

CONSTITUTIONALLY SPEAKING, DOES RETENTION MATTER?

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I. INTRODUCTION

The short answer has to be “no.” But then that’s only my opinion, which like vestigial organs and orifices unmentioned in polite company, everyone’s got. Scholar or simpleton, “As many men, so many minds;’ every one his own way.”¹

The forests chopped down for paper in service of decades of attenuated scholarship on judicial process and judicial selection are too numerous to count. Nevertheless, particularly when it comes to judicial elections—whether contested, uncontested, partisan, nonpartisan, or yes/no retention, the empirical data² is wanting.³ What’s left is mostly anecdotal or opinion-driven conjecture.

Depending on the author’s agenda, hypotheses are tied to thin reeds of statistically-manipulated support reminiscent of Mark Twain’s popular remonstrance, “There are three kinds of lies: lies, damned lies, and statistics.”⁴

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¹ “Quot homines tot sententiae: suo quoque mos.” *Phormio; or, The Scheming Parasite, in THE COMEDIES OF TERENCE* 301 (Henry Thomas Riley ed., 1874), available at http://www.gutenberg.org/files/22188/22188-h/files/terence5_6.html#phormio.

² See Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 65 (2009) (“In general, our analysis emphasizes the need for hard evidence about the impact of various selection-related procedures.”).

³ But thank God for social scientists. Unlike lawyers with their penchant for answering difficult questions with, “It depends,” political and social scientists try to offer something a tad more substantive via institutional research on state courts. While hardly dispositive, some of their work, most notably by Melinda Gann Hall is to be lauded for moderating the overheated conclusory beliefs of each side of the independence vs. accountability debate. See generally Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 326 (2001) (“One conclusion from this research is inescapable: Court reformers underestimate the extent to which partisan elections have a tangible substantive component and overestimate the extent to which nonpartisan and retention races are insulated from partisan politics and other contextual forces.”).

⁴ MARK TWAIN, CHAPTERS FROM MY AUTOBIOGRAPHY 471 (Shelley Fisher Fishkin ed. 1906).

So my views on the topic are these. Since judicial retention elections operate even more under-the-radar than open, contested judicial elections, it's eminently more difficult for voters to give them much notice. So state constitutionally speaking, since retention elections do such a great job of insulating judges from voters,⁵ the question of whether or not retention elections have an effect on the capacity of state courts to enforce state constitutional rights and responsibilities is pretty much a non sequitur.

Moreover, it's only when high profile hot-button issues like abortion, the death penalty, and most recently, same-sex marriage boil over that the public finds any sense of possible judicial overreaching. It's then that the otherwise under-informed plebs are sufficiently informed to consider running for their pitchforks and torches.

But it's still useful to sardonically note the inconsistencies within the legal academy evidenced by Professor Larry Kramer's populist wisdom⁶ epitomized by his so-called "popular constitutionalism"⁷ on the one hand versus the view of voter as ignoramus on the other.⁸

"*Ahoy polloi.*"⁹ In the tension between judicial independence and judicial accountability, the legal guild wastes little time in subordinating the competing interests of the unwashed masses. To

⁵ See Michael DeBow et al., *The Case for Partisan Judicial Elections*, FEDERALIST SOC'Y (Jan. 1, 2003), <http://www.fed-soc.org/publications/detail/the-case-for-partisan-judicial-elections> ("Less than one percent of all judges standing for retention elections have been removed through that process.").

⁶ See Larry D. Kramer, *Undercover Anti-Populism*, 73 *FORDHAM L. REV.* 1343, 1343 (2005); see also Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 *N. KY. L. REV.* 267, 274 (noting one commentator's view that the framers had a more attenuated view of judicial independence given the weight accorded juries to find the law as well as the facts). Further, Dimino writes, "And, fundamentally, if the law is more than what the judges say, then there is no reason why my opinions, or anyone else's, are necessarily any less valid than those of the members of the Supreme Court." *Id.*

⁷ Kramer, *supra* note 6, at 1344. Kramer defines "popular constitutionalism" as "the idea that ordinary citizens are our most authoritative interpreters of the Constitution." *Id.* Also defined by Kramer as "active and ongoing control over the interpretation and enforcement of constitutional law." Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 *CALIF. L. REV.* 959, 959 (2004).

⁸ Dimino, *supra* note 6, at 267. Where commenting on "the defects of judicial elections," he states, "The public is too ignorant of the legal system, the candidates, and the law to make wise choices; consequently, judges are elected often because of their famous names, ethnicities, position on the ballot, party affiliation, and the like, rather than through an assessment of merit." *Id.*

⁹ See *CADDYSHACK* (Orion Pictures 1980). The comedy, subtitled "The snobs against the slobs," features a scene where Spaulding Smalls greets Danny Noonan with "Ahoy, polloi! Where did you come from, a scotch ad?" as Noonan arrives for the christening of Spaulding's grandfather's boat, "The Flying Wasp." *Id.* Spaulding's grandfather is Judge Elihu Smalls. *Id.* Danny tells Spaulding, "I'm going to law school, too." *Id.* Spaulding disbelievingly asks, "Really? Are you going to Harvard?" "St. Copius of, uh, Northern . . ." Danny answers. *Id.*

the boundless consternation of legal elites, the *ignorant*¹⁰ multitudes favor direct contested elections of state judges over *Missouri Plan* nominating committee merit selection mechanisms and their placatory corollaries, yes/no judicial retention elections.¹¹

Indeed, despite the unfounded wishful thinking and ardent campaigning,¹² the latest effort went down to a predictable crushing defeat in Nevada.¹³ Despite the painstaking statistical machinations of merit selection proponents, the public continues to resist. And in Nevada, it was the third time in a generation, giving the lie to the adage that the third time's the charm.¹⁴ The results of the November 2010 ballot initiative for merit-based selection of judges failed when fifty-eight percent of Nevada voters rejected it.¹⁵

Notwithstanding the collagen-injected lip service to the ideals of judicial accountability paid by lawyers, judges, bar associations, and legal academics, judicial independence always trumps accountability.

As a matter of fact, merit selection where judges are appointed to an initial term by the governor from a list of nonpartisan commission nominated candidates was supposed to be the bridge less far between independence and accountability.¹⁶ Freed from contested electioneering and the influence of campaign money, the initial appointment of judges was supposed to preserve and protect judicial independence.¹⁷ And retention elections were supposed to

¹⁰ See generally Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1292 (2004) (discussing the significance posed by politically ignorant voters).

¹¹ KATHLEEN HALL JAMIESON, *Public Understanding of and Support for the Courts: 2007 Annenberg Public Policy Center Judicial Survey Results*, ANNENBERG PUB. POL'Y CTR. (Oct. 17, 2007), http://www.law.georgetown.edu/judiciary/documents/finalversionJUDICIAL_FINDINGSoc1707.pdf. "The public favors electing judges." *Id.* Sixty-four percent of those asked favored direct election by more than 2-1. *Id.* Only thirty-one percent favored a system in which governors nominate judges from a list prepared by an independent, bipartisan committee. *Id.*

¹² See Meryl J. Chertoff, *Trends in Judicial Selection in the States*, 42 MCGEORGE L. REV. 47, 49 (2010) ("[V]oters are ready to re-evaluate the way judges are selected, and that effective change . . . may serve as a model for a more widespread recalculation in other states.").

¹³ Doug McMurdo, *Voters Reject Changing Judge Selection*, LAS VEGAS REV.-J., (Nov. 3, 2010), <http://www.lvrj.com/news/voters-reject-changing-judge-selection-106597233.html>.

¹⁴ *History of Reform Efforts: Unsuccessful Reforms*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state= (last visited Apr. 21, 2012).

¹⁵ McMurdo, *supra* note 13; *Statewide Ballot Results: State Question No. 1*, NEV. SECRETARY ST., <http://www.nvsos.gov/SilverState2010gen/Ballots.aspx> (last visited Apr. 21, 2012).

¹⁶ See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 47 (2003).

¹⁷ See *id.*

provide the means for voters to hold outlier judges accountable.¹⁸

But it's hard to dismiss the unvarnished wood in the cynical assertion offered by Indiana Law Professor Charles Gardner Geyh that "[t]he presence of retention elections in merit selection systems can only be explained as a concession to the entrenched political necessity of preserving judicial elections in some form, so that merit selection proponents have an answer for detractors who oppose plans that 'take away our right to vote.'"¹⁹

Given the reams of often caustic critical analyses, principally from lawyers and academicians, the ignorant and apathetic voters have no basis to object. Some commentators not only look down their noses but down their chins wondering "whether citizens can select judges and interpret and enforce the constitution in a reasoned and responsible way. Do people have the capacity to achieve the goals of popular constitutionalism given a society apathetic and ignorant in the voting booth?"²⁰

And on the heels of the hand-wringing and teeth-gnashing following the decision of a "confused electorate" in Iowa's November 2010 election cycle where three state supreme court justices lost their retention elections, one law school academic found reason to complain about something rotten in the state of Iowa.²¹ "[I]t does seem," he opined, "that there is something problematic about a judicial selection and retention process that allows a simple majority of voters to retaliate against judges who are charged with protecting the constitutional rights of minority groups."²² University of Nevada Las Vegas Boyd Law School Associate Professor Ian Bartrum argues, "After all, only 'the People'—not a passing majority consensus—have authority to speak in constitutional terms."²³

Bartrum's prescription to save "the People" from themselves is to raise the bar higher by imposing a supermajority requirement to not retain a judge.²⁴ But why stop there? No matter that retention elections already approximate a lighter form of lifetime tenure, why beat around the bush? Can "the People" ever be trusted? Why not

¹⁸ *See id.*

¹⁹ *Id.* at 55.

²⁰ Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 35 (2011).

²¹ Ian Bartrum, *Constitutional Rights and Judicial Independence: Lessons From Iowa*, 88 WASH U. L. REV. 1047, 1047 (2011).

²² *Id.* at 1050.

²³ *Id.* at 1051.

²⁴ *Id.*

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just skip retention votes altogether and call for lifetime tenure?

As it is, with few exceptions, judicial retention elections do little to promote judicial accountability and far more to protect incumbency.²⁵ The infrequently cited truth is that very few judges are ever ousted via retention elections. For instance, “[a] study of retention elections in ten states between 1964 and 1994 showed no trend toward an increasing number of defeats.”²⁶

The reasons? “In practice, however, there appears to be little accountability because the judges run unopposed in an unpublicized ‘campaign.’”²⁷ The voting public is not as informed about the judge’s qualifications or judicial record as they would be if there was an opponent to raise these issues. “As such, judges ‘elected’ through merit selection by and large serve as long as they desire.”²⁸

So for all the caterwauling, Iowa is an aberration. And so was the oft-criticized albeit now twenty-six-year-old ‘poster child’ example of Rose Bird and her associates, Joseph Grodin and Cruz Reynoso, who lost their seats on California’s Supreme Court in 1986 over their opposition to the death penalty.²⁹

It’s hardly surprising, then, that given an understandable self-interest in job security, undisturbed by the specter of accountability-minded voters, judges prefer the merit selection and retention model. Moreover, research further validates the degree of their self-satisfaction since, “In states where most judges are chosen by merit selection or appointment, judges rate the quality of the work done by their state courts higher than judges in states where most judges are selected through partisan or nonpartisan elections.”³⁰

²⁵ Social science researchers have even asserted “that the retention-election system is a sham.” Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOL. PUB. POL’Y & L. 242, 248 (1997) (discussing the overwhelming prevalence of incumbents winning retention elections).

²⁶ Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 17 n.17 (2003) (citing Larry Aspin et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 9–10 tbl.3 (2000)). More recently, the percentage of judges losing retention elections is even smaller, less than one percent. Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 577 (2009).

²⁷ Ed Haden & Conrad Anderson, IV, *Professional Responsibility and Legal Education: Electing State Judges: Unpleasant, but Not Unconstitutional*, ENGAGE, June 2008, at 132, 134, available at http://www.fed-soc.org/doclib/20080703_Haden.Engage.9.2.pdf.

²⁸ *Id.*

²⁹ *Executions Resume in California*, HISTORY.COM (Apr. 21, 1992), <http://www.history.com/this-day-in-history/executions-resume-in-california>.

³⁰ Damon Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226, 231 (2007).

II. THE REALITIES OF JUDGING

Judicial accountability is important because judges enjoy substantial discretion in interpreting state constitutions. The worst kept secret sold long ago to the public and which is resold like snake-oil every time there's a U.S. Supreme Court Senate Confirmation Hearing is that judges are *not* ideologues. Here's how the storyline goes. They're empty vessels. Judges interpret the law. Judges don't make law.

But this is hokey. Unfortunately, law reviews—where such worst kept secrets are revealed—have never enjoyed a popular audience. Indeed, some mordantly argue that law reviews have never had *any* audience, save for the authors' mothers.³¹ And with the immediacy of today's online social media world and blogosphere, they're read even less³² than they were thirty-six years ago when political scientist Paul Dubois tried exploding that nonideological judges bill of goods, writing in a grey-whiskered 1976 law review article, “[t]here is no escaping that judges make policy. . . . Since judges make public policy, it follows that, like other policymakers, they should be accountable to the people in a representative political system.”³³

In 1989, in the context of the federal judiciary, Erwin Chemerinsky also tried further exposing the role played by ideology in choosing judges, arguing that “ideology matters.”³⁴ In fact, he called for the consideration of ideology by the President, governor, Senate, and electorate.³⁵

That is, in deciding whether to appoint, approve, or retain a judge, consideration should include examination of the individual's professional qualifications, his or her judging skills, and also, his or her ideology. It is appropriate and necessary to focus on the individual's views on important issues that are likely to come before his or her court. It is

³¹ See Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, <http://www.nytimes.com/2007/03/19/us/19bar.html>.

³² See *id.* Writing about the legal academy's declining influence, the story quoted Judge Robert Sacks who, having written several of his own law review articles said, “I feel your pain As far as I can tell, the only person to have read any of them was the person who edited them.” *Id.*

³³ David Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 768 (1976).

³⁴ Erwin Chemerinsky, *Ideology, Judicial Selection and Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 643, 646 (1989).

³⁵ *Id.* at 644.

acceptable and, in fact, essential that the evaluator reject a nominee whose views are deemed to be objectionable.³⁶

More recently, in analyzing President Barack Obama's nomination and confirmation of Judge Sonia Sotomayor, Harvard Law Professor Randall Kennedy brilliantly deconstructed the "hackneyed and hollow claim that confuses the public about the realities of judging."³⁷ Professor Kennedy wrote:

Of course judges "make law." Of course they make policy choices. Of course they make rulings that reflect and advance their ideological preferences. That is why selecting the personnel who occupy positions of judicial power matters. To suggest otherwise is simply to nourish the misleading but deep-seated mythology that Senator Jeff Sessions invoked when, while hectoring Sotomayor, he declared that "politics has no place in the courtroom." It is the mythology reflected in the widespread journalistic convention that labels the executive and legislative branches of the federal government as "political" in contrast with the "apolitical" judicial branch, or that portrays the judiciary as outside the government altogether. It is the mythology that Chief Justice John Roberts, Jr., deployed at his confirmation hearings when he likened judges to umpires. "I will remember that it's my job as a judge to call balls and strikes and not to pitch or bat," Roberts vowed. "I come . . . with no agenda. I have no platform. Judges are not politicians." Of course, Roberts's performance as a justice belies his claim. He is, as Professor Christopher Eisgruber notes, "an odd sort of umpire"—one who consistently calls the key pitches the conservatives' way.³⁸

Not long after, writing in a state bar magazine and reflecting on ignorant and apathetic voters, a lawyer merit selection proponent smugly riffed on the fatuous umpire analogy dismissively stating, "It turns out that voters do not really want to choose their judges, no more than fans really want to be involved in the hiring and firing of umpires."³⁹

³⁶ *Id.* at 646–47.

³⁷ RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY 200* (2011).

³⁸ *Id.* at 200–01.

³⁹ Ted A. Schmidt, *Part I: Merit Selection of Judges: Under Attack Without Merit*, ARIZ. ATT'Y, Feb. 2006, at 13, 18.

III. NO RESPECT

Some commentators rightly note that the populist nature of state constitutions often causes these state government charters to not only be ignored by law school curricula,⁴⁰ but to be generally given the Rodney Dangerfield treatment of “No Respect.”⁴¹

Nevertheless, state court judges have the job of interpreting these typically unwieldy state constitutions, which while ‘dissed’ by the legal cognoscenti are nevertheless accorded a populist worship of rights and responsibilities enshrined in a state’s constitution.

To cite one instance of what happens when a state’s highest court decides to look askance on its state constitution, look no further than the 2003 Nevada Supreme Court case of *Guinn v. Nevada State Legislature*.⁴² In the usual mode of political animals everywhere, Nevada’s *pols* were deadlocked over the budget and more specifically, on whether to make further spending cuts or to raise taxes.⁴³ Nevada’s late Governor Kenny Guinn, later eulogized as the “Education Governor,” had controversially endorsed higher taxes to pay for additional spending especially on education.⁴⁴ Consequently, Guinn petitioned the court for a writ of mandamus to declare the legislature in violation of the Nevada Constitution and to compel it to fulfill its constitutional duty to approve a balanced budget and in particular, to appropriate funds for public education during that fiscal period.⁴⁵

Article IV, section 18(2) of the Nevada Constitution, enacted in 1996 by voter initiative, requires a two-thirds majority to increase taxes.⁴⁶ And there was the rub. The court parsed the supermajority constitutional requirement to torture a surprising finding allowing it to pirouette over the voter imposed two-thirds majority

⁴⁰ See Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 687, 689 (2011) (“[T]he norm [is] that most state constitutions diminish the essentials of governing by associating them with page after page of laws that amount to nothing more than legislation dressed up in constitutional garb.”).

⁴¹ RODNEY DANGERFIELD, NO RESPECT (MCA Special Products 2000). Dangerfield, an American comedian and actor, passed away in 2004 and is best remembered for his “I get no respect” comedy monologues, including the memorable humor available at <http://www.rodney.com/home/home.asp> (last visited Apr. 21, 2012).

⁴² *Guinn v. Legislature of Nev.*, 71 P.3d 1269 (Nev. 2003).

⁴³ *Id.* at 1272.

⁴⁴ Staff Report, *Former Gov. Kenny Guinn remembered as ‘Education Governor,’ passionate fighter*, RENO GAZETTE J. (July 22, 2010), <http://www.rgj.com/article/20100722/NEWS/100722027/Former-Gov-Kenny-Guinn-remembered-Education-Governor-passionate-fighter> (last visited June 23, 2012).

⁴⁵ *Guinn*, 71 P.3d at 1269, 1272.

⁴⁶ *Id.* at 1273; NEV. CONST. art. IV, § 18(2).

requirement to raise taxes.⁴⁷ The court said that requirement was “procedural” while the affirmative constitutional obligation to fund public education was “substantive.”⁴⁸ And so procedural rights were subordinated.⁴⁹ The court placed a higher value on what it called a “substantive right”—no matter that Nevada’s Constitution article XI, section 6 only requires that “the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient.”⁵⁰ The court held:

We order the Legislature to fulfill its obligations under the Constitution of Nevada by raising sufficient revenues to fund education while maintaining a balanced budget. Due to the impasse that has resulted from the procedural and general constitutional requirement of passing revenue measures by a two-thirds majority, we conclude that this procedural requirement must give way to the substantive and specific constitutional mandate to fund public education. Therefore, we grant the petition in part and order the clerk of this court to issue a writ of mandamus directing the Legislature of the State of Nevada to proceed expeditiously with the 20th Special Session under simple majority rule.⁵¹

Besides riling constituents, the decision also got non-Nevadans exercised, including blogger and UCLA Law Professor Eugene Volokh who called the whole thing “shameful,” going as far as to decry the Nevada Supreme Court’s “willingness to completely ignore the very constitution that gives it power.”⁵² Fortunately, the episode did not go unnoticed by Nevada’s naked unwashed. And despite protestations to the contrary, the conventional wisdom among the *polloi*, particularly members of the Nevada Bar, was that Justice Deborah Agosti and fellow Justice Miriam Shearing opted to retire rather than face the voters following the public backlash.⁵³

According to a May 4, 2004 editorial referencing a Clark County, Nevada lawyer poll in the *Las Vegas Review-Journal*,

In 2002, Supreme Court Justices Deborah Agosti and

⁴⁷ *Guinn*, 71 P.3d at 1272.

⁴⁸ *Id.* at 1275.

⁴⁹ *Id.*

⁵⁰ NEV. CONST. art. XI, § 6.

⁵¹ *Guinn*, 71 P.3d at 1272.

⁵² Eugene Volokh, *Nevada Supreme Court Orders Violation of Nevada Constitution*, THE VOLOKH CONSPIRACY (July 10, 2003), <http://www.mail-archive.com/volokh-l@listserv.ucla.edu/msg00281.html>.

⁵³ Editorial, *Up to the Voters to Decide*, LAS VEGAS REV.-J., May 4, 2004, http://www.reviewjournal.com/lvrj_home/2004/May-04-Tue-2004/opinion/23800496.html.

Miriam Shearing received retention ratings of 84 and 78 percent, respectively. This year—after both joined in the astonishing *Guinn v. Legislature* decision, which threw out the voter-approved constitutional amendment requiring a two-thirds legislative vote to raise taxes—the two justices saw their retention ratings slip to a dismal 44 and 55 percent, respectively.

Why? “This judge led the charge in blatant abuse and neglect in regards to our state Constitution,” one surveyed attorney said of Ms. Agosti. “Given her vote on the tax issue I am happy to see that she is not running for re-election,” another said of Justice Shearing.⁵⁴

To the credit of Nevada’s highest court, it reversed itself as part of a subsequent 2006 opinion.⁵⁵

And since the committee has made a distinction between different types of constitutional procedural requirements, urging this court to adopt a looser standard of compliance for some constitutional requirements, while maintaining a strict standard for constitutional authentication requirements, we take this opportunity to clarify *Governor v. Nevada State Legislature*, wherein this court, in construing the Nevada Constitution, distinguished between “procedural” and “substantive” requirements, concluding that procedure must yield to substance if the requirements conflict. We expressly overrule that portion of the opinion. The Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision.⁵⁶

Would the same outcome occur in a retention election jurisdiction when a state’s constitution is similarly disrespected? Without an overheated high profile situation as occurred in Iowa’s 2010 election, probably not. Ironically, an Iowa law professor now believes that given the ouster of the three justices, judges need to campaign for retention.⁵⁷

“The 2010 elections clearly signaled that at least as far as state’s high courts are concerned, the days of reliably quiet retention elections are over,” [Todd] Pettys [University of

⁵⁴ *Id.*

⁵⁵ *Nevadans for Nevada v. Beers*, 142 P.3d 339, 348 (Nev. 2006).

⁵⁶ *Id.*

⁵⁷ *Iowa Law Professor Suggests Judges Should Campaign for Retention, or States Should Change Law*, U. IOWA NEWS SERVS. (Dec. 6, 2011), http://news-releases.uiowa.edu/2011/december/120611retention_elections.html.

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Iowa law professor,] says. “They demonstrate that judges in retention-election states can no longer rest comfortably on the assumption that voters will routinely exempt them from meaningful scrutiny.”⁵⁸

The last sentence speaks volumes. It gives credence to and contradicts the talking point that accountability through judicial elections is unnecessary. This is because state courts have institutional mechanisms to constrain judicial behavior.

Almost every judge is accountable to someone. For example, trial judges’ rulings are subject to at least two levels of appellate review. Intermediate appellate judges act in panels of three or more, so the judgment of two colleagues may rein in the excess of another. Next are the canons of ethics, judicial conduct committees, and grievance procedures. Recusal motions (and self-recusal) exist as mechanism to exclude a judge from hearing cases in which he or she may have a financial interest or bias. Only the highest court of the state exercises unreviewable discretion.⁵⁹

While the statement about the unreviewable discretion of a state supreme court is the money quote, the preceding descriptions of “institutional mechanisms” oversimplify reality. While it is true that lower courts may be reversed on appeal, few civil cases are ever actually tried. Most settle before trial. And according to recent statistics compiled by the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, only fifteen percent of civil cases are actually appealed and appellate courts reverse or modify trial court outcomes in only one in three appeals reviewed on the merits.⁶⁰

Grievance processes involving the judiciary largely lack the transparency of, for example, attorney disciplinary proceedings. If a matter is plead out before a probable cause determination is made, the substance of the charge is deemed confidential and is never publicly disclosed.⁶¹ Early retirement with a pledge never to seek judicial office is often the mutual salutary remedy for all concerned. As for recusal motions, notwithstanding Justinian’s *Corpus Iuris Civilis* and the ancient maxim, “*nemo debet esse iudex in propria*

⁵⁸ *Id.*

⁵⁹ Chertoff, *supra* note 12, at 51.

⁶⁰ Donald J. Farole, Jr. & Thomas H. Cohen, *Appeals of Civil Trials Concluded in 2005*, U.S. DEPT JUST., OFF. JUST. PROGRAMS, BUREAU JUST. STAT. (Sept. 2011), <http://www.bjs.gov/content/pub/ascii/actc05.txt>.

⁶¹ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16 cmt. (2002).

causa” (no person may judge their own cause), twenty-five of the forty-three states,⁶² that have either a statutory or a constitutional right of recusal for cause at the trial court and the appellate court levels, expressly or implicitly permit the same judge whose recusal is sought to hear and rule on the motion to disqualify herself.⁶³

As for the much ballyhooed importance of judicial performance evaluations, aggregated data is hard to obtain, much less to properly assess. Certainly, there is much biased “scholarship” commending the merits of evaluation commissions, particularly over lawyer polls, which are devalued because they’re supposedly agenda or politically driven and therefore, deemed unreliable.

But short of reviewing individual state jurisdictions and their performance matrixes for aberrations, because the performance evaluations rarely recommend nonretention, it’s difficult to weigh their value to voters.⁶⁴ For example, in Arizona, which proponents tout as the be-all and end-all of judicial selection and judicial retention election,⁶⁵ even dyed-in-the-wool advocates acknowledge the criticism that Arizona’s Commission on Judicial Performance Review (“JPR”) “has never concluded that a judge does not meet standards.”⁶⁶

But they quickly explain away such “slightly inaccurate” but nonetheless embarrassing critiques by inferring with little support that such rarely-seen nor heard below standard evaluated judges’ self-select retirement when faced with unsatisfactory evaluations since

[T]he JPR Commission has predetermined that a few judges would not meet the standards. Rather than face the public humiliation of such a rating on the ballot and in the voter publicity pamphlet, these affected judges chose to retire. No one wants to be the first “bad apple” on Arizona’s fine bench.⁶⁷

⁶² William E. Raftery, “*The Legislature Must Save the Court From Itself?: Recusal, Separation of Powers, and the Post-Caperton World*,” 58 *DRAKE L. REV.* 765, 766 (2009/2010).

⁶³ *Id.* at 767.

⁶⁴ See Larry Aspin, *Judicial Retention Election Trends 1964–2006*, 90 *JUDICATURE* 208, 213 (2007) (“Voters still routinely retain almost all judges, which is what existing judicial performance evaluation systems usually recommend (e.g., Alaska, Arizona, and Colorado.”).

⁶⁵ Chertoff, *supra* note 12, at 59.

⁶⁶ Mark I. Harrison et al., *On the Validity and Vitality of Arizona’s Judicial Merit Selection System: Past, Present, and Future*, 34 *FORDHAM URB. L.J.* 239, 257 (2007).

⁶⁷ *Id.* at 257–58.

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IV. ILLUMINATE NOT INCINERATE

The debate between judicial independence and judicial accountability will continue—doubtless, ad nauseam and without benefit of impartial intellectual rehydration. I have no doubt that even more forests will be destroyed in the unread legal scholarship that will follow.

Contested judicial elections are imperfect. But so is the merit selection and retention election system. It is too bad there is so much dissembling opinion passing for scholarship on both sides.

But here are two points upon which all can agree. First, judicial independence and judicial accountability are both ideals deserving of protection. Second, regardless of the judicial selection system chosen, to sustain a robust democracy in the contest between insight and ignorance, institutions and their actors need to do a far better job of civic education.