

Interest Group Campaigns in Judicial Retention Elections: A Case Study

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Spring 2012

April 30, 2012

Abstract

In 2010, all three Iowa Supreme Court justices on the ballot for retention were unseated following an unprecedented interest group-led anti-retention campaign organized in response to the Court's decision to legalize gay marriage. The anti-retention campaign was largely organized and funded by out-of-state entities working through an Iowa-based puppet group called Iowa for Freedom. I conduct a case study of the 2010 Iowa judicial retention election, analyzing why judges lose in retention elections and what role interest groups play in determining the outcomes of such contests. Previous scholarship shows that theories on legislative elections, voter behavior, and interest groups apply to the unique case of judicial elections. However, there is little research on the involvement of interest groups in judicial retention elections. I hypothesize that the more visible and active interest groups are in judicial elections, the more likely they are to influence voters and affect the outcome of the contest. Analyzing the organization and strategies of the groups involved on both sides, the media coverage of the campaign, and the response of the judges on the ballot, I conclude that large amounts of out-of-state money coupled with the local political climate and underwhelming campaign efforts by the judges on the ballot led to their eventual defeat. These conclusions indicate the interest group activity in the 2010 Iowa judicial retention elections can act as a model for single-issue campaigns in other jurisdictions in the future.

Introduction

Judicial elections first emerged on the American political scene during the 1830s. Prior to this shift toward an elected state judiciary, all of the states admitted to the Union modeled their judicial selection processes on the federal system of appointment (Streb 2007). As the American democracy matured, voters demanded more accountability of judges by way of an electoral

selection process. Throughout the next century and a half, the judicial selection process became more varied among the states as legislatures attempted to balance this demand for accountability with the need for an independent judiciary. As elections became increasingly costly during the latter half of the 20th Century, concerns emerged regarding the impact of large donors and interest group campaign activity on the integrity of the judiciary. Moreover, the impact judges can have on policymaking has attracted a wide range of powerful interest groups to the judicial selection process. In recent years, interest groups have been more involved than ever before in attempting to influence the outcomes of judicial elections.

The merit selection and retention election system emerged in 1940 as a result of concerns about the interference of political machines and cronyism in judicial selection (Streb 2007). Although this system is touted by the American Bar Association for creating a desirable balance between accountability and independence, retention elections have followed competitive judicial elections into the fray of politicized campaigns. However, the political activity surrounding retention elections is necessarily unique in comparison with competitive elections. Candidates in these elections are not contested by another person; voters are simply asked to decide whether or not the judge should be kept in office. In addition, judicial conduct and ethics codes have historically limited the extent to which judges on the ballot can court voters. In the 2002 case of *Republican Party of Minnesota v. White* (536 U.S. 765), however, the Supreme Court upheld the First Amendment rights of judges to announce their views on issues. Although this shift in the understanding of judicial ethics opens the door for judges to take action in election campaigns, many judges who face retention election still refrain from announcing views as a way to advocate for themselves in order to maintain their independence. Thus, the increasing involvement of interest groups in retention elections raises important questions about how judges

should act in balancing their self-interest in being retained with the principles of accountability and independence.

Research Question

As I explore the relationship between interest groups and judicial retention elections, I seek to explain why judges lose in these contests. While many factors are at play in determining the outcome of retention elections, interest groups have a unique role as a major force leading to the politicization of judicial elections. In order to evaluate the specific impact of interest groups in retention elections, I examine the major campaign strategies and organizational characteristics of groups that get involved in these elections. Similarly, I look at how judges who face significant attention from interest groups respond to the campaigns against them. By applying theories derived from research on legislative elections, other low-information elections, and interest group behavior, I assess how the competing actors in retention elections influence voter behavior and, in the end, determine the outcome of the elections.

Literature Review

In recent years, state judicial elections have become more expensive and competitive than ever before (Streb 2005). Moreover, interest groups have become increasingly active in financing judicial campaigns and influencing voter behavior. The politicization of the state judiciary raises concerns about the impact of interest group activity in elections on the impartiality and independence of judges on the bench. In exploring this issue, previous scholarship on judicial elections has largely focused on competitive head-to-head selection systems, drawing significantly from theories of legislative elections. Specific research on the merit selection and retention election system explores the impact of campaigns and availability of information on how voters make the decision to retain or unseat judges. This group of

scholarship on judicial elections, however, neglects questions regarding the impact of interest groups on voter behavior and the outcome of the contests. Previous research on the functions of interest groups in elections is centered almost entirely on congressional and presidential elections. There is little scholarship on the organizational and campaign strategies of interest groups attempting to influence the outcomes of noncompetitive judicial elections.

Judicial Elections

The unique political and electoral characteristics of judicial elections have raised several important questions for scholars. First, the states use a variety of selection methods ranging from gubernatorial appointment to partisan election. The goal in choosing a particular selection method is to achieve a suitable balance between accountability and judicial independence (Hall 2001, Cann 2007, Gibson 2009). Unlike elections for other political offices, judicial elections have a significant interest in maintaining legitimacy as an objective adjudication system (Streb). Indeed, it would be unusual to ask legislative or executive elected officials to maintain a buffer of separation from voters and political interests in order to make objective decisions. Thus, the role of the judiciary in American democracy as an unbiased interpreter of laws and protector of rights shapes how judges act when they face election. In past scholarship on the issue of how electoral activities affect the integrity of the court, campaign contributions have the most impact on undermining popular support and creating perceived illegitimacy of judicial decisions (Cann 2007, Cann 2008, Gibson 2009). On the other hand, money is necessary for any candidate in a competitive election to be viable (Bonneau 2007). Money has also been shown to increase voter participation, which can have an impact on the outcome of judicial elections (Hall and Bonneau 2008). The money raised by judicial campaigns often increases the availability of information

about the candidates, which increases the likelihood that voters can reliably distinguish between the two (or more) contenders.

Second, despite recent trends of increased competition, judicial elections are generally low-salience, low-information contests (Dubois 1979). Indeed, little research has been conducted on the judicial selection process at the state level because, according to Matthew Streb, “judicial campaigns just aren’t that exciting” (2005, 171). The lack of information and excitement in judicial contests has led scholars to explore how candidates and voters behave and what influences their behavior. In his 2007 study on fundraising in competitive state supreme court elections, Chris Bonneau finds that legislative theories on campaigning and fundraising can describe the systematic and predictable behavior of candidates in such head-to-head contests. Candidate factors like incumbency, quality, and experience function similarly in both legislative and competitive judicial elections by increasing the amount of money raised (Bonneau 2007). Similarly, voters’ reliance upon information cues such as party identification in judicial elections reflects the extensively studied voter behavior trends of legislative elections (Dubois 1979). In addition, according to a 2007 study by Melinda Hall, contextual factors such as the election method and competitiveness of the race are “critical keys” in determining whether or not voters participate in judicial elections. To a large extent, research on the state judicial selection process has been concentrated on competitive partisan and nonpartisan contests (Dubois 1979, Bonneau 2007, Cann 2007).

Retention Election System

In contrast, far less research has been conducted on the merit selection and retention election system used in fourteen states. Under this system, known as the Missouri Plan, governors fill a judicial vacancy by selecting from a slate of candidates provided by an

independent commission. The appointed candidate serves a predetermined term before appearing on the ballot to retain office for another term. Unlike competitive elections, voters are only faced with a decision to retain each judge (a “yes” vote) or not (a “no” vote) (Streb 2007). In addition to the states using the Missouri Plan, another six states include retention elections in some fashion during their judicial selection process. Although judicial reformers prefer the retention system for its supposed ability to maintain the independence of the court better, Melinda Hall (2001) finds that even retention elections are not fully insulated from partisan influence. In addition, several studies have evaluated the influence of campaigning on the outcomes of retention elections. Affirmative campaigns, or those encouraging voters to retain the judges on the ballot, have little impact on increasing the percentage of “yes” votes and do not reduce the percentage of voter roll-off (Aspin 1998). Roll-off is the tendency of voters to participate in high-profile contests on the ballot, while choosing not to vote in less salient races like judicial elections. On the other hand, opposition campaigns that encourage voters to unseat the judges on the ballot have a much greater impact on influencing voter behavior (Klump 2005). Larry Aspin (2011) asserts that the impact of opposition campaigns is even more powerful when they are centered on a clear, concrete issue. Indeed, the percentage of voter roll-off is reduced when there is “substantial disapproval of incumbents in retention elections” (Hall 2007, 1154).

In a study on what influenced voters in the 1978 Wyoming retention elections, researchers found that most voters were apathetic toward the contests and failed to seek out information that may be available from bar associations and other organizations prior to voting (Griffin and Horan 1979). Indeed, Olson (2001) finds that voters generally ignore evaluations conducted by state bar associations and other organizations unless an organized campaign

specifically draws their attention to the information. Moreover, the results of bar association evaluations are a stronger predictor of vote choice among more educated voters (Klump 2005). Other than seeking out the limited information, Aspin and William Hall (1987) find that voters who have a higher level of trust in political institutions in general are more likely to vote to retain judges. In addition, voters are more likely to participate in retention elections if the judge is from their home county, according to what is termed a “friends and neighbors effect” (Aspin and Hall 1987 (2)). Overall, however, analysis of election statistics shows that judges are rarely unseated in retention elections (Aspin 2011).

Previous studies on judicial elections use a variety of study designs to evaluate different aspects of the contests. Frequently, researchers will develop case studies of a single state’s judicial elections over a certain period of time (eg. Griffin and Horan 1979, Hojnacki and Baum 1992, Klump 2005, and Cann 2007). While these types of studies usually result in generalizable conclusions, unique characteristics of the jurisdictions can raise additional questions about the true extent to which the findings are applicable. For example, states may have an unusual judicial selection method (Hojnacki and Baum 1992), the composition of the judiciary may be ideologically homogenous (Cann 2007), or the district may be extreme in terms of urban or rural demography (Klump 2005 and Griffin and Horan 1979, respectively). Other studies about judicial elections evaluate all elections of a certain type over a specific period of time (Dubois 1979, Hall 2001, and Bonneau 2007). The generalizability of these studies seems to be more reliable, however, they oversimplify the complex variety of election systems and institutional and political characteristics.

Interest Groups in Elections

Beyond the findings suggesting that opposition campaigns and increased availability of information can guide voters' decision-making process, there is little research on what impacts the identity of who leads campaigns or provides information has on the fate of judges in retention elections. In our modern electoral system, interest groups play a significant role in electioneering activities "anywhere that a group can be found or organized" (Herrnson 2005, 25). Most of the scholarship on the function of interest groups in elections focuses on federal contests (Herrnson 2005, Magee 2002). In this context, interest groups play several important roles. First, interest groups are a major force in financing federal candidates. The advent of political action committees in the 1970s enhanced the electioneering arm of interest groups by simplifying the process of organizing donations and funneling them to candidates (Herrnson 2005). Research has shown that campaign donations from interest groups to challenger candidates have a large effect on election outcomes (Magee 2002). The implications of this finding on noncompetitive judicial retention elections have not been evaluated, but it may be analogous to the previously discussed impact of opposition campaign fundraising on the outcome of these contests (Aspin 1998, Klumpp 2005).

A second function of interest groups in elections is their "efforts to mobilize voters" (Herrnson 2005, 35). Interest groups hold voter registration drives, participate in voter education, and conduct get-out-the-vote campaigns (Herrnson 2005). A notable example of the function of organizations in voter mobilization is the role that labor unions have historically played in providing additional voting cues to assist their members in the polling booth. In fact, Marie Hojnacki and Lawrence Baum (1992) explore this question in the context of competitive judicial elections in Ohio. They find that in contests lacking reliable candidate and issue

information like judicial elections, unions are able to provide informational cues that allow voters to vote “in terms of their political attitudes and interests” (944). Furthermore, interest groups encourage voter participation by influencing the perceived importance of certain issues through issue advocacy ads, which do not explicitly endorse any particular candidate (Herrnson 2005).

The previous studies on interest groups are generally designed to cover a broad range of legislative contests. For example, the studies mentioned here evaluate interest groups in terms of all congressional elections or presidential elections during a certain period of time (Herrnson 2005). The bulk of the data is derived from monetary campaign contributions and individual donations. It provides a quantitative assessment of how interest groups function within the electoral context, while qualitative elements are less frequently considered. Herrnson (2005) provides some insight to specific groups to highlight unique tactics. For the most part, however, the organizational and campaign strategies of individual groups in a particular election are overlooked. Moreover, there is a distinctive lack of research regarding the interest group activity in judicial elections.

Overall, the previous research on the topic of judicial elections and interest groups provides a basic framework of findings and study designs. The lack of specific research on how interest groups operate in the context of judicial elections and why judges are unseated in retention elections provides a significant gap that my research will attempt to fill. As we have seen, if voters have adequate information, they are more likely to participate in judicial elections. Interest groups that function as information-providers to motivate voters, thus, may have a significant impact on judicial elections. Similarly, judges are particularly vulnerable to being unseated if there is an organized opposition campaign. The financial resources of interest groups

may make them particularly powerful in leading such campaigns, thus influencing the outcome of retention elections. In this way, the previous research on these topics creates some obvious connections among the findings that have yet to be systematically explored.

Hypothesis

Based on the previous literature on judicial elections and interest groups, I organized my hypotheses around the impact of organizational structure and activities of a campaign and the institutional and political context in which they operate. I hypothesize that the more visible and active interest groups are in judicial elections, the more likely they are to influence voter behavior and affect the outcome of the contest. In low-information and low-salience elections like judicial elections, any information source that can make a contest relevant to voters has great power in affecting how citizens will vote. The extent to which interest groups are visible and active in judicial elections may be further predicted by the organization of the campaign, the presence of opposing factions, and the overall political context of the contest. The organization of an interest group campaign can be determined by the campaign activities such as television and radio advertisements, events and rallies, and direct appeals to voters through phone calls or door-to-door canvassing. In addition, the tactics used to assemble groups of supporters and garner external funding may be important indicators of group organization as well as the overall receptiveness of voters within a particular political climate. Finally, elements of judges' behavior including lack of an organized response to interest group campaigning and appeals to the abstract principle of judicial independence rather than responding to the concerns of voters may help to explain why interest groups are likely to have a significant influence on voter behavior.

Study Design

As I approached the questions in this research project, I determined a case study design would provide the greatest insight to the roles of specific interest groups in a particular judicial election contest. Case studies allow for multiple data collection methods in order to gain a broad understanding of the important elements of a single case. Due to the exploratory nature of case studies, they are often “more useful for generating” rather than evaluating new hypotheses (Gerring 2007, 38). Thus, in exploring the basic preliminary hypotheses posed here, I seek to expand the theoretical understanding of judicial elections to generate topics for further research. To address the questions presented here, I examined the case of the 2010 judicial retention elections for the Iowa Supreme Court. In 2007, District Court Judge Robert Hanson overturned the state’s ban on gay marriage on the grounds that denying gay and lesbian couples the right to marry violated the liberty and equal protection clauses of the state constitution. The case was subsequently appealed to the Iowa Supreme Court as *Varnum v. Brien* (763 N.W.2d 862). In 2009, the Court unanimously upheld the District Court’s decision citing no substantial government interest in maintaining the ban on same-sex marriage. Angered by the outcome of the case, conservative Republican leaders initiated a campaign to oust the judges on the ballot for retention in 2010, including Judge Hanson and three of the supreme court justices who participated in the unanimous decision in *Varnum*. Chief Justice Marsha Ternus and Justices Michael Streit and David Baker, the three supreme court justices on the ballot, were all unseated, while Judge Hanson and other lower court judges experienced lower than normal percentages in favor of retention. Thus, this case provided a unique perspective of the clash between enabling voters to hold judges accountable for their decisions and empowering judges to make decisions according to the law without fear of the political consequences. Moreover, the presence of an

interest group campaign advocating for a particular electoral outcome provided an opportunity to analyze the overall impact of interest groups on judicial elections.

Data Sources

In exploring the events surrounding the 2010 retention election in Iowa, I selected three main variable groups: Interest Groups, Media Coverage, and Judicial Response. The interaction of these elements, I will argue, spelled defeat for the three supreme court justices on the ballot. The specific methodologies used for the content analysis of media coverage and interviews of the supreme court justices can be found in Appendix A: Methodology.

Interest Groups

In order to explore the specific activities of interest groups and judges that affected the outcome of the election, I examined several types of data. First, I evaluated the campaign strategies of the interest groups opposing the retention of the judges. The groups, based throughout the country, include Iowa for Freedom, which was funded by the American Family Association (Mississippi); the Family Research Council (Washington, DC); the Iowa Family Policy Center; the Campaign for Working Families (Washington, DC); the Citizens United Political Victory Fund (Washington, DC); and the National Organization for Marriage (New Jersey). In addition, the Fair Courts for Us Committee emerged as the only significant pro-retention group in direct response to the “Vote No” campaign. The groups varied in the extent of their participation from donating money to running television or radio advertisements to hosting events and rallies. The data for this element was gathered from fundraising and expenditure reports filed with the Iowa Ethics and Campaign Disclosure Board, statistics from watchdog groups, such as FollowTheMoney.org, and the local and statewide media, and analysis of television advertisements that can be found on YouTube. In addition, the activities were

evaluated based on the location of the group (in-state vs. out-of-state) and the interaction and interdependence among the groups involved in the campaign.

Media Coverage

Second, content analysis of the coverage of the anti-retention campaign by the local media provided data on the extent to which the interest groups were able to reach voters and influence opinion. Moreover, the watchdog function of the media helped to deconstruct the interest group coalition and spending habits. For the purposes of this research, I focused on coverage of the retention election in local newspapers. Although television and online news sources are clearly more popular today, newspapers provide unique insight to the attitudes of a local community through letters to the editor and opinion pieces. The major newspaper organizations also conducted the available polls on the judicial retention election throughout the campaign season. Moreover, online newspaper archives provide content in its original format, which can be a barrier for conducting analysis of other forms of media, such as television or radio. In order to account for regional differences in these attitudes, I looked at newspapers throughout the state. Accordingly, the scope of the content analysis in this research was limited to articles appearing in the Des Moines Register (statewide based in central Iowa), the Sioux City Journal (northwest Iowa), the Cedar Rapids Gazette (northeast Iowa), the Council Bluffs Daily Nonpareil (southwest Iowa) and the Quad-City Times (eastern Iowa). The circulation rates of these newspapers all fall among the top 25 in the state, ranging from approximately 105,000 (the Des Moines Register) to just under 12,000 (the Council Bluffs Daily Nonpareil). To further narrow the scope of analysis of these local media sources, I focused on coverage that took place six months (in May), three months (in August), and one month (in October) prior to the November election. After selecting articles, I coded them for pro- or anti-retention and assigned

them to one of five categories: Interest Group(s), Spending, Judges, Campaign Events, and Public Opinion.

Judicial Response

Finally, I conducted personal interviews with the three supreme court justices who were unseated in the election. Although the media coverage provided some evidence of their response to the anti-retention campaign, the interviews conveyed more insight to how their response (or lack thereof) had an impact on the outcome of the election. In order to construct a complete narrative of judicial conduct throughout the course of the campaign, I centered the interviews on questions to establish the timeline of events, activities in which the judges engaged, and motivations of their response to the anti-retention campaign. The data gathered from these interviews provided substantive information to determine the actual impact of interest groups on the outcomes of the retention contests. For example, if the judges choose not to respond to opposition campaigns out of respect for maintaining the integrity and independence of the court, interest groups have a greater chance of influencing voters because theirs is the only opinion available. On the other hand, if the judges participated in active self-promotion in the face of opposition campaigns, theoretically the electorate would produce different results.

Findings

In examining the effect of the variables of interest group activity, local media coverage, and judicial response on the outcome of Iowa's 2010 judicial retention elections, I gathered a significant amount of data. In discussing this data, I first provide a basic overview of my findings in each of the variable categories. Then, I synthesize the variables to construct a comprehensive assessment of the factors impacting the eventual defeat of Chief Justice Ternus and Justices Streit and Baker. In this discussion, I also incorporate the impact of the local

political climate and other factors indirectly connected, yet significantly relevant to the judicial retention election.

Interest Group Activity

I explored several aspects of the interest groups involved on both sides of the issue, including financial information, organizational characteristics, and campaign strategy. Overall, it seems the most basic campaign strategy, especially for the anti-retention groups, was to amass and spend as much money as possible to get their message to voters. Indeed, independent expenditures advocating for or against judicial retention accounted for over three-quarters of all such expenditures in Iowa in 2010. According to data from the Iowa Ethics and Campaign Disclosure Board, seven interest groups reported independent expenditures made in connection with the judicial retention election. However, shortfalls in the Iowa disclosure system made it possible for groups to report expenditures without indicating what candidates or issues they support or oppose and without disclosing individual donors. Therefore, it is possible the data here is only the tip of the iceberg in terms of spending related to the 2010 judicial retention election. In terms of the specific groups that filed reports, the Fair Courts for Us Committee, an Iowa-based 527 organization created in October 2010, was the only pro-retention group. The other six groups represented a range of levels of involvement and direct connections to the state. For example, the Campaign for Working Families and the Citizens United Political Victory Fund each made an independent expenditure opposing judicial retention. However, the former spent \$100,000 to run a statewide television advertisement, while the latter spent just over \$17,800 to make telephone calls to voters during the weekend before Election Day.

In contrast, the other four groups leading the anti-retention campaign all reported multiple independent expenditures between the middle of September and the end of the year.

Most significantly, the National Organization for Marriage injected over \$636,000 into the anti-retention effort. Interestingly, the American Family Association, which initiated the Iowa campaign through its creation of the Iowa for Freedom group led by Bob Vander Plaats, reported far more independent expenditures, but the total amount spent was only about \$171,000. The only truly Iowa-based and locally-operated group, the Iowa Family Policy Center's political advocacy group, Iowa Family PAC, made five independent expenditures totaling just over \$11,000, all during the week before Election Day. Finally, the Family Research Council PAC spent nearly \$56,000 in four independent expenditures made during the last two weeks of the anti-retention campaign. In sum, the six anti-retention groups that filed independent expenditure reports with the Iowa Ethics and Campaign Disclosure Board account for about \$990,000 spent in connection with the election. The Fair Courts for Us Committee, in contrast, spent less than \$424,000 in support of retaining the supreme court justices on the ballot.

<i>Anti-Retention Campaign Activity</i>		
Group	Expenditures	Major Activities
AFA Action (Iowa for Freedom)	\$171,225.27	Administrative expenses, research, printing
Campaign for Working Families	\$100,000	Statewide TV ad
Citizens United Political Victory Fund	\$17,822.55	Phone calls
Family Research Council PAC	\$55,996.63	Bus wrapper, bus tour, phone calls
Iowa Family Policy Center Action	\$11,137.61	Autodial phone calls, bus tour
National Organization for Marriage	\$635,627.95	Bus tour, TV ads, text messages, phone calls
<i>Pro-Retention Campaign Activity</i>		
Fair Courts for Us Committee	\$423,766.83	Radio ads, auto tour, mailings, polling

Table 1: Interest Group Expenditures and Activities

Organizationally, the anti-retention groups featured much more complex legal and interdependent structures than the pro-retention group. The Fair Courts for Us Committee, as previously mentioned, was an IRS-registered 527 group apparently operating independently from any other group. Over the course of the campaign, the Committee only reported receiving funding in the amount of \$25,000 from the Fairness Fund PAC, which is the political arm of the local non-profit gay rights advocacy group, One Iowa. Unlike the anti-retention groups, the Fair Courts for Us Committee provided significant information under the “Contributions Received to Aid in the Expenditure” section of the independent expenditure disclosure forms, which is only required if the donations have been earmarked for a specific purpose. For example, the group’s October 19, 2010, disclosure report lists the names and addresses of around fifty individual and local business contributors that donated \$100 and \$50,000 to support the pro-retention campaign. The donors included law firms, prominent attorneys, and even the mayor of Des Moines. The October 28, 2010, disclosure report similarly includes around fifty contributors, this time mostly individuals, that donated anywhere between \$5 and \$5,000 to support the pro-retention campaign. Notably, most donations received throughout the campaign were from contributors in Iowa, rather than out-of-state.

While the money involved in the anti-retention campaign was more difficult to trace, it seems the groups involved were significantly interconnected. There was a predictable exchange of funds between 501(c)(3) non-profit groups and their political advocacy counterparts, such as between the Iowa Family Policy Center and its Iowa Family PAC. In addition, the money and leadership for the anti-retention campaign came into the state from across the nation, including contributions by several future 2012 Republican presidential candidates. For example, the

biggest “Vote No” spender, the National Organization for Marriage, which is based in Washington, D.C., did not report any individual contributors. Interestingly, Brian S. Brown, the organization’s president, was listed as an individual donor of \$15,000 to the Family Research Council Action committee on the group’s October 29, 2010, disclosure report. Brown provided the address of the headquarters of the National Organization for Marriage, rather than a personal address, thus directly connecting the donation to his organization. It is certainly possible that other contributions were received or expended by the National Organization for Marriage that would serve to complicate the group’s role in the campaign. However, their legal status as a Section 501(c)(4) non-profit organization, which allows for campaign activities for the promotion of social welfare, and their apparent transparency redirects focus to another major anti-retention group: the American Family Association.

Although the Tupelo, Mississippi-based group was out-spent by a large margin, it was a major force in creating the local organizational structure of the campaign and coordinating expenditures within Iowa. According to Advisory Opinion 2010-07 issued by the Iowa Ethics and Campaign Disclosure Board in response to an inquiry from the American Family Association, the Iowa for Freedom group, led by Bob Vander Plaats, was considered a project of AFA Action, Inc., rather than an autonomous group. Moreover, because “all source funds for the Iowa for Freedom will come from AFA directly and...no other individuals or organizations will contribute directly or specifically for the campaign,” AFA was automatically considered the donor and no other disclosure was required (“Advisory Opinion 2010-07”). As a result, AFA Action was able to receive donations that were only implicitly intended to finance Iowa for Freedom from a variety of partially to mostly obscured sources, including several prominent state and national politicians. For example, the week before the election, AFA Action received

\$7,500 from the Freedom First PAC-Iowa, which was a state branch of Tim Pawlenty's national Freedom First PAC established in June of 2010. In addition, former Speaker Newt Gingrich provided significant financial support, prompting David Lane, the Iowa for Freedom executive director, to say in regard to the success of the anti-retention campaign in a March 3, 2011, article in the Los Angeles Times, "It wouldn't have happened without Newt." The future Republican presidential candidate funneled at least \$125,000 (estimates run as high as \$300,000) through his non-profit organization, Restoring American Leadership, to AFA Action. Thus, despite shortfalls in the Iowa campaign finance disclosure system, it is clear that the dominance of the anti-retention message was largely the result of funding from out-of-state groups representing pro-family, anti-gay marriage interests.

With over one million dollars dedicated to influencing the outcome of the 2010 judicial retention election in Iowa, the campaign strategies of the groups on both sides played an important role in determining how effectively the money was used to communicate the message. The pro-retention campaign, led by the Fair Courts for Us Committee, got under way in late September, almost two full months after Vander Plaats officially announced the creation of Iowa for Freedom. According to the reports filed with the Iowa Ethics and Campaign Disclosure Board, the Fair Courts for Us Committee channeled their funds to run radio advertisements, mail pro-retention postcards to voters, and organize a tour throughout the state to advocate for retention. In one radio advertisement released in mid-October, former Republican Governor Robert Ray encourages voters to vote yes because "there's enough politics out there, we don't need it in our courts" ("Moderate Republicans Co-Chair"). In total, the group reported spending over \$300,000 on radio advertisements, all during the last two weeks of October.

Another major part of their campaign strategy was the pro-retention auto tour, dubbed the Homegrown Justice tour, which likely cost well below \$50,000. It included eleven stops around the state and was designed to coincide with rallies held in conjunction with the anti-retention bus tour. Throughout the tour, speakers characterized the anti-retention campaign as a political scheme that would have dangerous implications for the independence of Iowa's judiciary. Indeed, Don Rowen, a former labor leader who spoke at several of the tour stops, was quoted in an October 28, 2010, article in the Iowa Independent as saying, "Working to oust judges is nothing more than political retribution." The website used to publicize the tour, www.homegrownjustice.com, still exists, but has not been updated since 2010. Finally, in the last two weeks of October, Fair Courts for Us also expended funds to conduct two polls to determine whether voters were likely to retain the supreme court justices. In addition to the Fair Courts for Us campaign activities, the Iowa State Bar Association and several other groups also organized events to support the judges. However, these events, which were framed in a more educational manner without explicit advocacy for retention, featured speeches by judges on the ballot and panel discussions on the advantages of merit selection and retention election system. Accordingly, these activities will be discussed more fully in the "Judicial Response" section.

On the anti-retention side, the major campaign activities, including a statewide bus tour and several rallies, involved expenditures from several groups. The Judge Bus tour, largely funded by the Family Research Council Action group and the National Organization for Marriage, was a four-day tour featuring rallies and appearances by prominent anti-retention supporters during stops in forty-five of Iowa's ninety-nine counties. The bus, akin to those commonly used by legislative and executive candidates during campaign season, was decked out in a purple and black wrapper that cost Family Research Council Action almost \$15,000. Their

message was clear with slogans like “Vote “NO Retention” for Activist Judges,” “Support Iowa Families, NOT Activist Judges,” and “Replace, Renew, Restore.” The slogans were accompanied by the official photo of each of the three supreme court justices on the ballot with “NO” superimposed over each image. The graphic also pointed interested voters to a website, www.judgebus.com, which now redirects to www.valuesbus.com, which is a multi-state tour running through the 2012 campaign season also organized by the Family Research Council Action group in partnership with The Heritage Foundation. In 2010, the Judge Bus tour featured guests such as future presidential candidate Rick Santorum, Iowa Congressman Steve King, and National Organization of Marriage president Brian Brown.

In addition to the Judge Bus tour, the anti-retention campaign included some heavy spending in Iowa’s television and radio media markets. Together, the National Organization for Marriage and Campaign for Working Families PAC spent over \$500,000 on three statewide television advertisements. The National Organization for Marriage’s “Activist Judges” advertisement characterized the three supreme court justices on the ballot as activist judges, pointing to the fact that when they “imposed gay marriage, they were the only judges within 1,200 miles to reach such a radical conclusion” (“NOM: Iowans for Freedom”). Interestingly, the disclosure language in the advertisement pointed to both the National Organization for Marriage and the Iowa for Freedom project under AFA Action, even though there is no evidence in disclosure reports that AFA Action expended any funds on television advertisements. Another advertisement attributed to Iowa for Freedom featured images of families, home-schooling parents, and hunters as a voiceover asked, “If [judges] can usurp the will of voters and redefine marriage, what will they do to other long-established Iowa traditions and rights?” (“TV Ad: Send Them”). Radio advertisements aired throughout the state delivered similar messages. For

examples, in one paid for by the Family Research Council Action group, Congressman Steve King encouraged voters to “send a message against judicial arrogance...vote no, no, and no” (“A Steve King Radio Ad”).

The anti-retention groups also recorded several autodial telephone messages and composed text messages to confront voters with their message on a more personal level. While most calls focused on ousting the three supreme court justices, at least one call in central Iowa asked voters to also vote no on Polk County judges Robert Hanson, who first heard *Varnum v. Brien*, and Scott Rosenberg, who waived the three-day waiting period to allow the first gay marriage in Iowa. Judge Jeff Neary, from Iowa’s Third District, was also a target in the anti-retention campaign for his role in setting the stage for the legalization of gay marriage. In 2003, Judge Neary had divorced a lesbian couple who had been legally married in Vermont by way of dissolving their civil contract. Autodial calls also played an important role in informing citizens of the different activities coordinated by the anti-retention groups. For instance, the Family Research Council Action group spent over \$4,000 to announce the Judge Bus tour. In sum, the anti-retention coalition spent around \$195,000 on autodial calls and text messages during the course of the campaign.

In addition, evangelical churches across the state played a significant role in the overall success of the anti-retention campaign strategy. As a gubernatorial candidate and state chair of Mike Huckabee’s 2008 presidential campaign committee, Vander Plaats had assembled a strong coalition of evangelical pastors and activists. This group served an important function as free advocacy from the pulpit for the anti-retention effort. Confidential internal memos from the National Organization for Marriage, released upon court order in April of 2012, indicate the organization viewed the fight against gay marriage as a fight against a “weapon that will be and

is being used to marginalize and repress Christianity and the Church” (“National Strategy for Winning”). By framing the anti-retention campaign as a religious issue, the organizations involved were able to appeal to morality to provide justification for unseating the judges who legalized “the weapon.” This appeal was so successful that Sioux City’s Cornerstone World Outreach church, one of the more active congregations in the anti-retention campaign, encouraged pastors across the state to risk their tax-exempt status by directly advocating for the ousting of the supreme court justices.

Media Coverage

As an informational and watchdog entity, the local media provided great insight to the overall context and impact of the campaign, as well as the interdependence of the anti-retention groups. In the selected months, the bulk of the media coverage took place in October, the month immediately before Election Day. Overall, the newspapers varied in actual number of news articles or opinion pieces about the retention election from forty-seven pieces published by the Des Moines Register to just thirteen by the Council Bluffs Daily Nonpareil. The divergence in coverage is likely the result of the locations in which the campaign events took place, as well as readership rates of the individual newspapers. For example, the Des Moines Register is a statewide newspaper with the highest readership in Iowa, and it is also headquartered less than two miles from the Iowa State Capitol and the Iowa Judicial Branch Building, where many of the campaign events took place. By contrast, the Council Bluffs Daily Nonpareil is a small newspaper, serving the smallest city among those included in this analysis, and is often overshadowed in the minds of local readers by the Omaha World Herald, which is published right across the Missouri River. In addition, there was only one retention election campaign event held in Council Bluffs, despite being part of Representative King’s Congressional District.

Nonetheless, the analysis of media coverage six months, three months, and one month before the election shows a distinct evolution in the theme and quantity of pieces published in connection with the judicial retention election.

In May, the first month selected for analysis, a total of six pieces about issues affecting judicial retention were published. The articles, all neutral or silent on the issue of retention, focused on the political ramifications of the supreme court's decision in *Varnum* in the context of the gubernatorial election and the approval of a new code of judicial conduct. Indeed, most of the articles were only assigned to the Judges category, which alone does not indicate the existence of a campaign atmosphere. Notably, Vander Plaats, who challenged eventual governor-elect Terry Branstad in the June Republican Primary, was covered by the local media for his plan to "hold the Iowa Supreme Court in check for its gay marriage ruling" (Jacobs). As for the revised judicial code of conduct, it was clear in the May 1, 2010, article published by the Quad City Times, that both the judicial branch and the public in general did not anticipate the impending campaign activity surrounding the retention election. Indeed, with the benefit of hindsight, the month of May represented the calm before the storm in local media coverage of the judicial retention election.

By August, just three months before Election Day, the debate over the supreme court's gay marriage decision had garnered significant attention from all but one (the Council Bluffs Daily Nonpareil) of the newspapers. Even before Vander Plaats's August 6, 2010, announcement of his intent to spearhead a campaign to unseat the three supreme court justices on the ballot, most of the newspapers had covered rallies both in support of and against gay marriage throughout the state. In August, forty-six pieces on the judicial retention election campaigns were published in the five newspapers. The common thread among the articles was

connections to both the Interest Group(s) and Judges categories. Besides the rallies for supporters on both sides early in the month, the media covered only one other specific event in August: a pro-gay marriage rally in Decorah, Iowa. Because most of the murmurs of campaign activity at this time were on the anti-retention side, the majority of the articles focused on Iowa for Freedom press conferences and announcements. In fact, of the Des Moines Register's eleven pieces on judicial retention in August, only four covered pro-retention events or editorial sentiments. Similarly, the Sioux City Journal published twelve judicial retention articles, of which just two covered pro-retention activities. However, ten of the fifteen pieces published in favor of retention were published in the second half of the month, indicating the growing strength and organization of a counterattack to the anti-retention campaign. Nonetheless, most of the pro-retention articles were centered on the public commentary of officials in response to the "attack" on the judiciary, with only two focused on the creation of a group to stand up for retention against Iowa for Freedom.

Among the articles published in August focusing on the anti-retention campaign, the most common topics were Vander Plaats's campaign announcement press conferences, endorsements or commentary of the campaign by prominent state and national officials, and rallies for traditional marriage held before and after the Iowa for Freedom announcement. Future presidential candidates Newt Gingrich and Tim Pawlenty expressed support for the anti-retention effort as early as August 13, 2010, according to articles published in the Sioux City Journal. Interestingly, Rick Santorum, who later would be the only future presidential candidate to ride the Judge Bus, told the Associated Press in a Cedar Rapids Gazette article on August 17, 2010, that he "did not know enough about a campaign to oust the justices to say whether he would support it" ("Santorum Not Sure"). Beyond several predictions that the campaign may garner

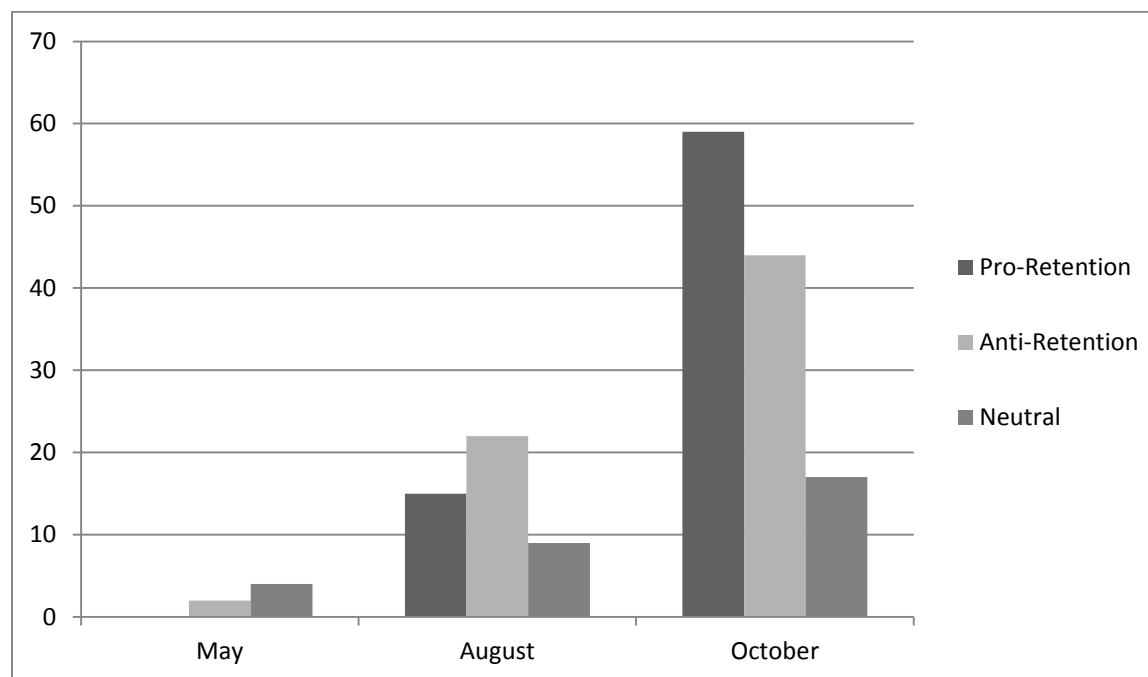
national attention and out-of-state funding, no articles mentioned specific connections between the Iowa for Freedom group and the American Family Association or the National Organization for Marriage. In fact, only a handful of articles during this period fit the Spending category at all. In addition, some anti-retention opinion pieces and letters to the editor set the stage for an increasingly radical campaign, including one letter published by the Quad City Times calling for the “deportations of activist judges” as a solution to “judicial tyranny” (Drahozal). Overall, in terms of substantial media coverage, August marked the beginning of the campaigns for and against retention, as the media more consistently provided readers with information on events on both sides of the issue.

In October, local newspaper coverage of the judicial retention election exploded, with most publications more than doubling the number of articles they had published in August. By this time, both pro- and anti-retention groups had organized events and mobilized supporters throughout the state, which resulted in additional media attention. In addition, the controversial nature of gay marriage, the activities of religious groups in connection with Iowa for Freedom, and the idea of a politicized judiciary sparked the interests of columnists and readers alike. In total, 120 articles on the judicial retention election were published by the five local newspapers in October, nearly tripling the number published in August. The campaign strategies of the groups, particularly of the Fair Courts for Us Committee, resulted in several instances of dueling rallies in the same city on the same day. With coinciding pro- and anti-retention events occurring throughout October, the media frequently covered both events in the same piece, thus providing a more balanced view of the campaigns while making it more difficult to detect which side was winning the electoral horserace. Another factor obscuring the campaign jockeying in the media was the relative foreignness of the retention election system. Several informational

pieces were published, some of which explicitly advocated for retaining the judges as they were the product of a fair system, but most simply explained the history and purpose of the state judicial selection and retention process.

In terms of the specific articles published in October, articles in the Interest Group(s) and Judges categories were the most common. In contrast to earlier months, however, the media coverage in October indicates an increase in campaign events and activities on both sides, with most newspapers reporting on at least a couple events each week. Similarly, although never a large percentage of articles published in any month, articles in the Spending category increased in October as the interest groups filed disclosure reports and questions about the identity of donors, especially on the anti-retention side, emerged. Perhaps as a result of the ambiguous spending and reporting habits of the anti-retention groups, almost half of the twenty-three pieces that were assigned to the Spending category were also considered coverage of pro-retention news events or opinions. As for the Public Opinion category, the Des Moines Register and the Sioux City Journal published a total of three articles about two polls conducted in October, showing a significant shift in opinion from 29 percent of likely voters who planned to vote No in mid-September to 37 percent in late October. These statistical measures of public opinion, however, do not reflect the attitudes expressed by editorial boards and readers in opinion pieces and letters to the editor, most of which supported retaining the judges. Among these was an opinion piece by former United States Supreme Court Justice Sandra Day O'Connor in which she offered her support for retaining the judges and for the Iowa judicial selection process in general. During the weekend going into Election Day (October 30 and 31, 2010), the five newspapers published a total of seventeen articles about judicial retention, twelve of which were pro-retention oriented.

At this point, the pro-retention message was more popular among newspaper editors and it is possible the campaign had gained some last-minute momentum.



Graph 1: Amount and Nature of Media Coverage

Judicial Response

Finally, the response of the judges on the ballot played an important role in the eventual success of the anti-retention campaign led by Bob Vander Plaats. While the Fair Courts for Us Committee was able to raise funds and hold events in support of retaining the judges, the activities of the judges themselves, the candidates per se, impacted how receptive voters were to the opposition campaign. In 2010, there were 74 judges from four different courts on the ballot for retention. Despite indications from Vander Plaats and the other anti-retention campaign leaders that it was not their intention to unseat all of the judges on the ballot, such a vigorous campaign against the supreme court put all the judges at risk. Nonetheless, with most of the

focus on the supreme court, the response of Chief Justice Ternus and Justices Streit and Baker was a significant variable in determining how successful the anti-retention campaign was. However, unique characteristics of the judiciary as an independent body, theoretically unable to be swayed by politics, immediately put the judges at a political disadvantage. Based on interviews with the defeated justices, it is clear that the code of judicial conduct, the principles of judicial independence and legal professionalism, and the unprecedented challenge they faced shaped how their generally apolitical response played out in a heated political arena.

Prior to being appointed to the supreme court, all three justices were practicing attorneys in Iowa and had very little political experience. As members of the supreme court at the Iowa Judicial Branch Building, they were fairly well-insulated from the political drama occurring across the street at the State Capitol. Indeed, Chief Justice Ternus stated her only real political involvement as a justice was delivering the State of the Judiciary Address each January, and attending meetings to determine the budget for the judicial branch. In their judicial capacity, the justices decided approximately 125 cases each year, most involving complex issues of interpretation of state law, but few garnering the attention of *Varnum*. Unlike many of the cases the justices heard on a daily basis, *Varnum* was arranged in the sense that the attorneys hand-picked six couples that, according to Justice Streit, would play well because they would be relatable in the minds of the court and the public. The events leading up to the case were also arranged as the couples filed for a marriage license in Polk County and were predictably denied under the current state law limiting marriage to between a man and a woman. Even before the supreme court ruled, then, the case had significant political undertones.

Following District Court Judge Hanson's initial ruling in *Varnum*, the supreme court justices indicated an interest in reading the opinion, and at least Justice Streit expected the case

to work its way into their court. Justice Baker, who was appointed to the court in 2008, was familiar with the case and Judge Hanson's ruling before he even applied to be considered for the nomination. Before hearing the argument, none of the judges reported being exposed to tactics of political persuasion from the other branches of state government or independent interest groups. The general culture of respect for judicial independence in Iowa likely accounts for the lack of outside interference with the court's decision-making process. After hearing oral arguments in the case, in what Chief Justice Ternus characterized as pretty straightforward deliberations, the members of the court "discussed the law, applied it to the record that was before us, and came to an agreement that the plaintiffs' constitutional rights were violated." Justice Streit pointed out that, unlike Judge Hanson's decision that found the ban on gay marriage unconstitutional on both equal protection and due process grounds, the supreme court only confronted the violation of equal protection. From the court's perspective, the interpretation of due process under the Iowa constitution created too many externalities to render the consideration of the issue meaningful. In this regard, the court recognized that their decision in *Varnum* would be a political issue and, in the 69-page document, strived to write a clear, easily-understood opinion to communicate their ruling to people of all intellectual and legal abilities.

Upon release of the decision on April 3, 2009, the justices were not immediately exposed to the firestorm of interest group activity. Initially, Justice Ternus noticed an increase in media presence at the Judicial Branch Building as well as an influx of letters from members of the public expressing both displeasure and gratitude in regard to the decision. As the 2010 gubernatorial campaign got underway, Republican challengers to incumbent Democrat Chet Culver leapt at the chance to tell voters how they would solve the gay marriage problem created

by *Varnum*. Vander Plaats, who announced his gubernatorial campaign committee in January of 2009 and official candidacy in September, was especially radical in his legally-questionable plan to issue an executive order to stop the county clerks from issuing marriage licenses to gay and lesbian couples. Justice Baker indicated that it was during Vander Plaats's gubernatorial campaign that he first was concerned about retaining his seat. Former governor Terry Branstad, the eventual Republican nominee, announced his candidacy in October of 2009. In contrast to Vander Plaats, he downplayed the issue of gay marriage, quietly supporting a constitutional amendment defining marriage as between a man and a woman. In the June 8, 2010, Republican Primary, Vander Plaats earned 40.5 percent of the vote, second only to primary winner Branstad, who garnered nearly 50 percent of the vote ("Official Results Report"). During the primary campaign, it was clear to the judges on the ballot that "there would be negative responses to our decision, and that it was possible we would lose our jobs because of it" (Ternus). Yet, especially after Vander Plaats lost the Republican Primary after running primarily on the issue of gay marriage, the justices were not prepared for the onslaught of anti-retention campaign activity that would emerge about two months later.

When Vander Plaats announced the Iowa for Freedom group in August, the justices on the ballot did not publicly react, but they knew the campaign would hurt their chances of retaining their seats. In addition, Vander Plaats's ambiguous characterization of Iowa for Freedom as a grassroots group in his announcement press conferences resulted in a delayed response from the judges and pro-retention activists who doubted the seriousness of the threat and its potential for success. Moreover, during the early weeks of the campaign, the extent to which Iowa for Freedom was coordinating with specific out-of-state groups and the existence of large donations from prominent national politicians were largely unknown factors. In response

to the campaign against them, the judges sought advice from internal attorneys with the judicial branch and the American Judicature Society, which is based in Des Moines. While generally prohibited from engaging in political activities, the Iowa Code of Judicial Conduct allows judges to form campaign committees, speak upon the behalf of their candidacy, and seek endorsements from non-partisan persons or organizations for the purposes of retention election. However, the advice from the attorneys and American Judicature Society, in the interest of protecting the impartiality and independence of the Iowa judiciary, was “do not form committees, do not campaign” (Streit). As a result, the justices did not work with the Fair Courts for Us Committee or any other judicial independence advocacy groups. Instead, the American Judicature Society, local bar associations, and other nonpartisan groups insisted that they would support the judges against attacks from the anti-retention groups.

The so-called support the groups provided the judges amounted to an educational campaign on the importance of judicial independence and the merit selection and retention election system. The justices were involved in the activities to the extent that they gave speeches a few times a week on *Varnum* to further explain the case and the law surrounding the decision, as well as the principles of a fair court system. Often, though, the audiences the justices drew already favored retention and would not have been swayed by the anti-retention message. Moreover, in line with the desire to avoid campaigning during speaking appearances, Chief Justice Ternus would say, “I’m not here asking for your vote, I’m simply giving you the context for the [decision].” Similarly, a group established in August 2010, Iowans For Fair and Impartial Courts, explicitly stated on its website: “IFIC does not advocate a yes or no vote for any specific judge or justice” (“About IFIC”). Thus, as the anti-retention campaign instilled fear in voters that the court was moving toward revoking all rights, including the seemingly irrelevant

freedoms to homeschool children and say the Pledge of Allegiance, the judges and their supporters essentially provided a civics lesson. Unfortunately for the pro-retention activists, as Justice Streit said, “People are not voting for a good court system, they're voting against activist judges.” The political nature of the campaign against the judges demanded a political response. While the Fair Courts for Us Committee made an effort to counteract the anti-retention campaign, the justices never explicitly supported the message of the group, even though it was in their best political interests to do so.

How the Judges Lost

On November 2, 2010, the three major areas of influence converged and Iowans voted to unseat all three supreme court justices on the ballot. In this unprecedented outcome, each of the judges lost by fewer than five percentage points. Over \$1.3 million in independent expenditures was spent to influence the outcome of the judicial retention election. This sum accounted for over three-fourths of all independent expenditures made in the state in 2010. As a result of interest group-funded statewide television and radio advertisements, bus and auto tours, and telephone calls directly to voters, 87 percent of voters who participated in the election cast a vote in the supreme court retention contest. In contrast to the turnout rates for the lower court retention election in 2010, which were as low as 70 percent in many contests, it is clear that by specifically targeting the supreme court justices, the interest groups were able to increase turnout and affect the outcome. In addition, the anti-retention campaign's broader pro-family goals provided the organizational and financial strength necessary to succeed. The pro-retention Fair Courts for Us Committee, on the other hand, was created in direct response to the anti-retention effort. As a result, the group lacked an established organizational structure, financial stability, and legitimacy gained from long-term goals. Thus, the financial dominance of the anti-retention

groups, as well as the clarity of their message demanding that voters oust activist judges and reestablish traditional family values, shaped voter behavior and aided in the rejection of the justices on the ballot.

Media coverage of the campaign, which was concentrated in the month before Election Day, increased interest in the judicial contests. Although several of the newspapers published a number of opinion pieces and letters to the editor in favor of retaining the justices, coverage of anti-retention campaign events (especially before the pro-retention group was established) legitimized the message and goals of the effort. The unusual nature of the candidates and campaign message produced some challenges for the local media, which are naturally more accustomed to covering competitive election campaigns. In competitive election campaigns, the media is able to provide both substantive and horserace coverage through candidate appearances, official statements, and sound bites. In this instance, the newspapers were limited to coverage of the events held by all the groups involved, as well as the educational forums attended by the judges and several non-advocacy groups. In addition, the newspapers consistently found it necessary to provide contextual and procedural information related to the campaign, including background about the *Varnum v. Brien* decision and the judicial selection and retention process. The inability of the newspapers to profile candidates or provide any substantial informational cues severely limited the media's impact on the election. Moreover, the lack of reliable campaign finance data and the ambiguous interrelationships between the anti-retention groups somewhat disabled the traditional watch-dog function of the media. In this way, the media provided a venue for both sides of the retention campaign to publicize their messages without directly affecting how Iowans voted on Election Day.

Finally, the lack of an organized judicial response to the anti-retention campaign contributed significantly to the outcome of the election. In contrast to the concrete vote “No” message espoused by the anti-retention groups, the judges and their supporters focused their efforts on educating voters on the abstract concept of judicial independence. These educational activities failed to communicate to voters how they should vote, instead focusing on the broader implications of the campaign and electoral outcome. In addition, the decision to avoid campaigning limited the public visibility of the judges and prevented voters from forming a personal connection with them. Unlike traditional political candidates, the judges were not able to build a policy platform or create a public image to entice voters to support their retention. As a result, when making their decision in the voting booth, voters relied much more heavily on the informational cues provided by the interest groups. In terms of spending and message clarity, the anti-retention campaign dominated the available information on the judicial retention elections and was able to directly impact the outcome of the contest. Thus, while the lack of judicial response may have preserved judicial independence and the overall integrity of the court system, it played a major role in the ultimate victory for the anti-retention message.

National Implications

In Iowa in 2010, although the three areas of influence affected an unprecedented result, the circumstances prompting the campaign are not unique and the outcome could be replicated elsewhere. The interest groups involved in the Iowa anti-retention effort are national groups involved in ongoing pro-family campaigns. For instance, as revealed in confidential memos, the National Organization for Marriage characterizes itself as “the only single-issue national organization making substantial investments in marriage fights in every state” (“National Strategy for Winning”). Their involvement in the Iowa anti-retention campaign showcases their

financial and organizational strength, as well as their creativity in attempting to upset the liberalization process of marriage in the states. Moreover, in the characteristically low-information and low-spending environments of judicial retention elections, powerful interest groups advocating on behalf of any issue are capable of filling both voids and spark interest in these contests. The number and diversity of interest groups already interacting with the American political process makes almost any controversial judicial decision vulnerable to electoral backlash. By combining voter mobilization efforts with a clear message, interest groups can increase turnout in retention elections and provide cues to affect the outcome of the election.

The local media will play a role in disseminating information and functioning as a watchdog entity wherever such retention campaigns emerge. The circumstances prompting interest group involvement in retention elections, namely controversial judicial decisions, unsurprisingly elicit media coverage. However, in Iowa, the reaction of the local media was shaped by the unfamiliar nature of the campaign. If this type of interest group activity becomes more common in judicial retention elections, the local media coverage will likely evolve as the public's understanding of the contests improves. Based on the analysis here, the size of the media market will play a role in determining the amount of coverage, with larger publications providing more articles and editorial pieces on the different issues in the interest group campaign. In addition, the media's watchdog function will be enhanced or limited as a result of the quality of state campaign finance disclosure laws and practices and the initiative of investigatory journalists. In any jurisdiction, the local media provide an important venue for discussion and explanation of interest group campaigns in judicial retention elections that may expand in overall electoral impact in the future.

Throughout the nation, state judiciaries are confronted with controversial issues and an increasingly challenging political environment. In states that hold retention elections as part of their judicial selection process, judges are far less likely to be recognized public figures and may have little experience in the realm of political campaigns. Like the supreme court justices in Iowa, judges up for retention in other states may feel that campaigning and politicization of the court are damaging to judicial independence. Many states have designed and implemented a code of judicial conduct based on recommendations from the American Bar Association that allow judges to establish campaign committees and solicit funds for the purpose of campaigning on their own behalf. However, it is generally recognized that such practices have significant potential to corrupt judicial independence and the integrity of the court system. States with judicial selection processes that include retention elections implemented such systems in order to create an optimal balance between judicial accountability and judicial independence. Thus, it would not be surprising for judges in other states to react similarly to the Iowa justices out of respect for the selection and retention system and to preserve judicial independence.

Conclusion

The involvement of interest groups in judicial retention elections is an important issue facing American democracy and should be examined more closely in both the scholarly and policy arenas. Through the examination of a specific case, this research establishes how interest groups, the media, and judges interact in a particularly heated electoral context. While I argue that this case is not unique and similar results could occur in other jurisdictions throughout the nation, further research of additional cases is necessary to systematically examine the specific elements that are necessary to replicate the outcome. The structure of this research around three variable areas establishes a model that, if reproduced to evaluate other elections, would lend

itself to comparing findings across cases. Moreover, if sufficient data exists, quantitative analysis of aggregated data for turnout, spending, and other variables from all of the states employing judicial retention elections may provide significant insight to the forces that impact these contests. In a related area, further analysis of judicial evaluation programs and legal limits on interest groups will provide a greater understanding of the viable policy solutions in the arena of judicial elections. If the politicization of judicial retention elections through interest group involvement continues (as it appears it will), further scholarly exploration of this issue will certainly be warranted.

In the policymaking arena, the long-term implications of interest group campaigns in judicial retention elections on judicial independence must be considered and remedied. Due to the unique role of the judiciary in democracy, for decades politicians and scholars alike have grappled with the issue of how best to maintain a balance between judicial independence and judicial accountability, evidenced by the variety of judicial selection systems among the states. In terms of insulating courts from interest group interference, lawmakers might consider adopting specific campaign regulations that apply only to the unique case of judicial elections. Stiffer campaign finance disclosure laws for all entities in all elections will also help to hold interest groups accountable for their activities and provide voters with information necessary to make rational decisions at the ballot box.

In place of information cues provided by interest groups, judges must be made more accessible to voters. Establishing a judicial evaluation program that provides voters with an independent evaluation of how well each judge on the ballot has performed on the bench allows voters to make informed decisions. Several states have already implemented such programs. For example, Colorado's Judicial Performance Evaluation Commission is renowned nationwide

for providing voters with reliable information about their judges. Another solution, mentioned by former Iowa Justice Streit, is to hold oral arguments at a variety of locations throughout the state. This will allow voters to see firsthand how the court works and establish a more personal connection to the justices by putting a face with a name on the ballot. Even in the face of intense interest group activity, these measures may dampen the overall impact of such campaigns as voters will have access to unbiased information and feel more involved in the judicial process.

Interest groups present a significant danger for the integrity of the nation's state court systems. If campaigns like the one Iowa judges faced in 2010 become a political norm for judicial retention elections, judges will be less free to interpret the law without considering the electoral implications of their decisions. As interest groups and the media play an increasingly important role in shaping voter behavior in all elections, the issues examined here remain highly relevant. In looking to the future of interest group activity in judicial retention elections, the question should be not "Will it happen again?" but rather, "Where will it happen next?"

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Appendix A: Methodology

Media Coverage: Content Analysis

Rather than sift through hundreds of articles published in a given month, I chose ten specific search terms to run through the search engines of the five newspapers' online archives. These terms, which account for various aspects of the retention election and interest group campaign, were: "judicial retention," "Varnum v. Brien," "same-sex marriage," "gay marriage," "Bob Vander Plaats," "Iowa for Freedom," "judicial independence," "Marsha Ternus," "Michael Streit," and "David Baker." Upon initial analysis of the newspaper articles, I found that most sources refer to the legal decision as "Varnum," rather than the full title of the case. However, the other search terms provided sufficient coverage of the topic so that it was not necessary to run an additional search using just "Varnum."

In designing the method for the content analysis of the selected newspaper articles, I focused on elements that provided insight on the campaign activities surrounding the retention election process, the overall political climate, and the public perception of the retention election-related campaign activities. Generally, each story as a whole served as an adequate unit of analysis. However, in a couple instances, coverage of the judicial retention election was included in overviews of statewide election activity. In these situations, I focused my analysis only on the section of the piece pertaining to the retention election. Initially, I coded each article with numbers 1 through 7 to describe the particular type of story. The categories were defined as Anti-Retention Event News (1), Pro-Retention Event News (2), Anti-Retention Editorial (3), Pro-Retention Editorial (4), Anti-Retention Letter (5), Pro-Retention Letter (6), and Neutral or No Mention of Retention (7). As a point of clarification, the designation of Editorial was given only to those pieces written by newspaper staff members, whereas Letters were written and

submitted to the newspaper by members of the public. Furthermore, articles assigned a Neutral or No Mention of Retention (7) label either provided a balanced discussion of pro- and anti-retention campaign activities or simply provided background information on the retention election process without expressly discussing campaign activities.

Next, I examined the content of each article for mentions of subjects particularly relevant to my analysis of the role of interest groups in judicial retention elections. I categorized these subjects into five main areas: Interest Group(s), Spending, Judges, Campaign Events, and Public Opinion. Each article was evaluated for all five categories and accordingly assigned a Yes (the subject is present) or a No (the subject is not present). Articles that received a Yes for the Interest Group(s) category mentioned either specific interest groups or general interest group activity. In the Spending category, articles that were assigned a Yes mentioned fundraising activity, independent expenditure reports, or any other finance-related topics. In the Judges category, articles that received a Yes mentioned any of several topics including judicial activism, judicial independence, justices' responses to the anti-retention campaign, personal qualities of the judges up for retention, and the overall impact on the judicial system or democracy. Articles that were assigned a Yes for the Campaign Events category mentioned either specific or general events associated with a pro- or anti-retention group, such as rallies, bus tours, and debate or informational forums. Lastly, in the Public Opinion category, articles that received a Yes mentioned specific polls or calls for a constitutional convention to resolve the issue of gay marriage, or more general "public views" on gay marriage or civil rights. On the whole, this categorization process for the selected local newspaper articles provided the basic framework for further analysis of media coverage of interest group activity in the retention election throughout the state.

Judicial Response: Interviews

In order to obtain a uniform set of data from the interviews, I presented each former justice with the same questions and information regarding the conduct of this research. Each of the former justices was initially contacted by e-mail in November 2011, with a brief explanation of this project and a request to meet for an interview. The interviews were conducted in Johnston, Iowa, between December 22, and December 29, 2011. I met with former Chief Justice Ternus and former Justice Streit at a Panera Bread Café and recorded our conversations with a digital recording device. Following the interviews, I composed complete transcriptions of the digital recordings for the purpose of preserving the oral record for use in this study. Unfortunately, I was not able to meet with former Justice Baker in person, and I was not able to record our telephone conversation. I compiled my notes from this interview into a brief narrative. None of the former justices provided substantially differing views or accounts of the events coinciding with the *Varnum* ruling or the anti-retention campaign, so the lack of a full transcription of my interview with former Justice Baker did not produce a major obstacle.

The content of the interviews was divided into five major sections. First, I set the stage with several general questions pertaining to the former justices' educational background and employment history. These questions served to distinguish each former justice from the others and potentially explain diversity in opinions later in the interview. Similarly, in the second section, I inquired about the former justices' judicial careers. This set of questions focused on their history of employment in the Iowa judiciary, as well as day-to-day duties and interactions of the supreme court. Next, I asked a series of questions specifically pertaining to the *Varnum v. Brien* case and subsequent ruling. These questions helped to establish context for the impending anti-retention campaign and response by the justices. In the fourth section of the interviews, I

focused my questions on the anti-retention campaign. Generally, these questions provided a sense as to how each former justice reacted to the campaign activity on both a personal and professional level, and how these attitudes evolved throughout the course of the campaign. Finally, I asked about the former justices' reactions to the election results and being forced out of their jobs. In terms of drawing significant conclusions from this research, these questions provided a great deal of insight to the effectiveness of the anti-retention campaign and the long-term implications of such interest group activity in judicial elections. The complete interview guide is included below.

Interview Guide: Former Iowa Supreme Court Justices

_____ Marsha Ternus

_____ Mike Streit

_____ David Baker

Preliminary Statement:

Day, Time, Location, Participants

Do I have permission to record this interview?

I. Background:

1. What is your current job?
2. What is your employment history?
3. How did you get interested in the law?
4. What is your educational background?

II. Judicial Career

1. What was your first judicial position?
2. When were you appointed to the bench?
3. When were you appointed to the Iowa Supreme Court?
4. What were your official responsibilities as a Supreme Court justice?

5. What is your basic philosophy on the role of the judiciary in democracy?
6. What interaction did you have with political figures in the legislative and executive branches?
7. What interaction did you have with interest groups or lobbyists?
8. What interaction did you have with the media?
9. What factors played a role in your decision-making process and legal opinions?

III. *Varnum v. Brien*

1. When did you first hear about *Varnum v. Brien*?
2. What was your initial reaction to Judge Hanson's ruling in the case?
3. Before hearing arguments in the case, were you contacted by any political figures? Interest groups? Media?
4. How did the Court come to its decision? What factors influenced your decision?
5. What interaction did you have with political figures, interest groups, and the media after the decision was released?
6. Initially, were you concerned about retaining your seat on the bench in 2010? Why or why not?

IV. 2010 Anti-Retention Campaign

1. When did you first hear about Bob Vander Plaats' anti-retention campaign?
2. What was your initial reaction to the campaign?
3. Did Vander Plaats' group or any of the associated interest groups contact you at any point?
4. What was your relationship with the media during the campaign?
5. What interaction did you have with other political figures? Did they offer any help?
6. What was your reaction to the tactics used in the anti-retention campaign? Ads, phone calls, etc.
7. What impact did local elected officials have on the anti-retention campaign? For or against?
8. Did you notice any difference between in-state and out-of-state groups' activities?
9. How did you respond to the campaign? Did this change over the course of the campaign?

10. Did you work with the other justices or any organization to coordinate a response?
11. What would you consider the pivotal moment in the anti-retention campaign?
12. Did you work with any interest groups to combat Vander Plaats' campaign? In what capacity?
13. Did you engage in any campaign activities on your own behalf? How?
14. How did judicial conduct and ethics codes affect your involvement in the election?
15. What were your biggest concerns going into Election Day?

V. Election Results

1. What was your initial reaction to the results of the election?
2. What response did you receive from political leaders? The media? The community at-large?
3. What factors contributed to your defeat? Political climate, money, organization, etc.
4. What factors helped lower court judges retain their seats despite the anti-retention campaign?
5. Do you regret the decision in *Varnum*? Would you do anything differently knowing the result?
6. What are the long-term implications of ousting judges based on a single decision?
7. What is your opinion of the retention election system? Has it changed since the 2010 election?
8. Should interest groups face stricter regulations in judicial elections? Why or why not?
9. Do you think the other justices involved in the *Varnum* decision will face a similar fate? Why?
10. Do you have any other comments regarding what we have talked about today?