BUFFALO LAW REVIEW
THE DOCKET

VOLUME 60 APRIL 2012 PAGES 1-11

Meaningful Information, Meaningful Retention

JORDAN M. SINGER†

Judicial retention elections are at a crossroads. Less than twenty years ago, they were seen as relatively sleepy affairs, characterized by low voter turnout and little or no campaigning. But times have changed. In 2010, high court judges in six states were targeted for non-retention by well-organized and well-financed opposition groups with overtly political agendas.[1] Although these efforts mostly proved unsuccessful, anti-retention forces appear to be gaining resilience with each election cycle.[2] Once heralded as a relatively apolitical means of ensuring judicial accountability, retention elections now face an uncertain future.

In his recent Article, Professor Todd Pettys suggests that we may have reached a breaking point.[3] Briefly summarized, his contention is this: modern anti-retention campaigns are particularly powerful because they are able to tap into voters' moral outrage over controversial court

† Assistant Professor of Law, New England Law | Boston.

I am grateful to Tigran Eldred, Lawrence Friedman, and Louis Schulze for helpful comments on earlier drafts.

1. *See* Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. REV. 118, 118 (2010).

2. *See* ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10, at 27 (2011) ("More assaults on impartial courts, taking a range of different forms, are on the horizon.").

3. Todd E. Pettys, *Judicial Retention Elections, the Rule of Law, and the Rhetorical Weaknesses of Consequentialism*, 60 BUFF. L. REV. 69, 78 (2012).

decisions.[4] That outrage, in the form of a moral mandate, overpowers the public's general deference to the courts as fair and impartial arbiters of the law, making voters more willing to remove judges who issue controversial decisions.[5] Moreover, the traditional arguments in favor of judicial retention—that judges should not be punished at election time for doing their jobs (the "deontological argument")[6] and that judges should not feel pressure to reach politically popular (rather than legally correct) outcomes (the "consequentialist argument")[7]—prove ineffective with morally outraged voters. In short, the dynamics of retention elections have changed, and the pro-retention arguments that may have resonated with the public a generation ago no longer work. Using the unsuccessful 2010 retention bids of three Iowa Supreme Court Justices as one recent example of the weakness of traditional arguments, Pettys concludes that retention elections should either be reimagined as staging grounds for vibrant policy debates over case outcomes, or simply eliminated altogether.[8]

Professor Pettys's Article offers a highly instructive account of the way that traditional pro-retention arguments fall short in the face of moral mandates. That account, however, only tells part of the story. And it is the rest of the story—comprising voter concerns about procedural fairness and the proper role of the judiciary, and the equivalent failure of traditional pro-retention arguments to address *those* concerns—that provides a clearer guide for the future of retention elections. This Response offers an alternative reading of the 2010 elections—the Iowa election in particular—and suggests the pro-retention forces should worry less about responding to moral mandates and more about bolstering the public's faith in the institutional legitimacy of the judiciary.

Social science research has identified two factors that drive voter decision-making in retention elections. First, citizens typically view judicial legitimacy and accountability in sociological terms, meaning that they expect judges first

4. *Id.* at 127-30.

5. *Id*. at 130-32.

6. *Id.* at 89-93.

7. *Id.* at 93-99.

8. *Id*. at 78.

and foremost to embrace fair, neutral, and trustworthy procedures,[9] and resist any invitation to overstep the court's limited constitutional role.[10] At the same time, retention voters are rationally ignorant, meaning that they generally will not invest much (if any) time to learn about their sitting judges before going to the polls.[11] Instead, most voters will simply assume as a default that judges are acting in a procedurally fair and institutionally sound manner unless presented with information to the contrary.[12] Together, these strains of reasoning typically work to keep incumbent judges in office. So strong is the presumption that incumbent judges are competent, fair, and trustworthy that only pervasive evidence of dereliction of these qualities will spur a successful non-retention vote.[13]

A controversial case outcome may be seen as evidence of such dereliction, at least to some voters in some circumstances. As Professor Pettys points out, if a person finds a case outcome to be morally outrageous, her view of the court's commitment to fairness and trustworthiness may diminish, and she may feel an incentive to replace the sitting judge(s) with new judges whose moral compasses are

---

9. *See* Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 4 (2007) ("[Procedural fairness] is a value that the American public expects and demands from judges . . . ."); *see also* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 786 (1994); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular United States Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 627 (1991) (finding that, despite unpopular Supreme Court decisions, most people believe that the Court follows fair procedures in making its decisions).

10. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1140 (2002) ("[T]he gravamen of the [judicial activism] charge is not simply that the Court is getting things wrong on the merits, but that it has somehow overstepped its institutional role.").

11. *See* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1153-54 (2003); Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255, 257-58 (2006).

12. I have developed this observation in more detail elsewhere. *See* Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. (forthcoming) (manuscript at 11), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937742.

13. *Id.*

similar to her own.[14] Pettys suggests that this type of "moral mandate" was at work in the 2010 Iowa judicial retention election: an angry electorate, brimming with moral outrage over the Iowa Supreme Court's decision to overturn the state's Defense of Marriage Act, ousted three Justices who sought retention.[15] This view reflects the now-conventional wisdom about the Iowa retention election. But there is more to the story.

The historical facts are plain enough. In April 2009, the Iowa Supreme Court unanimously held in *Varnum v. Brien* that state legislation restricting marriage to one man and one woman violated the Equal Protection Clause of the Iowa Constitution.[16] The decision angered many conservative and religious groups in Iowa (and nationwide), who pledged to override the ruling through political and non-political means.[17] However, political avenues against same-sex marriage in Iowa quickly dried up when Governor Chet Culver and the state legislature ruled out support for a marriage amendment to the state constitution.[18] Anger over the *Varnum* decision accordingly coalesced into a campaign to oppose the three Supreme Court Justices who would be seeking retention in November 2010. After a bitter campaign in which proponents spent $400,000 to retain the Justices and opponents spent twice that to unseat them,[19] all three Justices fell short of the threshold needed for retention.[20]

---

14. Pettys, *supra* note 3, at 131-32.

15. *Id.* at 70.

16. 763 N.W.2d 862, 872 (Iowa 2009).

17. *See* Schotland, *supra* note 1, at 120-21.

18. *See* Mike Glover, *Iowa Gov Cool to Attempting Gay-Marriage Reversal*, ASSOCIATED PRESS, Apr. 7, 2009, *available at* http://www.huffingtonpost.com/huff-wires/20090407/iowa-gay-marriage/; Rod Boshart, *Culver Praises Legislature for Not Taking Up Gay Marriage*, SIOUX CITY J. (Mar. 31, 2010, 2:14 PM), http://siouxcityjournal.com/news/state-and-regional/iowa/article_c0ecb378-3cf9-11df-8dd0-001cc4c002e0.html.

19. Press Release, Brennan Ctr. for Justice, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), *available at* http://www.brennancenter.org/page/-/Democracy/release-november%202010-110310-final.pdf.

20. Schotland, *supra* note 1, at 120.

Moral outrage unquestionably fed the anti-retention campaign in Iowa, but moral mandates alone cannot explain the election result. The numbers simply don't add up. A statewide survey taken shortly before oral argument in the *Varnum* case found that only 32% of Iowans opposed same-sex marriage in any form, with 28% *supporting* same-sex marriage, and another 30% opposing marriage but supporting civil unions.[21] In other words, less than one-third of Iowans were predisposed to experience the deep and strongly held moral outrage over same-sex marriage that would be necessary to overcome the baseline inclination that the court's decision was procedurally legitimate.[22] Yet 54% of Iowa voters chose not to retain the Justices. Some factor other than moral outrage was necessary for the anti-retention movement to succeed on a statewide scale.[23]

That additional factor was not a moral concern, but a sociological one: the widespread belief that the Iowa Supreme Court had overstepped its institutional role in directly legalizing same-sex marriage. This perception was fueled by anti-retention forces, whose primary theme throughout the campaign was not "*Varnum* was wrong for moral reasons" but rather "*Varnum* was wrong for institutional reasons."[24] Indeed, a study of letters to editor

---

21. Press Release, Univ. of Iowa, Big Ten Battleground Poll: Iowans' Views on Gay Marriage and Civil Unions 1 (Dec. 1, 2008), *available at* http://news-releases.uiowa.edu/2008/november/112508gaymarriagetopline.pdf.

22. *See* Linda J. Skitka & Elizabeth Mullen, *The Dark Side of Moral Conviction*, 2 ANALYSES SOC. ISSUES & PUB. POL'Y 35, 37 (2002) (describing a moral mandate as "a strong attitude with an equally strong moral investment").

23. The level of support for same-sex marriage in Iowa in the pre-*Varnum* poll was not an anomaly, but part of a trend toward greater acceptance of same-sex marriage in Iowa. A 2010 poll, taken well after *Varnum*, but before the retention election, found that support for same-sex marriage in the state had grown to 44%. *See* Andrew Gelman et al., *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 22, 2010, at WK3. Similarly, a poll from August 2011 found that only 29% of Iowans opposed same-sex marriage in any form, while 40% supported gay marriage and another 30% supported civil unions. *See* Press Release, Public Policy Polling, Iowans Up on Gay Marriage and Branstad (Aug. 26, 2011), *available at* http://www.publicpolicypolling.com/pdf/PPP_Release_IA_0826.pdf.

24. *See* 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. (forthcoming 2012) (manuscript at 22), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793313.

appearing in Iowa newspapers prior to the election found that nearly 70% of anti-retention letters argued against *Varnum* based on institutional overreach themes like "usurping the will of the people" and "legislating from the bench."[25] By contrast, less than 12% of anti-retention letters derided *Varnum* for religious or moral reasons.[26] The messaging of the anti-retention forces in Iowa, then, was much more sophisticated and richly textured than a simple tap into the reservoir of moral outrage or an appeal to sacred values. The middle ground of voters did not need to be morally outraged by *Varnum* to cast a vote against the three Justices; they merely needed to believe that the Court had improperly assumed the responsibility of the legislature in effectuating an important social policy.

In the face of this institutional critique, the traditional arguments offered by pro-retention forces were doomed to fail. Supporters of retention argued that the Court was simply "doing its job"[27] and that a vote against retention was "a vote against the judicial system."[28] But these deontological arguments did not—and could not—resonate with voters who viewed the court as overstepping its constitutional bounds. In other words, saying that judges should not be fired for doing their jobs will not work if voters perceive those judges as *not* doing their jobs, but instead intruding into the proper domain of the legislature. Similarly, consequentialist arguments lack rhetorical power in light of concerns about sociological accountability because the public generally believes that judges *should* be held accountable for procedural fairness and upholding the ideals of the court as an institution. Put differently, if

---

25. *Id.* (manuscript at 22-23).

26. *Id.* (manuscript at 22). Pettys cites to this study, but conflates the arguments, noting merely that "more than 85% of the anti-retention letter-writers condemned *Varnum* in one manner or another . . . ." Pettys, *supra* note 3, at 85. But the nature of the condemnation is the key to understanding the motivation for a non-retention vote.

27. Pettys, *supra* note 3, at 90 (quoting Rob Potts, Letter to the Editor, *Justices Did Not "Make Law;" They Interpreted It*, OTTUMWA COURIER ONLINE (Oct. 22, 2010), http://ottumwacourier.com/letters/x693285242/Justices-did-not-make-law-they-interpreted-it).

28. *Id.* (quoting Alan L. Egly, Letter to the Editor, *Don't Vote Against Judge Based on Self-Interest, Ideology*, QUAD-CITIES ONLINE (Oct. 27, 2010), http://www.qconline.com/archives/qco/display.php?id=516205).

judges are so independent that they disregard the very procedures and institutional arrangements that are designed to ensure fair and accurate outcomes, those judges should be replaced—or at least should feel pressure to change their behavior in the face of public disapproval.

To be clear, I am not suggesting that the perception of the Iowa Supreme Court's institutional overreach was actually grounded in reality. Indeed, any fair reading of the *Varnum* opinion shows it to be cautious and carefully constructed, demonstrating an explicit awareness of the limited role of the judiciary in a government premised on the separation of powers. But surely most Iowa voters did not read the court's opinion. As rationally ignorant voters, they instead relied on information that could be obtained passively or with little effort, and most of that "information" consisted of the opposition's relentless drumbeat of judicial activism and warnings that the Justices were "legislating from the bench." In the end, the middle ground voters who would eventually decide the election swung against the three Justices not because of moral outrage, but because they had become convinced that the Justices had not met their commitment to sociological accountability.

The dynamics of voter decision-making based on sociological accountability illustrate both the strengths and the limitations of the "fairness and impartiality" rhetoric that characterizes traditional pro-retention arguments. Given public concern that their courts remain fair, impartial, and unwilling to succumb to the temptation of institutional overreach, it is of course essential that pro-retention forces remind voters that their incumbent judges embrace these qualities. But merely asserting fairness and impartiality is no longer enough. Such qualities must also be demonstrated to the public.

And therein lies the key to the future of judicial retention elections. Voters are hungry for information concerning their judges' commitment to procedural fairness and tendency to avoid institutional overreach. Pro-retention forces historically have not bothered to supply such information to voters, because in an information vacuum, most rationally ignorant voters will adopt the default position that judges are good enough to retain. But anti-retention forces are now filling that vacuum, and voters will gravitate toward *any* easily accessible information, accurate or not. Pro-retention forces can no longer rely on the lack of meaningful information to do their work for them. They

must be prepared to provide substantial information on judges' sociological accountability early and often in the election cycle.

The ongoing relevance of sociological accountability to voters—both with respect to campaign rhetoric and with respect to concrete information on the performance of sitting judges—is not just theoretical. The 2010 election season saw more efforts to unseat state high court justices than perhaps ever before.[29] Anti-retention forces in Alaska, Colorado, Florida, Illinois, and Kansas pushed for removal of one or more jurists, and in many states the push was sparked by a single court decision on a controversial issue.[30] Yet in every state except Iowa, the justices were retained, many by comfortable margins.[31] Several factors likely contributed to this discrepancy, but the ready availability of information on judges' commitment to sociological accountability in the other states clearly played a significant role. Most obviously, states like Alaska, Colorado, and Kansas enjoyed robust state-sponsored judicial performance evaluation ("JPE") programs, which expressly review each judge's performance with respect to procedural fairness factors like clarity of communication, demonstrated impartiality, judicial temperament, integrity, and administrative capacity, and place the results in voter guides prior to the election.[32] JPE programs also inquire about judicial humility and each judge's commitment to deciding only issues that are properly within the court's jurisdiction and institutional role.[33] Unfortunately, the Iowa

29. *See* Schotland, *supra* note 1, at 118.

30. Larry Aspin, *The 2010 Judicial Retention Elections in Perspective: Continuity and Change from 1964 to 2010*, 94 JUDICATURE 218, 228-29 tbl.3 (2011) (listing states holding retention elections in 2010 and describing the reason for opposition to retention in each state).

31. *Id.*

32. *See* Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 203-05 (2007) (listing states with JPE programs, including Alaska, Colorado, and Kansas, and noting that Alaska and Colorado have two of the most developed JPE programs).

33. For example, the Colorado Judicial Performance Evaluation Program asks attorneys to evaluate appellate judges on, among other things, each judge's commitment to "[r]efraining from reaching issues that need not be decided." COLO. OFFICE OF JUDICIAL PERFORMANCE EVALUATION, APPELLATE QUESTIONNAIRE, *available at* http://www.coloradojudicialperformance.gov/

Justices benefitted from no such program, leaving their judicial careers exclusively at the mercy of election year hype. Perhaps more importantly, the critical swing voters in Iowa were forced to rely exclusively on partisan messaging with respect to the sociological accountability issues that mattered most to them.

Given the voters' primary interest in procedural fairness and institutional legitimacy and the ongoing potential of JPE programs to provide information relevant to those interests, it is not clear that the only choices are to either eliminate retention elections altogether or encourage sitting judges to engage in external defenses of their decisions. If judicial retention voters only cared about case outcomes or substantive judicial policymaking, such engagement might be appropriate. But most people care about the process of judicial decision-making as well as outcomes—indeed, typically they care about process *much more* than outcomes. Studies have consistently shown that support for appellate courts is linked "to judgments that the decisions, whether favorable or unfavorable, were made using procedures that are competent, reasonable, and fair."[34] It is therefore hard to see the benefit of infusing retention elections with full-fledged policy debates about the wisdom of specific case outcomes. Such debates are unlikely to influence a change in position among the minority of voters who are driven by a moral mandate, and at the same time are likely to erode the court's legitimacy among voters who do not have strongly held moral convictions on the issues.

For related reasons, the proposed elimination of retention elections altogether also seems unwise. Even if such a move were politically feasible, it would be ill-advised because it would deny voters the reasonable opportunity to hold their judges accountable for transgressions that voters *do* find important: violations of procedural fairness or lack of commitment to protecting and preserving the court's institutional legitimacy. All this is to say that case outcomes may drive *some* non-retention votes in any given election, but concern about moral mandates alone is insufficient to

---

documents/CO%20Attnys%20re%20COA%20&%20SC%20Judges-Justices%20questions%20revised1.pdf.

34. Tyler & Mitchell, *supra* note 9, at 786.

justify radical changes to retention elections as we know them.

For most voters in most retention elections, judicial accountability begins and ends with sociological accountability. Has the judge demonstrated a commitment to the trappings of procedural fairness—the opportunity for all parties to be heard, fair consideration of all the evidence, and a clear explanation of the court's decision? Has the judge acted as a trusted public servant and a worthy guardian of the court's institutional legitimacy? The judges who show themselves to be knowledgeable, humble, impartial, and trustworthy tend to win favor with a majority of voters, even when some percentage of the voting public strongly disagrees with one or more of their decisions.[35] By contrast, the judges who are perceived to be boorish, haughty, disinterested, unclear, intellectually overwhelmed, or unprofessional are far less likely to survive a retention bid.[36]

We are right to be concerned with many of the recent trends in judicial elections. And it is near certain that morally outraged groups will continue to seek ouster of state judges based on case outcomes for the foreseeable future. But the solution, it seems to me, is to return to the principles of judicial accountability that already occupy the minds of most citizens. Every state with retention elections should conduct formal performance evaluations of its judges based on criteria related to the *process* of adjudication, and provide those evaluation results to the public in advance of the election. If the evaluations are strong, pro-retention forces should adopt strategies to remind voters that the judge in question has demonstrated a commitment to procedural fairness and preserving the legitimacy of the court. If the evaluations are poor, all interested parties—including those who are typically supportive of sitting judges—should debate whether the judge really deserves retention. In either event, the retention decision will better reflect what voters really want in their judges, and will

---

35. *See* Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 21 (2008) (providing a detailed example of a state judge who was retained despite making a controversial, high-profile ruling in an adverse possession case).

36. *See* Aspin, *supra* note 30, at 225.

naturally dissipate some of the concerns about moral mandates within a minority of the voting population.