

REVISED

1:27 pm, Mar 23, 2011

1

FRAMING THE DEBATE:
UNDERSTANDING IOWA'S 2010 JUDICIAL RETENTION
ELECTION THROUGH A CONTENT ANALYSIS OF
LETTERS TO THE EDITOR

*Tyler Buller**

ABSTRACT: This Note explores framing of political advocacy concerning Iowa's 2010 judicial retention election through a content analysis of letters to the editor in Iowa newspapers over the three months preceding the election. In November 2010, Iowa voters denied retention to all three Iowa Supreme Court justices on the ballot, following *Varnum v. Brien*, a recent supreme court decision invalidating Iowa's statutory prohibition of same-sex marriage, and an unprecedented campaign to oust the justices. Because judicial retention elections fall at the intersection of law, public policy, and politics, this study provides insight for the bench, the bar, advocates and political and legal scholars in understanding the debate over same-sex marriage and Iowa's 2010 retention election. The data collected in this study paint a picture of the conversation that occurred between pro- and anti-retention factions as it played out across Iowa opinion and editorial pages, ultimately demonstrating that that pro- and anti-retention advocates framed the retention-election in substantively different ways.

* J.D. Candidate, The University of Iowa College of Law, 2012; B.A., Drake University, 2009. The author wishes to thank John Lande, Michael Nelson, and Justin Knight for thoughtful comments on early drafts of this piece. All remaining errors and omissions belong solely to the author.

TABLE OF CONTENTS

I. INTRODUCTION	3
II. BACKGROUND	5
<i>A. The Iowa 2010 Judicial Retention Election</i>	5
<i>B. Letters to the Editor as a Vehicle for Exploring Framing</i>	9
III. METHODOLOGY.....	11
<i>A. Sample Selection and Data Acquisition</i>	11
<i>B. Coding and Data Compilation</i>	14
1. Coding for express-advocacy letters vs. issue-based letters.	16
2. Coding for framing.....	17
IV. RESULTS	18
<i>A. Express-Advocacy Framing</i>	18
1. Pro-retention letters	19
2. Anti-retention letters.....	22
<i>B. Issue-Advocacy Framing</i>	25
1. Letters concerning same-sex marriage and the rights of same-sex couples.....	25
2. Letters concerning the merit-selection–retention system.....	26
3. Discussion of civics or historical background.....	28
4. Other, uncategorized letters.....	29
V. ANALYSIS.....	29
<i>A. Quantitative Analysis: Pro- and Anti- Retention Advocates Framed Issues Differently</i>	30
<i>B. Qualitative Analysis: Pro-Retention Advocates Avoided Discussing Varnum, while Anti- Retention Advocates Focused on Arguing Varnum Was Wrongly Decided</i>	31
<i>C. Advocacy Analysis: Varnum Wrong for Institutional Reasons Was Loudest, Most Persuasive Frame in Letters</i>	32
VI. CONCLUSION.....	33
<i>A. Implications for Legal Scholarship</i>	34
<i>B. Implications for Political Scholarship</i>	36
<i>C. Implications for the Bench</i>	36
<i>D. Implications for Advocates</i>	37
<i>E. Implications for Further Research</i>	38
APPENDIX A: TABLE OF NEWSPAPERS ANALYZED.....	39

I. INTRODUCTION

On November 2, 2010, Chief Justice Marsha Ternus and Justices David Baker and Michael Streit of the Iowa Supreme Court all lost their jobs.¹ Iowans, for the first time since adopting a merit-selection–retention system in 1962, opted not to return sitting supreme courts justices to the bench following a retention election.² The election was preceded by an unprecedented anti-retention campaign,³ sparked by *Varnum v. Brien*, a 2009 decision invalidating Iowa’s In Defense of Marriage (“DOMA”) statute and effectively legalizing same-sex marriage.⁴ Following the announcement that Iowans had not retained Justices Ternus, Baker and Streit, voters, judges, political actors and citizens were left wondering: What does this election result mean?⁵ Did voters turn anti-gay animus into “no” votes? Did the voters take issue with the justices’ legal reasoning or merely the policy implications of the decision? Were the election results a shot across the bow, directed at judges across the country faced with controversial decisions?⁶ Or was the retention election about something else entirely?

The answers to these questions matter—to judges, lawyers, political actors, citizens and everyone in between. Not only do judicial retention elections fall at the intersection of law, public policy, and politics,⁷ the

¹ OFFICIAL RESULTS REPORT, IOWA SECRETARY OF STATE 5, 10, 15 (Nov. 29, 2010), *available at* <http://www.sos.state.ia.us/pdfs/elections/2010/judicialorr.pdf>.

² Grant Schulte, *Iowa Poll: Retention of Justices a Tossup*, DES MOINES REG., Oct. 4, 2010, at A1, *available at* 2010 WLNR 19673438.

³ *See id.*

⁴ *See Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). For a discussion of the *Varnum* decision, *see supra* Subpart II.A.

⁵ *Des Moines Register* political columnist Kathie Obradovich forecast this question before the election in a column aptly titled, *Retention Vote Means: You Name It*. DES MOINES REG., Oct. 9, 2010, at OP3, *available at* 2010 WLNR 20210411. Obradovich wryly notes that, through election results, Iowa voters might be sending any of the following messages:

- (a) Don't want same-sex marriage in Iowa;
 - (b) Are afraid of judicial activism;
 - (c) Don't mind special-interest influence;
 - (d) Don't like judges, period;
 - (e) Consider one or more of the justices incompetent or corrupt;
 - (f) Forgot to turn over the ballot;
 - (g) All of the above;
 - (h) None of the above.
- (internal numbering style modified). *Id.*

⁶ This theme appeared in law-related publications following the election results. For an example of this argument, see Mark Curridan, *Judging the Judges: Landmark Iowa Elections Send a Tremor Through the Judicial Retention System*, ABA J., January 2011, at 56, *available at* http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/.

⁷ Indeed, several major legal scholars have begun to devote attention to this intersection in

debate over judicial selection and the role of the courts is centuries old.⁸ Arguments marshaled by each side of the retention debate in Iowa can illuminate our understanding of topics as varied as state constitutional law, judicial selection, the politics of same-sex marriage and the efficacy of political–constitutional advocacy. Because “the Constitution is the site of struggle among competing political arguments about the basic principles of our social compact,”⁹ exploring messages and frames used by competing advocates can tell a story that goes beyond judicial election results. Framing can tell us not only who won or lost an election, but also what arguments contributed to those outcomes and what meaning these arguments may have for future developments in politics and law. These arguments take on particular salience under theories of law that rely on an understanding of the people’s will for improving our understanding of law. For example, in the context of popular constitutionalism,¹⁰ “Thinking about judicial elections . . . can illuminate a wide range of matters at the intersection of constitutional construction, democratic representation, jurisprudence, and the state courts.”¹¹ This illumination adds value not only to the particular scholarship of popular constitutionalism, but also to general legal scholarship, as we all must rebut, support, question, or at least coexist with these theories in the marketplace of ideas.

This Note aims to provide a qualitative and quantitative groundwork for

recent years. *See, e.g.*, Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133 (1998) (discussing the relationship between regulation of judicial conduct, judicial elections, and judicial outcomes); Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward A State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629 (2010) (on how politics, elections, and law affect state-supreme-court decision-making); Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077 (2007) (discussing the political and legal challenges arising in recent judicial elections).

⁸ Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 2 (1995) (“The debate over the proper role of the judiciary and, consequently, the appropriate method of judicial selection and retention, dates at least to the time of Hamilton and Jefferson.”).

⁹ DENNIS GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 287 (2005). Of note, Professor Goldford’s book is targeted toward the federal constitution; his arguments, however, seem appropriate for state constitutionalism as well.

¹⁰ For a summary of the premises underlying formulations of popular constitutionalism, see David E. Pozen, *Judicial Elections As Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–65 (2010) (discussing the “basics” of popular constitutionalism). One writer has succinctly summarized the claims of recent popular constitutionalist scholars as follows:

In the end, popular constitutionalists call for a return to a constitutional system in which final interpretive authority rests with the People and the Court is chastened by popular devices, such as jurisdiction stripping, budget cutting, court-size modification, and public challenges by political leaders.

Tom Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 958 (2009) (discussing, among other texts, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

¹¹ Pozen, *supra* note 10, at 2053 (2010).

understanding advocates' arguments in Iowa's 2010 judicial retention election, based on a content analysis of letters to the editor submitted to Iowa newspapers in the three months preceding the election. Part II discusses the background leading up to the 2010 retention election, including the *Varnum* decision, and briefly summarizes multi-disciplinary research concerning letters to the editor. Part III walks through the methodology used to conduct the content analysis, detailing the data acquisition and coding processes. Part IV presents the results of this study. Part V descriptively analyzes the data, explaining differences in framing between pro- and anti-retention advocates. Finally, this Note concludes by exploring the study's implications on legal and political scholarship, political advocacy, and suggests lessons for the bench, bar and other players in future retention battles.

II. BACKGROUND

To place this Note's content-analysis study and resulting data in the appropriate context, two important pieces of background must first be explored. First, Part II.A discusses exactly what happened in the months prior to and on election day in 2010. The story begins with a discussion of Iowa's judicial-selection system, a brief analysis of particulars of the *Varnum* decision, and a brief exploration of the campaign waged against the justices before ending with the election results on November 2, 2010. Next, in Part II.B, existing social sciences literature on framing is synthesized and applied to letters to the editor as a vehicle for exploring framing in Iowa's 2010 judicial retention election.

A. THE IOWA 2010 JUDICIAL RETENTION ELECTION

Since 1962, Iowa has selected state district and appellate court judges through a merit-selection-retention system.¹² Iowa's selection system is fairly typical of other states that followed the so-called "Missouri Plan."¹³ A brief synopsis provided by the American Judicature Society provides sufficient background for purposes of this Note:

Merit selection of judges was established by constitutional amendment, adopted by a vote of Iowa citizens in 1962. Under Iowa's system, a bipartisan commission of lawyers and citizens evaluates applicants and compiles a list of the most qualified individuals. The governor then

¹² See IOWA CONST. art. V, § 16, available at <http://www.legis.state.ia.us/Constitution.html>.

¹³ *Judicial Merit Selection: Current Status*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf (last accessed Jan. 24, 2011). Although the history of merit-selection systems is of interest to scholars and citizens alike, it has been treated extensively elsewhere and need not be repeated here; for a detailed and accessible treatment of the history of merit selection and its effect on judicial selection, see Professor Rachel Caufield's article, *What Makes Merit Selection Different?*, 15 ROGER WILLIAMS U. L. REV. 765 (2010).

appoints one individual from that list. At periodic intervals, judges appear on the ballot for retention elections in which voters determine whether they will remain on the bench for another term.¹⁴

Iowa's retention elections are staggered, with supreme court justices standing for retention the first election following appointment and every eight years after that.¹⁵ No justice had ever been voted out of office before 2010, and, since 1998, all justices standing for retention had received more than 75% of the vote.¹⁶ This is not particularly divergent from national trends, which show that less than 2% of state supreme court justices subject to retention elections have been defeated.¹⁷

On April 3, 2009, the Iowa Supreme Court released its opinion in *Varnum v. Brien*, a challenge to Iowa's one-man, one-woman marriage statute.¹⁸ In *Varnum*, the Iowa Supreme Court unanimously held that Iowa's law limiting marriage to one man and woman¹⁹ violated the state constitution's equal protection clause.²⁰ In coming to its conclusion, the court reviewed Iowa's law through intermediate scrutiny analysis—determining whether the classification was substantially related to a legitimate government interest.²¹ The court found that the government's alleged interests in the “‘traditional’ institution of marriage, the optimal procreation and rearing of children, and financial considerations” were not substantially advanced by the statute; as a result, the classification violated

¹⁴ *Merit Selection and Retention in Iowa: Some Facts*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/uploads/documents/Fact_sheet_JSS_9FAC644C55106.pdf (last accessed Jan. 24, 2011).

¹⁵ See IOWA CONST. art. V., § 17, available at <http://www.legis.state.ia.us/Constitution.html>.

¹⁶ Schulte, *supra* note 2. This figure is also consistent with a study of retention elections between 1980 and 1995, showing an average vote of 78% for retention over 20 elections. See Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 329 (2001).

¹⁷ Hall, *supra* note 16, at 319.

¹⁸ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). This Note offers a brief summary of the *Varnum* decision, providing only information relevant for the content analysis and understanding the data's implications for legal scholarship. For a step-by-step walkthrough of the *Varnum* opinion and commentary on how the opinion's language affected the debate over retention, see Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, KAN. L. REV. (forthcoming 2011), at 3–7 (“Part II. The *Varnum* Opinion”), available at <http://ssrn.com/abstract=1721158>.

¹⁹ Iowa Code § 595.2 (2008).

²⁰ *Varnum*, 763 N.W.2d. at 906. Iowa's equal protection clause reads: “All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.” IOWA CONST. art I, § 6, available at <http://www.legis.state.ia.us/Constitution.html>.

²¹ *Varnum*, 763 N.W.2d at 896 (“Because we conclude Iowa's same-sex marriage statute cannot withstand intermediate scrutiny, we need not decide whether classifications based on sexual orientation are subject to a higher level of scrutiny.”) The court justified its use of heightened scrutiny on four factors: the history of discrimination against gay and lesbian people, the sexual orientation and the ability to contribute to society, immutability of sexual orientation, political powerlessness of lesbian and gay people. *Id.* at 889–95.

the state's equal protection clause.²² The court-ordered remedy was for the state to begin issuing marriage licenses to same-sex couples, rather than waiting to allow the state legislature to craft an alternate statute.²³ The decision became effective upon issue of procedendo, 21 days after the opinion was filed.²⁴

Immediately following the *Varnum* decision, opponents of same-sex marriage began promoting a state constitutional amendment to limit marriage to one man and one woman.²⁵ While the *Des Moines Register* devoted a six-page spread to same-sex marriage—including an above-the-fold story and photo on A1—the day after the *Varnum* opinion was released, none of the quoted sources even mentioned 2010's judicial retention election.²⁶ The words “retention” or “retain” do not even appear in *Des Moines Register* news coverage of same-sex marriage or the 2010 judicial retention election until July 22²⁷—two and a half months after the *Varnum* decision. A slow trickle of candidates in the Republican gubernatorial primary began to mention the retention election in campaign rhetoric concerning same-sex marriage,²⁸ but the anti-retention campaign did not gain much of its momentum until after the 2010 Republican Iowa gubernatorial primary came to a close.²⁹ In a literal sense, the campaign to

²² *Id.* at 906 (“We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important government objective.”) In its analysis, the Court rejects that the government has an important interest in preservation of the “traditional” institution of marriage. *Id.* at 899 (noting that “some underlying reason other than the preservation of tradition must be identified” to justify the classification). The government’s interest in promotion of the optimal environment to raise children, promotion of procreation and rearing of children and financial considerations were instead flawed in their classifications, not in the interest itself. *See id.* at 899–903.

²³ *Id.* at 906–7.

²⁴ *Id.* at 907.

²⁵ *See* Tony Leys, *Opponents Demand Amendment*, DES MOINES REG., Apr. 4, 2009, at A4, available at 2009 WLNR 16853769.

²⁶ *See* DES MOINES REG., Apr. 4, 2009, at A1, A3, A4, 6A, 8A, 9A.

²⁷ Thomas Beaumont, *Roberts Supports Marriage Vote*, DES MOINES REG., Jul. 22, 2009, at A1, available at 2009 WLNR 15657111. The first person quoted discussing the retention vote was (unsuccessful) Republican gubernatorial primary candidate Rod Roberts. The relevant excerpts of Beaumont’s story are as follows:

Roberts also reminded Iowans unhappy with the Iowa Supreme Court’s April decision to allow same-sex marriage in Iowa that three justices will be on the ballot next year . . . “If [the same-sex marriage ruling] matters a great deal to you, and you want to express your will about the decision that was made, you can express it at the ballot box next year on the question of retention of three justices,” Roberts said.

²⁸ *See* Kathie Obradovich, Op-Ed., *Attendees at GOP Picnic Hear from 5 Seeking to be Governor*, DES MOINES REG., Aug. 16, 2009, 2009 WLNR 16017246.

²⁹ Throughout the primary season, Republican gubernatorial candidate Bob Vander Plaats frequently referred to the *Varnum* decision and same-sex marriage, but claimed that the proper remedy was an executive order to ban same-sex marriages until a constitutional amendment could be placed on the ballot. *See* Thomas Beaumont, *Vander Plaats Gains Backing*, DES MOINES REG., Jan. 13, 2010, at B1, available at 2010 WLNR 774614; Clark Kauffman, *Gubernatorial Candidates Target Same-Sex Unions*, DES MOINES REG., Sept. 13, 2009, at B2, available at 2009 WLNR

oust the Iowa Supreme Court justices was not announced until August 6, 2010, when failed Republican gubernatorial primary candidate Bob Vander Plaats “launched a full-force battle” against retention.³⁰

The months between Vander Plaats’ August announcement and the November 2 election saw extensive paid and free media efforts by pro- and anti-retention advocates. Even church pastors announced their positions on retention, risking tax-exempt status.³¹ By one account, anti-retention groups spent at least \$948,355 in their campaign to oust the justices, while pro-retention groups spent at least \$366,000 to try and retain them.³² However, as actors across the state—and many from beyond Iowa’s borders³³—mobilized to advocate for or against retention, the justices themselves declined to campaign and remained largely silent.³⁴ It wasn’t until just weeks before the election that Chief Justice Ternus began publicly defending the court and the *Varnum* decision at public forums.³⁵ These limited attempts at late-game campaigning also resulted in renewed criticism from anti-retention opponents, who alleged that the Chief Justice was “hostile,” “lack[ed] judicial temperament,” and engaged in “an attack

17977056.

³⁰ Jason Clayworth, *Vander Plaats Seeks to Eject 3 Justices*, DES MOINES REG., Aug. 7, 2010, at A1, available at 2010 WLNR 15739253.

³¹ See Grant Schulte, *Iowa Pastor: Churches Will Urge Voters to Remove 3 Justices*, DES MOINES REG., Oct. 11, 2010, at A1, available at 2010 WLNR 20288281 (“The Rev. Cary K. Gordon has a prayer he recites as he campaigns against the three Iowa Supreme Court justices . . . ‘Dear God,’ he says, ‘please allow the IRS to attack my church, so I can take them all the way to the U.S. Supreme Court.’”).

³² Jason Hancock, *Anti-Gay Groups Spent \$948,000 in Iowa to Oust Judges*, IOWA INDEPENDENT, Nov. 18, 2010, <http://iowaindependent.com/47598/anti-gay-groups-spent-948000-in-iowa-to-oust-judges> (last accessed Jan. 10, 2011) (citing *State/Local Campaign Disclosure Reports*, IOWA CAMPAIGN ETHICS AND DISCLOSURE BOARD, <https://webapp.iecdb.iowa.gov/PublicView/?d=IndepExpend/2010> (last accessed Jan. 10, 2011)).

³³ On the pro-retention side, advocates brought former Supreme Court Justice Sandra Day O’Connor to Des Moines to champion Iowa’s merit-selection–retention system. See Grant Schulte, *Former Justice O’Connor Backs Iowa Judge Selection*, DES MOINES REG., Sept. 8, 2010, at B2, available at 2010 WLNR 17822511. Anti-retention advocates launched a “Judge Bus Tour” that included Rep. Steve King (R-IA), former Sen. Rick Santorum (R-PA) and Tony Perkins (president of the conservative Family Research Council organization). See *Iowa Politics Insider: Bus Tour to Advocate Vote Against Judges*, DES MOINES REG., Oct. 20, 2010, at B5, available at 2010 WLNR 20973679 (discussing King and Santorum’s involvement); Christina Crippes, *Judge Bus Makes Stop in Burlington*, THE HAWK-EYE (Burlington), Oct. 29, 2010, available at 2010 WLNR 21668120.

³⁴ *How Should We Respond to the 2010 Judicial Elections?*, 94 JUDICATURE 102, 105 (2010) (“In Iowa, the justices themselves did not organize campaigns or raise money.”); see Courtney Blanchard, *Chief Justice: Keep Politics Out of Courts*, TELEGRAPH-HERALD (Dubuque), Oct. 1, 2010, at A1, available at NewsBank Rec. No. MERLIN_3144306. Exactly why the justices opted not to campaign is not perfectly clear. Speaking after the election, ousted Justice Michael Streit indicated the justices did not actively campaign because they “falsely believed voters would see through the political attacks on the court.” Grant Schulte, *Targeted Judges Will Likely Need Own Ads, Streit Says*, DES MOINES REG., Feb. 4, 2010, at B1, available at 2011 WLNR 2280119.

³⁵ See Grant Schulte, *Ternus Decries Anti-Judge Vote*, DES MOINES REG., Oct. 13, 2010, at B1, available at 2010 WLNR 20447237.

against average citizens.”³⁶

Polling in the months preceding the election showed voters were split on retention, sometimes within the margin of error. The first published poll concerning the retention election came in June 2010, reporting that 50% of likely Republican primary voters agreed that Iowans should vote out the Iowa Supreme Court justices “because of their decision on gay marriage.”³⁷ A September poll indicated that 40% of polled likely voters planned to vote against all three justices and another 16% planned to vote against some.³⁸ A poll conducted a month later—just one week before the election—showed that 37% of voters would vote out all three justices and another 10% planned to vote against retention of at least one justice.³⁹ Unofficial results on November 2 indicated all three justices had likely lost their seats on Iowa’s highest court.⁴⁰ According to the certified results released by Iowa’s Secretary of State on November 29, the polling numbers had overestimated the vote to retain—in the end, 45.02% of Iowans voted to retain Chief Justice Ternus, 45.86% to retain Justice Baker and 46.62% for Justice Streit.⁴¹ The three defeated justices’ terms expired on December 31, 2010.⁴²

B. LETTERS TO THE EDITOR AS A VEHICLE FOR EXPLORING FRAMING

In political discourse, “virtually all public debates involve competition between contending parties to establish the meaning and interpretation of issues.”⁴³ Iowa’s 2010 judicial retention election is no exception. In the dialogue surrounding the election, contending parties—for example, pro- and anti-retention advocates, defenders of the court system, opponents of same-sex marriage—competed to persuade voters and achieve a desired political outcome. The process of presenting information in a way that is “intended . . . to influence public preferences” is known as framing.⁴⁴ Framing, as used throughout this Note, refers to the “words, images, phrases and presentation styles that a speaker . . . uses when relaying information

³⁶ *Chief Justice Lacks Judicial Temperament*, IOWA FOR FREEDOM, Oct. 13, 2010, http://iowafreedom.com/news/iowa_for_freedom_chief_justice_lacks_judicial_temperament/ (last accessed Jan. 24, 2011).

³⁷ Thomas Beaumont, *New Iowa Poll Shows GOP Majority Favors Terry Branstad in Governor’s Race*, DES MOINES REG., June 6, 2010, at A1, A12, available at 2010 WLNR 11562448.

³⁸ See Schulte, *supra* note 16.

³⁹ Grant Schulte, *New Iowa Poll: Voters Tilt Toward Axing Justices*, DES MOINES REG., Oct. 31, 2010, at A1, available at 2010 WLNR 21770180.

⁴⁰ See Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REG., Nov. 3, 2010, at A1, available at 2010 WLNR 21990809.

⁴¹ OFFICIAL RESULTS REPORT, IOWA SECRETARY OF STATE, *supra* note 1.

⁴² *Justice Cady to Serve as Chief Justice While Court Awaits New Members*, Press Release, IOWA SUPREME COURT (Dec. 2, 2010), available at http://www.iowacourts.gov/news_service/news_releases/NewsItem441/index.asp.

⁴³ Dennis Chong & James N. Druckman, *A Theory of Framing and Opinion Formation in Competitive Elite Environments*, 57 J. OF COMM. 99, 100 (2007).

⁴⁴ *Id.* at 100.

about an issue or event to an audience.”⁴⁵ Put differently, framing is the “process by which [communicators] define and construct issues or events.”⁴⁶ The existing social sciences literature suggests that either the loudest (most frequent) or strongest (most persuasive) frames will have the greatest effect on readers.⁴⁷ Studies of framing can reveal important information about what speakers consider important regarding the issues they discuss and how the public reconciles competing frames in media.⁴⁸ Some scholars have suggested “[f]raming is considered so important, in fact, that it has been described as the essence of public opinion formation.”⁴⁹

To better understand the dialogue and frames surrounding the 2010 judicial retention election, this Note explores the content of letters to the editor in Iowa newspapers. Letters to the editor have been regular features in most American newspapers since at least the 1850s and are generally thought to be “important spaces for public expression.”⁵⁰ Although studies diverge on precisely how closely letters to the editor reflect public opinion,⁵¹ letters provide a useful window into “public thoughts and perceptions for journalists, editors and readers.”⁵² One scholar has even noted that publication spaces for letters to the editor are “a place where democracy blossoms because regular citizens are allowed a voice of their own.”⁵³ Thus, while letters may not statistically correspond to the exact views of the general public, they do provide valuable information about framing, views, dialogue, and discourse. Indeed, letters to the editor and other newspaper articles have been used to precisely that end in exploring

⁴⁵ *Id.* at 100. Although some literature distinguishes between “frames in communication” and “frames in thought,” this Note only discusses framing in communication. *See id.* at 100–01.

⁴⁶ Fuyuan Shen, *Effects of News Frames and Schemas on Individuals’ Issue Interpretations and Attitudes*, JOURN. & MASS. COMM. Q., Summer 2004, at 400 (2004).

⁴⁷ Chong & Druckman, *supra* note 43, at 104. The “persuasiveness” of a frame depends on many factors, such as speaker credibility, readers’ pre-existing values, and knowledge. *Id.* at 102–4.

⁴⁸ *Id.* at 100 (“The chosen frame reveals what the speaker sees as relevant to the topic at hand.”).

⁴⁹ Rune Sloothuus, *When Can Political Parties Lead Public Opinion? Evidence from a Natural Experiment*, 27 POL. COMM. 158, 158 (2010) (citing Dennis Chong, *How People Think, Reason, and Feel About Rights and Liberties*, 37 AM. J. OF POL. SCI. 867, 870 (1993)) (internal quotation marks omitted).

⁵⁰ Jennifer Hannah & Oscar H. Gandy, Jr., *Editorial Opinion and Racial Profiling: Coming to Terms with DWB*. Paper submitted to the Annual Meeting of the International Communication Association, Acapulco, Mexico, May 2000, at 10, available at <http://www.asc.upenn.edu/usr/ogandy/ICA2000.htm>.

⁵¹ For a recent, concise summary of research on the conflicting scholarship concerning letters to the editor and its application to modern studies, see Daniel M. Butler & Emily Schofield, *Were Newspapers More Interested in Pro-Obama Letters to the Editor in 2008? Evidence from a Field Experiment*, 38 AM. POL. RES. 356, 358–69 (2010).

⁵² Hannah & Gandy, *supra* note 50, at 12 (internal citations omitted).

⁵³ Karin Wahl-Jorgensen, *A ‘Legitimate Beef’ or ‘Raw Meat?’ Civility, Multiculturalism, and Letters to the Editor*, THE COMM. REV. 70, Mar.–May 2004, at 89–105.

the framing of topics such as “driving while black,”⁵⁴ attitudes toward Martin Luther King Day,⁵⁵ stem-cell research,⁵⁶ health policy,⁵⁷ welfare and trade policy,⁵⁸ attitudes toward Latino voters,⁵⁹ and even moviegoers’ attitudes toward the film *Brokeback Mountain*.⁶⁰

III. METHODOLOGY

This study was motivated by two central research questions: one qualitative and one quantitative. First, did pro- and anti-retention advocates frame issues concerning the 2010 judicial–retention election in a significantly different way? Second, how did these advocates frame the issues?

To explore these questions, a study was designed to conduct a content analysis of letters to the editor in Iowa newspapers. Content analysis is “a research method that uses a set of procedures to make inferences from text.”⁶¹ The inferences drawn from text can be about a variety of topics, such as “sender(s) of the message, the message itself, or the audience of the message.”⁶² Here, the selected items were letters to the editor and the inferences drawn were the frames used by advocates in their discussion of the 2010 judicial retention election. The two major methodological design questions in this study were: (1) how to select a sample and acquire items for content analysis and (2) how to code items in a useful way based on their content.

A. SAMPLE SELECTION AND DATA ACQUISITION

As a practical matter, it was not possible to conduct a content analysis of the entire universe of Iowa newspapers. The Iowa Newspaper Association estimates that the total universe of Iowa newspapers is 303

⁵⁴ See Hannah & Gandy, *supra* note 50.

⁵⁵ See Lee Siegelman & Barbara J. Walkosz, *Letters to the Editor as a Public Opinion Thermometer: The Martin Luther King Holiday Vote in Arizona*, 73 SOC. SCI. Q. 938 (1992).

⁵⁶ See Shen, *supra* note 46.

⁵⁷ See Lindsay H. Hoffman & Michael D. Slater, *Evaluating Public Discourse in Newspaper Opinion Articles: Values-Framing and Integrative Complexity in Substance and Health Policy Issues*, 84 JOURN. & MASS. COMM. Q. 1, 58 (2007).

⁵⁸ See Rune Slothuus & Claes H. de Vreese, *Political Parties, Motivated Reasoning, and Issue Framing Effects*, 72 J. OF POL. 3, 630 (2010).

⁵⁹ See Laura Gomez, *What’s Race Got to Do With It?: Press Coverage of the Latino Electorate in the 2008 Presidential Primary Season*, 25 ST. JOHN’S J. L. COMMENT. 425 (2009).

⁶⁰ See Brenda Cooper, *The Mormons Versus the “Armies of Satan”: Competing Frames of Morality in the Brokeback Mountain Controversy in Utah Newspapers*, W. J. OF COMM., April–June 2009, at 134.

⁶¹ ROBERT PHILIP WEBER, *BASIC CONTENT ANALYSIS* 9 (2nd ed. 1990). Weber’s short book provides a concise and introductory account of content analysis for a reader with limited scientific or statistical background.

⁶² *Id.* at 9.

papers—266 weekly and 37 daily.⁶³ Many of these publications are not maintained—anywhere—on microfilm or in current issues and cannot realistically be acquired for research. Because of this, it was prudent to select a sample of newspapers for study.

The sample selected for this analysis was the 25 highest-circulation daily newspapers in the state of Iowa. Circulation is a useful variable in determining sample size for an exploration of framing because letters published in high-circulation newspapers reach more voters and therefore may have a larger effect on the population. In the interest of research efficiency, the study was limited to daily newspapers on the assumption that they were more likely to be practically acquirable, include letters to the editor, and generate items for analysis. Although there may be some bias incurred by not including small (less than 3000 circulation) weekly or daily newspapers, it is expected that this risk is outweighed by the value of having full access to 25 full publications without expending unreasonable resources.⁶⁴ The sample was also limited chronologically to roughly the 90 days prior to the 2010 retention election, analyzing only issues published between August 1, 2010 and November 2, 2010, to reflect the window of time immediately preceding the election. The sample size also reflects a wide range of newspapers from geographically diverse communities. Circulation ranged from more than 120,000 for the *Des Moines Register*⁶⁵ to just over 3000 for the *Washington Evening Journal*.⁶⁶ All of the analyzed newspapers published at least one letter to the editor concerning the 2010 judicial retention election, though the number per publication ranged from 66 letters in the *Des Moines Register* to only one letter each in the *Creston News-Advertiser* and *Washington Evening Journal*. Although the precise phrasing of each newspaper's letter-publication policy varied, most limited word length to approximately 200 words and noted that all letters were subject to editing for length, grammar and style.⁶⁷

⁶³ IOWA NEWSPAPER ASSOCIATION, <http://www.inanews.com> (last accessed Jan. 24, 2011).

⁶⁴ Put differently, if the time and resources to acquire research items was the same for 25 daily newspapers and 10 weekly newspapers, the wider array of data available from the former seems a more valid research choice.

⁶⁵ The *Des Moines Register* is Iowa's highest-circulation daily, with a weekday circulation of 124,295 and readership of 248,590. See Appendix A.

⁶⁶ The *Washington Evening Journal* is Iowa's twenty-fifth-highest circulation daily, with a weekday circulation of 3,184 and readership of 6,368. See Appendix A.

⁶⁷ See, e.g., *Daily Iowan Opinions: Send a Letter to the Editor*, DAILY IOWAN, <http://www.dailyiowan.com/pages/lte.html> (last accessed Jan. 10, 2011) (“[A]ll letters will be verified before publication. Letters should not exceed 300 words. The DI reserves the right to edit for length and clarity and will only publish one letter per month per author. Letters will be chosen for publication by the editors according to space considerations.”); *For Publication in the Des Moines Register*, DES MOINES REG., <http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=/99999999/HELP/40507010> (last accessed Jan. 10, 2011) (“Preference is given to letters that are 200 words or fewer. Include your name, complete address and daytime phone number. All submissions may be edited for length,

Because of the recency of the letters' publication,⁶⁸ issues could not be acquired through microfilm. As a result, the researcher developed a hierarchy of search methodologies. If possible, letters to the editor were recovered from an online database, such as ProQuest, WestLaw, LexisNexis or NewsBank. If the publication was not available through a database, letters were acquired from a publication's website, so long as the website included complete archives of individual, dated letters to the editor.⁶⁹ If the website did not include letters to the editor, hardcopies of the original publication were reviewed at the Iowa State Historical Library in Des Moines. Under all of these methods, the sources were reviewed by hand (rather than through electronic searching) to ensure consistency in methodology between hardcopy and digital sources. All sources were reviewed at least twice to minimize researcher error in locating letters. A full list of sources, including the method of content acquisition, can be found in Appendix A.

Upon review, these publications included a number of potential items for analysis, including news and feature stories, editorials, opinion columns and letters to the editor. This analysis was solely concerned with the views expressed in letters and analogous (but perhaps differently titled) spaces. To that end, items included for analysis only included those items written by persons not affiliated with the newspaper's regular editorial staff. For example, *Des Moines Register* political columnist Kathie Obradovich's regular commentary⁷⁰ was excluded from the analysis, but a guest opinion by law school dean emeritus N. William Hines in the *Daily Iowan* was included.⁷¹ Unsigned staff editorials were also excluded.⁷² Although letters

accuracy and clarity and may be published or distributed in print, electronic or other forms.”); MARSHALLTOWN TIMES-REPUBLICAN, <http://www.timesrepublican.com/> (last accessed Jan. 29, 2011) (select “opinion” from horizontal menu, then click “SUBMIT Opinions” in right-hand menu, then select “Letters to the Editor”) (“Letters will be edited for libel, grammar and length and should not exceed 400 words; shorter letters, of course, are often published sooner due to space constraints. The Times-Republican reserve the right to shorten letters and reject those deemed libelous, in poor taste or of a personal nature. Include your full name, address and a daytime phone number where you can be reached between 8 a.m. and 5 p.m. for verification. Only one letter per person per month is permitted.”).

⁶⁸ The content analysis was conducted less than two months following the November 2, 2010 election.

⁶⁹ The two student publications that ranked within the top-twenty-five daily newspapers (the *Daily Iowan* and the *Iowa State Daily*) included .PDF copies of their printed edition via the website Issuu. These copies replicate the printed edition and were used in the analysis. See ISSUU, <http://issuu.com/> (search for “Daily Iowan” or “Iowa State Daily”).

⁷⁰ See *Author Archive*, DES MOINES REG., <http://blogs.desmoinesregister.com/dmr/index.php/author/kathie-obradovich/> (last accessed Jan. 1, 2011).

⁷¹ N. William Hines, *Students: Vote ‘yes’ to Retain Iowa Justices*, Op-Ed., DAILY IOWAN, Oct. 11, 2010, at 4, available at <http://issuu.com/thedailyiowan/docs/101110> (use arrows on newspaper image to navigate to page four).

⁷² For purposes of considering the broader political context of dialogue on the opinion pages, it

simultaneously published online were included, online-only comments—such as those posted under individual newspaper stories on a website⁷³—were excluded, as they were generally less lengthy than printed letters, did not contain author’s real names, and may have been more heavily moderated by the newspapers’ online editors and staff. Throughout this Note, “letters” refers to all items reviewed in the content analysis.

Among the letters considered, every piece that discussed the retention election, directly or indirectly, was included in the content analysis. This determination was made by personally reviewing each piece. Through individual review, the risk of incurring false positives through keyword searches was minimized. For example, Iowa City newspapers included dozens of letters about the “retention” of a 21-only ordinance for local bars,⁷⁴ as well as “retention” of the Iowa Supreme Court justices; by personally reviewing each letter, the ordinance-related letters could be discarded without risking the loss of retention-election-related letters. Similarly, many Eastern Iowa newspapers’ readership extends into Illinois, resulting in letters concerning retention of Illinois judges and justices.⁷⁵ Personal review of items also prevented these false positives from contaminating sample selection. Determinations as to whether or not to include a letter in the content analysis sample erred in favor of inclusion, such that letters that discussed the retention election, *Varnum*, the merit-selection system, or other related issues in any substantive depth were included. This process resulted in 331 items for analysis. After acquiring the sample, the next phase of the content analysis was coding and compiling the resulting data in a useful way.

B. CODING AND DATA COMPILATION

The coding process used here is empirical, though not purely objective or free from human biases.⁷⁶ While some content analysis can rely solely on

is worth noting that the author did not locate any staff editorials that were *not* pro-retention among the 25 newspapers analyzed.

⁷³ For an example of these types of online-only story comments, see DES MOINES REG., <http://www.desmoinesregister.com/> (last accessed Jan. 15, 2011) (open any news article, scroll to the bottom of the screen and select “show comments for all articles” to view “story chat”).

⁷⁴ E.g., Victoria Sharp, *Vote for Health – Retain 21-Ordinance*, Letter to the Editor, DAILY IOWAN, Oct. 27, 2010, at 4, available at <http://issuu.com/thedailyiowan/docs/102710> (use arrows on newspaper image to navigate to page four) (concerning retention of Iowa City’s restriction on minors in bars).

⁷⁵ E.g. Karen Beshears, Letter to the Editor, *Retain Kilbride*, QUAD-CITY TIMES, Oct. 19, 2010, at A9, available at NewsBank Rec. No. MERLIN_1287505 (concerning retention of Illinois Supreme Court justice Tom Kilbride).

⁷⁶ For the seminal piece on empirical legal research, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2–3 (2002). Epstein and King note:

The word “empirical” denotes evidence about the world based on observation or experience. That evidence can be numerical (quantitative) or nonnumerical (qualitative); neither is any more “empirical” than the other. What makes research empirical is that it is based on observations of the

a computer-calculation of the appearance of certain words or phrases for coding, that approach is inappropriate and unfitting here. Attempts to devise a digital coding scheme were fruitless, in large part because arguments and rhetoric marshaled by pro- and anti-retention advocates relied on the same words, phrases, and ideas—often toward polar opposite conclusions.⁷⁷ Similarly, reliance on pre-existing political-coding dictionaries⁷⁸ for content analysis did not lead to meaningful results. For example, a digital representation of Laver and Garry’s coding dictionary led to relatively meaningless categorizations of tested letter samples.⁷⁹ This is perhaps unsurprising, given that both pro- and anti-retention letters discussed political institutions and Larry and Gaver’s dictionary cannot distinguish between different institutional arguments.

Coding of data in this study was a two-step process. First, letters were coded for whether they were letters of express advocacy or issue-based. Second, letters were descriptively coded based on the framing used to discuss or advocate regarding retention of the Iowa Supreme Court justices. The methods used during each coding step are discussed in turn below.

world—in other words, data, which is just a term for facts about the world. These facts may be historical or contemporary, or based on legislation or case law, the results of interviews or surveys, or the outcomes of secondary archival research or primary data collection. Data can be precise or vague, relatively certain or very uncertain, directly observed or indirect proxies, and they can be anthropological, interpretive, sociological, economic, legal, political, biological, physical, or natural. As long as the facts have something to do with the world, they are data, and as long as research involves data that is observed or desired, it is empirical.

Id. at 2–3 (footnote omitted). The principles and best practices discussed in Epstein and King’s article heavily influenced the design and methodology of this study. The discussion of results was also heavily influenced by Epstein’s work concerning the communication of empirical studies. See Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811 (2006), available at <http://epstein.law.northwestern.edu/research/communicating1.pdf>; Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part II*, 60 VAND. L. REV. 801 (2007), available at <http://epstein.law.northwestern.edu/research/communicating2.pdf>.

⁷⁷ For example, both pro- and anti-retention advocates discussed whether justices “did their job.” Compare John Waldorf, *Justices Should Be Retained*, Letter to the Editor, WATERLOO–CEDAR FALLS COURIER, Oct. 21, 2010, http://wfcourier.com/news/opinion/mailbag/article_07597ddc-dc82-11df-93a1-001cc4c002e0.html (scroll down to third letter) (“The Supreme Court’s job is to interpret the law, and to me it looks like they did their job.”) with Jerald T. Smith, *People Hold the Power*, Letter to the Editor, WATERLOO–CEDAR FALLS COURIER, Oct. 27, 2010, http://wfcourier.com/news/opinion/mailbag/article_0453dbf4-e138-11df-a570-001cc4c03286.html (scroll down to seventh letter) (“The judges did what they were supposed to do by interpreting the law. At that point their job was done. This issue should have been handed off to the legislative The judges overstepped their authority by declaring same-sex marriage legal in Iowa.”).

⁷⁸ One example of a political-coding dictionary is proposed by Michael Laver and John Garry in their article, *Estimating Policy Positions from Political Texts*, 44 AM. J. OF POL. SCI. 3, 619–34 (2000).

⁷⁹ This attempted sample analysis was conducted using Yoshikoder, an open-source content-analysis program for Windows and Mac OS. The Yoshikoder program is available at <http://http://www.yoshikoder.org/downloads.html> and a version of Laver and Garry’s political dictionary is available at <http://www.yoshikoder.org/resources.html>.

1. *Coding for express-advocacy letters vs. issue-based letters.*

After an initial review of the acquired letters to the editor, it was clear that there were two different broad categories of letters: those that clearly advocated for or against retention of the justices and those that were more issue-based and informational in nature. Because a content analysis of the letters must be based on qualitative observations, it would have been difficult—if not impossible—to categorize letters without making an independent evaluation each letter’s content.

A review of potential tests for categorizing letters to the editor inevitably led to materials published by the Federal Elections Commission (“FEC”). Among the many distinctions the FEC and federal law make among political communications is the distinction between materials that expressly advocate for a clearly identified candidate and those that do not. Because this distinction seemed to mirror the two broadest categories among the 331 letters analyzed, FEC guidelines were used as a springboard to create an operational definition for whether letters contained express advocacy. Under the FEC guidelines, communications include express advocacy if one of two tests are satisfied.⁸⁰ The first test concerns so-called “magic words,” which by default establish that the communication includes express advocacy.⁸¹ The second test would find that communications may also include express advocacy based on a totality of the circumstances test.⁸²

The FEC tests were further refined to better apply to the specifics of a judicial retention (rather than partisan candidate) election. To help resolve

⁸⁰ See 11 CFR § 100.22 (2009), available at <http://www.gpo.gov/fdsys/pkg/CFR-2009-title11-vol1/pdf/CFR-2009-title11-vol1-sec100-22.pdf>.

⁸¹ Under federal law, these words include:

(a) [. . .] “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in 94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One,” “Carter ’76,” “Reagan/Bush” or “Mondale!”

Id.

⁸² Under federal law, the precise contours of the totality of the circumstances test is met:

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because--

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Id.

ambiguities, the researcher also relied on the *Federal Election Commission Campaign Guide: Congressional Candidates and Committees*, which synthesizes federal election law and relevant agency advisory opinions.⁸³ For purposes of coding, express advocacy letters included those that either: (1) Use express advocacy words found in the federal regulations or the words “fire,” “throw out” “punish,” “retain,” or “retaliate”⁸⁴ and clearly identify the Iowa Supreme Court justices; or (2) in a totality of the circumstances analysis, engaged in express advocacy. Letters that did not meet the express-advocacy criteria were categorized as issue-advocacy letters. Based on these criteria, the research sample yielded 161 express-advocacy letters and 170 issue-advocacy letters. Following the coding for express-advocacy versus issue-advocacy, letters were further analyzed and coded for framing using the processes detailed below.

2. Coding for framing

After the initial categorization of express-advocacy letters was made, each letter was individually reviewed and coded for its message framing. Each frame was recorded independently before being collated to determine categories for reporting. Any message that appeared in more than six letters—roughly 2% of the total sample size—was categorized separately. Messages that appeared less than six times were categorized as “other.” In letters that employed more than one of the framing categories, coding was determined based on the word count of each frame and the prominence of the framing in the letter’s headline, introduction, and call to action.⁸⁵

Once the probable categories were determined, each letter was again reviewed and then coded a final time to ensure consistency. Stability in the coding of this section was measured by re-coding a sample 30 days after initial coding. The results of the re-coding indicate that stability was high at 93.9%.

⁸³ See FEDERAL ELECTION COMMISSION CANDIDATE GUIDE: CONGRESSIONAL CANDIDATES AND COMMITTEES, FEDERAL ELECTION COMMISSION, April 2008, at i, available at <http://www.fec.gov/pdf/candgui.pdf>.

⁸⁴ These terms were added following a cursory review of letters conducted at the outset of the review. The terms parallel those included in the federal regulations, helping to adapt the test to the particulars of a judicial-retention election. Understandably, there may be some concern that this operational definition casts a wider net than federal law would; however, because the categorization here serves only to provide meaningful distinctions—rather than trigger government regulation—this should not be seen as inappropriate or even undesirable.

⁸⁵ For example, in a letter listing eight reasons to vote to retain the justices, the letter was coded for “did not defend *Varnum*, advocated for preservation of merit-selection–retention system” when four items pertained to merit-selection, two pertained to the role of the judiciary and two pertained to same-sex marriage. See Randy Black, *Why Do We Vote Yes on Judges?*, Letter to the Editor, *GLOBE-GAZETTE* (Mason City), Oct. 30, 2010, http://www.globegazette.com/news/opinion/letters_to_the_editor/article_6a86544a-e496-11df-aaf0-001cc4c002e0.html (last accessed Jan. 10, 2011).

The results of this coding comprise the data discussed in Part IV below.

IV. RESULTS

The results of the content analysis are presented below in both tabular and narrative format. As discussed above, the greatest division in categories was between express-advocacy letters (of which there were 161) and issue-advocacy letters (of which there were 170). These broad categories, and the sub classifications based on framing, are discussed below. A Microsoft Excel spreadsheet including all raw data discussed in this section—letter headlines, author names, dates of publication, city of author residence, and all coding—is available for download at [web address intentionally omitted].⁸⁶

Figure 1. Categorical Breakdown of Letters Analyzed

<i>Letter Category</i>	<i>Number of letters</i>	<i>Percentage of total sample analyzed</i>
Pro-retention express-advocacy letters	83	25.1%
Anti-retention express-advocacy letters	78	23.6%
Issue-advocacy letters concerning same-sex marriage	65	19.6%
Issue-advocacy letters concerning the merit-selection-retention system	47	14.2%
Issue-advocacy letters concerning civics or history	32	9.7%
Issue-advocacy letters, uncategorized	26	7.9%

A. EXPRESS-ADVOCACY FRAMING

Of the 161 express-advocacy letters analyzed, roughly half divided between pro-retention advocates (83 letters, 51.6% of express-advocacy letters) and anti-retention advocates (78 letters, 48.4% of express-advocacy

⁸⁶ The preferred citation for the raw data is as follows: [Author Name Intentionally Redacted], FRAMING THE DEBATE: RAW DATASET, Jan. 15, 2011, available at _____ [web address intentionally omitted for anonymity].

letters). Both pro-retention and anti-retention express-advocacy letters were further subcategorized, as detailed below.

1. *Pro-retention letters*

Pro-retention express-advocacy letters fell into four different categories: (1) letters that did not defend *Varnum*, but urged retention to preserve Iowa’s merit-selection–retention system; (2) letters that did not defend *Varnum*, but urged retention because the justices fulfilled their legal duty or “did their job”; (3) letters that defended the *Varnum* decision on its merits; (4) letters that did not defend *Varnum*, but urged retention on other grounds.

The breakdown of express-advocacy pro-retention letters can be found in Figure 2 below.

Figure 2. Pro-retention express advocacy letters

<i>Framing of Pro-Retention Advocacy</i>	<i>Number of letters</i>	<i>Percentage of pro-retention letters analyzed</i>
Did not defend <i>Varnum</i> , advocated preservation of merit-selection–retention system	32	38.6%
Did not defend <i>Varnum</i> , argued justices fulfilled legal duty, “did their job”	31	37.3%
Defended <i>Varnum</i> decision on merits	12	14.5%
Other	8	9.6%

A majority of pro-retention advocates—75.9%—declined to defend the *Varnum* decision, instead opting to advocate for retention to either preserve Iowa’s merit-selection–retention system or because the writers believed the justices fulfilled their legal duty and “did their job.” Most letters avoided mentioning same-sex marriage or the *Varnum* decision entirely,⁸⁷ but a handful acknowledged forthright that they would not defend the decision or same-sex marriage. For example, a piece by Principal Financial Group’s CEO in the *Des Moines Register* declined to discuss *Varnum* in any substance, instead asking readers to “Note I haven’t mentioned where I stand on the Varnum decision. That’s a key point: For purposes of voting in

⁸⁷ E.g. Johanna Anderson, Letter to the Editor, *Vote to Retain Judges*, GLOBE-GAZETTE (Mason City), Oct. 30, 2010, http://www.globegazette.com/news/opinion/letters_to_the_editor/article_022d93c8-e486-11df-846d-001cc4c002e0.html (last accessed Jan. 15, 2011).

the upcoming retention election, my view of Varnum *doesn't matter*.”⁸⁸

Thirty-two letters—38.6% of all pro-retention letters—advocated for retention as a means of preserving Iowa’s merit-selection–retention system. These letters typically attempted to equate the retention vote as really being a vote on the merit-selection–retention system, rather than a vote about same-sex marriage or the *Varnum* decision. For example, one letter-writer argued:

Iowa’s record for selecting judges and the handling of cases is considered by most impartial observers to be top-rate. Our state’s merit-based judicial nomination process is largely responsible for this superior record. This is not a vote on a single issue. It is a vote on an entire system. If you want to retain our current system of justice, vote “yes.”⁸⁹

Put simply, writers using this framing technique attempted to replace the question of “shall these justices be retained in office?” with “shall Iowa’s merit-selection–retention system be retained?” in the minds of voters they were trying to persuade. Many letters also devoted space to informing readers about the merit-selection–retention process,⁹⁰ such as detailing the letter-writer’s perceptions of what might be valid reasons to vote against retaining a particular justice.⁹¹ For example, a lengthy piece by long-time journalist and former Iowa Board of Regents president Michael Gartner walked laboriously through the history of the merit-selection–retention process while advocating for retention.⁹²

Thirty-one letters—37.3% of the pro-retention sample—advocated for retention because writers believed the justices fulfilled their legal duty and “did their job.” These arguments were often straightforward, such as an *Ottumwa Courier* letter that argued “[t]he Iowa Supreme Court was doing its job, interpreting law even when it may be unpopular.”⁹³ Multiple letters

⁸⁸ Larry Zimpleman, Op–Ed., *Injecting Politics into Justice System May Hurt Economy*, DES MOINES REG., Oct. 19, 2010, at OP2, available at <http://siouxlandchamberblog.com/2010/10/27/guest-opinion-injecting-politics-into-justice-system-may-hurt-economy/>.

⁸⁹ Jim Erb, *Vote Yes for Judges*, Letter to the Editor, GLOBE-GAZETTE (Mason City), Oct. 29, 2010, http://www.globegazette.com/news/opinion/letters_to_the_editor/article_213257f4-e332-11df-9f2c-001cc4c002e0.html (last accessed Jan. 15, 2011).

⁹⁰ These letters can be distinguished from those discussed in Part IV.B.2 *infra*, as these letters, in addition to informing readers about the merit-selection–retention process, also included express advocacy.

⁹¹ *E.g.* Carl Vogelhuber Letter to the Editor, *Don’t Turn Backs on Judicial System*, GLOBE-GAZETTE (Mason City), Oct. 18, 2010, http://www.globegazette.com/news/opinion/letters_to_the_editor/article_01700212-db3b-11df-9fae-001cc4c002e0.html.

⁹² See Michael Gartner, *Justice Is Blind, Iowa Court Loyal to Its Legacy*, Letter to the Editor, DAILY TIMES-HERALD (Carroll), Oct. 28, 2010, http://www.carrollspaper.com/SearchForm_Advanced.asp (select “advanced search” and use “Michael Gartner” as keyword).

⁹³ Rob Potts, Letter to the Editor, *Justices Did Not ‘Make Law;’ They Interpreted It*, OTTUMWA

drew parallels between the Iowa justices “doing their job” concerning same-sex marriage in 2009 with the U.S. Supreme Court doing its job concerning interracial marriage in the 1960s.⁹⁴ According to writers, both may have been unpopular results at the time, but neither warranted removing judges from the bench.⁹⁵ Others stressed that the ruling, whether they agreed with it or not, was reasonable and did not establish the judges were incompetent.⁹⁶

The few pro-retention advocates that did defend *Varnum*—just 12 letters, 14.5% of the pro-retention sample—often framed the issue as one based on equality, noting that “[e]qual rights are the law of our land.”⁹⁷ Several letter-writers also defended *Varnum* as a well-reasoned decision, while avoiding discussion of whether they were personally in favor of same-sex marriage. For example, one noted that the justices’ “25-page-plus [opinion] is a logical and legal argument that also makes the strongest case possible for the retention of the judges.”⁹⁸ Former Iowa Court of Appeals Judge Bruce M. Snell made a similar argument in his letter to the *Sioux City Journal*, noting that the issue decided in *Varnum* “would have been the same if the Legislature had denied the right to marry to mulattos, or epileptics or quadriplegics.”⁹⁹ Among the letter-writers that did defend *Varnum*, many drew parallels to other civil rights issues, like interracial marriage¹⁰⁰ and discrimination against other groups, such as Muslims, the homeless and women.¹⁰¹ Only one letter, written by a Christian pastor, explicitly defended *Varnum* as justified by tenets of the Christian faith.¹⁰²

COURIER, Oct. 22, 2010, NewsBank Rec. No. 20717539831c816d21fec556each3f395c549e3.

⁹⁴ *Id.*; Russ Fry, Letter to the Editor, *Keep the Judges*, THE HAWK-EYE (Burlington), Oct. 22, 2010, at A6, available at NewsBank Rec. No. 2905838.

⁹⁵ Fry, *supra* note 94. Interestingly, these letter-writers generally did not acknowledge that federal Article III judges—such as those who invalidated statutory bans on interracial marriage in *Loving v. Virginia*, 388 U.S. 1 (1967)—have life tenure and are not subject to retention elections.

⁹⁶ Mike Schulte, Letter to the Editor, DAILY TIMES-HERALD (Carroll), Oct. 29, 2010, http://www.carrollpaper.com/SearchForm_Advanced.asp (select “advanced search” and use “Mike Schulte” as keyword).

⁹⁷ Julie Fischer, Letter to the Editor *Equal Rights for All*, WATERLOO-CEDAR FALLS COURIER, Aug. 22, 2010, http://wcfcourier.com/news/opinion/mailbag/article_b8842f1c-abb8-11df-87ba-001cc4c002e0.html.

⁹⁸ Raymond A. Stassen, Letter to the Editor, *Same-Sex Marriage Ruling Based on Law*, GAZETTE (Cedar Rapids), Oct. 7, 2010, at A4, available at NewsBank Rec. No. 5878188.

⁹⁹ Bruce M. Snell, *Ex-Justice: Court Shows Respect for Law*, Letter to the Editor, SIOUX CITY J., Oct. 30, 2010, <http://www.siouxcityjournal.com/> (search “Bruce M. Snell” in advanced search box in upper-right).

¹⁰⁰ Angela Onwuachi-Willig, Letter to the Editor, *Varnum Ruling Ranks with Loving v. Virginia*, IOWA CITY PRESS-CITIZEN, Oct. 30, 2010, at A11, available at 2010 WLNR 21773659.

¹⁰¹ Paul Roxlau, Letter to the Editor, *Rights are Rights*, THE HAWK-EYE (Burlington), Oct. 30, 2010, at A1, available at NewsBank Rec. No. 2949994.

¹⁰² Robert Bowlin, Letter to the Editor, *Pastor Welcomes Iowa Gay Marriages*, QUAD-CITY TIMES, Oct. 27, 2010, at A8, available at NewsBank Rec. No. MERLIN_1290895 (“I believe the gospel calls us to welcome and cherish all people, gay and straight. . . Last year’s same-sex marriage decision continues [Iowa’s] distinguished history. The competent justices who supported it deserve to

These letters also commonly had strong secondary messages pertaining to the other categories, such as advocacy concerning the merit-selection–retention system or the role of the judiciary.¹⁰³

2. *Anti-retention letters*

Anti-retention letters also fell into four categories: (1) letters that argued *Varnum* was wrongly decided based on institutional reasons, such as separation of powers; (2) letters that argued *Varnum* was wrongly decided based on religious or moral reasons; (3) letters that argued *Varnum* was wrongly decided based on other reasons; (4) letters that did not explicitly argue *Varnum* was wrongly decided, but advocate against retention for other reasons. A breakdown of the letters by category can be found in Figure 3 below.

Figure 3. Anti-Retention Express-Advocacy Letters.

<i>Framing of Anti-Retention Advocacy</i>	<i>Number of letters</i>	<i>Percentage of anti-retention letters analyzed</i>
<i>Varnum</i> wrong because of institutional reasons	54	69.2%
<i>Varnum</i> wrong because of religion or morality	9	11.5%
<i>Varnum</i> wrong because of uncategorized reasons	4	5.1%
Other	11	14.1%

By far, the most common frame used by anti-retention advocates—54 letters or 69.2% of the total anti-retention sample—was that *Varnum* was wrongly decided based on institutional reasons. Although a handful of letters invoked arguments well outside the political mainstream—for example, that voters “should quit paying all fines, taxes or any other fees to the state”¹⁰⁴—the vast majority of arguments were common messages concerning the separation of powers,¹⁰⁵ “activist judges,”¹⁰⁶ “usurping the

be retained in office.”).

¹⁰³ See, e.g., Onwuachi-Willig, *supra* note 100 (discussing judicial independence); Snell, *supra* note 99 (discussing constitutional duty of Iowa judges); Stassen, *supra* note 98 (discussing judicial independence).

¹⁰⁴ Rick Phillips, Letter to the Editor, *End Judicial Supremacy Now, Writer Says*, OSKALOOSA HERALD, Oct. 29, 2010, at A4.

¹⁰⁵ See Alan Laird, Letter to the Editor, *Vote No Convention; Hold Justices Accountable*, OTTUMWA COURIER, Oct. 15, 2010, NewsBank Rec. No. 2de8747c5527a120eb5248f9f89b6fa3e294d6 (“seven judges violated the separation of powers”).

will of the people,”¹⁰⁷ or “legislating from the bench.”¹⁰⁸ These messages were often used in the aggregate, as in a letter from the *Oskaloosa Herald* that argued, “Three activist judges on the Iowa Supreme Court . . . overturned the will of the people and legislated from the bench.”¹⁰⁹ A guest opinion piece in the *Council Bluffs Daily-Nonpareil* by Congressman Steve King (R-IA5) is archetypal of this category, noting that the justices “legislate[d]” from the bench, made a “lawless decision,” and “usurped the constitutional authority of the legislature.”¹¹⁰ Other arguments in this category appealed to a sense of direct democracy, noting that the *Varnum* decision was at odds with the “will of the people” and that was sufficient cause for voting against retention.¹¹¹

The second most common frame used by anti-retention advocates was that *Varnum* was wrongly decided for religious or moral reasons. This frame accounted for nine letters—11.5% of the total anti-retention sample. These letters were typically straightforward and direct.¹¹² The letter below, from the *Fort Dodge Messenger*, is typical:

To the editor:

God put the first man and woman together and told them to be fruitful and multiply. That is our example of marriage.

The Iowa Supreme Court said that a man should be allowed to marry a man. That ruling showed a lack of knowledge or an utter disregard for God's plan.

Either way those judges have proven they are not fit to serve the state of Iowa.

¹⁰⁶ David Vandenberg, Letter to the Editor, *Kick the Judges Off the Bench*, FT. MADISON DAILY DEMOCRAT, Oct. 22, NewsBank Rec. No. c5ed885eeae7343cccf6acfb53890b05c806352 (“We must stop activist judges and restore the proper balance to our government.”).

¹⁰⁷ See Doris Secor, *Judges Shouldn't Legislate from the Bench*, OTTUMWA COURIER, Oct. 29, 2010, NewsBank Rec. No. fd383fc1ae699c2c4bcd7b52f3ead4419194232b (“Quoting Chuck Laudner of the Iowa for Freedom Campaign, ‘Iowans deserve a Supreme Court that follows the Constitution. Iowans don’t deserve activist judges who usurp the will of the people.’”); Don Woods, *Fire Judges Because They Didn't Do Their Job*, Letter to the Editor, GAZETTE (Cedar Rapids), Aug. 8, 2010, at A4, available at NewsBank Rec. No. 5771909 (“Dump the judges because they did not do their job, and knowingly and purposely usurped the Iowa Legislature's job and powers.”).

¹⁰⁸ Jerry Crew, *Firing Judges Won't Hurt Judicial System*, Letter to the Editor, DES MOINES REG., Oct. 26, 2010, at OP2 (“The court not only found a phantom clause in the constitution, but it legislated from the bench when it said the state must give homosexuals the same marriage rights as one man and one woman.”).

¹⁰⁹ Carmen Reitsma, Letter to the Editor, *Vote 'No' on the Retention of Activist Judges*, OSKALOOSA HERALD, Oct. 15, 2010, at A4.

¹¹⁰ Steve King, Op-Ed., *Remove Supreme Court Justices*, COUNCIL BLUFFS DAILY NONPAREIL, Oct. 10, 2010, at A4.

¹¹¹ E.g., Emily Reneker, Letter to the Editor, *Judges Voted Against the Will of the People*, OTTUMWA COURIER, Oct. 12, 2010, NewsBank Rec. No. fc704487e5a5719332c984e0b742e83b98586ace.

¹¹² E.g., Daniel R. Murphy, Letter to the Editor, *Fire Judges and Amend Constitution*, QUAD-CITY TIMES, at A9, available at NewsBank Rec. No. MERLIN_1290807 (“The Iowa Supreme Court is wrong. Let’s fire those three and then amend our Constitution.”).

I urge you to join me and vote no for their retention.¹¹³

Many of these letter-writers also echoed popular rhetoric concerning America as a “Christian nation” and argued that sanctioning same-sex relationships would harm society. Appeals to a perceived set shared of Christian values were also common, as letter-writers attempted to tie Christian principles to the language of the Iowa Constitution.¹¹⁴ Some letters even cited scripture directly, invoking passages from Leviticus.¹¹⁵

The remaining fifteen letters comprise the last two categories. Four letters advocated against retention based on *Varnum* for unspecified or other reasons,¹¹⁶ while eleven other letters advocated against retention for a scattering of uncategorized reasons, such as negative personal encounters with judges.¹¹⁷ None of the frames in the last two categories accounted for more than 2% of the total sample, as required for separate categorization and coding.¹¹⁸

¹¹³ Philip Cline, Letter to the Editor, *Will Vote ‘No’ on Judge Retention*, FT. DODGE MESSENGER, Oct. 29, 2010, <http://www.messengernews.net/page/content.detail/id/533937/Will-vote--no--on-judge-retention.html?nav=5088>.

¹¹⁴ The excerpt below, from a letter in the *Marshalltown Times-Republican*, is fairly typical of letters appealing to Christian values:

Iowa's merit system for selecting judges is not under attack. What's under attack is what's right and wrong, Christian values, an Iowa Constitution based on those values and resisting those negative forces (in this case - homosexual leadership) that wish to tear down our society and the Iowa Constitution that is based on those Christian principles . . .

We must focus our attention on all branches of government as it's not just the judicial system in Iowa and across the nation that's acting inconsistent with the Constitution and Christian values. Also, other issues will come before the judges as there are many activist groups that want to change the moral fabric of our society, restrict our God given rights and destroy our Constitutions.

We must get active in our governments by educating ourselves on the issues (not just listening to the media), consulting our Bibles for direction (the same forces and behaviors were active then), learning about the candidate's values, beliefs and positions on issues and then voting . . .

Vote no on retainment [sic] of Supreme Court Justices and vote for candidates that will act out Christian values and constitutional intent.

Al Hays, Letter to the Editor, *Think Before Retaining Judges*, MARSHALLTOWN TIMES-REPUBLICAN, Oct. 24, 2010, <http://www.timesrepublican.com/page/content.detail/id/534330/Think-before-retaining-judges.html?nav=5004>.

¹¹⁵ Robert Anderson, Jr., Letter to the Editor, *Vote No on Judges*, GLOBE-GAZETTE (Mason City), Oct. 25, 2010, http://www.globegazette.com/news/opinion/letters_to_the_editor/article_3828810c-e0b9-11df-b3ad-001cc4c03286.html (“Every true Christian who believes the Bible knows that same-sex marriage is an abomination; Leviticus 18:22; 20:13. Marriage is between a man and a woman. We have the responsibility to vote to change what we know to be wrong.”).

¹¹⁶ See Jeanne Fehseke, Letter to the Editor, *Remember Ruling*, THE HAWK-EYE (Burlington), Oct. 31, 2010, at A1, available at NewsBank Rec. No. 2981434 (“If you are against same-sex marriage in Iowa, then you will want to vote no to retain the three Iowa Supreme Court Justices who ruled in April 2009 to allow gay marriage in Iowa. They are Marsha Ternus, Michael J. Streit and David L. Baker. Their names will be on the back of the ballot.”).

¹¹⁷ Bill Fortin III, Letter to the Editor, THE HAWK-EYE, Oct. 29, 2010, at A9, available at NewsBank Rec. No. 3004954.

¹¹⁸ See *supra* Part III.B.2.

B. ISSUE-ADVOCACY FRAMING

The 170 issue-advocacy letters were concerning three general topics. These letters were categorized as follows: (1) letters that discussed same-sex marriage or the rights of same-sex couples; (2) letters that discussed the merit-selection–retention system; (3) letters that discussed civics or informed readers about other historical information. The first two categories were also broken down into favorable and unfavorable discussions. A favorable–unfavorable distinction was not appropriate for the third category. The final grouping included the 32 letters on topics that were not independently coded because they did not account for more than 2% of the issue-advocacy sample. A breakdown of issue-advocacy letters by category can be found in Figure 4 below.

Figure 4. Breakdown of Issue-Advocacy Letters

<i>Framing of Issue-Advocacy Letters</i>	<i>Number</i>	<i>Percentage of issued- of letters based letters analyzed</i>
Favorable discussion of same-sex marriage	27	15.9%
Unfavorable discussion of same-sex marriage	38	22.4%
Favorable discussion of merit-selection–retention system	36	21.2%
Discussion of retention vote as a political recourse against justices	11	6.5%
Discussion of civics or history	26	15.3%
Other, uncategorized	32	18.8%

1. Letters concerning same-sex marriage and the rights of same-sex couples

Favorable discussion of same-sex marriage and the rights of same-sex couples accounted for 27 letters—15.9% of the total issue-advocacy sample. These letters typically championed values of equality and fairness and espoused a general support of same-sex couples’ rights.¹¹⁹ Others explained

¹¹⁹ Art Speece, Letter to the Editor, *Bible vs. Constitution*, THE HAWK-EYE (Burlington), Oct. 31, 2010, at A1, available at NewsBank Rec. No. 2918525.

why marriage was important as a legal right, compared to other institutional arrangements.¹²⁰ Many of these letters also argued that the impact of same-sex marriages on opposite-sex marriages was minimal or nonexistent¹²¹ or attempted to defuse religious arguments against same-sex marriage. Others stressed that they were proud of Iowa’s civil rights history and inclusiveness.¹²²

Letters that discussed same-sex marriage unfavorably constituted 38 letters—22.4% of the issue-advocacy sample. Religious arguments featured prominently.¹²³ Several even tied same-sex marriage directly to threats of divine retribution and Biblical punishment.¹²⁴ Others opposed same-sex relationships without appealing to religion or morality—for example, arguing that “homosexuality is, and always will be, a disorder.”¹²⁵ Although letters in this category did not engage in express advocacy, many did discuss court decisions, such as *Perry v. Schwarzenegger*,¹²⁶ in advocating against same-sex marriage.¹²⁷

2. Letters concerning the merit-selection–retention system

Two categories of issue-advocacy letters directly addressed Iowa’s merit-selection–retention system. The first category—36 letters or 21.2% of

¹²⁰ See, Sophie Prell, Letter to the Editor, *Gay Marriage Advocates Don’t Only Want ‘Special Friendships,’* IOWA STATE DAILY, Aug. 30, 2010, at A11, available at <http://issuu.com/iowastatedaily/docs/8.30.10-daily> (use arrows on newspaper image to navigate to page 11).

¹²¹ Bill & Jan Rink, Letter to the Editor, *Everyone Has the Right to Love*, QUAD-CITY TIMES, Aug. 13, 2010, at A13, available at NewsBank Rec. No. MERLIN_1270953 (“Same-sex marriage has no effect whatsoever on anyone else’s marriage. Letting everyone enjoy the same opportunities and rights is a matter of fairness for all.”).

¹²² See Kentin F. Waits, Letter to the Editor *Iowans Should Embrace Marriage Ruling*, OTTUMWA COURIER, Oct. 7, 2010, NewsBank Rec. No. c078436175bac5a7a480079bbb8cce5b271f5 (“Iowans should be proud of our democratic heritage and slow movement toward inclusion and progressive thought.”).

¹²³ See, e.g., Dan and Donna Holman, Letter to the Editor, *Remember, God’s Word Never Changes*, FT. MADISON DAILY DEMOCRAT, Sept. 2, 2010, at NewsBank Rec. No. 2444d8d45e9febbd80ee5ba69ccae690a921cd75 (“This is another example of sodomy not only perverting sex, but the whole social order. Sodomites prevent religion, law, marriage, family and even dictionaries! The times certainly are changing but not for the better. God’s word never changes.”); Ben Ratekin, Letter to the Editor, *No Exceptions on Marriage Definition*, QUAD-CITY TIMES, Aug. 7, 2010, at A11, available at NewsBank Rec. No. MERLIN_1269686.

¹²⁴ Mary Doering, Letter to the Editor, *Two Disgusting Articles*, FT. MADISON DAILY DEMOCRAT, Sept. 23, 2010, NewsBank Rec. No. 34f6faaf8964e4f1a31b8cb71eb0c1b0f977a5 (“Satan is loose in our country and God has been pushed out . . . This is something to contemplate. Will we end up like Sodom and Gomorra? Please pray.”).

¹²⁵ Joe Rodrigue, Letter to the Editor, *No Common Sense*, THE HAWK-EYE (Burlington), Aug. 31, 2010, at A6, available at NewsBank Rec. No. 2342382.

¹²⁶ 704 F. Supp. 2d 921 (N.D. Cal. 2010). *Perry* was a federal equal-protection challenge to a California ballot initiative amending the California Constitution to limit state recognition of marriage to one man and one woman. *Id.* at 927.

¹²⁷ Rodrigue, *supra* note 125 (“Judge Vaughn Walker overturned the part of the California Constitution that states that marriage is between a man and a woman as ‘unconstitutional.’”).

all issue-advocacy letters—consisted of letters that favorably discussed the system and stressed its importance, purpose and structure. The second category—11 letters, or 6.5% of the issue-advocacy sample—made the distinct argument that the retention system was designed to allow the voters political recourse against the unpopular decisions of judges or justices. Together, these two categories accounted for 47 letters—27.7% of all issue-advocacy letters.

At roughly one-fifth of all issue-advocacy letters, favorable discussion of Iowa’s merit-selection–retention system was a significant component of dialogue on Iowa opinion and editorial pages in the fall of 2010. These letters often took a didactic tone, attempting to educate voters on the institutional structure, history, and operation of the merit-selection–retention system.¹²⁸ Many of the letters that favorably discussed the merit-selection–retention system were written by members of two non-profit groups: Iowans for Fair and Impartial Courts (“IFIC”) and Justice, Not Politics (“JNP”). The issue-advocacy sample even included three letters personally written by the JNP co-chairs.¹²⁹ In addition to the pieces written by the co-chairs, JNP also seems to have prompted other letter-writers, many of whom repeated themes mirroring “sample letters” made available on the JNP website.¹³⁰ Letters written by leaders of Iowa’s League of Women Voters and its local chapters were also included in this framing category. These letters stressed the League’s hope that voters would both be informed about the judges they were voting on and would preserve Iowa’s merit-selection–retention system.¹³¹ Although the tone of these letters was

¹²⁸ See, e.g., Charlie Comfort, Op-Ed., *Judicial Retention Never Meant to be Big Campaign*, OSKALOOSA HERALD, Oct. 15, 2010, at A4 (high school student’s regular column concerning history and purpose of merit-selection–retention system); Mary Baird Krafska, Letter to the Editor, *Merit Selection Ensures Impartial Courts*, OTTUMWA COURIER, Oct. 29, 2010, NewsBank Rec. No. 7fdf4e360f61d969b4bebe8d07ab46def9e1.

¹²⁹ See Sally Pederson & Joy Corning, Op-Ed., *Join New Coalition to Protect Iowa’s Court System*, IOWA CITY PRESS-CITIZEN, Sept. 30, 2010, at A7, available at ProQuest 2151498601; Sally Pederson & Joy Corning, *There Is Bipartisan Agreement for Justice, Not Politics in Iowa*, TELEGRAPH-HERALD (Dubuque), Oct. 7, 2010, at A4, available at NewsBank Rec. No. MERLIN_3155959; Sally Pederson & Joy Corning, Op-Ed., *Preserve Integrity and Impartiality of Iowa Courts*, DAILY IOWAN, Sept. 9, 2010, at A4, available at <http://http://issuu.com/thedailyiowan/docs/092910> (use arrows on image of newspaper to navigate to page four). JNP was co-chaired by former Iowa lieutenant governors Sally Pederson (Democrat under Governor Tom Vilsack) and Joy Corning (Republican under Governor Terry Branstad). See *About, JUSTICE, NOT POLITICS*, <http://www.justicenotpolitics.org/about> (last accessed Jan. 10, 2011).

¹³⁰ See *Letters to the Editor*, JUSTICE NOT POLITICS, <http://justicenotpolitics.net/letters> (last accessed Jan. 10, 2011). The two sample letters reflect themes and arguments common to letters that favorably presented the merit-selection–retention system. *Id.*

¹³¹ E.g., Myrna Loehrlein, Letter to the Editor, *Have A Responsible Merit Plan for Choosing Judges*, OTTUMWA COURIER, Sept. 15, 2010, NewsBank Rec. No. 4888f615b7533cfe4e5b8e918823f4b677178f; Sue Richardson & Myrna Loehrlein, Letter to the Editor, *Vote Thoughtfully for Independent Judiciary*, OTTUMWA COURIER, Oct. 19, 2010, NewsBank Rec. No. 35d272e8f0a97464bf8c7428faf7bf33296884c.

almost universally positive, they appeared careful to distance themselves from any express advocacy.

The anti-retention advocates' response to issue-advocacy letters such as those described above came in the form of letters that urged using the retention election as political recourse against unpopular court decisions was appropriate. Letters responding to merit-selection supporters were often defensive in nature, rebutting opposition arguments and stressing that declining to retain the justices would not be a "rejection of the Constitution, the rule of law, or any other such thing."¹³² Other letters also stressed to readers that, because of Iowa's drawn-out constitutional amendment process,¹³³ the retention vote was voters' "only chance to express" their disapproval of *Varnum* and the legalization of same-sex marriage.¹³⁴

3. Discussion of civics or historical background

Twenty-six letters—15.3% of all issue-advocacy letters—were informative letters, discussing civic or historical background relevant to the judicial retention vote. Letter topics ranged widely, from general commentary on the history of civil rights in Iowa¹³⁵ to cautions against the tyranny of the majority¹³⁶ and discussion of the principles underlying a separation of church and state.¹³⁷ These letters often went to great length to respond to arguments raised by anti-retention advocates,¹³⁸ particularly

¹³² Craig Payne, Letter to the Editor, *Vote on Judges Only Chance to Express Self*, OTTUMWA COURIER, Oct. 9, 2010, NewsBank Rec. No. 15c162334532efe0bc10efd72680a3a59c26ec4.

¹³³ See IOWA CONST., art X, §§ 1–3, available at <http://www.legis.state.ia.us/Constitution.html>. Iowa's amendment process requires that a proposed amendment must either: (1) be passed by both the Iowa House and Senate of two consecutive General Assemblies before being submitted to the voters for a majority vote; or (2) that amendment take place at a constitutional convention. *Id.* The question of whether to hold a constitutional question is submitted to the voters every ten years. *Id.* The voters declined to hold such a convention by an overwhelming margin—67.15% of Iowans voting no, and only 32.85% voting yes—in 2010, on the same ballot (even the same side of the ballot) as the retention election discussed in this Note. See OFFICIAL RESULTS REPORT, IOWA SECRETARY OF STATE, Nov. 29, 2010, at 10, available at <http://www.sos.state.ia.us/pdfs/elections/2010/ballotquestionsorr.pdf>.

¹³⁴ See Payne, *supra* note 132.

¹³⁵ Ben Stone, Op-Ed., *ACLU Iowa Looks Back 75 Years – And Ahead*, DES MOINES REG., Oct. 4, 2010, at OP2 (discussing history of ACLU's fight for civil rights, including involvement in *Varnum*).

¹³⁶ See Kirstin Sullivan, Letter to the Editor, *The Tyranny of the Majority*, AMES TRIB., Dec. 17, 2010, http://amestrib.com/articles/2010/10/29/ames_tribune/opinion/letters_to_the_editor/doc4ccad9bf846d2665549384.txt.

¹³⁷ See Cathleen McLeod, Letter to the Editor, *We Honor God's Law, but Follow Man's Law*, DES MOINES REG., Oct. 19, 2010, at OP2; Kentin Waits, Letter to the Editor, *Democracy is not Tethered to Christianity*, OTTUMWA COURIER, Sept. 3, 2010, NewsBank Rec. No. c14223aa11116e818beb2edcb03fb876e92cba.

¹³⁸ An excerpt from a letter written by a high school government teacher is illustrative of this category:

[An anti-retention advocate], for all his bantering about "We The People," demonstrates a gross

concerning society's condemnation of same-sex marriage on religious or moral grounds.¹³⁹

4. *Other, uncategorized letters*

Thirty-two letters—18.8% of the total issue-advocacy sample—were concerning issues that did not appear frequently enough for separate categorization.¹⁴⁰ Topics for these uncategorized letters covered a wide variety of topics, such as informing readers that some justices on the Iowa Supreme Court donated to the Iowa Democratic Party,¹⁴¹ reminders that writers prefer other issues (like the economy) take precedence to same-sex marriage,¹⁴² pleas for voters to read the *Varnum* decision before heading into the voting booth,¹⁴³ and even writers' complaints about newspapers' news and editorial coverage of same-sex marriage and the retention election.¹⁴⁴

V. ANALYSIS

The results discussed in Part IV provide answers to both of the research questions proposed for this study.¹⁴⁵ As to the first, quantitative question—whether pro- and anti-retention advocates framed issues concerning the

misunderstanding of how government works. As any middle school civics text illustrates, legislatures are responsible for making law, executives are responsible for enforcing law, and the courts are responsible for interpreting the law. This is exactly what the Iowa Supreme Court did in *Varnum* — it interpreted an Iowa statute. Furthermore, in a republic, "We The People," elect people to represent us. The problem of a direct democracy, our Founders recognized, was the inability of the masses to be knowledgeable on all issues. As a result, we were to entrust representatives who would make decisions in a disinterested manner, instead of demagogues who would appeal to the passions of the majority to oppress the minority in our society.

Given [the anti-retention advocate's] lack of understanding about the more rudimentary parts of American government, one cannot be surprised that he demonstrates an even greater misunderstanding of the 14th Amendment. The amendment, which was intended to guarantee civil rights to millions of newly-freed African-Americans in the wake of the Civil War, appears lost on [him] . . .

Jeremy R. Yenger, Letter to the Editor, *Previous Letter Wrong About "Court Making Law,"* NEWTON DAILY NEWS, Aug. 31, 2010, NewsBank Rec. No. d99cf576e4d4224fa6db1afad5825cbcf72a272.

¹³⁹ E.g., Waits, *supra* note 137 ("America is not a Christian democracy.").

¹⁴⁰ Only frames that appeared in more than 2% of the total sample (more than six letters) were included. See *supra* Subpart II.B.2.

¹⁴¹ Craig Payne, Letter to the Editor, *Several Justices on Iowa Supreme Court Donate to Democratic Party,* OTTUMWA COURIER, Oct. 29, 2010, NewsBank Rec. No. 15c162334532efe0bc10efd72680a3a59c26ec4.

¹⁴² See Curt Gustafson, Letter to the Editor, *Watch for Real Issues,* THE HAWK-EYE (Burlington), Sept. 7, 2010, NewsBank Rec. No. 2415900.

¹⁴³ Adam Pollack, Letter to the Editor, *At Least Read Opinion First,* IOWA CITY PRESS-CITIZEN, Oct. 8, 2010, at A7, available at 2010 WLNR 20224248.

¹⁴⁴ Bob Stewart, Letter to the Editor, *I Checked Editorial; It Wasn't Balanced,* DES MOINES REG., Oct. 23, 2010, at OP2.

¹⁴⁵ See *supra* Part III.

2010 retention election differently—the data show a stark difference in the framing of pro- and anti-retention express-advocacy letters. As to the second, qualitative question—how did the advocates frame the issues—the data provide a strong framework for understanding the arguments advanced by each side of the retention debate.

A. *QUANTITATIVE ANALYSIS: PRO- AND ANTI-RETENTION ADVOCATES FRAMED ISSUES DIFFERENTLY*

Analysis of the express-advocacy letter data provides a relatively unambiguous answer to the first research question and strongly supports a finding that pro- and anti-retention advocates framed issues surrounding the retention election differently. The largest quantitative difference between groups was that pro-retention advocates' framing was much more fragmented than that of anti-retention advocates. On the pro-retention side, 14.5% of letters defended *Varnum*, 38.6% advocated for the merit-selection–retention system, and 37.3% argued the justices did their job—no single frame accounted for more than 40% of letters. In contrast, on the anti-retention side, 69.2% of advocates used virtually identical framing to argue that the justices should not be retained for institutional reasons. Put differently, the frame used by anti-retention advocates was much more unified and homogenous than the message framing of pro-retention advocates. This appears to mirror the messaging of paid media during the campaign, as Iowans for Freedom¹⁴⁶ was the main voice of the anti-retention movement and numerous groups—including One Iowa,¹⁴⁷ IFIC, JNP, Fair Courts for Us,¹⁴⁸ the Iowa State Bar Association¹⁴⁹ and others—had sometimes competing messages and were vying to be seen as the voice of the pro-retention movement.

¹⁴⁶ See IOWA FOR FREEDOM, <http://iowaforfreedom.com/> (last visited Jan. 15, 2011). To be clear, although other groups allied themselves with Iowa for Freedom—like the National Organization for Marriage and the Family Research Council—these groups typically co-sponsored events or repeated virtually identical messaging, rather than using alternate frames to persuade voters.

¹⁴⁷ “One Iowa is the state’s largest lesbian, gay, bisexual, transgender (LGBT) advocacy organization, committed to full equality for LGBT individuals, including the freedom to marry.” *Mission*, ONE IOWA, <http://www.oneiowa.org/web/mission> (last accessed Jan. 15, 2011).

¹⁴⁸ *About*, FAIR COURTS FOR US, <http://www.faircourtsforus.com/about.asp> (last visited Jan. 24, 2011).

¹⁴⁹ The Iowa Bar Association also conducted its annual plebiscite evaluation of all Iowa judges and justices standing for retention. In 2010, all three justices were favored for retention by Iowa Bar respondents—Chief Justice Ternus with 72%, Justice Baker with 82.8%, and Justice Streit with 83.7%. JUDICIAL PLEBISCITE, IOWA STATE BAR ASSOCIATION 5 (2010), *available at* <http://iabar.net/associations/4664/files/2010%20Plebiscite%20Results%20Supreme.pdf>.

B. QUALITATIVE ANALYSIS: PRO-RETENTION ADVOCATES AVOIDED DISCUSSING VARNUM, WHILE ANTI-RETENTION ADVOCATES FOCUSED ON ARGUING VARNUM WAS WRONGLY DECIDED

In answering the second research question—how did each group frame the retention election—the data provide somewhat murkier qualitative answers. The largest qualitative difference between pro- and anti-retention groups for express-advocacy letters was that an overwhelming majority—nearly 86%—of anti-retention letters attacked *Varnum* as wrongly decided,¹⁵⁰ while only 14.5% of pro-retention letters took the opportunity to defend *Varnum*. This framing is significantly different, with pro-retention advocates avoiding the *Varnum* decision in favor of abstract concepts like the role of the judiciary and the importance of merit-selection, while anti-retention advocates made clear, concise arguments that detailed reasons why they believed the *Varnum* decision was wrongly decided.

In looking at the issue-advocacy letters, a slightly different picture emerges. If one theorizes that issue-advocacy letters should have mirrored arguments from express-advocacy letters, one would expect that the two most common approaches among issue-advocacy writers would be favorable discussion of the merit-selection–retention system (for pro-retention advocates) and arguments concerning Iowa’s separation of powers and institutional structure (for anti-retention advocates). However, that is not what the issue-advocacy data show. While favorable discussion of merit-selection–retention is the second-most common frame in the issue-advocacy sample,¹⁵¹ the most common frame was an unfavorable discussion of same-sex marriage.¹⁵² Less than six letters alleged a violation of separation of powers, which was too small a sample to warrant separate categorization. This discrepancy raises some question about whether or not the express-advocacy frames genuinely reflect the beliefs and attitudes of authors.¹⁵³ For example, authors may have put forward arguments that they

¹⁵⁰ Although 85.8% of anti-retention letters framed the issue by attacking *Varnum*, it is worth repeating that not all letter-writers offered the same justification as to why *Varnum* was wrongly decided. Specifically, 69.2% argued *Varnum* was wrong for institutional reasons, 11.5% argued *Varnum* was wrong for religious or moral reasons and 5.1% argued *Varnum* was wrong for other reasons. See *supra* Subpart IV.A.2.

¹⁵¹ Favorable discussion of merit-selection–retention comprised 36 letters or 21.2% of the total sample. See *supra* Figure 4.

¹⁵² Unfavorable discussion of same-sex marriage comprised 38 letters or 22.4% of the total sample. *Id.*

¹⁵³ This discrepancy is particularly interesting, given findings that attitudes toward gay-rights policies and laws are primarily value-driven. See Paul R. Brewer, *Values, Political Knowledge, and Public Opinion About Gay Rights: A Framing-Based Account*, 67 PUB. OP. Q. 173, 185 (2003). The data here offer limited, if any, illumination as to what values may have motivated voters in the 2010 judicial retention election; such a study, perhaps by analysis of exit polling or an experimental valuation of a dependent variable value’s effect on perception of a frame, may help to explain this discrepancy.

believed would appeal to popular interests, rather than arguments that more accurately reflected their internal beliefs and values. This distinction may reflect a socio-political consciousness about the effectiveness of rhetoric versus advocacy that genuinely reflects writers' personal views.

C. *ADVOCACY ANALYSIS: "VARNUM WRONG FOR INSTITUTIONAL REASONS"*
WAS LOUDEST, MOST PERSUASIVE FRAME IN LETTERS

In the broader context of framing in the 2010 judicial retention election, two inferences can be drawn. The first is that the loudest (most common) competing frame was the anti-retention frame that the *Varnum* decision was wrongly decided based on institutional reasons. The second most common frame was pro-retention advocates' argument that the justices fulfilled their duty, which accounted for just 19.3% of all express-advocacy letters, compared to 33.5% for the frame that *Varnum* was wrong for institutional reasons. In other words, behind the "*Varnum* wrong for institutional reasons" frame, the runner-up was not even close. The second inference is that this same frame was also the strongest (most persuasive) frame. "Strong frames are those that emerge from public discussion as the best rationales for contending positions on the issues" and those that "strike opinion leaders and audiences as being more compelling than alternative arguments."¹⁵⁴ The strength of the frame arguing *Varnum* was wrong for institutional reasons can be seen both in its straight-forward appeal and the lack of response from opposition leaders or citizens; only 14.5% of pro-retention letters defended *Varnum* at all, and just a fraction of these letters addressed the institutional arguments advanced by anti-retention advocates. This is consistent with pollster Ann Selzer's observations during the election, when she noted pro-retention advocates' difficulty in counteracting the message-framing of their opponents.¹⁵⁵ Although it's impossible to tie a causal link between this communication frame and how it was processed by individual readers or voters,¹⁵⁶ that this frame was both the loudest and the strongest, and that its advocates achieved their desired political outcome (ousting the justices), is unlikely coincidental.

The analysis is also likely impacted by at least one finding that was not predicted by the research questions: the prevalence of repeat-writers: letter-writers that, among the sample analyzed, were responsible for writing more

¹⁵⁴ Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANNUAL REV. POL. SCI. 103, 116 (2007).

¹⁵⁵ See Schulte, *supra* note 39 ("The cornerstone of our government is representation of the people by the people, and the people have the right to vote," said J. Ann Selzer, pollster for The Des Moines Register. "The pro-retention side never found a way to counteract this, and they end up saying, no, the people need to be protected from the will of the people. It is not exactly much of a rallying call.").

¹⁵⁶ That is, impossible without conducting an additional experiment that measures reader response to different frames, as discussed in *infra* note 179 and accompanying text.

than one individual letter. Seventy-nine letters—23.9% of the total sample of 331 letters—were written by repeat-writers. Among the repeat-writer sample, there is some incongruence with general findings. For example, an overwhelming majority of anti-retention letters—22 of 25 letters or 88% of the anti-retention repeat-writer sample—argued that *Varnum* was wrong for institutional reasons. This is an even greater disparity than in the general sample, where only 69.2% of anti-retention advocates employed that frame. On the pro-retention side, the results were slightly less variant from the general sample.¹⁵⁷ Issue-advocacy letters were largely consistent in proportion with the general sample, although the small sample size limits the validity of any comparison.¹⁵⁸ These findings regarding repeat-writers may suggest that the anti-retention camp was a small group of highly motivated advocates. For example, the most prolific repeat-writer in the sample wrote six letters that advocated *Varnum* was wrong for institutional reasons,¹⁵⁹ and another repeat-writer wrote four letters using the same frame.¹⁶⁰ Assuming that 45%¹⁶¹ of newspaper readers read these letters, the six-letter-writer may have reached as many as 90,383 newspaper readers.¹⁶² This finding demonstrates the significance—and power—of repeat-writers in political advocacy.

VI. CONCLUSION

Because judicial retention elections fall at the intersection of law, public

¹⁵⁷ In the repeat-writer sample, 45.5% of letters did not defend *Varnum* and advocated to preserve the merit-selection-retentions system (compared to 38.6% in the general sample), 36.4% of letters did not defend *Varnum* on the merits but argued the justices fulfilled their legal duty and “did their job” (compared to 37.3% in the general sample), 4.5% of letters defended *Varnum* (compared to 14.5% in the general sample), and 13.6% made other, uncategorized arguments (compared to 9.6% in the general sample).

¹⁵⁸ Among the 32 issue-advocacy letters in the repeat-writer sample, four categories (advocating for the retention election as political recourse, favorable discussion of same-sex marriage, discussion of civics or history and other, uncategorized) consisted of less than five letters.

¹⁵⁹ Put differently, this writer—John Hesling of Oskaloosa—contributed nearly 2% of the total sample of letters to the editor. His letters were published in the *Cedar Rapids Gazette*, *Des Moines Register*, *Iowa City Press-Citizen*, *Newton Daily News*, *Oskaloosa Herald and Ottumwa Courier* (two letters). See [AUTHOR NAME INTENTIONALLY REDACTED], FRAMING THE DEBATE: RAW DATASET, Jan. 15, 2011, available at ____ [website intentionally redacted for anonymity] (in the Microsoft Excel file, navigate to the “repeat-writer sample” sheet).

¹⁶⁰ Kent Muntz of Farming had letters published in the *Des Moines Register*, *Fort Madison Daily Democrat*, *Keokuk Daily Gate City* and *Ottumwa Courier*. See *id.*

¹⁶¹ The Iowa Newspaper Association has reported that 45% of Iowa newspaper readers read political advertisements in their local newspaper. See IOWA NEWSPAPER ASSOCIATION, *supra* note 63, at 8. No data are available specifically about the reading of letters to the editor, possibly because there is no financial incentive (such as increased advertising rates and revenue) for collecting such information.

¹⁶² This calculation was determined by summing the circulation of each newspaper Hesling wrote to, see *supra* note 159 and accompanying text, and multiplying by 0.45. This number may be even more significant for political advocacy, as 85.6% of voting Iowa adults read a newspaper. See IOWA NEWSPAPER ASSOCIATION, *supra* note 63, at 8.

policy, and politics, so too do conclusions flowing from a content analysis of the dialogue surrounding them. This study and the resulting data could be taken in literally dozens of different directions, suggesting answers for political scientists, legal scholars, sociologists, political actors, voters, and others. Instead of suggesting the virtually countless potential implications of this research, this Note highlights just a few of the most salient and relevant—the implications for legal scholarship, political scholarship, the bench, and pro- and anti-retention advocates. In the final Subpart, this Note also suggests routes other scholars might take to branch out into yet more arenas by building on and improving this body of research.

A. IMPLICATIONS FOR LEGAL SCHOLARSHIP

This study can provide interesting dimensions to general legal scholarship in at least two ways. First, the dialogue of voters summarized in this study helps to inform scholarship about the proper role of state supreme courts in state constitutionalism. Given that the seven state courts to interpret state constitutions “to provide expansive protections to same-sex couples” were subject to retention (rather than popular) elections,¹⁶³ letter-writers’ claims concerning the separation of powers and the role of the judiciary may have particular meaning in how state citizens construct their perspective on state constitutionalism and constitutional values. A better understanding of state constitutionalism may prove critical if state constitutions continue to serve as the battleground for emerging civil-rights struggles, like the fight over same-sex marriage.¹⁶⁴

Second, the data raise serious questions about whether merit-selection–retention systems in Iowa and beyond are working as intended. The nearly 70% of letter-writers that advocated against retention because of a single unpopular decision lends support to the notion that the defeat of Justices Ternus, Streit and Baker may have served as a “capricious public pronouncement[] on judicial performance.”¹⁶⁵ If reprimand of judges for the political outcome of a decision (rather than a decision’s legal substance) is indeed inconsistent with the purpose underlying a merit-selection–retention system,¹⁶⁶ the question remains: What can be done about it? The data here at least provide direction on what paths scholarship answering that question might take—such as exploring voters’ perceptions of arguments about separation of powers and the role of retention elections or empirically

¹⁶³ Devins, *supra* note 7, at 1666 (2010).

¹⁶⁴ For a brief outline and critical discussion of the fight to legalize same-sex marriage through state constitutions, see Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695 (2010).

¹⁶⁵ See Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 Mo. L. Rev. 573, 604 (2009).

¹⁶⁶ Indeed, many scholars would argue that it is. *See id.*

evaluating voters' knowledge of the state's constitutional structure.

This study can also provide new insight into legal scholarship that hinges on particular theories of law or schools of interpretation. A convenient example is popular constitutionalism—and indeed, David Pozen has argued for “[c]onceputalizing judicial elections as instruments of popular constitutionalism” at length.¹⁶⁷ In exploring the consequences of applying theories of popular constitutionalism to judicial elections, Pozen has argued there are consequences both in and outside of the courthouse.¹⁶⁸ The content-analysis data in this study may provide a quantitative and qualitative foundation for looking at these consequences. For example, if “elections provide a mechanism . . . for enshrining popular control over [an] institution” and serve as “accountability mechanisms,”¹⁶⁹ this bolsters anti-same-sex-marriage advocates' arguments that the 2010 judicial retention election served as a “check” on a renegade court. Further still, if judicial elections serve as constitutional change agents,¹⁷⁰ the 2010 retention election may serve to change the course of Iowa's constitutional law in a direct way, through the appointment of justices with different views than their ousted predecessors.¹⁷¹

However, the framing uncovered by this study also throws a wrinkle into the popular constitutionalist argument. Following the popular constitutionalist line of thinking—that the election and its discourse express the people's sovereignty, provide for accountability, and serve as constitutional change agents—the dialogue surrounding the election should breathe meaning into those abstract concepts of change. But that dialogue, as revealed in this study, does not argue that same-sex couples should not be governed by Iowa's equal protection clause, that the court's reasoning was flawed, or even that Iowa's ban on same-sex marriage was constitutionally valid. Instead, the most common frame—by far—was that the court erred by engaging in judicial review instead of deferring to the people or their elected representatives.¹⁷² To the popular constitutionalist,

¹⁶⁷ For a summary of the premises underlying popular constitutionalism, see Pozen, *supra* note 10, at 2053–65 (discussing the “basics” of popular constitutionalism). Although much of Pozen's article is targeted toward contested judicial elections, rather than retention elections, his arguments still provide insight here. For an accessible rebuttal of popular constitutionalism in favor of judicial review, see Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673 (2004).

¹⁶⁸ Pozen, *supra* note 10, at 2068–2087.

¹⁶⁹ *Id.* 2069–2071.

¹⁷⁰ *Id.* at 2071–2073

¹⁷¹ Pozen even draws a comparison to same-sex marriage in his article, contrasting the fallout of a United States Supreme Court decision (“it could easily take several decades before constitutional doctrine caught up with popular sentiment”) with judicial elections (“[j]udicial retention elections can effectuate this same change over one or two election cycles, without the contingent of vacancies arising and like-minded executives holding office.”). *Id.* at 2072.

¹⁷² See *supra* Part III.A.2, Figure 3 (discussing how 69.2% of anti-retention letters framed the

then, this is a constitutional command for the court to be more deferential to the legislature and is perhaps an attack on judicial review in its entirety—a position rejected even by a majority of popular constitutionalists.¹⁷³ One can't help but wonder how, if the people's dialogue surrounding the retention election should guide constitutional change, judges or other actors can know exactly what change is demanded. This ambiguity raises important questions about popular constitutionalism as it applies to judicial retention elections and is just a small glimpse into the implications that arise from reconstructing dialogue surrounding retention elections, particularly following a controversial decision such as *Varnum*.

B. IMPLICATIONS FOR POLITICAL SCHOLARSHIP

These data may also provide insight into political scholarship in understanding the emerging landscape of advocacy concerning same-sex marriage and its intersection with political and legal institutions. One limitation of applying these findings to the motivations underlying political discourse is that the letters analyzed here are what advocates consciously chose to publish, with their name affixed, in print—that is, the framing and messages chosen by advocates were those that they knew their friends, families and neighbors would read and associate with their name and identity. As a result, it is entirely possible—if not plausible—that the frames explored and analyzed here are merely “masks” for other political arguments, such as antipathy for same-sex couples or disgust at their lifestyles. As Martha C. Nussbaum discusses at length in her book, *From Disgust to Humanity*, “Disgust is like racial hatred: it does not always announce itself in polite company.”¹⁷⁴ Further political science research to “unmask” these underlying arguments—and explore their prevalence in the formation of frames appropriate for “polite company”—would be important additions to scholarship in this area.

C. IMPLICATIONS FOR THE BENCH

To the bench, the data revealed in this study may tell a different story. The *Varnum* opinion was, by at least some accounts, written in a remarkably accessible and non-legalistic way.¹⁷⁵ Yet its message appears not to have resonated with the majority of Iowa voters in the 2010 judicial retention election. Despite the court's multi-page discourse on the

issue as *Varnum* being wrong for institutional reasons).

¹⁷³ Pozen, *supra* note 10, at 2076.

¹⁷⁴ MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* 26 (2010).

¹⁷⁵ See Pettys, *supra* note 18, at 4 (“If anything is remarkable about the form of the [*Varnum*] opinion itself, it is the great patience and clarity with which the court explained its reasoning. Justice Mark Cady, the opinion's author, seemed to go out of his way to walk through the analysis in a way that an educated lay reader could easily understand.”).

separation of powers envisioned by the Iowa Constitution and how that division of power squared with the *Varnum* decision,¹⁷⁶ nearly 70% of anti-retention advocates' letters championed the view that the court flagrantly ignored that separation of powers and improperly usurped the will of the people. The data here alone cannot tell us whether the Court failed in its mission to sufficiently explain its reasoning, but it's reasonable to wonder if more outreach efforts to explain the justices' reasoning—in schools, public forums, or even radio or television ads—might have saved Justices Ternus, Baker and Streit's jobs. If one takes the position that anti-retention advocates who allege the court “legislated from the bench” or otherwise violated separation of powers have their facts wrong—that they misunderstand the role of the judiciary—the importance of education and increasing voter knowledge is also supported by the data.¹⁷⁷ Perhaps, “Our nation needs a refresher course on the concepts of separation of powers, checks and balances, and the role of the courts,” as the American Judicature Society noted in an editorial after the 2010 election.¹⁷⁸ It is appropriate to wonder whether better “public relations” about the *Varnum* decision's rationale and the role of Iowa's judiciary might have overcome the distrust voters expressed about usurping the voice of the people in their letters.

D. IMPLICATIONS FOR ADVOCATES

The data compiled during this study may also offer suggestions to both pro- and anti-retention camps for future judicial-retention elections in Iowa and perhaps other states. For advocates in favor of retaining judges following controversial decisions, such as *Varnum*, the data supports a conclusion that framing arguments about the role of the courts and the purpose of the merit-selection–retention system may be insufficient to carry the day. The data also illustrate the peril of pro-retention advocates avoiding discussion of controversial judicial decisions when faced with opponents that focus virtually all of their advocacy on the decision as wrongly decided. For advocates opposed to retaining judges following an unpopular decision,

¹⁷⁶ See *Varnum v. Brien*, 763 N.W.2d 862, 874–76 (Iowa 2009) (Part III “Constitutional Separation of Powers”).

¹⁷⁷ Justice Penny J. White stresses the importance of voter knowledge in judicial elections in her article, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 640–41 (2009). Justice White hinges her argument on two premises summarized from existing research:

First, [voters] with a greater understanding of and experience with the justice system are more confident in it. Second, [voters] with less knowledge are not only less confident in the system but are also more readily influenced by the least reliable information sources.

Id. at 640–41. If one takes Justice White's premises as fundamentally correct, then the data summarized in this study may demonstrate that a voting populace with greater knowledge would have been more likely to retain the justices because (1) voters would be more likely to have confidence in the judges' work and (2) more likely to resist less reliable information sources.

¹⁷⁸ *How Should We Respond to the 2010 Judicial Elections?*, *supra* note 34, at 105.

the data support the value of a consistent message appealing to voters concerned with activist judges, unelected officials usurping the will of the people and the separation of powers.

E. IMPLICATIONS FOR FURTHER RESEARCH

Further research using the data gathered during this study could also be of great value to scholars in understanding the particulars of Iowa's 2010 retention election. Limitations of this research—such as the lack of causal link between exposure to certain frames in letters to the editor and changes in readers' opinions—should be developed by researchers with more extensive resources available to conduct human trials with sample letters.¹⁷⁹ Other useful research might expand the timeframe of this study (limited to the three months preceding the 2010 retention election) to explore framing of the issue before *Varnum* and after the 2010 election. Each of these periods in Iowa political culture may be able to offer insights into the ongoing dialogue concerning Iowa's constitution, merit-selection-retention system and same-sex marriage. As other writers have suggested,¹⁸⁰ there may even be value in applying the analysis model used for letters to the editor here to other communication vehicles—for example, radio advertisements, mailers, phone calls, and even television programming—concerning same-sex marriage or the judicial retention election in general.

Although, on balance, the collection of data studied and analyzed here may raise more questions than answers, the data give an empirical, qualitative and quantitative grounding to scholarship understanding Iowa's 2010 judicial retention election. These data provide a springboard to further scholarship by establishing that pro- and anti-retention advocates framed issues in a significantly different way, raising different arguments and pushing different messages in their attempts to influence voters. Having laid this foundation, it is now appropriate to look toward applications, both practical and scholarly, for an enhanced understanding of dialogue surrounding judicial retention elections.

¹⁷⁹ A valid experimental model might be that used by Slothuus and de Vreese, *supra* note 58. Using the frames found in this study to evaluate the effect of single variables—e.g. party affiliation, age, religious identification—could yield valuable results about how voters internalize attempts at persuasion through framing concerning retention elections.

¹⁸⁰ R. Lance Holbert, David A. Tschida, Maria Dixon, Kristin Cherry, Keli Steber & David Airne, *The West Wing and Depictions of the American Presidency: Expanding the Domains of Framing in Political Communication*, 53 COMM. Q. 505, 518 (“[W]e feel this study is symptomatic of a growing need for empirical political communication scholarship to step beyond the realm of news . . . it is not just news that frames politics. Various situation comedies, dramas and entertainment talk shows are constantly raising concerns of interest to our democracy.” (internal citations omitted)).

APPENDIX A: TABLE OF NEWSPAPERS ANALYZED

<i>Newspaper</i>	<i>Circulation</i>	<i>Letters analyzed</i>	<i>Method of acquisition</i>
DES MOINES REGISTER	124,295	66	Website, hardcopy
DAVENPORT QUAD-CITY TIMES	58,302	10	NewsBank
CEDAR RAPIDS GAZETTE	54,166	24	NewsBank
SIoux CITY JOURNAL	41,181	20	Website
WATERLOO COURIER	36,896	30	Website
DUBUQUE TELEGRAPH- HERALD	28,099	5	NewsBank
BURLINGTON HAWK-EYE	19,152	22	NewsBank
FT. DODGE MESSENGER	17,259	7	Website
UNIVERSITY OF IOWA DAILY IOWAN	16,465	5	Issuu.com
MASON CITY GLOBE-GAZETTE	16,184	28	Website
OTTUMWA COURIER	13,603	28	NewsBank
AMES TRIBUNE	13,414	18	Website
COUNCIL BLUFFS DAILY NONPAREIL	13,381	2	Hardcopy
IOWA STATE DAILY	12,816	3	Issuu.com
CLINTON HERALD	11,920	2	Hardcopy
IOWA CITY PRESS-CITIZEN	11,195	15	ProQuest, WestLaw
MARSHALLTOWN TIMES- REPUBLICAN	9,340	8	Website
MUSCATINE JOURNAL	6,725	5	Website
CARROLL DAILY TIMES- HERALD	5,581	2	Website
CRESTON NEWS-ADVERTISER	4,519	1	Website
KEOKUK DAILY GATE-CITY	4,470	2	Website
FT. MADISON DAILY DEMOCRAT	4,400	13	Website
NEWTON DAILY NEWS	4,283	7	NewsBank
OSKALOOSA HERALD	3,371	6	Hardcopy
WASHINGTON EVENING JOURNAL	3,184	1	Website

* Newspaper circulation information was acquired from the Iowa Newspaper Association's database of Iowa newspapers, available at <http://www.inanews.com/about/findaniowanewspaper.php>