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CONSTITUTIONAL RIGHTS AND JUDICIAL INDEPENDENCE: LESSONS FROM IOWA

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As was true across the country, the elections held in Iowa this past November were tough on incumbents. In Iowa, however, it was not just legislative and executive candidates that fell at the hands of an angry and confused electorate—three members of the state supreme court also lost their jobs after a controversial and closely contested judicial retention election.¹ Iowa, like several other states, has adopted a version of the Missouri Plan of merit-based judicial selection, in which the justices of the supreme court appear periodically on the statewide ballot for a retention vote.² This year, that vote was held in the shadow of the court's controversial opinion in *Varnum v. Brien*, in which the justices unanimously struck down the state's ban on same-sex marriage.³ In response, a coalition of socially conservative Iowans, under the loose leadership of former high school principal Bob Vander Plaats, mounted a vigorous campaign to oust those justices that happened to be up for retention.⁴ With the aid of a tremendous influx of out-of-state money, Vander Plaats's efforts succeeded in unseating Chief Justice Marsha Ternus and Justices Michael Streit and David Baker.⁵ All three were talented jurists and dedicated public servants, and their departure is a profound loss to the state. With that said, I think it is important to consider ways to restructure and improve a judicial retention process that badly failed Iowans in 2010.

To begin, it is worth briefly recounting the story of the 2010 retention campaign in Iowa. In 1998, the Iowa Legislature revised the state's

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1. Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REG., Nov. 3, 2010, at A1, available at <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices> [hereinafter Schulte, *Iowans Dismiss*].

2. IOWA CONST. art. V, §§ 16–17.

3. *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009).

4. Dave Dreeszen, *Vander Plaats Shakes Off Gubernatorial Losses, Leads Fight to Oust Justices*, SIOUX CITY J., Feb. 1, 2010, at A1, available at http://siouxcityjournal.com/news/local/a1/article_1a7a5957-f0d7-571d-b43b-5117a5652f55.html.

5. Jason Hancock, *Anti-gay Groups Spent \$948,000 in Iowa to Oust Judges*, IOWA INDEP., Nov. 18, 2010, <http://iowaindependent.com/47598/anti-gay-groups-spent-948000-in-iowa-to-oust-judges>; Schulte, *Iowans Dismiss*, *supra* note 1.

marriage statute to affirmatively exclude homosexual couples from the institution.⁶ In April of 2009, the Iowa Supreme Court, speaking unanimously through Justice Mark Cady, struck down the decade-old statutory provision as a violation of the state's equal protection provision.⁷ The decision provoked an immediate backlash among social conservatives, some of whom vowed to take out their anger on the justices at the next retention election. As that election neared, the opportunistic Vander Plaats—a three-time loser in state gubernatorial primaries—seized the chance to promote himself as the public face of the anti-retention movement. National conservative organizations likewise jumped at the opportunity to influence an election that might serve as a warning to other “activist” judges across the country.⁸ The largest out-of-state contributions came from New Jersey's National Organization for Marriage, which put up more than \$635,000 to fund a series of television commercials.⁹ Mississippi's American Family Organization spent another \$140,000 as the sole subsidizer of a group called Iowa for Freedom, and three other groups combined to contribute a total of \$170,000 to anti-retention efforts.¹⁰ With nearly a million dollars in expenditures, the out-of-state organizations overwhelmed the pro-retention efforts of bipartisan groups like the Fair Courts for Us Committee;¹¹ the Iowa State Bar Association;¹² Justice, not Politics;¹³ and Iowans for Fair and Impartial Courts.¹⁴

But the influence of out-of-state money was not the only cause for concern coming out of the campaign. Within the state, several churches—most notably Cornerstone World Outreach in Sioux City—openly pushed their congregations to vote against retention.¹⁵ Notwithstanding the church's tax-exempt 501(c)(3) status, which prohibits nonprofit

6. IOWA CODE § 595.2(1) (2011) (“Only a marriage between a male and female is valid.”).

7. See *Varnum*, 763 N.W.2d at 907.

8. See Dreeszen, *supra* note 4.

9. Hancock, *supra* note 5.

10. *Id.*

11. Hancock, *supra* note 5.

12. Letter from Frank J. Carroll, President, Iowa State Bar Ass'n, to ISBA Member (Aug. 26, 2010), available at http://content.clearchannel.com/cc-common/mlib/1165/08/1165_1283134196.pdf.

13. O. Kay Henderson, *Former Lieutenant Governors Launch “Justice, Not Politics,”* RADIO IOWA (Sept. 27, 2010), <http://www.radioiowa.com/2010/09/27/former-lieutenant-governors-launch-justice-not-politics/>.

14. Grant Schulte, *Iowa Pastor: Churches Will Urge Voters to Remove 3 Justices*, DES MOINES REG., Oct. 11, 2010, at A1, available at <http://www.desmoinesregister.com/article/20101011/NEWS09/10110315/Iowa-pastor-Churches-will-urge-voters-to-remove-3-justices> [hereinafter Schulte, *Iowa Pastor*]. See generally IOWANS FOR FAIR AND IMPARTIAL COURTS, <http://www.learnhowcourts.org/> (last visited Feb. 23, 2011).

15. Schulte, *supra* note 14.

organizations from advocating for or against candidates for office, Cornerstone pastor Cary Gordon openly defied the IRS and threatened to challenge the tax code in federal court.¹⁶ Indeed, Gordon publicly pleaded with God to “allow the IRS to attack my church, so I can take them all the way to the U.S. Supreme Court.”¹⁷ Again, out-of-state organizations such as the Liberty Institute offered to provide free legal representation to help Cornerstone make its case.¹⁸ But to date—despite repeated calls from national groups—the IRS has not investigated the church’s political advocacy.¹⁹ This failure to enforce has been particularly frustrating for other 501(c)(3) groups, such as the Iowa ACLU, who felt restrained from taking a public position during the campaign.²⁰ Meanwhile, the support of Cornerstone and other churches helped Vander Plaats’s anti-retention coalition to vote out the three justices on the ballot. And—perhaps still intoxicated with victory—the former principal likened the remaining justices to “teenagers who flee from a beer party” and called on them to “do the honorable thing [and] share the punishment of their peers” by resigning.²¹

So far, however, the Iowa Supreme Court seems unreceptive to Vander Plaats’s suggestion and, indeed, appears unbowed in the face of the transparent efforts at political intimidation. On December 2, 2010, the remaining justices voted on a new interim chief justice and selected Mark Cady—the author of the *Varnum* opinion—for the position.²² Cady was

16. Michele Linck, *Cornerstone Case Could Prove Costly*, SIOUX CITY J., Oct. 3, 2010, at A1, available at http://www.siouxcityjournal.com/news/local/a1/article_a0ed770c-3d1d-585f-af4a-b6b64a28b5ea.html.

17. Schulte, *Iowa Pastor*, *supra* note 14.

18. Hancock, *supra* note 5.

19. See Molly Montag, *Group Asks IRS to Investigate Cornerstone Church*, SIOUX CITY J., Oct. 1, 2010, at A1, available at http://www.siouxcityjournal.com/news/local/a1/article_856385b5-e1ea-5050-8027-0931ee9f5d39.html.

20. Ian Bartrum, *Iowa Justices Shaken, but Not Bowed By Retention Vote Outcome*, ACSBLOG (Dec. 7, 2010, 6:03 PM), <http://www.acslaw.org/acsblog/node/17848>.

21. See Jennifer Jacobs, *Vander Plaats Compares Iowa Justices to Teens Who Flee A Beer Party*, DES MOINES REG. IOWA POL. INSIDER BLOG (Dec. 23, 2010, 11:54 AM), <http://blogs.desmoinesregister.com/dmr/index.php/2010/12/23/vander-plaats-compares-iowa-justices-to-teens-who-flee-a-beer-party>. It is certainly worth noting that, at the time of this writing, Vander Plaats has also been involved in a movement to impeach the remaining justices. Michael J. Crumb, *Vander Plaats Raises Funds to Remove 4 Justices*, CONN. POST, Dec. 29, 2010, available at <http://www.ctpost.com/news/article/Vander-Plaats-raises-funds-to-remove-4-justices-926415.php>; Rod Boshart, *Vander Plaats Might Back Impeaching Justices*, QUAD CITY TIMES (Dec. 27, 2010), http://qctimes.com/news/local/article_8d495796-0efa-11e0-b7d9-001cc4c03286.html.

22. See Grant Schulte, *Cady to Be Chief of Iowa Supreme Court Until New Justices Selected*, DES MOINES REG. CRIME & CTS. BLOG (Dec. 2, 2010, 1:38 PM), <http://blogs.desmoinesregister.com/dmr/index.php/2010/12/02/cady-to-be-chief-of-iowa-supreme-court-until-new-justices-selected/>.

appointed to the court in 1998 by then governor Terry Branstad, who—in an ironic twist—won his comeback bid for the state’s highest office on the night of the other justices’ ouster.²³ Branstad, for his part, has made disturbing noises about his intentions when appointing replacement justices, reportedly warning the state judicial nominating commission that “[o]nly candidates who respect Iowa voters’ rejection of last year’s same-sex marriage ruling should be considered”²⁴ Still, remaining Justice David Wiggins has publicly said that he believes the current selection process adequately ensures judicial independence.²⁵ Iowa ACLU Director Ben Stone is not so sure, however, and has cautioned that “in a state that doesn’t have an independent judiciary, all of the rights that are at stake in the state courts are up for grabs.”²⁶ On a moment’s reflection, it does seem that there is something problematic about a judicial selection and retention process that allows a simple majority of voters to retaliate against judges who are charged with protecting the constitutional rights of minority groups.

To better understand the structural difficulties that Iowa’s current process presents, it may be helpful to think about the issue in light of Bruce Ackerman’s “dualist” account of American constitutionalism.²⁷ While Ackerman’s model describes the *federal* constitutional system—and state constitutionalism may be different in important ways²⁸—the fundamental structural commitments he reveals are still useful in this context. Ackerman contrasts American constitutional “dualism” with two European alternatives: British “monism” and German “rights foundationalism.”²⁹ Prior to October of 2009, the British “monist” system placed entire constitutional authority in Parliament, which could revisit constitutional rights, if it chose, in keeping with election returns.³⁰

23. *See id.*

24. Jennifer Jacobs, *Branstad: Political Imbalance on Judicial Nominating Commission Needs to Be Corrected*, DES MOINES REG. POL. INSIDER BLOG (Dec. 6, 2010, 4:01 PM), <http://blogsdesmoinesregister.com/dmr/index.php/2010/12/06/branstad-political-imbalance-on-judicial-nominating-commission-needs-to-be-corrected>.

25. *See* Grant Schulte, *Justice Wiggins: ‘I Am Not Going to Second-Guess’ Retention Results*, DES MOINES REG. CRIME & CTS. BLOG (Dec. 2, 2010, 9:41 PM), <http://blogs.desmoinesregister.com/dmr/index.php/2010/12/02/justice-wiggins-i-am-not-going-to-second-guess-retention-results>.

26. *Id.*

27. Bruce Ackerman, *We The People: Foundations* 7 (1991).

28. *See, e.g.*, Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1517–20 (2009) (exploring the democratic payoffs of more permissive amendment processes in state constitutions).

29. *See* ACKERMAN, *supra* note 27, at 7–16.

30. *Id.* at 8. October 1, 2009, marked the opening of the United Kingdom’s Supreme Court,

Conversely, the German “rights foundationalist” model puts certain individual rights entirely beyond legislative reach; the famous “human dignity” provisions remain a stark reminder of destructive demagoguery and the Holocaust.³¹ The American “dualist” model, Ackerman claims, strikes a balance somewhere in between the European alternatives by protecting certain individual rights as part of the “higher law,” while leaving most topics and issues to the whims of “normal politics.”³² In this two-track system, it is the court’s role to preserve the “higher law”—the Constitution—against encroachments by simple legislative majorities, which are empowered only to engage in “normal” lawmaking. Only when popular will has reached a sufficiently high threshold—when the requirements for constitutional amendment are met—must the court yield to the voice of “the People.” Thus, in the “dualist” model, it becomes critical to recognize the difference between the voice of “the People” and that of a snapshot majority of citizens—and to zealously guard the former against intrusions by the latter.

The question that the recent retention election in Iowa highlights is whether a structure that allows a simple majority to intimidate or remove the guardians of the “higher law” undermines our basic constitutional structure. There are certainly those that would say no; the current model simply helps guarantee that a constitutional court will stay within the bounds of a majority consensus about constitutional meaning. But this response, I think, only begs the question. After all, only “the People”—not a passing majority consensus—have authority to speak in constitutional terms. With this in mind, it might seem logical that a successful non-retention vote should require some kind of supermajority, some provision to ensure that our constitutional judges are not subject to the vagaries of “normal politics” and tyrannical majorities. Requiring a supermajority to unseat a sitting justice seems consistent with a “dualist” constitutional structure in that it provides some mechanism to ensure that it is “the People”—not just a reactionary majority (or even a committed minority)—that believe the court has gotten the higher law egregiously wrong. In Iowa, for example, amending the state constitution requires a heightened demonstration of political will: a proposed amendment must win a majority in two consecutive legislative sessions and must then go on the

which, for the first time, transferred ultimate judicial authority away from the House of Lords. *History*, SUP. CT., <http://www.supremecourt.gov.uk/about/history.html> (last visited Feb. 23, 2011). This seems to bring Britain closer to the “dualist” constitutional model.

31. See ACKERMAN, *supra* note 27, at 15.

32. *Id.* at 6–7.

ballot for a popular vote.³³ Knowing they lacked the necessary support for such an amendment, however, Vander Plaats and his supporters took advantage of an easier route: remove (or at least intimidate) judges with a simple majority non-retention vote.

Given how much sense a supermajority requirement seems to make, it is perhaps surprising that more states have not made it a part of their judicial retention structures. Of the thirteen states that have adopted a straightforward version of the Missouri Plan, none require anything more than a simple majority to oust a judge whose name appears on the ballot.³⁴

Another six states that vary with regard to judicial appointment and selection still hold periodic retention elections for at least some judicial offices.³⁵ Of these states, only two, Illinois and New Mexico, require any kind of supermajority in their retention elections, and both of those states actually require a supermajority to *retain*, rather than to *remove*, a judge.³⁶ Thus, no state has adopted the structure I suggest here. This is most likely because the architects of the Missouri Plan saw the retention election as a “democratic” offset to a perhaps “elitist” selection process, in which the general public has no input.³⁷ In other words, the retention provisions were implemented as a political compromise with those who supported outright judicial elections of the kind that are held in over twenty states.³⁸ But at least implicit in the design of the Missouri Plan are judgments that the judicial role is qualitatively different than the legislative role, and that we value judges for their intellectual merit rather than their political charisma or popularity. If that is true, it may be that the “democratic” counterweight to the “elitist” selection process actually undermines the entire endeavor.

33. IOWA CONST. art. X, §1.

34. Those states are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, and Wyoming. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 759 n.34 (2009); see also ARIZ. CONST. art. VI, § 38; COLO. CONST. art. VI, § 25; FLA. CONST. art. V, § 10; IND. CONST. art. VII, § 11; KAN. CONST. art. III, § 5; MO. CONST. art. V, § 25; OKLA. CONST. art. VII-B, § 2; WYO. CONST. art. 5, § 4(h); ALASKA STAT. § 22.10.150 (2008); IOWA CODE § 46.24 (2010); NEB. REV. STAT. § 24-817 (2004); S.D. CODIFIED LAWS § 16-1-2 (2004); TENN. CODE ANN. § 17-4-115 (2009).

35. CAL. CONST. art. VI, § 16; ILL. CONST. art. VI, § 12; MD. CONST. art. IV, § 5A; N.M. CONST. art. VI, § 33; PA. CONST. art. V, §§ 13, 15; UTAH CONST. art. VIII, §§ 8–9.

36. ILL. CONST. art. VI, § 12(d); N.M. CONST. art. VI, § 33.

37. See Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 574–75 (2009).

38. See *id.* at 575 (“The plan was thought to be a compromise between judicial independence and judicial accountability, balancing the two incompatible political goals in a workable (though undeniably imperfect) compromise.”). In truth, however, I find it hard to see how a supermajority requirement could be seen as “elitist”; after all, it requires that *more*, not *less*, of the people agree with a particular outcome.

Having said all this, I recognize that making a change to supermajority retention elections is probably a political impossibility at this point. In an increasingly polarized climate in which the phrase judicial “activism” has taken on highly politicized meanings, it is unlikely that there exists sufficient public will to actually *increase* judicial independence. This is, after all, the heart of the structural question at issue—the proper balance point between judicial autonomy and judicial accountability—and it does seem that the current movement is toward *less* autonomy. But, current political realities notwithstanding, I think the Iowa experience should give those who think carefully about constitutional design a moment’s pause. It may well be that the Missouri Plan envisioned retention elections as vehicles to remove only those judges who engage in real misconduct, but it has become clear that—whatever the intentions—these elections can become a simple majority referendum on constitutional meaning. This, for the reasons I have suggested, seems to present very real structural problems, and I think they are problems worthy of increased scholarly attention. I hope that the suggestion of supermajority retention elections can provoke some thought along these lines.