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### WHAT HAPPENED IN IOWA?

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*Reply to: Nicole Mansker & Neal Devins, Do Judicial Elections Facilitate Popular Constitutionalism; Can They?, 111 Colum. L. Rev. Sidebar 27 (2011).*

November 2, 2010 is the latest milestone in the evolution of state judicial elections from sleepy, sterile affairs into meaningful political contests. Following an aggressive ouster campaign, voters in Iowa removed three supreme court justices, including the chief justice, who had joined an opinion finding a right to same-sex marriage under the state constitution.<sup>1</sup> Supporters of the campaign rallied around the mantra, “It’s we the people, not we the courts.”<sup>2</sup> Voter turnout surged to unprecedented levels;<sup>3</sup> the national media riveted attention on the event. No sitting Iowa justice had ever lost a retention election before.<sup>4</sup>

Although unusually dramatic, this episode is continuous with what has transpired in other recent high court races. In fact, it bears striking parallels to the 1986 California Supreme Court race that helped launch the modern era of judicial elections. Then as now, a well-financed attack on one set of liberal

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1. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

2. A.G. Sulzberger, In Iowa, Voters Oust Judges over Marriage Issue, *N.Y. Times*, Nov. 3, 2010, at <http://www.nytimes.com/2010/11/03/us/politics/03judges.html> (on file with the *Columbia Law Review*) (quoting signs at election night party); see also *id.* (quoting statement by leader of ouster campaign that result “will send a message across the country that the power resides with the people”).

3. See Mark Curriden, Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System, *A.B.A. J.*, Jan. 2011, at 56, 57 (reporting turnout rose more than twenty percentage points above typical rates); Jason Clayworth, Midterm Vote Saw Record Turnout, *Des Moines Reg.*, Nov. 30, 2010, at B1 (reporting elections drew “the largest midterm . . . turnout in Iowa history”).

4. A.G. Sulzberger, Voters Moving to Oust Judges over Decisions, *N.Y. Times*, Sept. 25, 2010, at A1.

decisions (overturning death sentences) led retention election voters to unseat three justices, including the chief justice, for the first time in the state's history.<sup>5</sup>

### I. THE IOWA ELECTIONS AS POPULAR CONSTITUTIONALISM

The Iowa results, which came in after my article *Judicial Elections as Popular Constitutionalism* went to press, would seem to confirm the article's claim that "judicial elections have the capacity to serve . . . as highly consequential vehicles of popular constitutionalism."<sup>6</sup> The ouster vote represented a symbolic affirmation of popular sovereignty,<sup>7</sup> generated public accountability,<sup>8</sup> and fostered extensive legal dialogue.<sup>9</sup> Through the election mechanism, ordinary citizens joined together to engage a contested constitutional question and to assert their primacy over judges in the elaboration of constitutional meaning—"we the people, not we the courts." Whether Iowans learned anything in the process about themselves or their constitution,<sup>10</sup> and whether their intervention will ultimately lead to a change in the governing law, remains to be seen.

Regardless of one's views on how judges ought to be selected or how constitutional controversies ought to be resolved, it remains possible to decry the outcome in Iowa. November 2 was a bitter day for those who saw the state supreme court's ruling as a triumph for civil rights and progressive constitutional change. But it is important to appreciate that the fact that three justices got thrown out for the way they decided a value-laden case is not, in itself, evidence of an institutional breakdown. It is evidence of a healthy electoral system.<sup>11</sup> Crudely put, if you are appalled by the *manner* in which Iowans registered their dissent, then you are appalled by the logic of judicial elections, and you probably don't much like popular constitutionalism either.

In their engaging response to my article, Nicole Mansker and Neal Devins question whether judicial elections really do, and ever can, facilitate popular

5. David E. Pozen, *The Irony of Judicial Elections*, 108 *Colum. L. Rev.* 265, 287 & n.99 (2008) [hereinafter Pozen, *Irony of Elections*]. Importantly, though, whereas the California justices were accused of consciously and chronically disregarding state law, no such charge was leveled against their Midwestern counterparts.

6. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 *Colum. L. Rev.* 2047, 2052 (2010) [hereinafter Pozen, *Popular Constitutionalism*]; see also *id.* at 2053–64 (explaining theory of popular constitutionalism).

7. See *id.* at 2068–70 (discussing judicial elections' potential to serve as "critical moments for expressing the people's active, ongoing sovereignty" (quoting Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 197 (2004) [hereinafter Kramer, *The People Themselves*])).

8. See *id.* at 2070–71 (discussing judicial elections' potential to serve as "accountability mechanisms").

9. See *id.* at 2073–74 (discussing judicial elections' potential to stimulate constitutional dialogue).

10. See *id.* at 2074–76 (discussing judicial elections' potential to serve as "teaching moments").

11. See Pozen, *Irony of Elections*, *supra* note 5, at 296–300, 310–13. Healthy, that is, according to basic precepts of electoral theory. I do not mean to claim that the Iowa system is, all things considered, a good system, or that it worked in the way its framers intended.

constitutionalism.<sup>12</sup> “The root problem,” they argue, is lack of “voter interest in [and knowledge about] either the state or federal constitutions”;<sup>13</sup> on account of these deficits, judicial elections will seldom achieve significant levels of constitutional dialogue and will instead tend to center on nonconstitutional issues. In these arguments, Mansker and Devins build on their valuable previous work on the ways in which state courts respond to public opinion<sup>14</sup> and on the difficulties posed by low-information voters.<sup>15</sup> Professor Devins is a leading proponent of the view that state courts have the ability to incorporate popular sentiment into their decisionmaking coherently and efficaciously, and a leading critic of the view that popular constitutionalism, in the form envisioned by scholars such as Larry Kramer and Mark Tushnet, is either viable or desirable.

These arguments largely complement my own. Although I do not believe that current levels of public ignorance and apathy are quite as ruinous as Mansker and Devins suggest, I agree that they pose a major impediment to any plan to realize popular constitutionalism.<sup>16</sup> Mansker and Devins’s admonition that constitutional issues often have low salience in judicial races echoes part of my overinclusiveness critique.<sup>17</sup> Their suggestion that elected judges may debilitate civic debate and ossify legal doctrine by hiding from contentious issues aligns with my discussion of the dynamics of backlash.<sup>18</sup> Both of our pieces take pains to emphasize that “the different natures of state and federal constitutions must be acknowledged in any state-focused theory of popular constitutionalism,”<sup>19</sup> and that “other state features outside of judicial elections,” such as initiatives and referenda, appear “better suited to advance the popular constitutionalists’ goals.”<sup>20</sup> And we are joined in our concern that, to an undue degree, “what competitive judicial elections do is politicize the court[s].”<sup>21</sup>

Yet seemingly unlike Mansker and Devins, I would not write off judicial

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12. Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 *Colum. L. Rev. Sidebar* 27 (2011), [http://columbialawreview.org/assets/sidebar/volume/111/27\\_Mansker.pdf](http://columbialawreview.org/assets/sidebar/volume/111/27_Mansker.pdf).

13. *Id.* at 37.

14. See generally Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 *Stan. L. Rev.* 1629 (2010); Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 *U. Pa. J. Const. L.* 455 (2010).

15. See generally Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 *Drake L. Rev.* 971 (2007); Neal Devins, *The D’oh! of Popular Constitutionalism*, 105 *Mich. L. Rev.* 1333 (2007) (reviewing Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* (2006)) [hereinafter Devins, *Popular Constitutionalism*].

16. See Pozen, *Popular Constitutionalism*, *supra* note 6, at 2093–99.

17. See *id.* at 2104–08.

18. See *id.* at 2128–33.

19. Mansker & Devins, *supra* note 12, at 31; see Pozen, *Popular Constitutionalism*, *supra* note 6, at 2088–93.

20. Mansker & Devins, *supra* note 12, at 37; see Pozen, *Popular Constitutionalism*, *supra* note 6, at 2088–93, 2110–12, 2119–23.

21. Mansker & Devins, *supra* note 12, at 36.

elections as potential outlets for popular constitutionalism.<sup>22</sup> Indeed, it is that very same politicization of the courts that underlines the possibility. The observation that many of these elections have “focus[ed] on single issues,”<sup>23</sup> such as the constitutional status of same-sex marriage, is not an indictment of their capacity to play this cultural and functional role, but rather a testament thereto.

My article explored a variety of reasons why judicial elections are liable to be compromised (as well as unattractive) vehicles of popular constitutionalism. The article also explained, though, how under the right conditions they may be able to get the job done. While advocates of “popular constitutionalism” have not defined the concept with precision, it would take a stringent and particular understanding for the Iowa elections—with their record-breaking turnout, historic removal votes, and intense public agitation over a burning equal protection question—to be left out. No one ever said popular constitutionalism would be pretty.

## II. CROSS-BORDER (AND INTERNAL) COMPLICATIONS

Except when one looks closely, the example of Iowa turns out to be a little more complicated, for a reason that Mansker and Devins identify in passing: “[O]n constitutionally salient issues like same-sex marriage, out-of-state interest groups often play a defining role in financing negative advertising and otherwise seek to shape judicial elections.”<sup>24</sup> We now know that out-of-

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22. It appears we may also part company on the question whether contested elections are liable to undermine the legitimacy of state supreme courts—or at least, on how best to frame this inquiry. Following political scientist James Gibson, Mansker and Devins suggest that “judicial elections might legitimate state supreme court decisionmaking” by attracting the support of voters. *Id.* at 32 n.23. This sociological understanding of legitimacy looks to the beliefs that members of the public hold, and scholars like Gibson use polls and surveys to test it. See, e.g., James L. Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 64 *Pol. Res. Q.* (forthcoming 2011) (on file with the *Columbia Law Review*). In my own scholarship, I have been more interested in testing the work of the courts against normative conceptions of legitimacy that do not directly depend on public opinion, which has long favored judicial elections at the state level, reflects widespread ignorance about what judges do, is heavily susceptible to priming effects, and may have a built-in majoritarian bias.

23. Mansker & Devins, *supra* note 12, at 36. The observation that judicial elections have also focused on “irrelevant personal characteristics,” *id.*, is, however, a large problem for any popular constitutionalist account or defense thereof. See Pozen, *Popular Constitutionalism*, *supra* note 6, at 2104–08, 2111.

24. Mansker & Devins, *supra* note 12, at 35–36. One might also question whether the Iowa process was sufficiently focused, deliberative, and informed; perhaps many voters registered their views on same-sex marriage generally rather than on the justices’ ruling *per se*. In his excellent overview of the elections, Todd Pettys contends that “[w]hat makes the Iowa experience so problematic is that, no matter what one’s political preferences might be on the issue of same-sex marriage, one who reads the [Iowa Supreme Court’s] *Varnum* opinion will find that the court’s reasoning fell well within the parameters of established methods of constitutional analysis.” Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 *Kan. L. Rev.* (forthcoming 2011) (manuscript at 3) (on file with the *Columbia Law Review*); see also *id.* (manuscript at 15) (emphasizing “visceral punch” of anti-retention advertisements, as compared to “more substantive and high-minded”—and therefore less effective—messages of pro-retention groups); Tyler Buller, Note, *Framing the Debate: Understanding Iowa’s 2010 Judicial Retention Election Through a Content Analysis of Letters to*

state groups spent more money on the Iowa elections than did in-state groups.<sup>25</sup> A similar financial dynamic characterized California's Proposition 8 campaign,<sup>26</sup> which overturned the state supreme court and deconstitutionalized the right to same-sex marriage. These outcomes highlight a number of challenging normative questions for popular constitutionalism, including the classic concerns over whether it is sufficiently rational and rights-protective. The role of out-of-state influences raises a more basic, definitional question, about the contours of the community of persons meant to participate in popular constitutional lawmaking.<sup>27</sup> The notion that the people themselves ought to determine their own constitutional fate certainly sounds stirring. But who are "the people"?

The literature's answer has been straightforward—popular constitutionalism is meant to empower "ordinary citizens" in the administration of fundamental law.<sup>28</sup> In its standard formulation, the theory pits alienated common folks against aloof federal judges. The latter have steadily arrogated to themselves all the interpretive power, even though in our democratic scheme the former were meant to rule; it is the great burden of modern constitutionalism to overthrow judicial supremacy and rectify this historic inversion. The first wave of popular constitutionalism's critics featured several scholars, Professor Devins among them, who questioned whether ordinary citizens have the capacity or the will to take the Constitution away from the courts.<sup>29</sup> (Others questioned whether "we the people" and "we

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the Editor, 97 Iowa L. Rev. (forthcoming 2012) (manuscript at 23) (on file with the *Columbia Law Review*) (finding "[t]he second most common frame used by anti-retention advocates," in letters published by newspapers, "was that *Varnum* was wrongly decided for religious or moral reasons").

25. The vast majority of out-of-state spending went to the anti-retention side. See Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 Ct. Rev. 68, 70–71 (2011) (reporting three out-of-state organizations together spent over \$900,000 against justices, whereas "[t]he main in-state sum spent against [them] was \$10,178"); Press Release, Brennan Ctr. for Justice et al., *2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say* 3–4 (Nov. 3, 2010) [hereinafter *Iowa Press Release*], at <http://www.brennancenter.org/page/-/Democracy/release-november%202010-110310-final.pdf> (on file with the *Columbia Law Review*) (reporting out-of-state organizations accounted for roughly \$700,000 of \$800,000 spent to defeat justices, versus roughly \$400,000 spent by in-state organizations in support of justices).

26. See Dan Morain, *Proposition Funds Flow from out of State*, L.A. Times, Aug. 1, 2008, at A3 (stating "[a]t least 39% of the \$3.3 million supporting Proposition 8's proposed ban on same-sex marriage has come from outside California," while "[o]pponents have drawn 52% of their \$5.7 million from outside the state"); John Wildermuth, *Prop. 8 Among Costliest Measures in History*, S.F. Chron., Feb. 3, 2009, at B1 ("Millions of dollars in out-of-state money flowed into both campaigns . . ."). Much of the analysis in this essay would also apply, *mutatis mutandis*, to California's Proposition 8 struggle.

27. The role of out-of-state influences, in other words, takes us all the way back to "step zero" of political theory, to the identification of the polis.

28. Kramer, *The People Themselves*, *supra* note 7, at 248; see also Larry D. Kramer, *Popular Constitutionalism*, circa 2004, 92 Calif. L. Rev. 959 *passim* (2004) [hereinafter *Kramer, Popular Constitutionalism*] (repeatedly identifying "ordinary citizens," along with political officials, as subjects of popular constitutionalism).

29. See generally Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 Geo. L.J. 897 (2005); Devins, *Popular Constitutionalism*, *supra* note 15.

the courts” ought to be seen in such oppositional terms.<sup>30</sup>) Focused on the national level, these scholars expressed skepticism that a sufficiently large, representative, and informed swath of Americans could be counted on to fulfill the active, lawmaking role that the theory would assign to them. The deliberative and participatory preconditions of popular constitutionalism might only rarely be attainable.

When we shift our focus down to the states, however, the incompleteness of this debate quickly becomes apparent. We observe that the United States contains not one but a multiplicity of constitutional orders, formally independent from yet deeply interconnected with each other, as well as a multiplicity of populist legal devices such as initiatives, referenda, recalls, legislative overrides, attorney general elections,<sup>31</sup> and judicial elections. The institutional architecture of popular constitutionalism is far more elaborate, visible, and robust at the subnational level; scrutiny of the states helps expose just how underspecified the standard theory is. This is not to say that popular constitutionalists ought to have accorded state constitutional systems equal stature or significance as the federal system. Yet given their positive aim of exploring how ordinary citizens experience and contribute to constitutional interpretation, their normative aim of reclaiming “diffuseness and decentralization” in the construction of legal norms,<sup>32</sup> and the critical importance of state courts and constitutions in the life of the country, it seems likely that many would find state constitutionalism highly relevant to their project.<sup>33</sup> Of particular interest here, the Iowa elections demonstrate how the permeability of state boundaries puts pressure on the assumption of a unitary “people” aspiring to self-rule.

Popular constitutionalism, in short, has a federalism problem. My article focused on judicial elections, but the problem is more general: State-state and state-national tensions could arise from all manner of popular constitutional activities. The balance of this essay will explore one facet, by showing how the role played by out-of-state interests in Iowa invites us to think critically about the notion of popular sovereignty that underlies the literature.

#### A. *Confusion*

When they unseated three justices on account of the same-sex marriage

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30. See generally Barry Friedman, *Mediated Popular Constitutionalism*, 101 *Mich. L. Rev.* 2596 (2003) (questioning empirical basis of claim that strong forms of judicial review undermine democracy); Lawrence G. Sager, *Courting Disaster*, 73 *Fordham L. Rev.* 1361 (2005) (questioning theoretical basis of this claim).

31. See Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 *Harv. L. Rev. F.* 108, 111–15 (2011) (suggesting state attorneys general ought to play larger role in accounts of popular constitutionalism).

32. Kramer, *Popular Constitutionalism*, *supra* note 28, at 963.

33. See Pozen, *Popular Constitutionalism*, *supra* note 6, at 2066–68, 2108–10 (explaining “why popular constitutionalists have ample reason to care about state courts and constitutions, independent of their federal analogues”); cf. Sanford Levinson, *Courts as Participants in ‘Dialogue’: A View from American States* 5–15 (2010) (unpublished manuscript) (on file with the *Columbia Law Review*) (reviewing debate over “ontological status” of state constitutions—whether they deserve to be considered “genuine” sources of higher law—and documenting their practical and sociological importance).

ruling, were Iowans truly exercising their own collective authority to control the courts and determine constitutional meaning? Or did the role of external money and advocacy dilute or distort the popular basis of the act? Of course, only Iowa residents were allowed to cast a ballot. But to some degree their votes, and their decisions whether or not to vote, were influenced by out-of-state sources. Those influences might call into question the authenticity of the revolt, the sense in which Iowans authored the achievement.

This point should not be confused with the stronger claim that genuine popular constitutionalism requires exclusively or predominantly grassroots action—mobbing, perhaps. Any such standard would be unrealistic in modern society. A certain amount of dedication, deliberation, and agreement may be all we can reasonably ask for in a constitutional politics. Yet even if some might see spending by corporations and special interests to jeopardize the purity, integrity, and organicity of ballot outcomes generally, in light of the realities of the political marketplace and the limits of civic competence, one need not necessarily go that far to appreciate the distinctive concerns raised by cross-border expenditures.<sup>34</sup>

When money pours into a state, it can help amplify debate and invigorate the efforts of local actors, and thereby augment popular forces that were already stirring. The interactions between internal and external social movements may be mutually reinforcing rather than unidirectional. This was evident in Iowa, as local norm entrepreneurs coordinated with out-of-state allies to form and operate ad hoc campaign organizations, particularly on the pro-incumbent side.<sup>35</sup> Yet this dynamic can also attenuate the relationship between that state's citizens and the constitutional ends they pursue. The salience of one or both sides' positions, if not also the substance, may to some extent be manufactured by individuals and entities who are not part of the relevant decisionmaking community. (Assuming, that is, that popular constitutionalism prioritizes the will of a bounded community over, say, a universal communicative rationality. Let us provisionally adopt this assumption, which is consistent with the literature's emphasis on "ordinary citizens" and the "will of the people."<sup>36</sup>) Empirically, moreover, the extent to which outside groups have been affecting local policy processes, whether to distort or enrich them, will often be very difficult to tell.

A hypothetical involving non-U.S. outsiders may help sharpen the point. If, in support of Arnold Schwarzenegger's candidacy for president, a grassroots movement swept the nation and ushered in an amendment repealing

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34. These concerns may be especially acute when the underlying issue is, as in Iowa, one of state law. It is easier to appreciate why all Americans might have an interest in supervising the state courts' administration of federal constitutional guarantees.

35. See Pettys, *supra* note 24 (manuscript at 9–15) (detailing these interactions); cf. David E. Pozen, *We Are All Entrepreneurs Now*, 43 *Wake Forest L. Rev.* 283, 294–314 (2008) (explaining concepts of social, policy, norm, and moral entrepreneurship).

36. Let us also bracket the various objections that might be raised to the notion of a "popular will" on questions of constitutional meaning. See Pozen, *Popular Constitutionalism*, *supra* note 6, at 2120–22, 2132. I am grateful to Robert Wiygul for incisive comments on this subject.

the United States Constitution's Natural Born Citizen Clause,<sup>37</sup> most observers would, I assume, have little trouble identifying this phenomenon as popular constitutionalism. Should we feel any differently if it turns out that Austrian supporters of Schwarzenegger conceived, spearheaded, and/or bankrolled the movement?<sup>38</sup>

*B. Competition, Conflict, and Conformity*

The Iowa elections stimulated a kind of mass constitutional competition, over whether to support or oppose same-sex marriage and judicial recognition of new constitutional rights, that has in recent years been all but absent at the national level. Ordinary citizens literally rallied to the cause of their constitutional beliefs. With competition, however, comes division. Candidate elections not only galvanize social forces but also sharpen and dichotomize them. They render constitutional argument as political theater, a pitched battle, with the judicial aspirants as the personification of one side's hopes, grievances, and worldview. Lacking the elaborate procedural rules and professional norms of litigation, the structured reasoning and justification of judicial opinions, or the multistage, supermajority hurdles imposed by most constitutions' formal amendment processes,<sup>39</sup> the constitutional competition waged through judicial elections tends to be comparatively thin, shrill, and abrupt.<sup>40</sup> Negative advertisements pumped in from out of state only exacerbate the divisiveness of the drama. We might generalize this (concededly unsubstantiated) claim: Relatively undisciplined, unmediated, majoritarian acts of constitutional decisionmaking—truly populist forms of popular constitutionalism—are as liable to fracture as to unite a people.

Judicial elections can also breed second-order competitive effects. To the extent that local mechanisms of popular constitutionalism allow states to develop distinct constitutional cultures, norms, and policies, they may help

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37. U.S. Const. art. II, § 1, cl. 5 (limiting presidential eligibility to "natural born Citizen[s]").

38. Or does this analogy falter because the Austrians, as foreigners, would have limited affective ties to and knowledge of this country, and therefore suspect motives? Or because they have no basis to participate in the United States constitutional amendment process, whereas U.S. citizens from one state do have an entitlement to participate, indirectly, in the constitutional amendment processes of other states (at least for issues such as marriage that implicate norms of comity and recognition)? To reject the analogy on this latter ground, one would presumably have to reject the notion that the U.S. states are fully sovereign entities with respect to their own constitutions.

39. It is notable in this regard that the Iowa Constitution is substantially more difficult to revise than most other state constitutions. See Pettys, *supra* note 24 (manuscript at 7, 18–19, 25–26) (explaining Iowa amendment process and positing "[t]here might be an inverse relationship between the ease with which activists can place a proposed constitutional amendment before the voters and the likelihood that justices will be targeted for non-retention").

40. Compared to the constitutional competition elicited by presidential elections and federal judicial appointment fights, on the other hand, the Iowa experience does not look so anomalous. All departmentalist models of popular constitutionalism ultimately rely on selection mechanisms to determine who will be authorized to speak for the people on constitutional matters; it is unsurprising that those mechanisms would become sites of political struggle. See Pozen, *Popular Constitutionalism*, *supra* note 6, at 2063–64 (discussing relationship between departmentalism and popular constitutionalism).



capture some of the benefits we associate with decentralization, “provid[ing] an additional and more accessible platform for collective deliberation,” “facilitat[ing] exit and voice in constitutional lawmaking,” “hold[ing] up a mirror to the national model.”<sup>41</sup> By empowering voters to fashion their courts, elections can, at least in theory, contribute to a more vibrant system of constitutional federalism. This is not necessarily a good thing. When it comes to matters of fundamental rights and constitutional affiliation, values such as local particularism and experimentalism take on a decidedly ambiguous cast. For this reason, among others, a number of scholars have criticized ambitious schemes of state constitutionalism as threats to the larger project of American constitutionalism.<sup>42</sup>

The role of out-of-state influences creates a more basic complication. By injecting themselves into the Iowa elections, national groups like the Family Research Council<sup>43</sup> have done more than skew these contests and put pressure on the remaining justices to reverse course and deconstitutionalize same-sex marriage. They have also sent a warning to elected judges across the country that their seats may be targeted, too. The most profound impact of the ouster campaign likely lies not in its visible effects within Iowa but in its invisible chilling effects on courts beyond. The campaign was conservative in its resistance to judicial creativity and legal change as well as in its substantive content. Its goal was to homogenize U.S. constitutional practice by bringing an outlier state back into line with the prevailing sociolegal norm and, in so doing, to reinforce that norm. The net result of the Iowa elections, then, may well be a national constitutional landscape that is less dynamic and diverse, in that the United States will have fewer jurisdictions that grant same-sex marriage rights, and fewer judges in the other jurisdictions who are willing to stick out their necks on this issue or related issues. In a federated polity, certain types of constitutional competition within states can depress constitutional competition among states.

There is another, more concrete sense in which the competitive pressures of judicial elections may bear on the question of who constitutes “the people” in popular constitutionalism. In resolving disputes that cut across jurisdictional lines, elected judges have a strong incentive, if not also a political mandate, to privilege their own constituents’ interests above the interests of outsiders. This hometown bias is one of the best-known criticisms of elected judges. What is less appreciated is that the same set of incentives can affect purely domestic disputes, when the “outsiders” are noncitizen residents who lack the franchise or minority groups who are widely despised in the broader population. Irrespective of the legal merits, recognizing new rights for a class of illegal aliens—or, in certain states, of gay plaintiffs—is not a good career move for the elected judge.

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41. *Id.* at 2109.

42. See *id.* (discussing “theorists of state constitutionalism [who] have argued that the development of a vigorous, self-conscious model threatens to subvert the operations of federal constitutionalism”).

43. See Iowa Press Release, *supra* note 25, at 3 (identifying National Organization for Marriage, American Families Association, Family Research Council, Campaign for Working Families, and Citizens United as major funders of Iowa ouster campaign).

“The people” and “the citizenry” are frequently conflated in the popular constitutionalism literature. Yet if “the people” encompasses all persons who live within a sovereign territory, these two groups are not coextensive. While this conflation may in some cases be the product of loose language rather than deliberate choice, it smuggles in a controversial judgment on citizenship as a prerequisite to the right to participate in consideration of constitutional questions. Whether or not one agrees with this judgment matters a great deal to the question of how to realize popular constitutionalism in practice. Institutional mechanisms such as judicial elections that tend to empower “ordinary citizens” in the administration of constitutional law may tend to disempower noncitizens. Within as well as across communities, we must come to terms with who is and who is not a proper subject of popular constitutionalism.

### C. *Conversation and Commotion*

Thus far, we have been focusing on some of the less appealing implications of the insight that the Iowa elections were not entirely a local event. But let’s not forget that the activists from other states who devoted their time and resources to the Iowa campaign were themselves engaging in a kind of popular constitutionalism. For those who feel passionately that same-sex marriage deserves no constitutional protection, the campaign provided a forum for testing this position and a focal point for enhancing public awareness and mobilizing public support. Through their advocacy in Iowa, these activists sparked a national conversation about same-sex marriage rights and the role of the courts—a conversation that could affect the trajectory of constitutional law in this area for years to come. Iowa’s unique role in the U.S. presidential selection system further magnifies the significance of the results. Several potential Republican presidential candidates for 2012 promptly celebrated the ouster vote as a model of democratic action; Newt Gingrich expressly connected the vote to popular constitutionalist (and Tea Party) themes, heralding the “citizen revolt” now underway against “dictatorial” judges.<sup>44</sup>

Hence, while the cross-border aspects of the Iowa elections may have weakened their claim to being a pure instance of constitutional self-determination, those same aspects also made the elections more relevant on a broader stage. This sort of interstate spillover, this blurring of the local and the national, reflects a larger trend in American electoral politics. As judicial elections have increasingly drawn the attention of major media outlets and advocacy groups, and as congressional elections have increasingly become referenda on national issues,<sup>45</sup> these races have become increasingly important

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44. See Pettys, *supra* note 24 (manuscript at 19–20) (describing reactions of Mike Huckabee and Newt Gingrich and quoting Gingrich); Catalina Camia, *Bachmann Praises Ouster of Iowa Judges in Gay Marriage Ruling*, USA Today, Mar. 24, 2011, at <http://content.usatoday.com/communities/onpolitics/post/2011/03/michele-bachmann-judges-iowa-gay-marriage-/1> (on file with the *Columbia Law Review*) (summarizing remarks of Michele Bachmann); Iowa Press (Iowa Public Television broadcast Feb. 25, 2011), available at <http://www.iptv.org/iowapress/episode.cfm/3825> (on file with the *Columbia Law Review*) (interviewing Rick Santorum about his views on, and role in, ouster campaign).

45. Cf. Rick Pildes, *Political Polarization and the Nationalization of Congressional*

contributors to the national discourse of popular constitutionalism.

Robert Post and Reva Siegel astutely observed in 2007 that “state court opinions about state law are venues within which national values are continually contested and reshaped.”<sup>46</sup> State court *elections* can be even more vibrant venues in this respect. Their publicity, accessibility, and winner-takes-all format give them significant power to catalyze and crystallize constitutional argument.

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So, the relationship between popular constitutionalism, federalism, and judicial elections turns out to be quite complicated, conceptually as well as empirically. A full treatment would require a major undertaking, a book. Here, I hope simply to have shown that popular constitutionalism is not only more legible at the state level but also more institutionally and intellectually complex, more promising but also more problematic.

### III. POLITICAL JUDGES, BOUGHT JUDGES, AND JUDICIAL ELECTION REFORM

A final note on a subject that Mansker and Devins raise in closing.<sup>47</sup> If one is distressed by the recent events in Iowa and by the political turn in judicial elections more generally, what can be done?

It is helpful, in thinking about reform possibilities, to disentangle two criticisms of judicial elections. The first criticism is that elections generate judges who are more likely to conform their outputs to constituent preferences. The second criticism is that elections generate judges who are more likely to rule in ways that gratify their campaign supporters, as an incentive or reward for such support. Although frequently conflated, these two types of deviations from the ideal of the wholly law-bound jurist are fundamentally different. The former reflects a defensible theory of how elected judges ought to negotiate legal indeterminacy, even if I personally do not agree with it.<sup>48</sup> The latter is a species of official corruption and is unacceptable under any theory of judging.<sup>49</sup> The threats posed to the rule of law and to the integrity of the courts from “political” judges are less profound, and different in kind, from the threats posed by “bought” judges. And whereas judges have always been (partially) political throughout U.S. history, and have always been accused of such, it is doubtful that the threat of justice for sale has ever been so widespread.

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Elections, Balkinization, Nov. 4, 2010, at <http://balkin.blogspot.com/2010/11/political-polarization-and.html> (on file with the *Columbia Law Review*) (summarizing evidence of “rise of more nationalized [congressional] elections” and hypothesizing that party polarization is main cause).

46. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *Harv. C.R.-C.L. L. Rev.* 373, 382 (2007).

47. Mansker & Devins, *supra* note 12, at 36–37.

48. See Pozen, *Popular Constitutionalism*, *supra* note 6, at 2083–86 (analyzing relationship between judicial selection methods and jurisprudential methods under rubric of “role fidelity”).

49. See Pozen, *Irony of Elections*, *supra* note 5, at 290–93 (distinguishing judicial favoritism from judicial majoritarianism).

The public has started to appreciate this problem. Retired Supreme Court Justice Sandra Day O'Connor has been unflagging in her efforts to expose and combat campaign-related improprieties.<sup>50</sup> Newspaper editorials routinely highlight the ethical and due process concerns raised by judges' hearing cases that involve contributors.<sup>51</sup> The Supreme Court's 2009 decision in *Caperton v. A.T. Massey Coal Co.*,<sup>52</sup> in which the chief executive of a West Virginia coal company had spent millions on behalf of a state supreme court candidate who went on to cast the deciding vote in an appeal brought by the company, drew sustained national attention to the issue. Just the other day, New York court officials announced a ban on elected judges' hearing cases when any of the lawyers or parties has donated \$2,500 or more to their campaigns in the preceding two years.<sup>53</sup> There is real hope, in the short- and medium-term, that states will address this second criticism of elective judiciaries through recusal reforms and related measures.<sup>54</sup>

There is far less hope that states will address the first criticism, for doing so requires nothing less than a return to the days of unexciting and uncompetitive judicial races or, perhaps more realistically, abandonment of judicial elections altogether. Indeed, to the extent that concerns over "judicial politics" have informed recent debates over how to select judges, they have cut in the opposite direction. Supporters of elections have gotten tremendous mileage out of empirical findings and common-sense perceptions that appointed courts respond to various extralegal influences, such as partisan affiliations and reappointment incentives, and in this sense are "political" too.<sup>55</sup> Given that all judges are to some extent legal policymakers who do not and could not resolve cases on the basis of legal sources alone, supporters of elections often assert, it follows that judges ought to be subject to electoral control like other high-level policymakers.<sup>56</sup>

This does not follow. Just because judging may involve significant decisional discretion, does not mean that judges ought to be subject to such intensive popular supervision. As my article explains, there are many reasons,

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50. See, e.g., Sandra Day O'Connor, Justice for Sale, *Wall St. J.*, Nov. 15, 2007, at A25.

51. See, e.g., Editorial, Justice Not for Sale, *N.Y. Times*, Mar. 3, 2009, at A26.

52. 129 S. Ct. 2252 (2009).

53. William Glaberson, State Is Cutting Judges' Ties to Lawyers Who Are Donors, *N.Y. Times*, Feb. 14, 2011, at A1.

54. See generally Deborah Goldberg, James Sample & David E. Pozen, The Best Defense: Why Elected Courts Should Lead Recusal Reform, 46 *Washburn L.J.* 503 (2007) (reviewing state recusal rules and outlining possible reforms).

55. It is important to maintain perspective on this point. For a compelling account of how "judicial politics" scholars have overstated the case that political preferences affect judicial decisionmaking, see Brian Z. Tamanaha, The Distorting Slant in Quantitative Studies of Judging, 50 *B.C. L. Rev.* 685 (2009).

56. See, e.g., Michael R. Dimino, Sr., The Worst Way of Selecting Judges—Except All the Others That Have Been Tried, 32 *N. Ky. L. Rev.* 267, 268 (2005) (arguing judicial elections are preferable because of "the opportunity they provide for a free people to choose those officials who exercise policy-making authority"); see also Chris W. Bonneau & Melinda Gann Hall, In Defense of Judicial Elections 138–39 (2009) (emphasizing that even life-tenured "judges are political beings who make political decisions," and accusing judicial election opponents of "not just assaulting a method for choosing judges but also . . . waging war on democratic processes and the rights of citizens to maintain control over government").

including democratic reasons, why it may be healthy to insulate one branch of government from direct forms of public discipline.<sup>57</sup> The observation that all judges are political does not entail that it would be futile or misguided to try to make them *less* political, or to make them political in different ways than other officials are. Recusal reforms, U.S. Supreme Court guidance, and media scrutiny may help stave off additional abuses of the kind that took place in West Virginia. Unless and until this subtler—and fundamentally antipopulist—point gains widespread traction, we can expect to see more of what happened in Iowa.

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57. Pozen, *Popular Constitutionalism*, *supra* note 6, at 2093–133; cf. *id.* at 2127 (explaining why “it is a fallacy to think that making the structure of each part of government more democratic, invariably makes the government as a whole more democratic”). I outlined additional grounds on which to build a democratic case against elective judiciaries in Pozen, *Irony of Elections*, *supra* note 5, at 317–24.