

# Who Do They Think They Are?

**Donald P. Judges,  
Professor of Law,  
University of Arkansas School of Law**

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## **Abstract:**

*There is a potential collision at the intersection of two axes of inquiry. One axis is the seemingly endless debate over how judges are best selected for office. The other is the question how they perform their judicial function, and especially how they believe they do so, once they get into office. The antipodal positions on the first axis are the ABA's recommended non-political "commission-based appointive system" on the one hand and full-bore partisan political campaigns, as advocated by some, on the other. One view along the judicial-performance axis is that, as Chief Justice Roberts put it during his confirmation hearings, judges are neutral "umpires, call[ing] balls and strikes." The view from the other end is that, as the so-called "attitudinalists" see it, judges act as largely unconstrained policymakers: they are not umpires, they are players. Intermediate points on this axis regard judges as taking seriously their commitment to law-adherence, but as influenced within the bounds of what reasonable argument will sustain by their own policy preferences. Drawing on research into cognitive psychology, this paper describes how judicial-selection methods may affect judges' own perceptions of their role, which in turn may affect their execution of that role with potential consequences for the rule of law.*



## **Rezumat:**

*La intersecția a două axe de cercetare este posibilă o coliziune. Una dintre axe privește dezbaterăa aparent nesfârșită privind selecția optimă a judecătorilor. Cealaltă privește maniera în care judecătorii exercită funcția judiciară și, în special, modul în care aceștia consideră că-și exercită atribuțiile, după accesul în profesie. Pozițiile antipodice privind prima axă sunt, pe de-o parte, sistemul recomandat de ABA, sistem non-politic, bazat pe un sistemul de numire prin comisii, și, pe de alta, sistemul bazat pe veritabile campanii politice partizane. În ceea ce privește a doua axă, cea a modalității de îndeplinire a atribuțiilor judiciare, conform unei opinii, așa cum Judecătorul Roberts, judecător în cadrul Curții Supreme a U.S.A., a arătat în interviul său de numire, judecătorii sunt „superarbitri neutri, care strigă mingile și loviturile (n.n. referință la arbitrul din jocul de baseball). În opinia de la celălalt capăt al axei, a așa-numiților atitudinaliști, judecătorii acționează ca factori de decizie politică în mare parte neconstrânși: ei nu sunt arbitrii, ci jucători. Puncte intermediare pe axă consideră că judecătorii iau în serios obligația de a respecta legea, dar sunt influențați în argumentele*

pe care pe vor susține de propriile preferințe politice. Bazându-se pe cercetarea în psihologia cognitivă, această lucrare prezintă maniera în care metodele judiciare de selecție a judecătorilor pot afecta percepția judecătorilor privind rolul lor, care, la rândul său, poate afecta îndeplinirea aceluși rol, cu potențiale efecte pentru statul de drept.

**Keywords:** *judicial independence; judicial accountability; judicial exceptionalism; merit selection system; nonpartisan/partisan electoral processes; judicial appointment; judicial conduct organizations*

### Introduction

With nothing less than the rule of law at stake, one might expect after more than two hundred years of experimentation, experience, debate, and study for there to be more fundamental agreement than there is about how best to compose our nation's judicial branches to resolve the inherent tension between judicial independence and accountability. The judicial-selection debate has been characterized as "endless."<sup>50</sup> Two antipodal positions illustrate the divide. One is the American Bar Association's primary recommendation that the antidote to the perceived pernicious effects of increasingly politicized judicial elections is the complete displacement of elective

processes by a "commission-based appointive system."<sup>51</sup> The ABA's Commission on the 21st Century Judiciary concluded that "states should be concerned about the impact of judicial elections on judicial impartiality and the rule of law."<sup>52</sup> The other is reflected, for example, in the lead article in this issue of the *Arkansas Law Review*, which, putting its faith in "the wisdom of crowds,"<sup>53</sup> vigorously endorses a full-bore partisan electoral process for selecting judges, replete with what in effect are the kind of candidate campaign commitments, attack ads, and unrestrained campaign expenditures (even by persons whose interests subsequently appear before the

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<sup>50</sup> Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 *GEO. 3. LEGAL ETHICS* 1259 (2008). Indeed, the endlessness of the debate has generated its own genre of futility-description. E.g., Roy A. Schotland, *Comment*, 61 *LAW & CONTEMP. PROBS.* 149, 150 (1998) ("[M]ore sweat and ink have been spent on getting rid of judicial elections than on any other single subject in the history of American law."); Phillip L. Dubois, *Accountability, Independence, and the Selection of State Judges*, 40 *Sw. L.J.* 31 (1986) ("It is fairly certain that no single subject has consumed as many pages in law reviews... over the past fifty years as the subject of judicial selection.").

<sup>51</sup> AM. BAR ASS'N, *JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION FOR THE 21ST CENTURY JUDICIARY* 70 (2003). Under this recommendation "a credible, neutral, nonpartisan, diverse deliberative body or commission" would recommend a slate of judicial candidates to the governor, who would make an appointment to a single lengthy term, subject only to "regular judicial performance evaluations and disciplinary processes that include removal for misconduct." *Id.* The ABA

also has adopted fall-back recommendations, apparently in recognition that judicial elections are here to stay. For example, "for states that cannot abandon judicial elections altogether, the Commission recommends that elections be employed only at the point of initial selection." *Id.* at 74.

<sup>52</sup> *Id.* at 68.

<sup>53</sup> Another work in the judicial-election literature invoking this notion is Stephen J. Choi, et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 *J.L. ECON. & ORG.* 290, 291 (2008) ("And when many people participate in a decision-making process, aggregation of information occurs, which can produce more accurate results than when the decision is made by only one person."). For a brief discussion of the limits of crowd wisdom, namely the requirement that crowd members have access to accurate information, see Cass R. Sustein, *When Crowds Aren't Wise*, Sept. 2006, *HARV. BUS. REV.*, available at <http://hbr.org/2006/09/when-crowds-arentwise/ar/1> (last visited Apr. 8, 2011).

successful beneficiary of those expenditures), that characterize elections to the other branches.<sup>54</sup>

Not only is there continuing deep disagreement about how judges are best selected for office, there is also an ongoing debate about what they do, and especially about what they believe they do, once they get there. As some formulations of the traditional “legal model” have it, judges decide cases based on their best interpretation of applicable authoritative sources (including constitutional, statutory, precedential, and historical sources) and honest appraisal of the facts, largely free from their own ideological preferences.<sup>55</sup> Under this view, as Chief Justice Roberts asserted during his confirmation hearings judges are like neutral “umpires call[ing] balls and strikes.”<sup>56</sup> As the legal realists have contended, by stark contrast, what judges call “the law” is mostly window-dressing, artfully applied to render presentable those outcomes the judges themselves prefer.<sup>57</sup> Judges in this vision are not umpires, they are players.

What is more, these two lines of inquiry have barely spoken to one another. Although the implications are potentially profound, there has been very little study of the relationship between claims about judicial selection and retention on the one hand and theories of judicial decisionmaking on the other hand.

In one of the few works explicitly considering this relationship, Charles Geyh observed that if, as many political scientists contend, judges follow their own policy preferences rather than the law in deciding cases, “the primary justification for judicial independence disappears” and presumably with it, grounds for opposition to direct electoral control.<sup>58</sup> Indeed, with it very likely goes much of the idea of the rule of law itself. But if judicial decisionmaking is constrained by law in meaningful measure, then “judicial independence is back in the game,” including in the debate about judicial selection.<sup>59</sup>

This article raises a concern about a potential collision in that intersection of theories. Recent scholarship criticizing the umpire-versus-player axis as oversimplified and contrary to judges’ own perceptions of what they do has argued that law does constrain judicial decisionmaking, in part because judges take seriously internalized norms of law-adherence.<sup>60</sup> That is, their behavior is shaped by their perceptions of their role or professional identity. But the difficulty is that some methods of selecting judges may affect not only public perceptions and hence perceived legitimacy as many have argued, a serious enough concern in itself, but also judges’ own perceptions of their role. Selection methods that regard judges, as Roscoe Pound complained in 1906,<sup>61</sup> as ordinary

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<sup>54</sup> Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minn. v. White, Caperton, & Citizens United*, 64 ARK. L. REV. 4 (2011).

<sup>55</sup> See RONALD DWORKIN, *LAW’S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Harry T. Edwards, *Public Misperceptions Concerning the ‘Politics’ of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619,619(1985).

<sup>56</sup> Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79, 81(2010) (quoting Nomination of Judge John G. Roberts, Jr. to Be Chief Justice of

the Supreme Court: Panel One of a Hearing of the S. Judiciary Comm., 104th Cong. (2005)).

<sup>57</sup> See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006) (offering a description and critique of the rise of the instrumental view of law).

<sup>58</sup> Geyh, *supra* note 1, at 1278.

<sup>59</sup> *Id.*

<sup>60</sup> See *infra* text accompanying note 206-08.

<sup>61</sup> Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 415 (2906) (“Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.”).

politicians, indeed rewards them for behaving just like other politicians do and punishes them when they do not, undermine that norm by encouraging judges to see themselves more as ordinary politicians or attracting mostly those candidates who already do. If, as some scholars have persuasively suggested, internalized judicial norms of law-adherence are an essential bulwark protecting the rule of law, and if what it takes to obtain judicial office affects the judge's perception of what that office is, then the current trend, now entitled to not-insignificant constitutional protection, toward "nastier, noisier, and costlier"<sup>62</sup> judicial elections – and elections of some type account for the selection of the majority of state judges<sup>63</sup> – is cause for serious concern. If there is such a thing as what I will call "judicial exceptionalism" – that is, if judges' professional identity is centrally committed to the norm that the judicial role is constitutively different from other governmental officers and judges' behaviors are constrained by that commitment, which constraint is central to the rule of law – the current trends in judicial selection may have a nontrivial corrosive effect on it. Do we really want our judges not only to behave like ordinary politicians on their way to office, but to see themselves that way once they arrive? If we are to insist on the one, how

realistic is it not to expect the other?

I will begin by covering familiar ground along the first line of inquiry, briefly describing where we are and how we got here: the concept of judicial independence and its relationship to judicial accountability, the background to today's array of judicial-selection and retention methods and related concerns about independence and accountability, and an overview of just how nasty, noisy, and costly judicial elections have become. I will next briefly traverse the second line regarding models of judicial decisionmaking. These two lines are much better covered elsewhere in the literature, but I include a synopsis here to reach my main point, which is to ask where we are headed: that is, whether current trends threaten to corrode judicial exceptionalism and thereby compromise the rule of law.

### **I. Judicial Independence and why it Matters**

Judicial independence matters to the extent it actually promotes the rule of law<sup>64</sup> and public acceptance of law.<sup>65</sup> First, people cannot know how to conform their behavior to the law if courts, which eventually will render a conclusive judgment on legal matters, base those judgments on some basis other than the law, such as political or financial pressure,

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<sup>62</sup> See Schotland, *supra* note 1, at 150.

<sup>63</sup> Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 369(2010) (noting pressures on elected judges).

<sup>64</sup> See, e.g., Geyh, *supra* note 1, at 1259 ("It is thought that if judges are independent – if they are insulated from political and other controls that could undermine their impartial judgment – they will be better able to uphold the rule of law, preserve the separation of powers, and promote due process of law." (citations omitted)); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 632 (1999) ("But judicial independence is only a means to an end; it is the mechanism chosen by the Founders

to ensure the rule of law.").

<sup>65</sup> See Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW. & CONTEMP. PROB. 59,61(1998): As Justice Robert Jackson once famously noted, [w]riting in the midst of the Cold War, and deep in the throes of the McCarthy era, Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices. (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J. dissenting)).

personal loyalties, or threat of violence.<sup>66</sup> Second, courts must be independent to determine which laws are constitutionally legitimate and to give those laws full effect.<sup>67</sup>

Although both John Adams in his draft of the Massachusetts Constitution<sup>68</sup> and Alexander Hamilton in his Federalist No. 78<sup>69</sup> recognized that an independent judiciary is essential to the preservation of individual rights and liberties, attitudes about and conceptions of judicial independence have long been ambivalent. "Throughout much of history, the question of judicial independence was not one of independence from political influence generally, but rather independence from a particular arm of government."<sup>70</sup> There was opposition during the ratification debates to the protections of Article III<sup>71</sup>

and at the state level following adoption of the Constitution: "Despite the embodiment of judicial independence in the federal constitution, political attacks on the judiciary have continued throughout the centuries."<sup>72</sup> They continue to this day.<sup>73</sup>

Judicial independence is usually divided conceptually into "decisional independence" and "institutional independence."<sup>74</sup> Decisional independence is a case-by-case matter. It means the latitude to decide the particular case at hand without interference or fear of retribution for the outcome.<sup>75</sup> Institutional independence is an inter-branch matter. It refers to the judiciary's ability "to resist encroachments from the political branches and thereby promotes the separation of powers."<sup>76</sup> At the federal level, for example, decisional inde-

<sup>66</sup> Under even a minimalist definition of the rule of law, the law must be capable of guiding behavior. See generally JOSEPH A. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210 (1979) (describing minimal conditions for the rule of law). It must be "followable." LON L. FULLER, *MORALITY OF LAW* 33-39(1964).

<sup>67</sup> John Ferejohn has articulated three aspects to this point. John Ferejohn, *Independent Judges. Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 366-67 (1999). The first is freedom from manipulation by powerful individuals as a precondition to the rule of law, such that "everyone is subject to the same publicly communicated general legal rules." The second describes a judicial role for what H.L.A. Hart calls "rules of recognition." H.L.A. HART, *THE CONCEPT OF LAW* 97-120 (1961); Kent Greenawalt, *The Rules of Recognition and the Constitution*, 85 MICH. L. REV. 621(1987) (discussing this concept in American constitutional law). "[I]n a constitutional government, only those laws that are constitutionally legitimate ought to be enforced, and courts must be able (independently) to do much of the work in deciding which laws survive this test." Ferejohn, *supra* note 18, at 366. And third, those laws that are "constitutionally legitimate" ought to be "given full effect" and not subverted by the shifting preferences of government officials not expressed through procedurally correct means. *Id.* at 366-76

<sup>68</sup> See *Justice in Jeopardy*, *supra* note 2, at 6 (quoting MASS. CONST. art. XXIX): 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.

<sup>69</sup> THE FEDERALIST No. 78, at 466 (Alexander Hamilton)(Clinton Rossiter, ed., 1961) (arguing that the Constitution's protections "can be preserved in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing").

<sup>70</sup> Paul J. DeMuniz, *Politicizing Stale Judicial Elections: A Threat to Judicial Independence*. 38 WILLAMETTE L. REV. 367, 369 (2002).

<sup>71</sup> *Id.* at 374 (quoting Anti-federalist "Brutus's" objection to such judges that "[t]here is no power above them, to control any of their decisions").

<sup>72</sup> *Id.* (citing BRUCE Fein *St Burt Neuborne, Why Should We Care About Independent and Accountable Judges*, 61 OR. ST. B. BULL, Apr. 2001, at 10).

<sup>73</sup> See William Leuchtenburg, *The Origins of Franklin D. Roosevelt's - "Court Packing Plan,"* 1966 SUP. Cr. REV. 347, 348 (1966) (calling "for empowering Congress to overrule the Supreme Court" and expressing other anti-judicial sentiment); see also *supra* note 22.

<sup>74</sup> Geyh, *supra* note 1, at 1259

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

pendence is protected by the robust tenure and salary provisions of Article III, but some degree of institutional dependence is maintained through congressional control over budgetary matters, the creation of lower federal courts, and federal court jurisdiction.<sup>77</sup> Threats to independence can arise from both “corruption of the political process – failures of political agency that lead politicians or other powerful actors to interfere in adjudication for their own private purposes – and endemic properties of popular government that tend to undercut judicial independence.”<sup>78</sup>

The stakes are economic as well as political. Economists explain that an independent judiciary, like other non-majoritarian institutions such as central banks, help “to mitigate the problem of time-inconsistent preferences,” thereby increasing government credibility and promoting investor confidence.<sup>79</sup> “If a neutral third party (the judiciary) has the competence to ascertain whether any of the conflicting players has reneged on its promises, and to force them to make good on their promises, incentives to honor one’s promises are substantially increased.”<sup>80</sup> The apparent rationality of

the decision to create independent judiciaries, however, is itself vulnerable to what has been called the “second order commitment” problem in which politicians faced with an uncomfortable judicial decision might be tempted to interfere with that decision or with the court itself.<sup>81</sup> Paper promises of independence in legal texts such as constitutions and statutes must be backed up by real and effective protections. One study of a cross-section of fifty-seven countries found that actual protection of judicial independence “has a significantly positive impact on economic growth, while the positive impact of [mere paper guarantees] is not significant.”<sup>82</sup> In short, “[a] switch from a totally dependent to a totally independent judiciary would – *ceteris paribus* – lead to an increase in growth rates of between 1.5 and 2.1 percentage points”<sup>83</sup> It seems clear that appointed judges, because their effective terms of office on average are longer, enjoy some attributes of greater actual independence than do elected judges.<sup>84</sup>

Among the factors that account for the effective level of judicial independence is public confidence in the legal system: “The higher legal confidence, the more independent will be the judges

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<sup>77</sup> See Ferejohn, *supra* note 15, at 356.

<sup>78</sup> John A. Ferejohn and Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 968(2002).

<sup>79</sup> Bernd Hayo and Stefan Voigt, *Explaining De Facto Judicial Independence*, 27 INT’L REV. L. and ECON. 269,272(2007).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (citing Peter Moser, *Checks and Balances, and the Supply of Central Bank Independence*, 43 EUR. ECON. REV. 1569 (1999)).

<sup>82</sup> Lass P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUR. J. POL. ECON. 497, 510 (2003). Variables identified as comprising *de facto* independence included: (1) the effective average term of members on the

highest court; (2) the degree of influence of each member (dilution of which, for example, Roosevelt sought to accomplish with his “courtpacking” plan); (3) adequate (in real-dollar terms) income as well as supportive resources (computers, clerks, access to legal materials); (4) stability of the legal foundation of the highest court; and (5) the extent of dependence on other branches for implementation of the court’s rulings. *Id.* at 503-04.

<sup>83</sup> Hayo & Voigt, *supra* note 30, at 270.

<sup>84</sup> Hanssen determined in 1999 that appointed judges hold office an average of 10.3 years compared to the 7.9 years for elected judges. F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205,206(1999).

factually.”<sup>85</sup> Public trust in the legal system, that is, its perceived legitimacy, which has long been identified as an important factor in compliance with law,<sup>86</sup> thus also interactively supports actual judicial independence, and “judges can increase their independence by generating trust about their work in the general populace.”<sup>87</sup>

For judicial independence to promote the rule of law and public trust in the judiciary, that is, for it to be constructive, it must be tempered with judicial accountability. Therein lies the tension. Judicial discretion is the cartilage in the decisional joints of the American legal system. “Facts and law require interpretation; justice and equity require judgment.”<sup>88</sup> Other tasks are also highly discretionary, such as the selection for appointment of court-related personnel, including “criminal defense counsel, court evaluators, guardians, receivers, trustees, mediators, referees, special counsel, or special masters.”<sup>89</sup> And the courthouse is a professional workplace dominated by the judge and populated with litigants, lawyers, clerks, staff attorneys, secretaries, bailiffs, court reporters,

**The belief that they are not ordinary politicians may be the most immediate force preventing judges from acting like ordinary politicians. It is difficult to see how the current trends in judicial elections toward highly politicized, interest-influenced, money-saturated, partisan warfare -which are increasingly rendering them indistinguishable from elections for ordinary politicians- yield a net gain in judicial accountability.**

witnesses, spectators, jurors, custodians, news reporters, and other judges. The judge exercises decisional or institutional power at each juncture, and thus has the opportunity not only to make goodfaith errors in legal and factual judgment, or administrative oversight, but also to engage in corrupt, incompetent, negligent, exploitive, abusive, inappropriate, deceitful, and politically influenced behavior.<sup>90</sup>

<sup>85</sup> Hayo & Voigt, supra note 30, at 284. Other factors include the extent of democratization, that is, “democratic states have, on average and controlling for other influences, a more independent judiciary,” (although the effect is small); the extent of freedom of the press; and the religious beliefs of the populace. Id. at 284. Note, however, that these benefits of judicial independence are not perfectly synonymous with predictability of the outcome of judicial rulings. Because – unlike the dependent judge – the independent judge does not require “the support of politically powerful groups to remain in office,” information about the likely impact of rulings on such groups’ interests helps predict the dependent more than the independent judge’s rulings. But independent judges tend eventually to serve longer terms and to compile a corpus of rulings on which to base predictions about future rulings. “The institutions that promote judicial independence may therefore increase or decrease litigants’ uncertainty about judicial decision making.” Hanssen, Judicial Institutions, supra note 35, at 206.

<sup>86</sup> E.g., TOM R. TYLER, *Why People Obey the Law* 3-7 (1990).

<sup>87</sup> Hayo & Voigt, supra note 30, at 284. Indeed,

some legal commentators have posited a relationship between judicial independence and judicial restraint, arguing that in the American federal court system, especially at the Supreme Court level, a properly balanced reconciliation between “the judiciary’s twin goals of democratic legitimacy and legal legitimacy” would recognize that maintenance of “the judicial branch’s independence lies as much or more in the judge’s own hands as in external political pressures.” Ferejohn & Kramer, supra note 29, at 962; see also William H. Pryor, Jr., *Judicial Independence and the Lesson of History*, ALA. LAW., Sept. 2007, at 392 (arguing that “the judiciary has a responsibility to safeguard its own independence by being cautious about the exercise of its jurisdiction and power”). Of course, at some point caution becomes submission and independence is lost.

<sup>88</sup> Stratos Pahis, Note, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L.J. 1900, 1903 (2009).

<sup>89</sup> Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 436-37 (2004) (citations omitted).

<sup>90</sup> For a comprehensive catalogue of instances of judicial misconduct, see id. at 432- 56.

The American legal system has developed multiple formal and informal methods for holding judges accountable for their actions and for checking the judiciary itself. Recall that judicial independence is usually conceived as decisional and institutional.<sup>91</sup> Accountability measures, however, can be divided along more than one axis. Some formal methods, like appeals, and informal methods, such as critical review, operate on the judge's decisions. Others focus on the judge individually, before or after taking office, such as the election or appointment process, and various forms of discipline. Some operate on both, such as recusal or petitions for writs of mandamus or prohibition. And, as mentioned, some operate on an interbranch basis, such as by controlling budgetary resources or jurisdiction or by diluting or concentrating judicial influence by controlling the number of judgeships. Just as the exercise of judicial office is subject to abuses that compromise the rule of law and trust in the judiciary, so too are the methods for checking the judges and the judicial branch subject to deployment in ways that degrade constructive judicial independence. Any dog can be made to bite. Thus, the perennial policy struggle is to strike an optimal balance between judicial independence and accountability, to ensure that judges are independent enough to follow the facts and law without

fear or favor, but not so independent as to disregard the facts or law to the detriment of the rule of law and public confidence in the courts.<sup>92</sup>

Which way the application of any particular measure tips that balance in any particular historical context can be a complex question. The next section briefly describes the variety of accountability measures adopted over the course of the nation's history. I focus mainly on those measures that operate on the level of the individual judge rather than at the institutional level. To be sure, deployment of institutional-level measures can threaten decisional independence.<sup>93</sup> I focus on judge-oriented measures, however, because those are the ones that intuitively seem most likely to affect perceptions of the judicial identity.

## **II. How do they get there and what happens once they do?**

### *A. Methods for Selecting and Disciplining Judges*

#### *1. Judicial Selection*

In the standard narrative, successive reforms to the methods of selecting and disciplining judges have aimed at a moving target of perceived threat to the rule of law. The independence/accountability conundrum means that the "perennial policy struggle" at best can only hope to find an acceptable compromise, not a perfect solution.<sup>94</sup> No known method

<sup>91</sup> Geyh, *supra* note 1, at 1259.

<sup>92</sup> *Id.* at 1260.

<sup>93</sup> Several salient historical examples at the federal level can be found. See generally William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (discussing Congress's suspension of a Term of the Supreme Court during the Marbury proceedings); William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973) (discussing Congress's use during military Reconstruction of its Article III power to make "exceptions" to appellate jurisdiction for the explicit purpose of interfering with the Supreme Court's decision in a pending case); Leuchtenburg, *supra* note 24 (Franklin Roosevelt's 1937 attempt to use Congress's power to create judgeships to dilute the

influence of sitting judges for the clear purpose of reversing the Supreme Court's decisional course). Other examples of modern-era court-stripping initiatives also can be found. See, e.g., Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 STAN. J. C.R. ST. C.L. 259 (2006); John Boston, *Road Blocks to Justice: Congressional Stripping of Federal Court Jurisdiction*, 67 BROOK. L. REV. 429 (2001); Michael J. Gerhardt, *The Constitutional Limits to Court-Stripping*, 9 LEWIS & CLARK L. REV. 347 (2005) (discussing the Marriage Protection Act of 2004); James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411 (2001).

<sup>94</sup> See Geyh, *supra* note 1, at 1260.



ensures selection of ideal judicial candidates, completely prevents judicial misconduct, or is free of threat to judicial independence and to judicial exceptionalism.<sup>95</sup>

The trend in judicial selection methods at the state level has been toward heterogeneity and, as described below recently in some states toward money-saturated politicization.<sup>96</sup> Founding-era concern with executive interference led five states to adopt legislative appointment, while eight opted for gubernatorial appointment with legislative confirmation.<sup>97</sup> The Jacksonian democracy movement is traditionally credited with the shift, which did not take root until after the Jacksonians themselves had begun to fade from the scene, from an appointive to a partisan elective process.<sup>98</sup> But some scholars now contend that it was “a desire to promote judicial independence from the political branches, rather than to increase democratic accountability for judicial decisions,” that drove the broad shift

toward judicial elections.<sup>99</sup> Dissatisfaction with perceived incompetence and corruption and dominance by machine politics, however, eventually led a substantial minority of states to switch to nonpartisan elections in the early decades of the twentieth century.<sup>100</sup> Concern both about an uninformed electorate and infection of even nonpartisan elections with improper political influence eventually led to the proposal, first adopted eponymously by Missouri in 1940, of “merit selection” systems or the so-called “Missouri Plan,” “in which judges were appointed by a governor from a pool of candidates whose qualifications had been reviewed and approved by an independent commission.”<sup>101</sup> The merit-selection movement in turn encountered some resistance and now, as Geyh put it, “has stalled.”<sup>102</sup> He noted that “[c]onstitutional amendments to install merit selection systems in Florida, Michigan, Ohio, and South Dakota have been rejected by voters.”<sup>103</sup> To that list can now be added Nevada.<sup>104</sup> Resistance

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<sup>95</sup> Indeed, “Professor Paul Carrington and Adam Long report on a state chief justice who ‘not long ago declared that there is no method of selecting and retaining judges that is worth a damn.’ He was not the first to express that wisdom.” JUSTICE IN JEOPARDY, *supra* note 2, at 69 (quoting Paul Carrington & Adam Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 471 (2002)).

<sup>96</sup> For a brief overview, see LARRY C. BERKSON, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT, AM. JUDICATURE SOC’Y (updated by Rachel Caulfield & Malia Reddick in Apr. 2010); Geyh., *supra* note 1, at 1261-63; DeMuniz, *supra* note 21.

<sup>97</sup> Geyh, *supra* note 1, at 1261.

<sup>98</sup> Randy J. Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability*, 5 WIDENER L. SYMP. J. 117, 123 (2000).

<sup>99</sup> Geyh, *supra* note 1, at 1261 (citing, *inter alia*, Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993)); see also Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and*

*Nonpartisan Elections*, 2009 WIS. L. REV. 21, 26 (summarizing historical scholarship finding that the movement to partisan elections was meant to free judges from dependence on legislatures, to enable them to “count on separate bases of political support,” and was accompanied by other independence-protective measures “such as lengthier terms and greater protection from removal by the legislature”).

<sup>100</sup> Geyh, *supra* note 1, at 1262 (quoting Stephen P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 723 (1995)).

<sup>101</sup> Geyh, *supra* note 1, at 1262.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Doug McMurdo, *Voters Reject Changing Judge Selection*, LAS VEGAS REV.-J., Nov. 3, 2010, available at <http://www.lvij.com/news/voters-reject-changing-judge-selection-106597233.html> (last visited Feb. 23, 2011). Another important but less-noted outcome of that election was the voters’ rejection of the creation of an intermediate appellate court to help relieve a heavy supreme court caseload. *Id.*

to reform has been associated with the entrenchment of power.<sup>105</sup>

“Today the combination of schemes used to select judges is almost endless. Almost no two states are alike, and many states employ different methods of selection depending upon the different levels of the judiciary, creating ‘hybrid’ systems of selection.”<sup>106</sup> On the simple categorization of states that elect judges versus states that appoint them, “[t]he two groups turn out to be fairly equal in number.” For the courts of last resort:

Twenty-one states hold elections for judges serving on courts of last resort: 8 use partisan elections, 13 use nonpartisan elections. In 24 states and the District of Columbia, judges are appointed to the highest court by the governor with the assistance of a judicial nominating commission. In California, Maine, and New Jersey, the governor appoints these judges without the aid of a nominating commission. In South Carolina and Virginia, Supreme Court judges are chosen by the legislature.<sup>107</sup>

The picture is even more complex among the forty states that have intermediate courts of appeal and at the trial court level, where some states even “use multiple methods to select judges for general jurisdiction trial courts.”<sup>108</sup> So

far, despite increased concern about the potentially compromising effect of the enormous increase in campaign spending on judicial elections, discussed below,<sup>109</sup> the movement toward public funding has been modest. North Carolina implemented it in 2002 and has had high levels of participation.<sup>110</sup> Several other states have begun to take steps in that direction.<sup>111</sup>

## 2. *Judicial Discipline*

The trend with respect to judicial discipline, by contrast, has been toward professionalization and explicit concern for balancing accountability with independence.<sup>112</sup> Traditionally, there are three methods of calling judges to account: “removal at the executive’s pleasure; removal by the executive upon ‘address’ from the legislature; and removal by the legislature through impeachment.”<sup>113</sup> Article III’s combination of tenure during good behavior and salary protection, subject to impeachment, reflects the Framers’ reconciliation of the competing demands of independence and accountability, informed by their experience under King George III and the common-law legacy of the Act of Settlement in 1701 following the Glorious Revolution.<sup>114</sup> “Almost all state

<sup>105</sup> “States with larger legislative majorities were less likely to do so, consistent with the hypothesis that a stronger hold on power reduces the attractiveness of an independent court,” and “states that had joined the Union more recently were more likely to adopt new procedures, consistent with the hypothesis that less firmly entrenched institutions are less costly to alter.” Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, AM. LAW & ECON. ASSOC. ANNUAL MEETINGS, paper 14, at 2 (2004). He also adds administrative burden to the list of factors: “Where [constitutional] amendments were not necessary, or where constitutions were being re-written anyway, new procedures were more likely to be adopted.” *Id.*

<sup>106</sup> BERKSON, *supra* note 47, at 2.

<sup>107</sup> *Id.* at 2-3.

<sup>108</sup> *Id.* at 3.

<sup>109</sup> See *infra* text accompanying note 106.

<sup>110</sup> JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE* 69.

<sup>111</sup> See *Id.* (reporting New Mexico adopted a public-funding system in 2007, which it has yet to implement; Wisconsin adopted a public-financing law in 2009; and West Virginia approved a pilot program for supreme court elections in 2012).

<sup>112</sup> For an account of this history, see Holland & Gray, *supra* note 49. For description of the systems in place in a selection of states, see James J. Alfani et al., *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 S. TEX. L. REV. 889(2007).

<sup>113</sup> Holland & Gray, *supra* note 49, at 118.

<sup>114</sup> *Id.*

constitutions,” Holland and Gray report, “provide for the removal of a judge by an impeachment process.”<sup>115</sup> Little is left of removal by executive action.<sup>116</sup> Address – legislative removal upon gubernatorial request – has rarely been used.<sup>117</sup> And removal by recall votes while available in some states, also is infrequently employed.<sup>118</sup> Today the more frequently used method for displacement of incumbent judges is by defeat when they are up for reelection or retention election.<sup>119</sup> But all of these methods suffer from common shortcomings. Each “continues to be timeconsuming, frequently becomes partisan and provides for only one<sup>120</sup> sanction-removal”.

The states’ response to those aspects of the independence accountability dilemma has been to develop judicial conduct organizations. This much more recent development than the antebellum origins of the partisan-elections movement or the turn-of-the-previous-century, nonpartisan-election initiative has involved more procedural commonality, and focuses more particularly on judges’ professional, rather than political, status. Properly implemented, these measures reinforce rather than undermine judicial exceptionalism while also promoting judicial accountability.

Between 1960 and 1981, “all fifty states and the District of Columbia had

established a judicial conduct organization.”<sup>121</sup> These organizations differ in a number of respects – such as whether they are situated in the judiciary (as most are), the number and composition of their membership, the extent of confidentiality, and the allocation of prosecutorial and adjudicatory functions – but they also share important basic features. They cover a wide range of judicial officers from the supreme courts on down; they act on complaints (and many can initiate inquiries) alleging misconduct, disability, or “conduct that reflects adversely on the integrity of the judicial system” (or similar formulation); they provide for some (albeit varying) measure of confidentiality in the proceedings; and they can impose a range of sanctions from private admonition to removal from office.<sup>122</sup> This broad-scale movement toward a more flexible and fine-tuned self-regulatory professionalized process has offered a more recent, less independence-threatening alternative to the potentially politicized blunt-instrument removal or nonretention processes.<sup>123</sup>

Finally, one relevant recent specific development is the effort under way in several states to develop more robust recusal and disqualification standards regarding campaign contributions and expenditures. This movement is in response to *Caperton v. A.T. Massey*

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<sup>115</sup> *Id.* at 121.

<sup>116</sup> *Id.* One surviving vestige is that “governors can perform the functional equivalent of removing an incumbent judge by not reappointing him or her to a new term of office in both Delaware and Maine.” *Id.* at 122 (citations omitted).

<sup>117</sup> *Id.*

<sup>118</sup> Holland & Gray, *supra* note 49, at 123.

<sup>119</sup> See *id.* at 125.

<sup>120</sup> *Id.* (citation omitted), (citing Edward J. Schoenbaum, A Historical Look at Judicial Discipline, 54 CHI-KENT L. REV. 1, 1-10 (1977)). For a thorough catalogue of the limitations of existing measures seeking to hold judges accountable, see Miller, *supra* note 40, at 459-78.

<sup>121</sup> Holland & Gray, *supra* note 49, at 126.

<sup>122</sup> *Id.* 126-27, 129-30, 132 (footnote omitted).

<sup>123</sup> Concerns about the practical limits of the impeachment power to address the wide range of judicial conduct and disability issues and recognition of states’ success in developing judicial conduct organizations prompted Congress in 1980 to pass the Judicial Councils Reform and Judicial Conduct and Disability Act. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980); Holland & Gray, *supra* note 49, at 133-34. (“The federal statute authorizes judicial councils in each of the thirteen federal circuits to review complaints against federal judges and to order sanctions [short of removal but potentially including recommendation to Congress for impeachment] for judicial misbehavior.”).

Coal Co.<sup>124</sup> and increasing concern about the impact on both public perception and judicial independence of the enormous increases in campaign contributions and expenditures by entities and individuals who have matters before the courts.<sup>125</sup> It lends particular support to judicial exceptionalism by seeking to counteract an especially powerful force pulling judicial candidates toward the ordinary-politician role identity.

### *B. What Difference Does It Make?*

Which method for judicial selection is superior – merit selection, appointment, nonpartisan election, partisan election – is a much-debated and complex question with normative and empirical dimensions; and the nature of judicial elections is not static but dynamic, changing rapidly over recent decades. Specification of the criteria of superiority is a normative matter and whether the data show evidence of their attainment can be a difficult empirical one. This article suggests that the escalating politicization and commodification of some judicial elections threatens to corrode judges' own conceptions of their role with adverse consequences for their fidelity to the rule of law.

The lead article in this issue of the *Arkansas Law Review* offers two categories of material by way of support for its endorsement of unencumbered electoral processes. The first recounts pungent anecdotes of judicial misconduct and concludes that an appointment process “does not seem to offer those who receive the appointment any immunity from the temptations that affect judges who secure their positions by election.”<sup>126</sup> The second states that “[i]t is surprisingly difficult to demonstrate, in any rigorous empirical way, the oft-repeated claim that campaign contributions affect the judges' decisions,”<sup>127</sup> and recites results from several studies of campaign contributor-litigants' success or failure before the courts.<sup>128</sup> The general implications seem to be (1) that appointment processes are not preferable because not perfect and (2) that conventional concerns about the vulnerability of electoral processes to improper influence are not well-founded.<sup>129</sup>

As mentioned above, the appointment-versus-election debate does not seem in danger of resolution any time soon,<sup>130</sup> although as described below those favoring a politicized and money-laced electoral approach seem to be making

<sup>124</sup> 129 S. Ct. 2252(2009).

<sup>125</sup> For an overview and recommendations, see AM. BAR ASS'N STANDING COMM. JUD. ON INDEPENDENCE, Report to House of Delegates, Recommendations for Improving Judicial Disqualification Practices and Procedures Among States (2010); JAMES SAMPLE, ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS (Brennan Center for Justice 2008); Amelia T.R. Starr et al., FUND FOR MODERN COURTS, A Heightened Recusal Standard for Elected New York Judges Presiding Over Cues, Motions or Other Proceedings Involving Their Campaign Contributors (2010), available at [http://www.moderncourts.org/documents/april\\_2010\\_recusal.pdf](http://www.moderncourts.org/documents/april_2010_recusal.pdf) (last visited Feb. 12, 2011). A Standing Committee on Judicial Independence resolution before the ABA House of Delegates urging states to adopt campaign-support

disclosure requirements was withdrawn on January 19, 2011.

<sup>126</sup> Rotunda, *supra* note 5, at 13.

<sup>127</sup> *Id.* at 14.

<sup>128</sup> *Id.* at 24.

<sup>129</sup> See generally Rotunda, *supra* note 5.

<sup>130</sup> Alex B. Long, Stop Me Before I Vote for This Judge Again: Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges, 106 W. VA. L. REV. 1, 14(2003). The arguments for and against each selection method have been repeated ad nauseam in academic literature. Supporters of each position are effectively able to undercut the other side's position to the point where one is left with the uneasy conclusion that each selection method is equally flawed or, at best, that one is only slightly less satisfactory than the others.

tangible progress on the ground. Indeed, in that sense, the facts in *Caperton v. A. T. Massey Coal Co.* may be more pertinent to the discussion than its ruling.<sup>131</sup> This article cannot hope to push the front line of the debate much one way or another, but it can help to put the lead article's misconduct and influence arguments in perspective and can raise a concern about the impact of current trends in judicial elections on judicial exceptionalism. I shall take up the lead article's judicial misconduct argument in this Part II.B. and its influence argument in Part II.C., where I describe recent trends in judicial campaigns.

### *1. Relation Between Selection Method and Judicial Behavior*

First, there is a large and growing literature supporting the view that appointed judges behave differently compared to elected judges.<sup>132</sup> Hanssen's 2004 review, for example, includes studies finding that: (1) "partisan elected judges decide cases in a more partisan fashion than appointed judges;" (2) in jurisdictions that elect judges, criminal cases tend to be resolved by

guilty plea more frequently than by trial; (3) "electoral incentives discourage justices from dissenting on highly controversial issues;" (4) "partisan elected justices are more likely to accept than to overturn death sentences for a given party affiliation;" and (5) "partisan judicial elections are associated with higher tort awards on average, and in decisions against out-of-state businesses."<sup>133</sup> Geyh cites several other studies finding that judges who face reelection are more reluctant to overturn capital convictions, voting in a direction "consistent with public opinion."<sup>134</sup> Hanssen's own 1999 study of relative filing rates found evidence that courts in states that appoint judges behave more independently than do courts in states that elect them,<sup>135</sup> as did his study of bureaucratic defensiveness.<sup>136</sup> In a 2003 study, Besley and Payne also found evidence that electoral processes reduce independence, and further found that "incentive effects" (risk of nonreelection), rather than initial "selection effects" (selection criteria and selfselection), account for the observed differences, with judges who serve life terms not surprisingly showing the

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<sup>131</sup> 129 S. Ct. 2252 (2009). For discussion of the scale of Don Blankenship's judicial-campaign expenditures, see *infra* notes 142-44 and accompanying text.

<sup>132</sup> See generally Timothy Besley & A. Abigail Payne, *Judicial Accountability and Economic Policy Outcomes: Evidence from Employment and Discrimination Charges*, Working Paper, London School of Economics, [http://scholar.google.com/cite\\_seerx.ist.psu.edu](http://scholar.google.com/cite_seerx.ist.psu.edu).

<sup>133</sup> See Hanssen, *Judicial Independence*, *supra* note 56, at 3 (citations omitted).

<sup>134</sup> Geyh, *supra* note 1, at 1275 (quoting Paul Brace & Brent Boyea, *Judicial Selection Methods and Capital Punishment in the American States*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* at 186, 193-99 (Matthew J. Streb ed. 2007)); see also Richard R.W. Brooks & Stephen Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections*

and Capital Punishment, 92 *CRIM. L. & CRIMINOLOGY* 609 (2003); Jason J. Czarnecki, *Voting and Electoral Politics in the Wisconsin Supreme Court*, 87 *MARQ. L. REV.* 323 (2003). Geyh also noted that "[e]arlier studies [most antedating the "new-style" judicial campaign] comparing decision-making behavior of elected and merit selected judges, however, found no meaningful correlation between selection method and decisionmaking behavior." Geyh, *supra* note 1, at 1275.

<sup>135</sup> His study found a difference at the high-court level but not the trial-court level, "reflecting the fact that trial judges have substantially less decision discretion than appellate judges." Hanssen, *Judicial Institutions*, *supra* note 35, at 206-07.

<sup>136</sup> See F. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 *J.L. ECON. & ORG.* 534 (2000).

greatest independence.<sup>137</sup> The ABA's Commission on the 21st Century Judiciary reached a similar conclusion about the risk of nonreelection:

The worst selection-related judicial independence problems arise in the context of judicial reselection. It is then that judges who have declared popular laws unconstitutional, rejected constitutional challenges to unpopular laws, upheld the claims of unpopular litigants, or rejected the claims of popular litigants are subject to loss of tenure as a consequence. And it is then that judges may feel the greatest pressure to do what is politically popular rather than what the law requires.<sup>138</sup>

Second, recent studies have attempted more directly to assess the relative "quality" of elected and appointed benches. Cairn's survey of trial judges found that those who serve in appointing or merit-selection states rate the quality of justice more highly than do those who serve in electing states.<sup>139</sup> According to Sobel and Hall, a U.S. Chamber of Commerce ranking based on a nationwide survey of lawyers found that "the selection of judges by election lowers

judicial quality, and this impact is even larger when those elections are of a partisan nature."<sup>140</sup> Their regression analysis, which controlled for various state-level data that might affect outcome (e.g., education levels in the state, the per capita concentration of lawyers, voting patterns, and judicial salary level), refuted that finding, concluding that "there is not a significant difference in judicial quality between nonpartisan elective states and appointed states, but that there is a significant difference for states using partisan elections."<sup>141</sup>

Sobel and Hall further considered whether, in states with partisan judicial elections, differences in judicial outcomes could be found according to which party dominated the highest court.<sup>142</sup> They found party-dominance effects in partisan-election states.<sup>143</sup> Working from a normative perspective that emphasizes security of property rights and protection of entrepreneurial activity, they operationalized "lower quality" in this context as reflecting "more use of eminent domain (less secure property rights), higher workers' compensation premiums, and more medical-malpractice lawsuits."<sup>144</sup>

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<sup>137</sup> Besley & Payne, note 82, at 2, 16-17. They theorized that courts' interpretations of antidiscrimination statutes reflect policy choices that would manifest in the size of awards in court, which in turn would affect claimants' propensity to file suit. *Id.* The authors expected judges in electing jurisdictions to be more generous to employees and considered whether such results were a function of "selection effects" and "incentive effects" (risk of nonreelection). *Id.* They found that filings were, indeed, significantly higher in electing states but that the effect resulted from reelection incentives rather than method of initial selection (a finding which takes account for hybrid states). *Id.* Included in their theory was the expectation that elected judges would be more responsive to the interests of employees, and thus more generous with awards, than appointed judges. *Id.* at 2, 15-17. All of the Besley and Payne data cover periods before 2000. In view of the enormous increase in campaign spending since then, a great deal of which has come

horn business groups, and the partisan shifts on some courts since then, their underlying assumption about the valence of judicial responsiveness may no longer obtain. See *infra* text accompanying notes 148-54.

<sup>138</sup> JUSTICE IN JEOPARDY, *supra* note 2, at 72.

<sup>139</sup> Damon Cairn, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226, 230 (2007).

<sup>140</sup> Russell S. Sobel & Joshua C. Hall, *The Effect of Judicial Selection Processes on Judicial Quality: The Role of Partisan Politics*, 27 CATO J. 69, 74 (2007).

<sup>141</sup> *Id.* at 74-76 (using regression analysis on data such as education levels in the state, the per capita concentration of lawyers, voting patterns, and judicial salary level).

<sup>142</sup> *Id.* at 77.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 77.

They found profound party dominance effects.<sup>145</sup> In Democratically controlled high courts, workers' compensation premiums were twice as high, while in Republican controlled high courts, eminent domain filings were significantly higher.<sup>146</sup> Their study suggests "that the large sums of money spent to influence judicial races are being spent because money can have an impact if it affects which party controls a state's supreme court. This has important implications for those analyzing judicial behavior and the impact of judicial selection processes on judicial outcomes."<sup>147</sup> Money, it seems, matters.

Third, two other recent studies reached conclusions at odds with conventional wisdom about the higher quality and greater independence of appointed judges, but which contribute to the concern raised here about the impact on judicial exceptionalism of highly politicized and money-saturated judicial elections. In the first, Stephen Choi and colleagues analyzed judicial performance along three dimensions – "productivity, opinion quality, and independence" – to conclude that, on balance, outdid judges in more and perhaps problematic judges decide to write appointed judges do not

perform better than elected judges.<sup>148</sup>

They operationalized productivity by the number of opinions written for any given year in the study period (1998-2000) and found that judges in partisan states out-performed judges in less partisan states.<sup>149</sup> They measured opinion quality by the number of out-of-state and federal citations and found a strong reverse effect: judges in less partisan states partisan states.<sup>150</sup> They used a novel measure of independence – whether opinions against judges of the same or opposite party – and found that there was no significant difference in independence.<sup>151</sup> The authors' overall conclusion is the one most relevant to present purposes: that elected judges – who tend to be "more politically involved, more locally connected, educated than appointed like politicians and less like more temporary, and less well judges" – "are more professionals."<sup>152</sup> In the authors' view, this distinction has normative content. To them, judges-as-politician are "more focused on providing service to voters," while the judges-as-professional are "more focused on their long-term legacy as creators of precedent."<sup>153</sup> It is hardly self-evident, however, that a judge who views himself

<sup>145</sup> Sobel & Hall, *supra* note 91, at 77.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 79.

<sup>148</sup> Choi et al., *supra* note 4, at 391, 328.

<sup>149</sup> *Id.* at 299-300, 309.

<sup>150</sup> *Id.* at 315-16.

<sup>151</sup> *Id.* at 302, 327. As the work of Hanssen, and others indicates, independence can be operationalized in a number of ways, including the impact of the court's work on potential litigants. With respect to voting patterns, other studies have looked at whether a judge voted against the interest usually attributed to the judge's political party and found strong party-affiliation influence. See, *ag.*, Joanna M. Shepherd, *Finger so the Wind: The Influence of Retention Politics on Judges' Decisions* (unpublished manuscript), available at <http://weblaw.usc.edu/centers/cleo/workShops/documents/ShePherd.pdf> (last visited Feb. 20, 2011) (finding that high court judges facing retention

tend to vote according to expected partisan line: Republicans tend to vote more probusiness and anticriminal defendant, and Democrats tend to vote the opposite).

<sup>152</sup> Choi et al., *supra* note 4, at 327.

<sup>153</sup> *Id.* The authors plainly prefer what they characterize as the "service" orientation. But that preference is open to question. For one thing, state high courts increasingly operate not mainly as courts of correction – many states now mimic the federal model with intermediate appellate courts performing that function – but as courts of law-development. Volume would seem to be a weak measure of quality in such circumstances. For another, the authors' productivity metric is itself a dubious criterion of service-delivery. It does not account, for example, for case dispositions on issue-avoidance grounds. Arkansas, which ranks highly on another Choi et al., study equating quality with productivity (Choi, Stephen 3., et al., *Which States Have the Best* (and

or herself as a professional jurist rather than an ordinary politician, given the nature of the judicial role as an arbiter of law rather than immediate public opinion, is ultimately short-changing the public interest. To the contrary, as discussed below, selection procedures that induce judges to regard themselves more as ordinary politicians than as professional jurists may compromise the first line of defense against abuse of the discretion inherent in the judicial task.<sup>154</sup>

The second study also challenges the common equation of partisan elections with lack of judicial independence, but its conclusions illustrate the impact on independence of the “new style,” highly politicized judicial campaigns.<sup>155</sup> Brandice Canes-Wrone and Tom S. Clark drew on

scholarship holding that party affiliation (which information is available to voters on the ballot in partisan judicial elections) is “the most significant determinant of electoral behavior”, to hypothesize that “judges facing partisan elections will be under less pressure than judges facing nonpartisan ones to issue decisions that comport with public opinion.”<sup>156</sup> Comparing abortion decisions between 1980 and 2006 from states with partisan and nonpartisan elections in light of public opinion in each state about abortion, they found strong support for the hypothesis that judges facing nonpartisan elections “are more responsive to variation in public opinion than judges facing partisan ones,” and that the effect is more pronounced the closer to the election the decision is.<sup>157</sup>

Worst) High Courts? (May 1, 2008) U OF CHICAGO LAW & ECONOMICS, OLIN WORKING PAPER No. 405), has an array of especially stringent and inconsistently applied doctrines the net result of which can often be case disposition without merits resolution. One is the requirement that appellants prepare an abstract of the record. For a critique, see John J. Watkins, A “Different” Top Ten List: Significant Differences Between State and Federal Procedural Rules, 45 ARK. LAW. 12 (2010) (noting that abstracting requirement has “one foot in the nineteenth century”); John J. Watkins & Price Marshall, Modest Proposal: Simplify Arkansas Appellate Practice by Abolishing the Abstracting Requirement, 53 ARK. L. REV. 37 (2000). Mother is the absence of a “plain error” rule with regard to jury instructions. See Watkins, *supra* note 104 (noting distinction from federal practice). For a notably stringent application of the requirement that the lawyer make a record at trial of objection to non-standard instructions see *Allstate Ins. Co. v. Dodson*, 2011 Ark. 19, at 7-9, S.W.3d (refusing to consider a challenge on appeal to nonstandard instructions because the lawyer failed to make an adequate record in a case in which the lawyer attempted to do so but was interrupted by the trial judge). Yet another is the so-called Dixon rule, under which the court will refuse to consider an issue raised on appeal if the brief fails to provide a convincing argument, a citation to authority, or the general appearance that the issue is well-taken. *Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977). The court’s application of this rule has not always been as sensible as the rule itself sounds.

For example, the court invoked it to decline to consider a free speech claim under the state constitution brought by a high school student on the ground that the student (indeed, both parties) had cited only federal cases in support of his argument. *Walters v.*

*Dobbins*, 2010 Ark. 260, S.W.3d. But state courts, including the Arkansas courts, frequently look to federal constitutional law for guidance (indeed the Arkansas Civil Rights Act specifically urges them to do so, Ark. Code Ann. & 16-123-105(c)) and, in any event, as the dissent pointed out, there were no Arkansas cases on the point raised by *Walters*. *Walters*, 2010 Ark. 260 (Brown, J., dissenting). It is difficult to see how such outcomes, in which the court substantially abdicates its judicial role of deciding cases properly before it, yet which would count toward productivity as measured by Choi et al., can be understood to provide the kind of “service” their analysis offers as the normative basis for their metric.

<sup>154</sup> See *infra* section IV.

<sup>155</sup> The term was coined in Marjorie Hojacki & Lawrence Baum, “New-Style” Judicial Campaigns and the Voters: Economic Issues and Union Members in Ohio, 45 W. POL.Q. 921(1992).

<sup>156</sup> Canes-Wrone & Clark, *supra* note 50, at 39-40 (emphasis added).

<sup>157</sup> *Id.* at 59-60 (emphasis added). One problem with their main conclusion is that they rely on states’ formal characterization of election systems. Nominally nonpartisan states such as Ohio, Michigan, Washington, and Wisconsin, however, have seen bitterly fought contests. See *infra* note 134.



They attribute this apparent compromise of the intended benefit of the nonpartisan election reform to dramatic changes in recent decades in the nature of judicial elections. These days – when judges campaign on issue-based platforms, are criticized by interest groups and challengers for past decisions, and are able to speak more freely about their positions on contested legal and political issues – the effect of nonpartisan elections is different.<sup>158</sup> It is the “absence of a partisan label” that “creates an additional incentive for judges in the new-style campaign to signal their policy positions through decisions.”<sup>159</sup>

## 2. *Judicial Misconduct*

The lead article’s judicial-misconduct argument is difficult to situate in the literature finding differences between elected and appointed judges. The lead article is surely correct that merit-selection methods provide no immunity from judicial misconduct. But no measure does. Consider post-selection accountability measures. Geoffrey P. Miller, collecting an impressive rogue’s gallery in his *Bad Judges* article, convincingly demonstrates that no post-selection measure – whether case-specific, such as appeal or mandamus, or judge directed, such as impeachment or discipline, or both, such as disqualification or recusal – is adequate

to prevent all bad judicial behavior.<sup>160</sup> But this conclusion hardly supports abandonment of those imperfect measures. Indeed, he notes that, while subject to shortcomings, “judicial disciplinary bodies have significantly improved policing against bad judges.”<sup>161</sup> And, with respect to selection methods, Miller points out that merit selection “offers significant benefits over overtly political selection,” even though it is “not a panacea for the bad judges problem.”<sup>162</sup> Again, no measure is a panacea.<sup>163</sup> It is difficult to see how it helps make the case for one particular method of promoting judicial accountability to note that another is less than perfect.

One would expect, however, the relative incidence of serious judicial misconduct to be higher among judges selected by the method that most compromises theft identification with professional norms.<sup>164</sup> The available data comparing serious misconduct by elected versus appointed judges do not clearly favor election processes. One source collected every conviction or impeachment related to bribery of a U.S. federal judge [including Bankruptcy and Magistrate Judges] from 1967 to 2000... includ[ing] most removals of state judges by a Oudicial conduct organization] or state court on charges related to bribery, and most briberyrelated convictions of

<sup>158</sup> *Id.* at 64.

<sup>159</sup> *Id.*

<sup>160</sup> Miller, *supra* note 40, at 458-69

<sup>161</sup> *Id.* at 466.

<sup>162</sup> *Id.* at 473.

<sup>163</sup> One important aspect of the “bad judges” problem, which is only recently beginning to receive serious attention, and only then in an isolated corner of the literature, resembles a large proportion of the “bad lawyer” problem: the contribution of mental health difficulties to compromised professional behavior. See generally Robert L. Childers, *Helping Our Fellow Judges: An Update on the CoLAP Judicial Assistance Initiative*, 47 *JUDGES’* 3. 41 (2008); Robert L. Childers, *Got Stress: Using*

*CoLAP and Its New Judicial Assistance Project*, 45 *JUDGES’* J. 1 (2006); Charles J. Delaurenti, II, *Judicial Assistance: The Best-Kept Secret*, 45 *JUDGES’* J. 8 (2006); Tracy D. Eels & Robert Showalter, *Work-Related Stress in American Trial Judges*, 22 *BULL. AM. ACAD. PSYCHIATRY & L.* 71(1994); Cynthia Gray, *The Worst-Kept Secret in the Counhouse*, 90 *JUDICATURE* 30 (2006); C. Robert Showalter & Daniel A. Martell, *Personality, Stress and Health in American Judges*, 69 *JUDICATURE* 83 (1985-86); Isaiah M. Zimmerman, *Stress: What It Does to Judges. and How it Can be Lessened*, 20 *JUDGES’* J. 5-6 (1981).

<sup>164</sup> See *infra* Part IV (discussing impact of highly politicized elections on professional identity).

state judges stemming from prosecution by the [Public Integrity Section of the Criminal Division of the United States Department of Justice].<sup>165</sup>

Of the 38 judges removed from office during the study period, 4 (approximately 11%) were federal judges (federal judges overall made up 1660 or 5%, of the more than 31,000 judges then on the bench).<sup>166</sup> With the overall base rate for removal so low, however, roughly 0.0012% removal is an exceptionally weak basis for comparison.<sup>167</sup> A somewhat stronger basis for comparison is the rate of detected instances of actual bribery, which among federal judges was relatively quite low, five instances (0.2%), “compared to over 2840 bribes by state judges (99.8%). This shows that corruption by federal judges is underrepresented in [the] sample” in relation to caseload.<sup>168</sup> An analogous picture emerges at the state level: the proportion of elected judges removed from office is about the same as the proportion in office and subject to the same baserate constraint for comparison purposes, but the overall number of bribes accepted by them dwarfs that of their appointed counterparts:

Of the state judges removed or convicted, 29 of the 34 judges (85%) were elected. This is almost identical to the 87% of state trial and appellate judges

who either gain or retain their posts through elections. Counting the number of bribes accepted by elected versus appointed judges shows a different result. Of the total number of bribes accepted by state judges, only 14 bribes accepted by appointed state judges were discovered (0.5%), while over 2700 bribes by elected judges were discovered (99.5%).<sup>169</sup>

More generally, the accountability provided by judicial discipline – while like everything else in life imperfect – comes at relatively little cost to judicial independence but some gain in reinforcing judicial exceptionalism. As Steven Lubet has noted, “[i]t is striking how little threat to independence is implicit in most instances that seem to call for accountability.”<sup>170</sup> Indeed, this observation would cover most if not all of the numerous instances in Miller’s parade of horrors.<sup>171</sup> And it would also cover most of the instances involving First Amendment concerns raised in the lead article in this issue of the *Arkansas Law Review* as well. As Lubet points out, “even the more rigid limits on campaign speech do not threaten judicial independence” and “[t]he same can be said of noncampaign related speech.”<sup>172</sup> Such restrictions may have a substantial and perhaps even an unconstitutional impact on the judge’s own First Amendment

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<sup>165</sup> Stratos Pahis, *supra* note 39, at, 1918-19. Note that, while much of the literature regarding judicial selection concentrates on appellate judges (especially on courts of last resort), the problem of outright corruption resides largely in courts of first instance: “cases of appellate corruption are minimal.” *Id.* at 1922.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* Note that federal courts accounted for 2% of the total trial cases accepted in 2006. *Id.*

<sup>169</sup> *Id.* at 1922-23.

<sup>170</sup> Lubet, *supra* note 16, at 62. Professor Alex Long sees a potential tension between judicial accountability through the electoral process and

through judicial discipline, which is imposed by unelected officials. Long, *supra* note 81, at 29-35.

<sup>171</sup> As Professor Lubet put it, [T]here can be no serious argument that independence is compromised when a judge faces reprimand or suspension for using his office to coerce payment of a debt to his daughter, fixing traffic tickets (or attempting to), or attempting to recruit litigants as Amway sales representatives to the judge’s own financial benefit. Nor would fairness and impartiality be threatened when a judge faces discipline for vulgar sexual harassment (or worse), public intoxication, or interference with law enforcement. Lubet, *supra* note 16, at 62 (citations omitted).

<sup>172</sup> *Id.* at 63-64.

rights, but that impact does not compromise judicial independence.

Some isolated instances of discipline, however, could raise serious questions about judicial independence, and these are the ones that bear the most similarity to the greatest excesses in the current highly politicized and money-saturated campaigns. Lubet notes two examples, one involving disciplinary proceedings against an appointed California Court of Appeals judge,<sup>173</sup> the other impeachment proceedings against an elected Illinois Supreme Court justice,<sup>174</sup> both of which were related to judicial decisions. The California case was especially troubling because the explicit basis for the disciplinary proceeding was the judge's dissent from the ruling of the court of appeals.<sup>175</sup> The Illinois case was troubling because, although ostensibly based on misconduct off the bench, "many believed that this was simply a convenient hook on which to hang an extraordinarily unpopular judge" – whose unpopularity derived from his ruling in a controversial case and was inflamed by a concerted media campaign attacking him personally.<sup>176</sup> Both disciplinary matters eventually were dismissed, but only after bringing considerable pressure on the judges involved.<sup>177</sup> A related

example was the firestorm that erupted after United States District Judge Harold Baer granted a suppression motion in a criminal case,<sup>178</sup> which generated both a presidential suggestion that he consider resigning and a presidential candidate's call for his impeachment. The decibel level became so extreme that then Chief Judge John O. Newman of the Second Circuit Court of Appeals and three former chief judges issued a joint statement that such attacks threaten the structure of our constitutional system.<sup>179</sup>

Judge Baer eventually reconsidered, vacated his original order, and denied the suppression motion.<sup>180</sup> The intense, often personally directed and politically charged media backlash against the good-faith judicial decision reflected in these cases, unlike ordinary judicial discipline, plainly poses a problem for judicial independence. The actual use of the disciplinary processes in such a fashion is, so far, rare.<sup>181</sup> But these kinds of

attacks resemble what has become the "new normal" in judicial campaigns.<sup>182</sup>

### C. *The Benjamins*

Judicial campaigns are much "noisier, nastier, and costlier" today than they were when Roy Schotland coined that much-quoted phrase more than two

<sup>173</sup> Id. at 65.

<sup>174</sup> Id. at 69-71.

<sup>175</sup> Id. at 66-67.

<sup>176</sup> Lubet, supra note 16, at 11. The California case involved a proceeding by the California Commission on Judicial Performance against California Court of Appeals Justice J. Anthony Kline for his dissent from a case granting stipulated reversal, which urged the California Supreme Court to reconsider the practice. Id. at 66. The panel eventually dropped the matter. Henry Weinstein, Panel Drops Case Against State Appeals Court Judge, L.A. TIMES, June 20, 1999, <http://articles.latimes.com/1999/jun/21/news/nm-48714>. The Illinois case involved Justice James Heiple, who incurred public criticism and the wrath of a Chicago Tribune reporter, who "declared virtual war on Justice Heiple, devoting column after column to

personal attacks on the judge." Lubet, supra note 16, at 70; see also Zemans, supra note 15, at 638 (describing Heiple case).

<sup>177</sup> Jerome B. Meites & Steven F. Pflaum, Justice James D. Heiple: impeachment and the Assault on Judicial Independence, 29 LOY. U. CHI. L.J. 74, 805-06 (1998); Henry Weinstein, Panel Drops Case Against State Appeals Court Judge, L.A. TIMES, June 21, 1999, <http://articles.latimes.com/1999/jun/21/news/nm-48714>.

<sup>178</sup> United States v. Bayless, 913 F. Supp. 232, 243 (S.D.N.Y.), vacated on reconsideration 921 F. Supp. 211, 217 (S.D.N.Y. 1996).

<sup>179</sup> Zemans, supra note 15, at 626.

<sup>180</sup> Bayless, 921 F. Supp. 211.

<sup>181</sup> Long, supra note 81, at 24-25.

<sup>182</sup> See infra notes 160-66 and accompanying text.

decades ago amid growing concern, even then, over whether justice was “for sale.”<sup>183</sup> They increasingly are coming to resemble ordinary political contests and thereby increasingly are framing the judicial role as an ordinary political one. An especially disturbing development is that more and more of the noise is concentrated in fewer and fewer very loud voices. Canes-Wrone and Clark identify four interrelated developments – “the increased involvement of interest groups, growth in political advertising, greater importance of campaign spending, and increased media scrutiny” – through which judicial campaigns increasingly have come to resemble legislative and executive campaigns.<sup>184</sup> One study has shown that judicial elections indeed are quite like other political contests and even found that “nonpartisan supreme court elections are more competitive than elections to the U.S. House.”<sup>185</sup>

G. Alan Tarr has attributed the increased politicization of judicial races to two primary factors. The first is the general “spread of two-party competition throughout the nation,” the intensity of which “tends to spill over into judicial elections.”<sup>186</sup> The second is the “increasing involvement of courts, particularly in recent decades in addressing issues with far-reaching policy consequences.”<sup>187</sup> These include “school

finance, abortion, same-sex marriage, tort reform, and taxing and spending limits (to name just a few).”<sup>188</sup> For interest groups, judicial elections present a financially rational opportunity to leverage impact. “As an AFL-CIO official put it, ‘We figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.’”<sup>189</sup>

Judicial campaigns have grown much costlier over the past decade. According to the latest report from the Justice at Stake Campaign, fundraising for high court contests has “more than doubled, from \$83.3 million in 1990-1999 to \$206.9 million in 2000-2009. Three of the last five supreme court election cycles topped \$45 million. All but two of the twenty-two states with contestable supreme court elections had their costliest-ever contests in the 2000-2009 decade.”<sup>190</sup> Not only has there been an enormous increase in spending, but also a concentration of it in what Justice at Stake calls the “Rise of the Super Spenders,” which overwhelms other supporters. For example, in twenty-nine contested elections taken as a whole during the last decade in Alabama, Ohio, Pennsylvania, Illinois, Texas, Michigan, Mississippi, Wisconsin, Nevada, and West Virginia, “the top five super spenders from each election – 145 in all – spent an average of \$473,000 apiece. By contrast, the remaining donors averaged \$850.”<sup>191</sup>

<sup>183</sup> For an early quote, see Richard Woodhury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, at 74 (quoting Professor Roy Schotland, “Judicial campaigns are getting noisier, nastier, and costlier).

<sup>184</sup> Canes-Wrone & Clark, *supra* note 50, at 31-33.

<sup>185</sup> See James L. Gibson, “New Style” Judicial Campaign and the Legitimacy of State High Courts, 71 POL. 1285, 1289 a 15 (2009) (quoting Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE*, *supra* note 85, at 165). And the label – partisan, nonpartisan, merit-selection, or hybrid – does not always distinguish among them. Some state elections, such as Ohio and Michigan, are

nonpartisan in name only; and some merit-selection states can involve hotly contested retention elections or can be structured to increase partisan selection. O. Alan Tan, *State Judicial Selection and Judicial Independence*, in *JUSTICE IN JEOPARDY* app. D, at 2.

<sup>186</sup> Tan, *supra* note 136, at 5.

<sup>187</sup> *Id.* at 6.

<sup>188</sup> *Id.* at 7.

<sup>189</sup> SAMPLE ET AL, *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: A DECADE OF CHANGE 9* (Brennan Center for Justice 2008).

<sup>190</sup> *Id.* at 1.

<sup>191</sup> *Id.* at 9.

The Justice at Stake's list of the top-five spenders on a single court election over the decade helps put the campaign finances involved in the Caperton case in perspective. The Caperton matter was not the first of its kind, but the clarity of its facts – an identifiable individual Super Spender whose expenditures were plainly overwhelming in proportion to all others in the campaign – presented the issue quite starkly. Not only did Don Blankenship's \$3 million in contributions and expenditures in aid of Brent D. Benjamin's 2004 West Virginia Supreme Court campaign overshadow all other financial support,<sup>192</sup> it was the second-highest known single-source expenditure on a single high-court race over the entire decade.<sup>193</sup> Blankenship stands in a class all his own as the only individual in the Top Five tier of Super Spenders. And he ranks sixth among the top-ten Super Spenders for the decade.<sup>194</sup> The lead article in this issue of the *Arkansas Law Review* suggests, based on comparison of his percentage stock holding with the size of the damages award at stake in the Caperton matter,

that the relationship between Blankenship's campaign expenditures and his interest in the Caperton case was attenuated.<sup>195</sup> The implications for the compromise of professional norms of the minimization of norm violation are discussed below.<sup>196</sup> For present purposes, note that Blankenship's personal interests were tied to Massey's beyond his \$175,000 stock ownership share of the Caperton litigation exposure. He was one of the highest-compensated executives in the industry, and his multimillion dollar compensation was linked to Massey's mine productivity.<sup>197</sup> He plainly had a direct and palpable stake in seeing someone he regarded as having a more pro-business orientation on the West Virginia Supreme Court. His method of promoting that result – funding attack advertisements against Benjamin's opponent – is a common one in judicial elections. And, as the experience in Alabama and Texas over the past two decades demonstrates, in which large campaign expenditures and contributions helped shift both high courts from Democratic to Republican control,<sup>198</sup> such goals are necessarily accomplished one judicial race at a time.

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<sup>192</sup> *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

<sup>193</sup> First place goes to the U.S. Chamber of Commerce and its Ohio Affiliates at \$4.4 million, third to the Illinois Democratic Party with \$2.8 million, fourth to the Alabama Democratic Party with \$2.4 million, and fifth to the Illinois Republican Party and U.S. Chamber of Commerce with \$1.9 million. *SAMPLE ET AL, NEW POLITICS*, supra note 140, at 16.

<sup>194</sup> *Id.* at 13.

<sup>195</sup> Rotunda, supra note 5, at 44.

<sup>196</sup> See infra part IV.

<sup>197</sup> For description of the relationship between mine productivity and Blankenship's compensation, see, e.g., Matthew Mosk & Asa Eslocker, *Boss Don Blankenship Cast as Cavalier About Worker Safety in Lawsuits*, ABCNEWS: THE BLOTTER (Apr. 8, 2010). He was "paid \$17.8 million [in 2009] even as some of the coal mines he supervised accumulated safety violations and injuries at rates that greatly exceed national rates [and] also has a

deferred compensation package valued at \$27.2 million at the end of [2009]." Howard Berkes, *Massey CEO's Pay Soared as Mine Concerns Grew*, NPR (Apr. 17, 2010), <http://www.npr.org/templates/story/story.php?storyId=126072828>. The immediate cash payments in his 2010 retirement compensation package amounted to \$12 million, and he received other substantial benefits, including assistance with defense of employment-related litigation. Kirsten Korosec, *Massey CEO Don Blankenship's Retirement Package: \$12M in Cash, Health Insurance, a Secretary and a Chevy*, BNET (Dec. 9, 2010), <http://www.bnet.com/blog/clean-energy/niassey-ceo-donblankenship-8217s-retirement-package-12m-in-cash-health-insurance-a-secretary-and-a-chevy/3381>. The retirement package is described in Massey Energy Co.'s December 7, 2010 Form 8-K Report to the SEC.

<sup>198</sup> *SAMPLE ET AL, NEW POLITICS*, supra note 75, at 38.

Both ends of the political spectrum, divided by Justice at Stake into “Democratic/Plaintiff Lawyers/Unions” and “Republican/Business/Conservative,” are represented in the Super Spender club, although for the 2000-09 decade as a whole, the right has outspent the left by more than two to one (roughly \$26.2 million compared to \$11.9 million), with more than half of its money going to expenditures rather than campaign contributions.<sup>199</sup> These are groups with money to spend and interests to advance, among them their respective positions in the tort wars.<sup>200</sup> For example, in 2002, President of the United States Chamber of Commerce, Thomas Donohue, announced that, in response to the actions of “unscrupulous thai lawyers, ... we’re going to get involved in key state supreme court and attorney general races as part of our effort to elect prolegal reform judicial candidates.<sup>201</sup> The United States Chamber of Commerce proceeded to top the high-court elections known Super Spenders list for 2000-09 with at least \$7.6 million.<sup>202</sup> Their role is part of what Justice at Stake characterized as an effort from the right that “nationaliz[es] state Supreme Court elections,” in which large well-financed organizations and individuals have poured money into contests in targeted states such as Ohio, Mississippi, Wisconsin, Illinois, Michigan, and Alabama.<sup>203</sup> Efforts from the left – thai lawyers, unions, and the Democratic Party – have tended to be organized more at the state level.<sup>204</sup>

Campaign expenditures lack transparency and can sometimes be nearly impossible to trace. For example, according to Justice at Stake, “[i]n two of the Midwest’s costliest states in 2007-08, Michigan and Wisconsin, the real money was largely undisclosed,” in part because laws in both states “allowed independent groups to advertise with impunity while concealing their funding sources.”<sup>205</sup> In Wisconsin’s exceptionally vicious 2008 contest between Michael Gableman and Louis Butler, it was estimated that “independent campaigns accounted for 90 percent of TV ad costs... and 80 percent of al spending in the election campaign.”<sup>206</sup> And in the race between Clifford Taylor and Diane Hathaway, “three independent TV campaigns – run by the Michigan Democratic Committee, the Michigan Republican Party, and the Michigan Chamber of

Commerce – accounted for two-thirds of all TV spending.”<sup>207</sup>

Contributions also can be obscured. Justice at Stake describes how, for example, “[w]ithout contributing a single dollar directly to Democrat Deborah Bell Paseur,” a Montgomery, Alabama plaintiffs’ law firm, using “an arcane maze of 30 political action committees” managed to funnel \$606,000 to her campaign treasury.<sup>208</sup> The firm’s money, along with that of other lawyers also giving to the Democratic Party either directly or indirectly, added up to \$1.6 million, or 61% of Paseur’s war chest. Ironically, her ads complained that “insurance companies

<sup>199</sup> Id. at 40. The left caught up for the 2007-08 cycle. Id.

<sup>200</sup> See Geyh, supra note 1, at 1266 (noting the role of “tort reform” in interestgroup involvement in judicial elections). For a review of leading works on the ton wars, see Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465 (2007) (book review).

<sup>201</sup> SAMPLE ET AL., *NEW POLITICS*, supra note 140, at 40 (quoting Tom Donohue, President, U.S. Chamber of Commerce, Chamber PAC Dinner

Speech (Mar. 11, 2002) (transcript available at <http://www.uschamber.com/press/speeches/2002/illinois.chamber-pac-dinner-speech>).

<sup>202</sup> Id. at 13.

<sup>203</sup> Id. at 39-41.

<sup>204</sup> Id. at 41-42.

<sup>205</sup> Id. at 48.

<sup>206</sup> SAMPLE ET AL., *NEW POLITICS*, supra note 140, at 48.

<sup>207</sup> Id.

<sup>208</sup> Id. at 46.

and bankers ha[d] bankrolled” her opponent’s campaign and that there had been “a million dollars tied to gas and oil lobbyists...,” while proclaiming in her own ads that “Deborah can’t be bought.”<sup>209</sup>

The “nastier and noisier” part appears especially in the increasingly dominant role of television ads in judicial campaigns. In 2000, 22% of states with contested high court elections had television ads; by 2006, the number had leapt to 91%.<sup>210</sup> A large proportion of these ads are run by noncandidate groups. In 2008, for example, “[s]pecial interest groups and state political parties were responsible for 65 percent and 22 percent of all negative ads, respectively.”<sup>211</sup> In the 2006 Washington Supreme Court election, virtually all of the advertising was sponsored by special-interest groups.<sup>212</sup> The 2008 Wisconsin campaign was an especially expensive and rough campaign, in which “special interest groups were responsible for nearly 90 percent of all money spent on television ads in the state (over \$3 million).”<sup>213</sup> One particularly controversial ad, which was run by the victorious challenger Mike Gableman himself, misleadingly conflated Butler’s work as an advocate with his role as a judge and provoked comparisons to the infamous Willie Horton ads during the 1988 presidential contest.<sup>214</sup> Other

examples from 2008 include the “Sleeping Judge” ad against Michigan Justice Clifford Taylor and the “Soft on Terrorism” attack on his opponent Diane Hathaway.<sup>215</sup> Some ads, too hot even for television, ran on the Internet, such as an ad in the recent successful nonretention campaign against Iowa justices in the aftermath of the court’s unanimous ruling that the Iowa marriage statute violated the equal protection clause of the Iowa Constitution.<sup>216</sup>

One might intuitively expect the already enormous and growing sums of money spent on judicial elections to influence judicial behavior. The lead article in this issue of the *Arkansas Law Review* states, “[t]hus far, studies of several states do not support a statistical correlation that judicial-campaign contributions are corrosive.”<sup>217</sup> Other studies have found evidence of influence. One study of Alabama Supreme Court decisions from 1995-99 found a correlation between a justice’s votes in arbitration cases and the source of campaign funds.<sup>218</sup> Mother found that justices on the Ohio Supreme Court “voted in favor of their contributors more than 70 percent of the time, with one justice, Terrence O’Donnell, voting with his contributors 91% of the time.”<sup>219</sup> Still another is the series of studies of the

<sup>209</sup> *Id.* at 34 (quoting Passeur’s TV ad voiceover).

<sup>210</sup> SAMPLE ET AL., FAIR COURTS, *supra* note 76, at 11.

<sup>211</sup> SAMPLE ETAL., NEW POLITICS, *supra* note 140, at 26.

<sup>212</sup> Rachel Caufield, Judicial Elections: Today’s Trends and Tomorrow’s Forecast, JUDGES’ J. 6, 7 (2007).

<sup>213</sup> SAMPLE ET AL., NEW POLITICS, *supra* note 140, at 32.

<sup>214</sup> *Id.*

<sup>215</sup> For a selection, see the Pair Courts page on YouTube at <http://www.youtube.com/user/FairCourtsPage> (last visited Feb. 12, 2011). For the comment that “judicial election campaigns are looking more and more like other elections,” and accompanying slide show of negative ads, see Richard L. Hasen & Dahlia Lithwick, *Slate’s Judicial*

*Election Campaign Ad Spooktacular!*, SLATE (Oct. 26, 2010 7:01 AM), <http://www.slate.com/id227086/>.

<sup>216</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). The ad, “Thanks Iowa Supreme Court,” featured a fictional couple in a parody of eHarmony’s television advertisements thanking the Iowa Supreme Court for allowing them, brother and sister, to marry each other and urging voters to vote “No” on judicial retention. This ad can be viewed in the slide show accompanying the Hasen & Lithwick article, *supra* note 166.

<sup>217</sup> Rotunda, *supra* note 5, at 19.

<sup>218</sup> Stephen J. Ware, Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama, 30 CAP. U. L. REV. 583,584(2002).

<sup>219</sup> Adam Liptak & Janet Roberts, Campaign Cash Mirrors a High Court’s Rulings. N.Y. TIMES, Oct. 1, 2006, at A1.

Louisiana Supreme Court finding not only that “justices voted in favor of their contributors 65% of the time, and two of the justices did so 80% of the time,” but also that the larger the contribution the higher the odds of a contributor favorable result; indeed, for one justice the odds increased 300% with each \$1000 donation.<sup>220</sup> Damon Cann found a relationship between campaign contributions and judicial rulings in Georgia.<sup>221</sup>

Chris Bonneau and Cairn, examining all types of decisions in the 2005 Term, found evidence of a quid pro quo relationship between campaign contributions and judicial voting in the partisan-election states of Michigan and Texas but not in the nonpartisan election state of Nevada.<sup>222</sup> These results are consistent with “extensive literature indicat[ing] that contributors to campaigns behave rationally, targeting candidates who are likely winners and who support their ideology or preferred position in an issue area.”<sup>223</sup> In other words, these

results tend toward the judge-as-ordinary-politician model.

The public plainly are concerned about the influence of money. A recent Brennan Center review of polls found wide concern about the influence of campaign spending on judicial decisionmaking: [A] February 2009 national poll conducted by Harris Interactive revealed that more than 80% of the public believes judges should avoid cases involving major campaign supporters. And a USA Today/Gallup Poll also conducted in February 2009 found that 89% of those surveyed believe the influence of campaign contributions on judges’ rulings is a problem. More than 90% of the respondents said that judges should not hear a case if it involves an individual or group that contributed to the judge’s election campaign.<sup>224</sup>

James Gibson’s research has found that “[f]or both the state high court and the legislature, the acceptance of campaign contributions significantly detracts from the legitimacy of the institution.”<sup>225</sup>

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<sup>220</sup> Adam Liptak, Looking Anew at Campaign Cash and Elected Judges, N.Y. TIMES, Jan. 29, 2008, at A14.

<sup>221</sup> Damon M. Cairn, Justice for Sale? Campaign Contributions and Judicial Decision making, 7 ST. POL. & POL’Y Q. 281,282(2007).

<sup>222</sup> Chris W. Bonneau & Damon M. Cann, The Effect of Campaign Contributions on Judicial Decisionmaking, 13-15 (Feb. 4, 2009) (unpublished manuscript), available at <http://www.msfraud.org/law/lawarticles/The%20Effect%20of%20Campaign%20contributions%20on%20judicial%20Decisionmaking.pdf>. Bonneau and Cairn hypothesize that the Nevada Supreme Court practice of hearing some cases in three-judge panels rather than en banc may have diminished the evidence of influence. *Id.* at 15.

<sup>223</sup> *Id.* at 6.

<sup>224</sup> Testimony of Adam Skaggs on MD Judicial Elections and Senate Bill 833 (Mar.9, 2010), reprinted at [http://brennancenter.org/content/resource/testimony\\_of\\_adam\\_skaggs\\_on\\_mdjudicial\\_elections\\_and\\_senate\\_bill\\_833/](http://brennancenter.org/content/resource/testimony_of_adam_skaggs_on_mdjudicial_elections_and_senate_bill_833/).

<sup>225</sup> Gibson, Legitimacy, *supra* note 136, at 1294; see also James L. Gibson, Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and the “New-Style” Judicial Campaigns.

102 AM. POL. SCI. REV. 59, 60 (2008) (reporting results of similar study in Kentucky). Gibson’s study also considered the impact of attack ads and candidate-position commitments on perceived legitimacy, finding no difference. *Id.* at 70. As Geyh has noted, however, the candidate commitment hypothesis was weakly operationalized. Geyh, *supra* note 1, at 1276 & n.94. The vignette stated that the judge “promises that, if re-elected, he will decide these kinds of cases in the way that most people in [State] want them decided.” Legitimacy, *supra* note 136, at 1291. A more powerful item would have had the judge-candidate making a directional commitment regardless of the law. Indeed, commitments did have a detrimental effect on perceived legitimacy in a follow-up to the Kentucky project when the item included “a more direct assertion of a policy position (e.g., ‘if elected, I will work to eliminate women’s right to have abortions’).” *id.* at 1291 n.16. Gibson further notes that one reason for the no-difference finding regarding the attack ads may have been the lack of salience of the stimulus, which simply stated that the candidate ran ads attacking his opponent and which may have failed to evoke sufficiently graphic images from respondents memory of judicial campaigns. *Id.* at 1295-96.



Large campaign contributions contribute to the public perception that judges are ordinary politicians, not exceptional public officials, thereby undermining both actual judicial independence and public confidence and, ultimately, the rule of law.<sup>226</sup>

A majority of business leaders and trial lawyers, among the largest spenders in judicial elections, also believe money buys influence but see themselves as locked in an “arms race” to acquire it, each afraid to cede the contested ground to the other.<sup>227</sup> A substantial portion of judges themselves are concerned about the influence of campaign money on decisionmaking.<sup>228</sup> As explained below, the negative impact on judges’ perceptions of their own role is of particular concern. To the extent it leads judges to see themselves as ordinary politicians, it may well encourage them to behave that way in derogation of the rule of law.

### III. What do they think they’re doing?

The underlying concern in the judicial selection debate is the rule of law, which concern is typically cast as a tension between judicial independence and accountability. This article began by suggesting that the concept of professional judicial identity and its accompanying norm of law-adherence –

the notion that judges are exceptional public officials rather than ordinary politicians – is an essential bulwark protecting the rule of law. I went on to suggest that current trends in judicial elections threaten judicial exceptionalism by pressuring judges to behave more like ordinary politicians on their way to office. This next Part will refine the picture by describing recent scholarship that rejects the view of many political scientists that judges are largely unchecked by legal doctrine and instead portrays judges’ conduct once they take office as meaningfully constrained by norms of judicial exceptionalism. Finally, Part IV will describe the mechanisms by which current trends in judicial elections threaten to corrode those norms.

#### A. *The “Whatever-They-Want” View*

An industrious group of political scientists, most prominently Harold Spaeth and Jeffrey Segal, have used qualitative and quantitative methods to debunk the legal model which stated in its most idealized terms they see as a “myth”.<sup>229</sup> Under their “attitudinal model,” judges are largely unconstrained by indeterminate textual legal sources or sparse and also indeterminate historical sources, and free to decide cases according to their own ideological attitudes and values.<sup>230</sup> To attitudinalists, legal materials “serve only to rationalize

<sup>226</sup> See supra note 36-38 and at accompanying text (discussing relationship between judicial independence, public perception, and the rule of law).

<sup>227</sup> ADAM SKAGOS, BRENNAN CTR. FOR JUSTICE: THE IMPACT OF CITIZENS UNITED ON JUDICIAL ELECTION 6 (2010) (discussing a Texas State Bar and Texas Supreme Court survey finding 79% of lawyers surveyed believe that campaign money influences judicial decisionmaking and a 2007 Zogby poll finding that the same percentage of business leaders believe there is some influence, with 90% expressing concern that campaign contributions and political pressure will compromise judicial independence).

<sup>228</sup> Id. at 7 (discussing a 2004 New York survey finding that 60% of judges believed that campaign contributions raise questions about judicial impartiality and a 2002 Greenberg Quinlan Rosner Research survey of 2400 state court judges finding that nearly half believed campaign money influenced decisions and that 70% are concerned about courts hearing cases in which a party has given money to one of the judges).

<sup>229</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 10 (2002). For a thoughtful critique, see Michael J. Gerhardt, Attitudes About Attitudes, 101 MICH. L. REV. 1733 (2003).

<sup>230</sup> SEGAL & SPAETH, supra note 180, at 86.

the Court's decisions and to cloak the reality of the Court's decision-making process.<sup>231</sup> According to Segal and Spaeth, for example, "[s]imply put, Rehnquist vote[d] the way he [did] because he [was] extremely conservative; Marshall voted the way he did because he was extremely liberal."<sup>232</sup>

As noted above, if judges decide cases according to their own preferences unconstrained by "law," then the "judicial independence" aspect of the debate over methods of judicial selection becomes substantially attenuated.<sup>233</sup> Concern over the escalating money-driven politicization of judicial elections does not entirely disappear, however, because it does not follow that judges' preferences ought to be so powerfully influenced by those few supporters with large amounts of money to spend. It is hardly clear that an expensive mouthpiece for a privileged few is preferable to a willful, independently minded rogue. But attitudinalism certainly suggests a reconsideration of the independence/accountability balance and describes a judicial role which is largely unexceptional.

Many other studies have linked judicial ideology to case outcome. For example, a 1999 meta-analysis of 140 books, articles, dissertations, and conference papers reporting the results of empirical research pertinent to a link between party

and modern judicial ideology in the United States, adjusting for moderator variables, found a distinct partisan effect: "Democratic judges indeed are more liberal on the bench than Republican counterparts."<sup>234</sup>

The attitudinal perspective has, however, come under some challenge. A recent article by Frank Cross and colleagues reviewed a number of criticisms of Segal and Spaeth's studies as inadequately accounting for actual influence of precedent on the Supreme Court in several ways, such as its influence in summary dispositions, in progeny cases reaffirming or leaving intact core holdings of precedent, in decisions of newly appointed Justices, and on the Court's certiorari decisions.<sup>235</sup> Lawrence Baum has concluded that "the existing evidence does not establish that Justices are motivated solely (or even overwhelmingly) by policy goals."<sup>236</sup>

Another perspective is "rational choice" theory, some versions of which also take a relatively weak view of the constraining force of precedent. This perspective portrays judges as basing their decisions on strategic considerations, including policy preferences, purely personal desires, and institutional concerns (such as avoiding adverse public reaction or confrontation with the other branches).<sup>237</sup> To some rational-

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<sup>231</sup> *Id.* at 53.

<sup>232</sup> *Id.* at 86. Segal and Spaeth concentrate on the Supreme Court of the United States, whose uniquely unreviewable position accords the Justices even more discretionary leeway. Trial courts, as the work of Rowland and Carp shows, are subject to a complex range of forces. E.g., CK. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* (1996). Although the indeterminateness argument would seem to apply to the lower courts, and the Supreme Court engages in very little corrective review, one study found strong evidence against anticipatory overruling in the courts of appeals. See *infra* note 202.

<sup>233</sup> See *supra* text accompanying note 9.

<sup>234</sup> Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 *JUST. SYS. J.* 219, 243 (1999).

<sup>235</sup> Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 *U. ILL. L. REV.* 489, 502-05.

<sup>236</sup> LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 20 (2006). Cross et al. found evidence for both an attitudinalist and legal model in citation practices of the Court. *Id.* at 541-48.

<sup>237</sup> For a brief overview and critique, see Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 *U. PA. J. CONST. L.* 903, 911-13 (2005); see also Cross et al., *supra* note 186, at 495-97, 507-11 (reviewing literature).

choice theorists, however, strategic concerns can also include “the utility of precedent in fostering social stability and judicial legitimacy” and therefore can lead judges to follow precedent they otherwise might prefer to distinguish.<sup>238</sup>

A third perspective goes further, recognizing judicial exceptionalism by claiming that “judges are likely to take the rule of law quite seriously,” as “[i]t is part of their set of role expectations – their institutionally induced beliefs about the way they should carry out their official functions.”<sup>239</sup> Thus, “[s]ocial scientists have long been interested in judge’s conceptions of their roles as a way of understanding how judges reach decisions in discrete cases... [One] study of federal appellate courts, for instance, found that judges’ role orientations were strong professional, much more professional, in fact, than political.”<sup>240</sup> This role-based perspective recently has been substantially elaborated to contend that judicial independence ought to be taken seriously even if, as seems likely, judges are influenced by their own preferences. Such work is described in the next section.

### *B. The “Not-So-Fast” View*

Some scholars have begun to look to cognitive and social psychology to develop a more nuanced portrait of

judicial behavior.<sup>241</sup> Some of that work has been through the lens of “cold” information-processing cognition, such as the demonstration by Guthrie et al., that judges, like everyone else, make intuitive judgments that are prone to cognitive heuristics and biases.<sup>242</sup> In recent decades, however, “[c]ognitive social psychologists have turned to explorations of the role of moods, emotions, goals, and motivations in human reasoning, with ‘warm’ cognition receiving considerable attention.”<sup>243</sup> The metaphor of this view is not the unfeeling computer but rather the “motivated tactician” who has “multiple information processing strategies available, selecting among them on the basis of goals, motives, needs, and forces in the environment.”<sup>244</sup> One such theory, “motivated reasoning,” seeks to bridge the affective/cognitive divide by explaining how motivation (that is, emotionally charged preferences) influences, and constrains, the cognitive processes and representations a person uses to reach preferred conclusions.<sup>245</sup>

Legal scholars have begun to apply motivated-reasoning theory to explain how internalized norms partially constrain judicial behavior. A decade ago Christopher Schroeder pointed out the weakness of “externalist” models of judicial decisionmaking, such as the attitudinalist model, which fail to account

<sup>238</sup> Gerhardt, *supra* note 188, at 912 (describing the work of Lee Epstein and Jack Knight). For application to the judge’s choice of interpretive theory, see Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U.L. REV. 769 (2008).

<sup>239</sup> Cross et al., *supra* note 186, at 497 (quoting Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2026 (1996)).

<sup>240</sup> Lauren K. Robot, *Private Justice and the Federal Courts*, 68 IND. L.J. 891, 901-02 (1993) (citing J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 150-51 (1981)).

<sup>241</sup> E.g., ROWLAND & CARP, *supra* note 188, at ch. 7; Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

<sup>242</sup> See Guthrie et al., *supra* note 192, at 13-29 (reviewing results of studies).

<sup>243</sup> Norbert Schwarz, *Warmer and More Social: Recent Developments in Cognitive Social Psychology*, 24 ANN. REV. SOC. 239, 241 (1998).

<sup>244</sup> *Id.* at 242 (quoting Shelley E. Taylor, *The Social Being in Social Psychology*, in I THE HANDBOOK OF SOCIAL PSYCHOLOGY 58, 75 (Daniel T. Gilbert et al., eds., 1998)).

<sup>245</sup> See generally Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480(1990).

for “the phenomenology of judging.”<sup>246</sup> He proposed an “internalist” model, which “respects the feelings of judges and lawyers who report that they feel constrained by the law.”<sup>247</sup> He drew on motivated-reasoning theory to suggest a deeper account, for example, of the Supreme Court’s noteworthy federalism cases of the 1990s, in which ideological preference and fidelity to precedent seemed to stand in considerable tension. Under the attitudinalist model, Schroeder explained, judges decide federalism cases the way they do because their trust or distrust of federal power inclines them to prefer outcomes that expand or limit it. Under an internalist, motivated-reasoning model, the judge’s distrust of the federal government “can tag the idea of federal authority with a negative or hostile affect [which] subsequently influences judicial reasoning in cases about federal authority, not by giving judges reasons for deciding against federal power, but by influencing what kinds of arguments judges find most persuasive.”<sup>248</sup> But this influence only supplies a directional goal. Contrary to the attitudinalist perspective, it does not liberate the decisionmaker to achieve whatever outcome suits his or her policy preference. Under motivated-reasoning theory, people who are

“motivated to arrive at a particular conclusion attempt to be rational and to construct a justification of the desired conclusions that would persuade a dispassionate observer. They draw the desired conclusion only if they can muster up the evidence necessary to support it.”<sup>249</sup> Such objectivity however is “illusory,” because people unknowingly engage in selective and constructive cognitive processes to assemble beliefs that would support the preferred conclusion; but, importantly, it is also constrained by the limits of what reason will allow. In this way, motivated reasoning is a process for reducing or avoiding the dissonance that would arise between an internalized norm of principled decisionmaking and pursuit of one’s policy preferences. We will return to what cognitive dissonance theory has to tell us about role-violative behavior in Part IV.<sup>250</sup>

The most extensive application of motivated-reasoning theory to the question of how judges decide cases is Eileen Braman’s recent book, *Law, Politics, & Perception*, which is an intuitively appealing and powerfully stated objection to the external cynicism of the “black box” externalist perspective of the attitudinalists.<sup>251</sup> Like Schroeder, Braman argues that a coherent conception of the

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<sup>246</sup> Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 *DUKE L.J.* 307, 329(2001).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 352.

<sup>249</sup> Kunda, *supra* note 196, at 482-83 (emphasis added).

<sup>250</sup> See *infra* Part IV. B.

<sup>251</sup> EILEEN BRAMAN, *LAW, POLITICS & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL THINKING* (2009). As Braman notes, Segal and Spaeth mention but do not pursue this possibility. Invoking motivated reasoning theory, Frank Cross has proposed that lower-court judges “gain utility from both ideologically consistent decisions and from law adherence.” Frank B. Cross, *Judges, Law, Politics & Strategy*, 42 *CT. REV.* 28, 30 (2006). His study of a selection of federal circuit

court rulings “found strong evidence against anticipatory overruling theory but supports the theses that both judicial ideology and precedent are important determinants of the votes of circuit court judges.” *Id.* at 31; see also Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 *RUTGERS L. REV.* 919, 964-65 (2008) (suggesting that motivated reasoning supports her findings regarding the influence of precedent on justiciability rulings of the United States Court of Appeals for the District of Columbia). And a recent experimental study, discussed below, directly examines motivated reasoning in legal decisionmaking. See Joshua R. Furgeson et al., *Do a Law’s Policy Implications Affect Beliefs About Its Constitutionality? An Experimental Test*, 32 *L. & HUM. BEHAV.* 219(2008).

judicial process must account not only for judges' attitudinal influences (i.e., policy preferences) but also for the constraining force of a strongly socialized commitment to apply legal authority appropriately. Attitudinalists seek to demonstrate that judicial claims to neutrality in effect are, as one Critical Legal Studies scholar once trenchantly put it, a "noble lie."<sup>252</sup> Braman by contrast sets out to explain not only how judges might sincerely believe that their rulings are based on legal authorities even as they choose outcomes consistent with their attitudinal preferences but also, importantly, how precedent can actually constrain attitude-consistent behavior when judges are unable reasonably to reconcile the two.

This description, Branan argues, accounts for what judges do. Her model regards judges not as ideologically or strategically driven deliberate manipulators of doctrine or as neutral umpires, but rather as largely sincere believers in their adherence to norms of objectivity and craftsmanship whose perceptions of and choices about legal authorities are unconsciously influenced by their attitudinal preferences within the outer limits of perceived legitimacy.<sup>253</sup> Attitudinalist and rational-choice theories, in her view, are incomplete because they fly in the face of judges' own self-perception and widely shared norms.<sup>254</sup> To her, judges cannot do whatever they want and do not believe they can, but also actually do more of what they want to do than they realize.

The linchpin of this position is the internalized norm of law-adherence, in

other words, judicial exceptionalism. The effort most people make to offer plausible rational justifications for their preferred outcomes moves to the foreground as a central commitment of the judicial role. If that commitment actually does constrain judges, then, as Geyh put it, "judicial independence is back in the game,"<sup>255</sup> and the impact of judicial selection methods on judges' own understanding of their role whether politician or professional-matters a great deal. Braman offers three categories of support for her claims: logical argument from extant literature, analysis of a sample of Supreme Court opinions, and the results of experimental studies looking for evidence of motivated reasoning processes in legal decisionmaking tasks.

Braman first argues that motivated-reasoning theory offers the most logical model to account for the likelihood that judges actually seek to accomplish multiple goals beyond pure policy intervention, including legal accuracy.<sup>256</sup> Like Schroeder and others, Braman argues that any meaningful theory of judicial decisionmaking must take seriously what almost all judges and many lawyers would claim is true: that, although the idealized legal model is surely overstated, law nevertheless really does matter. She cites as evidence studies of the materials of judicial work (legal briefs and conference notes) and judges' indignant reaction to scholars' suggestion that they decide cases based on personal preference rather than law.<sup>257</sup> As she points out, the attitudinalist model taken to its extreme implausibly implies a

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<sup>252</sup> Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1,58 (1984).

<sup>253</sup> See BRAMAN, *supra* note 202, at 25.

<sup>254</sup> *Id.* at 21.

<sup>255</sup> See *supra* text accompanying note 10.

<sup>256</sup> BRAMAN, *supra* note 202, at 28. This view

is prominently suggested by Lawrence Baum's careful work. E.g., LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997); Lawrence Baum, *The Supreme Court in American Politics*, 6 *ANN. REV. POL. SCI.* 161 (2003).

<sup>257</sup> BRAMAN, *supra* note 202, at 24-25.

centuries-old-grand-but-ultimately-transparent conspiracy among the entire legal profession in which the public has tacitly acquiesced.<sup>258</sup>

Braman's second source of support for her theory, like Schroeder's, is a selection of the Supreme Court's federalism jurisprudence, specifically the Court's three recent Commerce Clause cases – *Gonzales v. Raich*, *United States v. Morrison*, and *United States v. Lopez*.<sup>259</sup> Braman links the mechanisms she has explored experimentally (described below) to actual judicial work, taking seriously that work's main product – judicial opinions. She ascribes broad ideological commitments to various Justices (e.g., Rehnquist and Scalia as “conservatively” against expansion of federal power but in favor of gun rights and crime control) and then compares their opinions or votes to what she states an attitudinalist model would predict, concluding that a motivated reasoning account fills in the “gaps.”<sup>260</sup> To her, the key is *Raich* – in which she compares Justice Kennedy's majority vote, Justice Scalia's concurrence, and Justice O'Connor's dissent with their respective positions in *Morrison* and *Lopez* – because of its apparent tensions among

policy preferences regarding federalism, crime control, and drug policy.<sup>261</sup> She suggests that these outcomes demonstrate two key processes. One is “analogical perception,” the perceived location of one case along a continuum of logical similarity to precedent, which is an inherent characteristic of case analysis. The other is “separability of preferences,” the notion that cases implicate multidimensional preferences across disparate issues the separability of which is itself an important variable.<sup>262</sup> These Commerce Clause cases are useful for consideration of “analogical perception” because the first two involve more than sixty years of consistent yet potentially distinguishable precedent pulling in one highly deferential direction, most notably *Wickard v. Fiiburn*<sup>263</sup> and *Heart of Atlanta Motel v. United States*,<sup>264</sup> and policy preferences (federalism, gun control, tort reform) pulling in a less than totally deferential direction. And the third, *Raich*, illustrates separability of preferences because it implicates multiple policy preferences (crime control, federalism, drug policy) in tension with each other and the Justices' previous approaches in the other two cases. In this way, Braman argues that judicial norms

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<sup>258</sup> Braman's model, like Schroeder's, would be strengthened by a more detailed consideration of how the theory's proposed mechanisms might apply to judicial decisionmaking. For example, Braman and others seem to assume that accuracy goals moderate rather than potentiate the influence of directional goals in legal decisionmaking. BRAMAN, supra note 202, at 30-31; Cross et al., supra note 186, at 30-31. It appears, however, that the relationship may be more complex and requires further explicit study. Accuracy goals paired with directional goals may actually increase bias because they may enhance intensity of processing. Kunda, supra note 196, at 481. And the relative contributions of accuracy and directional goals are probably not the same across the range of judicial actions and levels of the judiciary. In many cases the judicial motive to be accurate, with relatively little directional valence, is likely to be quite strong,

especially on trial and intermediate appellate courts. Models of judicial decisionmaking also need to consider the situational effects of collegial decisionmaking, chambers clerks and staff attorneys, and judicial bureaucratization. See Wendy L. Martinek, *Judges as Members of Small Groups in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, supra note 23 at 73 (discussing collegial decisionmaking).

<sup>259</sup> BRAMAN, supra note 202, at 41-79 (discussing *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); and *United States v. Lopez*, 514 U.S. 549(1995)).

<sup>260</sup> Id. at 44,47.

<sup>261</sup> See id. at 145-46.

<sup>262</sup> Id. at 86-87, 115-1 16.

<sup>263</sup> 317 U.S. 111(1942).

<sup>264</sup> 379 U.S. 241 (1964).

of lawadherence interact with policy preferences through motivated reasoning processes of analogical perception and separability of preferences: the Justices' view of precedents' application is shaped by their layered policy preferences, but also is constrained by what reason will permit.

There is a circularity about Braman's analysis, but it is one all such work faces. Like the attitudinalists, Braman attributes underlying policy preferences to the Justices based on their votes and then draws inferences from their votes and opinions about the influence of those preferences.<sup>265</sup> This kind of attribution process also risks oversimplification. Neither judicial attitudes nor the ideological contexts in which they are catalogued are necessarily fixed.<sup>266</sup> Nor are they necessarily two-dimensional. A review of even a sample of Justice Scalia's criminal procedure work that includes his opinions for the majorities in *Crawford v. Washington*,<sup>267</sup> *Arizona v. Hicks*,<sup>268</sup> *Whren v. United States*,<sup>269</sup> *Kyllo v. United States*,<sup>270</sup> and *Maryland v. Shatzer*,<sup>271</sup> his concurrences in *Thornton v. United States*,<sup>272</sup> and *Arizona v. Gant*,<sup>273</sup> his dissent in *National Treasury Employees Union v. Von Raab*,<sup>274</sup> and his vote in *Chandler v. Miller*,<sup>275</sup> for example, would suggest a perspective more complex than the conservative/liberal or crimecontrol/fairness labels would imply. Instead, they point toward the kind of

multidimensional perspective that Braman's concept of "separability of preferences" seeks to consider.<sup>276</sup>

Braman's case analysis also reveals questions about the mechanism of motivated reasoning's application to judicial behavior, which her experimental studies discussed but did not attempt to resolve: whether judges' "perception" of precedent is unconsciously influenced by ideological preferences and that such influence is evidenced by their votes and opinions, whether judges deliberately choose to characterize precedent in a way that suits their preferred outcomes, or whether there is some combination of both unconscious and conscious processes at work. These issues require study in their own right, which has only recently begun.<sup>277</sup> It may well be the case that explicit judicial discussion of precedent in conferences and opinions reflects the kind of sincere struggle Braman's model describes.<sup>278</sup> As noted above, this claim has considerable intuitive appeal and reflects shared understandings in the profession. But the judicial socialization process Braman describes as beginning in law school, which includes training in use of "legally appropriate arguments and considerations" that refer to "relevant facts and controlling authority,"<sup>279</sup> also steeps students in an adversarial approach to both facts and law. It may be the case, therefore, that such discussion also

<sup>265</sup> See Gerhardt, *supra* note 189, at 1749-52, for this critique of the attitudinalist model.

<sup>266</sup> *Id.* at 1749.

<sup>267</sup> 541 U.S. 36(2004).

<sup>268</sup> 480 U.S. 321(1987).

<sup>269</sup> 517 U.S. 806(1996).

<sup>270</sup> 533 U.S. 27(2001).

<sup>271</sup> 130 S. Ct. 1213(2010).

<sup>272</sup> 541 U.S. 615,625(2004) (Scalia, J., concurring).

<sup>273</sup> 129 S. Ct. 1710, 1724(2009) (Scalia, J., concurring).

<sup>274</sup> 489 U.S. 656,680(1989) (Scalia, J.,

dissenting).

<sup>275</sup> 520 U.S. 305 (1997).

<sup>276</sup> For a doctrinal analysis of Justice Scalia's Fourth Amendment views, see Richard H. Seamon, *Kyllo v. United States and the Partial Ascendance of Justice Scalia's Fourth Amendment*, 79 WASH. U. L.Q. 1013 (2001).

<sup>277</sup> See *infra* notes 238 and accompanying text.

<sup>278</sup> For samples of conference discussions, see generally THE SUPREME COURT TN CONFERENCE (1940-1985) (Del Dickson ed., 2001).

<sup>279</sup> BRAMAN, *supra* note 202, at 26.

includes an advocate's deliberate tactical deployment of constructed arguments even if also to some extent revelation of perceived interpretations.<sup>280</sup> It will take a considerable amount of work to sort out the complicated relationships between directional goals, interpretive choices influenced by preferences, and the extent to which interpretive perceptions are influenced either by choices or by preferences.<sup>281</sup>

Some experimental work does suggest that motivated reasoning may manifest in adjudicatory tasks. One example concerns studies of the biased evaluation and interpretation of scientific research.<sup>282</sup> Most specifically, judges are called upon to evaluate and interpret scientific research in both their gatekeeper and factfinder roles. More

generally, although science and law are quite different undertakings with distinct methods, norms, and goals, both kinds of judgment implicate the tension between vulnerability to ideological influence and explicit norms of objectivity. The motivated-reasoning literature has found that directional goals bias subjects' evaluation of scientific studies.<sup>283</sup> One study specifically examined the impact of ideological attitudes on actual judges' evaluation of the relevance of scientific evidence.<sup>284</sup> The study found a moderate biasing effect when the evidence was consistent with views on the death penalty, but reassuringly also found that the effect was more pronounced among law students than judges, suggesting that, in a practical application of discretionary

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<sup>280</sup> Further, Raich, Morrison, and Lopez are themselves part of a larger modern federalism fabric, which also includes the dormant Commerce Clause and statutory preemption rulings, as well as other statutory interpretations informed by federalism concerns, all of which need to be considered as a totality. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (discussing federalism doctrine in terms of path-dependence). Chief Justice Rehnquist's assumed federalism objectives may well unconsciously have colored how he "saw" more than sixty years of highly deferential rulings, as Braman's account of his Lopez opinion argues. BRAMAN, *supra* note 202, at 43-44. But that opinion also could reflect highly sophisticated and quite intentional advocacy, within the decisional context of a nine member collegial court requiring a five-vote majority, of a result reconciling a complex array of ideological, doctrinal, and institutional goals, which, as some rational-choice theorists point out, can include preservation of at least the appearance of respect for stare decisis. See Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 39-45 (1995) (presenting a careful doctrinal description of some of those considerations in Lopez). Another perhaps more transparent example is Chief Justice Rehnquist's opinion in *Dickerson v. United States*, 530 U.S. 428 (2000), which backhandedly upheld *Miranda*, especially when considered in light of the anti-*Miranda* circumstances of his appointment to

the Court, see, *ag.*, PHILIP B. JOHNSON & MORGAN CLOUD, *CONSTITUTIONAL CRIMINAL PROCEDURE: FROM INVESTIGATION TO TRIAL* 396 (4th ed. 2005) (describing background), his ensuing campaign to restrict *Miranda*'s reach and to undermine its doctrinal foundation, e.g., *Michigan v. Tucker*, 417 U.S. 433 (1974), his explicit juggling act in *Dickerson*, and his subsequent unexplained joinder in Justice Thomas's opinion in *Chavez v. Martinez*, 538 U.S. 760 (2003), which utterly ignored *Dickerson*. And what are we to make of Justice Alito's concurrence in *Montejo v. Louisiana*, in which he contended that the same stare decisis principles applied in *Gant*, in which he dissented, as in *Montejo*, in which he concurred? *Montejo v. Louisiana*, 129 U.S. 2079, 2092-94 (2009) (Alito, J., concurring).

<sup>281</sup> Bartels' work seeks to address this question. See Brandon L. Bartels, *Top-Down and Bottom-Up Models of Judicial Reasoning*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 41 (David E. Klein & Gregory Mitchell, eds., 2010).

<sup>282</sup> See Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANN. REV. PSYCHOL. 259 (1998). Braman notes but does not discuss MacCoun's review article.

<sup>283</sup> Linda, *supra* note 196, at 193.

<sup>284</sup> Richard E. Redding & N. Dickon Reppucci, *Effect of Lawyers' Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 L. & HUM. BEHAV. 31 (1999).



judgment, judges may be more resistant to bias.<sup>285</sup>

Braman's own experimental studies consider whether legal training measurably affects the cognitive processes implicated in legal decisionmaking.<sup>286</sup> Her results offer qualified support for her theories regarding the role of motivated reasoning in legal decisionmaking. One study, with Thomas Nelson, demonstrated that attitudinal preferences can

affect judgments about case similarity, although the effect among law students, which occurred as predicted in the middle range of case similarity, appeared less constrained than among persons who have had no formal legal training.<sup>287</sup> Braman and Nelson point out that "nothing [we] have found suggests a conscious effort to twist the law to serve one's opinions."<sup>288</sup>

<sup>285</sup> *Id.* at 47-48. More generally, MacCoun's article describes several different theoretical accounts of biased evidence-processing and reviews both "cold" and motivated cognitive sources of bias, and also discusses their relationship to distinctions between adversarial and inquisitorial methods of truth-seeking. MacCoun, *supra* note 233, at 263. Another perspective that Braman's approach will need to consider is that of individual differences, which she mentions but does not explore. BRAMAN, *supra* note 202, at 161. There is reason to believe, for example, that not only situational variables but also individual differences can influence the respective contributions of distinct decision strategies. Cognitive psychology has long recognized a dual-process model that regards quicker, implicit, relatively effortless, affectively influenced intuitive processes (sometimes unimagineratively referred to as "System 1") and slower, more effortful, rational deliberative processes ("System 2") as implicating different information-processing systems. (Kunda discusses this distinction, for example, in her presentation of accuracy-driven goals.) While the verbalized output of judgments necessarily involves System 2, the underlying decisions themselves can have varying contributions from Systems 1 or 2. Recent work has examined the interaction between preferred decision strategy and actually used decision strategy (which can be subject to situational constraints) to explore the consequences of "decisional fit." Cornelia Betsch & Justus J. Kunz, Individual Strategy Preferences and Decisional Fit, 21 J. BEHAV. DECISION MAKING 532, 533 (2008). One finding of this research is that decisional fit enhances the perceived value of the chosen or evaluated object. *Id.* at 535. Other work has sought to specify the situational factors influencing judicial inclination toward top-down (i.e., predisposition-driven) processing or bottom-up (i.e., data-driven) processing. Bartels, *supra* note 232.

<sup>286</sup> The studies she reports in her book were previously published as Eileen Braman & Thomas E. Nelson, Mechanisms of Motivated Reasoning? Analogical Perception in Discrimination Disputes. 51 AM. J. POL. SCI. 940 (2007); Eileen Braman. Reasoning on the Threshold: Testing the

Separability of Preferences in Legal Decision Making, 68 J. POLS. 308 (2006).

<sup>287</sup> BRAMAN & NELSON, *supra* note 237, at 954. The generalizability of these findings is limited by Braman's use of undergraduates and law students, not judges, as participants. In response to this objection she cites practical difficulties in recruiting judges to participate in experimental studies and the limited scope of her specific hypotheses. But her claims are broader than the specific hypotheses she tests in her studies. They extend to actual judicial behavior and subjective experience, so the concern about generalizability is not trivial. Other empirical studies of the role of cognitive bias in judicial behavior have used real judges, and some have found differences between judges and law students. E.g., Guthrie et al., *supra* note 192 (reviewing studies of cognitive biases among judges); Redding & Reppucci, *supra* note 235 (finding differences between state court judges and law students). Pathbreaking work in terror-management theory used judges performing judicial tasks (sentencing) in an experimental design. E.g., Abram Rosenblatt & Jeff Greenberg. Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values, 57 J. PERSONALITY & SOC. PSYCHOL. 681 (1989). But the application through experimental work of motivated reasoning to judicial behavior is in its early stages and Braman's research to date helps lay the groundwork for subsequent studies involving judges themselves.

<sup>288</sup> BRAMAN, *supra* note 211, at 110. A recent study found that participants' decisions did indeed correspond to the relationship between policy implication and policy preference: "Law students in this study were more likely to overturn a law changing taxes when the policy implications of the law were inconsistent with their policy preference." Ferguson et al., *supra* note 202 at 225. To their surprise, the authors' follow-up inquiry found that fully 75% of participants "believed that their policy preferences had affected their legal judgments." This finding needs further study, but it raises a serious question regarding the respective contributions of conscious versus unconscious influence.

Another Braman study sought to “test whether decision makers’ preferences with regard to substantive policy issues influence their decisions on a seemingly neutral threshold question” of standing.<sup>289</sup> While a pure legal model would see standing as independent of the merits, Braman’s model “allows for the very real possibility that attitudinal considerations can influence seemingly objective reasoning processes as decision makers use tools of legal analysis to achieve norm-appropriate goals.”<sup>290</sup>

Braman created conditions with both controlling authority and heavily weighted persuasive authority and multiple policy dimensions (support or opposition to abortion rights, governmental control over political activity, and free speech), allowing her to compare a “pure legal model,” “pure attitudinal model,” and “constrained attitudinal model.”<sup>291</sup> The results, while mixed, provide considerable support for her thesis.<sup>292</sup> The strongest support for Braman’s “constrained attitudinal” model emerged in her finding that participants’ views on abortion significantly affected their decisions on standing only in the condition in which

applicable law offered latitude (even if against the “weight” of persuasive authority).<sup>293</sup> In the controlling-authority condition, participants followed the law to find standing regardless of their agreement with the underlying policy issues (speech favoring abortion).<sup>294</sup> Results with respect to governmental regulation of political activity were consistent with a pure legal model. Results with respect to free speech were consistent with an attitudinal model, however, not the predicted constrained model. Results with respect to abortion were split. Participants with pro-choice attitudes acted consistently with a constrained model. Pro-life participants, however, behaved consistently with a purely attitudinal model.<sup>295</sup>

Braman’s follow-up inquiries indicated that participants regarded the law as more influential than the facts in their decision and that they had greater confidence in their decision when there was controlling authority.<sup>296</sup> Further, relatively few participants mentioned abortion at all and there were no significant differences in the frequency of its mention between groups in the constrained and unconstrained

<sup>289</sup> BRAMAN, *supra* note 202, at 115.

<sup>290</sup> *Id.* at 116. Commentators and Justices alike complain about the Court’s tendency to “peek at the merits” when deciding standing. E.g., Warth v. Seldin, 422 U.S. 490, 518-19 (1975) (Douglas, J., dissenting); Gene B. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650 (1985). Braman’s assumption that a ruling in favor of standing implies endorsement of the litigant’s position on the merits does not always follow, however, at least not in the Supreme Court. Some of the Court’s dodgiest rulings on standing opened the door to denial of the asserted claim on the merits. E.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973). But this distinction does not detract from her main point.

<sup>291</sup> BRAMAN, *supra* note 202, at 121-23. Participants were all second- and third year law students.

<sup>292</sup> Her sample was heavily skewed toward participants with pro-choice and profreedom-

of-expression views (in excess of 70% on each policy measure), and overwhelmingly favored standing (75%). Consequently, her efforts to adjust for this skew yielded small sample sizes on the pro-life side. *Id.* at 124-25.

<sup>293</sup> *Id.* at 129.

<sup>294</sup> Regression analysis on the variables of attitudes regarding government regulation of political activity, free speech, and abortion, however, yielded some results in the predicted direction (some of which were weak) and some at odds with her hypotheses. *Id.* at 109.

<sup>295</sup> *Id.* at 140. These results raise a question about the validity of her model’s implicitly assumed equivalence of accuracy-commitment across the ideological spectrum – whether there is an association, for example, between rights-favoring attitudes (speech, reproductive choice), or the congruence of one’s attitudes and extant precedent, and fidelity to that precedent.

<sup>296</sup> BRAMAN, *supra* note 211, at 129.

conditions.<sup>297</sup> These results suggest that, while participants in both conditions were equally aware of abortion as an issue, at least for the pro choicers, that awareness affected them in the unconstrained condition to a greater extent. Responses to other questions indicated, not surprisingly, that the arguments cited by participants tended to be related to their outcomes, but also that participants did mention opposing arguments as well.<sup>298</sup> These results support Braman's constrained model in which legal boundaries cabin effectuation of policy preferences. The results cannot negate the possibility of deliberate, top-down, rationalization of preference-driven decisionmaking, but Braman reiterates her socialization argument, discussed above, and notes that abortion was equally in the minds of participants despite their respective case outcomes.<sup>299</sup>

*Law, Politics & Perception's* premise of taking seriously judges' own widely shared and deeply held norms and the operative assumptions of most members of bench and bar has powerful intuitive appeal and has been repeatedly recognized in the literature. This work did not set out to refute a deliberate manipulation model, but does provide support, albeit qualified, for the operation of important components of a motivated reasoning model. In assessing the weight of Braman's studies, it is necessary to keep in mind that very little research in this area undertakes the rigor of the controlled-experimental method. We are far from a "unified theory" of judicial decisionmaking. It may well be that efforts to reduce such a complex, heterogeneous, and multiply-determined

set of phenomena to a single model are misguided. But Braman's work, together with that of others, does suggest that the mechanisms of motivated reasoning may affect judicial behavior. While judicial decisions are plainly not immune to influence from policy preferences, judges' commitment to the norms of their role very well may constrain the extent of that influence.

#### IV. Who do they think they are?

Who judges think they are, what they think they are doing, and what they actually do thus all interact.<sup>300</sup> Under the foregoing application of motivated-reasoning theory, and the view shared by other scholars and certainly by many judges, judges do take seriously their professional judicial role and its constitutive norms of neutrality and fidelity to law, and those attitudes do constrain judicial decisionmaking. Their embrace of that exceptional-public-official identity is thus the first line of defense of the rule of law. It is not a perfect protection, first because the less-than-completely-determinate nature of the law sometimes allows judges considerable analogic space within which sincerely to construct legally plausible explanations for a range of preferred outcomes, and second because judges of course can and sometimes do simply violate their professional norms. As discussed above, however, law to be functional requires discretion and the pursuit of the perfect cannot be allowed to become the enemy of the pretty darned good.<sup>301</sup> This Part will explain the mechanisms by which current trends in judicial elections toward money-saturated partisan politics present several kinds of threats to this internalist bulwark.

<sup>297</sup> Id. at 145.

<sup>298</sup> Id. at 150.

<sup>299</sup> Id. at 157.

<sup>300</sup> For a detailed discussion of "judicial self-presentation," see BAUM, *supra* note 207, at 32-49.

<sup>301</sup> See *supra* text accompanying notes 39-41.

### A. Impact on Norms

The first threat is to the norms themselves. If judicial norms are the bricks in the bulwark, it is necessary to examine how social norms work. Social norms influence behavior a ante in several ways: by description, by injunction, and by subjective experience.

“Descriptive norms” influence behavior by providing information about what most people do, which we tend to heed on the implicit assumption that “[i]f everyone is doing it, it must be a sensible thing to do.”<sup>302</sup> Such information operates as a heuristic guide to often adaptive behavior: “[it] saves us time and cognitive effort while providing an outcome that has a high probability of being effective.”<sup>303</sup> Accordingly, “[w]e are most likely to use the evidence of others’ behavior to decide the most effective course of action when the situation is novel, ambiguous, or uncertain .... [and] to imitate those who have visible signs of success, such as wealth, power, or status.”<sup>304</sup> When the situation focuses attention on the descriptive norm, as when people see others littering in an already-littered environment, the norm’s influence is strengthened. Thus, they are more likely to litter.<sup>305</sup>

Whereas descriptive norms are concerned with what is, “injunctive” norms

are concerned with what ought to be. “They specify what ‘should’ be done and are therefore the moral rules of the group. Injunctive norms motivate behavior by promising social rewards or punishments for it.”<sup>306</sup> Thus, when people are led to believe that littering risks social condemnation, they are less likely to litter. The closer the conceptual relation to the specific behavior, the greater the injunctive norm’s influence.<sup>307</sup> Antilittering injunctions have more influence on littering behavior than do good-citizen injunctions. The conjunction of descriptive and injunctive norms can intensify their influence.<sup>308</sup>

Finally, some researchers propose that there are also subjective or personal norms, which are defined as “the person’s perception that most people who are important to him think he should or should not perform the behavior in question.”<sup>309</sup> Social norms thus involve both attitudes and social identity.

Research has indicated that normative focus is a mediator of normative influence. That is, behavior is likely to be influenced by that norm on which circumstances focus attention.<sup>310</sup>

Current trends in judicial selection may operate negatively in all three normative domains. First, descriptive norms are compromised. As more and more judicial

<sup>302</sup> Robert B. Cialdini et al., A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places, in READINGS ABOUT THE SOCIAL ANIMAL 56, 57 (Elliot Aronson ed., 9th ed. 2003).

<sup>303</sup> Robert B. Cialdini & Melanie R. Trost, Social influence: Social Norms, Conformity, and Compliance, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 155 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

<sup>304</sup> Id. (citations omitted).

<sup>305</sup> Cialdini et al., supra note 253, at 60-67. Thus, descriptive norms or “social proof” can influence behavior in constructive ways and less than constructive ways. See, e.g., Cialdini & Trost, supra note 254, at 156-57 (reviewing studies of bystander inaction in emergencies, as in the Kitty

Genovese case; imitative suicides; and substance abuse); P. Wesley Schultz et al., The Constructive, Destructive, and Reconstructive Power of Social Norms, 18 PSYCHOL. SCI. 429, 429-30 (2007) (reviewing research on social norms, binge drinking, energy consumption).

<sup>306</sup> Cialdini & Trost, supra note 254, at 157.

<sup>307</sup> Cialdini et al., supra note 253, at 74-75.

<sup>308</sup> Schultz et al., supra note 256, at 430-32.

<sup>309</sup> Cialdini & Trost, supra note 254, at 159 (quoting MARTIN FISHBEIN & ICEK AJZEN, BELIEF, ATTITUDE, INTENTION AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH 302 (1975)).

<sup>310</sup> Cialdini et al., supra note 253, at 75-76; Cialdini & Trost, supra note 254, at 160-61 (discussing norm salience).

contests become dominated more visibly by partisan politics and big-money interests, and as more judges carry the influence of those forces onto the bench, the judge-as-ordinary-politician becomes a more salient descriptive norm. These sorts of behaviors become part of what judges and prospective judges see judicial candidates doing, and they see that it is often (although not always) the ones who do it the most who succeed. There is more lift on the judicial normative landscape, communicating the message that littering is what judges do.

Second, injunctive norms are under pressure. For example, current trends in campaign commitments and campaign spending toward a more ordinary-politician model have received explicit scholarly<sup>311</sup> and implicit judicial<sup>312</sup> endorsement. Further, an election process that misrepresents opponents' records and portrays the candidate as one who will rule based on public sentiment implicitly communicates contempt for the exceptional-public-official role. The judge's own supporters may well be the ones most strenuously urging the judge to play the political game to win, and assuring the judge that it is acceptable to do so.

Third, current trends impact subjective norms by involving judges in behavior that may be inconsistent with their own

attitudes about the proper judicial role. This problem implicates dissonance theory, discussed next.

#### *B. Norm-violation and Dissonance*

The preceding section suggests that current trends threaten to substitute the norm of judicial exceptionalism with the norm of judge-as-ordinary-politician. This section explains how current trends, by engaging judicial candidates in behaviors inconsistent with norms of judicial exceptionalism, undermine judges' identification with that norm. The second threat thus is from an ex post perspective, which considers the consequences of behavior that is inconsistent with beliefs, attitudes, and norms.<sup>313</sup>

Leon Festinger's original cognitive-dissonance theory holds that psychological discomfort arises when there are discrepancies among one's "attitudes, beliefs, and feelings about oneself, others, or the environment," which can be induced by a discrepancy between an attitude and a behavior.<sup>314</sup> Later work has considered the role of the self, in particular social identity, self-categorization, and social support, in inducing and reducing dissonance.<sup>315</sup> "Social identification is a result of selfcategorization as a group member," through which process people "become aware of the stereotypic in-group norms from the behaviors and

<sup>311</sup> Witness the lead article in this issue of the *Arkansas Law Review*

<sup>312</sup> *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

<sup>313</sup> For a brief discussion of the relationship between descriptive norms, injunctive norms, discrepant behavior, and dissonance in terms of "framing" one's behavior, see Jeff Stone et al., *When Exemplification Fails: Hypocrisy and the Motive for Self-Integrity*, 72 *J. PERSONALITY & SOC. PSYCHOL.* 54, 57 (1997).

<sup>314</sup> Eddie Harmon-Jones, *An Update on Cognitive Dissonance Theory, with a Focus on the Self*, in *PSYCHOLOGICAL PERSPECTIVES ON*

*SELF AND IDENTITY* 119, 120 (Abraham Tesser et al. eds., 2000) (describing the work originally set forth in LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957)).

<sup>315</sup> For an overview, see Blake M. McKimmie et al., *I'm a Hypocrite, But So is Everyone Else: Group Support and the Reduction of Cognitive Dissonance*, 7 *GROUP DYNAMICS THEORY, RES., & PRAC.* 214, 214-16 (2003). Harmon-Jones, *supra* note 265, at 122-33, reviews challenges to self-based dissonance theories. For a general overview of identity theory and social-identity theory, see Michael A. Hogg et al., *A Tale of Two Theories: A Critical Comparison of Identity Theory with Social Identity Theory*. 58 *Soc. PSYCHOL. Q.* 255 (1995).

attitudes of other group members.”<sup>316</sup> Motivated-reasoning theory in essence describes a dissonance avoidance mechanism.<sup>317</sup> Its application to judicial behavior predicts that judges will avoid the psychological discomfort of dissonance by behaving in ways they sincerely believe are consistent with the law because such behavior is an important part of their social identity. And, as described above, it is that identification which keeps judicial decisionmaking within the limits of what the law will allow.

To see what dissonance theory has to tell about judicial selection processes, consider the two admittedly oversimplified sets of self-categories and behaviors suggested by the discussion so far: the judge-as-exceptional-official and the judge-as-ordinary-politician. For a judge who already views himself or herself more as an ordinary politician – that is, whose behaviors and attitudes are shaped by the stereotypic norms of that group – participation in highly politicized, money-saturated judicial elections, and perhaps even allowing his or her votes once on the bench to be substantially influenced by the electoral process, should produce relatively less dissonance because there already is less discrepancy between attitudes and behaviors.

Accordingly, such a judge will feel less constrained by the law in the first place and more free to pursue his or her own directional goals or the perceived goals of his or her supporters or voters. Thus, to the extent that current trends in judicial elections either attract individuals whose view of the judicial identity tends more toward the ordinary politician, or offers a

social categorization for an aspiring judicial candidate to internalize, it fosters a judiciary less constrained by law and ultimately undermines the rule of law.

Current trends are problematic from the other direction for the judge who sees himself or herself not as an ordinary politician but as an exceptional official. Such a judge should experience considerable dissonance upon behaving in ways inconsistent with the latter group’s norms. As Ohio Supreme Court Justice Paul Pfeifer once trenchantly put it, “I never felt so much like a hooker down by the bus station... as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to [buy] a vote.”<sup>318</sup> The problem is that once dissonance is induced, something has got to give. The adverse affective state of dissonance “motivates activities designed to reduce the arousal.”<sup>319</sup> Some of those strategies are potentially corrosive/

One direct way to reduce psychological discomfort is to “change the discrepant attitude or self-belief.”<sup>320</sup> People whose self-concept is threatened by their own discrepant behavior may be motivated to modify the self-concept itself by shifting toward identification with other attributes that tend to justify the discrepant behavior and away from identification with the standard violated by their behavior.<sup>321</sup> The disidentification process extends to social identity as well. An individual whose behavior violates group norms may seek to reduce dissonance “through reduced levels of identification with the group.”<sup>322</sup> Thus, an individual who began the election process more closely identified with the judge-as-exceptional-official

<sup>316</sup> McKimie et al., *supra* note 266, at 215-16.

<sup>317</sup> See Kunda, *supra* note 196, at 480.

<sup>318</sup> Liptak & Roberts, *supra* note 170.

<sup>319</sup> Stone et al., *supra* note 264, at 54.

<sup>320</sup> *Id.*

<sup>321</sup> Joshua Aronson et al., *From Dissonance to Disidentification: Selectivity in the Self-Affirmation*

*Process*, 68 *J. PERSONALITY & SOC. PSYCHOL.* 986, 989 (1995).

<sup>322</sup> McKimie et al., *supra* note 266, at 216, 221 (finding that disparity with the norms of a salient in-group “was associated with greater attitude change and reduced levels of group identification”).

exemplar, but who engages in highly discrepant conduct throughout the campaign and perhaps thereafter – that is, the person who began the process “feeling like a judge” and eventually came to “feel like a hooker”<sup>323</sup> – may seek to reduce the resulting dissonance by shifting away from those discrepant attitudes and group norms and toward those of the judge-as-ordinary-politician.

Another direct dissonance-reduction strategy, known as “trivialization”, consists of “decreasing the importance of the elements involved in the dissonant relations.”<sup>324</sup> Through this mechanism, the individual alters the valuation of either the attitude or the discrepant behavior. This strategy is problematic for present purposes in at least two ways. First, the judicial candidate for example may come to regard the issue of independence from supporters as less important, which is a substantial step away from the judge-as-exceptional-official model and toward the judge-as-ordinary-politician model. Second, the judicial candidate may come to minimize the extent of his or her departure from the norm. The Caperton matter offers an example. To many observers, Blankenship’s role in Justice Benjamin’s campaign was an extreme instance of financial pressure. In objective terms it was certainly an extreme instance of financial involvement. The dissonance resulting from the discrepancy with the norm of independence, however, may lead some, including perhaps the justice himself, to downplay the potential for, and the appearance of, influence.<sup>325</sup> This strategy

could have at least two unfortunate consequences. The judge who is in a position to decline such extravagant support – that is, if the support is not provided entirely independently of the judge’s campaign decisions – may fail to do so because the judge has minimized its impact. Or, even if the judge had no decisionmaking role in the expenditure, the judge may later decline to recuse himself or herself when the supporter’s case comes before the court, again because he or she has underappreciated the extent of the norm-violation.

### *C. To Sum Up*

Current trends in judicial campaigns may threaten the mechanism that motivated-reasoning theory indicates supports judicial respect for the rule of law – the judges’ own identification with the norms of judicial exceptionalism. These kinds of campaigns may do so by instantiating countervailing descriptive norms of judges as ordinary politicians and by implying injunctive norms that degrade the model of judge-as-exceptional-official. Current trends in judicial elections may also do so by inducing judges who experience the discomfort caused by dissonance between the norms of judicial exceptionalism and their campaign-related conduct to deploy dissonance-reduction strategies corrosive of those norms’ influence.

### **Conclusion**

To seek the benefits of judicial independence is to run the risk of judicial

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<sup>323</sup> See supra text accompanying note 289 (noting Justice Pfeifer’s lament).

<sup>324</sup> Linda Simon et al., *Trivialization: The Forgotten Mode of Dissonance Reduction*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 247, 247 (1995) (quoting FESTINGER, supra note 265, at 264).

<sup>325</sup> Dissonance can also be reduced indirectly, through means that are not related to the

discrepancy and thus leave the discrepancy unresolved, for example by boosting global self-esteem, engaging in distracting activities, or self-medicating (e.g., consuming alcohol). Research indicates, however, that people tend to use direct strategies for dissonance reduction, even if affirmation of self has more overall value for self-worth. Stone et al., supra note 265, at 62.

abuse of the discretion inherent in judicial decision making. The legal systems in the United States have experimented with a variety of methods for selecting and overseeing judges to strike the best balance between independence and accountability. Optimality has been an elusive goal, but it has become increasingly clear that choice of method does have real-world consequences for judicial behavior. No particular method provides complete protection against abuse, as none could reasonably be expected to do; but some, like the advent of judicial-conduct organizations, have improved matters, and others, like highly politicized, money-infused elections, apparently do challenge judicial independence and integrity.

This top-down perspective, however, overlooks a fundamental bottom-up safeguard against judicial over-reaching: the judge himself or herself. Recent scholarship implies that, as a practical matter, the first line of defense is the extent to which the judge internalizes the constitutive norm that “judicial decisions must be based on the law.”<sup>326</sup> The application of motivated-reasoning theory to judicial behavior suggests that the internalization of this norm constrains the range of judges’ decisional discretion. If judges sincerely believe that law matters, they will feel bound to act as though it does. They will read the law through the lens of their own policy preferences to be sure, but only so far as the outer limits of legal analysis permit.

This constraint is not trivial. It may help to explain anotherwise puzzling contradiction. On the one hand, the “attitudinalist” political scientists and some legal scholars have labored mightily to

demonstrate that judges largely follow their ideological predispositions rather than the law in deciding cases. Under this view, law counts for little. On the other hand, real judges and lawyers seem to have a quite different view. They behave – investing prodigious amounts of time and energy in the process – as though they believe law really does matter. There is evidence that it does. In any event, most of the leaf-and-tree counting debate about judicial decisionmaking has overlooked the enormous fact of the forest. Ultimately, the kind of development the United States has experienced – growing from its tattered and humble origins into a spectacularly successful and prosperous liberal democracy in which individual rights enjoy relatively strong protection – could be possible only in a country in which law matters a great deal.

This important constraint may be what largely holds the “crown jewel of our democracy” in place.<sup>327</sup> The belief that they are not ordinary politicians may be the most immediate force preventing judges from acting like ordinary politicians. It is difficult to see how the current trends in judicial elections toward highly politicized, interest-influenced, money-saturated, partisan warfare – which are increasingly rendering them indistinguishable from elections for ordinary politicians – yield a net gain in judicial accountability. But it is easy to see how they can corrode the idea of what it means to be a judge and, in consequence, what judges are likely to do.

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<sup>326</sup> BRAMAN, supra note 202, at 24.

<sup>327</sup> Michael S. Greco, Popular Dissatisfaction with Judicial Restraint-Do Americans Really Want

an Independent Judiciary?, 82 IND. L.J. 1265, 1268 (2007) (quoting Chief Justice Rehnquist’s observation about judicial independence).