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THE CROCODILE IN THE BATHTUB:

An Examination of California's System for Judicial Selection

By: *Shaun Hoting*

Introduction

In 1986, as the result of an intense, expensive, and emotionally charged campaign, the Chief Justice of California's Supreme Court, Rose Bird, Associate Justice Cruz Reynoso, and Associate Justice Joseph Grodin were removed from office. The removal of the justices was not the result of malfeasance or criminal behavior on the justices' part.

Instead, it was the result of capital punishment proponents, including then-Governor Deukmejian, waging a systematic campaign against the justices when they were up for reelection. This campaign was only possible because California, like 38 other states, forces judges to face the electorate in some form of judicial election. For those 39 states (including California) that have judicial elections, the elections can be generally characterized as one of three types: partisan elections, where the candidates for judicial office run against each other and use established political party labels; non-partisan elections, where candidates run against each other without running under a partisan label; and retention elections, where a candidate is appointed by the executive, and then faces an uncontested election with a "yes" or "no" vote for retention in office.

Like many of the other states, California operates under multiple judicial selection systems. For the California Supreme Court and District Courts of Appeal, the California Constitution provides for uncontested retention elections to take place during the general election once every 12 years.¹ For trial courts, however, the California Constitution provides that candidates engage in a competitive, non-partisan election once every 6 years.² This system is substantially different than the "pure" appointive system that exists in the Federal Judiciary, wherein all judges are appointed by the president, confirmed by the Senate, and have lifetime tenure. This raises the question of why such contrasting systems exist. And, along the same vein, what are the benefits or drawbacks of California's system?

This paper will answer these questions by examining the history of judicial selection methods that developed into California's current system. It will then examine whether California's system of judicial selection accomplishes the goal its proponents argue it is designed to achieve, namely, accountability. This examination will take place from a theoretical perspective as well as a practical perspective. Finally, this paper will analyze several alternative methods of ensuring judicial accountability and compare them with judicial elections to determine which, if any, are preferable.³

History of Judicial Selection and California's System

The debate over how California should select its judges is not new. At the formation of the United States, debates over the best method to select judges took place. The history of

this debate in the United States illustrates that some of the tensions inherent in the role of judges are actually tensions between democracy and constitutionalism, a topic discussed in Section III, *infra*. Expressed in terms common to the debate, the inherent tension of the judiciary's role is between accountability and independence. While an examination of the history of judicial selection provides some insight into this debate, this examination also provides context for the adoption of California's first system of judicial selection—the popular election. The history of judicial selection methods in the United States and California reveals that once elections become the chosen method of judicial selection, regardless of the beneficial nature the elections are believed to impart, they can easily devolve into emotionally-charged contests that have little to do with the quality of the judge or the judge's reasoning, and more to do with the ultimate outcome of the cases.

An Enduring Debate

During America's colonial period, "King George III retained and exercised the power to appoint and remove judges."⁴ This power was not subject to review, and was exercised at the King's pleasure.⁵ "This power was so deeply resented by the colonists that the Declaration of Independence lists [this power] among its grievances. . . ."⁶ Specifically, the Declaration of Independence states that the subservience of the judiciary to the King is but one of "a long train of abuses and usurpations," as the King of England "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."⁷ After declaring their independence, however, the colonists did not unite around a single method for selecting a judiciary.

Of the original thirteen states, "eight . . . provided in their constitutions for the selection of judges by one or both houses of the legislature."⁸ The remaining states permitted executive appointment of judges, provided that it was concurred with by established legislative bodies (referred to as "the Council").⁹ In order to avoid the problem of executive influence that was seen under King George III, a "majority of the states provided for lifetime appointments, subject to good behavior. Popular elections for judges were[, at this time,] unheard of."¹⁰

The debates over the proper method for selection of the federal judiciary were immortalized in the Federalist Papers and the Constitution. Article III of the United States Constitution provides that federal judges "would hold office for life, 'during good behavior'; that their compensation could not be diminished while they remained in office; and that they could be removed only by the relatively unwieldy impeachment mechanism, and then only for 'Treason, Bribery, or other high Crimes and Misdemeanors.'"¹¹ In writing the Federalist Paper number 78, which supported lifetime tenure for federal judges, Alexander Hamilton wrote:

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.¹²

However, not all of the colonists supported Hamilton's views. Brutus, one of the "Anti-Federalist" opponents of the Constitution, believed that the Constitution created a judiciary that was too independent. Brutus stated that federal judges entrusted with this power would be placed in an unprecedented situation: they would "be rendered totally independent, both of the people and the legislature, both respect to their offices and their salaries. No errors they may commit [could] be corrected by any power above them. . . nor [could] they be removed from office for making ever so many erroneous adjudications."¹³ Thus, Brutus "worried that the proposed Constitution created a government in which the judiciary would rule without legal or popular restraint."¹⁴ Brutus' concerns are not without merit, and have been historically addressed by the federal government in two ways. The first is an appointment process that requires a majority of the Senate to confirm a judicial candidate; the underlying theory of which is to ensure "that those appointed to the bench have the appropriate character and independence of mind."¹⁵ The second way that Brutus' concerns have been addressed in the federal government is via various congressional powers. Congress has been empowered to amend the Constitution, impeach judges, remove subject matters (with limited exception) from the jurisdiction of the federal courts, "to decide how many federal judges there will be . . . , to appropriate funds for the courts, to enact rules of court procedure, to create alternative systems of courts under Articles I and IV, to insulate state court decisions from review, and . . . to override certain kinds of judicial decisions."¹⁶

Interestingly, one of Congress's most powerful methods of maintaining accountability, impeachment, is not used as frequently as it could be because it has a relatively high *political* threshold. In the election of 1800, Thomas Jefferson's Democrat-Republican party (often called "Republicans") defeated the Federalist party and took control of both houses of Congress and the Presidency.¹⁷ However, "[b]efore the Republicans took power, the Federalists expanded the size of the federal judiciary, largely by adding a new system of circuit

courts, and filled all of those new judicial positions with Federalists."¹⁸ Unsurprisingly, "Jefferson and the Republicans were outraged, and Jefferson hinted early on that action might have to be taken."¹⁹ Republicans then began impeaching Federalist judges. After impeaching John Pickering, the Republicans "set their sights on the most hated of Federalist judges, Supreme Court Justice Samuel Chase."²⁰ Instead of focusing on the misdeeds of Justice Chase, the Republicans focused on using "the impeachment effort . . . as a means of removing Federalists simply because of disagreement with their decisions and their political views . . ."²¹ However, the "idea of impeaching judges because of their political views was too much even for a solidly Republican Senate to bear."²² Thus, despite the language in the Constitution stating that "Judges . . . shall hold their Offices during good Behaviour,"²³ it was not this or any other Constitutional provision that prevented the Republicans from successfully impeaching Justice Chase, but rather the lack of political will.²⁴

The Supreme Court's decision in Marbury that established judicial review of legislation, while hailed today as the cornerstone of American constitutional jurisprudence, was poorly received in 1803.

In the decades following the adoption of the Constitution, development of judicial selection procedures amongst the states took a decidedly different path. Unlike the adherence to the relatively strict judicial independence model espoused by the U.S. Constitution, the states' constitutions took several different approaches to judicial selection. The reasons for these departures from the federal model are uncertain; however, the reasons appear to include the inherent distrust of the judiciary, participation in politics by western-frontier settlers, the emergence of populism as a political movement, judicial corruption, and the then-recent decision of *Marbury v. Madison*.²⁵

The Supreme Court's decision in *Marbury* that established judicial review of legislation, while hailed today as the cornerstone of American constitutional jurisprudence, was poorly received in 1803.²⁶ After *Marbury*, Thomas Jefferson, who had supported life tenure for the judiciary before becoming President, "argued . . . that judicial terms should be limited to six years, and that judges should be elected by the people."²⁷ Indeed, Jefferson's criticism of the judiciary post-*Marbury* has been said to have "contributed materially to the distrust of the judiciary, and to the idea that popular election of judges for short terms was feasible and desirable."²⁸

It is, however, believed that Andrew Jackson's new populism, "that preached voter control over all aspects of government, including the judiciary,"²⁹ was the factor that contributed the most to states adopting election as the preferred method of judicial selection.³⁰ In response to this movement, "most states which had provided for the appointment of judges with lifetime tenure amended their constitutions to provide for selection of judges either through election or appointment. Judges would be awarded fixed terms subject to elections in which the incumbent judge could be challenged by an opponent on the ballot."³¹ Thus, states that entered the union after Andrew Jackson's presidency often adopted this populist model³² with minimal discussion. California was one of these states.³³

California was one of many states that entered the Union during the era of Jacksonian populism. Accordingly, "California's first constitution provided for the popular election of judges. No other method of judicial selection had [even] been considered in [California's] Constitutional Convention of 1849."³⁴ California's method of selecting judges remained the same until 1879.³⁵ Unlike the Constitutional Convention of 1849, however, California's 1879 Constitutional Convention contained a "heated debate" about whether California should change its method of selecting judges from election to appointment. This debate was silenced when the measure was defeated by workingmen's delegates.³⁶ California's story does not end here, however.

Several decades later, on December 11, 1912, the issue of judicial selection reemerged in a meeting of the Commonwealth Club in San Francisco. At that time, members of the Commonwealth Club (henceforth, "the Club") were "generally conservative in their political and economic outlook," a majority were "Republicans, and the average wealth [was] well above the norm."³⁷ At the December 11th meeting, the Club discussed possible methods to shorten the time it took for cases to go to trial. As an aside to the general meeting, the debate brought the "general agreement that the difficulties in the administration of justice were to be found in the qualifications of judges, rather than in the provisions of the codes."³⁸ After coming to this conclusion, the Club passed "a resolution asking the Club's Board of Governors to organize a section to formulate some method of securing an appointive system for judges."³⁹

The committee of the Club that subsequently met on May 13, 1914, reported that judges should be selected through appointment. The Club subsequently concluded that the most appropriate method of selection was appointment by the governor, and confirmation by the legislature. Based on its conclusions, the Club proposed an amendment to California's Constitution. This amendment, which was "subsequently known as the Chandler Amendment, was introduced in the legislature of 1915."⁴⁰ Although the Chandler Amendment was favorably reported to the Senate, it ultimately failed to pass. According to Malcom Smith:

Opposition to the Chandler Amendment developed when it was discovered that one of its provisions made it necessary for the governor either to renominate an incumbent judge for a six-year term, or to select his successor, placing all incumbent judges at the mercy of the governor.⁴¹

Revised versions of the Chandler Amendment were submitted in 1921 and 1927. Both times, the Assembly failed to pass the amendment, taking no action on it in 1921, and defeating it in committee in 1927. In 1929, despite the "limited use of pressure tactics" and the "endorsement of the reorganized State Bar Association of California," the Club's plan was again defeated in committee.⁴²

The Club's defeats can be attributed to pressure from diverse groups. Some members of the California State Bar opposed a change because they believed that they had a better chance of becoming a judge under an elective, rather than an

appointive system.⁴³ Organized labor also opposed the Club's plan. Organized labor had recently been subject to numerous injunctions and court orders, and the group feared it would lose its power as a voting block to oust a judge who ruled against the group.⁴⁴ To overcome the pressure of these special interests, the Club "discussed the possibility of submitting its plan to the voters by means of an initiative petition."⁴⁵ The State Bar opposed this possibility, and the Club's efforts to persuade the legislature were again defeated in 1931.⁴⁶

As the numerous defeats caused the Club's interest in judicial selection to diminish, the interest of the State Bar in judicial selection began to increase. In 1932, two events spurred an interest within the bar to reform California's method of selecting judges. The first was the "work of the Los Angeles Bar Association, following the recall of several superior court judges in Los Angeles County."⁴⁷ The second event was the report of a vote of bar members taken on the subject of judicial selection by a professor at Boalt Hall, revealing dissatisfaction with the method of judicial selection.⁴⁸

After the creation of special committees and the subsequent reports by the committees, the State Bar submitted a proposal to the legislature titled "Assembly Constitutional Amendment No. 98" ("the Bar Amendment").⁴⁹ The substance of the Bar Amendment called for appointment of judges by the governor from a list of candidates crafted by a nominating commission. The proposed commission would "consist of the chief justice of the Supreme Court, the presiding justice of the district court of appeal . . . and the state senator for the county in which the appointment would be made."⁵⁰ The Bar Amendment also provided that superior court judges would serve from four to six years (an extension over the previous rules). Significantly, the Bar Amendment, like the proposed amendments offered by the Club, provided for retention elections; i.e., at the expiration of his or her term, the judge would run unopposed for a strict "yes" or "no" vote from the electorate.⁵¹ If a majority of the electorate voted "no" in the judge's retention election, the governor would then appoint a successor.⁵²

The Bar Amendment was well received by the legislature. After introduction in the Assembly, the Bar Amendment was amended to only apply to counties of more than 1.5 million people. The purpose of this revision was to confine the Bar Amendment's application to Los Angeles County.⁵³ Afterward, the Bar Amendment passed the Assembly; and, despite a brief attempt to bury it in committee, the Senate passed the Bar Amendment.⁵⁴ Thus, at the end of 1933, the State Bar had accomplished in one year what the Club could not accomplish over eighteen years: judicial selection reform passing through the legislature and being submitted to the electorate for a vote. The voters, however, still had to accept the Bar Amendment at the next general election, which was over a year away.

During the years 1933 and 1934, before the November 1934 election that contained the proposed Bar Amendment, California suffered from a crime wave that caused voters to demand legislative action. The legislature responded. In 1934, to consolidate the work of several independent groups, a statewide committee was formed. The committee was called the "California Committee on Better Administration of Law," ("the Statewide Committee") and "its task was to draft legislation

that would ‘curb crime in California’”⁵⁵ Two other groups were set up to assist the Statewide Committee: the “Committee on Better Administration of Justice of the California State Chamber of Commerce,” and a committee which consisted “entirely of members of the bar,” which “acted as the statewide committee’s advisory body.”⁵⁶

The Statewide Committee considered propositions from study groups and ultimately supported four measures that were to appear on the ballot as proposed initiative constitutional amendments.⁵⁷ One of the four proposals pertained to the “[s]election of judges and confirmation by vote of the people” (this proposal, along with the other three are, henceforth, “the Proposal”).⁵⁸ The Statewide Committee did not determine who would select the judges, or for how long they would serve.⁵⁹

The Statewide Committee decided to use the initiative petition to pass the Proposal instead of submitting their measures to the legislature for two reasons. First, “[m]ost of the proposed changes had already been before the legislature at one time or another; and (2) The people would still have to ratify the constitutional amendments even if they were passed by the legislature.”⁶⁰ The changes could not be ratified until two years later, at the general election in November 1936. However, if the Statewide Committee placed the Proposal on the ballot for the November 1934 election, it would sit opposed to the Bar Amendment, which had already passed through the legislature. Since the Bar Amendment was developed earlier, and had been campaigned for throughout the State, some of the Statewide Committee members felt that the Bar Amendment was more likely to be adopted.⁶¹ Other Statewide Committee members, however, felt voters might support the Proposal “if it were presented to [the voters] as part of a comprehensive ‘package’ arrangement.”⁶² The Statewide Committee thus decided that the judicial selection proposal should still be included in the Proposal offered to the voters.

Given that the Statewide Committee planned to proceed with the judicial selection proposal, the Statewide Committee needed to determine precisely how judges should be selected under the Proposal. Initially, the Statewide Committee supported lifetime tenure for judges, yet, several of the Statewide Committee’s members, such as Earl Warren, did not want to allow the current judges to be “blanketed in” if the Proposal passed. One of the members proposed a method under which all of the sitting judges could run for a retention election, and, if retained, would have lifetime tenure.⁶³ However, the Statewide Committee was aware that this life-tenure provision would be problematic for the voters. Accordingly, the Statewide Committee modified their proposal for judicial selection. The modified proposal on judicial selection provided for:

- (1) Appointment by the governor from a list of two names;
- (2) A nominating board composed of the chief justice of the Supreme Court, the senior presiding justice of the district court of appeal, and the attorney general; and,
- (3) Tenure for life if the voters retained the judge after one term of twelve years, the judge to run against his record rather than against an opponent.⁶⁴

In February 1934, the Club intervened. Mr. Perry Evans, a member of the Club, addressed a dinner meeting of the entire membership of the Statewide Committee. Although he

(and, by proxy, the Club) agreed that an appointive judiciary was desirable, Mr. Evans argued that the retention elections that took place after a candidate was appointed by the Governor should not give the judge lifetime tenure.⁶⁵ Instead, Mr. Evans advocated that the retention elections should be for renewable twelve-year terms instead of lifetime tenure. Mr. Evans argued that this plan combined the best features of both election and appointment processes.⁶⁶ Mr. Evans was able to convince many in the audience, including Earl Warren.

When it met a few days later, the Statewide Committee altered its judicial selection proposal by replacing the nominating board with “a reviewing board, thus enabling the governor to appoint anyone he wished, subject to the board’s approval.”⁶⁷ Additionally, the Statewide Committee included a provision that would allow individual counties to decide whether to adopt an elective or appointive system for the county’s superior court judges.

After enlisting several groups, including the California Federation of Women’s Clubs and the League of Women Voters, to obtain the requisite number of signatures, the Proposal was placed on the ballot for the November 1934 election. In order for the judicial selection proposal, referred to as “Proposition No. 3” on the ballot, to gain support, the Statewide Committee had to demonstrate how the process of judicial selection was linked to crime. They argued that: reduction of crime requires high-quality administration of justice; administration of justice can be improved by placing the most qualified individuals on the bench; Proposition No. 3 was the best combination of appointive and elective methods to ensure the selection of the best judges; therefore, Proposition No. 3 ensures high quality of administration of justice, resulting in the reduction of crime.⁶⁸ The Statewide Committee’s campaign proved successful. All four of the individual proposals, that together, created “the Proposal”, passed. The Bar Amendment, however, which was also on the November 1934 ballot, did not pass.

After its passage, Proposition No. 3 was incorporated into the California Constitution as Section 26. Just two years later, in 1936, “the voters had an opportunity to test the operation of the new constitutional amendment.”⁶⁹ One Supreme Court Justice and five Court of Appeals Justices were up for retention; all six Justices were retained.

Interestingly, under the popular election system pre-Proposition No. 3, the governor still appointed close to eighty percent of all judges. This is because, when a sitting judge retired or passed away before the end of his or her term, the elections system permitted the governor to appoint replacement judges. As a result, the “principal effect of [Proposition No. 3] was to impose a limitation upon the governor by subjecting his appointments to review by the Commission on Qualifications.”⁷⁰

The first judicial defeat after the passage of Proposition No. 3 came during the term of Governor Culbert L. Olson. On June 10, 1940, Governor Olson nominated Professor Max Radin of the University of California Law School as an associate justice on the California Supreme Court. Professor Radin, a politically liberal individual, on one occasion “wrote a letter of protest to a trial judge regarding the dubious conviction

conviction of three members of a maritime federation for the murder of an engineer.”⁷² At the time, then-District Attorney Earl Warren viewed this Professor Radin’s letter as “unwarranted and indiscreet.”⁷³

On June 26th, the Commission on Qualifications received Professor Radin’s nomination. The Commission consisted of the Chief Justice of the California Supreme Court, the Presiding Justice of the District Court of Appeal, First Appellate District, and Earl Warren, then-Attorney General of California. Despite support from Justice Frankfurter of the U.S. Supreme Court and two justices from the Ninth Circuit, the Commission refused to confirm Professor Radin’s appointment. While this may have been the first defeat under California’s new method of judicial selection, it was not the last, and it would not be the most memorable.

Rose Bird and the Transformation of the California Supreme Court

In February 1972, five years before the arrival of Rose Bird, the California Supreme Court, in *People v. Anderson*,⁷⁴ held that California’s death penalty violated the state’s constitutional prohibition on cruel and unusual punishment.⁷⁵ Almost immediately thereafter, in the 1972 elections, California passed Proposition 17.⁷⁶ Proposition 17 amended California’s Constitution stating, “[t]he death penalty provided for under [existing death-penalty] statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of [the California Constitution].”⁷⁷ The decision in *People v. Anderson* was one of many⁷⁸ that resulted from “judicial doctrines initially set forth by a series of progressive chief justices since 1940.”⁷⁹ Up to this point, many controversial decisions had

been defended by a broad spectrum of politicians on the ground that what the courts ordered was the law and deserved support even if the substance of the decision were distasteful. As time went on, however, political leaders tended to defend particular decisions only if they agreed with the result. As a consequence, the California [Supreme Court] became identified with the liberal side of the political spectrum, and attacking the court became easier for the extreme right as moderates [withdrew] from the debate.⁸⁰

Unfortunately, Rose Bird joined the California Supreme Court precisely during this political change.

In 1975, Jerry Brown succeeded Ronald Reagan as Governor of California. When Governor Brown took office, Rose Elizabeth Bird, an active member of Governor Brown’s gubernatorial campaign, became a member of Governor Brown’s cabinet.⁸¹ In 1977, Chief Justice Wright retired from the California Supreme Court, opening a vacancy for Governor Brown to fill. Governor Brown “nominated Bird to fill the vacancy, and her appointment was confirmed by a two-to-one vote of the Judicial Appointments Commission.”⁸² The ensuing political change, combined with “Chief Justice Bird’s position in the inner circle of the Governor, the Governor’s attacks upon the establishment, the split vote on the confirming commission, and Chief Justice Bird’s minimal experience at the bar” focused

close attention to the court.⁸³

From the beginning of Chief Justice Bird’s tenure, she was seen as difficult to work with, disrespectful of past Chief Justices, withdrawn, and overly partisan.⁸⁴ When she came up for her initial retention election in 1978, she was “confirmed with a bare majority, under 52%, the narrowest majority on record at that time.”⁸⁵ During this same election, California voters again demonstrated their commitment to capital punishment by passing the “Briggs death penalty initiative”; an act that effectively broadened California’s capital punishment regime.⁸⁶ Under the leadership of Chief Justice Bird over the next eight years, the California Supreme Court took a “liberal” stance on numerous issues, but none were as contentious as the Court’s stance on capital punishment.⁸⁷

During Chief Justice Bird’s tenure, the California Supreme Court “reviewed seventy-one death penalty convictions by automatic appeal between 1977 and 1986. In only four of these cases were the convictions or death sentences upheld.”⁸⁸ Unsurprisingly, the 94% reversal rate caused a significant outcry from capital punishment supporters. In 1986, this left Chief Justice Bird and two other “ultra-liberal” members of the court, Justices Reynoso and Grodin, “in vulnerable positions as the . . . retention election approached.”⁸⁹ Chief Justice Bird was particularly vulnerable “because of her record of dissents from the few opinions affirming death penalties and her penchant to write separate, and at times extreme, opinions in important cases where she was not the author of the majority opinion.”⁹⁰

Although the Chief Justice’s rulings pertaining to capital punishment made her politically vulnerable in her 1986 retention election, her rulings were not the only cause for her opposition. The state Republican Party, which, at that time, was “able to elect Republican nominees for President equally with the Democratic Party . . . had reason to believe that the court had become an instrument of Democratic politics.”⁹¹ Additionally, a perception resonated that the liberal justices on the court, including Chief Justice Bird and Justices Reynoso and Grodin, treated the court’s “function as that of achieving a political agenda, and a partisan one at that.”⁹² This view was compounded by the fact that a large portion of opinion writing was done not by the justices, but by staff attorneys who were perceived to write opinions that justified the justices’ desired outcomes.⁹³ Thus, entering into the 1986 election, opposition to the justices existed across a wide spectrum. This included the state Republican Party, Republican Governor Deukmejian, others who viewed the court as a Democratically partisan body, proponents of capital punishment including numerous district attorneys, and members of the legal community who believed in traditional notions of judicial decision making.⁹⁴

Given the position of the state Republican Party, it is unsurprising that Governor Deukmejian was also opposed to Chief Justice Bird and was an active participant in the campaign to unseat her. Initially, however, the Governor was not committed to unseating Justices Reynoso and Grodin. During the 1986 elections Governor Deukmejian

publicly warned Justices Grodin and Reynoso he would oppose them in their retention elections unless

they voted to uphold more death sentences. When asked by reporters if he would endorse Grodin and Reynoso if they began affirming death penalty cases, Deukmejian replied, "It would certainly help a lot." Apparently dissatisfied with Grodin's and Reynoso if they began affirming death penalty cases, Deukmejian replied, "It would certainly help a lot." Apparently dissatisfied with Grodin's and Reynoso's responses to his warnings, Deukmejian opposed them....⁹⁵

Over the course of the campaign, the opposition to the justices spent approximately \$6.6 million, much of which came from small donations by individuals.⁹⁶ Larger donations were also received from agricultural and business interests that viewed the justices as being "anti-business."⁹⁷ Supporters of the justices spent approximately \$4 million. The justices' largest supporters came from within the plaintiff's bar, many of whom worked on contingency fees and benefited from the court's recent tort decisions.⁹⁸

The tenor of the campaign was extremely negative and has been described as a "blatant appeal to emotion and desire for revenge."⁹⁹ The opposition campaign engaged in a two-pronged attack:

First, it emphasized the undisputed proposition that despite the number of years since the California Constitution had been amended to expressly authorize the death penalty, there had been no executions in the state. Then, in a constantly repeated series of television spots, many times spotlighting relatives of murder victims, it graphically depicted the circumstances of the crime, concluding with the statement that the death penalty imposed upon the defendant had been reversed.¹⁰⁰

By comparison, supporters of the justices attempted to persuade voters that the justices reached their conclusions "by law . . . that [their] ideologies played no part in the process," and their opposition consisted of "right wing extremists" and "right wing bully boys."¹⁰¹ In the end, although the opposition was initially focused on Chief Justice Bird, the campaigns of the other justices were submerged in the pro- and anti-Bird debate. Ultimately, after the campaigns were waged, and the votes tallied, "none of the elections were even close."¹⁰² Voters rejected Chief Justice Bird by 66%, Justice Reynoso by 60%, and Justice Grodin by 57%.¹⁰³

After the defeat of Chief Justice Bird and Justices Reynoso and Grodin, Governor Deukmejian elevated his former law partner, Justice Malcom M. Lucas, to the position of Chief Justice, and appointed three new associate justices: John A. Arguelles, David N. Eagleson, and Marcus M. Kaufman.¹⁰⁴ The change in the court's treatment of the death penalty was dramatic. Over the next nine years, between 1987 and "late 1995, the Lucas court upheld eighty-five percent of the 212 death penalty convictions it reviewed.

The errors the Bird Court justices determined were 'reversible' were usually regarded as 'harmless' by the Lucas Court justices."¹⁰⁵

Deficiencies in California's System

The history of judicial selection in the United States demonstrates that the initial struggle over the proper method

for selecting judges involved debates between independence and accountability. However, California's history of judicial selection demonstrates how regardless of whether the chosen system attempts to balance the independence of judges with the need for accountability, judges can quickly become the subjects of emotionally charged campaigns. These campaigns have more to do with the displeasure of a portion of the electorate because of the disposition of a particular case or issue than the competence of the judge or the judge's reasoning. The attempt to remove a judge to secure an outcome of a case appears to completely contradict the notions of judicial independence. To be sure, there is little dispute that by making judges face elections, be they retention elections such as California's, partisan elections, or non-partisan elections, such elections sacrifice a degree of judicial independence in order to achieve the desired accountability. However, to determine whether elections are an unjustifiable reduction of the independence of the judiciary for the sake of accountability to the electorate, the terms "independence" and "accountability" need to be properly defined and examined.

What is Independence, and What does it Achieve?

In a characteristically simple, humorous, and elegant comment, Judge Alex Kozinski of the Ninth Circuit Court of Appeals expressed the difficulty in defining independence:

What does it really mean to be judicially independent? I've often considered the question of what would happen if one day I decided to show my independence by getting on the bench dressed like Ronald McDonald. I don't really like the traditional black robe--I think it's kind of stupid-looking--and it would be much nicer to have orange hair. Would that prove my judicial independence?¹⁰⁶

Judge Kozinski's comments, while perhaps somewhat extreme, serve to highlight the core of the problem: what does it actually mean for a judge to be independent? Unsurprisingly, scholars have defined independence in several different ways:

[The ability of judges to be free] from political pressures and public outcry in order to settle disputes between parties fairly.

[T]he degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law) . . . in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and . . . particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judge personally or on the power of the court.

[The ability of judges not to] make decisions on the basis of the sorts of political factors (for example, the electoral strength of the people affected by a decision) that would influence and in most cases control the decision were it to be made by a legislative body such as the U.S. Congress.

[T]he right of judges to be free from inappropriate control by others in the exercise of judicial decision making.¹⁰⁷

The common thread in all of these definitions is that independence exists when judges who are impartial to the parties of a dispute are permitted to act on their own “sincerely-held preferences...without fear of facing reprisals from the public or the political regime.”¹⁰⁸ The next structural question is: why is it important for judges to be independent?

There are two primary reasons that judicial independence is important: legitimacy and Constitutionalism. To understand how independence results in legitimacy, one need only look at the purpose of a court. “[W]hen two parties come into [a] conflict that they cannot resolve themselves, common sense leads them to seek the assistance of a third party to help them achieve a resolution—triadic dispute resolution.”¹⁰⁹ Under this rubric, the “third party” is the court. If the triadic dispute resolver’s neutrality is questionable, then this appearance of partiality can erode the system’s legitimacy, causing the losing party in the triadic dispute to contest the results and question the validity of using the third party as a method for dispute resolution. Thus, “the appearance of an impartial judiciary will produce public confidence in the judiciary and build legitimacy for the institution.”¹¹⁰ While the mere appearance of impartiality can lead to legitimacy,¹¹¹ actual impartiality can also achieve legitimacy while providing for a “normative good.”¹¹² Using the definition of independence discussed above, an independent judge may utilize his or her freedom from fear of the public or political regimes’ reprisals. Thus, the judge is more likely to actually be impartial, which gives the judge the appearance of impartiality that, in turn, generates legitimacy.

The second and perhaps most important reason for judicial independence is Constitutionalism. Constitutionalism is a check on the democracy that is rooted in part, “in a fear of the consequences of majoritarian rule.”¹¹³ Under Constitutionalism, there are certain areas in which the majority “possesses no immediate control. These [areas] are designated as ‘rights,’ and the individual is said to ‘possess’ these rights ‘against’ the majority, which is to say, against encroachment by majoritarian power.”¹¹⁴ The United States Constitution and the Bill of Rights are “designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.” Perhaps the most eloquent articulation of this principle came from Justice Jackson in *West Virginia State Board of Education v. Barnette*, where he stated:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹¹⁶

Although the Constitution clearly protects these rights, Constitutionalism raises another question: what, or whose interpretation of the Constitution and the rights enumerated therein will society regard as authoritative? Alexander Hamilton argued

the judiciary should be the “authoritative interpreter of the Constitution on the grounds that the judiciary’s independence renders it uniquely suitable for that role.”¹¹⁷ This role was confirmed when Justice Marshall famously stated in *Marbury v. Madison*, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹¹⁸ Given that the subsequent reluctant acceptance of this decision by the body-politic meant that the judiciary could now authoritatively interpret the Constitution, the question remained whether the judiciary should be independent.

As previously mentioned, in Federalist 78, Alexander Hamilton stated, “[p]eriodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to [judges’] necessary independence.”¹¹⁹ Hamilton continued:

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, ... have a tendency...to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.¹²⁰

Alexander Hamilton clearly believed judicial independence functioned as a necessary means for the protection of Constitutional rights.¹²¹ Several others shared Hamilton’s view. In a letter written in June 1776, Thomas Jefferson said:

The dignity and stability of government in all its branches, the morals of the people, and every blessing of society, depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislature and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that. The judges, therefore, ... should not be dependent upon any man, or body of men.¹²²

The Massachusetts Constitution of 1780 expressed this opinion by stating:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.¹²³

Chief Justice John Marshall, who wrote the opinion in *Marbury*, espoused the same view in 1829 when he stated: “The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.”¹²⁴ More recently, Chief Justice William H. Rehnquist succinctly stated the issue when he noted that “[t]he independence of [the judiciary]... is every bit as important in securing the recognition of the rights granted by the Constitution as is the declaration of those rights themselves.”¹²⁵

Clearly judicial independence accomplishes two important tasks. First, judicial independence contributes to the

legitimacy of the court. Second, judicial independence serves to protect the principle of Constitutionalism; i.e., protecting certain individual rights from infringement by the transient majority. “Accountability” effectively runs contrary to both of the principles established by judicial independence.

What is Accountability, and Do Elections Establish it?

Unlike independence, accountability can be more easily defined.¹²⁶ Put simply, accountability is a response to the counter-majoritarian difficulty created by judicial independence. The term “counter-majoritarian difficulty” comes from Alexander M. Bickel’s book, *The Least Dangerous Branch*, in which he states: “The root difficulty is that judicial review is a counter-majoritarian force in our system. [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not [o]n behalf of the prevailing majority, but against it.”¹²⁷ Thus, in theory, judicial “accountability” serves as a response to decisions the prevailing majority believe are too far outside the realm of acceptable decisions. By creating a system whereby the political majority can remove those judges who make such decisions, the belief is that this resolves the counter-majoritarian difficulty.

Note, however, that for accountability to truly be an appropriate response to the counter-majoritarian difficulty presented by judicial independence, the people to whom the judiciary are accountable must represent the *majority*. If this is the goal of accountability, the question, therefore becomes whether judicial elections serve to accomplish this goal. An examination reveals, quite simply, that these elections do not accomplish this goal and instead serve to malign the independence of the judiciary without holding them accountable to a majority of the electorate.¹²⁸

The lack of information held by the voters creates the first problem inherent in judicial elections. This comes from both the “supply side” and the “demand side.” “On the supply side legal constraints, ethical obligations, and professional norms restrict the extent to which judicial candidates can supply potential voters with information about themselves.”¹²⁹ In other words, unlike their opposition who can make virtually any claim or promise, judicial candidates cannot promise a result to the electorate; to do so would violate judicial ethics and would demonstrate an impermissible bias.

“On the demand side voters have traditionally had very little incentive to gather information about judicial candidates,” for three reasons.¹³⁰ First, individual voters are not likely to appear before the judge up for election. Accordingly, a self-interested voter has little incentive to vote for a candidate because it is unlikely that the candidate’s views will directly affect the voter.¹³¹ Second, courts are inherently reactive devices; they cannot choose the matters before them¹³² and, as such, they are extremely limited in their ability to control policy. This compounds the lack of incentive for a self-interested voter to vote. Third, the information related to judicial decisions is relatively complex to a voter not trained in the legal profession.¹³³ Although a background in law is not necessarily required, such a background substantially aids the voter in understanding the point of law the judge is discussing, and the

underlying reasons for the outcome. For the average voter, the time required to understand the judicial opinions is likely to dissuade the voter from attempting to obtain all of the relevant information. Thus, the information necessary to make a decision about a judicial candidate is overly time-consuming to obtain, is relatively limited in scope, and is unlikely to affect the self-interest of the voter.¹³⁴

The second problem with judicial elections is voter “roll off” or “drop off.” For elections to truly provide accountability to the majority, voters must participate. The evidence shows, however, that this is not the case. “From 1948 to 1974, voter turnout in judicial elections, measured as the percentage of persons of voting age casting ballots, was...38.2% in retention elections.”¹³⁵ Moreover, even when judicial elections coincided with general elections, as is required for California Supreme Court and Appellate Court retention elections, the voter roll-off was 59.8%.¹³⁶ Kurt Scheurman defines “roll-off”, “as the percentage of voters casting ballots in the major partisan race of an election who also cast ballots for the state judicial election.”¹³⁷ Thus, because of the “roll-off” phenomenon, more than 40% of those voters who cast a ballot failed to vote for *any* state judicial candidate.¹³⁸ Given the low voter turnout even in general elections, and the substantial rate of voters who failed to vote for a state judicial candidate, it appears that elections enable a minority of the electorate to hold judges “accountable.” To test this theory, data from two years will be examined.

The first year examined is 1986, the year that Chief Justice Rose Bird and others were defeated. In 1986, 43.4% of those voters who were eligible to vote actually voted.¹³⁹ Of those who voted, 66% voted against Chief Justice Bird. Thus, a maximum of 28.64% of those eligible to vote in California removed Chief Justice Bird from office.¹⁴⁰ Moreover, the actual number of voters is *lower*, because the rate of “roll-off” is unknown. Note, however, that because of the intensity of the campaign in 1986, the roll-off rate was significant; i.e., the intensity of the campaign meant that those who voted in the general election also voted in the heavily contested judicial elections.¹⁴¹

The second year examined is 2004, which is, at the time of this writing, the most recent general election. In 2004, 59.2% of those voters who were eligible to vote actually voted.¹⁴² If the roll-off rate of 59.8% is applied, then only an estimated 35.4% of the voters cast votes for state judicial candidates, which means that, in judicial retention campaigns, it is possible for 17.8% of the electorate to determine the outcome.¹⁴³

These results lead to the conclusion that judicial elections, in particular, create a situation in which the “majority” expressed by the total number of votes is not reflective of the majority of the populace, but of a minority group. Accordingly, if accountability is defined as a solution to the counter-majoritarian problem, then the control over the judiciary by a minority of the populace fails to solve the counter-majoritarian problem; instead, it replaces the minority group exerting its will on the judiciary with a minority of the electorate.

Assume, for the moment, that elections did, in fact reflect the will of the majority. These elective judiciaries would

still pose two fundamental problems for a system based, in part, on Constitutionalism. "First, the rights of individuals and unpopular minority groups may be compromised.... Second...the impartial administration of 'day-to-day' justice may be compromised" as well.¹⁴⁴ If the outcomes of the judicial elections are dependent on the attitudes of a majority of the electorate, the elected judiciary could easily compromise the rights of individuals.¹⁴⁵ If a judge believes that a majority of the electorate opposes the judge "vindication...constitutional right when its violation is suffered by some disfavored minority group," the judge will be left with two options, vindicate the right, or let the will of a majority of the electorate govern.¹⁴⁶ If the judge vindicates the right of the minority, finding "against the majority," the next retention election may remove the judge from office. "Over time, this phenomenon would create a systematic bias in favor of judges most responsive" to the pressures of the majority.¹⁴⁷ Alternatively, a judge who wants to be retained in the next election and who is aware of the majority's preference now has an incentive to act strategically. To increase his chances of retention by the majority at the next retention election, the judge could "compromise the constitutional rights of subsets of their judicial electorate who are unpopular, unorganized, or otherwise outvoted."¹⁴⁸ These actions are fundamentally at odds with the nature of Constitutionalism and the Bill of Rights, which, in the words of Justice Jackson, are designed "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."¹⁴⁹

An elective system affects more than just the Constitutional rights of a minority; it also affects the "day-to-day" administration of justice. Criminal sentencing exemplifies this effect. Assume for the moment that an appellate justice must determine if the case warrants the trial court's sentence. The justice has the discretion to consider "such factors as the number and type of past convictions, the severity of the way the particular offense was committed, and the character of the convicted. . ." to determine if the trial court abused its discretion.¹⁵⁰ Under an elective system, the justice may decide to demonstrate her "tough posture toward crime and thus...win favor from the majority whose continued favor is a necessary condition for reelection."¹⁵¹ The justice's action demonstrates a lack of independence, and, ultimately, undercuts the legitimacy of the courts.

Thus, as has been demonstrated, the current system of retention elections does not generate accountability to the majority of the electorate, and, therefore, does not resolve the counter-majoritarian difficulty. Moreover, even assuming that the current system of retention elections did generate accountability to the majority, the nature of the retention elections virtually ensures infringement of the Constitutional rights of minority groups, and will hamper the day-to-day administration of justice. These results have led Judge Peter Webster to note that, given the numerous alternatives to elections that would properly respond to the counter-majoritarian difficulty it becomes clear that one who says he or she "wants judges to be more 'accountable' actually means that one wants judges who will decide cases the way he or she thinks they should be decided."¹⁵²

The debate between independence and accountability, represented by retention elections, while intriguing, may be entirely irrelevant if the pressures associated with the election are unnoticed by the judges. In other words, does the fact that the judge will have to face an election actually inject itself into the judge's decision making? After examining the statistical and anecdotal evidence, the answer is a definitive "yes."

One example of the "real-world" effects of California's system can be inferred from the events just before the 1986 campaign to remove Chief Justice Bird and others. In addition to Chief Justice Bird, and Justices Reynoso and Grodin, Justice Stanley Mosk was also on the 1986 ballot. Initially, like Bird, Reynoso, and Grodin, Justice Mosk was "targeted for defeat by the organized opposition in early 1986..."¹⁵³ And, even though Justice Mosk had "voted to overturn death sentences in the past, he also voted to uphold the sentences in 14 of 15 capital cases decided between December 1985 and October 1986."¹⁵⁴ When a reporter from the Los Angeles Times questioned Justice Mosk about his votes in these capital cases, Justice Mosk stated that "his death penalty decisions had not 'changed significantly' over the years, but rather 'the bugs and flaws in the 1978 death penalty law' had gradually been eliminated by the court, thereby making it easier to affirm capital sentences."¹⁵⁵ Initially, Justice Mosk's explanation appears credible. A closer examination, however, reveals that the timing of Mosk's revelation that the "bugs and flaws" of California's capital punishment system had been eliminated is, to say the least, curious. One need only look at the court's 1984 and 1985 terms, as well as the 1989 and 1990 terms, to discover this discrepancy.

In 1984 and 1985, Justice Mosk cast votes in thirty-three death penalty cases. Unlike his 1986 term (including December 1985), where Justice Mosk voted to uphold a death sentence 93% of the time (14 of 15 cases), in the 1984 and 1985 terms, Justice Mosk voted to uphold a death sentence only 48.5% of the time (16 of 33 cases)¹⁵⁶. The difference between the time periods is substantial. Justice Mosk was almost twice as likely to uphold a death sentence during 1986, an election year, than the two years immediately prior. To borrow from a colloquialism, it appears that Justice Mosk saw the "writing on the wall;" i.e., this statistical evidence gives strong support to the notion that Justice Mosk changed his voting behavior when it became clear that significant opposition was mounting against his fellow justices for failing to affirm death penalty sentences.

Such a move could have been the result of strategic behavior on the part of Justice Mosk. During 1984 and 1985, four other justices rarely, if ever, upheld capital sentences. Justice Mosk was likely aware that Justices Reynoso, Grodin, Broussard, and Chief Justice Bird, almost never voted to affirm a death sentence.¹⁵⁷ Thus, even if Justice Mosk wanted to reverse a death sentence, he would have been able to vote to uphold it, thereby ensuring his retention in the upcoming election, but the votes of the four anti-death penalty justices would reverse the sentence. Whether Justice Mosk actually engaged in this strategic behavior, or, whether he, in fact, became satisfied with California's death penalty scheme just before the start of

an election year is unknown. Nevertheless, Justice Mosk's voting record does lend support to the inference that the impending elections substantially changed his decisions.

There is yet another factor that supports the inference that Justice Mosk was behaving strategically, or that the upcoming election otherwise influenced his vote. Professor Nicholas Georgakopoulos conducted a survey that compared the death penalty decisions of all of the justices on the California Supreme Court from 1984-85 to those from 1989-90.¹⁵⁸ As previously mentioned, in 1984-85, Justice Mosk voted to affirm the death penalty 48.5% of the time. During the election year of 1986, Justice Mosk's affirmed death sentences 93% of the time. If Justice Mosk allowed the upcoming elections to affect his decisions in death penalty cases, one would expect that the rate of affirmance would decrease after the election. This is, in fact, precisely what happened. In 1989-90, Justice Mosk cast votes in fifty-two death penalty cases, in only 21 of which did he vote to affirm the death sentence, a rate of 40.4%.¹⁵⁹ Again, while it is possible that there are viable alternative reasons for Justice Mosk's voting pattern, none are readily apparent. Moreover, Justice Mosk's 1989-90 death sentence affirmance rate casts doubt on his assertion that he affirmed 14 of 15 death sentences during a heated election year because he felt the "bugs and flaws" in California's death penalty scheme had been eliminated.

Besides Justice Mosk, there were only two other justices of the California Supreme Court that were present during the 1984-85 and 1989-90 time periods: Justices Lucas and Broussard. An examination of their voting patterns for death sentences reveals that the election of 1986 influenced them as well. During 1984-85, Justice Lucas cast votes in twenty death penalty cases;¹⁶⁰ he affirmed the death sentence in 12 of those cases, for an affirmance rate of 60%. During 1989-90, Justice Lucas voted in fifty-two cases, and affirmed the death sentence in 44 of those cases, for an affirmance rate of 84.6%. Justice Lucas' rise in death sentence affirmance rates supports the inference that he too was influenced by the 1986 elections. However, unlike the other justices mentioned here, during the Bird Court, Justice Lucas displayed substantial support for death sentences. The question therefore becomes whether Justice Lucas was constraining his support beforehand and believed that the elections implicitly authorized him to uphold more death sentences (i.e., he "could" uphold more death sentences if he wanted to), or whether the 1986 elections were a mandate from the voters that he "should" uphold more death sentences. Although both inferences are plausible, the author of the study, Professor Georgakopoulos, suggests it is the former. Specifically, Professor Georgakopoulos argues that Justice Lucas' opinions reflect a justice who was, before the 1986 election, constrained by the precedent set during the Bird Court, but, after the election, was willing to overturn the constraining precedent.¹⁶¹

Although Justice Lucas' increase in affirmance rates was substantial, it was not the most dramatic change amongst the three justices. During 1984-85, Justice Broussard voted in thirty-three cases; he did not affirm the death sentence in *a single case*.¹⁶²

During 1989-90, however, Justice Broussard voted in fifty-two cases, and affirmed the death sentence in 21 of those cases, for an affirmance rate of 40.4%. Professor Georgakopoulos suggests that this dramatic change was because Justice Broussard was keenly aware of the post-Bird court's support for the death penalty. As such, Justice Broussard was "[g]oing along with the majority [to] create good will that Broussard could use in other instances, or, by agreeing with the majority, [Broussard] could influence the writing of the majority opinion so that it might take a more lenient tone than if he had stayed in the minority."¹⁶³ Although Professor Georgakopoulos' inference is plausible, these statistics also support an alternative inference: that the 1986 elections influenced Justice Broussard's decisions in death penalty cases and his votes reflect a desire to avoid being targeted for defeat in his next retention election.

In a more expansive examination, Professor Gerald F. Uelman conducted a study "correlating death penalty affirmance rates for all state supreme courts for the ten year period ending in 1987, with the manner of judicial selection used for the justices on those courts."¹⁶⁴ Professor Uelman found that those states that used executive appointment, with no elections, had an average death sentence affirmance rate of 26.3%; those that used uncontested retention elections, such as California, had an average affirmance rate of 55.3%; those with non-partisan and partisan elections, 62.9% and 62.5%, respectively; and those with legislative elections had an affirmance rate of 63.7%.¹⁶⁵ Professor Uelman concluded that his findings "suggest that judges whose tenure is more secure are more willing to overturn a death penalty judgment."¹⁶⁶

Beyond the statistical evidence, there is also anecdotal evidence suggesting that retention elections have a "real-world" effect on judicial decision making and, thus, on judicial independence. One such example is the "Korean grocer case" in Los Angeles. In the "Korean grocer case" Latasha Harlins, a fifteen-year-old African American, entered Soon Ja Du's grocery store.¹⁶⁷ Du accused Harlins of shoplifting and Harlins began to assault Du.¹⁶⁸ Du then shot and killed Harlins as Harlins walked away.¹⁶⁹ The jury convicted Du of voluntary manslaughter and Superior Court Judge Joyce A. Karlin sentenced Du, to five years' probation.¹⁷⁰ "The sentence was considered unusually lenient by segments of the public," and public outcry "led to a campaign to defeat Judge Karlin in her impending reelection bid."¹⁷¹ The campaign was unsuccessful, and Judge Karlin was reelected. However, the systematic influence of the campaign to defeat Judge Karlin could still be seen. During the campaign, "one of her judicial colleagues reportedly reportedly remarked off the record: straight probation because I don't want to be the next Joyce Karlin."¹⁷²

In 1996, in a slightly different event, Justice Penny White of the Tennessee Supreme Court was defeated in a retention election in which her opponent distorted White's record on the death penalty, implying that she was "soft on crime."¹⁷³ "Shortly after [White's] defeat, Tennessee Governor Don Sundquist said: "Should a judge [when making decisions] look over his shoulder [worried] about whether [he is] going to be thrown out of office? I hope

An examination of their voting patterns for death sentences reveals that the election of 1986 influenced them as well.

so.”¹⁷⁴ In this frontal attack on judicial independence, the Governor clearly intends to ensure that each time a judge makes a decision he or she considers election pressures. If the defeat of Justice White combined with the Governor’s statement did not influence judges at every level of the courts in Tennessee, it would be surprising.

Perhaps the most colorful example comes from Justice Otto Kaus of the California Supreme Court. When asked if an upcoming election had ever influenced his decisions, Justice Kaus stated:

[T]o this day, I don't know to what extent I was subliminally motivated by the thing you could not forget—that it might do you some good politically to vote one way or the other When you're eating dinner with a gorilla, it's hard to make small talk, even when he's using the right knife and fork”¹⁷⁵

Judge Kaus later generally described the dilemma judges face when deciding controversial cases while facing a retention election, “comparing it to ‘finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving.’”¹⁷⁶ Judge Kaus made this now-famous comment in 1985, the year before Chief Justice Rose Elizabeth Bird, Justice Cruz Reynoso, and Justice Joseph Grodin were denied retention for their decisions on the death penalty.¹⁷⁷

Conclusion

The statistics and anecdotal evidence confirm that elections do, in fact, influence judicial decision making. Moreover, elections as a method of resolving the counter-majoritarian difficulty fail because they do not properly hold the judiciary accountable to the majority. Instead, judicial elections, due to a lack of information, diminished voter turnout, and voter “roll-off,” hold the judiciary accountable to a small minority of voters. Even if elections represented the majority of the electorate, the effect that they have on judicial independence serves to undercut the legitimacy of the court system as a whole, and sacrifices one of the founding principles of this republic, Constitutionalism. Ultimately, it is clear that elections are not an appropriate judicial selection method.¹⁷⁸

This leaves the question open of how a democratic and constitutionally based society can hold a judge to some degree of accountability, thus attempting to resolve the counter-majoritarian difficulty, without infringing upon the judge’s independence. There are numerous methods available, including statutory amendment, constitutional amendment, courts of appeal, disciplinary measures, and, ultimately, impeachment. Statutory amendment is the most direct method of resolving the counter-majoritarian difficulty. If a judge interprets or applies a statute in a method that the majority dislikes, the majority, via initiative (in California) or the legislature can amend the statute to clarify the precise method of interpretation or application. An example of this type of behavior can be seen on the federal level with the national “Do-Not-Call List.” On September 24,

2003, Federal District Judge Lee West ruled that the Federal Trade Commission (“FTC”) did not have authority to operate the Do-Not-Call registry.¹⁷⁹ The very next day, Congress passed legislation granting the FTC the authority to operate the registry; President Bush signed the bill the following Monday.¹⁸⁰ This process is even simpler in California, where action by the legislature is not required because the California Constitution provides voters a right to pass laws on their own through the referendum process.¹⁸¹

The same analysis can be applied if a judge finds that an agency action or statute is invalid because it violates the California state constitution.¹⁸² Similar to the referendum process, the California Constitution can be amended by placing an initiative measure on the ballot to be voted on in the next election.¹⁸³ For the initiative measure to pass, it must be approved by a majority of the votes; a “super-majority” is not required.¹⁸⁴ Thus, if the position taken by groups claiming to represent the “majority,” is, in fact, the opinion of a majority of the electorate, then initiative will have a substantial chance at success. Unfortunately, this method suffers from voter turnout. As previously mentioned, in 2004, the last general election in California at the time of this writing, voter turnout was only 59.2%,¹⁸⁵ indicating that it would still be possible for a minority to exert control over the majority, thereby shifting the counter-majoritarian difficulty from the judges to the minority. Although problematic, there are two reasons why this solution is preferable to judicial elections. First, assuming for the moment that just over 50% of the population who actually voted did vote for the constitutional amendment, and that voter turnout was 59.2%, this means the amendment would pass with the support of only 30% of the electorate. If the remaining 70% truly objected to the amendment, it could be repealed or otherwise amended in the next election. If, however, the other 70% did not object, then one can infer that the majority does, in fact, support the amendment on some level.¹⁸⁶ The second reason that this method is preferable to judicial elections is because this method prevents the judge from having to incorporate his or her chances of reelection into making decisions, thereby preventing infringement of the judge’s independence. Thus, this method provides some alleviation of the counter-majoritarian difficulty, without infringing on the independence of the judiciary.

Appellate courts provide an alternative method to challenge an undesirable lower-court decision. Unlike the previous alternatives to judicial selection mentioned, appeals courts serve to constrain lower courts to a universe of acceptable decisions. In this sense, judges are held accountable by virtue of the fact that if a decision is outside the universe of acceptable decisions it will be corrected by the appeals court. Moreover, even though this method of “accountability” does constrain the judge and thereby reduce his independence, it does not hamper the judge’s ability to perform his duties. In other words, appellate courts effectively control lower-court judges without subjecting judges to possible recall in the event that they make an opinion that is outside the universe of acceptable decisions. Unfortunately, this method of controlling judges

does not provide a resolution to the counter-majoritarian difficulty, as the majority never has direct opportunity to exert its will.¹⁸⁷

The last two alternatives, impeachment and disciplinary measures are relatively intertwined and will be discussed together. Disciplinary measures and impeachment, much like appellate courts, constrain judges by providing two universes of acceptable decisions, with the disciplinary measures universe being a subset of the impeachment universe. However, disciplinary measures and impeachment differ from appellate courts in that the potential universe of acceptable decisions is substantially larger.¹⁸⁸ Under a disciplinary scheme, a special committee created for such matters could discipline a judge who exceeded his or her judicial authority. The following is an example of a possible model for such a disciplinary system.

Under this proposed disciplinary scheme, the committee would have the power to issue formal and informal reprimands, to suspend judges without pay, and to remove cases from the judges calendar—a particularly useful tool if the judge appears to express a substantial bias against a particular party. Finally, in the event of extreme cases of judicial malfeasance, the committee could refer matters to the legislature for possible impeachment hearings. These impeachment hearings would be in cases of criminal conduct, or other, similar behavior. Additionally, impeachment hearings would, like the federal system, require more than a simple majority to remove the judge; a two-thirds majority vote of the senate would be required. Like the disciplinary procedures above, these impeachment proceedings serve to allow the majority, via their elected representatives, to exert some influence over judges in extreme cases of malfeasance. In so doing, this scheme does hinder judicial independence to some degree by potentially forcing the judge to suffer personal consequences for his or her decisions. However, by operating only at the outskirts of judicial behavior, and by requiring more than a simple majority vote for removal, these proceedings would minimize the aforementioned hindrance on judicial independence.

Interestingly, and perhaps counter-intuitively, the analysis of these alternatives leads to the conclusion that elections are the *minority's* preferred method of holding judges accountable. To demonstrate why this is a preferred method, compare judicial elections with either California's referendum system or initiative measure system. All three of these systems allow for "direct" accountability to voters by permitting a majority of voters to determine whether to remove a judge, amend the law, or amend the Constitution. In the general election, a minority of the electorate, 17.79%, can remove a judge from office.¹⁸⁹ This modest percentage is the result of low voter turnout combined with significant voter "roll-off." By contrast, in the same general election, with the same voter turnout, but because of voter roll-off, a proposed referendum or initiative measure would require 29.66% of the vote to pass.¹⁹⁰

Thus, a judge's opponents need 40% fewer votes to remove a judge from office than they do to change the law the judge interpreted. It is therefore a substantially simpler process for a displeased minority to remove a judge than to change the law. Moreover, as discussed in Section III(c), *supra*, the consequence of removal does affect judicial decision making, indicating that the next judge to face the displeased minority may be less likely to rule against them.

Note also that, from a structural perspective, judicial elections seem to negate the need for constitutionalism, and, thus, a constitution. As previously mentioned, the Constitution and Bill of Rights are "designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest."¹⁹¹ Since judges are the interpreters of the constitution, direct election of judges, be it via a non-partisan or a retention election, effectively allows the transient majority to control who interprets the constitution. By controlling who interprets the constitution, the transient majority can effectively control how the judges interpret the constitution. Therefore, through judicial elections, the transient majority is able to subject constitutional interpretation to a majority vote, which, in turn, minimizes any protections the constitution may have provided to individual citizens and groups that are at odds with the desires of the transient majority. Thus, judicial elections effectively negate the need for a constitution.

Unfortunately, despite the numerous defects that exist within judicial election systems, the scholarly support for their reform, and the support for reform from numerous Federal and State judges, judicial elections appear to be rising, albeit slowly. In 1906, judicial election rates were around 80%. Today, the figure is 89%.¹⁹² Disturbingly, 76% of voters and 26% of state court judges "believe that campaign contributions made to judges have at least some influence on [the judges'] decisions."¹⁹³ This statistic demonstrates that voters and judges alike believe that elections affect judicial independence. And, because of the nature of courts as triadic dispute resolution systems, the electorate's belief that judges are not independent poses a fundamental threat to the legitimacy of the courts as a whole. Reform is, therefore, imperative. To borrow from Justice Kaus' metaphor, given the apparent propensity of the electorate for judicial elections, we may never be able to completely remove the crocodile from the bathtub, but hopefully, through reform and political courage, we can minimize its bite.

¹ CAL. CONST. art. VI, § 16(a).

² CAL. CONST. art. VI, § 16(b-c). Note that California also provides that counties may elect to adopt the statewide method of appointment followed by election, but, to date, no county has adopted this method. See CAL. CONST. art. VI, § 16(d)(3).

³ It should be noted that the majority of this paper analyzes the issue with respect to California's use of retention elections for Supreme Court and Appeals Court justices. Unless otherwise noted, however, the same analysis also applies to the non-partisan, competitive election used for trial court judges.

⁴ See Joseph R. Grodin, *Developing a Consensus of Restraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1970 (1988).

Under this proposed disciplinary scheme, the committee would have the power to issue formal and informal reprimands, to suspend judges without pay, and to remove cases from the judges calendar.

5. See Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 542 (2006) (stating that “[d]uring the colonia era, King George III appointed and removed judges at his pleasure”).

6. *Id.* at 543.

7. See Joseph L. Darby, *Guarantees and Limits of the Independence and Impartiality of the Judge*, 41 SAN DIEGO L. REV. 997, 998 (2004) (quoting THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776)).

8. Grodin, *supra* note 4, at 1970.

9. *Id.*

10. *Id.*

11. See Judge Peter A. Webster, *Who Needs an Independent Judiciary?* 78-Feb. FLA. B.J. 24 (2004) (quoting U.S. CONST. art. III, § 1, and art. II, § 4).

12. THE FEDERALIST NO. 78 (Alexander Hamilton) (concerning the judiciary).

13. See John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 354 (1999) (quoting Essays of Brutus, No. XI (Jan. 31, 1788), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 293 (Ralph Ketcham ed., 1986)).

14. *Id.*

15. *Id.*

16. *Id.*

17. See Barry Friedman, *‘Things Forgotten’ in the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 739-40 (1998) (describing the conflict surrounding the federal judiciary after the election of 1800).

18. *Id.*

19. *Id.*

20. *Id.* at 740 (citation omitted).

21. *Id.*

22. *Id.* at 741.

23. U.S. CONST. art. III, § 1.

24. Indeed, one scholar has noted that:

[C]onstitutional protections afforded to individual judges remain dependent on a congressional willingness to maintain a relatively high barrier for impeachment. As the early assaults on federal judges showed, this willingness can be tenuous under certain political circumstances. Congress could choose to redefine what constitutes an impeachable offense to include actions taken on the bench in good faith. It is hard to see that the Constitution or the Supreme Court could offer any real resistance to such efforts—particularly in the political circumstances in which they are likely to occur—and it is even more difficult to see how the “precedent” established in the failure of the attempt to convict Justice Chase can have any restraining effect on future congressional impeachments. It is true that judicial impeachments historically have been relatively rare and remain so today. However, the low frequency of impeachment should not be seen as evidence of the security of constitutional protection, because this may be due as much to judges’ reluctance to make politically controversial decisions as to any display of congressional virtue.

The only real barriers to the frequent resort to impeachment are, therefore, political. At least in politically controversial cases, impeachment, with whatever due process requirements Congress chooses to impose on itself, remains a cumbersome, costly, and visible process that exposes congressmen to electoral danger and distracts them from more politically attractive activities. For these reasons, it is usually difficult to form a sufficiently large and unified congressional majority to do the job.

Ferejohn, *supra* note 13, at 358-59.

25. See Stephen P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714-16 (1995); see also Grodin, *supra* note 4, at 1971 (explaining that the federal model was not widely accepted despite the notion that judges should “subject to some form of ‘accountability’”).

26. See Croley, *supra* note 25, at 715 (acknowledging that the *Marbury* decision did not have much support).

27. *Id.*

28. *Id.* (citing EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 93 (National Conference of Judicial Councils, 1944)).

29. Grodin, *supra* note 4, at 1971.

30. *Id.*

31. *Id.*

32. Croley, *supra* note 25, at 716.

33. See Grodin, *supra* note 4, at 1971 (explaining that California’s Constitution adopted the populist model).

34. Malcolm Smith, *The California Method of Selecting Judges*, 3 STAN. L. REV. 571 (1951).

35. Note, however, that the “tenure for Supreme Court judges was lengthened from ten to twelve years.” *Id.* (citation omitted).

36. *Id.*

37. *Id.* at 573.

38. *Id.*

39. *Id.* at 574.

40. *Id.* at 574.

41. *Id.* (internal citations omitted).

42. *Id.*

43. See *id.* at 576 (explaining that “[M]embers of the bar who believed that their own chances for a judicial career were greater with an elective rather than an appointive system opposed a change”).

44. See *id.* (observing that organized labor feared its power being subordinate to an unpopular judge).

45. *Id.*

46. See *id.* (noting that the “legislature was again appealed to in 1931 with the same negative result”).

47. *Id.*

48. *Id.* at 576-77 (explaining the report by Professor Evan Haynes, the State Bar’s Research Director).

49. *Id.* at 577.

50. *Id.*

51. See *id.* (explaining that “the judge’s name would go on the ballot without an opponent”).

52. See *id.* (noting that the governor is then “required to appoint a successor”).

53. *Id.* at 578 (explaining that one member added an amendment so that it would apply to counties whose populations were over 1,500,000, which in effect restricted the application to Los Angeles County).

54. See *id.* (stating that “[a]ssembly passage was quickly followed by endorsement in the Senate, although there was an attempt to bury the bill in committee”).

55. *Id.* at 579-80.

56. *Id.* at 580.

57. See *id.* (commenting that there were originally thirty suggested propositions).

58. *Id.*

59. *Id.* Note, however, that then-District Attorney of Alameda County, Earl Warren, advocated executive appointment combined with lifetime tenure. Earl Warren was, however, unwilling to permit the statute to be applied retroactively because he felt it would result in too many judges in the state (Los Angeles County in particular). In other words, he was unwilling to permit all of the sitting judges to be granted lifetime tenure.

60. *Id.* (citation omitted).

61. *Id.* at 581.

62. *Id.* at 582.

63. *Id.* at 581-582.

64. *Id.* at 582-83.

65. See *id.* at 583 (communicating the draft proposal’s proposition for “[t]enure for life if the voters retained the judge after one term of twelve years, the judge to run against his record rather than against an opponent”).

66. *Id.*

67. *Id.* at 584.

68. See *id.* at 586 (relaying the reasoning in Proposition No. 3).

69. *Id.* at 587.

70. *Id.* at 588.

71. *Id.* at 590. Note, the “University of California Law School” refers to the law school at the University of California at Berkeley, which is now known as “Boalt Hall”.

72. *Id.* at 591.

73. *Id.* at 592.

74. 493 P.2d 880 (1972).

75. See Nicholas L. Georgakopoulos, *Judicial Reaction to Change: The California Supreme Court Around the 1986 Elections*, 13 CORNELL J.L. & PUB. POL’Y 405, 409 (2003-2004).

76. *Id.*

77. *Id.*

78. See John H. Culver, *The Transformation of the California Supreme Court: 1977-1997*, 61 ALB. L. REV. 1461, 1465 (1998).

79. *Id.*

80. *Id.* (quoting PREBLE STOLZ, JUDGING JUDGES 82 (1981)).

81. See 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).

82. *Id.*

83. *Id.* at 2022.

84. See generally *id.* at 2023-24 (noting that the Chief Justice had “minimal experience at the bar”).

85. Georgakopoulos, *supra* note 75, at 410.

86. *Id.*

87. See Culver, *supra* note 78, at 1461 (comparing the numerous decisions of the California Supreme Court under Chief Justice Bird with similar decisions under Chief Justice Bird’s replacement, Chief Justice Lucas).

88. *Id.* at 1486.

89. Thompson, *supra* note 81, at 2036.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 2033.

95. See John D. Fabian, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 Geo. J. Legal Ethics 155, 162 (2001) (internal footnotes omitted) (citing Steve Wiegand, “Governor’s Warning to Two Justices,” SAN FRANCISCO CHRON., Mar. 14, 1986).

96. Thompson, *supra* note 81, at 2038.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 2038-39 (citation omitted).

101. *Id.* at 2039.

102. See B. Michael Dann and Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1432 (2001).

103. *Id.*

104. See John T. Wold & John H. Culver, *The Defeat of the California Justices: The*

Campaign, the Electorate, and The Issue of Judicial Accountability, 70 JUDICATURE 348, 353 (1987); see also The California Supreme Court Historical Society, "The Justices" available at http://cschs.org/02_history/02_c.html (last visited Dec. 10, 2007).

105 Culver, *supra* note 78, at 1486 (internal quotations and citations omitted).

106 See Hon. Alex Kozinski, *The Many Faces of Judicial Independence*, 14 GA. ST. U. REV. 861, 862 (1998).

107 See Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Election Systems*, 10 WM. & MARY BILL RTS. J. 7, 28-29 (2001).

108 *Id.* at 29; see also Judge Myron Bright, *Judicial Independence*, 20 U. HAW. L. REV. 611, 615 (1998).

109 See Souders, *supra* note 5, at 538-39 (citing MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (1980)).

110 *Id.* at 539.

111 *Id.* Indeed, as discovered by Professor Martin Shapiro, the creation of the "appearance" of impartiality is how the English government was able to "mollify" the public. See *id.*

112 *Id.* at 539-40.

113 Croley, *supra* note 25, at 704.

114 *Id.*

115 *Id.*

116 See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

117 Croley, *supra* note 25, at 706-07.

118 5 U.S. 137, 177 (1803).

119 THE FEDERALIST NO. 78 (Alexander Hamilton) (concerning the judiciary).

120 *Id.*

121 Croley, *supra* note 25, at 707.

122 Webster, *supra* note 11, at 24.

123 *Id.* (citing Mass. Const. of 1780, pt. 1, Art. XXIX).

124 *Id.* at 25 (emphasis added).

125 See Souders, *supra* note 5, at 531 (citing William H. Rehnquist, *An Independent Judiciary: Bulwark of the Constitution*, 9 N. ILL. U. L. REV. 1, 8 (1988)).

126 As a preliminary matter, however, it is recognized that, inherent in the argument of accountability, is a debate about the proper place for judges in society. Those who argue for increased accountability appear to believe that the role of judges is as a pseudo-legislative body. There are a number of structural and theoretical arguments that refute this position, but for the moment this paper takes no stance on the "proper role" of the judge. Instead, this paper examines the issue with the assumption that the role of the judge is an impartial third party empowered to arbitrate disputes between two opposing parties. This stance does not "assume away" the issue, as parties that are characteristically impartial can still be accountable if their decisions are disliked by the electorate.

127 See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (2nd ed. 1986).

128 This holds true regardless of whether the elections are retention elections, partisan elections, or non-partisan elections.

129 Croley, *supra* note 25, at 730-31.

130 *Id.* at 731.

131 *Id.*

132 It should be noted that, with the exception of capital punishment appeals, the California Supreme Court, when deciding whether to grant a writ of certiorari, is still confined to the universe of cases appealed to the court.

133 And, arguably, to many who are trained in the legal profession.

134 A problem related to the lack of information is the deceptive nature of information that exists during elections. An example of this can be seen in the 1986 California elections that removed Chief Justice Bird and Justices Reynoso and Grodin from office. During the campaign, the justices campaigned by demonstrating the structural position of the courts in society, and stating the reasons for their decisions. By comparison, the opposition to the justices engaged in an extensive campaign using the ultimate outcomes of the justice's decisions, regardless of the underlying reason. When a voter is faced with a lack of substantial information from the judge seeking retention, and the information that is provided by the judge is limited in scope, any opposition to the judges that operates without these constraints will have a substantial impact.

135 See Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 477 (1993) (comparing the percentage of persons of voting age casting ballots in retention elections as compared to partisan and nonpartisan elections and concluding that turnout dropped when voters had less incentive to go to the polls).

136 *Id.*

137 *Id.*

138 It should be noted that it was unclear if this also applied to elections for local superior court judges.

139 UNITED STATES ELECTION PROJECT, *VOTER TURNOUT*, available at http://elections.gmu.edu/voter_turnout.htm (follow "Turnout 1980-2008.xls" hyperlink) (last visited October 16, 2008).

140 *Id.* (deriving this number using the equation $43.4 \times .66 = 28.64$).

141 See John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 351 (1986-87) (agreeing with the author's assertion that the unusual political environment surrounding the judicial election led to an aberration in that year's election results).

142 UNITED STATES ELECTIONS PROJECT, *supra* note 139.

143 *Id.* (arriving at this number by determining 50% of the 35.4% of votes cast, yielding 17.7%, and then adding one tenth of one percent for a total of just over 50% of the votes cast. Note that, technically, the precise number is 17.7% plus one vote).

144 Croley, *supra* note 25, at 726. (examining the potential pitfalls of a direct oversight of judicial decisions by the electorate by describing how Justices would affect their positions to fit in with the opinions held by the majority to the detriment of the minority)

145 *Id.* at 727.

146 *Id.*

147 *Id.*

148 *Id.*

149 *Barnette*, 319 U.S. at 638.

150 Croley, *supra* note 25, at 728.

151 *Id.*

152 Webster, *supra* note 11, at 26.

153 Wold, *supra* note 136 at 349-51.

154 *Id.* (emphasis added).

155 *Id.* (citing LOS ANGELES TIMES, Oct. 21, 1986, at I1:3).

156 Georgakopoulos, *supra* note 75, at 412-14.

157 *Id.* Justice Grodin is the one exception. Between 1984 and 1985, Justice Grodin upheld six of the thirty-two cases in which he voted. *Id.*

158 *Id.*

159 *Id.*

160 *Id.* at 424. Justice Lucas was not appointed to the court until 1984. *Id.* at 424.

161 *Id.* at 425-26.

162 *Id.* Clearly, the affirmance rate during this period was 0%. *Id.*

163 *Id.* at 418.

164 See Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1137 (1997)

165 See *id.* (analyzing data which tended to show that as the risk of potential electoral defeat subsided, so did hesitancy to overturn a death penalty ruling).

166 *Id.*

167 Croley, *supra* note 25, at 739.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.* (internal citations omitted).

172 *Id.* at 740 (internal citations omitted).

173 Webster, *supra* note 11, at 25.

174 *Id.*

175 Souders, *supra* note 5, at 561.

176 Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1099-1100 (2007).

177 *Id.*

178 This statement applies regardless of whether it is a partisan, non-partisan, or retention election.

179 See Todd Wallak, *FCC Steps Up, Says It Will Enforce Do-Not-Call List*, SAN FRANCISCO CHRON., Sept. 30, 2003, at A1 (available on Westlaw as 2003 WLNR 8250137). The Do-Not Call registry was a list containing the phone numbers of individuals who did not want to receive commercial solicitations by telephone. *Id.*

180 See *id.*; see also, Marilyn Geewax, *No-call registry can be enforced*, KANSAS CITY STAR, Oct. 8, 2003, A1 (available on Westlaw as 2003 WLNR 14584919).

181 See CAL. CONST. art. II, § 9.

182 Note, however, that if a state court finds that a statute violates the United States Constitution, the transient majority must engage in the appeals process, discussed below. Alternatively, the majority can attempt to amend the United States Constitution, but the majority's chance of success is *de minimis*.

183 CAL. CONST. art. II, § 8.

184 CAL. CONST. art. II, § 10.

185 See UNITED STATES ELECTIONS PROJECT, *supra* note 139.

186 Even if this simply means the majority does not actively oppose the amendment.

187 Arguably, the appointment of the Appellate and Supreme Court justices is an expression of the majority's will, as these justices would be appointed by the governor and confirmed by the Senate. However, this method of the majority exerting its will is not "direct" for purposes of this analysis. Additionally, the justices may have held their positions for some time, during which the previous majority expressed a different view than the current majority.

188 As it must be, for it would be an extreme hardship on a lower court judge if the judge were subjected to discipline every time he or she was reversed by a higher court.

189 UNITED STATES ELECTIONS PROJECT, *supra* note 139. This number was derived from taking the voter turnout in the last general election, 59.2%, and multiplying it by the rate of voter "roll-off" to achieve the percentage of voter turnout in judicial elections: 35.52%. This number was then multiplied by 50.1% (the 0.1% being the margin of victory), to result in 17.79%. *Id.*

190 *Id.* This number was derived from the same voter turnout, 59.2%, and multiplying it by 50.1%, for a total of 29.66%. *Id.*

191 *Id.* (citation omitted).

192 Schotland, *supra* note 176, at 1092.

193 Fact Sheet on Judicial Methods in the States 2, http://www.abanet.org/leadership/fact_sheet.pdf (last visited December 13, 2007).

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