

## Five Propositions for This Fall's Judicial Retention Vote

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My assignment this morning is to provide an Iowa legal perspective on how our Constitution achieves the laudable end identified by Justice O'Connor and the other panelists, a non-politicized judiciary, and specifically a commentary on the judicial retention vote mechanism.

In approaching this matter, I have found it very helpful to remember the admonition of Chief Justice Warren Burger:

*Judges . . . rule on the basis of law, not public opinion, and they should be totally indifferent to pressures of the times.<sup>i</sup>*

The matter of importance before us is how we ensure that judges can be “indifferent to the pressures of the times” so that litigants in individual cases can be assured that the outcome of their case will be on the basis of law, not on the basis of pressure or politics.

I distill this down to five propositions. As always, starting with history gives us valuable context. For almost fifty years Iowa has had a merit system for the selection of judges. This system of judicial selection was advocated by Republican Governor Norman Erbe who found the system of popular election of judges “degrading . . . to the Judiciary,” and “felt very strongly that judges should be removed from the thrust of partisan politics.”<sup>iii</sup> A large, bipartisan majority of the Legislature (in every vote the amendment got large majorities Republican and Democratic legislators) and a large majority of the voters (the measure carried 73 of the 99 counties) established this selection system in 1962 to keep our judges from being subjected to pressure from political parties, lobbyists, special interests and litigants. This selection system has worked and worked well. Citizens appear in Iowa courts knowing that the judge is fair and impartial, that, in Chief Justice Burger's words, “Judges rule on the basis of law, not public opinion.”

As established almost fifty years ago, the merit selection process for judges includes periodic votes on judges. Every eight years each member of the Supreme Court appears on the ballot with the simple question: should this individual be retained for another term in office. For other judges the vote is every six years, but the question is the same.

It is absolutely clear from the historical record that the retention vote was designed for a very limited purpose, to give a mechanism for the removal of a judge who was truly unfit for office.

This limited view of the judicial retention vote – as a mechanism to remove truly unfit judges – is confirmed by the history of these votes: only four judges at any level have not been retained since 1962. No justice of the Supreme Court has ever failed in a retention vote.

Thus, our first proposition:

**Our judicial retention vote is an extraordinary and limited tool to remove unfit judges.**

It is equally clear from the historical record that the fitness determination of the retention vote was not supposed to be a proxy for challenging a judge's ruling on a particular case.

Why is this? The answer is simple and obvious. If the retention vote is used as a proxy for a referendum on an individual case, then judges stand to be pressured, in Chief Justice Burger's formulation, to rule on the basis of public opinion, not the basis of law. Judges in cases with litigants of vastly disparate wealth and power would rule against the backdrop of the possibility that a ruling adverse to the wealthy and powerful litigant could trigger retribution in the next judicial retention vote. The situation becomes even worse once wealthy and powerful interests have succeeded in subverting the judicial retention vote – thereafter all cases would be held against such a backdrop.

Thus the judicial retention vote this fall isn't a referendum on the definition of marriage, or whether you think same sex civil marriage is right or wrong, or whether you think *Varnum* was correctly decided. The question on the ballot this fall is whether the three justices who are up for a regularly scheduled vote should be retained in office. To attempt to make it anything else is improper.

Thus, our second proposition:

**Our judicial retention vote is not a forum to overturn decisions of the courts; the fitness determination is not a proxy to relitigate individual cases or to bring pressure upon the courts as to future cases.**

The rhetoric of the day, however, may suggest that there are two types of judicial error. The first, when a judge simply gets it wrong – typically, misconstrues the law – clearly isn't an appropriate ground for a negative retention vote. That is, after all, why we have appellate courts. But what about the suggestion that there is a second type, when a judge grossly oversteps his or her role? Might a negative retention vote be appropriate then?

The short answer is that such inflammatory rhetoric – usurpation, legislating from the bench, and the like – is almost invariably the product of a complete misrepresentation as to what the court has done. Once the misrepresentation is corrected, it can be seen that the court was acting within the bounds of its Constitutional role, and people acting in

good faith conclude that there is no basis for a negative retention vote.

Let me walk us through how this misunderstanding frequently arises. More often than not, of course, cases before the courts do not involve issues that raise the allegation that a judge has acted outside his or her authority. People may think that a judge has decided incorrectly in a typical case – a routine personal injury, contract, or divorce case – but they do not think the judge had no right to rule. The cases that do lead to such allegations typically involve Constitutional challenges to acts of the Legislature or the actions of police and other public officials. If a court upholds Constitutional challenge it is left open to a charge that it overstepped its Constitutional role, usurped powers of the other branches of government, “legislated from the bench,” and the like.

An example drawn from history known to all is the 1954 U.S. Supreme Court case of *Brown v. Board of Education*, in which the Court held that state-mandated segregation in public education violated the Equal Protection Clause of the Constitution. Though this had been the law in Iowa since the 1868 case of *Clark v Board of Directors*, and is of course beyond any debate today, remember that *Brown* spawned “massive resistance” in several states, and efforts were made to remove members of the Court on the basis that they usurped the power of the legislature and overstepped their authority. I am of an age to remember the “Impeach Earl Warren” billboards across the South.

What is the role of a Supreme Court in cases like these? More than two centuries ago, in the historic 1803 U.S. Supreme Court case of *Marbury v. Madison* – an opinion the late Chief Justice William Rehnquist called “the lynchpin of our constitutional law ever since” – Chief Justice John Marshall answered the question and explained what the role of the Supreme Court is. He was speaking of the United States Constitution and Congress, but the same principle applies to our Iowa Constitution and Legislature. The Constitution forms “the fundamental and paramount law of the nation” and an act of the legislature in conflict with it “is void.” What is the role of the court? “It is emphatically the province and duty of the judicial department to say what the law is. . . . This is the very essence of judicial duty. . . .”

When an individual case raises a Constitutional issue the Supreme Court may be required to address it. If it considers the Constitutional argument and finds that the act fails to meet the requirements of the Constitution, it declares the act void. In doing so it does not overstep its Constitutional role, it fulfills it. It does not usurp the powers of the other branches of government, it exercises its own authority. It does not legislate from the bench, it declares the Legislature’s act void. In Chief Justice Marshall’s words, “This is the very essence of judicial duty.” Properly considered and characterized, invariably the actions of the judges in such cases simply do not justify a negative vote on retention.

The lesson here is that almost always once the inflammatory rhetoric is put aside, these are just situations where the speaker disagrees with a decision of the court; as such they are handled by the first proposition and do not constitute legitimate reasons for a negative retention vote. This suggests our duty as citizens: because this is a point upon which the danger of inflammatory and irresponsible rhetoric is great, in dealing with

these issues we must resist the temptation to spin and mislead. We ought not mischaracterize the actions of the court in order to win, or take seriously those who do. We are required to speak fairly, with precision and in utmost good faith.

Thus, our third proposition:

**Our judicial retention vote is so important, and the risk of mischaracterization is so great, that we must speak fairly, with precision, and in utmost good faith on the question of the judiciary's role, and reject the calls of those who do not meet this high standard.**

If the judicial retention vote is not the proper place to challenge individual judicial decisions, and if we avoid the mischaracterizations that support hyperbolic rhetoric, does that mean that Constitutional decisions are beyond challenge? After all, intelligent and well-meaning individuals may believe that the courts came to the wrong decision in a specific case of Constitutional note.

The answer is that, of course, such cases are not beyond correction; it is simply that attacks on the judiciary are not the proper means of redress. This misunderstanding is bound up, it seems to me, with the misrepresentation that the courts are “legislating” when they declare an act of the Legislature invalid. They aren’t, and one indication is that the Legislature can itself act to reverse the court’s ruling.

When the Supreme Court interprets an act of the Legislature and the Legislature disagrees, the answer is for the Legislature to pass new legislation clarifying the law or modifying it as necessary. When the Court has held an act unconstitutional the Legislature has two paths: it can rewrite the statute in a way that avoids the Constitutional infirmity, or it can initiate an amendment to the Constitution which would change the Supreme Court’s analysis.

Thus, our fourth proposition:

**Although our judicial retention vote is not the proper forum for changing the outcome of cases, judicial decisions of Constitutional note are not beyond challenge using appropriate means.**

We in Iowa are extremely fortunate to have the merit selection process for appointing and retaining judges that a large, bipartisan majority amended the Iowa Constitution in 1962 to provide. The hallmark of our system is the conviction that judges ought to be deciding individual cases on the merits and should not be subjected to pressure from rich and powerful litigants, lobbyists and special interests. Our Constitutional system honors Chief Justice Burger’s admonition that “Judges rule on the basis of law, not public opinion, and they should be totally indifferent to pressures of the times.”

Our system works because (1) our judicial retention vote is an extraordinary and

limited tool to remove unfit judges, and (2) our judicial retention vote is not a forum to overturn decisions of the courts; and the fitness determination is not a proxy to relitigate individual cases or to bring pressure upon the courts as to future cases.

What happens if that Constitutional system is undermined, if the judicial retention vote is politicized and becomes the vehicle for political parties, lobbyists, special interests and litigants to attack judges based on their rulings in individual cases?

One need look no further than to those states that elect their judges. Judicial elections – which increasingly entail millions and millions of dollars raised by those running for office in donations from lobbyists and special interests – are not the best means for doing so.

Look for example at West Virginia in the 2007-2008 judicial election cycle, a cycle in which judicial candidates raised over \$3.3 million dollars in campaign funds and in which the successful candidate for the Supreme Court raised over \$1.4 million, some \$740,000 of which he funded himself.<sup>iii</sup> But perhaps the most disturbing aspect of the West Virginia 2007-2008 judicial election was the case of Elliott “Spike” Maynard. Justice Maynard won a seat on the West Virginia Supreme Court in 1996, running as a Democrat. He served as Chief Justice. He lost the 2008 Democratic primary for the Supreme Court seat. According to station WSAZ in Charleston: “Many blamed his loss on the conflict of interest scandal involving photos of him and Massey CEO Don Blankenship. The court had been dealing with several cases involving Massey Energy at the time.”<sup>iv</sup>

Astoundingly, the scandal was photos with Massey’s CEO, not the campaign contributions Justice Maynard had received from Massey executives: this sitting justice of the West Virginia Supreme Court had received 60 contributions from individuals tied to the mining industry, including what appear to be the legal maximum contributions from the President of Massey Metallurgical Coal; the CIO, Director of External Affairs, VP for Operations, and an unspecified “executive” for Massey Energy; and an attorney for Massey Coal Services.<sup>v</sup> Indeed, the campaign contribution records from Justice Maynard suggest layers of questionable activity; or am I wrong to be suspicious that he also got the legal maximum contribution from a “receptionist” for Appalachian Fuels and a “surface miner” for Pritchard Mining. A final problem with this method of judicial selection is that it blurs the lines between the branches of government. I would note that in this election cycle Spike Maynard switched parties and won the Republican Congressional nomination in West Virginia’s 3<sup>rd</sup> District.

I do not mean to suggest that elected judges invariably fall to the level of Spike Maynard. Before returning to Iowa I was Dean of the University of Kentucky College of Law. The Commonwealth of Kentucky elects judges in theoretically non-partisan elections. I knew many judges and members of the Kentucky Supreme Court for whom I had the highest regard. But I am absolutely convinced that their system of judicial selection produces such judges of quality in spite of, not because of, their system of selection. And I can report first-hand that their judges, lawyers and civic leaders are

scared to death of what may be coming in the form of politicized and special-interest-financed judicial elections.

I cannot imagine that this is a system we want to emulate, or even take a tentative step toward becoming. But the first step towards such a system is to subvert the judicial retention vote of the current Constitutional merit selection system.

Thus, our fifth proposition:

**Misuse of our judicial retention vote and the politicization of our courts will cause serious damage to our system of justice.**

It comes as no surprise that Iowans intuitively understand all of this. In the September 2009 Iowa Poll only 12% of us said that the *Varnum* decision would be the single most important factor in their vote on retention, and 61% said that other issues would be more important in their vote. If those numbers have moved in the last year, it is an indication of the temporary success realized by those who seek to politicize our courts and a measure of the work that we must do to protect our judicial system.

In the final analysis, I have to believe that Iowans will reject any effort to undermine the Constitutional judicial merit selection system and politicize our courts.

That isn't what Iowans do, or should accept; not at our best. Iowans understand the importance of having a fair and impartial system of justice. We have a historic commitment to due process of law, and to equal protection. We believe in fairness, in playing by the rules.

Perhaps most importantly, this attempt to subvert by misdirection the judicial retention vote isn't who we are. Iowans listen to and respect one another. We reason with people with whom we disagree. And we seek to do the right thing, as our parents and grandparents did the right thing in 1962 when they established the Constitutional judicial merit selection system.

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<sup>i</sup> Charlotte Saikowski, *The Power of Judicial Review*, Christian Science Monitor, February 11, 1987, at 18.

<sup>ii</sup> Norman A. Erbe, RINGSIDE AT THE FIREWORKS, at 167 (1997).

<sup>iii</sup> [www.transparencydata.com](http://www.transparencydata.com)

<sup>iv</sup> <http://www.wsaz.com/home/headlines/83251512.html>

<sup>v</sup> [www.transparencydata.com](http://www.transparencydata.com)