A COIN ON THE TRACKS: CAN BIG MONEY AND POLITICS DERAIL JUDICIAL IMPARTIALITY THROUGH ELECTION SPENDING?

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Table of Contents

I. Introduction 716
II. Judicial Impartiality and the History of Merit Selection in State Courts with an Emphasis on Iowa 720
A. Federal and State Court Systems 720
B. Judicial Selection in Iowa 723
III. The Pros (and Cons) of Merit Selection with Retention Elections 725
A. Safe and Meritoriously Sound 726
B. Unsafe and Unfair 730
IV. Tipping the Scales of Justice with Dollars 734
A. The Legal Basis for Financial Influence 736
B. Trending the Spending 2000–2009 738
C. Remarkable Spending Patterns in 2010–2011 740
V. Tying It All Together 742
A. Iowa Reluctantly Takes the Stage 742
B. Looking Down the Line 744
C. Abuse of the Great Merit System/Retention Election Compromise 746
VI. Conclusion 752

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I. INTRODUCTION

Following colonial abuses by the English Crown and Parliament, the original thirteen colonies asserted independence[1] and created a tripartite government.[2] Our Constitution gives Americans the power to elect members of Congress and the President for defined terms.[3] The Founders reduced the risk of poor decision making by creating a judicial life-tenure system,[4] but they prioritized staking an independent judiciary[5] and removing the mercurial influence of the Zeitgeist on the judicial branch.[6]

1. *See* THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776) (declaring independence from the British Crown and establishing the "United Colonies" as "Free and Independent States").

2. *See* U.S. CONST. arts. I–III (providing for the legislative, executive, and judicial branches of the United States government).

3. *See* U.S. CONST. art. I, § 2, cl. 1 (establishing that Representatives in the House of Representatives are "chosen every Second Year by the People of the several States"); U.S. CONST. amend. XVII, § 1 (providing that Senators must be "elected by people [from each respective State], for six years"); U.S. CONST. art. II, § 1, cls. 1–3 (establishing the election process for the President of the United States who holds office for a "Term of four Years").

4. *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (acknowledging his opponent's concern as to life tenure for federal judges).

5. *Id.* at 466, 469–70; *see also* U.S. CONST. art. III, § 1 (providing federal judges are to "hold their Offices during good Behaviour"). French political philosopher Baron de Montesquieu, to whom a number of our nation's founders looked for guidance in designing our government, described division of political power among an executive, a legislature, and a judiciary:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the power of judging be not seperated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressour.

BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 163 (J.V. Prichard ed., Thomas Nugent trans., Fred B. Rothman & Co. 1991) (1794).

6. *See* THE DECLARATION OF INDEPENDENCE para. 11 (noting one of the reasons for declaring independence from England was because of the dependence of the judiciary on the King).

The federal system balances judicial impartiality with judicial accountability; judges are charged with the vow to decide cases fairly and impartially based on only the facts and the law. Federal judges serve during good behavior,[7] meaning that removal from the bench requires an impeachment proceeding.[8]

After declaring independence, most states originally adopted the Founders' method of appointing judges.[9] Some states, however, instituted popular election of state judges.[10] Populist judicial elections gained traction in many states.[11] States desiring middle ground between appointment and election methods created an appointment process with a periodic election to retain judges. This process is termed "merit selection."[12] A number of states adopted various forms of merit selection, but controversy over state judge selection persists.[13] Recent court decisions fuel the debate regarding judicial selection and retention issues.[14]

7. U.S. CONST. art. III, § 1.

8. *See* U.S. CONST. art. II, § 4 ("The President, Vice President *and all civil Officers of the United States*, shall be removed from Office on Impeachment . . . ." (emphasis added)); Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 CALIF. L. REV. 1233, 1247 (2000) (footnote omitted) (noting that impeachment is the only way to remove federal judges).

9. LARRY C. BERKSON, UPDATED BY RACHEL CAUFIELD, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 1 (2004) [hereinafter BERKSON & CAUFIELD] (footnote omitted), *available at* http://www.ajs.org/selection/docs/Berkson.pdf.

10. *See id.* (noting the gradual shift by some states to elect judges).

11. *Id.*

12. *See id.* at 2 (explaining that the merit plan requires commissioners to forward names of qualified candidates to the executive, who then makes appointments based on the nominations).

13. *See id.* ("Today the combination of schemes used to select judges is almost endless.").

14. *See* Citizens United v. FEC, 130 S. Ct. 876, 909–10, 913, 917 (2010) (holding Congress may not, according to the First Amendment, suppress political speech due to the speaker's corporate identity through a federal statute barring independent corporate expenditures for electioneering communications even though Congress was trying to dissuade quid pro quo for officials); Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2262–63 (2009) (addressing the issue of campaign contributions by an attorney or litigant to a judge, which creates a necessity for recusal under a due process constitutional analysis, and noting that the Constitution may not always be implicated but the dangers of bias still remain); Republican Party of Minn. v. White, 536 U.S. 765, 787–88 (2002) (recognizing "an obvious tension between the article of Minnesota's popularly-approved constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause that places most subjects of interest to the voters off limits" and holding Minnesota's "announce clause"

Iowa experienced unprecedented spending and politicization in the 2010 judicial retention elections.[15] Out-of-state interest groups opposed to same-sex marriage funded and organized a campaign against three Iowa Supreme Court Justices.[16] The lightning rod issue was the Iowa Supreme Court's unanimous ruling in *Varnum v. Brien*[17] that struck down Iowa's Defense of Marriage Act.[18] All three justices standing for retention failed to receive the popular vote.[19] The election controversy bled out to the Iowa's entire merit selection process.[20]

The arrival of out-of-state private interest money skewed the perception of justice in Iowa,[21] despite wide laudatory recognition of Iowa's courts.[22] Across the nation, interest groups have increased funding for and

in judicial elections as violative of the First Amendment).

15. *See* ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2009–10: HOW SPECIAL INTEREST "SUPER SPENDERS" THREATENED IMPARTIAL JUSTICE AND EMBOLDENED UNPRECEDENTED LEGISLATIVE ATTACKS ON AMERICA'S COURTS 7–8 (2011) (delineating the abrupt change in Iowa judicial election funding from 2000–2009 to 2010).

16. Linda Casey, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices*, NAT'L INST. ON MONEY ST. POL. (Jan. 10, 2011), http://www.followthemoney.org/press/ReportView.phtml?r=440 (footnote omitted); *see also* SKAGGS ET AL., *supra* note 15, at 8–9 (detailing where the out-of-state funds were used and how they affected the election). Of note, at least one out-of-state group is again attempting to influence Iowa voters with a pledge to match in-state fundraising up to $100,000 to oust Justice David Wiggins on 2012. *See* Jason Noble, *Wiggins Must Go, Too, Foes Say,* DES MOINES REG. (Aug. 12, 2012), http://www.desmoinesregister.com/proart/20120812/news09/308120038/iowa-supreme-court-s-wiggins-must-go-too-foes-say?archive&pagerestricted=1.

17. Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009).

18. *See* SKAGGS ET AL., *supra* note 15, at 9; Casey, *supra* note 16.

19. SKAGGS ET AL., *supra* note 15, at 9; Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REG. (Nov. 3, 2010), http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices.

20. *See* Josh Nelson, *Vander Plaats Urges Selection Reform*, WCF COURIER (Mar. 30, 2011), http://wcfcourier.com/news/local/article_6b3820ae-a812-5877-8ae4-c691fec77cc4.html; Ed Tibbetts, *Conservatives Form Iowa Judicial Watch*, QUAD-CITY TIMES (Jan. 4, 2011), http://www.qctimes.com/news/local/crime-and-courts/article_a3e5c97e-187f-11e0-a366-001cc4c03286.html (describing a new group that formed to "reform the selection process").

21. *See* SKAGGS ET AL., *supra* note 15, at 8–9 (discussing the impact of the influx of out-of-state private interest money in the Iowa retention elections).

22. *See* Stephen J. Choi et al., *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1331–32 (2009) (showing Iowa in the top ten performing states in studies regarding judicial satisfaction).

spearheading of judicial campaigns.[23] The power of special interest groups soared following the talismanic *Citizens United v. FEC*[24] ruling by the United States Supreme Court.[25] Concerns about challenges to merit selection are magnified at a time when state courts face both increased caseloads and diminished resources.[26]

Judicial impartiality is key to protecting individual rights and to maintaining orderly operation of society.[27] The judicial system is more vulnerable to attack than the other two branches of government.[28] Resources are shifting away from supporting the actual operation of the third branch of government;[29] at the same time, special interest groups are

23. *See* SKAGGS ET AL., *supra* note 15, at 3 (discussing the increased funding by independent interest groups in judicial elections compared to the decrease in spending by candidates and noting the concern caused by such spending).

24. *See* Citizens United v. FEC, 130 S. Ct. 876, 917 (2010) (finding restrictions under federal law on corporate independent expenditures unconstitutional).

25. *See* JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE 9 (2010) (noting that a transformation in spending on elections has begun).

26. *See, e.g.*, Lisa A. Rickard & Bill Robinson III, *Column: Why Underfunded Courts Hurt All Americans*, USA TODAY (Jan. 4, 2012), http://www.usatoday.com/news/opinion/forum/story/2012-01-04/courts-judiciary-budget-funding/52379760/1 ("The poor funding situation for New Hampshire's judiciary had grown so dire [by 2009] that then-Chief Justice John Broderick Jr. reluctantly suspended civil jury trials for 12 months."); Mark S. Cady, Chief Justice, Iowa Supreme Court, 2012 State of the Judiciary 7 (Jan. 11, 2012), *available at* http://www.iowacourts.gov/wfdata/files/StateofJudiciary/2012/Webspeech.pdf ("[W]hile we have faced budget cuts year after year, resulting in a workforce smaller than we had 24 years ago, our workload has increased dramatically.").

27. *See* THE FEDERALIST No. 79, *supra* note 4, at 465–66 ("The standard of good behavior for the continuance in office of the judicial magistracy . . . is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws. . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").

28. *Id.* ("[T]he judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks." (footnote omitted)).

29. Rickard & Robinson, *supra* note 26 ("[In 2011], 42 states cut much-needed funding for their judiciaries."); *see also State Activities Map: Budget Shortfalls by State*, NAT'L CENTER FOR ST. CTS., http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/States-activities-map/.aspx (last visited Apr. 23, 2012) (providing additional detail and web links to the particular undertakings of each state's decision to cut funding of the judiciary).

attempting to control the judiciary through elections.[30] In addition to subverting the independence of the judiciary, political manipulations put individual rights at risk.[31] Providing a competent and unbiased judiciary to guard individual rights requires funding, and voter education about the balance of powers and about the funding necessary to maintain that balance.[32] The judicial branch is the least equipped of the three branches to defend itself because it is neither a political entity nor does it control how it is funded.[33] For these reasons, the judiciary is the branch of government most in need of protection.

This Article proceeds in five additional parts. Part II traces the history of state judge selection through the current method of merit selection and retention elections in Iowa. Part III explores the strengths and weaknesses of merit selection and the retention voting system. Part IV addresses increasingly large expenditures in judicial elections and the role of money in undermining or supporting the impartiality of state judiciaries. Part V expounds upon the trends surrounding judicial elections and the dangers these trends present to judicial impartiality. Part VI concludes with recommendations by the Authors.

II. JUDICIAL IMPARTIALITY AND THE HISTORY OF MERIT SELECTION IN STATE COURTS WITH AN EMPHASIS ON IOWA

A. *Federal and State Court Systems*

Our Founding Fathers knew the detriments of a judiciary beholden to special interests. While still a colony, the British Parliament passed laws

30. SAMPLE ET AL., *supra* note 25 ("Much of the cash boom [in state judicial elections] in the last decade was fueled by a new class of super spenders. These special interests, including business executives, unions and lawyers who are stakeholders in litigation, can dominate contributions to candidates, year after year, and/or go outside the system by spending millions on independent TV ad campaigns." (footnote omitted)).

31. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009) ("Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties' consent—a man chooses the judge in his own cause.").

32. *See* AM. COLL. OF TRIAL LAWYERS, JUDICIAL INDEPENDENCE: A CORNERSTONE OF DEMOCRACY WHICH MUST BE DEFENDED 11–12 (2006) (explaining a number of factors impacting the judiciary, including funding, that need to be addressed both to "educate the public and meet the threat" of assault on the judicial system).

33. *Id.* at 2.

providing that Massachusetts's colonial judges would serve only at the King's pleasure and would be paid from revenues derived from taxes on, among other things, tea.[34] The Founders understood the magnitude of the offense and listed it among the grievances in the Declaration of Independence.[35] To ensure the impartiality of the judiciary and to prevent threats from the executive or legislative branches, the Framers of the Constitution guaranteed, within Article III, life tenure and salary protection for federal judges.[36]

Originally, the states followed the model of the Constitution, providing for appointment rather than election of state court judges.[37] States provided judges ample protection from executive control and somewhat less protection from some state legislatures.[38] The first challenge to the state systems emerged in the mid-nineteenth century when Jacksonian democracy—Populism—gained strength.[39] Populists believed that state legislatures and governors, along with the wealthy, swayed the judicial appointment process.[40] The populist surge led some states to judicial election systems.[41]

34. Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 683 (1980) (footnotes omitted); Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 481 (2009) (footnote omitted).

35. THE DECLARATION OF INDEPENDENCE para. 10–11 (U.S. 1776) ("He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers. . . . He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.").

36. U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); *see also* THE FEDERALIST NO. 79, *supra* note 4, at 472 ("Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.").

37. BERKSON & CAUFIELD, *supra* note 9.

38. Kaufman, *supra* note 34.

39. Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 167 (2007).

40. *See id.*; O'Connor, *supra* note 34, at 483 ("Many people felt that appointive systems had allowed governors and legislators to award judgeships based on party loyalty rather than legal ability, judicial temperament, or fair mindedness.").

41. Harvey Uhlenhopp, *Judicial Reorganization in Iowa*, 44 IOWA L. REV. 6, 52–53 (1958) ("Starting with Mississippi in 1832, one state after another thrust its judges under the elective system." (footnote omitted)); *see also* BERKSON & CAUFIELD,

As money and politics were injected into a previously insulated coordinate branch of government, the drawbacks of judicial elections became apparent.[42] Citizens expressed concern that judicial elections led to "corrupt, unethical, unqualified, and incompetent" judges.[43] By the 1930s, the tide turned, and compromise between the Framers' system of appointment and the Jacksonian populist approach was found.[44] This compromise was termed the "merit plan."[45] Merit selection, with the addition of retention elections, removed the input from political parties and election campaigning, thereby depoliticizing the judicial selection process and restoring respect for the bench that had dwindled under the judicial election process.[46] Endorsements from the American Judicature Society and the American Bar Association further paved the way for state consideration and adoption of merit selection.[47]

Missouri, the first state to adopt merit selection, amended its constitution in 1940.[48] More than thirty states followed, adopting all or part of merit selection.[49] Currently, twenty-four states use merit selection with bipartisan commissions in the appointment process for state supreme court justices, while twenty-two use contested elections.[50]

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supra note 9; Caufield, *supra* note 39, at 167–68 (detailing the move by states to elect via direct election).

42. *See* O'Connor, *supra* note 34, at 483–84 ("If they were not corrupt before they got to the bench, chances are they were corrupted while on it.").

43. Caufield, *supra* note 39, at 168 (footnote omitted).

44. *See* BERKSON & CAUFIELD, *supra* note 9, at 1–2 (discussing the history of judicial selection and the rise of commission plans).

45. Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, *in* SELECTED READINGS: JUDICIAL SELECTION AND TENURE 29, 29 (Glenn R. Winters ed., rev. ed. 1973).

46. *See* BERKSON & CAUFIELD, *supra* note 9, at 2.

47. G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 609 (2009); Winters, *supra* note 45, at 30 (footnote omitted).

48. RACHEL PAINE CAUFIELD, INSIDE MERIT SELECTION: A NATIONAL SURVEY OF JUDICIAL NOMINATING COMMISSIONERS 6 n.7 (2012) [hereinafter INSIDE MERIT SELECTION]; O'Connor, *supra* note 34, at 485 (citing Winters, *supra* note 45, at 29, 36). Therefore, merit selection is sometimes referred to as the "Missouri Plan." Winters, *supra* note 45, at 30.

49. *See* INSIDE MERIT SELECTION, *supra* note 48, at app. B. 64–68.

50. *See Election vs. Appointment*, JUST. AT STAKE CAMPAIGN, http://www.justiceatstake.org/issues/state_court_issues/election-vs-appointment/ (last visited Apr. 30, 2012). The additional four states use a form of appointment similar to the federal system. *Id.*

B. *Judicial Selection in Iowa*

Iowa entered the Union in the midst of the populist shift. The Iowa Constitution of 1846[51] "reflected [the] compromise between those who favored direct, popular elections and those who did not."[52] The Iowa Constitution[53] provided for district court judge popular elections and for an election of supreme court justices by the Iowa General Assembly.[54] Populism later won the day with lawmakers reassessing the constitution in 1857[55] and providing for popular election as the selection method for all state judges.[56]

A century later, merit selection gained attention in Iowa.[57] In 1958, District Court Judge Harvey Uhlenhopp wrote *Judicial Reorganization in Iowa*, published in the *Iowa Law Review*.[58] Judge Uhlenhopp proposed four changes to "greatly improve the administration of justice."[59] The most sweeping proposed change[60] was "[t]he return to a nonpolitical judiciary."[61] Judge Uhlenhopp asserted that "[u]nswerving devotion to justice is the quintessence of the judicial function" that "requires judges beholden to no one."[62] Judge Uhlenhopp characterized America's historical struggle over the judiciary as a sort of tug of war between "royal domination on the one hand and unbridled popular oppression on the other."[63] Outlining his distaste for judicial elections in Iowa, whether by party nomination or

51. IOWA CONST. art. V, §§ 3, 4 (1846).

52. Ryan C. Cicoski, *Judicial Independence and the Rule of Law: A Warning from Iowa*, 29 DEL. LAW. 16, 16 (Summer 2011), *available at* http://www.delawarebarfoundation.org/wp-content/uploads/2011/09/Vol-29-No-2-Summer-2011.pdf.

53. IOWA CONST. art. V, §§ 3, 4.

54. Cicoski, *supra* note 52.

55. IOWA CONST. art. V, §§ 3, 5 (1857).

56. Cicoski, *supra* note 52.

57. *See* RUSSELL M. ROSS, THE GOVERNMENT AND ADMINISTRATION OF IOWA 356 (W. Brooke Graves ed., 1957) (writing that judicial elections should be replaced with "[a]ppointment of judges by the governor with Bar Association aid"); Uhlenhopp, *supra* note 41, at 54–55, 65–66 (explaining that "[p]opular election is . . . a poor way" to fill judgeships and advocating for the American Bar Association's plan).

58. Uhlenhopp, *supra* note 41, at 6.

59. *Id.* at 11.

60. *See generally id.* at 51–63 (detailing the necessities to put the nonpolitical judiciary in place, requiring a change in selection process and tenure decisions).

61. *Id.* at 11 (footnote omitted).

62. *Id.* at 51 (footnote omitted).

63. *Id.*

partisan election, Judge Uhlenhopp pushed for a "choice [that] must be made intelligently"[64] and one which allowed for objectivity; "[o]bjectivity is the priceless ingredient in the judicial process."[65] Recognizing that "[a]bsolute objectivity is not attainable in this world," Judge Uhlenhopp pointed out that "[t]he best we can do is to eliminate as much judicial dependence as possible," and he stated that the judicial election systems in Iowa were "the worst conceivable" systems to accomplish this goal.[66]

Given that "judicial work by nature involves contests between opposing interests" and "that right decisions are not infrequently unpopular," Judge Uhlenhopp urged that "judges must be insulated from extraneous pressures if we desire fair results consistently."[67] He noted that side effects of judicial politics, such as "the loss of public confidence"[68] are of little concern under merit selection, as "students of the subject [of judicial selection] generally agree that the best selection system yet devised" is the merit selection system.[69] Judge Uhlenhopp detailed the benefits of merit selection through the processes of intelligent judicial selection and tenure-promoting impartiality.[70] Driven by supporters such as Judge Uhlenhopp, the Iowa General Assembly took a step toward amending the state's constitution in 1959 by passing a joint resolution to replace elective judicial selection with an appointive system.[71] The Iowa General Assembly passed the resolution again in 1961,[72] and a popular vote passed the resolution on June 4, 1962.[73]

The merit selection and retention system in Iowa is markedly similar to the system originally advocated by Judge Uhlenhopp.[74] A judicial

64. *Id.* at 54 (footnote omitted).
65. *Id.* at 56.
66. *Id.*
67. *Id.* at 57 (footnote omitted).
68. *Id.* at 62.
69. *Id.* at 65 (footnote omitted).
70. *See id.* at 65–72.
71. *See* STATE OF IOWA, IOWA OFFICIAL REGISTER: NUMBER FIFTY, 1963–1964, at 484–85 & n.47 (Edward F. Mason ed., 1963).
72. *Id.* at 484 n.47.
73. *Id.*; IOWA CONST. art. V, § 16; AM. JUDICATURE SOC'Y, MERIT SELECTION AND RETENTION IN IOWA: SOME FACTS (n.d.), *available at* http://www.judicialselection.us/uploads/documents/Fact_sheet_JSS_9FAC644C55106.pdf. In Iowa, constitutional amendments must be passed by two general assemblies, with an intervening general election, and then be adopted by popular vote. *See* IOWA CONST. art. X, § 1.
74. *Compare* Uhlenhopp, *supra* note 41, at 65–72 (arguing that intelligent

nominating commission interviews and selects judicial candidates. The judicial nominating commission is comprised of an equal number of appointed members and elected members, who each serve a six-year term.[75] Half the commission members are appointed by the governor and confirmed by the Iowa Senate, and Iowa Bar members elect the other half of the commission.[76] The senior judge or justice of the court, based on length of service on the court for which appointment is sought, serves as the chair of the nominating committee.[77] The nominating committee sends three nominees for each supreme court opening and two nominees for each district court opening to the governor.[78] Judges appointed by the governor stand for a retention election after their first full year of service, and, if retained, district court and court of appeals judges serve six-year terms and supreme court justices serve eight-year terms.[79] After each complete term, a retention election is held.[80]

III. THE PROS (AND CONS) OF MERIT SELECTION WITH RETENTION ELECTIONS

The arguments about the strengths and limitations of merit selection are well-documented. The pitfalls of judicial elections were outlined by Judge Uhlenhopp more than fifty years ago.[81] Those drawbacks are even more visible today. Detractors argue that merit selection has not delivered on its promises and that it merely swaps one form of political influence for another.[82] Supporters of merit selection respond that, though imperfect, merit selection provides safeguards for the judiciary and that judicial

selection involving the use of nominating commissions and appointments, followed by votes to get rid of judges not properly completing their work, will work best), *with* IOWA CONST. art. V, §§ 16–17 (providing for a state judicial nominating commission and setting limits of tenure for judges that are based on retention elections).

75. IOWA CONST. art. V, § 16.

76. *Id.*

77. *Id.*

78. *Id.* § 15.

79. *Id.* § 17.

80. *See id.*

81. *See* Uhlenhopp, *supra* note 41, at 58–62 (explaining that the selection and tenure methods of the time had four main side effects); *infra* notes 94–97 and accompanying text.

82. *See, e.g.*, Tarr, *supra* note 47, at 616–18 (suggesting negative campaigning and perceptions of judicial legislating persist regardless of whether a merit selection process is used).

elections rip away those safeguards.[83] In addition, recent United States Supreme Court decisions provide greater ability for politicking to enter state courtrooms. Increased politicization of the third branch is illustrated through recent significant increases in judicial campaign expenditures.[84] The *Citizens United* decision affirmed that corporations have First Amendment rights, that political speech is protected, and that prohibitions on "independent expenditures for political speech based on the speaker's corporate identity" were unconstitutional.[85] As demonstrated within, moneyed speech is becoming louder in courtrooms nationwide.

A. *Safe and Meritoriously Sound*

The contrast of merit selection and judicial elections is set out in everything from scholarly articles[86] to newspaper opinion pieces.[87] Judge

83. *See, e.g.*, John F. Irwin & Daniel L. Real, *Thoughts About Enriching Judicial Independence by Improving the Retention Vote Phase of Appointive Selection Systems*, 43 CT. REV. 60, 63–65 (2006) (refusing to consider open elections but instead suggesting approaches to reform retention elections through academic education, increased information availability, and ensuring quality information reaches the public); O'Connor, *supra* note 34, at 486–89 (explaining that although "merit-selection plans are imperfect, they remain on the side of virtue" and eliminate politics from retention, which "is a pretty strong advantage over the open-election system").

84. *See* SAMPLE ET AL., *supra* note 25, at 5–8 (providing comparative statistics and an explanation of the recent "money explosion" in judicial elections).

85. Citizens United v. FEC, 130 S. Ct. 876, 899–900, 903, 917 (2010).

86. *See, e.g.*, Martin H. Belsky, *Electing Our Judges and Judicial Independence: The Supreme Court's "Triple Whammy,"* 2 AKRON J. CONST. L. & POL'Y 147, 159 (2011) (providing an analysis of how caselaw, campaign contributions, elected judges and the majority can have an impact on the judiciary, and advocating that "[t]he core principle . . . is judicial independence"); O'Connor, *supra* note 34, at 479–94 ("The question of how we choose our judges, whom we entrust to uphold and interpret our laws, speaks to foundational principles of our judiciary and, indeed, our nation.").

87. *See, e.g.*, Editorial, *Keep the Politics and Money out of Judicial Selections*, GLOBE GAZETTE (Apr. 11, 2011), http://www.globegazette.com/news/opinion/editorial/article_92157cd0-63de-11e0-9ee1-001cc4c002e0.html (arguing that a change in selection method is dangerous and cautioning Iowans not to make a wrong decision, like Wisconsin); Nathan Tucker, Op-Ed., *Dems Dominate Judges Selection Process*, THE GAZETTE (Sept. 12, 2010), http://www.thegazette.com/2010/09/12/dems-dominate-judges-selection-process/ (advocating for a better nominating commission selection system because the "Democratic-dominated nominating commissions" are not being held accountable); David S. Walker, Allan W. Vestal & William Hines, Op-Ed., *Guest Opinion: Reject Campaign to Change Iowa's Judge Selection Process*, DES MOINES REG. (Sept. 24, 2010), http://www.desmoinesregister.com/article/20100927/OPINION01/9270305/Guest-opinion-Reject-campaign-change-Iowa-s-judge-selection-process

Uhlenhopp detailed the benefits and drawbacks of merit selection versus judicial election.[88] In his article, Judge Uhlenhopp contrasts popular election and merit selection, poignantly stating "[t]he backslapper is well known, but the student of the law is often more retiring."[89] Presenting the distinction between professionals and policymakers, Judge Uhlenhopp stated that "[t]he people . . . should only be called upon to select policy makers," and he argues if we elect judges, "[w]e might as well pick our school teachers and highway engineers at the polls."[90] Regarding judicial tenure, Judge Uhlenhopp recognized that "it is impossible to erase the personal element entirely."[91] At all levels, elections cause four obstacles to placing the best individuals on the bench.[92]

First, competent jurists who might otherwise desire a seat on the bench are dissuaded from running in judicial elections for fear of losing hard-earned practices in the election process.[93] Second, party affiliation may prevent individuals from attaining a judgeship.[94] Third, judicial elections inject politics into court administration, creating a possible clash "between a judge's personal prosperity and [the judge's] public duties," especially when up for reelection.[95] Fourth, when politics seep into judicial selection, citizens may experience a "loss of public confidence" in, and a loss of respect for, the courts.[96]

Nonpartisan organizations, including the American Bar Association and the American Judicature Society, have promoted merit selection in state courts for nearly three-quarters of a century.[97] Individual attorneys,[98]

(providing a demand from law professors to the general public to reject the notion of getting wrapped up in the politically infused retention election); Tyler J. Buller, *Framing the Debate: Understanding Iowa's 2010 Judicial-Retention Election Through a Content Analysis of Letters to the Editor*, 97 IOWA L. REV. 1745 (2012).

88. *See* Uhlenhopp, *supra* note 41, at 51–72 (advocating for a "[r]eturn to [n]onpolitical [j]udiciary" in comparing the various judicial selection methods).

89. *Id.* at 55.

90. *Id.* (footnote omitted).

91. *Id.* at 56.

92. *See id.* at 58.

93. *See id.* at 58–59.

94. *See id.* at 59–61.

95. *See id.* at 61–62.

96. *Id.* at 62.

97. Tarr, *supra* note 47.

98. Merit selection in Iowa has bipartisan support. Former Iowa Supreme Court Justice Mark McCormick spoke in support of the system leading up to the retention election in 2010. *See* Trish Mehaffey, *Retention Vote May Deter Future*

business leaders,[99] and political leaders[100] join in supporting the merit selection system. A prominent supporter of the merit selection system, Justice Sandra Day O'Connor "recognize[s] that the merit-selection plan

Judges and Put Politics into Court System, E. IOWA NEWS NOW (Nov. 3, 2010), http://www.easterniowanewsnow.com/2010/11/03/retention-vote-may-deter-future-judges-and-put-politics-into-court-system/ ("[T]he retention vote will have a negative impact on the court to do its work but it won't deter those who aspire to be on the bench."). Likewise, Des Moines attorney and Democrat Jerry Crawford has spoken in support of Iowa's merit selection system. Bob Rafferty and Norbert Kaut, of the nonpartisan group Justice Not Politics, advocated for having an educated vote on whether to retain Iowa judges and to keep politics out of courts. *See* Rod Boshart, *Defenders of Iowa Court System Warn Against Partisan Crusade*, QUAD-CITY TIMES (Sept. 17, 2010), http://qctimes.com/news/local/government-and-politics/elections/article_e3de7ddc-c2b7-11df-877b-001cc4c03286.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+StatelineorgRss-Elections+%28Stateline.org+RSS+-+Elections%29 ("'We're raising the red flag and saying that's dangerous to the system.'"); Jason Clayworth, *Group Forms to Halt "Vindictiveness" in Judicial Retention; Vander Plaats Cries Foul*, DES MOINES REG., http://blogs.desmoinesregister.com/dmr/index.php/tag/bob-rafferty/ (last visited Apr. 30, 2012) (noting the public needs to be educated about the system).

99. Many prominent businessmen supported the Iowa courts and voiced pro-retention opinions, including Larry Zimpleman, President and CEO of The Principal Financial Group in Des Moines; Barry Griswell, former Chairman of The Principal Financial Group; and Michael Gartner, former NBC News President and Des Moines newsman. *See Retired Justice Sandra Day O'Connor Joins Panelists in Praising Iowa's Merit Selection of Judges*, THE IOWA LAW., Oct. 2010, at 6, *available at* http://www.iabar.net/Iowa%20Lawyer.nsf/7410b4ac565446c1862566b40069ac86/f8d65df6f4da0372862578ed004cfa6f/$FILE/IL_OCT%202010_lores.pdf; Andrew Duffelmeyer, *Panelists: Judicial Retention, Impeachment Processes Misused*, THE IOWA INDEP. (Nov. 1, 2011), http://www.iowaindependent.com/63115/panelists-judicial-retention-impeachment-processes-misused; Larry Zimpleman, *Guest Opinion: Injecting Politics into Justice System May Hurt Economy*, SIOUXLAND CHAMBER OF COM. BLOG (Oct. 27, 2010), http://www.siouxlandchamberblog.com/tag/larry-zimpleman/.

100. Former Lieutenant Governors Joy Corning, Republican, and Sally Pederson, Democrat, are now cochairs of Justice Not Politics, a bipartisan coalition dedicated to protecting Iowa's courts. *About*, JUST. NOT POL., http://www.justicenotpolitics.org/about (last visited Apr. 30, 2012). Former Iowa Governor Robert Ray, former Lieutenant Governor Art Neu, former First Lady of Iowa Christie Vilsack, and others are involved with Fair Courts for US, a group supporting retention of Iowa judges. *Group Forms to Support Iowa Supreme Court Justices*, WCF COURIER (Oct. 14, 2010), http://wcfcourier.com/news/local/govt-and-politics/article_ef54bedc-d7d5-11df-8d6b-001cc4c03286.html. Iowans for Fair and Impartial Courts was also formed—a nonpartisan group dedicated to educating Iowans on the importance of keeping Iowa courts fair and impartial. *See About IFIC*, IOWANS FOR FAIR & IMPARTIAL CTS., http://www.learniowacourts.org/about.php, (last visited Apr. 30, 2012).

could still use some improvement" but that "it is far better than the alternative" as "[n]o amount of reform will remove the politics inherent in partisan judicial elections because they specifically aim to infuse politics into the law."[101] Justice O'Connor, buttressing points made by Judge Uhlenhopp and others, states that the huge volume of money pouring into judicial elections "just does not look good."[102] Quoting Illinois Supreme Court Justice Lloyd Karmeier, Justice O'Conner posits "'how can people have faith in the system'" when millions of dollars "are used to influence the outcome of judicial elections?"[103] With judicial elections calling for campaign contributions on an increasing scale, merit selection and retention elections require and garner much less financial attention, though it is increasing.[104] Further, Justice O'Connor points out that while the executive and the legislative branches wield the power of the sword and purse, respectively, the "courts wield the power of the quill. The judicial power lies in the force of reason and the willingness of others to listen to that reason."[105] With the increase in judicial election spending, judicial accusations, and the influx of politics into the courtroom, "the legitimacy of the judicial branch," which "rests entirely on its promise to be fair and impartial," will erode in the court of public opinion.[106] As Justice O'Connor recognizes, judicial elections will turn judges into "politicians in robes."[107] The courts' primary roles of "provid[ing] a check against the popular will" and "limit[ing] the other branches when they circumvent the Constitution" will become an empty promise.[108] Finally, Justice O'Connor urges the need to keep our courts fair and impartial because only then will "courts remain 'the one safe place'" in society where all citizens—rich or poor—are guaranteed fair and impartial treatment by the rule of law.[109]

101. O'Connor, *supra* note 34, at 486.

102. *Id.* at 488 (footnote omitted).

103. *Id.* at 487 (quoting Ryan Keith, *Republican Lloyd Karmeier Wins Supreme Court Seat*, ASSOCIATED PRESS, Nov. 3, 2004).

104. *See* SAMPLE ET AL., *supra* note 25, at 14 (explaining that traditionally, nonpartisan and partisan elections draw exorbitant amounts of money compared to retention elections, yet retention election spending has recently been on the rise).

105. O'Connor, *supra* note 34, at 489.

106. *See id.*

107. *Id.*

108. *See id.*

109. Rod Boshart, *Former Justice Backs Judicial Independence*, QUAD-CITY TIMES (Sept. 8, 2010), http://qctimes.com/news/state-and-regional/iowa/article_5e26167a-bb53-11df-966d-001cc4c03286.html (quoting part of Justice O'Connor's remarks from a forum on judicial independence in Des Moines in September 2010); *see also President's Report to BOG on National Summit on*

B. *Unsafe and Unfair*

G. Alan Tarr, in his article entitled *Do Retention Elections Work?*, published in the *Missouri Law Review*, analyzed merit selection and the retention vote, noting several advantages:

> First, retention elections serve to depoliticize judicial selection, thereby promoting judicial independence and impartial decision-making. Second, by replacing contested elections with a simple yes-or-no vote on incumbents, retention elections reduce the likelihood of negative campaigning and the need for judges to solicit sizable campaign contributions, thereby avoiding practices that undermine respect for the judiciary. Third, by eliminating party affiliation and other irrelevant cues for voting, retention elections encourage voters to focus on judicial experience and performance, thereby promoting better voter choice. Finally, as a result, retention elections lead to a highly qualified judiciary.[110]

Tarr also contested each of these assertions, noting first that "[i]n the present day, . . . the threat of politicization comes not from party elites but from contentious and expensive election campaigns dominated by special interests, from transparent efforts to influence judicial rulings through campaign contributions, and through independent spending designed to influence the outcome of judicial elections."[111] Pointing to the increase in money spent in state judicial campaigns and the coordinated campaigns to oust state supreme court justices in California, Nebraska, Tennessee, Pennsylvania, and Florida—and, more recently, Iowa, Illinois, Colorado, and Alaska[112]—Tarr asserts that retention elections do not in fact remove politics from judicial selection.[113] Tarr opines that retention elections actually provide interest groups with an easier vehicle to attack judges, as these groups can focus their campaign and enter the arena late in the game, whereas judicial elections force challengers into the limelight earlier in the process.[114] Regarding respect for the judiciary, Tarr contrasts the American Bar Association and Justice at Stake Campaign polls regarding

Defending Merit Selection, IOWA L. WKLY., http://www.isba.affiniscape.com/associations/4664/Iowa-Lawyer-Weekly/?NBR=594 (detailing the speech Justice O'Connor gave at the National Summit on Defending Merit Selection in St. Louis, Missouri in August 2011).

110. Tarr, *supra* note 47, at 610 (footnote omitted).

111. *Id.* at 611.

112. *See* SKAGGS ET AL., *supra* note 15, at 7.

113. *See* Tarr, *supra* note 47, at 613–14.

114. *Id.*

concern for judicial spending in campaigns with a 2005 Maxwell School poll, which provides that a majority of respondents felt judges decided cases based on personal beliefs and that partisan backgrounds affected judicial decisions.[115] Though Tarr admits "[i]t may well be that campaign ads that accuse judges of 'legislating from the bench' and 'judicial activism'. . . have fueled popular suspicions that judges are partial and not independent," he "suspects that negative campaigning and accusations of judicial legislation have reflected, rather than created, the current legal and political climate."[116]

Tarr also rejects any assertion that retention election voting has led to a more informed public.[117] Instead, Tarr likens bar associations, and other institutions that distribute information about judges for retention elections, to political organizations, noting that as they "choos[e] what information to convey about judges, these evaluations are designed not only to inform voters but also to influence the bases on which they decide."[118] Tarr states that "[i]f fidelity to the law is the most important trait in a judge, then it should certainly be a criterion in deciding whether a judge should remain on the bench. And if voters do not assess whether judges have adhered to the rule of law, who will?"[119] Citing a Justice at Stake Committee study, Tarr asserts that "seventy-three percent of voters reported having only some or a little information about judicial candidates."[120] Finally, regarding the quality of judges in retention elections, studies show "the vast majority of judges seeking retention have kept their seats."[121] Tarr states that "[i]t is hard to believe that more than ninety-eight percent of all appellate judges consistently decide cases based on law rather than their personal attitudes," and consistently exhibit other attributes believed to be positive judicial qualities.[122] Tarr points out that opponents of popular judicial elections designed retention elections this way:

115. *Id.* at 616–17.

116. *Id.* at 617–18.

117. *See id.* at 619 (questioning the idea that voters are basing decisions on more reliable information when partisanship is not involved).

118. *Id.* at 621–22.

119. *Id.* at 623.

120. *Id.* at 625 (citing GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001), *available at* www.justiceatstake.org/media/ms/JASNationalSurveyResults_6F537F99272D4.pdf).

121. *Id.* at 627.

122. *Id.* at 628 (footnote omitted).

> Retention elections are designed to minimize the risk of non-retention by stripping elections of features that might inspire voters to become interested enough to oust incumbents. Thus, there is no choice to make between competing candidates or viewpoints, no race to follow, no opportunity to pick a new winner, and no political party to support.[123]

In light of these retention election shortcomings, Tarr calls for "new solutions to the problems currently confronting state courts"—solutions that address the shortcoming of retention elections, especially those demonstrated as of late.[124] Each of Tarr's assertions revisits merit selection as a method for selecting state court judges.

Tarr contends that interest groups may have an easier time mounting offensives against incumbent judges in a retention election[125]—a weakness of the merit selection system especially apparent in Iowa after 2010.[126] This assertion misses the point that, while it may be easier for interest groups to attack state judiciaries in merit selection and retention states, the constant barrage of money, judicial campaigning, and politics on the judiciary accompanying judicial elections creates a continued perception of bias.[127] Tarr argues retention elections have not led to a more informed voting public, as bar associations and other institutions control the flow of information in retention elections.[128] Again, however, this only describes a point on which retention elections can improve, and it is not an impetus for change of the retention system. This is a recognized and partially addressed issue of the need for continued civics education and increased transparency.[129]

123. *Id.* at 629 (quoting Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 55 (2003)).

124. *Id.* at 632–33.

125. *See id.* at 614.

126. *See* SKAGGS ET AL., *supra* note 15, at 8–9 (explaining how the largely funded interest groups ousted the Iowa judges).

127. *Id.* at 1 ("[A] coalescing national campaign . . . seeks to intimidate America's state judges into becoming accountable to money and ideologies . . . .").

128. Tarr, *supra* note 47, at 621–22.

129. *See* SANDRA DAY O'CONNOR PROJECT ON THE STATE OF THE JUDICIARY, 2007 CONFERENCE RECOMMENDATIONS FOR STATE COURT JUDICIAL SELECTION 1–2 (2007), *available at* http://www.law.georgetown.edu/judiciary/documents/Recommendations.pdf. Iowa has a guide to its court system, as well as an information guide regarding retention elections. IOWA JUDICIAL BRANCH, GUIDE TO IOWA'S COURT SYSTEM (n.d.), *available at* http://www.iowacourts.gov/wfData/files/Publications/GuidetoIowa'sCourtSystem.pdf; IOWA JUDICIAL BRANCH, IOWA VOTERS

Merit selection and retention elections continue to offer public participation without the tarnish of politics and money that comes with popular election. Critics challenge merit selection, arguing that nominating commissions are merely proxies for state bar associations and effectively remove public input from the process.[130] Early surveys of judicial nominating commissions arguably supported this assertion, but trending shows commissions have, over time, developed more formal processes, more transparency, more diversity, and are consciously working to remove political influences from the judicial nominating process.[131]

Rachel Paine Caufield's report, *Inside Merit Selection: A National Survey of Judicial Nominating Commissioners* (*Inside Merit Selection*), is the most recent and in-depth survey of its kind.[132] Caufield, in conjunction with the American Judicature Society, conducted a nationwide survey of judicial nominating commissioners.[133] Of the thirty-six states that have nominating commissions, Caufield received responses from thirty states plus the District of Columbia.[134] Responses deny critical assertions and indicate, "Judicial Nominating Commissions are highly functional decision-making units that engage in a fair and independent assessment of judicial applicants."[135] The survey results demonstrate that lawyer and non-lawyer members agree on many facets of a nominating commission's role, and "[a]rguments that merit selection systems are dominated by members of the bar appear to be unfounded, based upon the evidence offered by the Commissioners themselves."[136] Of the commissioners who responded to the survey, many felt that "the merit selection process is fair, that it works to promote highly-qualified individuals for service on the bench, that it appropriately constrains the power of the governor, and that it helps to minimize the role of partisan politics."[137] Overall, the survey results

JUDICIAL DIRECTORY (2010), *available at* http://www.iowacourts.gov/wfData/files/RetentionElections2010/IowaVotersJudicialDirectory.pdf.

130. INSIDE MERIT SELECTION, *supra* note 48, at 6 n.14 (citing Stephen J. Ware, The Federalist Society, *Selection to the Kansas Supreme Court* 11 (2007); Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL'Y 392 (2009); Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009)).

131. *See* INSIDE MERIT SELECTION, *supra* note 48, at 7–8.

132. *Id.* at 3.

133. *Id.*

134. *Id.*

135. *Id.* at 55.

136. *Id.*

137. *Id.* at 4.

provide "ample evidence to suggest that Judicial Nominating Commissions are operating in a way that is consistent with the original goals of those who fought to enact merit selection and, by doing so, help to promote and maintain a fair and impartial justice system for the generations to follow."[138] Finally, Caufield's findings demonstrate a trend in nominating commissions toward increased processes, greater transparency, and a decrease in the role of politics.[139] Where earlier surveys were "overwhelmingly based upon outsiders' perspectives" and found "high levels of political activism among Commissioners," later surveys "reported that political considerations rarely, if ever, entered into [commissioners'] deliberative processes."[140] Caufield's survey concludes that commissioners have taken strides toward eliminating the influence of politics in nominations.[141]

Per capita judicial campaign spending is far less in states with retention elections than in states with direct judicial elections.[142] Merit selection with retention elections continues to be the favored method of judicial selection by allowing public participation without the tarnish of politics and money.[143] The dialogue about judicial selection methods, which was previously isolated in policy-making arenas, is now dispersed into political realms mainly occupied by PACs and special interest groups.[144] This dialogue has become less pragmatic and more polarized by the influx of money.

IV. TIPPING THE SCALES OF JUSTICE WITH DOLLARS

Attempts at influencing the judicial branch are not new. A 2006 report by the American College of Trial Lawyers (ACTL Report) outlined

138. *Id.* at 55.

139. *Id.* at 8.

140. *Id.* at 7–8 (citing RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NON-PARTISAN COURT PLAN (John Wiley & Sons eds., 1969); Beth M. Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328, 334 (1990); Joanne Martin, American Bar Foundation, *Merit Selection Commissions: What Do They Do? How Effective Are They?* (1994)).

141. INSIDE MERIT SELECTION, *supra* note 48, at 8.

142. *See* SAMPLE ET AL., *supra* note 25, at 6–7 fig.2.

143. *See* INSIDE MERIT SELECTION, *supra* note 48, at 3, 55 (providing that nominating commissions are fair and independent assessment tools and are used in a majority of the states).

144. *See* SAMPLE ET AL., *supra* note 25, at 9–15 (summarizing the rise of the super spenders in these elections that formerly were virtually unpublicized).

four threats to judicial impartiality at the state level.[145] The ACTL Report discusses: (1) incursions by the public when judges are harassed or threatened because of particular rulings;[146] (2) incursions by the legislature through reduced funding,[147] reduced subject matter, or through the use of impeachment proceedings;[148] (3) incursions by the executive through use of political clout or pressure towards a desired result;[149] and (4) financial incursions when judicial salaries are diminished through inflation and influence is garnered through political contributions.[150]

The widespread—and grounded—belief among voters is that money buys votes.[151] Three crucial decisions are at the forefront of the discussion regarding the influence of campaign funding: *Republican Party of Minnesota v. White*,[152] *Caperton v. A.T. Massey Coal Company*,[153] and

145. AM. COLL. OF TRIAL LAWYERS, *supra* note 32, at 6–11.

146. *Id.* at 7.

147. Currently, the Iowa courts' budget is only slightly higher than the amount courts bring in through the imposition of court costs and fines. Cady, *supra* note 26. Few budget increases have been given by the legislature even though courts' caseloads and the number of laws on the books have increased greatly. *Id.* at 6.

148. AM. COLL. OF TRIAL LAWYERS, *supra* note 32, at 8–10. Iowa has four live pieces of legislation for impeachment against the four justices remaining on the court who were in the unanimous *Varnum* decision. "A Resolution impeaching Supreme Court Justice David S. Wiggins for malfeasance in office[,]" proposed by Shaw, Alons, De Boef, Massie, and Pearson. H.R. 50, 84th Gen. Assemb., Reg. Sess. (Iowa 2011). "A Resolution impeaching Supreme Court Justice Daryl L. Hecht for malfeasance in office[,]" proposed by Shaw, Alons, De Boef, Massie, and Pearson. H.R. 49, 84th Gen. Assemb., Reg. Sess. (Iowa 2011). "A Resolution impeaching Supreme Court Chief Justice Mark S. Cady for malfeasance in office[,]" proposed by Shaw, Alons, De Boef, Massie, and Pearson. H.R. 48, 84th Gen. Assemb., Reg. Sess. (Iowa 2011). "A Resolution impeaching Supreme Court Justice Brent R. Appel for malfeasance in office[,]" proposed by Shaw, Alons, De Boef, Massie, and Pearson. H.R. 47, 84th Gen. Assemb., Reg. Sess. (Iowa 2011).

149. AM. COLL. OF TRIAL LAWYERS, *supra* note 32, at 10.

150. *Id.* at 10–11.

151. *See* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 21–24 (2012) (discussing prior state sanction of campaign spending limits to avoid possible corruption); Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 107 (2009) (stating that in the author's previous voting district, polling demonstrated that "88% of Democratic voters believed money buys results in Congress" (footnote omitted)); *see generally* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 127–31 (2011); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010) (discussing the link between political corruption and money and looking to address what reform can come from the vulnerabilities provided after *Citizens United*).

152. Republican Party of Minn. v. White, 536 U.S. 765 (2002).

Citizens United v. FEC.[154] These decisions helped spread politicization and the perception of politicization in state judicial elections.[155] The span of the decisions is still not defined, but each decision adds to the pall of campaign promises, payments, and political action committees (PACs) in judicial elections.

A. *The Legal Basis for Financial Influence*

In 2002, the United States Supreme Court held in *Republican Party of Minnesota v. White* that a prohibition placed on judicial candidates regarding campaign statements violated the First Amendment.[156] Minnesota elects its judges in non-partisan elections.[157] The section of the state's code of judicial conduct at issue, known as the announcement clause, prohibited a "'candidate for a judicial office, including an incumbent judge,'" from "'announc[ing] his or her views on disputed legal or political issues.'"[158] A candidate running for an associate justice position on the Minnesota Supreme Court wished to make statements on legal issues, and he challenged the announcement clause under the First Amendment.[159] Tracing the history of prohibitions against judicial announcements, the United State Supreme Court held 5–4 that the announcement clause's prohibition on speech violated the First Amendment.[160]

In 2010, the United States Supreme Court in *Citizens United v. FEC* made sweeping changes to election spending and reporting rules, including spending and reporting rules in judicial elections.[161] In *Citizens United*, a corporation planned to provide on-demand access to a movie that cast a candidate in an unfavorable light.[162] The corporation intended to promote and provide access to the video leading up to the date of the elections, but it recognized money spent would run afoul of § 441(b) of the United States

153. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).
154. Citizens United v. FEC, 130 S. Ct. 876 (2010).
155. *See* SAMPLE ET AL., *supra* note 25, at 55–64.
156. *White*, 536 U.S. at 788.
157. MINN. CONST. art. VI, § 7.
158. *White*, 536 U.S. at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000)).
159. *See id.* at 769–70.
160. *Id.* at 785–88.
161. *See* Citizens United v. FEC, 130 S. Ct. 876, 886, 913, 916–17 (2010).
162. *Id.* at 887.

Code[163]—part of the Federal Election Campaign Act[164] that prohibits corporate expenditures in elections.[165] Citizens United filed for a preliminary injunction barring application of § 441(b) to its movie.[166] Again, in a split decision, the Supreme Court ruled campaign contribution limits placed on corporations violated a corporation's First Amendment right to free speech.[167]

In 2009, the United States Supreme Court decided *Caperton v. A.T. Massey Coal Co.*[168] *Caperton* is an anecdotal illustration of the detrimental effect of judicial campaign contributions. In *Caperton*, a West Virginia jury awarded a multi-million dollar verdict against A.T. Massey Coal Company (Massey).[169] While the case was on appeal, the CEO of Massey contributed the statutory maximum to a judicial candidate for West Virginia's highest appellate court.[170] In addition, the Massey CEO donated $2.5 million to a political organization that supported the candidate, in addition to spending over half a million dollars on direct mailings, letters soliciting donations, and television and newspaper advertisements.[171] The Massey CEO spent more than all other supporters for this candidate combined.[172] With this support, the candidate unseated the incumbent justice.[173]

When Massey appealed the damage award to the highest appellate court, the newly elected justice refused to recuse himself from the case.[174] The West Virginia Supreme Court reversed the damages awarded against Massey in a split decision, with the newly elected justice siding with Massey.[175] After a rehearing, in which the new justice again denied a motion for recusal, the court reversed the jury award again.[176] The United States Supreme Court then granted certiorari to determine if the lack of

163. 2 U.S.C. § 441(b) (2006), *invalidated by Citizens United*, 130 S. Ct. at 880.
164. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.
165. *Citizens United*, 130 S. Ct. at 888.
166. *Id.*
167. *Id.* at 913, 917.
168. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).
169. *Id.* at 2257.
170. *Id.*
171. *Id.*
172. *Id.*
173. *See id.*
174. *Id.* at 2257–58.
175. *Id.* at 2258.
176. *Id.*

recusal by the justice violated the losing party's due process rights under the Fourteenth Amendment.[177] The Supreme Court did not determine whether actual bias existed, stating that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," but the Court concluded that a "serious risk of actual bias" exists "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign."[178] The Court found that the campaign contributions had a "significant and disproportionate influence" in the election and that "the probability of actual bias [rose] to an unconstitutional level," offending the Due Process Clause.[179]

Together, these three decisions: yield access to the tracks from *White*, place a large penny from *Citizens United*, and provide a single engineer on the lookout for obstructions from *Caperton.* The next section surveys past derailments and gauges whether the train has enough momentum to clear other monetary obstructions.

B. *Trending the Spending From 2000–2009*

Though the past decade is marked by huge upticks in election spending, the concerns about campaign contributions are not new. The perennial issue was visible in Iowa's 2010 judicial retention election. This section first takes a broad view of spending on judicial elections and the players involved. Then, it focuses on Iowa in 2010, addressing trends and distinctions.

In a veritable call to arms, Thomas Donahue, president of the conservative political organization, the U.S. Chamber of Commerce, said in a 2002 speech "[o]ur approach is simple—implement a multi-front strategy. . . . On the political front, we're going to get involved in key state supreme court and attorney general races as part of our effort to elect pro-legal reform judicial candidates."[180] Somewhat ironically, the U.S. Chamber of Commerce labeled the Iowa judiciary among the five best in the country for litigation climates by trusted business leaders in 2009.[181]

177. *See id.* at 2262.

178. *Id.* at 2263–64.

179. *Id.* at 2264–65.

180. Thomas Donohue, President, U.S. Chamber of Commerce, Illinois Chamber PAC Dinner Speech (Mar. 11, 2002), *available at* http://www.uschamber.com/press/speeches/2002/illinois-chamber-pac-dinner-speech.

181. SAMPLE ET AL., *supra* note 25, at 74.

The U.S. Chamber of Commerce, National Association of Manufacturers, and pro-business entities collected money at the national level to influence key judicial elections.[182] In order to counter those special interest groups, traditionally conservative groups, like local and state bar associations, joined with traditionally liberal unions and the Democratic Party to focus on state-level fundraising.[183]

The Brennan Center for Justice at New York University School of Law, in conjunction with organizations including the Justice at Stake Campaign and the National Institute on Money in State Politics, published reports on spending and influence in state judicial elections.[184] In 2010, the Brennan Center published *The New Politics of Judicial Elections 2000–2009: Decade of Change*, detailing spending, influence, and the organizations and groups at work in state judicial elections from 2000–2009.[185] The information adds detail to the question posed by an Illinois Supreme Court justice who won a seat after an election that saw $9.3 million raised: "How can people have faith in the system?"[186]

The Brennan Report provides numerous benchmarks for measuring total campaign spending, including total spending or fundraising, spending by judicial selection method, spending by industry, spending by individual entity, and rankings of the elections that garnered the greatest spending attention.[187] From 2000 to 2009, state supreme court candidates raised $206.9 million for their campaigns, compared to $83.3 million in the previous decade.[188] Of the amounts raised from 2000 to 2009, nearly twenty percent was raised in Alabama.[189] On the other end of the spectrum, out of the five states ranking lowest on the report's fundraising chart, four hold retention elections, and the remaining holds nonpartisan elections.[190] In total, these five states saw only $317,438 in fundraising over the ten-year period.[191]

182. *See id.* at 41 (showing these organizations and their local affiliates funneled money into supreme court campaigns).

183. *See id.* at 41–42.

184. *See generally id.* at 1–108; SKAGGS ET AL., *supra* note 15, at 1–30.

185. *See generally* SAMPLE ET AL., *supra* note 25, at 1–108.

186. *Id.* at 1.

187. *See id.* at 5–22.

188. *Id.* at 1, 8.

189. *See id.* at 6–7 fig.2 (showing graphically that Alabama raised $40,964,590 across forty-five candidates).

190. *Id.* at 6 fig.2.

191. *See id.*

Election watchdogs tracked large expenditures and total fundraising from entities called "Super Spenders."[192] The Brennan 2000–2009 Report tracked the top twenty-nine elections from ten states that had at least one candidate benefitting from more than $1 million in fundraising.[193] The total spending in these twenty-nine elections was $174,514,881,[194] approximately forty percent of which was made by 145 Super Spenders[195] who contributed an average of $473,679 each.[196] Only one of the fifty-five top spenders was an individual, Don Blankenship, the CEO of A.T. Massey Coal Company, who was party to a suit at the time of his contributions.[197] Of the top ten Super Spenders of 2000 to 2009, nine have either business connections to the U.S. Chamber of Commerce, National Association of Manufacturers, or the insurance industry, for example, or connections to a political party.[198] These political spending is reality in many judicial jurisdictions.

Given these figures, the axiomatic conclusion is supported by "[n]umerous polls show[ing] that three in four Americans believe campaign cash affects courtroom decisions."[199] While partisan elections over the decade earned the brunt of the spending at $153.8 million, nonpartisan elections and retention elections maintained a much quieter presence, raising $50.9 million and $2.2 million over the decade, respectively.[200] Of note, Iowa is mentioned once in the 2010 Brennan Report,[201] and only as being ranked among the top five best states by the U.S. Chamber of Commerce according to litigation climate.[202]

C. *Remarkable Spending Patterns From 2010 to 2011*

The Brennan Center published an updated report on state judicial election spending in October 2011, documenting changes that occurred in the previous election year.[203] Whether viewing the tremendous increase in

192. *See id.* at 9–11.
193. *Id.* at 9.
194. *Id.* at 11 fig.4.
195. *See id.* at 10 fig.4 (noting that 145 Super Spenders spent $68,683,472 total).
196. *Id.* at 10–11 fig.4.
197. *Id.* at 9; *see also supra* text accompanying notes 169–80.
198. SAMPLE ET AL., *supra* note 25, at 13 fig.6.
199. *Id.* at 9.
200. *Id.* at 14 fig.7.
201. *See id.* at 106.
202. *Id.* at 74.
203. SKAGGS ET AL., *supra* note 15, at 1–30.

retention election spending,[204] the entrance of new Super Spenders,[205] or the drastic increase in legislative attempts to limit state judiciaries,[206] this new report carries a concerning message. Coming off a decade in which total retention spending was $2.2 million,[207] spending in retention elections in 2009–2010 set an eclipsing precedent of $2.8 million for a single election cycle in which retention candidates in Alaska, Colorado, Illinois, and Iowa faced opposition.[208] Nonpartisan election spending remained nearly constant, at $5.6 million, and partisan election spending, on average, dropped to approximately $18.5 million.[209] Following the path paved by *Citizens United*, independent parties' PACs, not affiliated with candidates, accounted for almost thirty percent of the spending in these elections—an increase from eighteen percent in the previous cycle.[210]

Iowa felt the most drastic changes in spending; special interest groups spent more than $1 million on the supreme court retention election.[211] This number is even striking when placed against a backdrop of zero campaign spending in Iowa during the previous decade.[212] This increase earned Iowa a spot in the top ten states for total spending in the 2009–2010 election cycle, for the first time.[213] Another newcomer to the top rankings, the National Organization for Marriage (NOM), made the report's Super Spender list with independent expenditures of $635,000, all made in Iowa.[214] Groups pushing for a "no" retention vote, in addition to NOM, include: American Family Association Action ($171,225), Campaign for Working Families ($100,000), Family Research Council Action ($55,997), Citizens United Political Victory Fund ($17,823), and Iowa Family Policy Center Action ($10,178).[215] Somewhere in these amounts also resides an alleged $150,000 connected with 2012 Republican presidential candidate

204. *See id.* at 7–8.
205. *See id.* at 6.
206. *See id.* at 21.
207. SAMPLE ET AL., *supra* note 25, at 14 fig.7.
208. SKAGGS ET AL., *supra* note 15, at 7.
209. *Id.*
210. *Id.* at 3.
211. *Id.* at 10; *see* Casey, *supra* note 16.
212. SKAGGS ET AL., *supra* note 15, at 8.
213. *Id.* at 5.
214. *Id.* at 6. *But see* Kevin McNellis, *Independent Spending in Iowa, 2006–2010*, NAT'L INST. ON MONEY ST. POL. (Oct. 27, 2011), http://www.followthemoney.org/press/ReportView.phtml?r=464 (listing NOM expenditures in 2010 at $721,708).
215. McNellis, *supra* note 214, at tbl.5.

Newt Gingrich.[216] An independent group advocating for retention, Fair Courts for Us Committee, spent $423,767.[217]

The previous decade was marked by limited spending. The 2009 to 2010 cycle came with surprise and resounding effect accompanied by the huge increases in retention election spending. The changes in the sources of spending provide some answers and more questions regarding the future of the judicial branch.

V. TYING IT ALL TOGETHER

A. *Iowa Reluctantly Takes the Stage*

As mentioned, the 2000–2009 Brennan Report discussed Iowa only once, referencing the state's friendly litigation climate.[218] As a microcosmic illustration of the change that occurred in a year, the 2009–2010 Brennan Report mentions Iowa fifty-three times.[219] Before 2010, only four Iowa judges had been removed in retention elections.[220]

In the 2010 retention elections, Justices Ternus, Baker, and Streit refused to accept campaign donations and refused to campaign on their own behalf, insisting that refusal to campaign was the only way to remain true to the promises of judicial impartiality.[221] It is axiomatic that campaigning for election is anathema to judges who are sworn to impartiality and fairness.[222] National attention is now focused on the unseated justices who received the John F. Kennedy Profile in Courage Award,[223] which honors public servants who "choose principles over

216. *See* Tom Witosky & Jens Manuel Krogstad, *Gingrich Group Gave to Effort Against Justices*, DES MOINES REG., Mar. 16, 2011, at 1A, 12A.

217. McNellis, *supra* note 215, at tbl.5.

218. *See supra* text accompanying notes 202–03.

219. *See* SKAGGS ET AL., *supra* note 15, at 1–30.

220. Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, A.B.A. J. (Jan. 1, 2011), http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/ (quoting Albert Kumpp, a national leading academic researcher on judicial retention from McDermott Will & Emery in Chicago).

221. *Iowa Chief Justice Won't Fight Ouster Campaign*, WCF COURIER (Oct. 1, 2010), http://www.wcfcourier.com/news/local/govt-and-politics/article_69d7d87e-cd54-11df-8f23-001cc4c002e0.html (noting that the three ousted justices "[did]n't want to set an example for judges by campaigning and raising money").

222. *See* O'Connor, *supra* note 34, at 486, 489; Uhlenhopp, *supra* note 41, at 58–62.

223. *See* Jason Clayworth, *Iowa's Three Ejected Supreme Court Justices Win*

partisanship" and demonstrate "courageous leadership."[224]

The amounts spent in Iowa in 2010 were astronomical when compared with past spending in Iowa.[225] When taken in context of other retention elections and other elections generally, however, those opposing retention got their desired result at bargain-basement prices. Spending an average of just over $300,000 per seat,[226] the opposition drove record-high numbers[227] to vote in the retention election.[228] These efforts caused a sway in the retention vote percentages from a historical average of seventy percent in favor of retention,[229] to only forty-five percent in 2010.[230]

The number of Iowans voting in the retention election as compared to other elections also skyrocketed. The 2000 election saw a voter roll-off between the presidential election and the Iowa retention election of almost forty-two percent.[231] In 2002 and 2004 there was a roll-off of thirty-nine percent,[232] while 2006 saw a forty-one percent roll-off,[233] and 2008 saw a

'Most Prestigious' National Award, DES MOINES REG. (Mar. 6, 2012), http://blogs.desmoinesregister.com/dmr/index.php/2012/03/06/iowas-three-ejected-supreme-court-justices-win-most-prestigious-national-award/.

224. *Profile in Courage Award*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, http://www.jfklibrary.org/Events-and-Awards/Profile-in-Courage-Award.aspx (last visited Apr. 30, 2012).

225. *See* SKAGGS ET AL., *supra* note 15, at 8.

226. *See id.* at 10 (noting about $1 million was spent in total).

227. Todd Dorman, *Retentionageddon—It's Official*, THE GAZETTE (Nov. 29, 2010), http://thegazette.com/2010/11/29/retentionageddon-its-official/ (comparing the total number of voters with the number of voters actually voting on the retention portion of the ballot).

228. *See Statewide Election Results*, DES MOINES REG., http://data.desmoinesregister.com/dmr/iowa-elections/ (last visited Apr. 22, 2012) (providing the total yes-no breakdown in votes for each justice).

229. Curriden, *supra* note 220.

230. SKAGGS ET AL., *supra* note 15, at 8.

231. Voter roll-off refers to the percentage of votes cast in the election that voted for certain, typically more prestigious offices, but failed to cast a vote on other offices despite being on the same ballot. In 2000, 1,315,563 votes were cast in the presidential election. IOWA SEC'Y OF STATE, NOVEMBER 7, 2000—GENERAL ELECTION: IOWA OFFICIAL RESULTS, PRESIDENT AND VICE PRESIDENT 3 (2000), *available at* http://sos.iowa.gov/elections/pdf/2000%20G%20PresVp.pdf. Compare this to an average of 764,486 votes in the Iowa Supreme Court retention election. *See* IOWA SEC'Y OF STATE, JUDGES OF THE IOWA SUPREME COURT GENERAL ELECTION, NOVEMBER 7, 2000, at 2 (2000), *available at* http://sos.iowa.gov/elections/pdf/results/2000s/2000judretention.pdf.

232. In 2002, the Iowa governor's race received 1,025,802 votes. IOWA SEC'Y OF STATE, 2002 GENERAL ELECTION, GOVERNOR/LIEUTENANT GOVERNOR 4 (2002),

thirty-eight percent roll-off.[234] The roll-off in 2010, however, was a mere thirteen percent of the number who voted in the gubernatorial election.[235] Thus, the removal of Justices Ternus, Baker, and Streit sends a message that "money talks"—loudly.[236]

B. *Looking Down the Line*

Examining the events of 2010 with the perspective of *White*, *Citizens United*, and *Caperton*, there are myriad issues that surround judicial campaign speech, judicial and independent fundraising, and calls for judicial recusal. In the next judicial retention election, if a group gives money to a PAC that supports retention, will each retained justice need to recuse himself[237] from hearing any action brought by or represented by a

available at http://sos.iowa.gov/elections/pdf/2002/results/GovernorCanvass.pdf. Compare that figure to an average 628,496 votes per judicial candidate in the Iowa Supreme Court and an average of 619,568 votes per judicial candidate for the Iowa Court of Appeals retention election in 2002. *See* IOWA SEC'Y OF STATE, JUDICIAL CANVASS SUMMARY 2, at 4 (2002), *available at* http://sos.iowa.gov/elections/pdf/2002/results/JudicialCanvassSummary.pdf. Of note, the 2002 election was Justice Ternus's and Justice Streit's most recent retention election before 2010.

In 2004, 1,506,908 votes were cast in the presidential election. IOWA SEC'Y OF STATE, CANVASS SUMMARY, 2004 GENERAL ELECTION 3 (2004), *available at* http://sos.iowa.gov/elections/pdf/2004/general/CanvassSummary.pdf. The retention election averaged 919,855 votes per Iowa Supreme Court candidate. *See* IOWA SEC'Y OF STATE, JUDICIAL CANVASS SUMMARY, 2004 GENERAL ELECTION 2 (2004), *available at* http://sos.iowa.gov/elections/pdf/2004/general/JudicialCanvassSummary.pdf.

233. In 2006, the gubernatorial election garnered 1,059,064 votes. IOWA SEC'Y OF STATE, OFFICIAL RESULTS REPORT—STATEWIDE 12 (2008), *available at* http://sos.iowa.gov/elections/pdf/results/offResultsGovLtGov.pdf. The statewide retention election for three court of appeals judges averaged 642,229 votes. *See* IOWA SEC'Y OF STATE, OFFICIAL MEASURES RESULTS, ELECTION: 2006 GENERAL ELECTION 3, 5, 8 (2006), *available at* http://sos.iowa.gov/elections/pdf/JudResults.pdf.

234. In 2008, 1,543,662 Iowans voted in the presidential election. IOWA SEC'Y OF STATE, STATE OF IOWA CANVASS SUMMARY, NOVEMBER 4, 2008 GENERAL ELECTION 5 (2008), *available at* http://sos.iowa.gov/elections/pdf/2008/OfficialCanvass2008General.pdf. On average, 948,358 voted in the Iowa Supreme Court retention election. *See id.* at 70, 74, 78.

235. In 2010, 1,133,430 Iowans voted for governor. IOWA SEC'Y OF STATE, OFFICIAL RESULTS REPORT 5 (2010), *available at* http://sos.iowa.gov/elections/pdf/2010/govorr.pdf. An average of 984,280 voted in the supreme court retention election. *See* IOWA SEC'Y OF STATE, OFFICIAL RESULTS REPORT (2010), *available at* http://sos.iowa.gov/elections/pdf/2010/judicialorr.pdf.

236. *See* SKAGGS ET AL., *supra* note 15, at 9.

237. "Herself" is not a current possibility in Iowa.

member of that PAC or its affiliates? Given the state's lack of judicial campaigning, one can see how amounts far less than those spent in *Caperton* may lead to motions for recusal. Even if such motions are not granted, how will public perception of impartiality be affected? The perception of bias has a partner in the perception of gamesmanship. "When litigants and attorneys with . . . interests fund judicial campaigns, the perception (if not the actuality) of improper influence leads people to believe that justice is for sale."[238] For example, imagine a conservative organization donating to a perceived liberal judge, or vice versa, to ensure recusal. Even if recusal is ultimately found to be unwarranted, the motions "gum up the works" of the court, destroy judicial efficiency, and provide additional ammunition for those attempting to establish bias.[239] Motions for disqualification have been labeled "a recipe for havoc"[240] whether in a state providing a specific, "'bright-line test, or a "stick-your-finger-in-the-air"'" standard for contribution limits amounting to recusal.[241]

Likewise, judicial campaigning and fundraising in Iowa can only have a negative impact on the population's view of the state judiciary. Studies detail decreased confidence in the impartiality of judicial decisions when judicial elections are politicized by fundraising efforts.[242] These need not be explored in this Article, but the interest at stake when judicial spending and campaigning is increased is summed up by Justice O'Connor's discussion on the power of the courts: "[C]ourts wield the power of the quill. The judicial power lies in the force of reason and the willingness of others to listen to that reason."[243] Future politicized retention elections will erode public perception of our courts, causing promises of fairness and impartiality to be viewed with disbelief.

With the 2012 presidential elections upon us, we already see the effect *Citizens United* has on popular elections. Candidates have unaffiliated

238. Belsky, *supra* note 86, at 161.

239. John Gibeaut, *Show Me the Money: States and the ABA Try to Figure Out When Campaign Cash Adds Up to a Judge's Recusal*, A.B.A. J., Mar. 2010, at 48, 54.

240. *Id.* (quoting Iowa District Court Judge Annette Scieszinski).

241. *See id.* at 53 (quoting Georgia Supreme Court Justice Harold D. Melton).

242. *See* Press Release, The Annenberg Pub. Pol'y Ctr. of the Univ. of Pa., Americans Overwhelmingly Favor Election of Judges but Disapprove of Judicial Campaign Fund-Raising, Fearing It Affects Fairness (May 23, 2007), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_KHJ_JudicialCampaignFunds20070523/jamieson_judicialelectionsurvey_factcheckconfFINALFINAL.pdf.

243. O'Connor, *supra* note 34, at 489.

PACs pumping the airwaves and Internet with pro- or anti-candidate messages.[244] Iowa, given its first-in-the-nation caucus, will continue to be a battlefield for these interests. The "failure" of the 2010 retention election lies in the precedent of the power of campaign spending, not just in the loss of three qualified justices. In the wake of that failure is opportunity, the reduced voter roll-off means more Iowans are open to thinking about Iowa courts, their purpose, and how the courts balance our democratic government. Now is the time to use that open door to show Iowans around the courtroom and to promote an understanding of Iowa courts' purpose and the need for their protection in order to maintain the impartiality of the court system.

C. *Abuse of the Great Merit System/Retention Election Compromise*

Finally, intolerance veiled with religious overtones motivated many Iowans opposing same-sex marriage to equate such opposition with a "no" retention vote.[245] Despite murmurs by individual spokespersons for the groups, the driving motivation for the ouster of the justices was one unpopular decision.[246] The ousted judges were nominated by different judicial commissions and were appointed by governors from different parties.[247] There is no one factor in common between the justices other

244. *See* Jennifer Jacobs, *Super PAC Paid Founder's Other Company $1.26 Million*, DES MOINES REG., Feb. 24, 2012, at 1A, 7A (providing a look into where the money comes from and what messages the money is promoting); Jennifer Jacobs & Jeffrey C. Kummer, *Superpowered Spending*, DES MOINES REG., Feb. 26, 2012, at 1A, 11A (discussing how Republican candidates used, not necessarily successfully, Super PACs to cause a downfall of their opponents).

245. *See* Jennifer Jacobs, *Confidential Memos Reveal Strategies to Fight Same-Sex Marriage in Iowa*, DES MOINES REG. (Apr. 2, 2012), http://blogs.desmoinesregister.com/dmr/index.php/2012/04/02/confidential-memos-reveal-strategies-to-fight-same-sex-marriage-in-Iowa (stating that the National Organization for Marriage fought against same-sex marriage "'just hours after'" the decision in *Varnum v. Brien*).

246. *See* DAVID BINDER RESEARCH, SUMMARY FINDINGS FROM IOWA DISCUSSION GROUPS 5 (2010) (on file with author) (summarizing report of the motivation behind individuals voting not to retain the Iowa Supreme Court Justices in 2010); SELZER & CO., STUDY # 2001, at 1 (2010) (on file with author) (surveying Iowa voters' likely decisions on retaining the Iowa Supreme Court Justices in 2010 and indicating seventy-three percent of voters thought the election was their chance to voice disagreement with the *Varnum* decision).

247. *See* Erika Binegar, *Culver Appoints Justice from C.R.: All Other Justices Are from Central, Western Iowa,* THE GAZETTE (Apr. 5, 2008), 2008 WLNR 6430275 (noting that Governor Culver appointed Justice Baker to the Iowa Supreme Court); *Streit Appointed to Supreme Court*, IOWA BENCH PRESS (Iowa Judicial Branch), July–

than the *Varnum* decision. This single-issue focus by "religious" and political zealots is again falling on our supreme court, with the recently renewed efforts to oust Justice Wiggins through the November retention vote.[248]

Historically, leaders who were most detested when deposed were individuals who gained power and popularity riding waves of intolerance and religious support. Surges of power impede efforts to protect minority groups from intolerance.[249] In our democratic government, the protectors of our constitutional rights are the courts and their impartial judges, regardless of race, class, or political party.[250] Separating courts from political and financial influence ensures equal and impartial justice for *all*.[251]

Aug. 2001, at 1, *available at* http://www.iowacourtsonline.org/wfdata/frame11617-1698/File25.pdf (noting that Governor Vilsack appointed Justice Streit); Rod Pritchard, *Iowa Supreme Court Chief Justice Marsha Ternus to Speak at Coe*, COE COLL., http://www.coe.edu/news/162/716/Iowa-Supreme-Court-Chief-Justice-Marsha-Ternus-to-speak-at-Coe (last visited Apr. 30, 2012) (noting that Governor Branstad appointed Justice Ternus).

248. Jason Noble, *Wiggins Must Go, Too, Foes Say,* DES MOINES REG. (Aug. 12, 2012), http://www.desmoinesregister.com/proart/20120812/news09/308120038/iowa-supreme-court-s-wiggins-must-go-too-foes-say?archive&pagerestricted=1.

249. *See* THE FEDERALIST NO. 10, *supra* note 4, at 77 (James Madison) (discussing the threat of political factions taking control in a democracy and governing by an "interested and overbearing majority" instead of the "rules of justice" and the rights of all). For example, one needs only to look to the Crusades, the Inquisition, or the rise of Nazism in post-World War I Germany to see how popular and religious support can quell rights of a minority group. For a more contemporary example, one can look at the theocratic change in government that happened in Iran in the late 1970s, when clerics pushed to overthrow a government seen as overbearing and overly friendly to the western world, only to replace that government with an overbearing and rights-choking theocracy. *See generally* SAID AMIR ARJOMAND, THE TURBAN FOR THE CROWN: THE ISLAMIC REVOLUTION IN IRAN 3 (Bernard Lewis et al. eds., 1988) ("explain[ing] the Islamic revolution of 1979 in Iran and . . . assess[ing] its significance in world history"); Shaul Bakhash, *Iran*, 96 AM. HIST. REV., Dec. 1991, at 1479–96 (summarizing and breaking down the debate scholars have created to figure out how and why the conflict in Iran arose).

250. *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 32, at 3–4 (explaining the judiciary is to protect society from the unconstitutional exercise of legislative and executive power, and is to be fair and impartial); THE FEDERALIST No. 79, *supra* note 4, at 469 ("[I]ndependence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people . . . .").

251. *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 32, at 3–5.

In the months prior to the 2010 retention election, opponents of retention, figureheaded by Bob Vander Plaats, maintained a pointed message underwritten by intolerance and fundamentalism.[252] This occurred at a time when Iowa observed increasing activity of numerous coalitions, economic struggles, and entrenched partisan fighting in the legislature.[253] These groups garnered national and local attention from pundits and politicians.[254] This publicity, coupled with multiple discussions and images of same-sex marriage, kept the limelight on Vander Plaats.[255] Other political figures avoided the issue; Governor Terry Branstad eschewed association with Vander Plaats and took a more populist position on judicial elections, calling for judicial restraint.[256] Vander Plaats adopted

252. *See* Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715, 726–29 (2011) (providing the background on why Bob Vander Plaats became involved in the 2010 election and how his allies grew quickly and forcefully).

253. A high fight and shift in political power from liberal to conservative occurred at the state and national level. Dennis Cauchon, *In State Capitols, GOP Engineers Historic Shift*, USA TODAY (Nov. 4, 2010), http://www.usatoday.com/news/politics/2010-11-04-legislatures04_ST_N.htm. The state and nation were also recently hit with the mortgage crisis. *See generally* KATALINA M. BIANCO, THE SUBPRIME LENDING CRISIS: CAUSES AND EFFECTS OF THE MORTGAGE MELTDOWN (2008), *available at* http://www.business.cch.com/bankingfinance/focus/news/subprime_wp_rev.pdf. January 2010 also saw the controversial United States Supreme Court decision *Citizens United* handed down. *See* Citizens United v. FEC, 130 S. Ct. 876 (2010) (allowing corporate expenditures without limit in elections).

254. *See, e.g.*, Tyler Kingkade, *Culver, Vander Plaats Agree About Branstad*, IOWASTATEDAILY.COM (Feb. 8, 2011) [hereinafter Kingkade, *Culver*], http://www.iowastatedaily.com/news/election/article_6562f10c-e5e1-11df-93e0-001cc4c03286.html (discussing Vander Plaats's encouragement of Branstad to speak out in support of Iowa for Freedom's efforts, like Minnesota Governor Tim Pawlenty and Newt Gingrich); Tyler Kingkade, *Citizens United, Huckabee Target Iowans over Judicial Retention Vote*, IOWASTATEDAILY.COM (Feb. 8, 2011), http://www.iowastatedaily.com/news/article_27bfe720-e536-11df-9c40-001cc4c03286.html (noting *Citizens United*'s use of former Arkansas Governor Mike Huckabee's voice in robo-call to 250,000 Iowans encouraging them to vote out the Iowa Supreme Court justices); Tyler Kingkade, *Gay Rights Activists Track 'Extremist' Bus Tour Against Iowa Judges*, IOWASTATEDAILY.COM (Feb. 8, 2011), http://www.iowastatedaily.com/news/article_637add86-e07e-11df-9f47-001cc4c002e0.html (describing Representative Steve King's remarks to a rally held by the Family Research Council and the National Organization for Marriage).

255. *See* Pettys, *supra* note 252, at 727–29 (discussing Vander Plaats's involvement in the anti-retention efforts in Iowa and noting his allies had religious undertones in providing their support, which only continued to grow).

256. *See* Kingkade, *Culver*, *supra* note 254 ("'I think people should vote their

Varnum early on as his cause *célèbre*, wielding it as a battle flag to promote his agenda.[257] This obvious manipulation of Iowa's retention election process provided Vander Plaats with a pulpit and a pay check.[258]

Rhetoric in the 2010 election stayed on a consistent message, using clichéd terms of "judicial activism"[259] and "legislating from the bench."[260] Though numerous definitions of judicial activism exist, Vincent Martin Bonventre of Albany Law School succinctly defined judicial activism as an "expansive interpretation [of law], or the rejection of legislative or executive action, or the overruling of longstanding precedent."[261] As Bonventre recognizes, judicial restraint would be defined as the opposite of each of the before-mentioned judicial actions.[262] With these definitions in mind, we also borrow from Bonventre's inquiry into whether judicial activism is to be avoided and whether judicial restraint is always right.[263] Without judicial activism, we would be without the groundbreaking opinions of[264] *Brown v. Board of Education*,[265] *McCulloch v. Maryland*,[266]

own convictions on these issues. . . .' 'I'm not going to try to influence the way they vote on ballot issues.'" (quoting Governor Terry Branstad)).

257. *See* Pettys, *supra* note 252, at 724–25 ("Vander Plaats . . . placed his opposition to *Varnum* at the center of his primary campaign . . . .").

258. *See* Mischa Olson, *Retention Vote Was Abused*, IOWASTATEDAILY.COM (Oct. 6, 2011), http://www.iowastatedaily.com/opinion/article_103cd25e-e84f-11df-8dfa-001cc4c002e0.html ("This ridiculous campaign was not at all about the character or overall quality of the judges' performance, which is the purpose of the periodic statewide vote on judicial intention. Instead it was an attack on the [*Varnum*] decision . . . ."); *Iowa Conservative Leader Mired in Controversy After Rick Santorum Endorsement*, ABC NEWS, Dec. 23, 2011, http://abcnews.go.com/blogs/politics/2011/12/iowa-conservative-leader-mired-in-controversy-after-rick-santorum-endorsement/.

259. *See, e.g.*, SKAGGS ET AL., *supra* note 15, at 9 (providing a quote from a television advertisement using "judicial activism" as a scare tactic).

260. *See, e.g.*, Rod Boshart, *Vander Plaats Explains Push to Vote Out Justices*, WCF COURIER (Sept. 10, 2010), http://www.wcfcourier.com/news/local/govt-and-politics/vander-plaats-explains-push-to-vote-out-justices/article_44e11276-bd1c-11df-9a86-001cc4c03286.html (quoting Vander Plaats using this phrase to appeal to voters).

261. Vincent Martin Bonventre, *Judicial Activism, Judges' Speech, and Merit Selection: Conventional Wisdom and Nonsense*, 68 ALB. L. REV. 557, 564 (2005).

262. *See id.*

263. *See id.* at 563–74 (providing a thorough analysis of the prominent judicial cases of the past decades, yet noting "it is also undoubtedly true that judicial activism does not guarantee a time-honored landmark, and judicial restraint hardly insures disaster").

264. *See id.* at 564–69, 572.

265. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (providing racial segregation using "separate but equal" facilities is unconstitutional).

Reed v. Reed,[267] *United States v. Nixon*,[268] and *West Coast Hotel Co. v. Parrish*,[269] not to mention those that applied the Bill of Rights to the states through the Fourteenth Amendment.[270] Likewise, "judicial restraint" provided us opinions, such as[271] the *Slaughterhouse Cases*,[272] *Plessy v. Ferguson*,[273] *Korematsu v. United States*,[274] and *Bowers v. Hardwick*.[275]

While these examples are telling, there are also examples demonstrating the error of judicial activism and the place for judicial restraint in the jurisprudence of our states or our country.[276] We should demand more than empty, rhetorical terms when discussing our judicial branch. In the past election cycle red herrings gave way to misinformation, including the widely held belief that the justices should follow popular opinion and that they made a law.[277] The empty terms are even more dangerous when the electorate is not educated to the actual proceedings. We owe greater attention to civic education from classroom to ballot box. We first failed in educating ourselves as to the role of the court.

266. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (using the strength of the Necessary and Proper Clause to deny states the power to tax a federally chartered bank).

267. Reed v. Reed, 404 U.S. 71 (1971) (finding an Equal Protection violation in the dissimilar treatment of men and women in a state probate statute).

268. United States v. Nixon, 418 U.S. 683 (1974) (denying the executive's request to quash a Watergate subpoena and limiting federal executive privilege).

269. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding federal legislation regulating businesses and overturning previous precedent).

270. Nearly all the guarantees in the Bill of Rights have been incorporated and apply to the states through the Due Process Clause of the Fourteenth Amendment, protecting citizens from both federal and state infringement. Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 569 (1998).

271. *See* Bonventre, *supra* note 261, at 569–70.

272. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (narrowly interpreting the Fourteenth Amendment to apply only to the privileges and immunities of United States citizenship and not to state citizenship).

273. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding state law providing "separate but equal" racially segregated facilities in public spaces).

274. Korematsu v. United States, 323 U.S. 214 (1944) (holding that the internment of Japanese–Americans in camps during World War II was constitutional).

275. Bowers v. Hardwick, 478 U.S. 186 (1986) (finding a Georgia criminal sodomy law constitutional as applied to consenting adult actions in private).

276. *See* Bonventre, *supra* note 261, at 563–74 (discussing these and other cases).

277. BINDER, *supra* note 246, at 17; SELZER & CO., *supra* note 247, at 1.

Iowans and Americans must be mindful of past patterns when intolerance leads a political charge.[278] Recalling the most stark historical examples of unrestrained executive power and of intolerance subverting democracy should be the first step in strategizing defense of an attack on a branch of government.[279] Many were disappointed that Iowa voters succumbed to the political messages of 2010.[280] Iowa is a "grassroots" state. Individual judges and lawyers can become more visible and can "get out into the community."[281] The additional lesson of the 2010 election is that we have a duty to provide increased civic understanding and education as attorneys, as judges, and as citizens.

Chief Justice Cady recently stated he was "very concerned" for the upcoming November 2012 election, as four members of the court would be on the ballot for retention.[282] Three of the justices up for retention, Justices Mansfield,[283] Zager,[284] and Waterman,[285] are recent appointments. The

278. "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, THE LIFE OF REASON 82 (1998).

279. Germany fell victim to a fascist dictator at a time when the country was divided, the economy was struggling, none of the political coalitions held a majority, and the legislature frequently stalled on issues. A candidate's strong message, including specific hate-fueled goals, used strong nationalism as a binding factor. This led to the rising escalator of suppressing civil rights, and then, executive orders led to declaring citizenship for an elite few and non-citizenship status for everyone else. *See Adolf Hitler*, HISTORY.COM, http://www.history.com/topics/adolf-hitler (last visited Apr. 22, 2012).

280. *See, e.g.*, Olson, *supra* note 258; Ian Bartrum, *Iowa Justices Shaken, But Not Bowed by Retention Vote Outcome*, AM. CONST. SOC'Y FOR L. & POL'Y (Dec. 7, 2010), *available at* http://www.acslaw.org/acsblog/all/iowa-retention-vote (labeling the vote as "disappointing").

281. *See* Marc Hansen, *Hansen: Judges Call Expert Witness in Bid to Keep Jobs*, DES MOINES REG. (Dec. 6, 2010), http://www.desmoinesregister.com/article/20101207/NEWS03/12070335/1001/.

282. O. Kay Henderson, *Chief Justice "Very Concerned" About November's Retention Election*, RADIO IOWA (Feb. 24, 2012), http://www.radioiowa.com/2012/02/24/chief-justice-very-concerned-about-novembers-retention-election/.

283. *Justice Edward M. Mansfield*, IOWA JUD. BRANCH, http://www.iowacourts.gov/Supreme_Court/Justices/Edward_Mansfield/ (last visited Apr. 30, 2012).

284. *Justice Bruce B. Zager*, IOWA JUD. BRANCH, http://www.iowacourts.gov/Supreme_Court/Justices/Bruce_Zager/ (last visited Apr. 30, 2012).

285. *Justice Thomas D. Waterman*, IOWA JUD. BRANCH, http://www.iowacourts.gov/Supreme_Court/Justices/Thomas_D_Waterman/ (last visited Apr. 30, 2012).

fourth, Justice Wiggins,[286] joined the unanimous *Varnum* opinion[287] and has been promised opposition by the same forces behind the "No No No" campaign in 2010.[288] The Authors share Chief Justice Cady's concern. Merit selection and retention were designed to remove the influence of politics from the judicial selection process; a fissure has developed. As in judicial elections, those with money and influence now see an opening through which they wedge PAC money and ultimately influence the decision of who sits on our courts. Iowans must bar the influence of political money in the courtrooms.

VI. CONCLUSION

It is fundamental to the intent of the framers—who saw well beyond their lifetimes—that judges are not elected.[289] The system was designed for checks and balances.[290] Judges should weigh evidence and interpret law. It seems evident that judges should not run opinion polls or meet lobbyists. Any weighing of popular or political opinion is contradictory to the judicial system that the Founders envisioned. Furthermore, following political trends weakens the protection for individual rights and liberties. "More than 95% of the country's judicial business is . . . conducted in state courts. . . ."[291] The skills needed to "administer justice without respect to persons, and do equal right to the poor and to the rich"[292] are not the same

286. *Justice David Wiggins*, IOWA JUD. BRANCH, http://www.iowacourts.gov/Supreme_Court/Justices/David_S_Wiggins/ (last visited Apr. 30, 2012).

287. *See* Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009).

288. *See* Jennifer Jacobs, *Iowa Supreme Court Justice David Wiggins Will See Effort to Oust Him, Branstad Says*, DES MOINES REG. (Apr. 15, 2011), http://blogs.desmoinesregister.com/dmr/index.php/2011/04/15/iowa-supreme-court-justice-david-wiggins-will-face-branstad-says (providing that Governor Branstad expects opposition to Justice Wiggins). And, in fact, that opposition has reared its ugly head with Vander Plaats again at the rein. *See* Jason Noble, *Wiggins Must Go, Too, Foes Say,* DES MOINES REG. (Aug. 12, 2012), http://www.desmoinesregister.com/proart/20120812/news09/308120038/iowa-supreme-court-s-wiggins-must-go-too-foes-say?archive&pagerestricted=1.

289. *See* THE FEDERALIST No. 10, *supra* note 4 (emphasizing the importance of an appointed, life-tenured, independent judiciary).

290. *See* THE FEDERALIST NO. 51, *supra* note 4, at 320 (James Madison) (providing that the key for the government to work is to have them "keep[] each other in their proper places").

291. AM. COLL. OF TRIAL LAWYERS, *supra* note 32, at 5 (citing Randall T. Shepard, *Electing Judges and the Impact on Judicial Independence*, 42 TENN. BAR J. 22FF (2006)).

292. 28 U.S.C. § 453 (2006).

as those needed to campaign for an office. The skills and desires of a politician are in conflict with the oath taken by judges and justices provide fair and impartial courts in a democracy. Democratic representation is fundamental to all levels of state and federal government. The balance of the judiciary is also fundamental to all levels of government.

Money will continue to flow as long as it is given influence in our judiciary. We cannot fight money with money; each dollar adds to the divide. First, the bar and the judiciary must work together to increase civic education from grade school to graduate school. If pro-retention commercials only fight anti-retention commercials, we are just increasing the polarization and teaching an electorate to make decisions based on sound bytes. Only education can provide a solid surface from which the judiciary may be protected. Justice O'Connor nationally,[293] and we locally,[294] push for greater civic education in our schools and communities.

Second, some money must get in the fight. It is necessary to simply repel the misinformation. The most grossly misleading information must be countered. Distributing information is a challenge; more people will watch the political commercials that will run during re-runs of *The Bachelor*[295] than will read this Article.

Third, the current judiciary must be funded. The most insidious attack on the judiciary is the one that takes place by slowly draining resources from the third branch of government with the intention of obfuscating the process and creating dissension among voters who are denied swift justice. Constituents must understand the importance of demanding court funding.

As interested citizens and past, current, and aspiring members of the bar, it is our duty to share words that were penned a half-century ago by Judge Uhlenhopp: "Absolute objectivity is not attainable in this world."[296]

293. Kerry Hannon, *Rebooting Civic Education with Sandra Day O'Connor*, FORBES (Dec. 2, 2011), http://www.forbes.com/sites/kerryhannon/2011/12/02/rebooting-civic-education-with-sandra-day-oconnor/ ("Justice O'Connor is atop her new bench speaking out about ways to make civics and government more appealing to school kids than it was for her growing up . . . .").

294. *See* ICIVICS, http://www.icivics.org/ (last visited Apr. 30, 2012) (providing tools to teach young Americans civic knowledge through participation in games and interactive activities).

295. *The Bachelor* (ABC television broadcast), *available at* http://www.abc.go.com/shows/the-bachelor.

296. Uhlenhopp, *supra* note 41, at 56.

We must strive to "eliminate as much judicial dependence as possible" through support for merit selection and Iowa's judiciary.[297]

297. *Id.*