

# Judicial selection and retention in Iowa: How to ensure the fairness and impartiality of our courts

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# Understanding 2010: a snapshot

A perfect storm?

- ⦿ Rising tide of money in judicial elections
- ⦿ Single issue politics and interest groups
- ⦿ Anti-incumbent political environment
- ⦿ Uncontested nature of retention elections
- ⦿ Lack of public knowledge about courts

# Putting Iowa's 2010 retention defeats in context

- ⦿ Iowa was not the first, nor will it be the last.
- ⦿ Retention elections are still largely immune from big money interest group politics.
- ⦿ The retention loss was about more than same-sex marriage
- ⦿ The underlying causes of the 2010 retention losses remain.

# The issues (yes, plural)

- ◎ “[Vander Plaats] said he was also motivated by a recently [*sic*] court ruling striking down Arizona’s law to block illegal immigration and a court ruling in California striking down the results of a public referendum to block same sex marriages. ‘If the courts will do that on this issue, what’s to say they won’t do it on your Second Amendment rights or eminent domain or any other issue?’”

# The issues (yes, plural)

- ⦿ <http://www.youtube.com/watch?v=C5NTdnj7vGk&fe>
- ⦿ <http://www.youtube.com/watch?NR=1&v=GVJxs-jkyL>
- ⦿ <http://tylerkingkade.com/2010/10/videosfromlastday>

# The issues extended

- © “The Supreme Court has taken upon itself to decide matters lawfully left to voters to decide. They have disenfranchised every voter in the state and greatly overstepped their constitutional limitations, proving that they truly are one of the most activist courts in the nation. Fortunately, citizens have a recourse. It’s called a merit retention vote. This election, three Justices are up for a retention vote. Voters can research their record and determine whether they deserve another shot.”

[www.restorejustice2012.com](http://www.restorejustice2012.com)



# The issues extended

- ◎ “[This] campaign is on the front lines of *one of the most important votes* [citizens] will cast in 2012. *Judicial activism* is a huge problem in our state and threatens so many of our *cherished freedoms*. As a *2nd Amendment* proponent and *small business* owner, I can confidently say that there is no greater threat to my livelihood than judges that *don’t respect the Constitution*. This is why I support [these efforts] to *shed light* on our judicial system”

[www.restorejustice2012.com](http://www.restorejustice2012.com)



# Framing the public debate

- ◎ Analysis of letters to the editor by Tyler Buller (University of Iowa Law) finds that:
  - > Anti-retention message was dominated by the argument that *Varnum* was wrong for institutional reasons. This was most common message overall.
  - > Pro-retention message (second most common among all letters) was that the Iowa Supreme Court was “just doing its job.”

Tyler Buller. “Framing the Debate: Understanding Iowa’s 2010 Judicial Retention Election Through a Content Analysis of Letters to the Editor.” *Iowa Law Review* 97: 5. (2012).





# Talking to voters

- ◎ Focus groups conducted after the election found that:
  - Out-of-state money was not a concern.
  - Anti-incumbent trend was strong.
  - Opposition to gay marriage was strong.
  - Distrust of the judiciary was important.

# Who voted “no”?

- © Data analysis of voting patterns confirms some of the assumptions, provides a basis to understand what to expect in Iowa and elsewhere.

# What does analysis show?

- ◎ After controlling for all variables:
  - > Ideology was important:
    - Counties with high rates of voting for McCain were more likely to have high rates of “no” votes.
    - Counties where social conservatives Rod Roberts and Bob Vander Plaats received a lot of support were more likely to have high rates of “no” votes.

# What does analysis show?

- ◎ After controlling for all variables:
  - > Demographic factors were important:
    - Rural counties had higher vote “no” rates than more urban counties.
    - Counties with higher levels of education were less likely to have high vote “no” totals.

# What do the numbers mean?

- ◎ After controlling for all variables:
  - > Issues were important:
    - Counties with high levels of immigration (percent of residents who are non-English speakers) were more likely to have high vote “no” rates.
    - Gun ownership was not important.
    - Those counties with more same-sex marriages had significantly lower vote “no” rates.

# What do we learn?

- ◎ The most important predictors of the “No” vote are not unique to 2010, but will continue.
- ◎ Marriage alone does not explain the vote, but the issue provided impetus.

# Long-term outlook

- ◎ The messages in Iowa's retention election are no longer limited to Iowa.
  - › Messages supporting courts are hard to convey, messages attacking courts are easy to convey.
- ◎ “Linking messages” lay the groundwork for anti-retention efforts on virtually any issue.
- ◎ Proactive efforts to provide alternative information in 2010 were limited.

# Long-term outlook

- ◎ 2012 legislative session will likely include
  - > Impeachment.
  - > Proposed changes to selection system.
    - Eliminate merit selection
    - Alter the makeup of the commission
    - Greater discretion for Governor



# Long term support

## © Judicial Performance Evaluation

- > 6 states have instituted broad-based systems to provide performance-related information on judicial performance.
- > Voters in these states report high levels of satisfaction with the information.
- > Reliable non-political system.



# Long term support

- ⦿ “Perfect storm” narrative is limiting.
- ⦿ Support must be broader than the legal community.
- ⦿ Judges can respect the judicial role while being more proactive.
- ⦿ Explaining the legal system is not the solution – effective messages are not based in rationality, but values.



# Finding a constituency

- ◎ Courts do not have natural constituencies beyond the bar –a politically suspect alliance.
- ◎ “Public education” is a long term prospect with no guarantees.
- ◎ This is a “political” endeavor – denying the political implications is not productive.