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Crocodiles in the Judge's Bathtub? Why California Should End "Unregulated" Judicial Recall

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> *There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.*
>
> *—Associate Justice Otto Kaus*
> *Supreme Court of California*[1]

I. INTRODUCTION

"Hey, what the f are you doing? She's unconscious."[2] Two international graduate students had just discovered nineteen-year-old Brock Turner thrusting toward a young woman with her genitals exposed, behind a dumpster at Stanford University in January 2015.[3] The half-naked victim was not moving.[4] Turner ran.[5] The graduate students managed to knock Turner onto the ground and waited for the police to arrive.[6] Turner was charged with two counts of rape, two counts of penetration, and one count of assault with intent to commit rape.[7] While the two rape charges were later dropped,[8] a jury convicted Turner of the remaining charges.[9] Probation officers formally recommended a "moderate county jail sentence, formal probation, and sexual offender treatment."[10]

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1. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 61 (Princeton University Press ed., 2006).

2. Scott Herhold, *Thanking Two Stanford Students Who Subdued Campus Sex Assault Suspect*, MERCURY NEWS (Mar. 21, 2016), http://www.mercurynews.com/2016/03/21/herhold-thanking-two-stanford-students-who-subdued-campus-sex-assault-suspect/ (on file with *The University of the Pacific Law Review*).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Timeline of Significant Dates in the Life of Brock Turner*, ASSOCIATED PRESS (June 11, 2016), http://bigstory.ap.org/article/962a8de554994637afce94a22afb78e9/timeline-significant-dates-life-brock-turner (on file with *The University of the Pacific Law Review*).

8. Michael E. Miller, *All-American Swimmer Found Guilty of Sexually Assaulting Unconscious Woman on Stanford Campus*, WASH. POST (Mar. 31, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/31/all-american-swimmer-found-guilty-of-sexually-assaulting-unconscious-woman-on-stanford-campus/ (on file with *The University of the Pacific Law Review*).

9. *Id.*

10. Probation Report at 12, People v. Turner, No. B1577162 (2016), *available at* https://www.documentcloud.org/documents/2858997-Probation-officer-s-report-in-Brock-Turner-case.html#document/p1 (on file with *The University of the Pacific Law Review*); Nick Anderson & Susan Svrluga, *In Stanford Sexual Assault Case, Probation Officer Recommended 'Moderate' Jail Term*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/06/10/probation-officers-report-for-brock-turners-

On June 2, 2016, Judge Aaron Persky of the Superior Court of California for Santa Clara County sentenced Turner to six months confinement in the county jail to be followed by three years of probation.[11] Judge Persky also ordered Turner to register as a sex offender and participate in a sex offender rehabilitation program.[12] According to Judge Persky, "a prison sentence would have a severe impact on [Turner]. I think he will not be a danger to others."[13]

Judge Persky's sentence sparked national concern for judicial leniency and a massive effort to formally recall the judge.[14] Some Stanford student groups were outraged at the news and held a demonstration during the university's commencement ceremony in 2016.[15] Professor Michele L. Dauber at Stanford Law School launched a campaign to recall Judge Persky from the state bench.[16] Another petition on Change.org, an online petition platform, has collected more than 1,324,000 signatures in support of the recall.[17] California, among eight other states, allows judicial recall as a method for the public to keep state court judges accountable.[18]

California's "unregulated" judicial recall process should end because it crosses the threshold of what is necessary to ensure judicial accountability of state court judges.[19] This Comment compares how state court judges are ultimately more accountable than federal judges, which places their judicial independence at risk.[20] Part II discusses how judges are decision-makers bound by the rule of law and should not bend to the political will like elected

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sentencing/ (on file with *The University of the Pacific Law Review*).

11. *Brock Turner Sentenced to Six Months Amid Calls for Tougher Penalty*, ESPN NEWS (June 4, 2016), http://www.espn.com/college-sports/story/_/id/15938889/brock-turner-former-stanford-cardinal-swimmer-sentenced-six-months-jail (on file with *The University of the Pacific Law Review*).

12. *Id.*

13. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), http://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html (on file with *The University of the Pacific Law Review*).

14. *Id.*

15. Liam Stack, *Judge Aaron Persky Under Fire for Sentencing in Stanford Rape Case*, N.Y. TIMES (June 7, 2016), http://www.nytimes.com/2016/06/08/us/judge-in-stanford-rape-case-is-being-threatened-who-is-aaron-persky.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=EndOfArticle&pgtype=article (on file with *The University of the Pacific Law Review*).

16. *Id.*

17. *Remove Judge Aaron Persky from the Bench for Decision in Brock Turner Rape Case*, CHANGE.ORG, https://www.change.org/p/california-state-house-impeach-judge-aaron-persky?version=meter+at+0&module=meter-Links&pgtype=article&contentId=&mediaId=&referrer=http%3A%2F%2Fwww.nytimes.com%2F&priority=true&action=click&contentCollection=meter-links-click (last visited Apr. 7, 2017) (on file with *The University of the Pacific Law Review*).

18. *See Methods of Judicial Selection: Removal of Judges*, NAT'L CTR. ST. CTS., http://www.judicialselection.com/judicial_selection/methods/removal_of_judges.cfm?state= (last visited Apr. 7, 2017) (on file with *The University of the Pacific Law Review*) (only Arizona, California, Colorado, Minnesota, Nevada, North Dakota, Oregon, and Wisconsin are the states where judges are subject to recall elections).

19. *Infra* Parts IV, V, and VI (explaining that other measures of accountability are sufficient to ensure judicial accountability, and that unregulated judicial recall in California is dangerous).

20. *Infra* Parts IV and V.

politicians.[21] Part III adopts a brief definition of judicial independence and explains its significance.[22] Part IV discusses how judicial elections of judges in the state courts, including California, continue to serve as a method of judicial accountability.[23] Part V discusses additional mechanisms of accountability that states like California continue to embrace—impeachment, judicial commissions on performance, and recall.[24] Part VI focuses on California's "unregulated" judicial recall system and its severe consequences on the integrity of California courts if recalls are successful.[25] Specifically, California's "unregulated" recall process encourages harsher sentencing, increases spending by special interest groups, and encourages an uninformed public to engage in judicial decision-making—making recalls easier, riskier, and more likely to occur in the future.[26] Therefore, California's "unregulated" recall of judges is redundant to the goal of judicial accountability, and ultimately unnecessary in keeping California's justice system accountable.[27]

II. JUDGES & THE RULE OF LAW

Article III of the United States Constitution created a federal judiciary as a co-equal branch of government, and "not as a servant of the president or Congress."[28] The Framers' intended creation of a third branch in a separate "Article" in the Constitution, to match Article I for Legislative Powers and Article II for Executive Powers, shows that the judiciary branch is a separate, co-equal institution created for the sole purpose of critiquing and invalidating government actions from the other branches of government.[29]

At a minimum, the separation of powers framework also separates the judges from electoral control to "protect the citizen" from oppressive congressional and executive actions.[30] This constitutional framework set up the hallmark of the American judiciary—the ability to abide by the rule of law and resolve disputes

21. *Infra* Part II.

22. *Infra* Part III.

23. *Infra* Part IV.

24. *Infra* Part V.

25. *Infra* Part VI.

26. *Infra* Parts VI.A–C.

27. *Infra* Parts IV, V, and VI.

28. Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 148, 148 (Stephen B. Burbank & Barry Friedman eds., 2002).

29. *Id.*

30. *See* W.F. Rylaarsdam, *Judicial Independence – A Value Worth Protecting*, 66 S. CAL. L. REV. 1653, 1655 (1993) ("The judiciary is the only institution that stands between the citizen and an omnipotent government; if the judiciary independence is not upheld, the judiciary cannot effectively protect the citizen"); Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 981–82 (2001) ("Judicial independence does not protect the judge; it protects the people.").

based on the case law and underlying facts, but nothing else.[31] Nothing serves as a timelier reminder of the judiciary's function than Judge James L. Robart's entry of a temporary restraining order of parts of the Trump Administration's Executive Order 13769,[32] Protecting the Nation From Foreign Terrorist Entry Into the United States, in *Washington v. Trump*.[33]

The judiciary was designed to interpret the laws that the legislature has enacted and the executive has enforced.[34] The public "expects its judges to resolve disputes by reasoning impartially on the basis of legal principles, and judges regularly explain their decisions in terms consistent with the public's expectations."[35] Some people posit that the mere use of judicial elections makes judges equals of the political branches' legislators and executives, and thus should follow the majority will.[36] However, the judge's only obligations are interpreting the enacted laws.[37] The majority will cannot influence a judge's actions if it was not formally enacted as law; this would circumvent separation of powers and fail to protect minority, fundamental rights.[38] As Justice Oliver Wendell Holmes, Jr. once said, a judge's duty is not necessarily to "do justice," but rather his job is to "apply the law" even when it may not be the most "just."[39]

Therefore, judicial politics and functions cannot be equated to legislative politics.[40] Judges are bound by making decisions based on laws that elected representatives enact on behalf of the people.[41] When making decisions in

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31. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 65 (2003) ("[impartiality] is an instrumental value designed to preserve a different end altogether: the rule of law . . . to resolve disputes between parties on a case-by-case basis according to the applicable facts and law").

32. *See generally* Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8,977 (Jan. 27, 2017) (example of executive power over immigration that was limited by the judicial branch).

33. As the court wrote in *State of Washington, et al. v. Trump, et al.*,

> "Fundamental to the work of this court is a vigilant recognition that it is but one of three equal branches of our federal government. The work of this court is not to create policy or judge the wisdom of any particular policy promoted by the other two branches. That is the work of the legislative and executive branches and of the citizens of this country who ultimately exercise democratic control over those branches. The work of the Judiciary, and this Court, is limited to ensuring that the actions taken by the other two branches comport with our country's laws, and more importantly our Constitution."
>
> No. C17-0141JLR, slip. op. at 6–7 (W.D. Wash. Feb. 3, 2017), *aff'd*, __ F.3d __ (9th Cir. 2017)

34. Franklin, *supra* note 28.

35. KEITH J. BYBEE, ALL JUDGES ARE POLITICAL – EXCEPT WHEN THEY ARE NOT 77 (2010).

36. Kermit L. Hall, *Judicial Independence and the Majoritarian Difficulty, in* THE JUDICIAL BRANCH 68 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

37. *Id.* at 63.

38. *Id.*

39. Michael Herz, *"Do Justice!": Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996).

40. Frank B. Cross, *Law* Is *Politics, in* WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 110 (Charles Gardner Geyh, ed., 2011).

41. Geyh, *supra* note 31, at 65 ("[Impartiality] is an instrumental value designed to preserve a different end altogether: the rule of law . . . to resolve disputes between parties on a case-by-case basis according to the applicable facts and law.").

individual cases, judges are not acting as legislative politicians but are "perform[ing] their role in governance by exercising their proclivities in cases where the governing legal materials are less clear."[42] Whatever mechanisms used to ensure the accountability of elected representatives like legislators—such as recall—should be narrowly and carefully applied to judges.[43] As Chief Justice John G. Roberts, Jr. noted in *Williams-Yulee v. Florida Bar*, "judges are not politicians, even when they come to the bench by way of the ballot."[44]

III. THE MEANING OF JUDICIAL INDEPENDENCE

To ensure that judges abide by the rule of law, a healthy state judicial system requires a degree of judicial independence.[45] Legal scholar Charles Gardner Geyh succinctly defines judicial independence as "the capacity of individual judges to decide cases without threats or intimidation that could interfere with their ability to uphold the rule of law."[46] To preserve the courtroom as a "citadel of public justice and public security," the idea of judicial independence evolved to ensure that the court remains not influenced by politics, but by the facts arising from each individual case.[47] The rule of law ought to control the outcome of a case—not public emotions, not public anger and frustration, and not the constituents themselves.[48] A results-oriented evaluation of the judiciary disregards judicial independence by slowly eroding a judge's role in upholding the rule of law.[49] "Judicial independence demands that public and political scrutiny … *focus on the process rather than the result*."[50]

In direct response to the unwavering amount of judicial independence in the federal system, states developed various systems for selecting and removing judges.[51] Kermit L. Hall describes the struggle in balancing judicial independence with judicial accountability in American federal and state courts as a "tale of two pities."[52] The first "pity" refers to an independent, but

42. Cross, *supra* note 40.

43. *Infra* Part VI (discussing the implications arising from the use of recall in a judicial context).

44. Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1662 (2015).

45. *Infra* Part VI (discussing the implications arising from the use of recall in a judicial context such as harsher sentencing).

46. ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, RETHINKING JUDICIAL SELECTION IN STATE COURTS 20 (2016), *available at* https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_ State_Courts.pdf (on file with *The University of the Pacific Law Review*) (citing Charles Gardner Geyh, *Methods of Judicial Selection & Their Impact on Judicial Independence*, 137 DAEDALUS 86, 88 (2008)).

47. The Federalist No. 78 (Alexander Hamilton); BANNON, *supra* note 46, at 6.

48. Hall, *supra* note 36, at 61; BANNON, *supra* note 46, at 6.

49. Rylaarsdam, *supra* note 30, at 1653.

50. *Id.*

51. *See generally* BANNON, *supra* note 46, at 4 (showing that states use a variety of manners in electing judges: non-partisan elections, merit selections, gubernatorial appointments, partisan elections, hybrid selection processes, or legislative appointments).

52. Hall, *supra* note 36, at 81.

unaccountable, federal judiciary.[53] The second pity refers to an accountable, but non-independent, judiciary in state courts.[54] When states become too intertwined and preoccupied with judicial accountability as a primary concern, it risks leaving judicial independence as a secondary concern.[55] Striking a balance is important to preserve a judge's ability to effectuate the rule of law; however, states like California have placed too much emphasis on judicial accountability with "unregulated" recall processes.[56]

IV. SELECTING JUDGES AS A METHOD OF JUDICIAL ACCOUNTABILITY

State courts are traditionally more "accountable but insufficiently independent" compared to the "appointive and largely unaccountable" judges in federal courts.[57] While federal court judges enjoy life tenure after being selected, state court judges must be reelected or retained after a certain number of years.[58] Part A of this Section elaborates on how the nomination process of federal judges stresses the value of judicial independence.[59]

Part B discusses how states responded to the unwavering amount of judicial independence in federal courts.[60] The first wave of reform from the traditional nomination process took the form of partisan judicial elections in state courts, as discussed in Subsection 1 of Part B.[61] Critics of partisan judicial elections later advanced two arguments in opposition.[62] First, critics argued that judicial selection should not involve political parties like legislative elections.[63] Secondly, critics were concerned with whether the electorate could meaningfully evaluate judicial candidates.[64] Thus, partisan judicial elections underwent two additional waves of reform in judicial selection since the 1830s.[65] Subsection 2 of this Section discusses the second wave of transformation that resulted in non-partisan

53. *Id.*

54. *Id.*

55. *Infra* Parts IV, V, VII.

56. *Infra* Parts IV, V, VII (explaining all the judicial accountability measures that are in effect to aid judicial accountability impede on judicial independence).

57. Hall, *supra* note 36, at 81.

58. *Compare* Part IV.A (discussing judicial selection in federal court) *with* Part IV.B (discussing judicial selection in state courts).

59. *Infra* Part IV.A.

60. *Supra* Part IV.B.

61. *Supra* Part III.B.1 (discussing partisan judicial elections).

62. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 7 (2009).

63. *Id.*

64. *Id.* at 8.

65. *Id.*

judicial elections.[66] Subsection 3 of this Section discusses the third wave of transformation leading to merit selection.[67]

A. Judicial Selection in Federal Court

Under the United States Constitution, federal judges are selected through an appointment process—these judges are nominated by the President, and confirmed with the advice and consent of the United States Senate.[68] Federal judges represent the epitome of judicial independence because they have life tenure, enjoy salaries that cannot be reduced, and can be removed only through impeachment.[69]

Political scientist Alexis de Tocqueville warned, "there is hardly ever a political question in the United States which does not sooner or later turn into a judicial one."[70] Thus, the nation's courtrooms allow judges to settle matters of public policy, which some argue is a job reserved for elected representatives who represent majority will.[71] Viewed in this light, arguably, these "public policy" judges should be accountable through elections just like their colleagues in the legislature.[72] However, judges who simply apply the law to public policy determinations are not "public policy" makers like elected representatives.[73] In fact, "it is precisely this independence rooted in professional attributes that makes the courts such a welcome place to send the political buck."[74] In other words, it is the rule of law at work in the federal court that separates judicial policymaking from traditional legislative policymaking.[75]

Perhaps the most popular argument against the federal system and its emphasis on judicial independence is the "countermajoritarian difficulty"—the idea that a vote of five of the nine unelected members of the Supreme Court can result in overturning federal and state legislation and public policies signed into law by elected representatives.[76] These detractors present the countermajoritarian difficulty as the most un-democratic part of our constitutionally created judicial

66. *Supra* Part III.B.2 (discussing non-partisan judicial elections).

67. *Supra* Part III.B.3 (discussing merit selection).

68. U.S. CONST. art. II, § 2, cl. 2 (stating that the President has the power to appoint, with Advice and Consent of the Senate, Justices of the Supreme Court and all other Officers of the United States).

69. Hall, *supra* note 36, at 60.

70. *Id.* at 69.

71. *Id.*

72. BONNEAU & HALL, *supra* note 62, at 11.

73. Hall, *supra* note 36, at 69–70.

74. *Id.* at 70.

75. *See generally* Geyh, *supra* note 31 (a judge following the rule of law not legislating the manner elected representatives enact law).

76. Hall, *supra* note 36, at 62.

system.[77] "How can a non-elective judiciary be justified in a democratic regime?"[78]

The answer is rather straightforward: there is no need for an elected judiciary because "the American system is not a *pure* democracy."[79] As explained by Kermit L. Hall,

> [[T]he American system] is a constitutional democracy forged on two competing principles: a commitment to government founded on the will of the people and a simultaneous commitment to *limit the excesses of popular will* through resort to fundamental law. This latter concept holds that there are fixed rights guaranteed to each individual . . . . The judiciary has emerged as the instrument to interpret that fundamental law and in theory the best hope for the rights of individuals and minorities. *To preserve the balance in the constitutional system, judges must be free of direct political influence.*[80]

Thus, the framework of America's constitutional democracy does not demand or mandate that every single judge be elected and re-elected.[81] Rather, in the federal system, judges are given the leeway and the independence to preserve the rights guaranteed to those individuals.[82] Electing these judges would dangerously shift what are constitutional guarantees and protections to what the popular will demands.[83] The federal system leaves ample room for federal judges to run their courtrooms without political influence in order to prevent majority will from overtaking the basic, fundamental rights of minorities.[84]

B. Judicial Selection in State Court

In contrast, modern state court judges are undoubtedly more accountable to the people than federal judges, and traditionally enjoy less judicial independence than their federal counterparts by virtue of the judicial selection process.[85] First, there are no state equivalents to the life-tenure provisions afforded to Article III judges by the U.S. Constitution; in fact, "[a]lmost all states have a fixed term of years for judges, and many also have a mandatory retirement age."[86] These

77. *Id.* at 62–63.

78. *Id.* at 63.

79. *Id.* (italics added).

80. *Id.* (italics added).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 60, 81.

85. James D. Miller, *State Disciplinary Proceedings and the Impartiality of Judges*, *in* STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 119, 119 (Roger Clegg & James D. Miller eds., 1996).

86. *Id.*

standards create a system of accountability that is unparalleled at the federal level.[87] Moreover, state judicial elections gained traction from the strong belief that judges are important political actors who should be deriving their power from the people like political players from other governmental institutions—making these judges even more accountable than their federal counterparts.[88]

Compared to federal courts, the number of cases that state courts resolve may explain the historic rise in judicial elections at the state level.[89] "Nearly all felony convictions—94%—occur in state courts, including 99% of rape cases and 98% of murder cases."[90] Over 100 million cases come before almost 30,000 state court judges each year.[91] Undoubtedly, state courts also play a crucial role in developing American law.[92] For example, modern state supreme courts play a significant role in developing areas of tort law, contract law, criminal procedure, property rights, and state constitutional rights.[93] Thus, because "[t]he great body of day-to-day justice has taken place and continues to take place in the state and not the federal courts," states may have felt obligated to ensure greater degrees of judicial accountability vis-à-vis elections.[94] Each wave of reform in the judicial selection process is discussed here in turn.[95]

1. The First Wave: Partisan Democratic Elections

Most states first replaced the nomination process with a partisan election—an election process where the candidates' political parties are designated on the ballot.[96] Voters often rely on a candidate's political party as a cue or meaningful basis when casting their vote.[97] Currently, 13 states use the partisan democratic election in electing state trial court judges.[98] Political scientists Chris Bonneau

87. *Id.*

88. *C.f. supra*, Part II (discussing the role of judges and that their adherence to the role of law is of the utmost importance); *see also* BONNEAU & HALL, *supra* note 62, at 5, 7 (contending that elected judges are essentially politicians).

89. KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 1 (2015), *available at* https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf (on file with *The University of the Pacific Law Review*); BANNON, *supra* note 46, at 1.

90. BERRY, *supra* note 89, at 1.

91. BANNON, *supra* note 46, at 1.

92. Hall, *supra* note 36, at 64.

93. *Id.*

94. *Id.*

95. *Infra* Part III.B.1.

96. BONNEAU & HALL, *supra* note 62, at 5, 7.

97. *Partisan vs. Nonpartisan Elections*, NAT'L LEAGUE CITIES, http://www.nlc.org/partisan-vs-nonpartisan-elections (last visited Dec. 30, 2016) (on file with *The University of the Pacific Law Review*).

98. *Methods of Judicial Selection: Selection of Judges*, NAT'L CTR. ST. CTS., http://www.judicialselection.com /judicial_selection/methods/selection_of_judges.cfm?state= (last visited Dec. 30, 2016) (on file with *The University of the Pacific Law Review*) (states using a partisan election system in selecting trial court judges: Alabama, Illinois, Indiana, Kansas, Louisiana, Missouri, New Mexico, New York, Ohio,

and Melinda Gann Hall believe "democratic politics is alive and well in the American states"[99] and there are "three primary reasons why judicial elections gained popularity."[100] First, people felt judges were invalidating laws enacted by legislatures and making political choices like their legislative counterparts.[101] Second, people felt that an elected judiciary was an opportunity to build its own separate constituency to ensure independence from the legislature.[102] Lastly, popular elections allowed people to remove "incompetent and arrogant judges" in place of more drastic and political forms of punishment for judicial misconduct or incompetence—such as impeachment.[103]

Proponents of pure democratic elections of judges argue that elections "facilitate self-government by empowering the people to hold accountable these important officials."[104] Another group of scholars believes judicial elections reaffirm the principle of popular sovereignty,[105] serve as an accountability mechanism,[106] act as a channel for dialogue between the public and the elected official,[107] and teach the importance of civic duty.[108]

Critics argue that judicial selection should not involve political parties like legislative elections, for fear that political parties want to control what is considered the third, neutral branch of government.[109] Secondly, critics are concerned with whether the electorate could meaningfully evaluate judicial candidates.[110] Because voters are not well-educated on the issues and the candidates, elections risk the "institutional quality and integrity" of an entire branch of government.[111] Nonetheless, partisan democratic elections are still used in judicial selection in several states to hold judges accountable before they take office.[112] These partisan elections give the public more frequent opportunities to

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Pennsylvania, Tennessee, Texas, and West Virginia).

99. BONNEAU & HALL, *supra* note 62, at 139.

100. *Id.* at 5.

101. *Id.*

102. *Id.* at 5, 7.

103. *Id.*

104. David Pozen, *Are Judicial Elections Democracy Enhancing*, *in* WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 248, 248 (Charles Gardner Geyh, ed., 2011).

105. *Id.* at 249–50.

106. *Id.* at 250–51.

107. *Id.* at 251.

108. *Id.* at 252.

109. BONNEAU & HALL, *supra* note 62, at 7; *Partisan vs. Nonpartisan Elections*, NAT'L LEAGUE CITIES, http://www.nlc.org/partisan-vs-nonpartisan-elections (on file with *The University of the Pacific Law Review*).

110. BONNEAU & HALL, *supra* note 62, at 8.

111. *Id.* at 261.

112. *See generally Methods of Judicial Selection: Selection of Judges*, *supra* note 98 (states using a partisan election system in selecting trial court judges: Alabama, Illinois, Indiana, Kansas, Louisiana, Missouri, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas, and West Virginia).

evaluate a judge's qualifications during election season compared to the politically driven nomination process for federal judges.[113]

2. The Second Wave: Non-Partisan Elections

In response to allegations that judicial partisan elections lead to political party corruption and control over the judicial bench, progressives began to remove candidates' party affiliations from the ballot around 1900.[114] States began adopting non-partisan judicial elections, which are competitive elections in the traditional sense except ballots do not include the partisan affiliations of the candidates.[115] The proponents of non-partisan elections believe that these elections meet the competing interests for electoral accountability and protection against partisanship.[116] These proponents also believe that political parties are irrelevant to the election of judges.[117]

However, the switch to non-partisan elections did not keep the same electoral interest that partisan elections had because non-partisan elections were "much less competitive and citizen participation plummeted," likely as a result of the inability to vote along party lines.[118] Today, 20 states—including California—use non-partisan elections as part of their scheme in reviewing judges, after their term expires for reelection.[119] In comparison with the federal nomination process, this non-partisan election process more directly ensures accountability with the public-at-large.[120]

3. The Third Wave: Merit Selection

The third wave of reform took the form of merit selection, originally proposed in 1913, and combined the best features of the appointment system

113. *Infra* Part IV.B.2; *see, e.g.*, Cristian Farlas, *Merrick Garland's Supreme Court Nomination Just Died With the Old Congress*, HUFFINGTON POST (Jan. 03, 2017), http://www.huffingtonpost.com/entry/merrick-garland-supreme-court-nomination-dead_us_586be633e4b0de3a08f9a8f2 (on file with *The University of the Pacific Law Review*) (Merrick Garland's nomination to the United States Supreme Court as an example of a political judicial appointment, and not subject to accountability by the people).

114. BONNEAU & HALL, *supra* note 62, at 8.

115. *Id.*

116. *Id.*

117. *Partisan vs. Nonpartisan Elections*, *supra* note 97.

118. BONNEAU & HALL, *supra* note 62, at 8.

119. *Methods of Judicial Selection: Selection of Judges*, *supra* note 98 (states that use a non-partisan election system in selecting trial court judges: Arkansas, California, Florida, Georgia, Idaho, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin).

120. *Compare* Part IV.A (discussing that there are no ways for the public at large to directly influence the nomination of a federal district court judge) *with* Part IV.B.2 (discussing that non-partisan elections demands the public at large to vote to secure a state court judge's position).

(independence) and the electoral system (accountability) of selecting judges.[121] Under merit selection, a judge is initially appointed by the state governor from a list of candidates submitted by a nominating commission, and the judge serves for a period of time before constituents vote for the candidate in a retention election.[122] If the judge fails to win retention, the process begins anew.[123]

Merit selection was designed to ensure a "more qualified bench and [to] remove political considerations from selecting judges."[124] Merit selection was intended to provide maximum independence because judges run unopposed during a retention election, and are no longer dependent on the governor and state legislatures for reappointment.[125] Today, 19 states use the merit selection process to ensure judges are qualified.[126]

In comparison, the President selects federal district court judges through nomination, without any input, vote, or influence from the public-at-large, while state court judges require the attention of the people by way of partisan, non-partisan, and merit selection processes.[127] Thus, all states—including California—tether their state judges to public accountability by requiring a judge to participate in a political process such as an election or retention election to keep their jobs.[128] These requirements alone make selection of state court judges more accountable to the public than federal court judges.[129]

V. DISCIPLINING & REMOVING JUDGES AS A METHOD OF JUDICIAL ACCOUNTABILITY

The most traditional method of accountability is the disciplining, and ultimate removal, of judges.[130] This Section compares the federal and state methods of disciplining and removing judges.[131] "[T]he current methods of removing judges in the fifty state constitutions reflect the continued diversity in

121. BONNEAU & HALL, *supra* note 62, at 8.

122. *Id.*

123. *Id.* at 9.

124. *Id.*

125. *Id.*

126. *See Methods of Judicial Selection: Selection of Judges*, *supra* note 98 (states that use a merit selection system in selecting trial court judges: Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, Rhode Island, Utah, Vermont and Wyoming).

127. *Compare* Part IV.A (discussing judicial selection of federal judges) *with* Part IV.B (discussing judicial selection of state court judges).

128. *Compare* Part IV.A (discussing that there are no ways for the public at large to directly influence the nomination of a federal district court judge) *with* Part IV.B.2 (discussing that non-partisan elections demands the public at large to vote to secure a state court judge's position).

129. *Compare* Part IV.A (discussing judicial selection of federal judges) *with* Part IV.B (discussing judicial selection of state court judges).

130. *Infra* Parts V.A and V.B.

131. *Infra* Parts V.A and V.B.

how each state balances judicial independence with judicial accountability."[132] Part A of this Section elaborates on impeachment—the only manner of removing a federal district court judge.[133] Part B of this Section discusses how states have developed various methods in disciplining and removing judges: the most popular methods are impeachment,[134] review by commissions of judicial conduct,[135] and recall.[136]

A. Removing a Judge in Federal Court

It is only possible to remove a federal judge is if he or she is impeached and convicted for "high crimes."[137] To successfully remove a federal judge, the House of Representatives must exercise its power to impeach,[138] and the United States Senate must exercise its power to convict based on the articles of impeachment.[139] Judicial impeachment is extremely rare in our nation's history.[140] Only one United States Supreme Court justice has ever been impeached—Associate Justice Samuel Chase for arbitrary and oppressive conduct during trials.[141] Moreover, only one judge from the United States Commerce Court has been impeached—Judge Robert W. Archbald for improper business relationships with litigants.[142] Judge Archbald was also the only Circuit Court of Appeals judge to be removed from office.[143]

Perhaps not so surprisingly, most judicial impeachments happens with federal district court judges; and of 13 impeachments of federal district court judges, eight federal district court judges have been successfully impeached and removed by the Senate.[144] The most recent impeachment and exercise of this

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132. Randy J. Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability*, 5 WIDENER L. SYMP. J. 117, 121 (2000).

133. *Infra* Part V.A.

134. *Infra* Part V.B.1.

135. *Infra* Part V.B.2.

136. *Infra* Part V.B.3.

137. U.S. CONST. art. II, § 4 (stating that the civil officers shall be removed from office on impeachment for conviction of treason, bribery, or other high crimes).

138. U.S. CONST. art. I, § 2, cl. 5.

139. U.S. CONST. art. I, § 3, cl. 6.

140. *See Impeachments of Federal Judges*, FED. JUD. CTR., https://www.fjc.gov/history/judges/impeachments-federal-judges (last visited Dec. 30, 2016) (on file with *The University of the Pacific Law Review*) (listing all the incidents of impeachment of a federal Article III judge).

141. *Id.*

142. *Id.*

143. *Id.* (Judge Robert W. Archbald sat on the United States Court of Appeals for the Third Circuit).

144. Jennifer Steinhauer, *Senate, For Just the 8th Time, Votes To Oust a Federal Judge*, N.Y. TIMES (Dec. 8, 2010), http://www.nytimes.com/2010/12/09/us/politics/09judge.html (on file with *The University of the Pacific Law Review*); *see also Impeachments of Federal Judges*, *supra* note 140 (naming all federal *district court* judges who have been impeached and its outcomes: Judge John Pickering of the District Court of New Hampshire (1804, convicted), Judge James H. Peck of the District Court of Missouri (1831, acquitted), Judge West H. Humphreys of the District Court for the Middle, Eastern, and Western Districts of Tennessee (1862,

method of judicial accountability in federal court is the impeachment and conviction of Judge G. Thomas Porteous, Jr. of the United States District Court for the Eastern District of Louisiana.[145] According to the House of Representatives, Judge Porteous exhibited a "pattern of conduct incompatible with the trust and confidence placed in him."[146] The House charged him with four articles "stemming from charges that he received cash and favors from lawyers who had dealings in his court, used a false name to elude creditors and intentionally mislead the Senate during his confirmation proceedings."[147] The Senate convicted him on all articles, and voted to disqualify him from ever holding federal office again.[148]

B. Removing a Judge in State Court

Compared to the federal system and its single system for accountability in its impeachment process, state court judges are held accountable and can be removed from office in several ways.[149] There are three popular categories in which state judges are held accountable at the state level: impeachment,[150] review by judicial commissions,[151] and recall.[152] All three procedures are available in California, and are discussed herein.[153]

1. Removal by Impeachment

Today, nearly all 50 states offer an impeachment process to remove a state trial court judge.[154] California is among 48 states that have adopted the federal

convicted), Judge Mark W. Delahay of the District of Kansas (1873, resigned), Judge Charles Swayne of the Northern District of Florida (1905, acquitted), Judge George W. English of the Eastern District of Illinois (1926, resigned), Judge Harold Louderback of the Northern District of California (1933, acquitted), Judge Halsted L. Ritter of the Southern District of Florida (1936, convicted), Judge Harry E. Claiborne of the District of Nevada (1986, convicted), Judge Alcee L. Hastings of the Southern District of Florida (1989, convicted), Judge Walter L. Nixon of the Southern District of Mississippi (1989, convicted), Judge Samuel B. Kent of the Southern District of Texas (2009, resigned), Judge G. Thomas Porteous, Jr. of the Eastern District of Louisiana (2010, convicted)).

145. Steinhauer, *supra* note 144.

146. *Id.*

147. *Id.*

148. *Id.*

149. *See Methods of Judicial Selection: Removal of Judges*, NAT'L CTR. ST. CTS., http://www.judicialselection.com/judicial_selection/methods/removal_of_ judges.cfm?state= (last visited Jan. 2, 2017) (on file with *The University of the Pacific Law Review*) (most categories can be divided into impeachment, judicial commissions, and recall processes).

150. *Infra* Part V.B.1.

151. *Infra* Part V.B.2.

152. *Infra* Part V.B.3; *see generally Methods of Judicial Selection: Removal of Judges*, *supra* note 18 (most categories can be divided into impeachment, judicial commissions, and recall processes).

153. *Infra* Parts V.B.1 to V.B.3; *Methods of Judicial Selection: Removal of Judges*, *supra* note 18.

154. *See generally Methods of Judicial Selection: Removal of Judges*, *supra* note 18 (states that use a

government's way of removing judicial officers.[155] Only two states do not allow for the impeachment process: Hawaii and Oregon.[156]

To illustrate, residents of Montana recently tried to start the impeachment of Judge John McKeon for not upholding "the responsibility of ensuring justice as he is required to in his elected position."[157] Like Judge Persky's and Judge Kelly's decisions to lessen sentences, Judge McKeon gave an allegedly lenient sentence, only 60 days in jail, to a man who incestuously raped his 12-year-old daughter.[158] The man served 43 days.[159] Judge McKeon apparently did not follow a statutorily mandated sentence for people who commit incest.[160] The Montana incest statute states that "if [a] victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense, the offender shall be punished by imprisonment in a state prison for a term of 100 years."[161] "The Court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed [] and the offender may not be eligible for parole."[162]

Montana follows an impeachment process similar to the impeachment processes for Article III judges in the federal judiciary.[163] In Judge McKeon's situation, there was mounting media pressure, and "Internet activism" led to a petition on Change.org of over 80,000 names to start impeachment

provide impeachment as a method of removing a state judge include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming).

155. *Id.*

156. *See id.* (explaining that Hawaii has a commission on judicial conduct which has "authority to investigate and conduct hearings concerning allegations of judicial misconduct or disability and to recommend to the supreme court that a judge be reprimanded, disciplined, retired, or removed," and explaining that Oregon judges can be removed in one of two ways: "on the recommendation of the commission on judicial fitness and disability, the supreme court may censure, suspend, retire, or remove a judge" and "judges are subject to recall election").

157. Rebecca Hersher, *Montana Judge Faces Call For Impeachment After Incest Sentencing*, NPR: TWO WAY (Oct. 20, 2016), http://www.npr.org/sections/thetwoway/2016/10/20/498676414/montana-judge-faces-call-for-impeachment-after-incest-sentencing (on file with *The University of the Pacific Law Review*).

158. *Compare* Stack, *Light Sentence*, *supra* note 13 *and* Kelly Puente, *Petition Moves Forward to Recall O.C. Judge M. Marc Kelly Over Sexual Assault Ruling*, ORANGE COUNTY REP. (Aug. 4, 2015), http://www.ocregister.com/articles/judge-676004-kelly-recall.html (on file with *The University of the Pacific Law Review*) *with* Hersher, *supra* note 157.

159. Hersher, *supra* note 157.

160. *Id.*

161. MONT. CODE ANN. § 45-5-507 (5)(a)(i) (West 2016).

162. *Id.* § 45-5-507 (5)(a)(iii).

163. *Compare* MONT. CONST. art. 5, § 13 (1), (3) (2016) (stating that judicial officers are subject to impeachment and impeachment shall be brought only by a two-thirds vote of the house) *with* U.S. CONST. art. II, § 4 (stating that the civil officers shall be removed from office on impeachment for conviction of treason, bribery, or other high crimes).

proceedings.[164] However, Judge McKeon had already announced his retirement a month before he issued the sentence, and will likely not have to go through the impeachment process.[165]

2. Removal by Judicial Commission on Judicial Conduct

Another popular method of removing judges is upon review by commissions investigating judicial misconduct.[166] Nearly all states, including California, have some sort of investigatory and disciplinary body to determine whether a judge committed judicial misconduct.[167] Only two states do not have any form of a commission designed to investigate complaints or to discipline judicial officers for judicial misconduct: Maine (which only allows for impeachment initiated by the Maine House of Representatives, or address by the governor to both houses of the state legislature) and West Virginia (which only allows for impeachment of judicial officers).[168]

These commissions and review boards play different roles in each state.[169] In most states, the commission on judicial conduct only has the power to recommend to the highest court of the state or a "court on the judiciary" that a state judge be removed from office.[170] Other states where a commission could directly remove a judge include California, Georgia, Illinois, Kentucky, Nevada, New York, and Utah.[171]

In California, the Commission on Judicial Performance ("Commission") is an independent state agency responsible for investigating complaints of judicial misconduct and judicial incapacity for disciplining judges.[172] Article VI, Section 18 of the California Constitution grants the Commission authority to conduct its

164. Rick Anderson, *Montana Judge, Facing Impeachment Threat for Lenient Rape Sentencing, Set to Retire Next Month*, L.A. TIMES (Oct. 21, 2016), http://www.latimes.com/nation/la-na-montana-judge-impeach-20161021-snap-story.html (on file with *The University of the Pacific Law Review*).

165. *Id.*

166. *See Methods of Judicial Selection: Removal of Judges*, *supra* note 18 (states that have commissions on judicial conduct include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming).

167. *Id.*

168. *Id.*

169. *Id.*

170. *See generally id.* (states that have commissions that may recommend the highest court for the state to remove a trial judge: Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming).

171. *Id.*

172. STATE OF CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, https://cjp.ca.gov/ (last visited Feb. 9, 2017) (on file with *The University of the Pacific Law Review*).

investigations.[173] The "mandate" of the Commission is to protect the public and to maintain public confidence in the integrity and independence of the judicial system.[174] In California, the "commission may impose sanctions ranging from confidential discipline to removal from office."[175]

The Commission has 11 members total, including a justice from the court of appeal, two judges of the superior courts appointed by the Supreme Court of California, and two attorneys appointed by the Governor of California.[176] Interestingly, six lay citizens are also appointed to the Commission—two appointed by the Senate Committee on Rules, two appointed by the Speaker of the Assembly, and two appointed by the Governor of California.[177] More than half of the Commission members are lay individuals without any legal knowledge.[178] The Commission's members represent a diverse group of individuals who ensure that judges are accountable to the rule of law.[179]

In December 2016, the Commission concluded that Judge Persky's sentence was "within the parameters set by law and therefore within the judge's discretion."[180] The panel stated, "there is not clear and convincing evidence of bias, abuse of authority, or other basis to conclude that Judge Persky engaged in judicial misconduct warranting discipline."[181] The recall effort led by Professor Michele Dauber fired back and stated the "recall is the only realistic way to remove Judge Persky from office" and the "petition for judicial discipline was not the correct venue to address [their] concerns" about an alleged "clear pattern of bias."[182] However, the Commission's impartial decision should not be disturbed because the impartial group of experts and laypersons have determined there was no "clear pattern of bias" to warrant sanctions or removal.[183]

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173. *Id.*

174. *Id.*

175. *Id.*

176. *Members & Meetings*, STATE OF CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, https://cjp.ca.gov/members_meetings/ (last visited Feb. 9, 2017) (on file with *The University of the Pacific Law Review*).

177. *Id.*

178. *Id.* (assuming the six "lay" people are not attorneys or hold a legal background or education).

179. *See generally* STATE OF CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, *supra* note 172 (implying that following the rule of law is not grounds for removal by stating that judges are removed for judicial misconduct and judicial incapacity).

180. Veronica Rocha, *Judicial Panel Clears California Judge Who Gave Lenient Sentence in Stanford Sexual Assault*, L.A. TIMES (Dec. 19, 2016), http://www.latimes.com/local/lanow/la-me-ln-judge-aaron-persky-no-judicial-misconduct -20161219-story.html (on file with *The University of the Pacific Law Review*).

181. *Id.*

182. *Statement: Recall Judge Persky Chair Re: Commission on Judicial Performance*, RECALL JUDGE AARON PERSKY (Dec. 19, 2016), http://www.recallaaronpersky.com/statement_recall_judge_persky_chair_re_commission_on_judicial_performance (on file with *The University of the Pacific Law Review*).

183. Rocha, *supra* note 180.

3. Removal by Recall

In the last, and certainly the least used method of removing judges, California, among eight other states, allows for the judicial recall of elected state court judges.[184] A recall is a special election to unseat an elected official—including judges—before his or her term expires.[185] Specifically, the California Constitution generally defines recall as "the power of the electors to remove an elective officer."[186]

California has an unsuccessful history of recalling judges.[187] Many of these elections are based on emotional outrage at the outcome of judicial decision-making.[188] Judge M. Marc Kelly faced such a situation in 2015 when Californians in Orange County petitioned to recall him for reducing the sentence of a convicted pedophile from a statutory 25-year sentence to 10 years.[189] Judge Nancy Wieben Stock of the Orange County Superior Court faced a recall effort after awarding O.J. Simpson full custody of his children after his acquittal in the highly publicized murder trial of his ex-wife.[190] One of the earlier recall efforts occurred after Judge Joyce A. Karlin of the Los Angeles Superior Court sentenced Korean storeowner Soon Ja Du to five years of probation and no imprisonment for killing an African American teenage girl that she suspected of shoplifting at the height of the 1992 Los Angeles riots.[191]

In another famous recall effort, California voters tried to recall Rose Bird, the former Chief Justice of the California Supreme Court.[192] Chief Justice Bird

184. *See Methods of Judicial Selection: Removal of Judges*, *supra* note 18 (Arizona, California, Colorado, Minnesota, Nevada, North Dakota, Oregon, and Wisconsin are the only states where judges are subject to recall elections).

185. *Initiative, Referendum and Recall*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx (last visited Sept. 20, 2016) (on file with *The University of the Pacific Law Review*).

186. CAL. CONST. art. 2, § 13.

187. *See* Hector Tobar, *Judge Who Gave Probation in '91 Killing Quits*, L.A. TIMES (Feb. 11, 1997), http://articles.latimes.com/1997-02-11/local/me-27514_1_court-judge (on file with *The University of the Pacific Law Review*); *Court Overturns Ruling Giving Simpson Custody of 2 Children*, N.Y. TIMES (Nov. 11, 1998), http://www.nytimes.com/1998/11/11/us/court-overturns-ruling-giving-simpson-custody-of-2-children.html (on file with *The University of the Pacific Law Review*).

188. *See, e.g.*, Tobar, *supra* note 187; Puente, *supra* note 158; Todd S. Purdum, *Rose Bird, Once California's Chief Justice, Is Dead at 63*, N.Y. TIMES (Dec. 6, 1999), http://www.nytimes.com/1999/12/06/us/rose-bird-once-california-s-chief-justice-is-dead-at-63.html (on file with *The University of the Pacific Law Review*).

189. Puente, *supra* note 158.

190. *Court Overturns Ruling Giving Simpson Custody of 2 Children*, N.Y. TIMES (Nov. 11, 1998), http://www.nytimes.com/1998/11/11/us/court-overturns-ruling-giving-simpson-custody-of-2-children.html (on file with *The University of the Pacific Law Review*).

191. Greg Krikorian, *Karlin Urges Voters to Reject Recall: Courts: In First Public Statement, Judge in Korean Grocer Case Says Her Removal Would Attack Constitution. Opponents Vow to Support Effort*, L.A. TIMES (Jan. 9, 1992), http://articles.latimes.com/1992-01-09/local/me-2292_1_recall-effort (on file with *The University of the Pacific Law Review*).

192. Purdum, *supra* note 188.

survived "repeated efforts" to recall her because she never upheld death sentences during her tenure.[193] In fact, she voted each time to vacate the sentences—a total of 61 times.[194] Chief Justice Bird, along with two other Associate Justices, was ultimately removed during a retention election, not a recall effort.[195] She was the first justice to fail to win a retention election in California history.[196]

VI. THE INESCAPABLE CONSEQUENCES OF "UNREGULATED" JUDICIAL RECALL IN CALIFORNIA

There are various methods of judicial accountability: election,[197] impeachment,[198] review and removal by commissions of judicial misconduct,[199] mandatory judicial opinion writing,[200] appellate courts,[201] and legislation.[202] However, judicial accountability cannot impede on judicial independence.[203] Supreme Court Justice Sonia Sotomayor noted that, if judges are succumbing to political pressures, the judicial system loses its integrity as an institution.[204]

Recall is a particularly dangerous political pressure that threatens the integrity of California courts because of the following explicit language in the California Constitution: "Recall of a state officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. *Sufficiency of reason is not reviewable*."[205] The constitutional language provides that, for a successful recall petition, the only requirement is a 200-word statement of the reason for the

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Supra* Part IV (discussing how judges in certain states are elected under one of three regimes).

198. *Supra* Part V.A (discussing the removal process of federal judges through impeachment).

199. *Supra* Part V.B (discssing the removal of state court judges through a commission of judicial misconduct).

200. *See generally* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING (1989) (discussing the importance of legal reasoning and its role in American courts for maintaining consistent precedent).

201. *See, e.g.*, CAL. PENAL CODE § 1237 (West 2016) (establishing the statutory right to an appeal criminal convictions).

202. *See generally id.* §§ 263.1 (enacted by 2016 Cal. Stat. Ch. 848), 1203.065 (amended by 2016 Cal. Stat. Ch. 863) (examples of legislation that the California Legislature enacted in response to the Brock Turner decision to ensure a minimum sentencing); Daniel Kreps, *California Governor Signs Law Enforcing Mandatory Prison for Sexual Assaults*, ROLLING STONE (Sept. 30, 2016), http://www.rollingstone.com/culture/news/California-passes-law-enforcing-mandatory-prison-for-sexual-assaultsw442950 (on file with *The University of the Pacific Law Review*).

203. *Supra* Part III (analyzing the definition and importance of judicial independence).

204. Woodward v. State, 123 So. 3d 989 (Ala. Crim. App. 2011), *cert. denied*, 134 S. Ct. 405, 408 (2013) (Sotomayor, J., dissenting).

205. CAL. CONST. art. 2, § 14(a) (emphasis added).

petition, and this reason is not reviewable.[206] So long as the petition garners enough signatures, it could succeed at removing *any* elected official—even a judge who follows the law appropriately—regardless of the stated reason for recall.[207]

When the reason for recalling a judge cannot be reviewed for substance, content, and legitimacy, the decision to remove a judge can be based on emotion and politics arising from a judicial decision that may be well within the boundaries of law.[208] For example, in the Soon Ja Du case, recall efforts were based on the heightened outrage stemming from racial disparities at the time.[209] In the Rose Bird example, people were outraged only at Chief Justice's anti-death penalty stance.[210] Because neither of these recall efforts focused on the law supporting the judicial decisions, state judges in California could begin to focus more on the political whims of the public whereas "federal judges never worry about Change.org petitions, or 'open letters' posted on Facebook, not because they are cold or unfeeling, but because their job is specifically designed to be immune to that kind of social pressure."[211] Including the Brock Turner example, these recall efforts have focused on the politics of the decision.[212] Thus, under the current language of the California Constitution, what a person may believe to be a moral or ethical wrong in coming to a final judicial decision, but not necessarily a legal wrong, can be a proper basis for successful recall.[213] However, when the judge's decisions are based on the rule of law, it should not be a proper basis for recalling the judge.[214]

In the Brock Turner scenario, proponents of the recall effort allege that Judge Persky's decision perpetuates white male and class privilege when compared to the harsher sentence he gave another defendant, Raul Ramirez, for an allegedly similar crime.[215] However, the recall effort to remove Judge Persky is not

206. *Id.*; CAL. ELEC. CODE § 10020 (West); *Procedure for Recalling State and Local Officials*, CAL. SECRETARY ST., http://www.sos.ca.gov/elections/recalls/procedure-recalling-state-and-local-officials/ (last visited Nov. 3, 2016) (on file with *The University of the Pacific Law Review*).

207. CAL. CONST. art. 2, § 14(a); *Procedure for Recalling State and Local Officials*, *supra* note 206.

208. CAL. CONST. art. 2, § 14(a).

209. Krikorian, *supra* note 191.

210. *See, e.g.*, Purdum, *supra* note 188 (basing the recall effort of Chief Justice Bird because she was classified as a "soft-on-crime" liberal, but not challenging on the legality of her decision making).

211. *See, e.g.*, Krikorian, *supra* note 191 (basing the recall effort on racial tensions immediately after the L.A. riots); Purdum, *supra* note 188 (basing the recall effort of Chief Justice Bird because she was classified as a "soft-on-crime" liberal, but not challenging on the legality of her decision making); Danny Cevallos, *Judge Persky's Sentence in Stanford Rape Case Unpopular But Legal*, CNN (June 11, 2016), http://www.cnn.com/2016/06/10/opinions/stanford-rape-case-cevallos/ (on file with *The University of the Pacific Law Review*) (all examples of attempted California judicial recalls).

212. RECALL JUDGE AARON PERSKY, http://www.recallaaronpersky.com/ (last visited Apr. 9, 2017) (on file with *The University of the Pacific*) (mentioning that the recall effort is based on allegations that Judge Aaron Persky does not understand sexual assault and violence against women).

213. CAL. CONST. art. 2, § 14(a).

214. *Supra* Part II (discussing the role of judges and the rule of law).

215. Stack, *Light Sentence*, *supra* note 13; Sam Levin, *Stanford Trial Judge Overseeing Much Harsher*

unopposed.[216] Opponents argue that Ramirez's case is starkly different than Turner's in several respects: age,[217] level of intoxication,[218] citizenship status,[219] bail,[220] and victim consent.[221] Attorneys, law professors, and former judges have opposed the recall and view recall as a serious threat to judicial independence.[222] The Santa Clara County District Attorney and public defenders have come together to oppose the recall.[223] Molly O'Neal, the Santa Clara County Public Defender, stated, "We need to be very careful we're not hanging judges out to dry based on one decision, especially because he is considered to be a fair and even-tempered judge."[224]

By not reviewing whether the reasons for recall in California are substantively sound, recall threatens lawful decisions in state courts by subjecting

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Sentence for Similar Assault Case, GUARDIAN (June 27, 2016), https://www.theguardian.com/us-news/2016/jun/27/stanford-sexual-assault-trial-judge-persky (on file with *The University of the Pacific Law Review*).

216. *See, e.g.*, *Debriefing and Defending the Brock Turner Sentence*, in Closing Arguments, TUMBLR (June 8, 2016), http://thesajidakhan.tumblr.com/post/145573169734/debriefing-and-defending-the-brock-turner-sentence (on file with *The University of the Pacific Law Review*) (one example of opposition to the recall of Judge Aaron Persky).

217. Jason Silverstein, *Brock Turner Judge Gives Harsher Sentence to an Immigrant*, DAILY NEWS (June 27, 2016, 10:05 AM), http://www.nydailynews.com/news/national/brock-turner-judge-harsher-sentence-immigrant-article-1.2689471 (on file with *The University of the Pacific Law Review*) (Turner was 20 years old at the time of the offense, and Ramirez was 32 years old at the time of the offense).

218. Tyler Kingkade, *Brock Turner Repeatedly Used Alcohol As An Excuse For The Sexual Assault He Committed*, HUFFINGTON POST (June 8, 2016), http://www.huffingtonpost.com/entry/brock-turner-drinking-party-culture_us_5758259b e4b0e39a28ac015c (on file with *The University of the Pacific Law Review*) (reporting that Turner was under the influence of alcohol during the time of the offense); Elena Kadvany, *Turner-trial Judge Criticized for Bias in Assault Case*, PALO ALTO ONLINE (July 8, 2016), http://www.paloaltoonline.com/print/story/2016/07/08/turner-trial-judge-criticized-for-bias-in-assault-case (on file with *The University of the Pacific Law Review*) (stating differences between the Turner and Ramirez case was the former was under the influence).

219. Silverstein, *supra* note 217 (explaining that Turner is a citizen of the United States; Ramirez is an immigrant from El Salvador).

220. *Id.* (explaining that Turner's bail was set at $150,000; Ramirez's bail was set at $200,000).

221. *Compare* Kadvany, *supra* note 218 (reporting that Ramirez sexually assaulted his pregnant roommate by blocking the door and fingering the victim until she cried), *with* Elena Kadvany, *Brock Turner: Woman Gave Him Verbal Consent*, PALO ALTO ONLINE (Mar. 23, 2016), http://www.paloaltoonline.com/news/2016/03/23/brock-turner-alleged-victim-gave-him-verbal-consent (on file with *The University of the Pacific Law Review*) (reporting that the victim verbally and willingly consented to the sexual activity that she and Turner engaged in).

222. Elena Kadvany, *Brock Turner Judge Launches Anti-Recall Campaign*, MOUNTAIN VIEW VOICE (Aug. 31, 2016), http://www.mv-voice.com/news/2016/08/31/brock-turner-judge-launches-anti-recall-campaign (on file with *The University of the Pacific Law Review*); Tracey Kaplan, *Brock Turner: Leading Law School Professors Issue Letter Opposing Judge's* Recall, MERCURY NEWS (July 27, 2016), http://www.mercurynews.com/2016/07/27/brock-turner-leading-law-school-professors-issue-letter-opposing-judges-recall/ (on file with *The University of the Pacific Law Review*); Acjpdebug, *Stanford Law School Graduates Submit Letter to Reconsider Recall Effort to Judge Persky*, ACJUSTICEPROJECT.ORG (June 22, 2016), https://acjusticeproject.org/2016/06/22/stanford-law-school-graduates-submit-letter-to-reconsider-recall-effort-of-judge-persky/ (on file with *The University of the Pacific Law Review*).

223. Liam Stack, *Judge Aaron Persky Under Fire*, *supra* note 15.

224. *Id.*

the judicial officer not only to review by courts of appeal, but also by the public at large—a group comprised of people that have no legal education or experience in making sure laws are properly followed and applied.[225] When the "sufficiency of reason" for recall is not reviewable, the recall is "unregulated" because *any* reason a person may have for removing a California trial judge is a viable reason if there are sufficient signatures for a recall election.[226] It becomes a pure numbers game based on signatures.[227]

Research shows that California's judicial recall is harmful, and questions whether recall is even necessary to ensure judicial accountability.[228] Judicial elections lead to an increase in harsher sentencing and punishment in criminal cases, and in spending by special interest groups.[229] Part A discusses how the threat of recall increases harsher sentencing.[230] Part B examines how recall also increases spending by special interest groups.[231] Part C analyzes how the public should not wield the power to remove a judge because of the likelihood for its future misuse.[232] Ultimately, California's "unregulated" recall is unnecessary for judicial accountability.[233]

A. Judicial Recall Leads to Harsher Sentencing

Unregulated judicial recall, like judicial elections, inevitably leads to unwarranted harsher sentences due to political pressures.[234] Studies show that more punitive sentences against criminal defendants are given near election time because death penalty decisions promote a "tough on crime" campaign, which in turn helps the judge get reelected or retained on the bench.[235] No judge in recent memory has run on a "soft on crime" campaign because "soft on crime" campaigns have been used to attack a judge's platform during election.[236]

When judges are susceptible to unregulated recalls, like in California, lawful sentences and criminal rulings are suddenly "reviewable" by the people

225. CAL. CONST. art. 2, § 14(a), (b).

226. CAL. CONST. art. 2, § 14(a).

227. CAL. CONST. art. 2, § 14(b).

228. *See generally* Zachary J. Siegel, *Recall Me Maybe? The Corrosive Effect of Recall Elections on State Legislative Politics*, 86 U. COLO. L. REV. 307 (2015) (on file with *The University of the Pacific Law Review*) (discussing the recall's corrosive effects given the political nature involved and calling attention to the "devastating results if the [recall] tactic took hold in another branch of government: the judiciary").

229. *Infra* Parts VI.A–VI.C.

230. *Infra* Part VI.A.

231. *Infra* Part VI.B.

232. *Infra* Part VI.C.

233. *Infra* Part VII.

234. *See generally* BERRY, *supra* note 89, at 1 (similar to pressures from an election, a recall is a similar political pressure that will also likely increase harsher sentencing).

235. *Id.* at 3–6.

236. *Id.*

whenever the decision comes out to see whether the judge was actually "tough on crime."[237] Thus, judges become more cognizant about how people outside of the courtroom might react.[238] The constituency is the proverbial "political crocodile" creeping into the judge's bathtub.[239] This crocodile is comprised of constituent emotion, anger, and frustration, and these emotions impact sentencing especially during judicial elections or recalls.[240] The logic is simple: people want to be liked, the desire to be liked affects behavior, and judges are people.[241] Judges undoubtedly seek approval from their public audiences when their own position is at stake.[242] When these public audiences become intertwined and influential on how judges sentence criminal defendants, it is mob justice by majority will.[243] These decisions should be based on the rule of law.[244]

Mob justice not only affects the particular judge who is under the public microscope, but the judges across the state and country.[245] What judges should be concerned with is the lawfulness of their decision, not the polarizing reactions the decision may cause.[246] Studies have shown that judges increase the length of their sentences when judicial elections approach (i.e. when the judge's own job security is at stake).[247] In one of these studies, it was shown that judges impose death sentences more often in election years, even after a jury sentenced the criminal defendants to life imprisonment.[248] In comparing the federal and state judiciaries, one scholar noted, "*If judges couldn't care less about retaining their office, the threat of future electoral sanctions would be empty*."[249]

Since the population is generally riled up at sentences it perceives as "too lenient," judges concerned about their reelection or retention at the state court level will likely hand down harsher sentences, based on what the public wants to see in a decision.[250] When there are recall pressures—on top of these judicial elections—that threaten the judge halfway through their term, judges will consider the "popularity" of sentences before they impose them more often and

237. *Id.*

238. Cevallos, *supra* note 211.

239. BAUM, *supra* note 1, at 61.

240. *Id.*

241. *Id.* at 25.

242. *Id.* at 43.

243. Franklin, *supra* note 28, at 151; BERRY, *supra* note 89, at 13.

244. *Supra* Part II.

245. Franklin, *supra* note 28, at 151; BERRY, *supra* note 89, at 8.

246. BERRY, *supra* note 89, at 13.; BANNON, *supra* note 46, at 6.

247. BERRY, *supra* note 89, at 9.

248. EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 5 (2011), *available at* http://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf (on file with *The University of the Pacific Law Review*).

249. Franklin, *supra* note 28, at 151 (emphasis added).

250. BERRY, *supra* note 89, at 7–8.

earlier within their term of office.[251] This skews the criminal justice system by inviting public opinion into the decision-making of what is supposed be done by an *impartial* and apolitical judge.[252]

B. Judicial Recall Politicizes Campaigns with Special Interest Groups

Over the past few decades, judicial elections have become "nastier, noisier, and costlier."[253] Judicial elections look similar to the "rough and tumble of political campaigns—from attack ads, to super PACs, to million-dollar elections."[254] In *Caperton v. A.T. Massey Coal Co.*, the United States Supreme Court determined that the surge of money in elections dilutes judicial impartiality.[255] Special interests have increased their attention and donations toward judicial elections.[256] Judges in state courts that use electoral processes to secure their position on the bench "face pressure to decide cases in a way that will please donors and avoid politicized attacks, rather than based on their understanding of the facts and the law."[257] When money is poured into judicial elections, "wealthy interests are able to shape the ideological direction of the courts by spending large amounts of money on judicial candidates who share their worldview."[258] As Paul Pfiefer, an Ohio Supreme Court justice, commented, "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 be buying a vote."[259] Deep-pocketed interest groups come to shape and influence the composition of courts whenever they can.[260] Election spending has soared since the United States Supreme Court decided *Citizens United v.*

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251. *Id.* at 7–8.

252. *Id.* at 7–8.

253. BANNON, *supra* note 46, at 6.

254. *Id.* at 6.

255. 556 U.S. 868, 884 (2009) (citing to Withrow v. Larkin, 421 U.S. 35, 47 (1975)); *see also* Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Capterton, 123 HARV. L. REV. 80 (2009) (discussing the implications of Caperton v. A.T. Massey Coal Co.) (on file with *The University of the Pacific Law Review*).

256. BANNON, *supra* note 46, at 6; *see also* Geyh, *supra* note 31, at 49–50 ("interest groups have called attention to one or two decisions as proof that a particular judge was soft on crime. In Illinois, a judge faced a fierce retention battle because he was allegedly not soft enough. In California, the issue was abortion; in Georgia, homosexual rights and family values. In Idaho, it was a water rights decision. In Ohio, it was school funding, and then tort reform, which has likewise been a pivotal issue in Alabama, Michigan, Pennsylvania and Texas.")

257. BANNON, *supra* note 46, at 6.

258. *Id.*

259. Maggie Clark, *Do Campaign Donations in Judicial Races Influence Court Decisions?*, PEW CHARITABLE TR. (June 11, 2013), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/06/11/do-campaign-donations-in-judicial-races-influence-court-decisions (on file with *The University of the Pacific Law Review*).

260. BANNON, *supra* note 46, at 6, 8.

Federal Elections Commission, which held that restrictions on independent spending by corporations and unions during elections are unconstitutional.[261]

When recall is an additional electoral process to judicial election, money can play an even larger role in influencing outcomes.[262] Recalls are "expensive and labor intensive."[263] For example, when Wisconsin voters attempted to recall Governor Scott Walker, it cost nearly $81 million.[264] With judicial recall, special interest groups further politicize the judiciary by investing more money in ensuring that their political views are the ones shared by judges and in making sure the judges that they do not like are removed from the bench, whenever the special interest groups want and prior to the end of the judge's elected term.[265] "There is a significant relationship between interest group donations and judicial decisions."[266]

The increase in corporate treasury spending, when coupled with the availability of a political recall process, could lead to unrestricted money going into an attack on judges.[267] Thus, when a judicial decision angers constituents, money should not be used to buy justice by rotating judges out for more favorable judges under an unregulated recall process.[268] "Justice requires that judges put aside their political preferences and loyalties when deciding cases, and rule based on their understanding of the law and the facts at issue."[269] The detrimental effect of how special interest groups can spend money on not only selecting judges, but also the removal of state judges whenever the public disagrees with an opinion, must be stopped to maintain judicial integrity of the judiciary.[270]

C. Unregulated Recall Will Lead To Future Misuse of Recall

"Should an angry group be able to throw out a sitting judge on the basis of one unpopular verdict?"[271] That would boast a "mob justice" mantra.[272] Although

261. *See generally* 558 U.S. 310 (2010) (upholding constitutionality of corporate funding of elections).

262. BANNON, *supra* note 46, at 8–9.

263. Melissa Batchelor Warnke, *The Stanford Rape Case Judge Messed Up. But Does It Make Sense to Recall Him?*, L.A. TIMES (July 1, 2016), http://www.latimes.com/opinion/opinion-la/la-ol-stanford-rape-dauber-turner-judge-persky-20160701-snap-story.html (on file with *The University of the Pacific Law Review*).

264. *Recall Race for Governor Costs $81 Million*, WIS. DEMOCRACY CAMPAIGN (July 25, 2012), http://www.wisdc.org/pr072512.php (on file with *The University of the Pacific Law Review*).

265. *See* BANNON, *supra* note 46, at 8–9 (inferring that the consequences of money in judicial elections will have the same deleterious effects as money in judicial recall elections).

266. Clark, *supra* note 259.

267. Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310 (2010).

268. BANNON, *supra* note 46, at 9.

269. *Id.* at 10.

270. *Id.* at 6.

271. Joseph R. Cerrell & Hal Dash, *Issues in Judicial Election Campaigns*, *in* STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 51 (Roger Clegg & James D. Miller eds., 1996).

272. Franklin, *supra* note 28, at 151.

elections and recalls reflect the American mantra—that "all citizens have the right to question their elected officials and challenge them openly,"[273] recalling a judge is different from recalling an elected official in the political branch.[274] A judge represents enforcement of the law.[275] Thus, judges are not representative of any specific constituent.[276] If judges are successfully recalled for reasons based on emotion and anger, reasons that have nothing to do with the lawfulness of the judge's decision, the public may develop the perception that judicial recall is an appropriate and effective solution to every single unpopular decision or criminal sentence.[277]

Like impeachment, review boards, and commissions that are already in place, the recall process should be based on concrete reasons of actual judicial misconduct or misfeasance.[278] When there is a successful recall based only on emotion and political differences, recall is understood as an easier way to get a judge out of office, simply for not liking the judge in a convenient manner.[279]

Not all electoral processes such as recall help reinforce judicial accountability or help facilitate "self-government by empowering the people to hold accountable these important officials."[280] The "Axiom of 80" provides that while roughly 80% of the public prefers to elect judges, roughly 80% of the public do not vote in judicial elections, cannot identify judicial candidates, and believe that judicial decisions are influenced by campaign contributions.[281] Thus, these electoral processes—elections and recall—will likely continue to persist despite the public not voting, not knowing the candidates, and believing that judges make rulings based on their campaign contributions.[282]

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273. Cerrell & Dash, *supra* note 271.

274. Siegel, *supra* note 228, at 339.

275. Geyh, *supra* note 31, at 65 ("[impartiality] is an instrumental value designed to preserve a different end altogether: the rule of law . . . to resolve disputes between parties on a case-by-case basis according to the applicable facts and law.")

276. *Id.* ("[impartiality] is an instrumental value designed to preserve a different end altogether: the rule of law . . . to resolve disputes between parties on a case-by-case basis according to the applicable facts and law.")

277. Katherine Seligman, *Recalling Judges in California May Become Easier, But Is That Better?*, L.A. DAILY NEWS (Aug. 27, 2016), http://www.dailynews.com/government-and-politics/20160827/recalling-judges-in-california-may-become-easier-but-is-that-better (on file with *The University of the Pacific Law Review*); *see also* Jeannie Suk Gersen, *The Unintended Consequences of the Stanford Rape-Case Trial*, NEW YORKER (June 17, 2016), http://www.newyorker.com/news/news-desk/the-unintended-consequences-of-the-stanford-rape-case-recall (on file with *The University of the Pacific Law Review*) (alluding to the risk of new and harsh legislative measures, and the likelihood recall will be used to "fulfill our apparent appetite for outrage and punishment").

278. Geyh, *supra* note 31, at 65 (suggesting that the obligation of a judge is to abide by the rule of law); *see also* Rylaarsdam, *supra* note 30, at 1655 (suggesting that judges should be removed if the judges performed incompetently, but should not be scapegoats when the law as applied produces a result that is disliked).

279. Seligman, *supra* note 277.

280. Pozen, *supra* note 104, at 248.

281. Geyh, *supra* note 31, at 52.

282. *Id.*

Constituents understand very little when it comes to elections.[283] "If we consider the realities of public information about judges, it is likely that most ballots cast in judicial elections are based only on the most fragmentary knowledge."[284] When it comes to evaluating a judge on a recall ballot, the electorate is missing information—essential information about whether the judge was acting appropriately.[285] "Voters seldom have well-conceptualized positions on the issues; they often suffer from an acute inattentiveness to and ignorance of public affairs, including the candidates on the ballot."[286]

Only a well-informed electorate—an electorate that that has an understanding of how the law is applied, how the rule of law operates, and when judicial decisions are within the law—should have the power to remove a judge.[287] Since it is extremely difficult to educate everyone as to how judicial decisions are made, recalling a judge when the reason is not reviewable places a judge who makes a decision within the law at the mercy of an ill-advised and uninformed electorate.[288]

As the late Justice Antonin Scalia warned, "[B]e slow to judge judges unless you know what they are working with."[289] With recall, the citizens are usurping the role of the judiciary as they review decisions as if they were decision makers without knowledge of the facts and law governing the original decision.[290] Doing so would give voters a chance to use unregulated recall more frequently and dangerously, which significantly threatens the rule of law and judicial independence in California.[291] Thus, when considering how California has existing methods of judicial accountability—judicial elections, the Commission on Judicial Performance, and impeachment processes—recall is unnecessary for judicial accountability, and thus should end as an option for judicial accountability.[292]

VII. CONCLUSION

California's "unregulated" judicial recall as an additional method of judicial accountability crosses the threshold of what is necessary to ensure judicial

283. Franklin, *supra* note 28, at 151.

284. *Id.*

285. *Id.*; Hall, *supra* note 36, at 63.

286. Hall, *supra* note 36, at 63.

287. *Id.*

288. *Id.*

289. C-SPAN, *Justice Scalia on Judges*, YOUTUBE (Oct. 6, 2009), https://www.youtube.com/watch?v=Tme4DEwGL3U (on file with *The University of the Pacific Law Review*).

290. *Supra* Part II (discussing that the design of judiciary as an institution upholding the rule of law for the protection of the states' citizens); *see also supra* Part VI.C (discussing how the people are not equipped to determine if a judge is following the rule of law).

291. Seligman, *supra* note 277.

292. *Supra* Part VI.

accountability in the state's justice system.[293] California ensures accountability in a direct way by allowing citizens to vote for their judges.[294] California also ensures judicial accountability through a myriad of other manners: an impeachment process and review by the California Commission on Judicial Conduct.[295] More traditional ways of accountability include the statutory rights to appeal and the important role of judicial opinion writing in American jurisprudence.[296] Citizens can also seek to hold judges accountable by pushing for more laws judges must follow through the traditional democratic process.[297]

Unregulated recall—when the reason for recall is non-reviewable for substance—invites inevitable, adverse consequences.[298] Recall leads to a dangerous increase in harsher sentences in criminal cases,[299] an increase in the political spending by public interest groups,[300] and the risk that uneducated citizens will misuse the judicial recall process.[301] An unregulated recall process, where citizens can base their reasons for judicial recall on anything, is not only excessive for the state's goal of judicial accountability, but is the proverbial fat, menacing crocodile that needs to be dragged out of the judge's bathtub in order to preserve judicial independence in California.[302]

293. *Supra* Part VI.

294. *Supra* Part IV.

295. *Supra* Part V.

296. *See generally* ALDISERT, *supra* note 200 (discussing the importance of legal reasoning and its role in American courts for maintaining consistent precedent); CAL. PENAL CODE § 1237 (West 2016) (establishing the statutory right to appeal criminal convictions in California).

297. *See, e.g.*, Kendall Fisher, *No Time Like the Present, Except the Past Fifty Years: Why California Should Finally Adopt the Model Penal Code Sentencing Provisions*, 49 U. PAC. L. REV. 661 (2018) (an example of how legislating and adopting sentencing provisions could have had a different outcome in the Brock Turner case).

298. *Supra* Part VI.

299. *Supra* Part VI.A.

300. *Supra* Part VI.B.

301. *Supra* Part VI.C.

302. *See generally* Gerald F. Uelmen, *Crocodiles in the Bathtub, Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1996) (suggesting that political pressures in the form of a crocodile persists with the presence of electoral processes involving judges).