

The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism

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THE *REAL* CONSTITUTIONAL PROBLEM WITH STATE JUDICIAL SELECTION: DUE PROCESS, JUDICIAL RETENTION, AND THE DANGERS OF POPULAR CONSTITUTIONALISM

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ABSTRACT

In Caperton v. A.T. Massey Coal Co., decided in 2009, the Supreme Court held for the first time that conduct related to a judicial election campaign violated a litigant's right to procedural due process because the opposing litigant had contributed an inordinate amount of money to the campaign of one of the justices ruling on the case. The due process danger recognized in Caperton rests on a fear of retrospective gratitude—that is, the fear that the Justice would decide his contributor's case differently because he was grateful for the litigant's generous support. The Court's focus on retrospective gratitude is simultaneously overinclusive and underinclusive. It is overinclusive because it proves far too much: all judges—even federal judges protected by Article III—owe their

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selection to someone, whether it is a president or a senator, and that has never been deemed to threaten their independence. Yet the due process rule that derives from the decision is also underinclusive, because it makes no reference to the real due process danger of state court elections. This Article argues that the key constitutional problem with the selection of state court judges is for the most part not the initial selection process, but rather the use of majoritarian processes (either retention elections or gubernatorial appointment) to determine judicial retention. It is in this context that all of the constitutional concerns about judicial independence converge because this is the context in which the very real threat to decisional independence arises. A judge's fears that deciding a particular case in a particular manner could threaten her continued employment could easily skew the decision from a neutral decision grounded in the judge's independent assessment of the facts and law. This Article argues that life tenure, or, at the very least, some form of formal term limit is required by the Due Process Clause to assure constitutionally required judicial independence. As radical as this recommendation may be, we argue that there is no other way to assure the appearance or reality of fairness, both of which lie at the core of the due process guarantee.

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INTRODUCTION

In *Caperton v. A.T. Massey Coal Co.*, the Supreme Court found for the first time that conduct related to a judicial election campaign could violate a litigant's due process rights.¹ The Court held that "serious risk of actual bias" that was "too high to be constitutionally tolerable" had resulted when recently elected West Virginia Supreme Court of Appeals Justice Brent Benjamin adjudicated an appeal involving his biggest campaign contributor, coal executive Don Blankenship.² Blankenship had spent millions to support Benjamin's successful bid for the high court, knowing his case would come before the court shortly after the election.³

The due process danger that the *Caperton* Court identified rests on a fear of retrospective gratitude—that is, the fear that Justice Benjamin might be so grateful for the generous campaign support that he would decide Blankenship's case differently. Although that was undoubtedly within the realm of possibility, as a constitutional matter, the logic of the Court's rationale may extend far beyond what the Court intended. The idea that Justice Benjamin might feel obligated to decide in favor of someone who had "a significant and disproportionate influence in placing" him on the court⁴ appears indistinguishable from a variety of well accepted forms of backward-looking gratitude that judges may encounter on the bench, short of quid pro quo bribery. For example, an Article III judge would presumably be continually grateful to the president responsible for her lifetime appointment. Yet it has always been understood that the Constitution somehow tolerates that risk: federal judges are not constitutionally barred from hearing cases involving the president who appointed them. Indeed, any other conclusion might well lead to chaotic results.

This exclusive focus on retrospective electoral gratitude as a threat to independent adjudication renders *Caperton* simultaneously overinclusive and underinclusive. The decision is overinclusive

1. 556 U.S. 868, 881-86 (2009).

2. *Id.* at 872-73, 884.

3. *Id.* at 873.

4. *Id.* at 884.

because it encompasses judicial conduct and relationships that, as a general matter, have never been thought to violate due process. Despite attempts to confine the decision to “extreme facts,” Justice Kennedy’s majority opinion offers an amorphous and potentially expansive basis for finding due process violations.⁵ This leaves it unclear how much spending on a judge’s behalf is sufficient to violate due process if a judge later hears a campaign supporter’s case, whether the supporter is a litigant or attorney.

Yet, in another sense, *Caperton* is simultaneously underinclusive because it focuses on election-related retrospective gratitude, while simultaneously ignoring the far greater *prospective* constitutional threats inherent in existing methods of state judicial selection.⁶ For the most part, the constitutional problem with state judicial selection is not the *initial* selection process. Every state judicial position has to be filled *somehow*. Whether it is by gubernatorial appointment, election, or some form of so-called “merit” selection process, judges owe their appointment to some person or group. Moreover, even in the federal system, we have long accepted the influence of some form of majoritarian interests on the initial selection process. After all, both the president who appoints the judge and the senators who confirm the appointment are themselves the product of majoritarian selection processes. Thus, whatever one thinks of the comparative merits of the various selection alternatives purely as a policy matter, foundational constitutional interests are, for the most part, unaffected by the ultimate choice of selection methodology.⁷

Of far greater constitutional concern on a number of levels is the method of deciding upon judicial *retention*—the method by which the judge’s continuation in office is determined. It is here that all of the constitutional concerns about judicial independence converge, because it is here that the very real threat exists that deciding a particular case a certain way may have seriously negative

5. *Id.* at 886-87 (speaking, for example, of an “unconstitutional probability of bias”).

6. Professor Karlan incisively noted this retrospective/prospective distinction in the wake of *Caperton*. See Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 81 (2009).

7. The primary exception, we suppose, would be cases of quid pro quo bribery, which are already deemed unacceptable and indeed, criminal. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 818 (2002) (Ginsburg, J., dissenting).

consequences on the adjudicator's continued employment. This threat may well influence the judge to decide the case in a manner different from her preferred resolution of the matter, purely on the case's merits. For example, when a judge fears that her preferred resolution of a case will be substantially unpopular with the electorate, determining retention by election seriously threatens the fair and neutral determination of that case. Moreover, in cases involving constitutional rights, judicial concern for electoral accountability effectively turns foundational precepts of American constitutionalism—which is firmly grounded in notions of counter-majoritarianism—on their heads. Similarly, if retention rests in the hands of an elected official or group of officials, the fear that the judge's preferred resolution will offend or annoy those officials could have the same skewing effect on the judge's decision-making process.

No doubt numerous cases will arise in which neither the electorate nor elected officials will have the slightest interest in the outcome. But there is no simple way, *ex ante*, to distinguish such cases from those which will trigger electoral backlash, and in any event, there is no way to insulate the adjudicator's independence solely in those cases where such fears are found to be realistic. As long as a judge knows that the voting public, legislature, or executive holds the power to remove her as a result of her decisions on the bench, the very real possibility exists that she will—if only subconsciously—shape those decisions to win their favor, or at least to avoid offending them. That danger, far more than the possibility of gratitude, presents a threat to due process “too high to be constitutionally tolerable.”⁸ Yet the Supreme Court has never seriously considered the possibility that popularly based methods for determining state judicial retention are constitutionally suspect. This hesitancy appears to spring, in varying degrees, from an ill-defined federalism concern,⁹ a desire to avoid impugning the

8. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

9. *See, e.g., Republican Party of Minn.*, 536 U.S. at 795 (Kennedy, J., concurring) (noting—without explaining why—that although there is a “general consensus” that Article III protections have “preserved the independence of the Federal Judiciary,” states are free to select their judges through elections). However, concern for federalism in this context begs the constitutional question because if due process is being violated, the Fourteenth Amendment quite intentionally trumps federalism.

integrity of state court judges, and a reluctance to upset the inertia of long-established judicial selection systems.¹⁰ Perhaps more fundamentally, the judicial unwillingness to explore the serious constitutional flaws in popularly grounded methods of state judicial retention may flow from a sorely misguided belief in what several scholars have described as “popular constitutionalism”—an ill-defined notion that the Constitution belongs to “the people” and that judicial review by judges insulated from the electoral process is therefore undemocratic and illegitimate.¹¹

Although scholarly advocates of this theory are frustratingly short on details as to exactly how constitutional interpretation is to be exercised by “the people,”¹² it is certainly plausible to view constitutional interpretation by judges chosen by the electorate as the closest feasible alternative. As the carefully structured system of federal judicial independence clearly demonstrates, however, democratically grounded judicial review is diametrically opposed to the inherently countermajoritarian nature of our constitutional system and core precepts of American constitutionalism. Article V of the Constitution imposes a complex and demanding method of supermajoritarian alteration.¹³ Moreover, Article III, the judicial article, expressly insulates federal judges whose power extends to cases arising under the Constitution of the United States from majoritarian accountability.¹⁴ This was not an accident. If only as a historical or descriptive matter, it is simply incorrect to suggest that our system is committed to some notion of democratically accountable judicial review. Even purely as a matter of common sense, the concept of democratically accountable judicial review is a puzzling one. The countermajoritarian Constitution is designed to serve as a check on democratically grounded government.¹⁵ It therefore undermines the Constitution’s intended role as a limit on popular government to vest the final say as to the Constitution’s meaning in

10. See, e.g., *id.* at 796 (“By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant.”).

11. See discussion *infra* Part III.C.

12. See discussion *infra* Part III.C.

13. U.S. CONST. art. V (“Amendments ... shall be valid ... when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.”).

14. U.S. CONST. art. III, § 1.

15. See THE FEDERALIST NO. 78, at 405-06 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

popularly accountable judges. The fundamental flaw in the theory of popular constitutionalism is as simple as that.

Equally important is the dangerous skewing impact that external influence caused by popular accountability will often have on the neutral adjudication required by due process. For a judge to be forced to focus on the possible impact of her decision on her future employment is to seriously threaten the rights of the litigants to fair procedure and a judgment based exclusively on a neutral judicial assessment of both facts and law.

Although the Court's willingness in *Caperton* to acknowledge a possible constitutional problem related to the popular electoral check on state judiciaries has left a potential doctrinal mess in its wake, the Court's failure to deal with the issue of popularly retained state judges does not make the practice any less of a real problem. To guarantee due process and avoid a confusing patchwork of decisions going forward, the Court needs to examine state judicial selection through a new lens. This Article aims to provide exactly that—by focusing on how judges are retained, not how they take the bench in the first place. Our inquiry draws by analogy on Article III's appointment and life tenure provisions, which signal that how a judge gains his or her office is nowhere near as important as how he or she can lose it.¹⁶

Although characterized by a wide consensus that judicial elections are undesirable, much of the voluminous, long-running debate on judicial selection¹⁷ also accepts that such elections are not going

16. *Id.* at 407 (“That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.”).

17. See, e.g., Symposium, *Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 895 (2007); Symposium, *Judicial Ethics and Accountability*, 42 MCGEORGE L. REV. 1 (2010); *Judicial Independence and Accountability Symposium*, 72 S. CAL. L. REV. 311 (1999); Symposium, *Judicial Review and Judicial Independence: The Appropriate Role of the Judiciary*, 14 GA. ST. U. L. REV. 737 (1998); Symposium, *Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 1 (2003); see also David E. Pozen, *The Irony of Judicial*

away and therefore focuses on ways to improve them, such as through campaign finance and recusal reform.¹⁸ However, such efforts, though no doubt well intentioned, either ignore or give short shrift to the foundational constitutional problem. Retention elections present a far greater threat to due process than does any existing method of initial electoral selection, and until this insight is recognized, the serious constitutional problem will remain unchanged.

Unlike legislative and executive officials, the very nature of what a judge does requires that she make decisions independent of popular sentiment.¹⁹ This is true in every case, because litigants are constitutionally guaranteed a neutral adjudication on the basis of the facts and law of their individual cases. But as previously noted, judicial independence is especially important when counter-majoritarian constitutional rights are at stake.²⁰ Core precepts of American constitutionalism depend on it. Yet popularly based judicial retention inherently makes the exact opposite result a very real possibility. Indeed, democratic accountability is the most common justification for requiring methods to determine judicial retention in the first place.²¹ Moreover, because retention gives voters the power to remove a judge for any reason, it has a unique, forward-looking power to influence a judge's decisions once on the bench. In this respect, what judges do to stay on the bench matters more than what they might do to get there, at least from the constitutional perspective of judicial independence.

To be sure, initial campaigns for judicial office may on occasion give rise to legitimate due process concerns, such as those tied to

Elections, 108 COLUM. L. REV. 265, 269 (2008) (“So much has been written about this subject that to proffer yet another disquisition risks being redundant or worse.”).

18. See, e.g., Paul M. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 107 (1998) (“In some form, judicial elections are here to stay.”); Charles Gardner Geyh, *Judicial Selection Reconsidered: A Plea for Radical Moderation*, 35 HARV. J.L. & PUB. POL’Y 623, 642 (2012). But see Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 72 (2003) [hereinafter Geyh, *Why Judicial Elections Stink*].

19. THE FEDERALIST NO. 78, *supra* note 15, at 406 (Alexander Hamilton) (describing judicial independence as “an essential safe-guard against the effects of occasional ill humours in the society”).

20. See *supra* notes 7-8 and accompanying text.

21. See, e.g., Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 303 (2005).

campaign donations and the possibility of candidates pre-committing themselves on issues. But judges must always be selected by *somebody* and will quite naturally feel some sense of gratitude toward those responsible for placing them on the bench, no matter who they may be. Thus, although some type of gratitude tied to initial selection might be undesirable, it is also unavoidable. By contrast, future electoral pressure exists purely out of choice and tradition, not necessity.

This distinction matters because, more than anything else, procedural due process requires a neutral adjudicator.²² A decision maker who bases her findings on factors outside of the evidence before her renders all other procedural safeguards—including notice and the opportunity to be heard, principles at the core of the Supreme Court’s procedural due process holdings—basically meaningless.²³ A non-independent decision maker impedes the search for the truth and thereby delegitimizes the adjudicatory system.

Yet every day, in thousands of state courts, judges weigh life, liberty, and property under the often very real threat of loss of employment if they make a decision sufficiently unpopular to provoke voters, or those who control or influence voters, in the next election. This threat looms in states that use judicial reelection and retention elections, but also in those that rely on any form of majoritarian branch reappointment—either legislative or gubernatorial—to determine whether judges remain on the bench.

The consequences are not merely theoretical. The bulk of citizens’ interactions with courts occur on the state level. Article III’s guarantee of life tenure, intended to ensure independence, currently encompasses 874 federal judgeships.²⁴ By contrast, there are at least 10,000 state court judges nationwide, and roughly 90 percent of them must stand for retention or reelection to keep their jobs.²⁵

22. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457, 479 (1986).

23. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

24. THE FEDERALIST NO. 78, *supra* note 15, at 401 (Alexander Hamilton); *Federal Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> [<http://perma.cc/WYG5-F7X7>] (last visited Sept. 5, 2014).

25. Indeed, there are likely many more state judges. However, conclusive figures are difficult to obtain. These numbers come from calculating data available at *Methods of Judicial*

These judges decide everything from traffic infractions to death penalty cases, often including constitutional questions, and are likely the only adjudicator to whom a litigant will ever have access, given the limited availability of federal review, either in the form of habeas, removal jurisdiction, or Supreme Court certiorari.²⁶

The question of whether a looming election actually influenced a judge's decision in a given case is necessarily less obvious than whether a decision involved a past campaign supporter.²⁷ But because this pressure can apply subconsciously, even the judge might not realize she has shifted her thinking. Moreover, litigants with cases before judges who must face voters to retain their jobs can never be sure whether that judge is deciding solely on the facts and law or instead with an eye toward electoral ramifications. Prospective pressure thus has the potential to influence judicial decisions in “more pernicious and less potentially self-correcting” ways than retrospective gratitude.²⁸

Selection, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= [<http://perma.cc/4SNP-UA9Z>] (last visited Sept. 5, 2014). Another 8 percent face pure legislative or executive branch reappointment. *Id.* Even most states that initially appoint their judges require regular retention elections for judges to hold onto their seats. *See infra* Part I.

26. *See, e.g.*, NANCY J. KING, ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 11-12 (2007), available at <http://perma.cc/8ZVL-ZKZL> (finding that habeas review is slower, less robust, and less likely to end in a grant of the writ in the wake of AEDPA); *Habeas Relief for State Prisoners*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 948 (2012) (detailing the labyrinthine hurdles prisoners must surmount to obtain habeas relief); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 953 (2012) (noting “a long line of U.S. Supreme Court opinions ... making it more difficult for state prisoners to obtain federal habeas relief under [AEDPA]”); *see also* 28 U.S.C. § 1441 (1976) (codifying the federal removal statute); *The Supreme Court, 2011 Term—The Statistics*, 126 HARV. L. REV. 388, 395 (2012) (noting that the Supreme Court granted review in 0.9 percent of cases filed during the 2011 term); *Cases in Federal and State Courts*, U.S. COURTS, <http://www.uscourts.gov/educational-resources/get-informed/federal-court-basics/cases-federal-state-courts.aspx> [<http://perma.cc/YJ8D-55KU>] (last visited Sept. 5, 2014) (providing a long list of subjects that fall almost exclusively under state court jurisdiction, including most crimes, family law, real property, regulation of trades and professions, professional malpractice, internal governance of business associations, personal injury, workers' compensation, probate law, and most traffic violations and registration of motor vehicles).

27. For example, imagine Justice Benjamin deciding the case in *Caperton* with an eye on securing Blankenship's financial support in a future election, instead of after having already received it. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

28. Karlan, *supra* note 6, at 81.

Such pressure undermines constitutional values on what can be called both “micro” and “macro” levels. On a micro level, the fear of electoral retaliation endangers procedural due process for individual litigants seeking their constitutionally guaranteed “fair trial in a fair tribunal.”²⁹ On a macro level, it undermines the judiciary’s essential countermajoritarian role in our constitutional system, for the obvious reason that judges may be reluctant to side with unpopular litigants or uphold controversial rights out of fear of sparking voter discontent.³⁰ This leaves a far less than adequate check on majoritarian branch activities that may endanger constitutional rights and effectively undermines the countermajoritarian check essential to preserving American constitutional democracy.

We conclude that judicial retention by means of either reelection or reappointment violates the Constitution’s guarantee of procedural due process. Though due process may not strictly mandate life tenure for all judges, it does demand, at the very least, a form of tenure secure enough to prevent judges from having to worry about pleasing voters or the popular branches while on the bench, or from making decisions on the bench with an eye towards how they will affect the judge’s future employment prospects.

This Article proceeds in four parts. Part I examines the current judicial elections landscape, explaining the pervasiveness of majoritarian retention methods. Part II explains why the Supreme Court’s holding in *Caperton* misses the mark for due process purposes by focusing on backward-looking gratitude to a campaign contributor as a potential due process violation, instead of focusing on forward-looking influence over a judge’s decision making. Part III explains why judicial elections violate due process in both the micro and macro senses—as applied to individual litigants and as a matter of broader constitutional theory. Finally, Part IV presents concrete examples of how judicial elections have threatened or undermined core notions of due process in the past.

29. *In re Murchison*, 349 U.S. 133, 136 (1955).

30. See THE FEDERALIST NO. 79, *supra* note 15, at 408-09 (Alexander Hamilton); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995).

I. JUDICIAL SELECTION AND RETENTION: THE CURRENT LANDSCAPE

A. *The Topography of State Judicial Selection and Retention*

States select their judges through a patchwork of methods in various combinations: appointment, merit selection, regular elections, retention elections, and some unusual outliers, such as legislative appointment in Virginia.³¹ However, elections remain the most common means of determining who sits on state courts and who stays there. Currently, judges in thirty-nine states must face elections to remain in office—either partisan reelection, nonpartisan reelection, or uncontested up-or-down retention election after initial appointment.³²

Originally, most states appointed their judges, though a few outliers employed elections for at least some judges starting in the 1810s.³³ That trickle became a flood amidst the rise of Jacksonian Democracy in the 1830s and 1840s, as well as concurrent economic and fiscal crises that triggered a wave of state constitutional conventions.³⁴ Frustrated by what they saw as the patronage politics of appointments and coziness between judges and those in the other branches of state government, people believed judicial elections “promised a *less* partisan and *less* politicized bench that would be emboldened to act as a stronger check and balance against the other branches.”³⁵ By the time of the Civil War, twenty-four of thirty-four states had established an elected judiciary, and new states subsequently admitted to the Union also adopted popular election of some or all judges, until the admission of Alaska in 1959.³⁶

Judicial elections fulfilled reformers’ hopes “in at least one respect,” as the first generation of elected judges blocked far more

31. *Methods of Judicial Selection*, *supra* note 25.

32. *See id.*

33. LARRY C. BERKSON ET AL., AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT (2010), *available at* <http://perma.cc/BB9N-K5QY>. Eight of the original thirteen states vested appointment power in one or both houses of the legislature, while the other five used appointment by a governor and his council. *Id.*

34. *Id.*; JED HANDELSMAN SHUGERMAN, THE PEOPLE’S COURTS 10 (2012).

35. SHUGERMAN, *supra* note 34, at 6.

36. BERKSON, *supra* note 33.

legislation than their appointed predecessors.³⁷ However, as party politics and their attendant corruption began to play an increasing role in judicial elections, “it became apparent that this new system was no panacea,” and in the late 1800s and early 1900s the pendulum swung toward other types of reform.³⁸ Nonpartisan judicial elections emerged in some states, although they also eventually suffered from some of the same problems as partisan elections.³⁹ Around the same time, prominent jurists and legal scholars also began advocating for “merit selection” to expand the pool of judicial candidates beyond merely politicians’ friends.⁴⁰ In 1940, Missouri became the first state to adopt such a plan.⁴¹ Though merit selection systems vary somewhat by state, most include “a permanent, nonpartisan commission composed of lawyers and nonlawyers,” appointed by a variety of public and private officials, to recruit and screen candidates.⁴² The commission then forwards a list of qualified individuals to the executive, who must make an appointment from the list.⁴³ The appointed judge serves a year or two and then faces a retention election in which he or she runs unopposed and must win a majority of the vote to win a full term on the bench.⁴⁴

Today, judges in fifteen states must run for partisan reelection, including all judges in Alabama, Louisiana, New Mexico, Ohio, Texas, and West Virginia.⁴⁵ Term lengths run from four to fourteen years, with six and eight years being the most common.⁴⁶ An additional nineteen states hold nonpartisan reelection, with six- and eight-year terms again common.⁴⁷ Eighteen states rely on judicial “retention elections” in which voters are asked only whether they wish to retain the judge currently holding the seat.⁴⁸ If the judge

37. SHUGERMAN, *supra* note 34, at 10.

38. BERKSON, *supra* note 33; SHUGERMAN, *supra* note 34, at 10-11.

39. BERKSON, *supra* note 33.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Methods of Judicial Selection*, *supra* note 25.

46. *Id.*

47. *Id.*

48. *Id.*

loses, the process to fill the vacancy starts over again. In these states, terms after a retention election range from four years, mainly for lower courts, to twelve years for the supreme and appellate courts in California and Missouri.⁴⁹ An additional five states use purely gubernatorial or legislative reappointment for subsequent judicial terms.⁵⁰ The rest either reappoint judges through merit commissions⁵¹ or have life or nonrenewable tenure.⁵² The latter category includes only three states: Massachusetts, New Hampshire, and Rhode Island.⁵³ Once appointed, judges there hold their jobs until age seventy or, in Rhode Island, for life.⁵⁴

Before roughly 1980, judicial elections were, according to Professor Shugerman, “sleepy and low key,” with “relatively inexpensive campaigns.”⁵⁵ But they have since transformed into what he calls “judicial plutocracy,” with businesses “capitalizing on socially conservative issues and pouring money into key races,” and trial lawyers spending more in response (or sometimes vice versa), prompting a flood of advertising and attention, including attack ads and sound bites.⁵⁶ In the 2000s, judicial elections cost \$200 million in direct campaign contributions, up from about \$60 million the decade before.⁵⁷

49. *Id.* The numbers in this section alone add up to fifty states because some states use more than one type of selection mechanism, depending on the type of court.

50. *Id.* Maine and New Jersey both use gubernatorial appointment to fill all judgeships for seven-year terms, while the legislature appoints and reappoints all judges in South Carolina and Virginia. Vermont’s judges are retained by a vote of the state’s general assembly. South Carolina technically has a judicial merit selection commission to make initial appointments, but six of the commission’s ten members are members of the same legislature that makes the ultimate decision on the nominees the commission selects. The state legislature also selects the four members of the general public that make up the rest of the commission. *Id.*

51. *Id.* Judges in Connecticut, Delaware, and Hawaii are all effectively reappointed by merit commissions. For instance, in Connecticut, the merit commission reviews incumbents’ performance on a noncompetitive basis; the governor will then renominate worthy judges, and the legislature will confirm them. New York’s high and intermediate courts also rely on a merit commission for reappointment. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* Massachusetts and Rhode Island use merit selection to pick judges initially, whereas New Hampshire relies on gubernatorial appointment, with approval of a five-member executive council. *Id.*

55. SHUGERMAN, *supra* note 34, at 24.

56. *Id.* at 24, 251-55.

57. *Id.* at 252.

B. The Problem of Judicial Retention

Percentage-wise, fewer judges in retention elections are defeated than those in other types of elections, suggesting that merit selection/retention election plans have to some extent achieved their aim of reducing political competition for judgeships.⁵⁸ This in no way removes the threat to due process posed by *any* judicial election to remain on the bench, however, because an election provides a means for voters to remove judges whose decisions with which they disagree. As Professor Geyh noted:

[O]ne should not assume that because few judges lose their reelection or retention elections, few judges feel threatened by the specter of a challenge to their incumbency based upon the decisions they render in particular cases. Were incumbents to feel no threat, they would presumably perceive no need to campaign aggressively (and spend lavishly) in defense of their seats, which is clearly not the case.⁵⁹

Indeed, it could well be that retention elections are often uneventful *because* judges who face them, knowing that they will face check by election, intentionally avoid doing anything to upset the electorate.

The reason for our suggested dramatic shift in constitutional focus from initial selection to retention is the simple fact that how judges are chosen in the first place matters far less from a due process standpoint.⁶⁰ Every method of initial selection has pluses and minuses. The pitfalls of judicial elections have been well documented, particularly with campaign spending rising to the almost astronomical levels seen in *Caperton v. A.T. Massey Coal Co.*⁶¹ It is worth noting, however, that the concentrated “patronage, cronyism, and capture” of gubernatorial and legislative appoint-

58. *Id.* at 257-58.

59. Geyh, *Why Judicial Elections Stink*, *supra* note 18, at 50.

60. Though, to be sure, selection still matters in other ways—especially in terms of qualifications. Longer, nonrenewable terms arguably create more pressure to pick capable candidates upfront precisely because there is no going back once a judge is picked, short of removal for misconduct.

61. 556 U.S. 868, 872 (2009); *see, e.g.*, Geyh, *Why Judicial Elections Stink*, *supra* note 18, at 51 & n.45.

ments is what initially spurred citizens to adopt such elections.⁶² Though more insulated from popular politics, at the very least, the merit system makes it harder for any one group to gain control of the selection process. Still, the merit system cannot escape party politics entirely, and for several decades, it has produced less diversity on the bench than other systems.⁶³ The key point to recognize is ensuring that a judge would not have to worry about how to remain on the bench once she got there would blunt the drawbacks of each selection method.

The Supreme Court has never even noted, much less adopted the selection/retention distinction advocated here. Its most extensive discussion of judicial elections came in the 2002 case *Republican Party of Minnesota v. White*, which dealt with whether a state could restrict judicial candidates' ability to announce their views on disputed legal and political issues.⁶⁴ Justice Scalia's majority opinion held that such a limitation violates the First Amendment, and in so holding, he explicitly downplayed the differences both between judicial and legislative elections and between state court judges and legislators more generally.⁶⁵ Unlike judges in "countries where judges neither make law themselves nor set aside the laws enacted by the legislature," Justice Scalia wrote, American state judges are not completely separated "from the enterprise of 'representative government,'" as they have the "power to 'make' common law" and "immense power to shape the States' constitutions as well."⁶⁶ He therefore concluded that subjecting state judges to elections is perfectly appropriate; their role and law-making power differ significantly from those of federal judges, and are more closely related to the functions that popular branches perform.⁶⁷

Justice Scalia's logic is highly questionable. After all, the very same rationale could just as easily apply to federal judges, who also

62. SHUGERMAN, *supra* note 34, at 257.

63. *Id.* at 257-59 ("However, as the bar has become increasingly diverse, so too have the nominations by the bar leadership on merit commissions.").

64. 536 U.S. 765, 768 (2002).

65. *Id.* at 770, 784.

66. *Id.* at 784. Justice Scalia describes this as "precisely why the election of state judges became popular," which is arguably inaccurate. *Id.*; see *supra* notes 33-36 and accompanying text.

67. *Republican Party of Minn.*, 536 U.S. at 784.

“make law” and “set aside the laws enacted by the legislature.”⁶⁸ Indeed, the very fact that, as Justice Scalia emphasized, state judges “set aside the laws enacted by the legislature” underscores the need for their separation from the legislature.⁶⁹ Justice Scalia’s opinion also puzzlingly ignores the fact that a judge’s job is radically different from that of a legislator because it requires resolution of individual cases in which the rights of individual litigants are at stake.⁷⁰ Regardless of whether that judge is in a common law state court system or an Article III tribunal, constitutionally dictated due process protections of life, liberty, and property apply.⁷¹

In the same opinion, Justice Scalia—perhaps inadvertently—identified the real issue:

[E]lected judges—regardless of whether they have announced any views beforehand—*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench.... So if, as JUSTICE GINSBURG claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process.⁷²

Justice Scalia presents this comment as one element of a parade of horrors, enabling him to ridicule the idea that electorally based judicial retention violates due process.⁷³ But in the process, he unknowingly makes the case for the opposite view. Although Justice Scalia was correct to challenge Justice Ginsburg for failing to fully

68. *Id.* Under the Rules of Decision Act (current version at 28 U.S.C. § 1652 (2006)), federal judges are not supposed to make common law. However, rightly or wrongly, a number of categories of federal common law exist. *See, e.g.,* *Tex. Ind., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (“[T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as ‘federal common law.’”). In addition, federal courts shape the law in myriad other ways simply by virtue of being part of a system that relies on binding precedent.

69. *Republican Party of Minn.*, 536 U.S. at 784.

70. *See, e.g.,* JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 109-10 (photo. reprint 1999) (1909) (“The essence of a judge’s office is that he shall be impartial, that he is to sit apart, is not to interfere voluntarily in affairs, is not to act *sua sponte*, but is to determine cases which are presented to him.”).

71. The Court’s Fourteenth Amendment jurisprudence makes this point clear.

72. *Republican Party of Minn.*, 536 U.S. at 782.

73. *See, e.g., id.* at 774.

commit to the logical implications of her argument, he does so in order to support the conclusion that judicial elections do not violate due process. Nevertheless his own logic demonstrates exactly how such elections do, in fact, contravene the dictates of due process. Similarly, the fact that state judges can “set aside the laws enacted by the legislature”⁷⁴ is the very reason why state judges need to be insulated from electoral pressure. Otherwise, if judges invalidate a popular law, voters could simply oust them in favor of different judges who will uphold it, undercutting one of the main reasons for having a separate judicial branch in the first place. It is difficult to understand how Justice Scalia can so readily ignore obvious threats to state judicial independence that unambiguously contravene long established constitutionally dictated standards of neutrality.

Unlike Justice Scalia’s majority opinion, both the concurrences and dissents in *Republican Party of Minnesota* evince varying levels of discomfort with judicial elections.⁷⁵ However, they all stop short of suggesting that judicial elections violate due process. As Justice Scalia noted, Justice Ginsburg’s dissent comes closest to following this concern to its logical conclusion.⁷⁶ Most notably, Justice Ginsburg’s dissent observes that a judge’s knowledge that his success and tenure in office depend on certain outcomes represents a “‘direct, personal, substantial, and pecuniary’ interest” sufficient to threaten a litigant’s right to due process.⁷⁷ Her statement is of special significance given that the Court’s judicial independence due process cases have never required proof of actual bias, but instead, have sought to prevent “even the probability of unfairness.”⁷⁸ Thus, one “cannot know for sure whether an elected judge’s decisions are

74. *Id.* at 784.

75. *Id.* at 788-89 (O’Connor, J., concurring); *id.* at 800 (Stevens, J., dissenting); *id.* at 803-804 (Ginsburg, J., dissenting).

76. *See, e.g., id.* at 813 (Ginsburg, J., dissenting) (“[J]udicial obligation to avoid prejudgment corresponds to the litigant’s right, protected by the Due Process Clause of the Fourteenth Amendment, to an ‘impartial and disinterested tribunal in both civil and criminal cases.’”) (internal citations omitted). Justice O’Connor’s concurrence also recognizes the danger that judicial reelection poses, although it does not *explicitly* cast it in due process terms. *See, e.g., id.* at 789 (O’Connor, J., concurring) (“Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”).

77. *Id.* at 815-16 (Ginsburg, J., dissenting) (citations omitted).

78. *Id.*

based on his interpretation of the law or political expediency,⁷⁹ but a prophylactic measure would eliminate that uncertainty. Due process—in Justice Ginsburg’s formulation in her opinion—errs on the side of overprotection. This position is in direct contrast to what Justice Stevens suggests in his dissent: “In the absence of reliable evidence one way or the other, a State may reasonably presume that elected judges are motivated by the highest aspirations of their office.”⁸⁰

The Court’s next consideration of the due process implications of a judicial election-related issue came seven years later, in *Caperton*.⁸¹ There the Court once again bypassed an opportunity to explore the due process ramifications of judicial retention, perhaps because the facts of the case concerned only the initial selection process.⁸² As we demonstrate in the following section, however, the facts of *Caperton* illuminate why popularly based judicial retention is inherently incompatible with both procedural due process and broader countermajoritarian constitutional values.

II. *CAPERTON* AND GRATITUDE AS A DUE PROCESS VIOLATION: TOO MUCH AND NOT ENOUGH

In *Caperton*, the Court held that although in most situations campaign contributions by a prospective litigant or attorney do not give rise to a probability of bias sufficient to constitutionally require a judge’s recusal, Blankenship’s “significant and disproportionate influence in placing [Justice Benjamin] on [his appeal] by raising funds or directing the judge’s election campaign” was sufficient to pose “a serious risk of actual bias—based on objective and reasonable perceptions,” in violation of the Due Process Clause of the Fourteenth Amendment.⁸³

In one way, the Court’s rationale for its decision in *Caperton* fits well with its previous cases invoking the due process right to an

79. *Id.* at 800 (Stevens, J., dissenting).

80. *Id.*

81. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

82. *Id.* at 873-74.

83. *Id.* at 884. Blankenship spent \$3 million on Benjamin’s behalf in the run-up to the election and appeal, more than the total amount spent by all other Benjamin supporters, and \$1 million more than the total amount spent by the campaign committees of both candidates combined. *Id.* at 873.

independent adjudicator. The justice in question in *Caperton* insisted that there was no evidence that he had been biased or that he was “anything but fair and impartial,” a conclusion that the Court did not dispute.⁸⁴ However, because of the “difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one,” the Court reasoned that “the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.”⁸⁵ Otherwise, the Court said, “There may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case.”⁸⁶ Such standards govern the constitutionality of “[e]very procedure which would offer a possible temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true,” to use the oft-quoted phrase from *Tumey v. Ohio*, the Court’s foundational judicial independence case.⁸⁷

Despite this sweeping language, the Court has acknowledged that it is impossible to root out all bias and interest.⁸⁸ It therefore confined its earlier judicial independence decisions to two categories of situations that could give rise to a due process violation: those in which the judge had a direct financial interest in the outcome of a case and those involving non-summary contempt procedures where the judge had such strong emotional ties from prior proceedings that he would be unlikely to rule fairly.⁸⁹

Non-summary contempt adjudication is rare, and the most recent case in the contempt line, *Mayberry v. Pennsylvania*, is from 1971.⁹⁰ In *Mayberry*, a criminal defendant repeatedly insulted both the

84. *Id.* at 874.

85. *Id.* at 883 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

86. *Id.*

87. 273 U.S. at 532. For additional information on *Tumey*, see *infra* notes 95-98 and accompanying text.

88. *Tumey*, 273 U.S. at 522, 531.

89. *Caperton*, 556 U.S. at 877-87. For an example of the second category, see *Mayberry*, 400 U.S. at 463-64 (“Where, however, [a judge] does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place.”). Though this article focuses on financial pressures, there are conceivably other prospective pressures that could influence a judge’s decisionmaking while on the bench—such as, the desire to remain a judge not because he needs the money, but simply because he likes the work.

90. 400 U.S. 455 (1971).

judge and the proceedings; after the trial ended, the judge charged the defendant with contempt and found him guilty.⁹¹ Although acknowledging that “not every attack on a judge ... disqualifies him from sitting,” the Court noted that the insults at issue in this trial were so vicious that due process required contempt adjudication before a different judge.⁹² Today, in an era of even coarser public dialogue, it seems unlikely that the Court would go quite as far out of its way as the *Mayberry* Court did in explaining how appalled it was by the defendant’s conduct.⁹³ Nonetheless, the contempt cases remain good law—a fact illustrated by Justice Kennedy’s citation of *Mayberry* in the majority opinion in *Caperton*.⁹⁴

Unlike the pecuniary interest cases, the contempt cases rest upon a backward-looking anger rationale. Direct personal insults are so likely to color a judge’s judgment of a particular litigant that it would deny due process for that judge to rule in the future on contempt charges stemming from those insults. These decisions never claimed to be broadly applicable. Rather, they attempted to confine their holdings to very specific factual settings. Though also based on the idea that backward-looking emotions can taint a judge’s decision making, this anger arguably presents a more direct due process violation than *Caperton*-style gratitude because the person acting as judge is also the complaining party. Such conflicts are also easier to detect. A judge will always owe many people for his job, but anger is case-specific.

The direct financial interest cases have had more widespread applicability, yet at the same time sparked greater uncertainty. *Tumey v. Ohio* represents the classic illustration of this category.⁹⁵ There the Court unanimously found that a “Mayor’s court,” in which the mayor-acting-as-judge was paid only if the defendant was convicted, violated the Fourteenth Amendment’s due process

91. *Id.* Among other things, the defendant called the judge a “dirty sonofabitch” and a “dirty, tyrannical old dog,” told the judge to “[g]o to hell,” and referred to the proceedings as “bullshit.” *Id.* at 456-58.

92. *Id.* at 466-67.

93. *Id.* at 456 (“Petitioner’s conduct at the trial comes as a shock to those raised in the Western tradition that considers a courtroom a hallowed place of quiet dignity as far removed as possible from the emotions of the street.”).

94. *See, e.g., Caperton*, 556 U.S. at 881.

95. 273 U.S. 510 (1927).

guarantee.⁹⁶ This “direct, personal, pecuniary interest in convicting the defendant” made it impossible for the mayor-judge to serve as the impartial adjudicator that due process requires.⁹⁷ This was so, even though “[t]here are doubtless mayors who would not allow such a consideration ... to affect their judgment” in the particular case; “[t]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.”⁹⁸

Subsequent cases elaborated and expanded upon what constituted the “direct, personal, pecuniary interest” sufficient to violate due process. In *Ward v. Village of Monroeville*, for example, the Court held that a mayor violated litigants’ right to due process by sitting as a judge in a court whose “fines, forfeitures, costs, and fees” made up roughly half of total village revenues.⁹⁹ The mayor played a role in managing the town’s finances and also had responsibilities for revenue production and law enforcement.¹⁰⁰ Applying *Tumey*, the Court held that the mayor’s interest in keeping the village coffers filled provided enough “possible temptation” to find against defendants.¹⁰¹

Ward was perhaps more important, and proved to be more of a step forward, than the Court realized at the time. In *Ward*, the mayor did not stand to gain directly or risk losing income as a result of his decisions—only the town did. Yet that interest was still sufficient to violate due process. One could argue that achieving healthy town finances provided indirect financial benefit to the mayor by satisfying voters and helping him remain in his elected position, but it is unclear from the decision how much the mayor-judge was paid for that job, if at all. In any event, the mayor-judge’s financial incentive to decide cases a certain way found to exist in *Ward* was both less personal and less financially direct than in *Tumey*, and more analogous to the dilemma faced by elected state judges (though, for reasons we will explain, not nearly as problematic).

96. *Id.* at 531-32.

97. *Id.* at 519-20, 523-24.

98. *Id.* at 532.

99. 409 U.S. 57, 57-58 (1972).

100. *Id.* at 60.

101. *Id.*; cf. *Dugan v. Ohio*, 277 U.S. 61 (1928) (upholding Mayor’s court when the mayor was paid a fixed salary regardless of conviction rate).

Similarly, in *Aetna Life Insurance Co. v. Lavoie*, the Court held that an Alabama Supreme Court justice violated due process by participating in a case that would help determine the law that would govern his *own* lawsuit against one of the parties, pending in a lower court.¹⁰² The 5-4 decision he authored “had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.”¹⁰³ Although the justice’s decision in the disputed case did not necessarily lead to *guaranteed* financial gain, unlike the rulings at issue in *Tumey* and *Ward*, it did give rise to a strong probability that the justice would succeed in his pending suit and receive money as a result. This, the Court held, constituted the requisite direct pecuniary interest sufficient to violate due process because it had the effect of making the justice “a judge in his own case.”¹⁰⁴

Importantly, the “direct, personal, substantial, pecuniary interest” cases all rely on a rationale grounded in a concern over a judge’s temptation due to the possibility of *forward*-looking financial gain: a judge who hears a case in which he has a *prospective* financial incentive to decide a certain way deprives litigants of a neutral adjudicator and thus violates their right to due process.¹⁰⁵ In *Tumey*, for example, that incentive came in the form of a direct payment that would result in a decision in favor of a particular litigant.¹⁰⁶ In *Ward*, the court deemed it sufficient that the money resulting from a particular judicial decision went to the city government which the mayor-judge played a major role in running.¹⁰⁷ The interest in *Lavoie* was filtered through another layer: state law governing insurance suits that would benefit the judge through resolution of a separate litigation.¹⁰⁸ But to the Court, the case in which the Alabama justice’s financial interests were at stake was sufficiently

102. 475 U.S. 813, 822-24 (1986).

103. *Id.* at 824.

104. *Id.*; see *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646 (C.P.); 8 Coke 114a.

105. See also *Connally v. Georgia*, 429 U.S. 245 (1977) (overturning Georgia system that paid justices of the peace based on the number of search warrants they issued); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (holding that the pecuniary interest of members of a state optometry board, optometrists themselves, was sufficient to bar them from adjudicating a law that would put half of their competitors out of business).

106. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

107. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 58 (1972).

108. *Lavoie*, 475 U.S. at 822.

dependent on the outcome of the case before the justice as to be constitutionally defective.¹⁰⁹

In contrast to all of the preexisting case law, the decision in *Caperton* rests on the potential of *past* financial benefit to skew a judge's decision making.¹¹⁰ The petitioners argued that although Blankenship's campaign support was not a bribe or criminal influence, Justice Benjamin "would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected," thereby creating a "temptation ... as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* and [*Ward*] ... as well as [in the contempt cases]."¹¹¹ Justice Kennedy, speaking for the Court, accepted that argument, holding that Blankenship's lavish spending in support of Justice Benjamin's campaign, combined with the timing of that spending, raised a "serious risk of actual bias," such that for Justice Benjamin to hear Blankenship's case would constitute a violation of due process.¹¹²

Justice Benjamin's failure to recuse himself gave rise to a strong impression of unfairness that would have caused the party opposing Blankenship to doubt the legitimacy of the result. But it was a far less obvious due process violation than those found in the prior judicial independence cases, and a less glaring threat to due process than judicial retention elections in general. First, in *Tumey* and *Ward*, as with judicial reelections, the risk is that a *future* financial incentive will sway the judge's decision making. That financial benefit could be a certainty, as in *Tumey*, or merely a possibility, as in *Lavoie*, but in either event, it hinges on decisions to be made by the judge in cases currently before her. In *Caperton*, the only prospective financial benefit that Justice Benjamin could conceivably receive from deciding in favor of Blankenship would be the cultivation of Blankenship's support in the next election, which was eight years away when Justice Benjamin last ruled on the case.¹¹³ It is conceivable, of course, that the Court could deem this consideration a sufficient threat to independence to constitute a constitutional

109. *Id.* at 823-24.

110. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881-81 (2009).

111. *Id.* at 882.

112. *Id.* at 884.

113. *Id.* at 873, 875-76. Benjamin was elected in 2004 and last refused to recuse in 2008; West Virginia's high court judges serve twelve-year terms. *Id.*

violation as a future benefit case; after all, the day a judge is elected she may reasonably be thinking about the need to prepare for reelection. Indeed, in many ways that is the very message of this Article. But the Court in *Caperton* chose not to focus on such a future-centric analysis and instead focused solely on the backward-looking factor of gratitude.¹¹⁴

None of this is to say that *Caperton* should have come out the other way, or that gratitude can *never* constitute a sufficient influence on a judge's thinking to violate litigants' rights.¹¹⁵ Rather, the point is that *Caperton's* gratitude rationale simultaneously proves slightly too much and not nearly enough.¹¹⁶ Judges will always owe their job to *someone*, and often someone who may at some point appear before them or be directly impacted by their decisions. But that in and of itself should not be considered constitutionally problematic. In addition, it would be difficult to sort out *when* gratitude is sufficient to deprive a litigant of an independent adjudicator. By contrast, the threat that a judge might make decisions on the basis of what might win her another term in office (and thus ensure her continued livelihood) looms constantly and fits with the rationale underlying the Court's hallmark cases concerning the right to an independent adjudicator: the prospect that future financial gain will influence and perhaps skew judges' decisions on the bench. *Caperton* thus avoids consideration of the greater structural concern that retention poses through the pressure of having to face voters, regardless of campaign spending.¹¹⁷

Despite the *Tumey* line of cases, the *Caperton* opinion does not expressly raise concerns about the possibility that a future election would improperly influence Justice Benjamin's decisions. Though

114. *See id.* at 882.

115. Indeed, as the *Caperton* opinion notes, nearly every state has adopted judicial conduct codes to guard against this type of appearance of impropriety, requiring judges to disqualify themselves from hearing cases in which their impartiality "might reasonably be questioned." *Id.* at 888 (quoting W. VA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (2009)). Two other West Virginia Supreme Court of Appeals justices recused themselves from rehearing the *Caperton* appeal on these grounds; Justice Benjamin refused. *Id.* at 874-75. In dissent, two of his fellow justices assailed him for participating in the decision. *Id.* at 875.

116. *See id.*

117. *See, e.g.,* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1276 (2008) ("[T]he primary threat to independence arises at the point of re-selection, when judges are at [sic] put at risk of losing their jobs for unpopular decisions that they previously made.").

Justice Kennedy attempted to limit *Caperton*'s holding to the "extraordinary situation" at hand, his majority opinion employs broad language that raises as many questions as it does answers.¹¹⁸ In defining the "objective standards" under which a judge's partiality violates due process, he wrote, "the question is whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"¹¹⁹ This language set off an avalanche of criticism and dissection, exemplified by the "Forty Questions" Chief Justice Roberts posed in his dissent.¹²⁰ Furthermore, Justice Kennedy's language closely resembles the emotional tie at issue in the contempt cases, minus the limited applicability to situations involving case-specific anger.¹²¹ For our purposes, it is enough to note that it is extremely unclear what "practice" must be forbidden on the basis of *Caperton*: Private financing of judicial elections? Spending over a certain amount on a judicial campaign (and if so, how is that amount determined)? Judges hearing cases that involve campaign supporters?

To take the narrow view, if hearing a case involving the person to whom a judge owes his position constitutes a due process violation, then Article III judges are arguably violating due process on a fairly regular basis.¹²² After all, federal judges more directly owe their position to the president who appointed them and the senator who recommended them than Justice Benjamin did to Blankenship. As generous as Blankenship's support was, it is impossible to know whether it was the determinative factor in Justice Benjamin's electoral victory. The Court in *Caperton* itself said that "proving what ultimately drives the electorate to choose a particular candidate is

118. *Caperton*, 556 U.S. at 887.

119. *Id.* at 869-70 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

120. *Id.* at 893-98 (Roberts, C.J., dissenting).

121. *Id.* at 869-70 (majority opinion).

122. See U.S. CONST. art. III. For instance, federal judges routinely hear cases involving challenges to statutes passed by, and decisions made by, the administration that appointed them, including the 2012 health care decision in which Obama-appointed Justices Kagan and Sotomayor participated. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2571-72, 2575 (2012). For a mundane but representative example, see *Papazoglou v. Napolitano*, No. 1:12-cv-00892, 2012 WL 1570778 (N.D. Ill. May 3, 2012), which involved a federal district judge, an Obama appointee, ruling on an Obama administration Department of Homeland Security decision.

a difficult endeavor, not likely to lend itself to a certain conclusion.”¹²³ It is much easier for an Article III judge to get a sense of who was instrumental in her appointment, since Article III judges are selected by a far smaller pool of individuals.

Yet implicit in the very structure of Article III—generally considered the gold standard for ensuring an independent judiciary—is the idea that backward-looking gratitude alone, even significant gratitude for the position that provides one’s livelihood, cannot be deemed a due process violation. Instead, Article III is set up to remove any *prospective* incentives to decide cases a certain way. Once on the bench, Article III judges never have to seek reappointment or worry about their salary declining, and they are therefore free to render decisions that might upset the President and the political party that appointed them.¹²⁴ For example, consider Justice Souter’s vote in *Bush v. Gore*,¹²⁵ or Justice Ginsburg’s vote against President Clinton’s position in *Clinton v. Jones*.¹²⁶ They decided cases differently from what their appointing president and party might have preferred, which suggests they did not feel bound by any sense of gratitude. Conversely, the chance that federal judges might “feel pressure to decide certain cases for reasons of self-interest” also does not constitute a due process violation.¹²⁷

When one combines the structure of Article III with the long history of cases holding that the prospect of future financial consequences poses the most serious danger to the guarantee of a neutral adjudicator, the core due process threat comes into focus. Requiring judges’ continuance in office to turn on the will of the voters or majoritarian branch officials whose jobs depend on the approval of the voters is itself the problem because it provides judges with a

123. *Caperton*, 556 U.S. at 885.

124. See U.S. CONST. art. III. It is true, of course, that even insulated federal judges could conceivably shape their decisions to curry favor with those empowered to promote them to a higher court or to raise their salaries. The only means of preventing these possibly skewing incentives, however, would be to prohibit either promotion or salary increases—an untenable result for a variety of obvious reasons.

125. 531 U.S. 98, 129 (2000).

126. 520 U.S. 681, 683-84 (1997) (holding that a sitting President is not immune from civil suits against him for actions taken before he became President and actions unrelated to the the presidency).

127. Redish & Marshall, *supra* note 22, at 498-99 (discussing the pressure judges may feel to decide cases in a particular way if they are hoping to be appointed to a higher court).

prospective financial interest in maintenance of their livelihood in potentially every decision they make on the bench. In this way, a judge's desire to avoid upsetting voters in order to keep his job is driven by financial concerns in much the same way as the judge in *Tumey* might have been.¹²⁸ Indeed, in certain ways the threat to judicial independence may be even greater in the reelection context than in *Tumey* because the loss of livelihood is a far greater financial concern than the loss of a possible supplement to the judge's salary.¹²⁹

It is true that, unlike in *Tumey*, the threat of a particular judicial decision to a judge's livelihood in the reelection context is far more speculative and diffuse.¹³⁰ But it is impossible to know, *ex ante*, exactly which judicial decisions are likely to attract voter attention. We are willing to concede, if only for purposes of argument, that the large majority of judicial decisions are sufficiently technical or esoteric as to completely escape the attention of the voters. However, as we so vividly demonstrate in subsequent discussion, this is by no means always the case, especially where sensitive constitutional issues are raised.¹³¹ To the contrary, many of the issues that arise in the course of state court litigation concern hot-button issues with various segments of the populace, often triggering the interest of powerful interest groups. Of course, the problem is that it is impossible, *ex ante*, to separate the cases which might engender public retaliation from those that do not pose such a risk.

Because subjecting adjudicators to such coercive influences on their decision making *always* constitutes an unambiguous violation of due process, the conclusion is inescapable: *All* state judges must be provided with protection of their retention in a manner that satisfies due process. If the necessary choice is between over-protection or under-protection of a constitutional right, it should hardly be controversial that the choice must be in favor of over-protection if at all possible. Granted, judges have to be selected somehow. As one of us wrote many years ago, “[r]eality forces us to tolerate some bias,” or else “there would probably be no one left to

128. See *Tumey v. Ohio*, 273 U.S. 510, 523-24, 535 (1927).

129. See *id.*

130. See *id.*

131. See *infra* Part IV.

adjudicate anything.”¹³² However, “[t]he degree of bias that we are willing to tolerate should be limited ... by our ability to avoid it.”¹³³

Types of bias that most threaten independent adjudication break down primarily into two rough categories, in addition to the rare situation of physical intimidation. The first source of bias is a financial stake in the outcome of a case. This includes a direct stake,¹³⁴ cases in which a judge may gain or lose money in the future based on her decision,¹³⁵ and any case a judge decides differently based on how it will look to voters in an upcoming election. The second source of bias is some personal bias towards a party in the case, along the lines of emotional ties such as friendship, animosity, or family connections.¹³⁶

These vary mostly in degree, not kind. Each “is potentially threatening, and it would be difficult to measure just how much temptation exists in each instance.”¹³⁷

Popularly grounded methods for determining judicial retention are fraught with the potential for just these types of biases. This potential for bias arguably presents the greatest threat to adjudicatory independence.¹³⁸ As Alexander Hamilton wisely noted in *Federalist 79*, “a power over a man’s subsistence amounts to a power over his will.”¹³⁹ The Supreme Court essentially concurred in this assertion in *Tumey*.¹⁴⁰ It did not matter whether the mayor-judge in *Tumey* was *actually* biased, nor did it matter that the payments he received from each conviction were relatively small: the mere perception of unfairness to which the financial interest gave rise was damaging enough.¹⁴¹

This coercive pressure on state judges is different in both degree and kind from mere personal preferences or prejudices, such as whether someone is a baseball fan or a member of the Catholic

132. Redish & Marshall, *supra* note 22, at 492.

133. *Id.*

134. *See Tumey*, 273 U.S. at 523.

135. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Vill. of Monroeville*, 408 U.S. 57 (1972).

136. Redish & Marshall, *supra* note 22, at 492, 500.

137. *Id.* at 492.

138. *Id.* at 494, 496.

139. THE FEDERALIST NO. 79, *supra* note 15, at 408 (Alexander Hamilton).

140. *Tumey v. Ohio*, 273 U.S. 510, 531 (1927).

141. *Id.* at 533.

Church. Unlike purely personal traits, future electoral pressure is inherently undesirable in judges and arguably a potential issue in all cases. Moreover, electoral pressure is easily avoidable. Electorally based judicial retention exists out of tradition, not necessity.¹⁴² States could therefore resolve the danger to which the practice gives rise either by providing for life tenure free from elections or via other reappointment mechanisms that do not require a judge to submit her candidacy to the diffuse and unpredictable mass of voters.

Although following the thread in *Caperton* to its logical conclusion could lead to a wholesale upending of judicial elections on due process grounds, the Court appears to want to avoid this result, especially given the current ubiquity of judicial elections and institutional inertia in their favor.¹⁴³ Granted, the Court is a passive institution that must wait for a case to be brought, and *Caperton*¹⁴⁴ did not squarely present the issue of whether judicial retention violated due process. But the Court has not considered the question in any context. As in the campaign finance realm, in which cases like *FEC v. Wisconsin Right to Life*¹⁴⁵ begat more sweeping change in *Citizens United v. FEC*,¹⁴⁶ it is likely that someone would bring a case if the Court hinted that it was troubled by the due process implications of existing state judicial retention practice.

Granting state judges Article III-style life tenure or some variation on it, such as service until a mandatory retirement age, is the most obvious prophylactic measure designed to remove the due process threat that current retention processes pose. However, it is not necessarily the only option. As Professor Monaghan has observed, “what relieves judges of the incentive to please is not the prospect of indefinite service, but the awareness that their continuation in office does not depend on securing the continuing approval of the political branches” or the voting public.¹⁴⁷ Consequently, fixed,

142. See generally SHUGERMAN, *supra* note 34.

143. To wit: It has now been more than 25 years since a state has amended its constitution to replace contested judicial elections with a merit selection system. Editorial, *How Should We Respond to the 2010 Judicial Elections?*, 94 JUDICATURE 102 (2010).

144. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

145. 551 U.S. 449 (2007).

146. 558 U.S. 310 (2010).

147. Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211 (1988).

nonrenewable terms of service could arguably protect due process as well.¹⁴⁸ After all, if a judge's term is not renewable, one might then conclude that the judge cannot reasonably fear that a decision one way or the other in a particular case will result in loss of employment.

Even in the federal system, proposals have been made for such tenure. For example, Professor Steven Calabresi has advocated fixed, eighteen-year, nonrenewable terms for Supreme Court Justices, in part because such terms would be long enough to allow Justices to adjust to their role and perform their most effective work, while also allowing for moderate, regulated turnover that insulates the court's membership as a whole from short-term political trends.¹⁴⁹ Though shorter terms might not "substantially influence" justices' behavior on the Court, they "run the risk that Justices might tailor their judicial behavior, even if only slightly, to maximize post-Court employment opportunities."¹⁵⁰ Although the Supreme Court is obviously not a perfect metaphor for lower state courts, a similar calculus would conceivably apply to setting state judges' nonrenewable terms, balancing the desire for occasional turnover with the need to protect independence.

Four-, six-, and eight-year terms are common in lower state courts, with states' highest courts often having slightly longer tenures, such as ten- and twelve-year terms.¹⁵¹ If state judges were no longer allowed to seek reelection or reappointment, terms lengthier than those that currently exist would probably be needed to achieve the proper mix of turnover and independence. Because people tend to become state judges at a younger age than they become U.S. Supreme Court Justices, state judicial terms might need to be longer than those Professor Calabresi proposes for U.S.

148. See Michael R. Dimino, Sr., *We Have Met the Special Interests, and We Are They*, 74 MO. L. REV. 495, 500 (2009) (proposing lengthy, non-renewable terms for state court judges because the "pressure on judges to decide cases consistently with popular opinion, rather than with the law, may be too great in a system where judges' jobs depend on someone else's evaluation of their decisions").

149. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 843 (2006).

150. James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court With Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1128-29 (2004).

151. *Methods of Judicial Selection*, *supra* note 25.

Supreme Court Justices to ensure that judges remain unconcerned about prospects for future employment and the possibility of displeasing a possible future employer while on the bench.¹⁵²

III. POPULARLY BASED RETENTION METHODS AND AMERICAN CONSTITUTIONALISM

Requiring judges to submit to popularly grounded methodologies to remain in office violates core constitutional values both in theory and in practice. In terms of constitutional theory, this pathology operates on both the micro and macro levels.¹⁵³ Micro constitutionalism involves the individual litigant's right to procedural due process. Macro constitutionalism, on the other hand, concerns the broad, foundational principles inherent in the Constitution—"the basic notion of limited government," with majoritarian branches and the will of the majority constrained by a binding, written, counter-majoritarian Constitution, enforced by an independent judiciary.¹⁵⁴ Linking the two is the perception of fairness, which is fundamental to both individual dignity and systemic, institutional legitimacy in a constitutional system that "holds itself out as promoting" equality and meaningful participation in its processes, as our justice system does.¹⁵⁵ But no matter how long a judicial term is made, there always will exist the possibility of a judge's concern about post-judicial employment. As a result, the threat to judicial independence will remain. Hence the only means of removing the possibly coercive input caused by judicial concern about continued employment is requiring life tenure.

152. *Id.* Alternately, states uncomfortable with life tenure could instead impose a mandatory retirement age, as in Massachusetts and New Hampshire, where judges must step down at age seventy. See *supra* notes 53-54 and accompanying text.

153. See generally Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 *YALE L.J.* 139, 152-53 (2006) (setting out why both the micro and macro levels of analysis "represent essential elements of American political and constitutional theory").

154. *Id.* at 152.

155. Redish & Marshall, *supra* note 22, at 488.

A. Appearance of Fairness

The appearance of fairness is one of the most fundamental values underlying constitutional rights on both micro and macro levels. It matters not just to individual litigants, but to broader perceptions of systemic legitimacy. The public is more likely to trust and participate in a justice system that it sees as fair.¹⁵⁶ Conversely, if people believe otherwise, their respect for the rule of law may deteriorate.¹⁵⁷ To put the difference in more practical terms, even if a judge finds against you, the result is likely to be more acceptable if you can be sure he ruled on principle, not out of personal or political calculation. The decision might be the same one he would have reached otherwise, but the difference in *appearance* is enough to increase your trust in both the result and the system that produced it.

Of all the values informing the due process guarantee, the perception of fairness “most clearly dictates use of a truly independent adjudicator.”¹⁵⁸ Accuracy means little on its own if litigants have no confidence in the result.¹⁵⁹ *Tumey v. Ohio* is illustrative.¹⁶⁰ There, the Court invalidated the defendant’s conviction for an offense not because the result was inaccurate, but because the procedure used to reach that result was itself unfair and, perhaps even more importantly, could never satisfy the appearance of fairness.¹⁶¹ As long as the judge received payments only if he found the defendant guilty, the defendant would never be able to know for certain whether the judge ruled against him because the judge actually believed he was guilty or because of financial enticement.¹⁶² An independent adjudicator was required to satisfy due process, independent of accuracy.¹⁶³

156. See, e.g., Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 108 (2005).

157. John R. Allison, *Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1158; Meares, *supra* note 156, at 108.

158. Redish & Marshall, *supra* note 22, at 483.

159. See *id.*

160. 273 U.S. 510 (1927).

161. *Id.* at 531-32, 535.

162. *Id.*

163. *Id.* at 535.

Post-*Tumey* cases up to and including *Caperton* have reiterated the importance of adjudication that *appears* fair. As the Court observed in *In re Murchison*:

[O]ur system of law has always endeavored to prevent even the probability of unfairness.... Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way “justice must satisfy the appearance of justice.”¹⁶⁴

Because the appearance of fairness so depends on the presence of an independent adjudicator, it should come as no surprise that judicial retention elections endanger this due process value more than anything else. Studies suggest that elected judges modify their decisions because of electoral pressures.¹⁶⁵ Indeed, a judge may adapt her thinking without even realizing she is doing so, and thus reliance on something like recusal requests to address the problem falls woefully short. The point is that as long as processes of judicial retention exist, so too does the possibility that elected state judges will decide cases differently out of fear of losing their jobs. Thus, the appearance of unfairness is inextricably tied to the uncertainty of retention.

Given the difficulty of separating actual from perceived bias in the electoral context, state judicial retention inherently violates the Constitution’s guarantee of due process. Though a step removed from the remuneration at issue in *Tumey*, this financial motivation is direct and powerful enough to pose a structural threat. The prophylactic measure of ending state judicial retention and reelection is necessary to ensure independent adjudication in state courts, especially as state governments cannot justify such elections as a matter of necessity.

164. *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

165. See, e.g., Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 623 (2009) (providing “empirical evidence that elected state supreme court judges routinely adjust their rulings to attract votes and campaign money” and “evidence that judges change their rulings when the political preferences of their voters change”). This speaks to the need for prophylactic protection: the fact that there is even a *debate* about whether this is the case should be enough to answer the question of whether judicial retention elections are unconstitutional.

B. “Micro” Constitutionalism: The Value of an Independent Adjudicator

“Micro” constitutionalism centers on the need to preserve the dignity of the individual inherent in the liberal social contract via procedural due process, and the individual litigant’s right in a democratic system.¹⁶⁶ Micro constitutionalism applies any time the state is in a position to deprive an individual of life, liberty, or property, including in every judicial proceeding, no matter how insubstantial or subconstitutional the issue involved.¹⁶⁷ It serves as a shield against the immense power of the state and an assurance that the Bill of Rights is not an empty promise.¹⁶⁸ More concretely, micro constitutionalism encompasses the procedural protections commonly included under the banner of due process.¹⁶⁹

The Supreme Court has long taken an instrumental view of procedural due process, holding that it is intended to protect persons “from the mistaken or unjustified deprivation of life, liberty, or property.”¹⁷⁰ But the value and power of micro constitutionalism extend well beyond the mere desire for an accurate result. It also ensures the individual dignitary interests underlying the Constitution’s guarantees¹⁷¹—the appearance of fairness, equality, and the chance to meaningfully participate in a proceeding in which one’s rights are at stake.¹⁷² Popularly based judicial retention threatens protection of all of those values because a judge deciding a case based on factors other than her view of the law and evidence is far less likely to reach an accurate result or treat the litigants fairly.

The presence of an independent adjudicator is thus the most fundamental element of the micro constitutionalism embodied in the Due Process Clause. Without it, as one of us wrote many years ago,

166. Redish, *supra* note 153, at 153.

167. *Id.* at 154.

168. *Id.* at 153.

169. *Id.*

170. *Carey v. Phipus*, 435 U.S. 247, 259 (1978).

171. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1736 (2008) (“The United States Constitution does not have a dignity clause, but Supreme Court opinions regularly and increasingly invoke dignity as a lens through which to make sense of the document’s structural and individual rights guarantees.”).

172. *Carey*, 435 U.S. at 259-60.

“[r]egardless of what other procedural safeguards are employed, the values of due process cannot be realized.”¹⁷³ Indeed, “[t]he rights to notice, hearing, counsel, transcript, and to calling and cross-examining witnesses ... are of no real value ... if the decisionmaker bases his findings on factors other than his assessment of the evidence before him.”¹⁷⁴ For instance, “if the individual seeking to enforce his rights is black, and the adjudicator is racially prejudiced and would therefore never find in favor of a black person,” other procedural guarantees mean nothing.¹⁷⁵ History further bolsters the case that the right to an independent adjudicator “constitutes the floor of due process;” such a right was “considered a crucial element of procedural justice by the common law, by those that established the law of the colonies, and, perhaps most important, by the Framers of the United States Constitution.”¹⁷⁶

When one applies the standard of judicial neutrality dictated by the Due Process Clause to popularly based methods of judicial retention, the unconstitutionality of such methods should become obvious. It should not be difficult to see how pressure from a looming election could taint a judge’s ability to reach accurate decisions in the cases before her.¹⁷⁷ This pressure could influence both the judge’s positive and normative decision making, and perhaps more importantly, create a general atmosphere in which the judge’s electoral concerns inevitably take priority over her desire to reach an accurate result. A judge who is concerned that finding for a particular litigant may upset voters and cause her to lose her job is no longer primarily concerned with accuracy. This also deprives the litigant of the chance to convince the decision maker of the merits of his case because the judge’s mind is already largely

173. See Redish & Marshall, *supra* note 22, at 457, 476, 479 (“Once that protection is dispensed with, the provision of all other procedural safeguards cannot cure the violation of fundamental fairness.”); see also Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1278-79 (1975) (calling an unbiased tribunal the most important factor in ensuring a fair hearing); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 308 (1989) (describing an impartial decision maker as the first requirement of a fair adjudication because it “helps to ensure that the decision is based on the merits of the controversy”).

174. Redish & Marshall, *supra* note 22, at 476.

175. *Id.* at 476-77.

176. *Id.* at 479.

177. See Shepherd, *supra* note 165, at 674 (finding a strong relationship between campaign contributions and how nonretiring judges vote).

closed. As described above, this electoral pressure differs from other personal biases because it is always a potential concern that is impossible to eliminate altogether.¹⁷⁸

Eliminating the practices of judicial reelection, retention, and reappointment would also augment the instrumental value of other due process safeguards. For example, the right to an oral hearing and the right to counsel mean little if the judge presiding over the proceedings is under externally imposed pressure to find against the litigant exercising those rights.

Due process does not rest on a utilitarian desire for accuracy alone: it also encompasses “non-instrumental,” dignitary values, such as the appearance of fairness, equality, and the chance to participate in a proceeding where one’s rights are at stake.¹⁷⁹ These values are part of our constitutional tradition and run through a range of Supreme Court cases, notably in the criminal realm, and form the basis for decisions such as *Tumey*.¹⁸⁰

Though these values are worth pursuing for their own benefit, they also support instrumental goals, and likewise depend on the participation of an independent adjudicator.¹⁸¹ For instance, state judicial elections threaten equality and participation, which reflect the individual’s dignitary interest in having a chance to play a role in proceedings that affect her, and influence the decision maker to rule in her favor.¹⁸² If a judge is predisposed to find for one side for reasons outside the merits of the case—such as, for our purposes, fear of electoral reprisal—then procedural inequality exists. Those whose position in a case would conceivably be more palatable or less upsetting to a majority of voters gain a built-in advantage; those on the opposite side come in behind.¹⁸³ Similarly, a party’s participation has a dramatically reduced chance of affecting the outcome of a case, and little value overall, if electoral pressure means the judge has a powerful incentive to find against that party.¹⁸⁴

178. See *supra* note 165 and accompanying text.

179. *Carey v. Phipus*, 435 U.S. 247, 259-60 (1978); see, e.g., Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981).

180. See Meares, *supra* note 156, at 111.

181. Redish & Marshall, *supra* note 22, at 482-83.

182. *Id.*

183. *Id.* at 485.

184. *Id.* at 488.

An adjudicator who injects irrelevant factors into the decision-making process—for example, a judge deciding a case based on how her decision will impact a future judicial election—also undermines the procedural values of predictability, transparency, and rationality.¹⁸⁵ Under such circumstances, she abandons the course set by the law and impedes individuals’ ability to plan their behavior.¹⁸⁶ By contrast, the absence of other procedural safeguards does not necessarily present the same threat.¹⁸⁷ For instance, a litigant who is unable to give an oral argument in his case may still benefit from procedural rationality if he knows in advance that he is not entitled to such a hearing, and can plan accordingly.¹⁸⁸ No such alternative exists for litigants facing trial or other proceedings before a judge unduly influenced by electoral pressure.¹⁸⁹

Finally, electoral pressure also compromises litigants’ ability to know the “why” of court decisions affecting their cases.¹⁹⁰ A judge who (a) *consciously* decides a case differently based on majority sentiment is almost certainly not going to admit it, and (b) *subconsciously* decides a case differently because of electoral pressure will also not be able to articulate the true reasons for her decision. Either instance leaves the affected individual without a true or satisfactory explanation of why the court decided the way it did. Officials are generally under no obligation to accurately explain the reasons for their decisions in informal settings (for example, a supervisor need not tell an employee why he was fired).¹⁹¹ However, judges generally *are* obligated to explain their decisions, and they cannot fulfill that duty without the kind of decisional independence that reelection and retention elections endanger.

C. “Macro” Constitutionalism: Understanding the Dangers of Popular Constitutionalism

Beyond the threat they pose to individual due process, popularly based methods of judicial retention also endanger what we refer to

185. *Id.* at 486.

186. *Id.*

187. *Id.*

188. *See id.*

189. *Id.*

190. *Id.* at 489.

191. *Id.* at 490.

as “macro” constitutionalism—the countermajoritarian governing structure that ensures due process, the rule of law, and protection of constitutional rights on a societal level.¹⁹² This structure simultaneously allows democratic input while protecting minority rights. Without it, there is little point in having a written constitution because the legislature or executive can simply override it at any time.¹⁹³

By clear design, the Constitution casts the prophylactically insulated federal judiciary in a distinctive role. Vested with the judicial power to decide individual cases and controversies, federal judges are protected by salary diminution prohibitions and life tenure to provide independence and allow them to restrain the popular branches if and when those branches contravene the Constitution.¹⁹⁴ “Without this, all the reservations of particular rights or privileges would amount to nothing,” wrote Alexander Hamilton in *Federalist 78*.¹⁹⁵ Unlike the legislative and executive branches, the federal judiciary is structured so that it is insulated from popular fervor, while still maintaining a tie to the representative branches through the appointment process.¹⁹⁶ The federal judiciary is not the government’s policy making engine, though it may nonetheless end up making law. It is an integral part of a constitutional scheme of self-government “that combines majoritarian and nonmajoritarian aspects in the service of something greater than ‘statistical democracy’ or ‘brute forms of preference aggregation.’”¹⁹⁷

State courts were never conceived of in quite the same way. The Constitution says nothing explicit about state courts or how they should be structured, which helps explain the wide variety of state

192. Redish, *supra* note 153, at 152.

193. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed.”).

194. See U.S. CONST. art. III, §§ 1-2; see also THE FEDERALIST NO. 78, *supra* note 15, at 403-405 (Alexander Hamilton) (noting that “[t]he complete independence of the courts of justice is peculiarly essential in a limited constitution,” and that life tenure is necessary if “the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments”).

195. THE FEDERALIST NO. 78, *supra* note 15, at 403 (Alexander Hamilton).

196. See U.S. CONST. art. III, § 1.

197. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2124-25 (2010) (citations omitted).

court structures and judicial selection and retention mechanisms. But, despite differences between federal and state court systems, since the ratification of the Fourteenth Amendment, the Due Process Clause applies equally to state as well as federal courts. State judges “perform a function fundamentally different from that of ... elected [state] representatives ... [who] act on behalf of the voters who placed them in office.”¹⁹⁸ State courts have the same constitutionally imposed duty to uphold constitutional rights that Article III tribunals do.¹⁹⁹ They also matter in the greater constitutional scheme because they routinely adjudicate federal constitutional claims and defenses, including § 1983 civil rights suits, equal protection claims, and myriad criminal procedure issues, with federal review a remote possibility at best. Though state courts may have more diverse responsibilities than Article III courts, they are similarly entrusted with the obligation to safeguard rights that protect unpopular views or groups against the power of the majority. And, unless they are free to render rights-protective decisions that may be unpopular with a majority of citizens,²⁰⁰ they cannot ensure minority rights. But the problem with popularly based methods of judicial retention, for purposes of macro constitutionalism, extends far beyond the concern over minority rights—as important as the preservation of those rights is to our constitutional system. The primary concern, rather, is that the entire structure of counter-majoritarian constitutionalism is severely undermined when those who interpret the Constitution’s provisions are subject to majoritarian pressure. Indeed, as Article V all too clearly shows,²⁰¹ the Constitution is, by its nature, a countermajoritarian document. It demands supermajorities to alter its provisions, *for the very reason that it is designed to limit simple majorities*. It is, then,

198. *Republican Party of Minn. v. White*, 536 U.S. 765, 803-04 (2002) (Ginsburg, J., dissenting) (quoting *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting)). In contrast, “judge[s] represen[t] the Law,” deciding individual cases based on the law and facts before them, and “judges are expected to refrain from catering to particular constituencies” or prejudging cases. *Id.* (alteration in original).

199. *See, e.g.*, Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 *Nw. U. L. REV.* 143, 156 (1982) (describing a “constitutional history which has always assumed that state courts could ultimately stand as the equal of the federal courts as protectors of constitutional rights”).

200. Such as the rights of criminal defendants.

201. U.S. CONST. art. V (requiring a complex supermajoritarian process for amendment).

highly illogical to vest in those who are vulnerable to majoritarian pressures the final say as to the meaning of the document.

As currently constituted, state court systems that require judges to stand for reelection or retention to remain on the bench have effectively reduced their judicial branch to a majoritarian instrument.²⁰² Professor Croley describes this as the “majoritarian difficulty,” the flipside of Professor Bickel’s “countermajoritarian difficulty;” rather than asking how unelected and unaccountable judges can be justified in a regime committed to democracy, we should instead consider whether “elected/accountable judges can be justified in a regime committed to constitutionalism.”²⁰³ After all, “constitutionalism entails, among other important things, protection of the individual and of minorities from democratic governance over certain spheres. When those charged with checking the majority are themselves answerable to, and thus influenced by, the majority, the question arises how individual and minority protection is secured.”²⁰⁴ And, as we have argued, as long as state judges must face voters to remain on the bench, our system risks denying due process over crucially important rights to large swaths of citizens.

Despite its inherently illogical foundation in the theory of American constitutionalism, popularly based methods of state judicial retention seem to draw strong scholarly support from the intellectually fashionable theory of “popular constitutionalism.” Despite the scholarly prestige of the academics who have shaped this theory in recent years, the serious flaws in this system are readily apparent in the oxymoronic nature of the phrase. “Constitutionalism,” by its very nature, contemplates a system committed to the rule of law and imposition of principled restraints on majorities.²⁰⁵ Hence the very notion of a popularly grounded form

202. JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES 21-22 (Phila., John Dunlap 1776). (“[Judges’] minds should not be distracted with jarring interests; they should not be dependent on any man, or body of men. To these ends they should hold estates for life in their offices, or in other words their commissions should be during good behaviour, and their salaries ascertained and established by law.”).

203. Croley, *supra* note 30, at 693-94 (discussing Alexander Bickel’s theory).

204. *Id.* at 694.

205. See, e.g., Redish & Marshall, *supra* note 22, at 467-68; Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1366 (2010).

of constitutionalism is incoherent because to the extent the system is popularly based, it is a system devoid of constitutionalism, as that concept has been generally understood in American political thought.

Popular constitutionalism posits that the final authority to interpret the Constitution lies not with courts, but with “the people themselves,” whatever that means, in a way that somehow amorphously extends beyond the ability to alter the Constitution via the amendment process.²⁰⁶ Judicial review exists, according to advocates of popular constitutionalism, as “only one of many mechanisms by which the people’s will could be enforced”—with, notably, the people’s will paramount.²⁰⁷ As should be immediately apparent, popular constitutionalism is difficult to define with any real level of precision,²⁰⁸ and it is unclear how it would or could ever work in practice: Who, exactly, are “the people themselves”? How do we know what they want? Are they not already expressing their views on the Constitution—and who is best suited to interpret it—by generally assenting to judicial decisions?

To the extent that judicial elections “suggest what a vigorous practice of popular constitutionalism might entail,” we have years of results from which to gauge their success—or lack thereof.²⁰⁹ Simply put, they are all quite “popular,” but with little or no “constitutionalism.”²¹⁰ As Professor Pozen noted, “[e]lected judges ... will generally seek to avoid a backlash at all costs,” so the safest strategy for incumbent judges facing reelection is to simply preserve the status quo and avoid making any segment of the population angry enough about a decision to protest (and thus threaten the judge’s reelection bid).²¹¹

206. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 107 (2004).

207. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1598 (2005) (reviewing KRAMER, *supra* note 206).

208. See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 676 (decrying the failure of popular constitutionalists “to define the concept with any precision”).

209. Pozen, *supra* note 197, at 2052; see also *infra* Part IV.

210. Which, admittedly, could also serve as a criticism of popular constitutionalism more broadly.

211. Pozen, *supra* note 197, at 2129.

Not surprisingly, this forced judicial restraint can end up at odds with a judge's duty to enforce the constitutional rights of unpopular minorities. Indeed, how could we possibly expect any other result? As Professor Pozen has correctly noted, "[w]hen pusillanimous judicial interpretations of the ... Constitution merely reproduce and reinforce prevailing beliefs ... [t]he courts contribute nothing distinctive to the 'discursive formation of popular will upon which democracy is based.'"²¹² For a countermajoritarian constitutional system to remain viable, the courts must function as more than a majoritarian echo chamber.²¹³

The leading scholarly advocate of popular constitutionalism is Professor Kramer. Kramer pays essentially no heed to the Constitution's inherently countermajoritarian tradition, structure, or text, or to courts' special ability to protect rights and enforce values embodied within that structure.²¹⁴ He excoriates those who believe in judicial supremacy, or at the very least view courts as specially positioned to settle constitutional rights, describing them as anti-democratic, modern-day High Federalists who disdain "ordinary people."²¹⁵ Of such people, he writes:

[T]hey would not deny or repudiate the underlying core [belief]: that constitutional law is motivated by a conviction that popular politics is by nature dangerous and arbitrary; that "tyranny of the majority" is a pervasive threat; that a democratic constitutional order is therefore precarious and highly vulnerable; and that substantial checks on politics are necessary lest things fall apart.²¹⁶

As our exploration of popularly based methods of judicial retention clearly shows, what Kramer is really challenging is not advocacy of judicial supremacy, but rather, the very essence of American constitutionalism. In any event, his analysis demonstrates that

212. *Id.* at 2131 (citing Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1036 (2004)).

213. KRAMER, *supra* note 206, at 45.

214. *See, e.g., id.* at 78. *But see* MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 4 (1991) ("[O]ur system is far from a total or unlimited representative democracy.... Both practically and theoretically ... the Constitution provides counter-majoritarian (at least counter-*simple* majoritarian) limits on democratic government.").

215. KRAMER, *supra* note 206, at 242-43.

216. *Id.* at 243.

concerns about the possibility of a tyranny of the majority are entirely justified.

The sad irony of the entire popular constitutionalist attack on judicial review is that far from being anti-democratic, constitutionalism actually helps to *ensure* democracy—to allow it to flourish.²¹⁷ On this point, de Tocqueville was characteristically prescient:

Under some constitutions the *judges* are *elected* subject to frequent reelection. I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked.²¹⁸

As Dean Post and Professor Siegel noted, “[s]upport for judicial finality in the protection of constitutional rights may reflect the simple idea that in certain contexts we want citizens to hold rights against their governments that are as secure and as reliable as the private rights that they hold against their fellow citizens.”²¹⁹ Truly independent courts are capable of enforcing those rights; those where judges are subject to retention and reelection turn the quest for enforcement into a roll of the dice that endangers the rule of law.

[B]oth common sense and practical experience dictate that the provisions of the Constitution will effectively be deprived of all legal force and meaning if the very majoritarian branches regulated and controlled by that document are allowed to act as the final arbiters of the counter-majoritarian limitations which the document imposes upon them.²²⁰

217. See, e.g., Mortimer Sellers, *An Introduction to the Rule of Law in Comparative Perspective*, in *THE RULE OF LAW IN COMPARATIVE PERSPECTIVE* 5 (Mortimer Sellers & Tadeusz Tomaszewski eds., 2010) (“The first necessary and inescapable desideratum of the rule of law is an independent judiciary.... The great breakthrough in securing the rule of law in most societies occurs when judges attain tenure ... during good behavior ... rather than ... at the whim of those in authority.”).

218. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 247 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966).

219. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1035 (2004).

220. REDISH, *supra* note 214, at 5.

Both judicial retention elections, and gubernatorial and legislative reappointment methodologies effectively provide, albeit indirectly, the majoritarian branches that type of final say. A system grounded in principles of constitutionalism—as ours is—is seriously undermined as a result.

IV. CASE STUDIES: WHEN VOTERS AND JUDGES COLLIDE

Our analysis in previous sections focused on the central contradiction of judicial retention: a judge's place on the bench is dependent on a popular vote when the point of judging is to reach decisions independent of popular sentiment. Although previous sections have explored the theoretical basis for why judicial retention is unconstitutional, this section looks to real-life examples to underscore the dangerously pathological consequences flowing from popularly based retention systems.

It is worth noting that ensuring democratic accountability for judges' decisions was not the primary goal of competitive judicial elections' early proponents, who saw elections more as a means of ensuring judicial independence.²²¹ Though it may seem paradoxical today, judicial elections were untested at the time. At least in the eyes of populist reformers, they offered an opportunity to break away from legislative corruption and other appointment abuses, thereby separating the courts “from the other branches and external political influences.”²²² Similarly, those who advocated retention elections never intended for them to be used to punish judges for unpopular decisions; retention advocates preferred life tenure, but proposed noncompetitive elections “to quiet the fears of ... devotees of the elective method.”²²³

One advocate of merit selection suggested that, in the short run, “the public is rarely in a position to know in advance how good a judicial candidate is, but if his record as a judge is outstandingly poor, the voters can ascertain the facts, and in the merit retention

221. SHUGERMAN, *supra* note 34, at 65.

222. *Id.*

223. G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 609 (2009) (quoting Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, in SELECTED READING: JUDICIAL SELECTION AND TENURE 41 (Glenn R. Winters ed., rev. ed. 1973)).

election they have a means of removing him.”²²⁴ And, in the long run, it was expected that such elections could be eliminated altogether.²²⁵

Retention elections were supposed to be “nearly meaningless”²²⁶ and were designed “to allow qualified judges to serve long terms with only a modest amount of direct accountability.”²²⁷ But despite their proponents’ benign intent, retention elections are basically indistinguishable from regular elections as a due process matter, since they still require judges to face voters to remain on the bench. In addition, experience suggests they have failed to even achieve their stated goal of providing a means for voters to remove judges whose records are outstandingly poor.²²⁸

Expecting voters to differentiate between a judge’s role and those of other candidates for elective office may well be too much to ask. At its core, an election is an opportunity for the electorate to vote for or against a candidate or policy for any reason. In a 2007 poll, the Annenberg Public Policy Center found that the public does not clearly distinguish the role of judges from that of legislators.²²⁹ In

224. *Id.* (quoting Glenn R. Winters & Robert E. Allard, *Judicial Selection and Tenure in the United States*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 164 (Harry W. Jones ed., 1965)).

225. *Id.*

226. Duane Benton, *Comments on the White, Caufield, and Tarr Articles*, 74 *MO. L. REV.* 667, 669 (2009).

227. *Id.* (quoting Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 *JUDICATURE* 210, 233 (1980)).

228. Consider the record of Cook County Circuit Judge Cynthia Brim, who was charged with misdemeanor battery, suspended (with pay—\$182,000 a year), and not “allowed in a courthouse without a sheriff’s escort” after allegedly shoving a sheriff’s deputy and throwing a set of keys at a courthouse security checkpoint—and went on to win her retention election. Editorial, *Bring Some Order to the Court*, *CHI. TRIB.*, Oct. 21, 2012, at C26; Steve Schmadeke, *Cook County Judge Removed from Bench*, *CHI. TRIB.*, May 9, 2014, http://articles.chicagotribune.com/2014-05-09/news/chi-cook-county-judge-removed-from-bench-20140509_1_traffic-court-call-cynthia-brim-judicial-inquiry-board [<http://perma.cc/MV2H-TSFM>]. The day before she was charged, Brim had been ejected from her own courtroom “after a 45-minute tirade during a traffic court call.” *Bring Some Order to the Court*, *supra*. “Elected in 1994, [Brim] ... received negative ratings each time she stood for retention: in 2000, 2006, and 2012;” she nonetheless won the backing of the local Democratic Party, and voters’ approval. *Id.* She was later found not guilty of the charges by reason of insanity, and in May 2014, removed from the bench by a state judicial panel, more than two years after the shoving incident. Schmadeke, *supra*.

229. *Public Understanding of and Support for the Courts*, ANNENBERG PUB. POL’Y CENTER (Oct. 17, 2007), http://www.annenbergpublicpolicycenter.org/Downloads/20071017_Judicial_Survey/Judicial_Findings_10-17-2007.pdf [<http://perma.cc/5KVN-VZ5V>].

addition, 64 percent of respondents preferred electing state judges, even as 73 percent of respondents in the same poll said that they believed to a great or moderate extent that the fear of not being reappointed or reelected “would hurt a judge’s ability to be fair and impartial when deciding a case.”²³⁰

The following examples demonstrate that the concerns this Article raises are not merely academic, and that voters in fact do punish judges based on their decisions—often, decisions involving sensitive constitutional and criminal matters—in a way that threatens due process. At the very least, such elections give rise to a sufficiently powerful threat that judges will often be influenced by the possibility of electoral removal. A contrasting example from the federal courts illustrates the significant difference that judicial job security can make.

A. *Rose Bird and “Soft on Crime”*

In 1986, California voters swept the state’s Chief Justice, Rose Bird, and two fellow justices from office, culminating in a “battle of freakish proportions” that started before Bird, the state’s first female justice, even won confirmation.²³¹ Though the Bird saga has been oft-described, its troubling majoritarian ramifications have been far less explored. Political foes had long sought to remove Bird from a position for which they never believed she was qualified in the first place, and fought her path to success by continually hammering her record of reversing death sentences.²³² Voters responded overwhelmingly, establishing a new paradigm for judicial elections, the lessons of which continue to ripple outward.

Bird, appointed in 1977 by Democratic Governor Jerry Brown, faced opposition from the very beginning,²³³ and her court wasted no time issuing opinions that angered powerful interests.²³⁴ At the

230. *Id.*

231. Frank Clifford, *What Will Be Effects of Political Fray Over Bird?*, L.A. TIMES, Nov. 3, 1986, at 1.

232. *Id.*

233. Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2020 (1988) (noting opposition from the “almost exclusively male bastion of the old boy network” comprising the state’s judicial establishment).

234. Including police, insurance companies, banks, and the Republican party. Claire

same time, the state and national political climates were taking a right turn, and Bird's opponents seized on her attitude towards the death penalty as a vehicle for attacking her.²³⁵ Ever since California voters reinstated the death penalty in 1972, the state's courts had faced a raft of knotty legal issues stemming from capital cases, and "[r]eversal after reversal" became the pattern.²³⁶ This had been true before Bird became Chief Justice, but her court continued the trend. By the time of the 1986 election, the Bird court had reversed the death penalty in fifty-eight of sixty-one cases, with Bird voting for reversal every time²³⁷—though never alone, and often with a large majority.²³⁸ The judges argued that defendants in the cases were deprived of fair trials, but public opinion saw it otherwise.²³⁹ Driven by a drumbeat of criticism from Attorney General-turned-Governor George Deukmejian as well as other Republican politicians and prosecutors, the public began to believe that the court, particularly the Chief Justice, was "soft on crime" and looked for technicalities to "thwart[] the will of the [voters]."²⁴⁰

At the time of the 1986 election, the public was quite receptive to a pro-death penalty message,²⁴¹ and anti-Bird groups crafted an emotional campaign that let crime victims, not politicians, make the case against the judges.²⁴² Bird, meanwhile, insisted on basing her campaign solely on the independence of the judiciary—"electoral suicide," according to a political consulting firm's in-depth survey of public opinion.²⁴³ Indeed, the survey "underscored the central

Cooper, *Rose Bird: The Last Interview*, CALIF. LAWYER, Feb. 2000, at 38-39, available at <http://perma.cc/C8VB-3JVG>.

235. Clifford, *supra* note 231.

236. Thompson, *supra* note 233, at 2034-35.

237. Clifford, *supra* note 231.

238. ASS'N OF MEDIA ACCURACY PAMPHLET, SHOULD CHIEF JUSTICE ROSE BE RE-CONFIRMED IN THE UPCOMING NOVEMBER 4, 1986 CALIFORNIA ELECTION? (1986).

239. Clifford, *supra* note 231.

240. Thompson, *supra* note 233, at 2035. Many Bird opponents explicitly espoused the idea that the state's judges should be more accountable to the will of the voters because "everything else is," even if that meant the courts would pay less respect to minority rights and civil liberties. BETTY MEDSGER, FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS 255-56 (1983).

241. Clifford, *supra* note 231 (citing polls at the time that showed a growing number of Californians—70 to 80 percent—supported capital punishment).

242. *Id.*

243. Bill Zimmerman, *The Campaign that Couldn't Win: When Rose Bird Ran Her Own Defeat*, L.A. TIMES, Nov. 9, 1986, at H1.

contradiction” of the campaign: despite the California Constitution’s mandate that the judiciary remain independent of other branches and reach decisions on the basis of law “without regard for political pressure and the changing tides of public opinion,” voters believed (68 percent to 24 percent) they had every right to reject sitting justices if they disagreed with their decisions.²⁴⁴

On Election Day, Bird won only 34 percent of the vote.²⁴⁵ Fellow Brown appointees Joseph Grodin and Cruz Reynoso—who had attempted to distinguish themselves from Bird by stressing their votes for the death penalty in some cases and noting their prior judicial experience²⁴⁶—were swept out as well, garnering 43 percent and 40 percent of the vote, respectively.²⁴⁷ Three other justices faced no organized opposition and won comfortably.²⁴⁸

Opponents of the justices spent about \$6.6 million on the election, while the justices’ supporters spent about \$4.1 million.²⁴⁹ But the true cost was not financial; it was psychological. Though one could have made reasoned arguments for ousting Bird,²⁵⁰ such arguments were not the ones that dominated the conversation, nor the ones that prevailed at the polls. Instead, the overwhelming message to sitting jurists was clear: Follow popular opinion, or risk losing your job. The same polls that showed Bird far behind in the election also showed that the voters generally thought she was qualified and performed her job with integrity.²⁵¹ “Can an institution, created in part to check the excesses of a majority, remain effective when it becomes vulnerable to the majority’s displeasure?” the *Los Angeles Times* asked two days before the election.²⁵² Former State Supreme

244. *Id.*

245. *County-by-County Results in Statewide Elections*, L.A. TIMES, Nov. 6, 1986, at A27.

246. Frank Clifford, *3 High Court Justices Seek to Avoid Bird’s Coattails*, L.A. TIMES, Feb. 9, 1986, at A3.

247. *County-by-County Results in Statewide Elections*, *supra* note 245.

248. *Id.*

249. Thompson, *supra* note 233, at 2038.

250. See Stephen R. Barnett, Op-Ed, *Bird Lacks Qualities to Be Chief Justice*, L.A. TIMES, Oct. 29, 1986, at B5 (arguing that voters could justifiably vote “no” on Bird because she lacked impartiality, fairness, and good judgment); Michael Moore, Op-Ed, *A Judicial Balance of Power vs. Duty*, L.A. TIMES, Oct. 7, 1986, at C5 (arguing that Bird should be removed not on the basis of her decisions, but because she treated her position as a political office and thus stepped beyond the judicial role).

251. Barbara Allen Babcock, Op-Ed., *Rose Bird Under Attack For Results, Not For Court’s Judicial Reasoning*, L.A. TIMES, Aug. 31, 1986, at E3.

252. Clifford, *supra* note 231.

Court Justice Otto Kaus had an answer: “It is hard to ignore the alligator in your bathtub.”²⁵³

Though California’s State Supreme Court elections have never again been so bitter, it is certainly conceivable that this is because justices have adjusted their judicial behavior in a manner designed to avoid the public’s displeasure. Moreover, those battling to defeat judges elsewhere have drawn inspiration from the anti-Bird forces’ tactics, especially by attempting to tar opponents as “soft on crime.”²⁵⁴ Subsequent campaigns have shown that a judge’s decision in just *one* case can come back to haunt her at election time. In 1996, Tennessee Supreme Court Justice Penny White lost her initial retention election following a campaign in which conservative activists vilified her for joining a majority to reverse a death sentence and remand for resentencing in a case involving the rape and murder of a 77-year-old woman.²⁵⁵ Justice White was the only member of that majority up for retention that year and her defeat meant that then-Governor Don Sundquist, a Republican, could appoint her replacement.²⁵⁶ He vowed to appoint only a justice who supported the death penalty.²⁵⁷ Sundquist described the election outcome as the result of pent-up frustration at Tennessee’s failure to execute anyone since the death penalty had been reinstated in 1976, but also drew a larger lesson from it: “Should a judge look over his shoulder [when making decisions] about whether they’re going to be thrown out of office? I hope so.”²⁵⁸

253. *Id.*

254. See, e.g., Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe For Disqualification*, 52 ARIZ. L. REV. 317 (2010); see also, David Callender, *A Shift to the Right: Butler Rips ‘Broken’ System as Gableman Wins High Court Race*, CAPITAL TIMES (Madison, Wis.), Apr. 2, 2008, at A1 (discussing a Wisconsin Supreme Court justice who was unseated after a race featuring “soft on crime” attacks on him); Curtis Krueger, *Old Case is Heart of GOP Attack*, TAMPA BAY TIMES, Sept. 29, 2012, at 1B (describing Florida Republican groups’ use of a nearly decade-old decision granting a new trial to a murderer on death row to attack three state Supreme Court justices up for retention; all three were Democratic appointees who had blocked initiatives favored by GOP Gov. Rick Scott).

255. Paula Wade, *White First Casualty of Yes-No on Judges: Soft-on-Crime Charge Costs Seat*, COMMERCIAL APPEAL (Memphis), Aug. 2, 1996, at A1.

256. *Id.*

257. *Id.*

258. Paula Wade, *White’s Defeat Poses Legal Dilemma: How is a Replacement Justice Picked?*, COMMERCIAL APPEAL (Memphis), Aug. 3, 1996, at A1.

B. Gay Marriage in Iowa

Though crime has become a common wedge issue in contested judicial elections, it is far from the only subject that inspires voters' passions about judicial decisions. Three members of the Iowa Supreme Court found this out firsthand in 2010 when they lost their seats as a consequence of a single opinion: *Varnum v. Brien*, which legalized gay marriage in the state.²⁵⁹ Surely anticipating the firestorm that would follow, the *Varnum* opinion is a model of reasoned craftsmanship, situating the gay plaintiffs among countless other ordinary Americans who have looked to the courts to vindicate their rights, yet also carefully weighing opponents' objections.²⁶⁰ Nevertheless, same-sex marriage opponents soon set their sights on the 2010 judicial retention election, where three of the Court's seven justices, originally appointed via a merit commission process, would be on the ballot.²⁶¹

In August 2010, Robert Vander Plaats, a Republican business consultant and unsuccessful gubernatorial candidate, launched "Iowa for Freedom," an organization devoted to unseating the justices.²⁶² The group, which drew most of its financial support from national Christian organizations,²⁶³ held a twenty-stop statewide bus tour featuring conservative politicians and urged voters via robo-calls to "send a clear message that we are taking back control of our government from political activist judges," accusing the judges of overturning "the overwhelming will of all Iowans."²⁶⁴ Meanwhile, the justices themselves vowed not to campaign formally, though Chief Justice Martha Ternus warned that judges under political pressure were less likely to be fair and impartial.²⁶⁵ Later

259. 763 N.W.2d 862 (Iowa 2009).

260. See, e.g., *id.* at 872-73.

261. See, e.g., Jennifer Jacobs, *Branstad: Vander Plaats 'Naive' About High Court*, DES MOINES REG., May 21, 2010, at A7.

262. Todd E. Pettys, *Letter From Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715, 726 (2011).

263. *Id.* at 728; Tom Witosky & Jens Manuel Krogstad, *Gingrich Group Gave to Effort Against Justices*, DES MOINES REG., March 16, 2011, at A1.

264. Grant Schulte, *Robo-Call Campaign Urges Iowans to Remove Justices*, DES MOINES REG. (Oct. 7, 2010), <http://www.blogs/desmoinesregister.com/dmr/index/php/2010/10/06/robo-call-campaign-urges-iowans-to-remove-justices/article> [<http://perma.cc/N8WQ-Z7F8>].

265. Grant Schulte, *Iowa Poll: Retention of Justices a Tossup*, DES MOINES REG., Oct. 4, 2010, at A1.

she tried to explain and defend the role of courts in a government of separated powers and noted that an “impartial, legally sound and fair reading of the law can lead to an unpopular decision.”²⁶⁶ This did not sway anti-retention voters, who said they would decide largely based on the gay marriage ruling. “The judges are supposed to follow the will of the people,” said one St. Olaf man.²⁶⁷ Ultimately, election night brought grim news for the three justices: all lost their seats, with each garnering only about 45 percent of the vote—less than the simple majority needed to remain on the bench.²⁶⁸

Iowa conservatives also tried to revive the 2010 fervor in 2012, campaigning against Justice David Wiggins, the only member of the *Varnum* court up for retention that fall.²⁶⁹ Unlike in 2010, however, pro-retention forces were quicker to respond.²⁷⁰ Although Wiggins and the groups supporting him were still reluctant to wage a traditional political campaign, they approached the election in a more coordinated and aggressive fashion than had the candidates in 2010.²⁷¹ In the end, Wiggins received 55 percent of the vote, less than the other justices on the ballot who had not had a hand in *Varnum*, but enough to keep his seat.²⁷² In a statement after the election, Justice Wiggins thanked voters for keeping politics out of

266. Grant Schulte, *Ternus Decries Anti-Judge Vote*, DES MOINES REG., Oct. 13, 2010, at B1.

267. Grant Schulte, *New Iowa Poll: Voters Tilt Toward Axing Judges*, DES MOINES REG., Oct. 31, 2010, at A1.

268. OFFICIAL RESULTS REPORT: 2010 GENERAL ELECTION, IOWA SECRETARY OF STATE'S OFFICE 5, 10, 15 (2010), available at <http://perma.cc/5DUS-2PMB>. Interestingly, the district court judge who wrote the initial decision legalizing same-sex marriage was easily retained, with 66 percent support. See *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (Iowa Dist., Aug. 30, 2007); OFFICIAL RESULTS REPORT: 2010 GENERAL ELECTION, *supra*.

269. Jason Noble, *Wiggins Must Go, Too, Foes Say*, DES MOINES REG., Aug. 12, 2012, at B5.

270. Jeff Eckhoff, *GOP Leader Calls for Justice's Ouster*, DES MOINES REG., Aug. 2, 2012 (quoting Wiggins calling it “unfortunate that [the GOP chairman] apparently thinks that all three branches ... should be political”).

271. Jeff Eckhoff, *Low-Key Response to Attacks May Hurt Wiggins*, DES MOINES REG., Aug. 12, 2012, at A12; see also Jeff Eckhoff, *Nonprofit Takes Charge of Effort to Retain Justice*, DES MOINES REG., Sept. 14, 2012, at B2 (detailing a new group formed to explicitly advocate a “yes” vote on Wiggins).

272. Jeff Eckhoff, *Retention Vote Shows Shift in Iowa's Same-Sex Marriage Views*, DES MOINES REG., (Nov. 8, 2012), <http://archive.desmoinesregister.com/article/20121108/NEWS09/311080050/Retention-vote-shows-shift-Iowa-s-same-sex-marriage-views> [<http://perma.cc/W45C-3DEJ>].

the state's courts.²⁷³ The final three members of the *Varnum* court face retention elections in 2016.²⁷⁴

C. Contrasts with Federal Court, and Lessons Learned

The Iowa justices were punished at the ballot box for one decision recognizing rights of a minority group. But in the South during the Civil Rights Movement of the 1950s and 1960s, federal judges routinely made such decisions in the face of popular and local government resistance so massive it makes California's fight over the death penalty look like a Sunday afternoon in Mayberry. This is worth remembering as a point of contrast, because these judges could have never survived an election. Without Article III's guarantee of life tenure, the entire history of the civil rights struggle would likely have taken a very different course.

Dean Chemerinsky has contended that this era in the history of the federal judiciary was the product of a historical anomaly, with the federal courts occupied by Democrats and liberal Republicans who were "more likely to enforce desegregation ... and follow Warren Court decisions than their state counterparts."²⁷⁵ Now, he says, with years of conservative appointees on the federal bench, Article III judges are no more likely to protect federal constitutional rights than state judges.²⁷⁶ At worst, however, this shows only that freedom from elections is a *necessary*, but not sufficient, condition of judicial independence—as the records of certain segregationist, obstructionist federal judges from the 1950s and 1960s make clear.²⁷⁷ But more importantly, Dean Chemerinsky's comment misses the point. If conservative federal judges had been appointed, rather than more liberal judges, they may well have chosen not to

273. *Id.*

274. Grant Schulte, *Remaining Four Justices Could Face Ouster Efforts*, DES MOINES REG., Nov. 6, 2010, at A1.

275. See, e.g., Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 597 (1991).

276. *Id.* at 598-99.

277. See JACK BASS, UNLIKELY HEROES 164-66, 169 (1981) (describing W. Harold Cox, a federal district court judge in Mississippi, who became "equally infamous for his vituperation as for his notoriously bad record on civil rights," an area in which three-fourths of his decisions were reversed, and federal district court Judge Robert Elliott of Georgia, who was reversed in 90 percent of his civil rights cases).

proceed as forcefully or quickly in implementing civil rights (though of course we cannot know that for sure). If so, it would not be due to lack of judicial independence, but rather, simply due to their different constitutional philosophy. The key point that Dean Chemerinsky ignores is that in the 1960s the federal judges' insulation of their salary and tenure enabled them to implement their constitutional philosophy despite widespread local pressures seeking to coerce them not to do so.

The remarkable record of the Fifth Circuit between roughly 1950 and 1970 shows in vivid detail how necessary it is to insulate judges from electoral pressure. At the time, the circuit encompassed Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida, where "state officials were using delay as a tactical weapon in a strategy based in wearing down the outside forces of change" in the wake of decisions such as *Brown v. Board of Education*.²⁷⁸ State courts were part of the local political system, "with judges chosen either by an electorate from which blacks were effectively excluded or by governors or state legislatures elected by the same constituency."²⁷⁹ Federal circuit and district court judges provided civil rights plaintiffs' only hope of asserting their rights in court—and they took that role seriously, presiding over cases that ended segregation on public transportation,²⁸⁰ desegregated scores of public schools, and ensured minority voting rights and fair jury selection, to mention just a few examples.²⁸¹ The judges often made these decisions at the risk of great personal cost, inspiring scorn, isolation, or worse.²⁸² But the two things that were never threatened were their salary and their tenure.

To illustrate the difference that not having to face reelection makes, consider for the sake of argument what might have happened if the Iowa justices had been confronted with a stream of meritorious gay rights claims following the 2010 election in which three of their colleagues had lost their jobs over *Varnum*. If the judges decided against gay rights, there would be no way of knowing whether they did so because they believed the result was legally

278. *Id.* at 18, 20.

279. *Id.* at 215.

280. See *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956).

281. BASS, *supra* note 277, at 97, 112, 271, 278.

282. See generally *id.*

correct or, instead, because they feared the popular ramifications of the decision. Indeed, even if the justices believed they had reached the legally correct decision, it would still be possible that fear of electoral repercussions subliminally affected the result, and yet, it would be impossible to sort out whether that had actually occurred. This psychological quandary affects both individual litigants and their rights more broadly: the individual litigants' faith in the legitimacy of the decision and the fairness of the procedure would likely be shaken, and members of the general populace would have reason to wonder whether the courts would be willing to make an unpopular decision in their favor if called to do so.

An additional lesson to draw from the California and Iowa campaigns is that any argument grounded in the need to preserve judicial independence is, for the most part, not a particularly winning campaign strategy. Hotly contested elections tend to be hotly contested *because* of controversial decisions. At the very least, such decisions provide kindling for judges' opponents to ignite. This forces judges either to defend their decisions to the majority of voters or attempt to stay above the fray, knowing that the latter course might seriously endanger their chances of remaining on the bench. Although judges should not be immune from having to justify their decisions, the court system already enforces that by design—through the tradition of written opinions and the appeals process. Requiring judges to defend their decisions to voters in order to keep their jobs subjugates the judicial process to the political process, provides incentive for judges to avoid making unpopular decisions in the first place, and feeds into the unanswerable question—*did the judge decide a particular way because of fear of unfavorable election results, or because of the law?*—that corrodes due process in cases before elected judges.

CONCLUSION

State judicial elections are employed across most of the nation, a practice voters support in the abstract even if they cringe at encountering a long list of judicial candidates at the ballot box. Yet tradition has never been enough to justify continuing a practice that

violates the Constitution.²⁸³ And make no mistake, tying judges' continued tenure on the bench to the voters' will violates the Constitution by providing a future financial incentive for judges to decide cases far differently from how they would otherwise. The very argument used to justify judicial elections—as an opportunity to hold judges accountable—renders such elections unconstitutional, especially because it is clear that voters have in fact used judicial elections to hold judges responsible for unpopular, yet arguably legally sound, decisions.

One might reasonably ask, why eliminate the whole institution when we cannot know for sure that *any* judge is deciding cases differently in response to future electoral pressure? That, though, is precisely the point: we will rarely, if ever, know with certainty that a judge decided a matter differently because of electoral pressure. Yet the fact that such pressure exists is simple common sense. It is exactly for this reason that due process demands a prophylactic safeguard of judicial independence. Any of the perceived benefits of judicial reelection or retention elections cannot constitutionally outweigh the psychological toll such elections take on judges and the danger they pose to both individual litigants' due process rights and the broader enforcement of constitutional rights. Judicial reelection and retention elections threaten accuracy, fairness, the chance for individuals to meaningfully participate in judicial proceedings, and courts' ability to protect minority rights. Purely as a constitutional matter, they are not worth the cost.

In *Caperton*, the Supreme Court for the first time found a due process violation linked to judicial elections, but in doing so, the Court adopted a constitutional rationale that proved too much by identifying backward-looking gratitude as the only source of that violation. The real problem in *Caperton* was not the possibility of judicial gratitude to whoever helped put the judge on the bench, any more than when a federal judge adjudicates a case involving the president who appointed her. The problem, rather, was that state

283. See *Shaffer v. Heitner*, 433 U.S. 186 (1977) (holding unconstitutional quasi in rem jurisdiction, despite its venerable origins and widespread current use). Compare *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954) (overturning *Plessy v. Ferguson* and holding unconstitutional segregation in public schools), with *Plessy v. Ferguson* 163 U.S. 537 (1896) (upholding the constitutionality of state laws requiring segregation in public facilities under the “separate but equal” doctrine).

court judges at some point will have to rely on politically-based retention methods once they take office in order to hold onto their jobs. This knowledge and constant pressure threatens sitting judges' decisions in a way that fits with the Court's other key cases on constitutional threats to judicial independence. In *Caperton*, the Court whacked away at a garden snake while ignoring the viper lolling nearby. With the number of high-stakes judicial elections likely to increase, the Court will almost certainly have a chance to revisit the issue in the future. It should do so in a more comprehensive and principled fashion than it did in *Caperton*.