephant. The judges, lawyers, law professors, political scientists, historians, psychologists, journalists and assorted policy wonks who think about judicial selection each bring their respective disciplines to bear. Each has useful perspectives to offer that are incomplete in isolation, but when taken together yield a composite that is closer to accurate. Deep interdisciplinarity diminishes path depen-

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121. Stephen Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339 (1999).

dence by promoting trade, rather than warfare, between the law and politics narratives. By better informing those narratives with the lessons of history, psychology, and anthropology, deep interdisciplinarity will weaken the hold of simplistic and strident binary claims by adding nuance and depth that can diminish the conceptual conflicts that give rise to cognitive dissonance.

A second step is to seek out middle ground that makes judges in elective systems more independent and judges in appointive systems more accountable. This would make binary choices less stark, facilitating incremental, intra-system reform when the political will for systemic change is absent. Electoral systems can lessen the threats they pose to independence and impartiality by holding elections less frequently, pursuing campaign finance reform, and implementing more rigorous disqualification regimes. Appointive systems can institute measures to make judges more accountable via periodic and meaningful performance evaluation processes, and better publicized recourse to disciplinary processes for judicial misconduct.

As deep interdisciplinarity narrows the divide between the law and politics camps, it becomes possible to think past incremental reform and contemplate new selection systems that better accommodate the concerns of all involved. For example, one might revisit an idea I first suggested in 2003, in which supreme court candidates prequalified by commission are chosen by the electorate in contested elections, for a single, lengthy term. This “qualified election” model has the potential to offer the legitimacy-enhancing benefits of a contested election, paired with a safety net to ensure that unqualified candidates are excluded from the pool. The threats electoral systems pose to judicial independence in the form of judges being overly beholden to voters and campaign supporters is diminished by the elimination of re-selection processes. Once elected, judges will be dependent for their tenure on no one. Disqualification processes will be available to ameliorate residual problems that arise when a judge’s campaign conduct undermines her impartiality. At the same time, the damage that rogue judges can do once elected is controlled by term limits and disciplinary processes. I do not propose this alternative as optimal. Rather, it is simply illustrative of approaches that states can consider when impediments to consensus weaken.

A third step is to acknowledge that ultimate failure to achieve consensus is inevitable—and perhaps that is a good thing. The competing values underlying the choice between elective and appointive systems will remain in constructive and perpetual tension despite best efforts to make both systems better and diminish the distance between them.

Moreover, the unavoidably binary character of the election versus appointment choice and the consequent inability to reach universal consensus may be a virtue, rather than a vice. It gives states the flexibility to accommodate changing times, changing circumstances, and changing legal cultures in different jurisdictions by keeping variations of two viable selection alternatives on the table. Which alternative is optimal will depend on which selection system's values take precedence in a given place at a given time.

#### IV. CONCLUSION

In choosing between elective and appointment systems, my views have softened over the years, but my preferred default position remains with appointive systems. An appointive system is most compatible with the role of the judiciary in America's brand of representative democracy, at least when the courts are in good public standing. The three branches of government wield separate powers capable of keeping the others in check. The judiciary's distinctive role is best preserved if it can interpret operative law and decide cases in a unique voice that is not auto-tuned by the same popular pressures that drive the decision-making of the elected branches of government.

The peril of an appointive system is that the judiciary can lose its legitimacy if the general public suspects judges are abusing their independence and going rogue. That is far from inevitable: public confidence in judiciaries of states that appoint their judges can be stable and strong. Additionally, it is no answer to quote survey data showing that the public regards elected judiciaries as more legitimate, if other problems associated with elected judiciaries offset the incremental gains to perceived legitimacy that elections supply.

That said, the judiciary depends on continued legitimacy. In a representative democracy, all branches of government require the support and acquiescence of the governed. This is particularly true of the judiciary, which lacks the executive branch's power to enforce court orders and the legislative branch's power to appropriate revenue for court operations. Without legitimacy, the judiciary is helpless to thwart defiance of its decisions. Hence, there comes a tipping point, where the public ceases to trust judges or those who appoint judges, and therefore adding an element of electoral accountability is necessary to preserve or restore legitimacy. At that tipping point, the default must yield to an elective system. For states that have opted for elective systems, the question then becomes when a return to the default position is justified. Here, the tipping point occurs when the perceived impact of elections on the litigating public and the rule of law,

including the perception that justice is for sale in privately financed judicial campaigns, is adverse enough to outweigh the benefits of electoral accountability. At that point, departure from the default position is justified.