

Retention Elections 2.010

By JAMES SAMPLE*

Introduction

COUNTER-HISTORICALLY, THE HIGHEST PROFILE judicial campaigns of the first judicial elections cycle following the Supreme Court's decision in *Citizens United v. Federal Election Commission*¹ were retention and ballot measure, rather than contested elections. Retention elections, in which voters cast their ballots either in favor of returning the incumbent judge to office for another term or for her removal, were intended to balance the values of judicial impartiality and accountability to the public. If anything, historically, and with very few exceptions, judicial retention races were non-events. The dynamics this Article coins under the label "Retention 2.010," however, reflect a seismic shift in that balance towards majoritarian accountability that undermines the fundamental role of America's state courts.

In Iowa, judicial retention elections—contests normally well beneath the radar even in Des Moines—became a national flashpoint for same sex marriage debates and, more to the point, for interest group spending in courts races.² Also underscored by the 2009 Iowa judicial retention election was the prisoner's dilemma faced by judges who are targeted by big dollar campaigns. Faced with that dilemma, the Iowa Chief Justice and two Associate Justices did "not want to contribute to the politicization of the judiciary," and thus chose not to engage in fundraising.³ Realistically, that tactical decision, more than the Court's unanimous 2009 decision in favor of same sex marriage, cost them their seats on the bench.

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1. 130 S. Ct. 876 (2010).

2. Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, ABA. J., Jan. 2011, at 56.

3. Josh Nelson, *Chief Justice: Don't Politicize Judicial System*, WATERLOO-CEDAR FALLS COURIER (Oct. 21, 2010, 12:00 PM), http://wfcourier.com/news/local/chief-justice-don-t-politicize-judicial-system/article_722dbfe9-90d1-5ab3-b37f-a5a7f988e9ee.html.

Conversely, Illinois Chief Justice Thomas Kilbride faced a well-funded anti-retention effort—this one based on perceived anti-business rulings, but Kilbride aggressively raised more than \$1 million from political parties, unions, and stakeholders before the bench, resulting in what the *Chicago Tribune* described as “a \$3 million fight over a name most Illinoisans didn’t even see on the ballot.”⁴ Kilbride retained his seat.

This Article examines the dynamics driving these events, particularly in light of *Citizens United*'s potential to open the financial floodgates in state court races that, in their contested (as opposed to retention) iterations over the past decade alone, have already become soaked in campaign cash. For judicial retention elections nationally, the opposition to retention in the 2010 Iowa and Illinois elections represents a bell that will never be un-rung. The strategies, attacks, and expenditures in Iowa and Illinois will, nationally, come to represent what I call Retention 2.010.

Part I of this Article proceeds by considering *Citizens United* and judicial elections through the lenses, respectively, of the predictions as to *Citizens United*'s impact on judicial races and the ambiguous early returns from the first post-*Citizens United* election cycle. Part II offers context as to the development of the merit selection systems with which retention elections are often (though not exclusively) associated. Part III then examines controversial state court retention elections in California and Tennessee in both 1986 and 1996, which, in retrospect, were precursors of Retention 2.010. Finally, Part IV looks more closely at the events leading up to and constituting Retention 2.010, the judges and the array of other actors in Iowa and Illinois, and the consequences of those events, both electorally and for the rule of law.

Finally, this Article draws a lesson pertaining to Retention 2.010 from another significant event that occurred on Election Day, 2010. Despite a concerted campaign that drew heavily on the prestige of Justice Sandra Day O'Connor, Nevada voters rejected a proposal to abandon contested elections, becoming the latest occasion in the last quarter century in which voters around the country have—without exception—chosen to maintain contested elections.

4. Monique Garcia, *State Supreme Court Justice Wins Retention Battle*, CHI. TRIB. (Nov. 2, 2010), http://articles.chicagotribune.com/2010-11-02/news/ct-elect-kilbride-20101102_1_jury-awards-retention-battle-constitutionality-of-state-law.

I. *Citizens United* & Judicial Elections

This Part addresses predictions with regard to state judicial elections and their campaign financing in the wake of *Citizens United*.⁵ These overwhelmingly negative predictions note that there will unquestionably be an increase in state judicial campaign expenditures, almost certainly paralleled by increased party polarity on the newly elected benches. The numbers in Subsection B show the increased jump in judicial election expenditures from 2000–2009, prior to the Court’s decision in *Citizens United*. However, Part I.B. also highlights underlying factors which indicate that this data captures but a fraction of the real influx of cash into these elections. Finally, Part I.C. addresses the effect *Citizens United* will have on judicial elections when viewed in light of the Court’s decisions in *White* and *Caperton*.

A. *Citizens United* & Judicial Elections: The Predictions

Technically, the decision rendered in *Citizens United* had zero direct applicability to state judicial campaigns. Instead, the 5-4 blockbuster of *Citizens United* overturned limits on corporate and union general treasury fund expenditures aimed at influencing only federal candidate elections.⁶ In derivative application, however, the reasoning in *Citizens United* sweeps within its ambit state-based regulations, and thus has potentially dramatic ramifications for state judicial campaigns. Jeffrey Toobin, a staff writer at *The New Yorker* and the senior legal analyst for CNN, frames this issue in this way:

I think judicial elections are really the untold story of *Citizens United*, the untold implication. Because when the decision happened, a lot of people said, “Okay. This means that Exxon will spend millions of dollars to defeat Barack Obama when he runs for re-election.” I don’t think there’s any chance of that at all. That’s too high profile. There’s too much money available from other sources in a presidential race. But judicial elections are really a national scandal that few people really know about. Because corporations in particular, and labor unions to a lesser extent, have such tremendous interest in who’s on state supreme courts and even lower state courts that that’s where they’re going to put their money and their energy because they’ll get better bang for their buck there.⁷

Prior to *Citizens United*, many states had laws equivalent to the federal bans on spending corporate and union general treasury funds (as

5. 130 S. Ct. 876.

6. *See id.* at 917.

7. Interview by Bill Moyers with Jeffrey Toobin, (Feb. 19, 2010), *available at* <http://www.pbs.org/moyers/journal/02192010/transcript2.html>.

opposed to via Political Action Committees (“PACs”)) in state campaigns.⁸ “No such restrictions survive *Citizens United*, a stark reality that . . . is likely to have a particularly pronounced effect on court campaigns”⁹ Indeed, in a ninety-page dissenting opinion in *Citizens United*, Justice John Paul Stevens pointed specifically to the decision’s impact on judicial races: “At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”¹⁰

It is worth noting that Justice Sandra Day O’Connor had, along with Justice Stevens, co-authored the 5-4 majority decision just six years earlier in *McConnell v. Federal Election Commission*.¹¹ In contrast to *Citizens United*, *McConnell* “sustain[ed] with few and trivial exceptions”¹² the campaign regulations commonly known as the McCain-Feingold laws—key portions of which were then struck down in *Citizens United*.¹³ Justice O’Connor reacted to the *Citizens United* decision in much the same way as Justice Stevens, asserting: “[T]he majority in *Citizens United* has signaled that the problem of campaign contributions in judicial elections might get considerably worse and quite soon [I]f both [unions and corporations] unleash their campaign spending monies without restrictions, then I think mutually-assured destruction is the most likely outcome.”¹⁴ Given that *Citizens United* negated much of Justice O’Connor’s earlier decision in *McConnell*, her comments are far from surprising.

Justice O’Connor’s visceral reaction is a product of at least two factors. First, since stepping down from the Supreme Court, she has devoted extraordinary time, effort, and attention to state judicial inde-

8. *Life After Citizens United*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=19607#laws> (last visited May 30, 2011).

9. James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 752 (2011).

10. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part) (citation omitted).

11. 540 U.S. 93 (2003).

12. Bob Bauer, *Determining Legacy and Influence in the Appraisal of Justice O’Connor*, MORE SOFT MONEY HARD LAW (June 11, 2008), <http://www.moresoftmoneyhardlaw.com/news.html?AID=1281>.

13. *Citizens United*, 130 S. Ct. at 967 (Stevens, J., concurring in part and dissenting in part); see also Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 203–204, 116 Stat. 91, 92 (codified at 2 U.S.C. § 441b (2006)).

14. Adam Liptak, *Former Justice O’Connor Sees Ill in Election Finance Ruling*, N.Y. TIMES, Jan. 27, 2010, at A16, available at <http://www.nytimes.com/2010/01/27/us/politics/27judge.html>.

pendence,¹⁵ and in her view, *Citizens United* undermines the efficacy of her tireless work. Second, *Citizens United* negates one of Justice O'Connor's signature decisions in that it "opened the door to corporate and union financing of broadcast ads right before an election" and "moved away from a standard O'Connor had crafted to regulate campaign financing."¹⁶

Justice Stevens' singling out of judicial campaigns in his *Citizens United* dissent echoed an *amicus* brief filed by the Justice at Stake Campaign on behalf of nineteen judicial reform groups.¹⁷ The brief predicted that ending the ban on corporate general treasury funding would have dire consequences for state court campaigns. It further asserted that "[s]pecial interest spending on judicial elections—by corporations, labor unions, and other groups—poses an unprecedented threat to public trust in the courts and to the rights of litigants," and that "as other groups felt pressure to match this corporate treasury spending, these issues would only snowball."¹⁸ Amid the more generalized controversies that followed the *Citizens United* opinion,¹⁹

15. See, e.g., Bill Mears, *O'Connor Talks Politics, Judicial Independence*, CNN POLITICAL TICKER BLOG (Jan. 26, 2010, 5:22 PM), <http://politicalticker.blogs.cnn.com/2010/01/26/oconnor-talks-politics-judicial-independence/>.

16. Joan Biskupic, *On the Reshaped Supreme Court, O'Connor's Legacy Is Fading Away*, USA TODAY, June 10, 2008, at 1A, available at http://www.usatoday.com/news/washington/2008-06-09-oconnor_N.htm. Writing in 2008, USA Today's veteran high court reporter Joan Biskupic stated that "[n]otably absent among the current justices is an emphasis on how the high court's decisions affect the states," whereas "O'Connor, a former Arizona state senator who was the only former elected official on the court during her tenure," consequently "took a realistic view of the need for money in the system but also saw some of the problems associated with it." *Id.*

17. The amici submitting the brief consisted of Justice at Stake, American Judicature Society, the Center for Governmental Studies, Citizen Advocacy Center, Common Cause, Colorado Judicial Institute, Democracy North Carolina, the Illinois Campaign for Political Reform, Justice For All (Arizona), Michigan Campaign Finance Network, North Carolina Center for Voter Education, Ohio Citizen Action, Pennsylvanians for Modern Courts, Public Campaign, Takeaction Minnesota, Texans for Public Justice, Transparency International USA, Wisconsin Democracy Campaign, Chicago Appleseed, Chicago Council of Lawyers, and Former Chief Justice Norman S. Fletcher (Georgia, Retired). Brief of Amici Curiae Justice at Stake et al. in Support of Appellee, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), available at http://www.justiceatstake.org/media/cms/JAS_CU_Brief_FA9AE1D6AB94E.pdf.

18. *Id.* at 19.

19. See Linda Greenhouse, *Justice Alito's Reaction*, N.Y. TIMES OPINIONATOR (Jan. 27, 2010, 11:18 PM), <http://opinionator.blogs.nytimes.com/2010/01/27/justice-alitos-reaction/> (describing Justice Alito's head shake "as if to rebut" Obama's characterization of *Citizens United*); Michael D. Shear, *Obama Calls Citizens United Ruling 'A Huge Blow'*, WASH. POST (May 1, 2010), <http://voices.washingtonpost.com/44/2010/05/obama-calls-citizens-united-ru.html> (recounting President Obama voicing his displeasure with the court's decision in front of the Supreme Court Justices during his State of the Union speech); *Chief*

commentators picked up on these cues, recognizing the derivative judicial elections wrinkle to the case. As Dorothy Samuels of the *New York Times* editorial board put the concern:

As I read over last week's aggressively wrong 5-to-4 Supreme Court decision greatly escalating the power of corporate and union money in elections, my thoughts turned to former Justice Sandra Day O'Connor.

That is not just because the ruling is another reminder of the court's rightward shift since Justice O'Connor was replaced by the starkly conservative Justice Samuel Alito. Since retiring, Justice O'Connor has been warning about the threat to judicial independence from big-money state judicial campaigns and attack ads paid for by special interests hoping to influence future court decisions. The *Citizens United* ruling promises to make that problem worse, possibly much worse.²⁰

Due to wide variation, (including with regard to accuracy of terminology), apples-to-apples comparisons of state campaign finance laws are, at best, inexact. Still, against the above predictions and reflections, the National Institute on Money in State Politics offered an empirical backdrop to the specter of *Citizens United* in the states, noting that in the 2007–2008 elections:

- In the twenty-two states that restrict direct corporate donations to candidates, individual donors provided 48% of the money. Just 23% came from corporations via their associations, PACs, etc. (Unions gave 5%, and the rest came from political parties, which are often conduits for more corporate and union money.)
- In the six states that permit unlimited corporate donations, corporations provided 41% of the money, while individual donors gave just 23%. (Union giving here was 8% and the rest via political parties.)²¹

Justice John Roberts Found State of the Union Scene 'Troubling,' WASH. POST (Mar. 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030903672.html> (characterizing as "troubling" the image of "one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering . . . while the court — according to the requirements of protocol — has to sit there expressionless"). My own thoughts with regard to the controversies created involving these meta-discussions are summarized in James Sample, *Roberts: Corporate Speech Good, Presidential Speech "Very Troubling,"* HUFFINGTON POST (Mar. 10, 2010), http://www.huffingtonpost.com/james-sample/roberts-corporate-peech-g_b_493206.html.

20. Dorothy Samuels, Op-Ed., *Hanging a 'For Sale' Sign over the Judiciary*, N.Y. TIMES, Jan. 30, 2010, at A22, available at <http://www.nytimes.com/2010/01/30/opinion/30sat4.html>.

21. Edwin Bender, *Guest Opinion: Corporations' Influence on Elections Will Grow*, BILLINGS GAZETTE (Feb. 6, 2010, 12:00 AM), http://billingsgazette.com/news/opinion/guest/article_59f82a8e-12b6-11df-8976-001cc4c002e0.html.

Commenting on that data, the Brennan Center for Justice at New York University School of Law (“the Brennan Center”) asserts that the “prospect of increased corporate spending in judicial elections in the 21 states where *Citizens United* invalidated corporate spending bans is of particular concern because many of these states have already experienced some of the highest spending and nastiest races to date.”²² Concededly, if that statement is taken alone, it is certainly reasonable to question the efficacy of the prior corporate spending bans in limiting the role of cash in the courts *ex ante*. It warrants recognition, however, that the state corporate spending bans served only the same limited, partial purposes that they served in the federal campaign system prior to *Citizens United*. No one contends that the provisions, standing alone, comprised comprehensive or effective regulation. Counter-intuitively, but also perhaps correctly, the Brennan Center further asserts that “even in states which have historically avoided the most egregious judicial electioneering . . . *Citizens United* may usher in a race to the bottom in terms of campaign finance practices.”²³ Taken together, the assertions are subject to the critique that the proponents of campaign finance regulation effectively admit the ineffectiveness of the corporate spending bans on the one hand, while simultaneously claiming that *Citizens United* will increase the role of corporate money in both states that had such bans and those that did not. Although such a critique is fair, the reality may prove to be just as the Brennan Center predicts.

Reflecting on *Citizens United*’s impact not merely on court races generally, but on the types of jurists the decision would favor and disfavor, one theory is that the result of the decision would be to disadvantage the type of moderate, thoughtful jurists more inclined—at the margins—to decide cases on narrow, case-by-case grounds. The same impact would not be felt by those jurists who tend to render decisions with the broad strokes more favored by wealthy interests at the edges of divided legal and policy spectrums. The result will inevitably polarize the bench “because more moderate candidates are unlikely to be considered a bankable vote by any special interest group investing heavily in judicial campaigns.”²⁴ Phrased differently, in the post-*Citizens United* era of judicial elections, arguably the type of candi-

22. Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections*, BRENNAN CENTER FOR JUSTICE, 8, <http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1> (last visited Nov. 21, 2011).

23. *Id.*

24. Samuels, *supra* note 20.

date most likely to be disadvantaged in a close court contest is a would-be jurist fashioned in the mold of Sandra Day O'Connor—effectively the critic in chief of the contests themselves.

Wherever one may fall on the spectrum of judicial ideologies, it is hard to avoid the conclusion that in such a scenario, the resulting vectors away from the ideological middle—in multiple directions—are skewed, and that such skewing is not contrary vis-à-vis the collective public interest. Arguing for campaign spending limits—as opposed to merely limits on contributions—in campaigns for court seats, I have previously attempted to describe this skewing result from the perspective of a hypothetical “wise but not wealthy candidate for judicial office who faces a substantial independent expenditure campaign.”²⁵ In brief, such a candidate essentially has three options: she can signal a disposition favorable to concentrated and moneyed interests who might then underwrite an independent expenditure campaign supporting her and/or attacking her opponent (in a contested, rather than retention race); she can embark on the “daunting and statistically almost impossible”²⁶ task of “raising enough money to meaningfully counter the funded speech—even inaccurate funded speech”; or she can “surrender—often before ever entering a race at all, thereby creating an adverse selection problem that degrades the quality of the courts, even apart from concerns about their impartiality.”²⁷

In a troubling twist, it is in states that have direct campaign contribution limits where the second of these options is made all the more difficult. While moneyed groups and individuals can spend unlimited sums, the candidate can only raise money in capped contributions, necessitating ever more time and energy devoted to the task of fundraising. Josh Rozenkranz aptly describes the interplay of unlimited expenditures and the restricted supply of capped contributions as turning “decent, honest politicians” into “junkies . . . caught in the political equivalent of an arms race in which neither side feels safe to disarm unilaterally.”²⁸ To this very point, a May 2011 *New York Times* article about the frantic pace of fundraising in Texas congressional races, well in advance of the 2012 elections, noted that “[t]he fundraising effort reflects the modern campaign cycle and the \$2,500 limit

25. Sample, *supra* note 9, at 756.

26. *Id.*

27. *Id.*

28. E. Joshua Rosenkranz, *Faulty Assumptions in “Faulty Assumptions”: A Response to Professor Smith’s Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 889 (1998).

on individual donations—both of which require candidates to seek campaign money all the time rather than only during the immediate prelude to an election.”²⁹ The contrast of that reality for candidates—and the unconstrained purview of those who engage in six- and seven-figure independent expenditure campaigns—is one that both proponents and opponents of campaign finance regulation decry, though they “solve” the problem in opposite manners.³⁰

B. *Citizens United* & Judicial Elections: Ambiguous Early Returns

The dire predictions regarding *Citizens United*'s impact on judicial elections benefit from a contextual background that almost assures their infallibility—spending in judicial elections seems as likely to *decrease* over the near term as does gravity over the same period. A recent empirical study of campaign spending in judicial elections found that “[f]rom 2000–09, Supreme Court candidates raised \$206.9 million nationally, more than double the \$83.3 million raised from 1990–1999 (by comparison, the consumer price index rose only 25% from 2000–2009).”³¹ The overall national aggregate increase may actually understate the degree to which, on a state-by-state basis, expensive court campaigns have become the norm, rather than the exception. As the study notes, “[d]uring the earlier decade, 26 Supreme Court campaigns raised \$1 million or more, and all but two came from three states: Alabama, Pennsylvania and Texas. In 2000–09, by contrast, there were 66 “million dollar” campaigns, in a dozen states.”³²

However, these figures tell only a partial story, and one that is becoming decreasingly complete with each passing election cycle. This is because the figures account only for direct contributions to

29. Matt Stiles & Ryan Murphy, *Fund-Raising for '12 Elections Sets Fast Pace*, N.Y. TIMES, May 5, 2011, at A23A, available at <http://www.nytimes.com/2011/05/06/us/06ttcash.html?src=recg>.

30. See, e.g., Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1757 (2001) (noting “the rejection of critical elements of *Buckley* by a majority of the justices” at the time, and that “Justices Kennedy, Scalia, Thomas, and Stevens . . . expressly called either for overruling of *Buckley* entirely or for overruling key elements of the decision” while Justices Breyer and Ginsburg “expressed the hope that *Buckley* could be salvaged through significant reinterpretation, including the modification of . . . the contribution/expenditure distinction”).

31. JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000–2009: DECADE OF CHANGE 8* (Charles Hall ed., 2010), available at http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

32. *Id.*

court campaigns. Yet, even the most conservative measurements³³ of television advertising—by far the biggest driver of campaign costs—reflect that “[s]pecial-interest groups and party organizations accounted for . . . more than 40 percent of the estimated TV air time purchases in 2000–09.”³⁴ In 2008, special-interest groups and political parties accounted for fifty-two percent of all TV spending nationally—the first time that noncandidate groups outspent the candidates on the ballot.³⁵

A substantial portion of the noncandidate spending is being fueled by a concentrated few, who are investing in court races in a disproportionately large manner. In the prior decade, the top five spenders in twenty-nine state high court campaigns in the nation’s ten costliest judicial election states—a total of 145—spent an average of \$473,000 each.³⁶ The result is that “a large number of justices in those states owe their elections to a few key benefactors.”³⁷ While just one such “super spender” in these races was an individual, the \$3 million in expenditures contributed by Chairman and CEO of Massey Energy Co., Don Blankenship, in the 2004 West Virginia judicial election was so conspicuously “generous” that it led to the landmark recusal discussion had in *Caperton v. A.T. Massey Coal Co.*³⁸ Insofar as *Citizens United* frees up the general treasuries of two key traditional combatants in judicial elections—corporations and labor unions—it opens the door for isolated “super spenders” inclined to play an ever more outsized role in court campaigns.

Given the number of judicial elections states that lacked Bipartisan Campaign Reform Act-equivalent general treasury bans prior to *Citizens United*—as well as the arguably limited efficacy of the bans in some of the more expensive judicial elections states that did employ them—it is possible that critics of *Citizens United* are exaggerating con-

33. With regard to the conservatism of the estimates, the study notes, these estimated costs of airtime in the *New Politics of Judicial Elections* are calculated and supplied by TNS Media Intelligence/CMAG, which uses satellite technology to track advertising in the nation’s 100 largest media markets. *Id.* Consequently, the ads “do not include either ad agency commissions or the costs of production” nor do they include the costs of advertisements in smaller media markets. As such, while the estimates unequivocally understate the actual expenditures, they also represent the best available data for comparison purposes. *See id.* at 37.

34. *Id.* at 2.

35. *Id.*; Erwin Chemerinsky & James J. Sample, Op-Ed., *You Get the Judges You Pay For*, N.Y. TIMES, Apr. 18, 2011, at A23, available at <http://www.nytimes.com/2011/04/18/opinion/18sample.html>.

36. SAMPLE, *supra* note 31, at 10–11.

37. Sample, *supra* note 9, at 751.

38. 129 S. Ct. 2252 (2009).

cerns that the decision will open the money floodgates to court races already awash in cash.

Weighing against the argument that the concerns are exaggerated, however, is this: The practical effect of the decision as applied to judicial races is that of a one-way ratchet—eliminating the general treasury bans where they existed and maintaining the status quo where they did not. As such, it is distinctly possible that some multistate corporations, faced with a complex and constantly changing patchwork of inconsistent state-by-state regulation, and who may have previously considered substantial spending in judicial races to be an inefficient proposition, will now decide that it is in their interests to take advantage of the across-the-board simplicity of a deregulated, post-*Citizens United* landscape. Viewed from the perspective of the general counsel's office in a multistate³⁹ corporation, the clarity and uniformity following *Citizens United* surely makes substantial engagement in judicial election spending, at the very least, less of a legal and logistical burden than it was prior to the decision.⁴⁰ If that perspective on reduced burdens holds sway, then *Citizens United* will increase corporate judicial election expenditures even in states where such expenditures were not legally curtailed in the past. In such a scenario, despite an in-state *de jure* status quo, court races will be dramatically different *de facto*. And the dire predictions will prove correct.

39. The term “multistate” is used in this context merely as shorthand for a corporation with significant business interests—and thus significant interests in the courts—in several or all of the states.

40. There is some anecdotal evidence, in non-judicial election settings, of a risk of customer backlash when a corporation, particularly a recognizable retail conglomerate, takes advantage of the opportunities opened up by *Citizens United*. Perhaps the highest-profile example involves Target. As framed by the *Washington Post*: “When Target gave money . . . to a pro-business group in Minnesota, the company thought it was helping its bottom line by backing candidates in its home state who support lower taxes.” Jia Lynn Yang & Dan Eggen, *Exercising New Ability to Spend on Campaigns, Target Finds Itself a Bull's Eye*, WASH. POST (Aug. 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/18/AR2010081806759.html>. The result, however, was more complex, such that, “[i]nstead, the retailer has found itself in a fight with liberal and gay rights groups that has escalated into calls for a nationwide boycott and protests at the company's headquarters and stores.” *Id.* The backlash against Target in the Minnesota state race at issue, however, did not dissuade other major corporations such as 3M, from spending in the same way, in the very same race. See Paul Krugman, Op-Ed., *The Flimflam Man*, N.Y. TIMES, Aug. 6, 2010, at A23, available at <http://www.nytimes.com/2010/08/06/opinion/06krugman.html>. For a fuller treatment of this issue, and although I don't agree with all of his suggestions, Bruce Freed of the Center for Political Accountability offers suggestions as to how corporations can “take advantage of newfound freedom after the Supreme Court's *Citizens United* decision without being ‘Target-ed.’” Bruce Freed, *How Companies Can Limit Political Spending Risks*, HUFFINGTON POST (Mar. 15, 2011), http://www.huffingtonpost.com/bruce-freed/how-companies-can-limit-p_b_836088.html.

C. *Citizens United* & Judicial Elections: Justice Kennedy Deconstructed

“Far from undermining arguments for differential treatment of judicial elections, *Citizens United* underscores their very differences.”⁴¹ Although a more fulsome analysis of Justice Kennedy’s divergent approaches in writing the opinions for the Court in both *Caperton*⁴² and *Citizens United* is beyond the scope of this Article,⁴³ Justice Kennedy’s opinion in the latter strains to distinguish his opinion in the former. Most directly, in *Citizens United* Justice Kennedy writes that “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”⁴⁴

There is no disputing the “salient differences between the ex post remedy of constitutionally mandated recusal due to independent expenditures, and upholding ex ante limits on the expenditures themselves.”⁴⁵ On the other hand, it cannot be disputed that “*Caperton*’s holding was limited”⁴⁶ to the narrower question in part because that was the precise and only question before the Court. Conversely, in *Citizens United*—as in the string of campaign finance cases from *Buckley v. Valeo*⁴⁷ through *Citizens United*’s precursor, *McConnell v. Federal Election Commission*⁴⁸—the Court analyzed federal statutes applicable to federal elections, which, by definition, do not include judicial appointments.

Further, relative to the Court’s campaign finance jurisprudence, even the “limited” holding of *Caperton* is actually rather dramatic in

41. Sample, *supra* note 9, at 773.

42. 129 S. Ct. 2252.

43. In *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, I trace Justice Kennedy’s opinions involving state judicial elections, beginning with *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and continuing through *López Torres v. New York State Board of Elections*, 462 F.3d 161, 171–81 (2d Cir. 2006). Sample, *supra* note 9.

44. *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010).

45. Sample, *supra* note 9, at 772.

46. *Citizens United*, 130 S. Ct. at 910.

47. 424 U.S. 1 (1976) (holding that (1) the provision in Federal Election Campaign Act limiting individual contributions to campaigns is constitutional; (2) provisions limiting the amount spent by candidates on their own behalf violate their right to free speech; (3) provisions limiting total expenditures in campaigns are unconstitutional; (4) provisions limiting individual spending, independent of a candidate but incidental to the candidate violate free speech; (5) the reporting requirements of the Act are constitutional; and (6) the Federal Election Commission created by the Act violates the Appointments Clause).

48. 540 U.S. 93 (2003) (upholding most of the Bipartisan Campaign Reform Act of 2002, including the restrictions on the use of corporate and union funds for “electioneering communications,” but this holding was later overturned by *Citizens United*, 130 S. Ct. 876).

the sense that “*Caperton*’s fundamental holding is that judicial elections are different. One cannot conceive of a court holding that a legislator (or executive) would be barred from acting in X matter because a campaign supporter was involved.”⁴⁹ Schotland’s point as to differential treatment applies, *a fortiori* in a circumstance where, as in *Caperton* itself, the “campaign supporter” he references is not a contributor—over whom the Court’s jurisprudence allows some curtailing even in legislative and executive contexts—but an “independent” spender—over whom the same jurisprudence in non-court races, does not.⁵⁰

Post-*Caperton*, those who assert that legally, judicial elections are subject to the same rules as legislative and executive races⁵¹ have already lost the argument and are attempting to re-litigate (both academically and actually) settled questions. Ironically, the purported foundation of the arguments for non-differential treatment is generally the Court’s holding in *Republican Party of Minnesota v. White*. In *White*, the Court held that a state canon of judicial conduct that prohibited judicial candidates from announcing their views on issues “likely to come before the candidate” failed First Amendment strict-scrutiny analysis.⁵² That holding, combined with ambiguity as to just how far *White* reached, spawned a plethora of challenges to other less restrictive judicial canons.⁵³ However, those pushing the theory—on the basis of *White*—that judicial and non-judicial elections must be subject to identical rules, did so by selectively reading *White* itself. Justice Scalia’s majority opinion expressly stated that “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”⁵⁴ Likewise, the

49. Roy A. Schotland, *Caperton Capers: Comment on Four of the Articles*, 60 SYRACUSE L. REV. 337, 344 (2010).

50. See Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181, 1198–99 (2007).

51. See generally James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Campaign Financing*, 86 DENV. U. L. REV. 195, 205, 231 (2008) (asserting that reformers “should not make the mistake, however, of equating increases in the amount of money spent on judicial campaigns with an increase in corruption” in spite of the fact that in the judicial, as opposed to legislative and executive contexts, preventing the perception or actuality of mere influence, rather than corruption, is the compelling state interest).

52. *Republican Party of Minn. v. White*, 536 U.S. 765, 771 (2002).

53. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 297–98 (2008) (surveying challenges to the canons).

54. *White*, 536 U.S. at 783. Indeed, Tom Phillips recently wrote “[i]n and of itself, *White* . . . was hardly a remarkable decision, as it affected only one obsolete provision that seemed patently overbroad.” Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges*

“fundamental” difference that Roy Schotland points to in *Caperton* was previewed by none other than Justice Kennedy who concurred in *White* but wrote that “[s]tates may choose to ‘adopt recusal standards more rigorous than due process requires.’”⁵⁵ Thus, while *White* ultimately stood for less than some claimed at the beginning, the holding in *Caperton* makes clear that judges—even elected judges—are different.

For now, as described above, speculation as to the impact of *Citizens United* on campaign spending in judicial elections remains mostly just that—speculative. While the one-way ratchet of *Citizens United* increases the pools of capital available for spending in elections, the degree of impact it has on judicial races, as opposed to non-judicial races, over the next several years will turn, in significant part, on the *degree* of difference that states, and subsequently the courts, find applicable.

II. Retention Elections and “Merit Selection” in Context

A. The Development of a Hybrid

Given the ambiguities described in Part I with respect to *Citizens United*'s impact on judicial elections, it is easy to make the mistake of confusing correlation with causation. During the limited sample of the 2010 election cycle, the most notable dynamic—which may or may not bear *any* causal relationship to *Citizens United*—was the emergence of retention elections as major campaign spending battlegrounds.

Although retention elections occur for judges who reach the bench in a variety of different manners,⁵⁶ these elections are most fre-

and Fair Appeals for Litigants: Judicial Recusal in a Post-White World, 55 *DRAKE L. REV.* 691, 698 (2007).

55. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (quoting *White*, 536 U.S. at 794).

56. Judges may face retention after: (1) election; (2) interim appointments to fill vacancy; or (3) hybrid selection/election system. Illinois, as described in *infra* Part IV, is a state in which they follow an election model. Missouri and South Carolina, on the other hand, are two examples of states in which an independent committee decides whether or not a judge will be retained. *Methods of Judicial Selection: Retention Evaluation Programs*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state= (last visited June 7, 2011) [hereinafter *Methods of Judicial Selection*]. Lastly, a hybrid method, as adopted in New Mexico, has an independent commission which evaluates the judges mid-term and before the retention election. *Id.* “Evaluations are based on a self-assessment, surveys of those who have come into contact with the judge, and a personal interview.” *Id.* The evaluations made before the retention election are then posted on the commission's website and published in state newspapers. *Id.*

quently associated with the commission-based appointment process commonly referred to as “merit selection”—which is also occasionally and perhaps more descriptively referred to as commission-based appointment.⁵⁷ Contextually, merit selection systems fit into what Charlie Geyh describes as “the struggle to balance independence and accountability [that] has played itself out over the course of more than two centuries, as five distinct methods of selecting judges—each striking the balance in different ways—have vied for preeminence.”⁵⁸

The two-century long struggle “is still going strong”⁵⁹ despite the fact that, in the words of one scholar, the “main elements of the controversy have not varied, and the question posed has remained the same: Is it more appropriate in a constitutional republic supposedly governed by the rule of law to have judges *appointed by an executive or elected by the people?*”⁶⁰ Merit selection systems are largely inspired by the idea of eliminating the mutual exclusivity of that choice. The systems aim to serve the Hamiltonian interest in preserving an independent judiciary while retaining public accountability.⁶¹ Accordingly, merit selection is, to some extent, a “hybrid between [the] appointment and election” methods of seating a member of the judiciary.⁶²

While systems vary in structure from state to state, the consistent elements include a nonpartisan nominating commission used to “lo-

57. Editorial, *Saving the Missouri Plan*, 91 JUDICATURE 160, 210 (2008). While there is a vibrant and seemingly never-ending debate among election and appointment proponents and others as to the propriety of the term “merit selection,” that debate is both beyond the scope of this Article, and, in the view of the author, ultimately circular and unhelpful. Whether rightly or wrongly on the merits, the term “merit selection” has become a term of art. Consequently, this Article uses both of the terms—“merit selection” and “commission-based appointments”—without endorsing or contesting the issue on the merits (so to speak). To the extent that this meta-discussion on nomenclature may be of interest see, for example, Rachel Paine Caufield, *What Makes Merit Selection Different?*, 15 ROGER WILLIAMS U. L. REV. 765, 767 nn.7–8 (2010); Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV. 249 (2011); Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 598 n.4 (2005).

58. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1261 (2008). Geyh notes, in particular, that “[i]n the fledgling states, all judges were selected by one of two methods: gubernatorial appointment with legislative confirmation (five states) or legislative appointment (eight states).” *Id.*

59. John L. Dodd et al., *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 354 (2002).

60. *Id.*

61. *See id.*

62. *See* Ryan L. Souders, Note, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 569 (2006).

cate, recruit, investigate, and evaluate”⁶³ judicial candidates in devising a short list of nominees—generally two to seven per vacancy⁶⁴—followed by the appointment by a state official—often the governor.⁶⁵ The judicial nominating commission—made up of lawyers and non-lawyers, appointed in part by the state bar association, state officials, and by other (optimally) diverse members of the local legal community—screens and selects candidates based on meritorious qualifications rather than various political interests.⁶⁶

Depending on the particular state guidelines, the subsequent gubernatorial selection may serve to fill the vacancy on the bench, or the plan may require legislative or executive council confirmation.⁶⁷ Unlike the federal appointment of Article III Judges, state judges are appointed to serve the judiciary for a limited term.⁶⁸ At the close of their term limit, judges appointed through the merit selection system are evaluated for retention either by a commission or by way of a retention election. Retention elections generally subject incumbent judges seeking to serve a subsequent term to a general election, which is aimed at depoliticizing judicial selection and promoting independence and impartiality in the adjudication process.⁶⁹ However, instead of running opposite (an) other judicial candidate(s), voters cast a ballot in which a majority vote often secures a judge’s retention—a minority vote generally restarts the process of merit selection.⁷⁰

Merit selection systems are often referred to as adopting the “Missouri Plan,” a byproduct of Missouri becoming the first state to adopt this system in 1940, and were first conceived during the Progressive Movement.⁷¹ Prior to the creation of merit selection, judges appointed to the courts were thought to be “in the pocket” of the political machine, and those elected were considered mere “rubber-stamp confirmations of the machine’s slate.”⁷² Elected judges were placed

63. *Merit Selection: The Best Way to Choose the Best Judges*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf (last visited Nov. 24, 2011) [hereinafter *JMS: The Best Way*].

64. *Judicial Merit Selection: Current Status*, AM. JUDICATURE SOC’Y, at tbl.3, http://www.judicialselection.us/uploads/Documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf (last visited Nov. 24, 2011) [hereinafter *JMS: Current Status*].

65. *Id.* at tbl.2.

66. *JMS: The Best Way*, *supra* note 63.

67. *Id.*

68. *Id.*

69. See G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 610 (2009).

70. See *Methods of Judicial Selection*, *supra* note 56.

71. Dodd et al., *supra* note 59, at 362; see Souders, *supra* note 62, at 569.

72. Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV.

on the bench as a consequence of their party affiliation rather than their qualifications and were increasingly viewed to be incompetent and corrupt.⁷³ The conflicting interests in strengthening the judiciary's responsiveness to the public and in creating politically independent state judiciaries gave birth to the merit selection process in which nominating commissions selected a group of candidates for appointment by the governor.⁷⁴

B. Retention Rhetoric v. Retention Reality

Today, led by the American Judicature Association, many Balkanized reform groups advocate for the adoption of merit selection as opposed to contested, partisan judicial elections, arguing that such elections threaten to undermine the integrity of the judiciary.⁷⁵ Retention elections, despite their overlap with more traditional contests, have long been an awkward, forced fit for many proponents of an appointed judiciary. The inclusion of retention elections within the merit selection system contributes to the responsiveness of the judiciary to its electorate, which seems to undermine the goal of appointment proponents to achieve an independent judiciary. That awkwardness is perceived to be somewhat mitigated because retention elections are devoid of “traditional voting cues including party labels, candidate appeals, incumbency, [and] campaigns.”⁷⁶ Further, retention elections have historically resulted in an overwhelming—indeed nearly unanimous—majority of incumbent judges being retained for an additional term, which critics signal in challenging the effectiveness of increased accountability.⁷⁷

One consequence of nearly statistically certain retention is to shift all of the *practical* selection to the appointment rather than the election part of the process. This consequence is heartily welcomed by opponents of judicial elections who could thus “safely” advocate for

625, 627 (2005); J. Clark Kelso, *Judicial Elections: Practices and Trends*, MCGEORGE SCH. L., 11 (1999), http://www.mcgeorge.edu/documents/centers/government/ccglp_pubs_judicial_elections_practices_and_trends_pdf.pdf.

73. See Caufield, *supra* note 72, at 627.

74. See Dodd et al., *supra* note 59, at 361.

75. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1086 (2007).

76. Larry T. Aspin & William K. Hall, *The Friends and Neighbors Effect in Judicial Retention Elections*, 40 W. POL. Q. 703, 703 (1987).

77. JEROME R. CORSI, JUDICIAL POLITICS—AN INTRODUCTION 112 (1984) (noting that “[i]n the forty-five-year history of retention election [through 1980] . . . only 1.6 percent of all judges in retention elections were defeated”); see also William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 342 (1987).

the merit selection hybrid, and even tout the system's accountability mechanism to voters with little fear that the actually disfavored elective component of that hybrid would prove meaningful.

A shift towards merit selection in many states took place in the 1960s and 1970s.⁷⁸ Fourteen states: Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Mexico, Rhode Island, Utah, Vermont, Wyoming, and the District of Columbia use a merit selection process.⁷⁹ Yet, whatever momentum merit selection generated in the 1960s and 1970s, it ran into a brick wall in the 1980s.⁸⁰ Changing the mode of selection for a state's judicial branch involves amending the state's constitution, which commonly requires the approval not only of the legislature, but also of the voters.⁸¹ Even where the former has existed, the latter has not for the last quarter century, and "in recent decades voters have consistently opposed merit selection"⁸²—so consistently in fact that an American Judicature Society website listing "unsuccessful reform efforts" on a state-by-state basis is several pages in length.⁸³ If anything, the pendulum in terms of elections versus appointment is swinging in the opposite direction with state legislatures—specifically Iowa, Arizona, and Oklahoma—advancing bills seeking to modify or overturn their merit selection systems. Those efforts have likewise been without significant success.⁸⁴

78. See Schotland, *supra* note 75, at 1086.

79. See Caufield, *supra* note 72, at 625, 628 n.23.

80. See Schotland, *supra* note 75, at 1086; see Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1478 (1987) (noting that "in every state but Delaware, an amendment proposed by the legislature becomes law only when ratified by the electorate").

81. See, e.g., *Judicial Selection in the States: Nevada*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=NV (last visited June 6, 2011) (noting Nevada legislature approved, in 2007 and 2009, proposed constitutional amendments calling for merit selection of Nevada judges); see also *South Carolina's State Government Structure, Including Judicial Selection, Balance of Power and the State Constitution*, LIBERTY FELLOWSHIP (Nov. 2010), http://www.libertyfellowshipsc.org/files/research/SC%20State%20Government%20Structure_LF_Final.pdf (explaining requirements to amend South Carolina's constitution to method of judicial selection).

82. See Schotland, *supra* note 75, at 1086.

83. See *History of Reform Efforts*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state= (last visited June 6, 2011) [hereinafter *History of Reform Efforts*].

84. See Bill Raftery, *In Last Seven Days, Bills to Tweak, Modify, or End Merit Selection Advance in the IA House, AZ Senate, and OK Senate*, GAVEL TO GAVEL (Mar. 9, 2011), <http://gaveltogavel.us/site/2011/03/09/in-last-seven-days-bills-to-tweak-modify-or-end-merit-selection-advance-in-the-ia-house-az-senate-and-ok-senate/>.

Stasis in selection systems is the order of the day. Stasis in how those systems operate, however, is decidedly not. Over the past decade, contested judicial elections have become, in the words of retired Justice Sandra Day O'Connor, "political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution."⁸⁵ Judicial election critics, who recognize the consistent resistance of voters in elective states to move to appointive judiciaries, attempt to persuade voters that a move to merit selection will not diminish voters' influence because of the *accountability* represented by the retention vote. Consider again, for comparative and illustrative purposes, the words of Justice O'Connor, this time advocating for merit selection in an op-ed article in the *New York Times*:

A better system is one that strikes a balance . . . by providing for the open, public nomination and appointment of judges, followed in due course by a standardized judicial performance evaluation *and, finally, a yes/no vote in which citizens either approve the judge or vote him out.* This kind of merit selection system—now used in some form in two-thirds of states—protects the impartiality of the judiciary *without sacrificing accountability.*⁸⁶

Strategically, from the perspective of those opposed to electing judges, such a pro-voter pitch costs little when, even relative to historically "sleepy judicial elections,"⁸⁷ retention races have long been the sleepest of all. The "sleepest" characteristic is undoubtedly part cause and part effect. Voter interest in contests that lack traditional adversaries and in contests that generate incumbent retention rates of well over ninety percent is low *ex ante*, and that low interest level becomes, prospectively, a self-fulfilling prophesy.⁸⁸ This dynamic is rarely, if ever, expressly acknowledged by merit selection proponents—and certainly not when the system is being pitched to voters. Whether acknowledged or not, the dynamic, from the perspective of merit proponents, preserves judicial independence while creating the perception—but rarely the actuality—of accountability to voters. Naturally, opinions differ as to whether such a dynamic amounts to a

85. SAMPLE ET AL., *supra* note 31, at 4.

86. Sandra Day O'Connor, Op-Ed, *Take Justice Off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9, available at <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html> (emphasis added).

87. See David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Elections*, 69 ALB. L. REV. 985, 985 (2006) ("[T]he future of many sleepy judicial elections may look increasingly more nightmarish . . .").

88. Corsi, *supra* note 77, at 112 (noting 1.6 percent success).

virtuous or vicious circle.⁸⁹ The 2010 judicial elections cycle, however, indicates that historical norms are changing, and changing dramatically.

C. Rose Bird & Penny White: The Precursors of Retention 2.010

Prior to 2010, the highest profile exceptions to the rules of sleepy and near-certain retention campaigns occurred in California and Tennessee in 1986 and 1996, respectively. In 1986, Californians voted three state supreme court justices out of office.⁹⁰ The justices included, most notably, Rose Bird, who in addition to having been elected the state's first female supreme court justice nine years earlier, became the "first chief justice in the modern history of the court to be voted out of office."⁹¹

Conventional wisdom holds—largely correctly—that Bird's defeat was attributable to her votes in capital cases. As one scholar notes, "Bird, in the sixty-one capital cases heard by the California Supreme Court while she served as Chief Justice, never voted to uphold a death sentence."⁹² Along with Bird, two associate justices who were frequently with Bird in the court's liberal majority at the time, Joseph R. Grodin and Cruz Reynoso, were also defeated, though by narrower margins.⁹³ The morning after the vote, the *Los Angeles Times* reported that, "[a]fter nine years in the job, Bird fell victim to a multimillion-dollar campaign that focused on her long record of voting to overturn death sentences. Bird's 'box score,' as it came to be known, of 61 reversals in 61 capital cases became a constant refrain of the campaign"⁹⁴ Although Reynoso (the first Latino member of the

89. Unsurprisingly, opponents of merit selection systems recognize the same dynamic but see it as anything but virtuous. See CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 5 (2009) (challenging claims of judicial elections opponents and raising concerns about "the lack of independence from the other political institutions in appointive systems").

90. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, §1, at 1.

91. *Id.*; see also John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 349 (1987) (identifying the 1986 retention election as the first one in which the chief justice was rejected by the public).

92. Patrick K. Brown, *The Rise and Fall of Rose Bird: A Career Killed by the Death Penalty*, CAL. SUP. CT. HIST. SOC'Y, 1, http://cschs.org/02_history/images/CSCHS_2007-Brown.pdf (last visited Nov. 24, 2011).

93. Clifford, *supra* note 90; John H. Culver & Chantel Boyens, *Political Cycles of Life and Death: Capital Punishment as Public Policy in California*, 65 ALB. L. REV. 991, 1003 (2002).

94. Clifford, *supra* note 90.

state's high court) and Grodin had initially "appeared safer,"⁹⁵ "a strong television push by opponents during the last month of the campaign kept their names before the voters, insisting that all three justices needed to lose if the death penalty [was] to be enforced."⁹⁶

To put into perspective just how exceptional this event truly was, the 1986 defeat of the three justices marked the first time *any* justice of the state's high court had been voted out of office since the state implemented its appointment-followed-by-retention system—a change that took place in 1934.⁹⁷ Several scholars have concluded that "the death penalty was not the primary motive for conservatives who wanted [Bird's] ouster, [but] rather it was the most powerful weapon they could use to influence the electorate"⁹⁸ An editorial published in the *New York Times* during the campaign framed it this way:

Don't believe for a moment that the campaign to oust Chief Justice Rose Bird from the California Supreme Court is a spontaneous public uprising. Four groups working to defeat her reconfirmation have raised more than \$5.6 million, much of it through direct mail to previous contributors on conservative mailing lists.

. . . Don't believe, either, that the effort to get rid of Chief Justice Bird . . . is nonpartisan. Gov. George Deukmejian, a Republican up for re-election; Mike Curb, the Republican candidate for lieutenant governor, and Ed Zschau, the Republican candidate for the U.S. Senate, have all campaigned openly against her.

. . . Don't believe, finally, that the anti-Bird campaign is about the death penalty, although that is the emotional issue that Mr. Roberts, the Republicans and the right wing have fanned into near-hysteria

Thus, the death penalty is only the trumped-up excuse for the anti-Bird campaign—the actual purpose of which clearly is to put a conservative majority on the California Supreme Court And a deeper motive of the business groups involved in the anti-Bird campaign—big contributors include the Independent Oil Producers Agency and the Western Growers Association—was suggested when Crime Victims for Court Reform issued a paper charging the Bird court with being "anti-business."⁹⁹

Some scholars note, however, that "those who place the blame for Bird's defeat on funding by agri-business, the taxpayer revolt, and big banking, and claim that such groups hid behind the death penalty issue, while correct in their analysis, nonetheless seem to be apologists

95. *Id.*

96. *Id.*

97. *Id.*

98. Brown, *supra* note 92, at 2.

99. Tom Wicker, *In the Nation; A Naked Power Grab*, N.Y. TIMES, Sept. 14, 1986, § 4, at 25.

for Bird.”¹⁰⁰ In a sense, both assertions are correct—business provided the funding—and it was also “evident . . . that the electorate made their decision about Bird based on her rulings in death penalty cases.”¹⁰¹ The fact that big business may have been behind the campaign was of little concern to voters who were unaware of the corporate support. In a state in which, at the time, more than 80% of the population supported the death penalty,¹⁰² Bird was “out of step with their beliefs.”¹⁰³ According to Patrick Brown, regardless of who may have funded the campaign, the voters:

[D]id not care that Rose Bird was a woman; did not care that Rose Bird was an enemy of big farmers; did not care that Rose Bird was not a supporter of property tax reform. They only knew that, from their perspective, Rose Bird did not care about victims of crime.¹⁰⁴

Television advertising was instrumental in framing Bird’s campaign, building on the dramatic factual foundation of her “box score.” At that time, television advertising was very much a judicial anomaly, but has since become the norm. Bird “did not raise half the amount of money collected by her opponents,”¹⁰⁵ and “her low-key commercials, stressing the need for a judiciary that can make unpopular decisions in the face of intense political pressure . . . was no match for the emotional appeals of her opponents.”¹⁰⁶

In a script, echoes of which have since played out in hundreds of *contested* judicial elections, the “hallmark” commercial of the “emotional appeals” against Bird—and secondarily against Reynoso and Grodin—featured “the somber face of Marianne Frazier, the mother of a murdered 12-year-old girl, sitting beside a framed picture of her daughter and asking voters to defeat the three justices who had voted to overturn the killer’s death sentence.”¹⁰⁷ In Frazier’s words, “[y]our vote can stop them from letting other killers escape justice”¹⁰⁸

Defeating three justices in a state and system where no justice had lost in a retention race in the sixty-two year history of the system took not only money, but the kind of strategies that strategists traditionally associated with a more bruising brand of politics. According to the *Los*

100. Brown, *supra* note 92, at 11.

101. *Id.*

102. *Id.* at 10–11.

103. *Id.* at 11.

104. *Id.*

105. Clifford, *supra* note 90.

106. *Id.*

107. *Id.*

108. Frank Clifford, *Anti-Bird Coalition’s \$900,000 Radio-TV Ad Blitz Gets Going*, L.A. TIMES, Oct. 8, 1986, § 1, at 24.

Angeles Times, the “juggernaut aimed at Bird, Grodin[,] and Reynoso enlisted some of the state’s most shrewd political operatives to fashion a \$10-million campaign,” led by strategist Bill Roberts, “who helped manage Ronald Reagan’s first campaign for governor in 1966” as well as some of the state’s top political consulting firms.¹⁰⁹

In characteristics that, viewed with the perspective of hindsight, foreshadowed Iowa in 2010, the political campaign inexperience and indecisiveness of the justices and, perhaps more importantly, their supporters, proved critical. “[T]here was confusion from the outset as to how to conduct a vigorous campaign that would not drag the high court into a political mud bath [and t]hat confusion dogged the campaign to the end.”¹¹⁰ Finally, in addition to the preceding factors, the justices—initially just Chief Justice Bird, but later the two associate justices as well—were opposed by “a statewide television blitz by Republican candidates led by Gov. George Deukmejian.”¹¹¹ Whatever the division in portions among the various factors involved in the justices’ defeats, the political consequence was clear: their losses “set the stage for a Republican governor to appoint a majority of the court for the first time since the Great Depression.”¹¹²

Ten years after Bird, Grodin, and Reynoso (hereinafter interchangeably referred to both individually and collectively as “Bird”) lost in California, a similar “first” occurred in the defeat of Tennessee Supreme Court Justice Penny White.¹¹³ The lead sentences of the *Memphis Commercial Appeal’s* report on White’s defeat reads as though it was pulled directly from the Bird accounts:

Tennessee voters threw Justice Penny White off the state Supreme Court Thursday after an unprecedented campaign by conservative activists and victims advocates who labeled her soft-on-crime.

The stunning defeat, which surprised even the leaders of the dump-White movement, means Gov. Don Sundquist will name his first justice to the court. He has promised to choose only a justice who supports the death penalty.

. . . .

White . . . was the target of a wildfire campaign that used a handful of her rulings to cast her as an enemy of the death penalty and a coddler of criminals.¹¹⁴

109. Clifford, *supra* note 90.

110. *Id.*

111. *Id.*

112. *Id.*

113. Paula Wade, *White First Casualty of Yes-No Option on Judges Soft-on-Crime Charge Costs Seat*, MEMPHIS COM. APPEAL, Aug. 2, 1996, at A1.

114. *Id.*

During the campaign against her, White and her supporters noted that “she had upheld convictions in 85 percent of her cases as an appellate judge,” but the “soft-on-crime charge resonated with voters” nonetheless.¹¹⁵ The campaign, however, successfully emphasized one case in which White joined an opinion authored by Tennessee’s then-Chief Justice A. A. Birch. In that case, the high court upheld a murder and rape conviction but overturned the death penalty sentence in the case and sent the matter back to the lower court for resentencing.¹¹⁶

The campaign strategy was illustrated by a letter from John Davies, who was then the president of the Tennessee Conservative Union, to conservative Tennessee voters. News reports during the campaign against White indicated that Davies’ letter “which also appeals for political contributions to his organization—says in part: ‘Now Justice White is asking for your vote She wants you to vote “Yes” for her in August. “Yes” so she can free more and more criminals and laugh at their victims!’”¹¹⁷ Defending her record in criminal cases in a campaign interview, White referred to her record and noted to the media that in that record they would “find . . . 127-year sentences affirmed and double-life sentences affirmed”¹¹⁸ With respect to the death penalty, White noted that the canons of judicial ethics precluded her from speaking about specific cases but noted, “I took an oath to uphold the laws the legislature has passed.”¹¹⁹

As Stephen Bright has noted, “Governor Sundquist and other opponents of Justice White also made it clear that their successful campaign against her was expected to influence the remaining members of the court.”¹²⁰ Focusing on the murder-rape case noted above, the Tennessee Republican Party mailed a brochure to voters that asserted

115. *Id.*

116. Richard Locker, *Conservatives Again Target Justice White*, MEMPHIS COM. APPEAL, July 17, 1996, at B1.

117. *Id.* Although not directly germane to the larger thesis of this Article, it bears noting here that in recent years I have had the privilege of getting to know Justice White. Based on my personal experiences, and acknowledging that reasonable people can and do disagree about matters of politics all the time—and that surely there were reasonable citizens of Tennessee who opposed Justice White’s retention—the accusation that Justice White would “laugh” at crime victims is outrageous. The accusation may have proven effective, but it was neither in service of truth nor taste.

118. *Id.*

119. *Id.*

120. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 324 (1997).

that White “puts the rights of criminals before the rights of victims.”¹²¹ Bright masterfully describes the disconnect between rhetoric and reality as follows:

[The brochure] described the case of Richard Odom as follows: “Richard Odom was convicted of repeatedly raping and stabbing to death a 78 year old Memphis woman. However, Penny White felt the crime wasn’t heinous enough for the death penalty—so she struck it down.”

Neither mailing disclosed that Richard Odom’s case was reversed because all five members of the Tennessee Supreme Court agreed that there had been at least one legal error which required a new sentencing hearing. The court affirmed Odom’s conviction and remanded his case for a new sentencing hearing. No member of the court expressed the view that the crime was not heinous enough to warrant the death penalty. Indeed, the remand for a new sentencing hearing at which a jury would decide between the death penalty and life imprisonment made it quite clear that the court did not find the death penalty inappropriate for Odom. Justice White did not write the majority opinion, a concurring opinion, or a dissenting opinion. Yet Tennessee voters were led to believe that she had personally struck down Odom’s death penalty because she did not think the crime was “heinous enough.”¹²²

White became the first Tennessee *judge* to be removed since the retention system was implemented for the state courts of appeals and criminal appeals in the early 1970s, and then expanded for the state’s high court in 1994.¹²³ White reflected in later years on her non-retention experience, noting that “[a] controversial decision by our court had prompted a landslide of opposition by special interest groups, police officers, and victims’ rights associations. The opponent was not an individual, or even a declared group, but a concept—‘tough on crime, soft on capital punishment.’”¹²⁴ A decade ago in a paper prepared specifically for the National Summit on Judicial Selection, social scientist Anthony Champagne specifically highlighted Justice White’s campaign as illustrative of the fact that while “[p]artisanship in judicial elections is nothing new . . . there is a new level of partisanship [that] . . . is not limited to partisan election systems, but can be found in nonpartisan systems and in retention elections as well.”¹²⁵

121. *Id.* at 314 (internal quotation marks omitted).

122. *Id.* (footnotes omitted).

123. See Locker, *supra* note 116.

124. Penny J. White, *Preserving the Legacy: A Tribute to Chief Justice Harry L. Carrico, One Who Exalted Judicial Independence*, 38 U. RICH. L. REV. 615, 644–45 (2004).

125. Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1421 (2001).

The “new level” of partisanship to which Champagne referred in 2001, regarding Justice White’s repudiation, from which we are now fifteen years removed, and Justice Bird’s, from which we are now a quarter of a century removed, is now very much the norm in contested races.¹²⁶ Yet the “new level” remains, for the most part, relatively unusual in retention races. The events in Illinois and Iowa in 2010 likely flip the exception-versus-rule coin in retention races. Prospectively, they likely flip that coin for good—whether for better or worse.

III. Retention 2.010

To begin to fully appreciate the transformation to “Retention 2.010,” it is best to start with a statistical comparison. From 2000–2009, spending on retention elections accounted for barely one percent of campaign spending in state high court elections.¹²⁷ By contrast, in 2010, “high-court retention elections in Illinois, Iowa, Colorado and Alaska resulted in about \$4.6 million in total costs—more than twice the \$2.2 million raised for all retention elections nationally in 2000–2009.”¹²⁸

As compared to the Iowa and Illinois retention campaigns on which this Article focuses more closely, the 2010 efforts to unseat incumbent justices in Colorado, Alaska, and Kansas were less organized and less consequential. In Colorado, a “527”¹²⁹ group called “Clear the Bench Colorado” described its mission as “to hold Colorado’s judicial branch—particularly, but not exclusively, our Supreme Court jus-

126. See generally SAMPLE ET AL., *supra* note 31, at 2.

127. *Id.* at 14 fig.7; Press Release, Justice at Stake Campaign, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), available at http://www.justiceatstake.org/newsroom/press_releases.cfm/2010_judicial_elections_increase_pressure_on_courts_reform_groups_say?show=news&newsID=9129 [hereinafter *2010 Judicial Elections Increase Pressure on Courts*].

128. *2010 Judicial Elections Increase Pressure on Courts*, *supra* note 127. Former Colorado Supreme Court Justice (a friend with whom I often agree, and occasionally spar) Rebecca Love Kourlis asserts that the dynamics this Article dubs Retention 2.010 reflect “spillover from the way in which contested judicial elections have been conducted over the last decade. There is leakage from that particular method of elections over into retention elections.” John Gramlich, *Judges’ Battles Signal a New Era for Retention Elections*, WASH. POST, Dec. 5, 2010, at A8.

129. Named for the section of the Internal Revenue Code under which they are organized, 527s frequently make independent expenditures to support or oppose political candidates. See I.R.C. § 527 (2006). For a more searching analysis of the distinctions applicable to such groups under campaign finance law, see Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 949 (2005).

tices—accountable to the Colorado Constitution and to the people of Colorado.”¹³⁰ According to Clear the Bench’s website, the:

[J]ustices subject to retention by voters in the [November 2010 election] have repeatedly violated their oath to uphold our Constitution and the rights of the citizens of Colorado – it is time for them to go. Chief Justice Mary Mullarkey, justices Michael Bender, Alex Martinez, and Nancy Rice have betrayed the trust of the people of Colorado, neglecting the proper judicial function of upholding the law in favor of imposing their personal political will.¹³¹

Clear the Bench spent just \$45,000 and all three Colorado justices retained their seats although the “justices’ margins of victory were slimmer than usual.”¹³² The National Center for State Courts attributed slimmer retention margins—not just in Colorado, but nationally—to the general anti-incumbent bent of the 2010 election cycle, noting that while:

[A]nti-incumbent fervor . . . did not [prove determinative] in Alaska, Colorado, Illinois, or Kansas . . . “No” votes against judges in these states were higher than they have been historically. For instance, the 10-year average (1998-2008) for “yes” votes in Kansas is 74 percent, but none of the four Kansas justices on the 2010 ballot received greater than 63 percent. Three Florida Supreme Court justices saw a similar drop of about 10 percentage points in voter support. Only two state high court judges on the ballot—both from Maryland—outperformed the 10-year “yes” vote average for their state.¹³³

A. Iowa Retention 2.010

Iowa is often characterized as one of those non-political states that has a pretty good balance This threatens to unsettle things.

—Indiana University Law Professor
Charlie Geyh in early October, 2010.¹³⁴

130. *About CTBC*, CLEAR BENCH COLO. (Apr. 4, 2009, 12:30 PM), <http://wwwlearthebenchcolorado.org/about/>.

131. Chuck Moe, *Clear the Bench Colorado*, COLORADOFREEDOM.NET (May 6, 2009), <http://www.coloradofreedom.net/wordpress/banner/clear-the-bench-colorado>.

132. Matt Masich, *Colo. Supreme Court Justices Retained*, LAW WEEK COLO. (Nov. 3, 2010), <http://www.lawweekonline.com/2010/11/colo-supreme-court-justices-retained/> (noting that “59.3 percent voted to retain Martinez, 60.2 percent voted to retain Bender and 61.7 percent voted to retain Rice” whereas “[h]istorically, justices are retained with roughly 65 percent to 75 percent voting for retention, closer to the lower figure in bad economic times and the higher figure in good economic times”).

133. Press Release, Nat’l Ctr. for State Courts, *Anti-Incumbent Mood Extends to Court-Related Elections* (Nov. 3, 2010), *available at* <http://www.ncsc.org/newsroom/news-releases/2010/election-roundup.aspx>.

134. Grant Schulte, *Iowa Poll: Retention of Justices a Tossup*, DES MOINES REG. (Oct. 4, 2010, 12:33 AM), <http://www.desmoinesregister.com/article/20101004/NEWS/10040323/Iowa-Poll-Retention-justices-tossup>.

In the spirit of “mighty oaks from little acorns grow,”¹³⁵ the dynamics that swept three Iowa justices out of office in November 2010 are arguably traceable to a relatively ministerial act by Judge Jeff Neary of Sioux City, Iowa in 2003. “It was ‘order hour’ at Woodbury County District Court in Sioux City, when lawyers line up to ask judges to sign routine orders.”¹³⁶ Judge Neary “started to hand the papers back to” one of the lawyers, when “he looked at the names” on a divorce petition and realized both parties were women.¹³⁷ At that point, in Neary’s recollection, the lawyer “explained to me they were legally united in Vermont. They lived in Sioux City. They decided to go their separate ways and wanted to do it legally.”¹³⁸ Neary decided to let the divorce stand, surmising, in his words, that, “[w]e have to figure out how to deal with it. If people have disputes, and they otherwise live here, then they should have access to the judicial system.”¹³⁹

For that perfunctory decision, “Neary became the target of a full-scale conservative campaign to unseat him—complete with accusations that he was a ‘judicial activist’ seeking to destroy the tradition of marriage—through a barrage of radio ads, brochures, yard signs, and protests.”¹⁴⁰ In the words of one report, Neary “incurred the full wrath of the Christian right.”¹⁴¹ “Focus on the Family founder James Dobson even showed up at one rally in Sioux City to stump against Neary. Warning a crowd of thousands against judges who create laws rather than interpret them, Dobson alleged, ‘You’ve got one of them right here, Judge Jeffrey Neary.’”¹⁴²

Neary was a particularly strange target for this kind of opposition. Through the years, I have had the privilege of meeting regularly with many state court judges. Yet I have only met Neary once, when we had lunch together at a small gathering in Washington, D.C. that focused on courts issues. At the time, while we discussed his experience, I was rather taken aback by how willingly he offered up his own personal

135. The exact origin of this quote is unknown, but some early sources are discussed at *Mighty Oaks from Little Acorns Grow*, PHRASE FINDER, <http://www.phrases.org.uk/meanings/247100.html> (last visited June 8, 2011).

136. Kathleen Burge, *Iowa Judge Causes Stir in Granting Gay Divorce*, BOS. GLOBE (Dec. 23, 2003), http://www.boston.com/news/local/articles/2003/12/13/iowa_judge_causes_stir_in_granting_gay_divorce/.

137. *Id.*

138. *Id.*

139. *Id.*

140. Michael Beckel, *Lest Ye Be Judged*, MOTHER JONES (Apr. 23, 2006, 11:00 PM), <http://motherjones.com/politics/2006/04/lest-ye-be-judged>.

141. *Id.*

142. *Id.*

opposition to same-sex marriage—almost by way of establishing a preemptive context for our conversation. This personal narrative is mirrored in some of Judge Neary’s published interviews on the topic. In his words: “The reality is this. Now you’re asking Jeff Neary what Jeff Neary thinks, not Judge Neary, okay? Jeff Neary himself personally is not in favor of same-sex marriage. Having said that though, I am in favor of an equalization of the rights and responsibilities similar to marriage.”¹⁴³

Aided by a coalition of civic and legal leaders from both the left and the right, Neary “raised an unprecedented sum for a judicial race in Iowa—\$27,735. Neary emerged victorious, but with only 58.9 percent voting yes in a state where judges routinely get 75 percent or more.”¹⁴⁴ In the aftermath of the election, Judge Neary reflected that “[t]here’s never been a judge [in Iowa] that had to face what I had to face.”¹⁴⁵ When spoken, his words were indisputably true. Today, he’s but the charter member of a club—with opponents of same-sex marriage again playing a pivotal role.

In 2009, in the case of *Varnum v. Brien*, the Iowa Supreme Court unanimously invalidated a state ban on same-sex marriages.¹⁴⁶ Based on *Varnum*, Iowa became the first state in the Midwest to allow same-sex marriage.¹⁴⁷ To the extent that *Varnum* put Iowa near the fore of the same-sex marriage curve, the decision was consistent with the state’s history, and specifically the history within the state’s judicial branch. As *The New York Times* noted, *Varnum* fits into historical norms in that “[f]rom its first decision in 1839, the Iowa Supreme Court demonstrated a willingness to push ahead of public opinion on matters of minority rights, ruling against slavery, school segregation[,] and discrimination decades before the national mood shifted toward racial equality.”¹⁴⁸

In the wake of *Varnum*, two individuals, David Lane, a “southern California operative, [who] began organizing religious leaders around

143. *Id.*

144. *Id.*

145. *Id.*

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

147. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

148. *Id.*; see also *Early Civil Rights Cases*, IOWA JUD BRANCH, http://www.iowacourtsonline.org/Public_Information/Iowa_Courts_History/Civil_Rights/ (last visited June 7, 2011) (summarizing early pro-civil rights cases decided by the Iowa courts, often years, and even decades ahead of other state and federal courts).

the country for political causes in the early 1990's,"¹⁴⁹ and Bob Vander Plaats, a Sioux City businessman and three-time Republican gubernatorial candidate,¹⁵⁰ led the group Iowa For Freedom, created specifically to oust the three justices—Chief Justice Marsha Ternus, Justice Michael Streit, and Justice David Baker. The group operated with a combination of money and bare-knuckled strategies that echoed the 1986 campaign that repudiated the three California justices.

With same-sex marriage in place of the California hot-button issue of the death penalty in 1986, Lane and Vander Plaats's campaign focused not only on urging Iowan citizens to vote "no" for the three justices on the retention ballot, but also advocated the replacement of the merit based system itself.¹⁵¹ Their cause was able to gain momentum, however, from "steady streams of monetary support"¹⁵² from organizations outside of Iowa, such as the Mississippi-based American Family Association,¹⁵³ and individuals, like former House Speaker Newt Gingrich,¹⁵⁴ supporting the ousting of the justices. Nearly \$1 million was spent on the campaign to oust the three justices, including more than \$900,000 by three out-of-state organizations.¹⁵⁵

New Jersey-based National Organization for Marriage ("NOM"), which spent \$635,627—the largest amount spent by an out-of-state or-

149. Richard G. Lee, *Behind the Fall of Iowa's Judicial Gods*, DALLAS BLOG (Nov. 23, 2010, 12:08 PM), <http://www.dallasblog.com/201011231007382/guest-viewpoint/behind-the-fall-of-iowa-s-judicial-gods.html>.

150. Rachel Slajda, *The Campaign You're Not Watching – But Anti-Gay Groups Are*, TPM-MUCKRAKER (Oct. 26, 2010, 10:19 AM), http://tpmmuckraker.talkingpointsmemo.com/2010/10/the_campaign_youre_not_watching__but_anti-gay_gr.php; *Iowa Gay Marriage Foes Emboldened by Judges' Removal*, GAZETTE (Nov. 3, 2010, 8:57 AM), <http://thegazette.com/2010/11/03/iowa-gay-marriage-foes-emboldened-by-judges-removal/>.

151. Josh Nelson, *Vander Plaats: Judge Retention Vote Just First Step for Gay Marriage Ban*, WFCOURIER.COM (Oct. 13, 2010), http://wfcourier.com/news/local/article_0c4d8312-d6d1-11df-ac2d-001cc4c002e0.html.

152. Sarah Haas, *Judicial Retention Vote Spikes Controversy*, IOWA ST. DAILY (Nov. 3, 2010), http://www.iowastatedaily.com/news/article_77068966-e792-11df-8a1b-001cc4c002e0.html.

153. Curriden, *supra* note 2.

154. Jillian Rayfield, *Newt Gingrich Helped Jump-Start Campaign to Oust Iowa Judges*, TPM-MUCKRAKER (Mar. 3, 2011), http://tpmmuckraker.talkingpointsmemo.com/2011/03/newt_gingrich_helped_jump-start_campaign_to_oust_iowa_judges.php. Gingrich purportedly contributed \$200,000 to the campaign for ousting the Iowa Supreme Court Justices. *Id.* Executive director of Iowa For Freedom, David Lane, was quoted as stating that "[i]t wouldn't have happened without Newt," who "had been courting evangelicals for some time" and for whom "[p]art of that courtship included playing a pivotal role in removing three Iowa judges." *Id.*

155. See Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. REV. 118, 120–21 (2011).

ganization,¹⁵⁶ used most of its money to fund two statewide television ads urging voters to vote “no” and alleging that “activist judges on Iowa’s supreme court have become political, ignoring the will of voters and imposing same-sex marriage on Iowa What will they do to other long-established Iowa traditions and rights?”¹⁵⁷ Another key part of the campaign involved the so-called “Judge Bus” tour, a four-day, twenty-city intrastate tour primarily funded by NOM.¹⁵⁸ The tour was “populated by stars of the anti-gay movement.”¹⁵⁹

Against this spending and political savvy, and in a state where just a few years earlier Judge Neary’s supporters spent the “unprecedented sum” noted above of \$27,735, the justices and their supporters were—very much like the three California justices in 1986—flatfooted, conflicted, and confused. One observer vividly described the confusion by noting that: “The pro-retention forces were caught off-guard and scrambled to respond. But most of their efforts backfired Pro-retention supporters were frustrated, but lacked the infrastructure and planning necessary to channel it into something productive.”¹⁶⁰ Supporters did coalesce to some degree, and, as Roy Schotland notes: “\$423,767 raised entirely in Iowa was spent by the Iowa-based Fair Courts for Us Committee. That committee was one of three groups supporting retention. The other two groups, Justice Not Politics and Iowans for Fair Courts, did not spend on direct advocacy, but only on educational efforts.”¹⁶¹ Even that comparatively modest total is misleading though, because almost all of that money was raised in mid-October or later, by which point panic had set in among supporters.¹⁶²

156. Jason Hancock, *Anti-Gay Groups Spent \$948,000 in Iowa to Oust Judges*, IOWA INDEP. (Nov. 18, 2010), <http://iowaindependent.com/47598/anti-gay-groups-spent-948000-in-iowa-to-oust-judges>.

157. Justice at Stake Campaign & Brennan Center for Justice, *Gay Marriage, Tax Fights Spark High-Profile Court Races*, JUSTICE AT STAKE CAMPAIGN (Sept. 23, 2010), http://www.justiceatstake.org/file.cfm/media/cms/releaseelection_AC8E2D91225E3.pdf.

158. Slajda, *supra* note 150.

159. *Id.* An account of the bus tour describes some of the “stars” by noting that the tour included:

FRC director Tony Perkins, former senator and likely presidential candidate Rick Santorum (who once compared same-sex relationships to “man on dog”), Rep. Steve King (who once said that same sex marriage would lead to the recognition of incestuous relationships and socialism) and Rep. Louie Gohmert (who once said that legalizing same-sex marriage would lead to the legalization of bestiality and necrophilia).

Id.

160. Lee, *supra* note 149.

161. Schotland, *supra* note 155, at 120.

162. *See id.* at 123 n.22.

The Iowa justices themselves chose not to raise money and not to actively campaign.¹⁶³ This was intended as a principled choice, intended to keep the court above the political fray. Yet, however well-intentioned, and no matter the amount of history on their side—and without exception in Iowa, it was—that choice amounted to the justices’ Waterloo. On Election Day: “[T]he votes cast on retention set a record for Iowa and were near the highest in any state ever. Normally only a bit more than 60% of Iowa voters would cast a ballot on whether to retain a justice, but 88% did so in 2010.”¹⁶⁴ Needing 50% of the vote to stay in office, each of the justices received about 45%, and consequently, a “first” in Iowa Supreme Court history occurred three times on the same day.¹⁶⁵

In the aftermath of the election, the three defeated justices released a letter indicating their support for the state’s merit selection system—a system opposed by, among others, Vander Plaats. According to the letter, while the “system helps ensure that judges base their decisions on the law and the constitution and nothing else . . . the preservation of our state’s fair and impartial courts will require more than the integrity and fortitude of individual judges, it will require the steadfast support of the people.”¹⁶⁶

Speaking in New York on a June 2011 panel with, among others, Hugh Caperton, Iowa Chief Justice Marsha Ternus¹⁶⁷ first contrasted the Iowa experience with that of Mr. Caperton in West Virginia. Chief Justice Ternus noted that as opposed to the scenario in West Virginia, where, in her words, “the money was spent . . . to influence the outcome of a particular case”¹⁶⁸ in Iowa, a larger purpose, and even a trans-state purpose was at play, such that “the money spent in Iowa in the judicial retention elections was designed to send a message of retaliation and intimidation to judges not only on the Iowa Supreme Court, but more importantly, to judges across the country.”¹⁶⁹

163. *Iowa Gay Marriage Foes Emboldened by Judges’ Removal*, *supra* note 149.

164. *See* Schotland, *supra* note 155, at 120.

165. Sulzberger, *supra* note 147.

166. *Iowa Gay Marriage Foes Emboldened by Judges’ Removal*, *supra* note 149.

167. In an interesting coincidence, like Chief Justice Bird who became California’s first Chief Justice—and for that matter, Justice Penny White, who became Tennessee’s first woman to serve on the state high court—Chief Justice Ternus was Iowa’s first female Chief Justice.

168. *See* Brennan Center for Justice, *Citizens United and the Role of Campaign Financing on Elections*, YOUTUBE (June 3, 2011), <http://www.youtube.com/watch?v=EYRKCzDTVjY> [hereinafter “The Brennan Center Video”].

169. *Id.*

On the same panel, Chief Justice Ternus expressly quoted from *Varnum*, noting the decision's lack of effect on a religious organization's prerogative to define marriage as between a man and a woman.¹⁷⁰ Yet, she noted that, "notwithstanding the fact that the Court's ruling did not affect religious beliefs and practices, substantial opposition . . . came from individuals and groups who believed the Court's decision had violated God's law or natural law."¹⁷¹ From Chief Justice Ternus's perspective, the extent of that religious opposition was evident in an initiative called Project Jeremiah, through which, in her words, "preachers were urged to use their pulpits to advocate for a 'no' vote on retention of the justices, notwithstanding that such action might jeopardize the churches' tax-exempt status," and that in a few instances, churches even applied for and received status as satellite polling places so that congregants could cast their votes in the vestibules while attending church services.¹⁷²

Adam Morse, among others, notes that the "irony of the results of the Iowa Supreme Court retention election is that it has no direct effect on the legal status of same-sex marriage—*Varnum* remains binding precedent in Iowa."¹⁷³ Yet, consistent with Chief Justice Ternus's

170. *Id.*

171. *Id.*

172. *Id.*

173. Adam H. Morse, *Second-Class Citizenship: The Tension Between the Supremacy of the People and Minority Rights*, 43 J. MARSHALL L. REV. 963, 1003 (2010). Although reserving a more thorough treatment of the events that followed the Iowa election for future work, it bears noting that the balance of the Iowa court that issued *Varnum* remains on the bench despite a concerted effort by those who opposed retaining the Iowa justices, to then *impeach* the remaining members of the court based on their decision in *Varnum*. While such an effort focused on the merits of an isolated court decision offends even the most basic, fundamental norms of American society, it nonetheless had non-trivial traction including, notably, with national figures who seized on the impeachment idea as a means to playing to conservative Iowans in advance of the 2012 Iowa Republican caucuses. While the impeachment effort ultimately failed, an op-ed in the *Washington Post* framed just how dramatic a departure from rule-of-law traditions the effort was, noting that: "For more than 200 years, a safety barrier has protected our nation's courts and our democracy. No matter how controversial the case or unpopular the ruling, no state or federal judge has been impeached for an opinion issued from the bench." Bert Brandenburg, Op-Ed., *End This War on Judges*, WASH. POST, Jan. 7, 2011, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604696.html>. Writing about the impeachment effort, Ian Bartrum captured the absurdities well: "Anti-retention leader Bob Vander Plaats—a failed gubernatorial candidate and former high school principal—likened the remaining justices to 'teens who flee a beer party' and called on them to 'do the honorable thing [and] share the punishment of their peers' by resigning. I kid you not." Ian Bartrum, *Judicial Retention and the Missouri Plan: Thoughts from Iowa*, PRAWFSBLAWG (Jan. 2, 2011, 5:07 PM), <http://prawfsblawg.blogspot.com/prawfsblawg/2011/01/judicial-retention-and-the-missouri-plan-thoughts-from-iowa.html>. Berkeley law professors Jesse Choper and Herma Hill Kay solicited law professor signatures for a letter opposing the Iowa im-

comment that the real purpose of the effort in Iowa was to “send a message,”¹⁷⁴ Morse asserts that “the net effect . . . however, may be to deter future courts from interpreting their Constitutions as broadly as they would have otherwise.”¹⁷⁵

The fact that the justices in Iowa earned even 45% of the vote, despite facing such organized opposition; despite being vastly outspent; and despite choosing not to utilize the only substantial pulpits they had—the imprimatur of their own incumbency—and their persuasive abilities as advocates on their own behalf, is remarkable.

This Article posits that the electoral passivity of the Iowa justices in the face of a prospective retention challenge will almost never be replicated by serious retention candidates. The efforts of those who opposed the justices, however, will not only be replicated, but will become the playbook for those seeking to challenge incumbents in a retention election. As Roy Schotland notes, “unlike the impact of the 1986 California event, which had occurred because of Bird’s consistent reversal of scores of capital cases and had little if any ripple effects, this time several specific reasons point toward more challenges

peachment effort. See Ian Bartrum, *Judicial Impeachment vs. Non-Retention Votes*, PRAWFS BLAWG (Jan. 13, 2011, 2:21 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/01/judicial-impeachment-vs-non-retention-votes.html>. As one of—I’m glad to say—many to sign the letter opposing impeachment, I think it also important to acknowledge that some scholars, while nonetheless agreeing that impeachment was inappropriate, declined to sign the letter merely because early drafts pointed to the legal and factual existence of retention votes as an alternative to impeachment. Respectfully, whether one believes in retention or not, this level of denial and disconnect from pragmatic realities—including those discussed in footnote 77 and the text accompanying it—that lends credence to “Ivory Tower” critiques.

174. See The Brennan Center Video, *supra* note 168.

175. Morse, *supra* note 173, at 1003. Charlie Geyh notes that the “the brave new world of expensive, high-profile, hotly contested judicial races creates greater voter interest, puts incumbents at higher risk of defeat, and to that extent promotes ‘accountability’—in an unvarnished sense of the term.” See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1271 (2008). In a sidebar piece for the *Columbia Law Review*, David Pozen offers an account of the events in Iowa through the lens of popular constitutionalism, arguing 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.” David E. Pozen, *What Happened in Iowa?*, 111 COLUM. L. REV. SIDEBAR 90, 91 (2011), http://www.columbialawreview.org/assets/sidebar/volume/111/90_Pozen.pdf. In Pozen’s view, “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.” *Id.* I would argue that Pozen’s account is less of a challenge for “the logic of judicial elections” than it is a challenge for those merit selection proponents who have, historically, indulged the luxury of being able to champion the system’s accountability mechanism to voters—without really meaning for voters to employ that mechanism. *Id.*

to incumbent judges.”¹⁷⁶ Consequently, retention elections have arrived at a point where, prospectively, the pressures commensurate with contested elections—fundraising pressures, attack advertising, interest group pressures, and the tendency of judges to have, at least in the recesses of their minds, an increased awareness of the possible retaliatory impacts of their decisions—will become standard. The Iowa 2010 experience ensures, in my view, that the two-sided campaign mores of Illinois in 2010 will become the norm for Retention 2.010.

B. Illinois Retention 2.010

To compare Iowa and Illinois judicial selection in *any* respect is to necessitate an *ex ante* acknowledgment that their cultures, traditions, and systems are complete apples and oranges in almost *every* respect. The lone commonality is that both states have retention elections. Iowa’s history, prior to 2010, is defined by its system of appointments, followed by sedate atmospherics of certain retention success. Illinois, conversely is one of the states that, over the past decade, came to embody the new politics of judicial elections.¹⁷⁷ The Illinois 2010 judicial retention election is the state’s most expensive election of that kind to date. Thus, while the 2010 retention campaign in Iowa marked a departure from the norm of Iowa judicial selection generally, in Illinois, Retention 2.010 was merely a departure from the subset of its retention—as opposed to contested—races specifically.

Make no mistake, though—2010 stands out, even in Illinois. Despite the expensive and bruising politics of contested races for Illinois’s high court, the 2010 vote, in which Chief Justice Tom Kilbride, needing a 60% supermajority for retention earned 65% of the vote, was very much a radical departure from the state’s prior retention elections. An August, 2010 editorial in *The Chicago Tribune* opened by remarking that “[j]udicial retention races are usually about as exciting

176. Schotland, *supra* note 155, at 118.

177. See, e.g., James Sample, *The Campaign Trial: The True Cost of Expensive Court Seats*, SLATE (Mar. 6, 2006, 4:16 PM), <http://www.slate.com/id/2137529>; SAMPLE ET AL., *supra* note 31, at 79 (highlighting the 2004 Illinois two-candidate judicial race between Lloyd Karmeier and Gordon Maag in which the two campaigns raised \$9.3 million, the most expensive two-candidate judicial election in American history).

as renewing your driver's license."¹⁷⁸ The editorial noted that "[n]o Illinois Supreme Court justice has ever not been retained."¹⁷⁹

Still, and despite that categorically pro-incumbent history, if the spending in Iowa caught the justices and their supporters off guard until it was too late, the warning signs gathered early in Illinois. Media reports in early 2010 predicted that "[m]illions of dollars will likely be spent on Kilbride's election this year, though no one is running against him."¹⁸⁰ Early in the year, veteran Illinois political observer Cindi Canary observed that voters should "[p]ut on [their] seat belts, it's going to be nasty The Kilbride race in central Illinois will be a very hot, very big money race."¹⁸¹ In fact, it turns out that despite a disarming demeanor that might best be described as that of an intellectual "antipolitician,"¹⁸² Chief Justice Kilbride, on the other hand, had the vision to see around the strategic bend earlier than most. According to Kilbride, "things started to pop two years before [his] retention election in 2010."¹⁸³

Recognizing that dynamic so early on, Kilbride and his supporters did what Rose Bird in 1986, Penny White in 1996, and the Iowa justices in 2010 did not—he organized early and well. In essence, he took the fight to his well-funded, well-organized opponents, as his own supporters raised millions in campaign funds. In a pattern reminiscent of Illinois' controversial 2004 contested high-court election (the

178. Ameet Sachdev, *Negative Politics Creep into Illinois Supreme Court Retention Race*, CHI. TRIB. (Aug. 24, 2010), http://articles.chicagotribune.com/2010-08-24/business/ct-biz-0824-chicago-law—20100824_1_retention-negative-politics-election.

179. *Id.*

180. Larry Yellen, *Illinois Supreme Court Election Flooded with Money*, FOX CHI. NEWS (May 20, 2010, 9:52 PM), <http://www.myfoxchicago.com/dpp/news/metro/justice-thomas-kilbride-illinois-supreme-court-justice-20100520>.

181. *Id.*

182. I coin the word "antipolitician" in this context because neither anti-political nor apolitical is quite right. To be sure, judges are political actors, and politics—regardless of selection system—are part of judicial selection. Here, however, I mean the term to reflect that, in a more personal sense, utterly separate from anyone's personal partisan inclinations, is the kind of thoughtfully reserved citizen whom few would ever think of as a "politician" as that term has come to be somewhat pejoratively understood.

183. In June of 2011, I had the privilege of meeting with Chief Justice Kilbride over breakfast, and then of appearing with him as a co-panelist at the ABA National Conference on Professional Responsibility in Memphis. With his permission, I took notes on some of his comments for purposes of this Article. Accordingly, this quote is from Chief Justice Tom Kilbride. Thomas Kilbride, Chief Justice, Ill. Supreme Court, Comments at the 37th ABA National Conference on Professional Responsibility, Memphis, TN (June 2, 2011) [hereinafter Memphis Comments] (notes on file with author).

nation's most expensive judicial election of all time),¹⁸⁴ traditional left-right fault lines were reinforced by particularly incentivized (in their perception) medical and insurance interests. On the right, these interests largely worked through the state Republican party in opposition to Kilbride. At the same time, significant segments of the left, including particularly incentivized (again, in their perception) segments of the plaintiffs' bar and union community, worked through the state Democratic party in Kilbride's support.¹⁸⁵

While Kilbride indeed aligned himself as a Democrat in his first run for Illinois Supreme Court, he did so only to conform to a state law requiring a judge "to file under a political party the first time they run."¹⁸⁶ Reflecting upon his first ten years as a judge in his retention campaign advertisements, he assuredly stated, "I am not a Democratic judge."¹⁸⁷ Further, public organizations similarly echoed Kilbride's self-perceived view of his own political neutrality on the bench. One year prior to the anti-retention campaign in which the opposition to Kilbride's retention called him a "liberal, Democrat extremist,"¹⁸⁸ the Illinois Chapter of the American Board of Trial Advocates ("ABOTA") named Kilbride Judge of the Year.¹⁸⁹ One of the fundamental goals of ABOTA, a nonpartisan group composed equally of leading plaintiff

184. See SAMPLE ET AL., *supra* note 31, at 79 (summarizing 2004 Illinois judicial race between Lloyd Karmeier and Gordon Maag).

185. See Yellen, *supra* note 180; see also Clare Howard, *Justice Steering Clear of Politics*, J. STAR (Sept. 12, 2010, 4:57 PM), <http://www.pjstar.com/news/tricounty/x531399511/Justice-steering-clear-of-politics>. See generally DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004*, at 25–26 (Jesse Rutledge ed., 2010), available at http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BBFBD7C43A3.pdf (presenting a compelling and dramatic illustration of the flow chart of money in such scenarios, originally prepared by the Illinois Campaign for Political Reform).

186. See ILL. CONST. art. VI, § 12(a) ("Supreme [Court] . . . Judges shall be nominated at primary elections . . . Judges shall be elected as the General Assembly shall provide by law."); see also 10 ILL. COMP. STAT. ANN. 5/7-1 (West 2010) ("[T]he nomination of all candidates for . . . judicial . . . officers . . . shall be made in the manner provided in this Article 7 . . ."); 10 ILL. COMP. STAT. ANN. 5/7-10 (outlining format of petition for nomination).

187. Michael Smothers, *Kilbride: I am not a politician*, PEKIN DAILY TIMES (Oct. 23, 2010, 8:00 AM), <http://www.pekintimes.com/highlight/x1946664548/Kilbride-I-am-not-a-politician>.

188. *Judge Kilbride Independent? No – He's a Liberal Democrat*, JUSTPAC (Oct. 4, 2010), <http://www.justpac.org/detail.php?c=2359971&t=Judge-Kilbride-Independent-No%E2%80%94He's-a-Liberal-Democrat>; see also *About JUSTPAC*, JUSTPAC, <http://www.justpac.org/about.php> (last visited Nov. 25, 2011).

189. *Justice Kilbride Honored by Illinois Chapter of the American Board of Trial Advocates*, CANTON DAILY LEDGER (Nov. 21, 2009, 5:00 AM), <http://www.cantondailyledger.com/news/x215401115/Justice-Kilbride-honored-by-Illinois-Chapter-of-the-American-Board-of-Trial-Advocates>.

and defense lawyers, is to “preserve . . . the independence of the judiciary.”¹⁹⁰

Despite the fairly neutral characteristics specific to Justice Kilbride, political forces larger than any one individual shaped the financial component of the race along partisan lines. The majority of Kilbride’s financial backing came from the Democratic Party of Illinois, which raised over \$1.4 million in the financial record-breaking retention election.¹⁹¹ Financially, the campaign also cleaved along state border lines. While the majority of Kilbride’s financial support came from in-state groups such as the Illinois Federation of Teachers, the majority of the funds spent opposing him were sourced in national organizations such as the American Justice Partnership, the U.S. Chamber of Commerce, and the American Tort Reform Association.¹⁹²

Kilbride’s campaign repeatedly sought to assure voters that he had not been a politician on the bench nor would he, despite reluctantly engaging in an active campaign.¹⁹³ Even if one assumes, *arguendo* that all of the indications as to Kilbride’s non-partisanship are false, it is telling that two other democratic justices who were also up for retention in 2010 did not face significant opposition expenditures and certainly were not forced to face the vicious attacks targeted at Kilbride.¹⁹⁴ In-state political observers posit that the real reason Kilbride—and not the others—became the focal point of retention opposition had more to do with geography rather than partisan or legal differences, particularly vis-à-vis his two colleagues who were also up for retention. One source put it this way: “Those advocating against him say he is more vulnerable than Fitzgerald and Freeman, who hail from Cook County, a Democratic Party stronghold. Kilbride, 57, who was a Rock Island lawyer before his election to the court in 2000, is

190. *Id.*

191. Press Release, Ill. Campaign for Political Reform, *Supreme Court Retention Election Most Expensive in State’s History* (Oct. 26, 2010), available at <http://www.ilcampaign.org/judicial-retention-race-money-candidates> [hereinafter Illinois Campaign for Political Reform Press Release].

192. Viveca Novak, *Fact-Checking State Supreme Court Ads*, NEWSWEEK, (Oct. 29, 2010, 2:24 PM), <http://www.newsweek.com/2010/10/29/fact-checking-state-supreme-court-ads.html> (“[The opposition group was led by the] Illinois Civil Justice League, which is funded by business, including the U.S. Chamber of Commerce, to go after Kilbride. The American Tort Reform Association and the American Justice Partnership, which was started by the National Association of Manufacturers, have also anted up to defeat Kilbride.”).

193. Smothers, *supra* note 187.

194. Sachdev, *supra* note 178 (“Kilbride is one of four Supreme Court justices up for retention in November, along with Thomas and Democrats Charles Freeman and Thomas Fitzgerald. So far Kilbride is the only Democrat being singled out by conservatives.”).

from the 3rd Judicial District, which stretches from Will County to the Mississippi River,”¹⁹⁵ an area that is “traditionally Republican-leaning” and the most likely chance for pro-business support.¹⁹⁶

To the limited extent that “genuine motivation” matters are discernible, the animating issue for many of those opposing retention was Kilbride’s vote as one of four justices in a high court decision overturning state-imposed limits on medical malpractice awards.¹⁹⁷ Opposition within the medical community was so organized as to create facsimiles of physicians’ prescription note pads, with each tear sheet indicating a prescription to vote against Kilbride’s retention so as to fix a crisis in medical malpractice insurance—and some physicians went so far as to hand these “prescriptions” out to their patients.¹⁹⁸

The Illinois Civil Justice League, a pro-business group that advocates for liability caps and other restrictions on civil lawsuits, seeks to raise \$1 million to defeat Kilbride, said its president, Ed Murnane. The group spent \$1.2 million last decade in contributions and ads on Supreme Court elections, mostly in 2004 to help Karmeier get elected.¹⁹⁹

The advertisements utilized to try and reach this goal took entirely different means to this end. In a sharp disconnect from reality that is familiar to incumbent elected judges in contested campaigns,²⁰⁰ the anti-retention campaign advertisements—including those funded by groups whose interests were entirely wallet-based—nakedly and distortedly attempted to paint Kilbride as soft on crime. The respected website FactCheck.org framed a disconnect not only from actual purpose, but truth as well:

Interestingly, the league isn’t going after Kilbride for his malpractice ruling. Ads sponsored by the league’s political action committee, JUSTPAC, focus instead on Kilbride’s rulings on criminal cases. “Our central issue is to remove Thomas Kilbride from the bench,” the league’s head, Ed Murnane, told the Chicago Tribune. “We will do whatever we feel is legal and we will be using whatever

195. *Id.*

196. Illinois Campaign for Political Reform Press Release, *supra* note 190.

197. See Andy Kravetz, *Justice Defends Malpractice Ruling*, J. STAR (Sept. 29, 2010, 9:12 PM), <http://www.pjstar.com/news/x399785547/Illinois-Supreme-Court-justice-defends-medical-claims-ruling>.

198. Memphis Comments, *supra* note 183.

199. Sachdev, *supra* note 178.

200. See generally Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 327 (2010) (“[T]he tough-on-crime message, or some derivation thereof, is among the most, if not *the* most, prevalent in judicial campaigns.”).

means necessary and whatever issues will have an impact on voters.” He didn’t promise they would be truthful.²⁰¹

Analyzing the soft-on-crime advertisements against Kilbride, FactCheck notes that the advertisement “shows silhouettes representing three criminals, whose voices (done by actors) describe their heinous crimes. The ad then says: On appeal, Justice Thomas Kilbride sided with us. Over law enforcement or victims.”²⁰² Writing for FactCheck, veteran journalist Viveca Novak masterfully dissects and positively skewers the claims. Unfortunately, millions of dollars in television advertising to portray such falsehoods to voters guarantees an exponentially greater exposure to the falsehoods than the truths to which Novak points. Yet, from a jurist’s perspective, while countering the falsehoods is difficult even *with* substantial campaign money, it is nearly impossible without it. Rather than reproducing the entirety of FactCheck’s analysis here, I merely recommend it in full, and note, in particular, its concluding paragraph:

For the record, this supposedly pro-defendant, anti-prosecutor justice has been endorsed by the majority of members of the executive board of an organization of thousands of Illinois state troopers, former Republican Gov. Jim Thompson, the state’s Fraternal Order of Police and some state’s attorneys. The Illinois Judges’ Association put out a statement condemning the attack on Kilbride, urging voters to “Vote on the basis of facts, not propaganda or an orchestrated disinformation media barrage.” The Illinois State Bar Association protested that JUSTPAC “has distorted the record and rulings of Justice Kilbride by characterizing him as allegedly soft on crime and criminals.”²⁰³

Once under attack from pro-business groups, Kilbride declined to take the position the justices in Iowa held. His open campaigning ranged from commercials criticizing the campaign against him to interviews about his background and career on the bench. However, even in his own articulation regarding his decision to openly campaign, he indicated a belief that he lacked any real volition in making such a choice, asserting that “I have to stand up and protect my reputation and fight for the integrity of the court system.”²⁰⁴ Despite Kil-

201. Novak, *supra* note 192.

202. *Id.*

203. *Id.* Contrary to the assertions made by JUSTPAC, in June 2010, “Illinois Supreme Court Justice Thomas L. Kilbride was honored as the recipient of the 2010 Award of Excellence in the Judiciary from the Illinois State Crime Commission during its annual awards dinner program.” *Justice Kilbride to Receive 2010 Award of Excellence*, ALEDO TIMES RECORD (June 17, 2010, 2:32 PM), <http://www.aledotimesrecord.com/newsnow/x1224664381/Justice-Kilbride-to-receive-2010-Award-of-Excellence>.

204. Sachdev, *supra* note 178.

bride's desire to keep the judicial branch separate from the campaign rhetoric and promise-making, electoral necessity trumped ideological removal from the political scheme. In his own words, "[u]nfortunately, the opposition is not using fair tactics, they're not campaigning in a fair way . . . [t]hey're misstating the record, they're skewing my record and in many instances they're flat-out lying' about 'the impact of my cases.'"²⁰⁵ Thus, with his record under attack, Kilbride laid aside any qualms he had with political posturing from the bench. If one takes Kilbride's remarks at face value, then his campaigning was much more to set the record straight than to be victorious at the end of the retention election. Yet, with Kilbride's success that summer the potential threat of him being replaced by a politically motivated judge fell to the wayside. Instead, the real problem moving forward becomes how to keep a judge who wishes to remain ideologically and politically neutral on the bench without forcing him into campaigning—where neither of those characteristics can realistically survive.

Conclusion

In the end, the foresight of Kilbride and his supporters, along with the money and tactics they raised and employed, lifted the votes in support of his retention above Illinois's required 60% threshold. Had the justices in Iowa—facing a threshold of only 50%—and their supporters organized similarly, they would likely still be on the bench today.

The contrasting approaches in Iowa and Illinois, and the similarly contrasting results will, in this author's view, become a self-fulfilling prophesy. Those who seek to unseat judges for self-interested, ideological and/or single-issue reasons will follow the playbooks of the retention opponents in both Iowa and Illinois. Judges and their supporters will—in some instances reluctantly, in others not—model their approaches on Chief Justice Kilbride's.

The contrasting scenarios leave open some empirically unanswerable questions. Did the Iowa justices' principled stand not only cost them their jobs, but embolden retention opponents both locally and nationally prospectively? If so, will their principled stand—and it was surely that—actually undermine judicial independence over the longer haul? Could that passivity, sourced in concerns over the influence of money, actually have led to a scenario that ensures the cer-

205. Smothers, *supra* note 187.

tainty of more fundraising not only in contested races but in retention races as well? Unfortunately, while not empirically verifiable, I believe the answers to these questions are likely affirmative.

Turning to Illinois, is it possible that Chief Justice Kilbride's approach was every bit as principled as that of the Iowa justices? Reasonable observers may disagree, but, given the circumstances he faced, I certainly think that question too deserves an answer in the affirmative. His experience, however, did not come without substantial costs, both literal and figurative, personal and institutional. Those losses, while harder to measure than the electoral losses in Iowa, are nonetheless real, non-trivial, and cause for prospective concern.

In closing, while not the focal point of this Article, another event on the same November 2010 election day reinforces the conclusion that Retention 2.010 is, or soon will be, the new normal. Despite ample investments of ink and oxygen, for more than a quarter of a century, voters in the thirty-nine states in which judges face election have overwhelmingly rejected every single proposed statewide move from an elective to an appointive bench. In Nevada, despite efforts tirelessly led by Justice Sandra Day O'Connor, voters became the latest to roundly reject such a change.²⁰⁶ In fact, at 58-42%, the margin of defeat was among the *narrowest* losses for appointment systems in the last twenty-five years.²⁰⁷

For those who see merit selection as optimal for protecting judicial independence, Iowa must be reconciled; decades of uninterrupted resistance to moving even *to* a system of merit-plus-retention—much less to a system that lacks retention's voter accountability moment—must finally be seriously acknowledged. Prospectively, addressing the new norms of retention campaigns is a necessity. Retention 2.010 is, unfortunately, here to stay.

206. Chemerinsky & Sample, *supra* note 35.

207. See *supra* text accompanying note 81 (citing *History of Reform Efforts*, *supra* note 83).