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The Politicization of Judicial Elections and Its Effect on Judicial Independence

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THE POLITICIZATION OF JUDICIAL ELECTIONS AND ITS EFFECT ON JUDICIAL INDEPENDENCE*

MATTHEW W. GREEN JR., SUSAN J. BECKER, HON. MARSHA K. TERNUS,
CAMILLA B. TAYLOR, AND DANIEL P. TOKAJI

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I. JUDICIAL INDEPENDENCE AND LGBT RIGHTS: AN UNEASY MARRIAGE

MATTHEW W. GREEN JR.*

A. Introduction

Good afternoon and thank you for joining us today for our conference on the Politicization of Judicial Elections and Its Effect on Judicial Independence and LGBT Rights. I thought that I would briefly explain the idea behind today's program and some of the issues that our panelists will be addressing before turning the program over to them. As the program title suggests, today's program marries

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two themes—judicial independence and the rights of lesbian, gay, bisexual and transgendered (“LGBT”) individuals, who often turn to the courts to protect their civil rights. This conference will explore the importance of an independent judiciary to the hot-button issue of same-sex marriage or marriage equality.

The idea for this conference stemmed from the November 2010 Iowa judicial election, in which three justices were voted out of office as a result of joining a unanimous ruling, *Varnum v. Brien*, that struck down, on equal protection grounds, a state statute limiting marriage rights to heterosexual couples.¹ That decision spawned a backlash, including a huge influx of money from out-of-state special interest groups used to urge voters to oust the judges based on their decision in *Varnum*. What was remarkable about Iowa is that for the first time since Iowa adopted its current system of electing judges, sitting Supreme Court justices were voted out of office and, undisputedly, were voted out of office because of a judicial ruling.²

Some who called for the ouster justified it by contending that the election sent a message that power resides with the people—presumably of Iowa—and not with the courts, and by claiming that the ouster was warranted as *Varnum* was the product of activist judges. It is not clear, however, that such assertions withstand scrutiny. To the extent the ouster was intended to demonstrate the power of the people, one wonders what “people” are being referenced? The campaign to unseat the justices was financed heavily by non-Iowan interest groups, including the Washington D.C.-based Citizens United and Family Research Council (“FRC”); the New Jersey-based National Organization for Marriage (“NOM”); and the Mississippi-based American Family Association (“AFA”).³ NOM and AFA, alone, reportedly contributed around seven hundred thousand of the nearly million dollars that was spent on the campaign to oust the justices.⁴ A quick Google search demonstrates that several of these groups are vehemently opposed to same-sex marriage and other legal protections for LGBT individuals. The organizations waged a highly visible non-retention campaign. FRC, for instance, sponsored a twenty city bus tour and NOM spent more than four hundred thousand dollars for TV advertisements urging voters to oust the justices.⁵ It takes no great leap of logic to conclude that these groups were voicing their own anti-LGBT message in Iowa as they had done in other states. To be sure, the anti-marriage equality message resonated with a segment of Iowa voters. It is also clear, however, that the “power” evidenced by the judicial ouster was wielded to a large degree by well-funded, out-of-state interest groups whose voices were loudly heard in Iowa and elsewhere.

¹ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

² See TODD E. PETTYS, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715, 715-16 (2011).

³ See *id.* at 728.

⁴ See *id.*

⁵ See Andy Kopsa, *National Anti-Gay Groups Unite to Target Iowa Judges*, IOWA INDEPENDENT, Oct. 21, 2010, available at <http://iowaindependent.com/45701/national-anti-gay-groups-unite-to-target-iowa-judges>. See also Andy Kopsa, *Anti-retention Leaders: Iowa Just the Start of National Gay Marriage Battle*, IOWA INDEPENDENT, Oct. 29, 2010, available at <http://iowaindependent.com/46519/anti-retention-leaders-iowa-just-the-start-of-gay-marriage-battle>.

More baffling is the charge that *Varnum* was the product of activist (presumably liberal) judges. As noted earlier, the decision was unanimous. Judges appointed to the bench by both political parties joined the opinion. Indeed, two of the justices voted out of office were appointed by Democratic governors and the third, one of our panelists and honored guests this afternoon, former Chief Justice Marsha K. Ternus, was appointed by a Republican governor. More importantly, it is not clear whether anyone who has actually read the *Varnum* opinion would call it a product of activists. Professor Todd Pettys has remarked that what makes the Iowa experience so problematic is that, no matter what one's political preferences might be on the issue of same-sex marriage, one who reads *Varnum* will find that the court's reasoning fell well within the parameters of established methods of constitutional analysis. As Professor Pettys aptly states, "[t]he three justices did not lose their jobs by violating widely embraced conventions of constitutional reasoning[; r]ather they lost their jobs by reaching a conclusion that many citizens found morally and politically objectionable."⁶

Accepting Professor Pettys' position regarding the settled constitutional analysis at work in *Varnum*, then at bottom, sitting justices were voted off the bench not for being activists, but for deciding a case based on the facts and the law and by employing reasoning that fell within the scope of accepted equal protection analysis. That unprecedented occurrence sparked the idea for this conference. The conference addresses, among other things, whether the backlash that occurred in Iowa after the *Varnum* decision might undermine judicial independence in jurisdictions where judges are elected.

B. Judicial Independence

Judicial independence has been defined in numerous ways, and our panelists will explore some of the ways in which the term has been defined. But one way in which judicial independence has been defined is as a condition in which judges are free from negative political consequences, such as being voted out of office, as a result of decisions made from the bench.⁷ Judges, of course, take an oath of office to uphold the constitution and uphold the rule of law without respect of person. In rendering a decision on a hot-button issue, however, it is unquestionably difficult to ignore the political consequences of that decision, particularly when those consequences might mean a campaign to unseat you. Former California Supreme Court justice Otto Kaus put the threat of negative political consequences on judicial independence this way: "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub."⁸

Many states, including Ohio, use some form of elections to select and to retain judges, although the types of elections often differ from state to state. Since the early 1960s, for instance, Iowa has used a merit-selection and retention system to

⁶ PETTYS, *supra* note 2, at 717.

⁷ See LAWRENCE BAUM, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 14 (2003).

⁸ *Id.* at 39 n.113 (quoting Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1987, at 52, 58).

select and retain its Supreme Court justices.⁹ After an initial appointment to the bench, the justices retain their seats by running unopposed in periodic elections. To remain on the bench they must receive a vote of at least 50 percent of all votes cast. It is commonly assumed that judges should be least vulnerable to political pressure under a system that uses retention elections as, among other things, judges run unopposed and have little obvious need to campaign or raise funds.¹⁰ Yet, as more and more money from interest groups pours into judicial elections of all kinds in an effort to influence the outcome of the election, one wonders whether that assumption is correct or will remain so in the future? Moreover, if interest groups are increasingly successful in their efforts to unseat judges, as they were in Iowa, what effect might that have in other states where judges are elected and are also adjudicating hot-button issues?

We are fortunate to have with us today Daniel Takoji, professor of law at the Ohio State University's Moritz College of Law, who will discuss, among other things, the role of money in judicial elections and more broadly its effect on judicial independence.

C. Marriage Equality

Despite the breadth of issues that might galvanize special interests to funnel money into judicial elections to unseat judges who vote "the wrong way," this conference takes a look at the potential effect of the Iowa ouster on judicial independence through the prism of same-sex marriage, which remains a hot-button social issue, and of course was the issue the court dealt with in *Varnum*. Minorities, including LGBT individuals—like the plaintiffs in *Varnum*—often have resorted to the courts to vindicate their civil rights under federal and state law. We focus here on the effect that the Iowa ouster might have on efforts to advance LGBT rights in state courts where judges are often elected. Currently, a majority of states use some form of election system to select and/or to retain judges.

Some have argued that marriage equality is the civil rights issue of the day. If that is so, it stands to reason that LGBT individuals would turn to the courts to protect their legal rights as other minority groups traditionally have done. Considering what occurred in Iowa, however, might courts be inclined to rule a particular way on marriage equality or LGBT rights more broadly considering the political consequences of doing otherwise? What other factors, if any, might affect judges grappling with LGBT-rights issues?

D. Symposium Structure

The panelists will address the issues I've raised and others pertaining to judicial independence and LGBT rights. Cleveland-Marshall College of Law Professor Susan Becker will begin the discussion. After providing a thoughtful overview of the struggle for LGBT rights, she will discuss various factors that likely have influenced and will continue to influence judicial independence when addressing LGBT rights. We also are fortunate to have with us today Camilla Taylor, of

⁹ See PETTYS, *supra* note 2, at 716. See also Hallie Sears, Note, *A New Approach to Judicial Retention: Where Expertise Meets Democracy*, 24 GEO. J. LEGAL ETHICS 871, 871-72 (2011).

¹⁰ See Sears, *supra* note 9, at 875.

Lambda Legal, who successfully litigated the *Varnum* decision through the Iowa courts, and who will discuss her efforts in Iowa prior to litigating the *Varnum* case and we expect will address whether the backlash that occurred after *Varnum* might affect Lambda's efforts to challenge laws affecting LGBT rights in other states where judges are elected.

After hearing from Professors Becker and Takoji and Ms. Taylor, we'll hear remarks from the Hon. Marsha K. Ternus, who we are extremely honored to have with us today. Justice Ternus was caught in the maelstrom that occurred in Iowa after the court's decision in *Varnum*. She will recount her experience and offer her unique perspective on whether politicized judicial elections might undermine judicial independence.

I'll begin things with a brief question: Might politicized judicial elections negatively affect judicial independence and LGBT rights? Taking Justice Kaus' views on the matter at face value, one might respond with "it might, but I hope it does not." We look forward to exploring this issue today and to a provocative discussion.

II. AN OVERVIEW OF LGBT EQUALITY AND JUDICIAL INDEPENDENCE

SUSAN J. BECKER*

A. Introduction

Today's program is part of the "transformative dialogue" series offered at the Cleveland-Marshall College of Law this academic year. I have the honor of commencing the dialogue by providing background information on two topics: first, the current status of the LGBT rights movement with primary focus on marriage equality, and second, the role that judicial independence—or perhaps the lack thereof—has played in advancing and impeding this civil rights movement.

1. Brief History of the LGBT Equality Movement

We cannot fully comprehend the current legal landscape as experienced by lesbian, gay, bisexual, and transgender (LGBT) persons without a brief glance in the rear view mirror. Although the 1969 riots at the Stonewall Inn in New York City are often cited as the birth of the LGBT civil rights movement in this country, its origins can be traced much further back.

More than four decades before Stonewall, a young Army veteran named Henry Gerber incorporated The Society for Human Rights in Illinois. The Society is generally acknowledged as the first gay rights organization in the United States.¹¹ Shortly after the Society was founded in 1924, Gerber and several other members

* Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. Professor Becker's areas of teaching and scholarship include Sexual Orientation and the Law, and she maintains a modest pro bono practice focusing primarily on legal issues presented by LGBT clients. Professor Becker also serves as Board President for the ACLU of Ohio, a co-sponsor of this conference.

¹¹ JONATHAN NED KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.: A DOCUMENTARY* 386-87 (1976); STEVE HOGAN & LEE HUDSON, *COMPLETELY QUEER: THE GAY AND LESBIAN ENCYCLOPEDIA* 244 (1998).

were arrested and charged with deviancy. After three trials, Gerber was acquitted.¹² He then reenlisted in the Army and served his country for an additional seventeen years.¹³

In the 1950s, courageous souls such as Phyllis Lyons and Del Martin formed the Daughters of Bilitis¹⁴ in San Francisco while Harry Hay and others founded the Mattachine Society in Los Angeles.¹⁵ One of the most amazing aspects of these and other early advocacy groups is that they flourished even while the rabidly anti-gay clouds of McCarthyism cast dark shadows over the land. Nonetheless, LGBT rights pioneers fought for the repeal of discriminatory laws and policies and for the recognition of lesbians and gay men as healthy and productive members of society.

The challenges faced by these trailblazers were daunting. Historically, the law in this country has not looked favorably upon LGBT citizens. In its most benign form, the law simply pretended that the United States was populated exclusively with heterosexual persons, thus finding no reason to recognize constitutional or other rights of non-heterosexuals. In its harshest form, the law penalized and punished anyone who dared stray from the classic heterosexual paradigm, including transgender or transsexual persons who challenged the conventional binary view of gender as either exclusively masculine or feminine.

As a result, LGBT parents were routinely denied custody and visitation of their children. LGBT employees terminated from employment due to their sexual orientation or gender identity had no legal recourse for wrongful termination. Same-sex couples who had been in committed relationships for decades were, in the eyes of the law, complete strangers to one another. Adults engaging in intimate, consensual, same-sex sexual conduct could be criminally prosecuted under state sodomy laws.

The work of Lyons, Martin, Hay, and other early advocates ultimately led to the American Psychiatric Association's decision to no longer define homosexuality as a mental illness,¹⁶ the repeal of many state sodomy laws, and a gradual shift in this country's collective consciousness about gender identity and sexual orientation. Successive generations of advocates built on these achievements to create the modern socio-political-legal environment for LGBT citizens.

Consequently, the modern legal landscape for LGBT citizens is very different than the one encountered by Gerber and his colleagues more than eight decades ago. Nonetheless, the legal rights and recognition of LGBT persons in the U.S. today are largely dependent on geography. States in the Northeast and the West Coast provide the greatest rights, while Southern states have proven the least receptive to LGBT equality.

¹² *Henry Gerber*, CHICAGO GAY AND LESBIAN HALL OF FAME, http://www.gllhalloffame.org/index.pl?item=18&todo=view_item (last visited Mar. 19, 2012).

¹³ *Id.*

¹⁴ KAY TOBIN & RANDY WICKER, *THE GAY CRUSADERS* 50 (1975).

¹⁵ CHARLES KAISER, *THE GAY METROPOLIS: 1940-1996*, at 122-23 (1997).

¹⁶ *Id.* at 123-24, 235-40.

2. Current Status of LGBT Equality in the United States

Legal recognition of same-sex relationships both illustrates the geographic divides in this country and serves as a barometer for both how far the LGBT equality movement has come and how far it has to go.

As of January 2012,¹⁷ six states and the District of Columbia (as of 2010) allow same sex couples to wed. The states and the year that this major milestone was achieved are Massachusetts (2004), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), and New York (2011).

Nine states offer state-level spousal rights to same-sex couples that are equivalent to marriage rights. These are California (domestic partnerships, effective in 1999, expanded in 2005), Delaware (civil unions, effective 2012), Hawaii (civil unions, effective 2012), Illinois (civil unions, 2011) Nevada (domestic partnerships, 2009), New Jersey (civil unions, 2007), Oregon (domestic partnerships, 2008), Rhode Island (civil unions, 2011), and Washington (domestic partnerships, established 2007, expanded in 2009). Colorado (2009), Maine (2004) and Wisconsin (2009) offer selective spousal rights to same-sex couples.

The ongoing fight for LGBT relationship recognition repeatedly teaches the lesson that achieving a civil rights victory comes with no guarantee of retaining those rights. California provides a classic case study. Although it may seem hard to believe, the following presentation is actually an abridged version of California's history related to same-sex marriage.

3. California's Marriage Wars

California established limited domestic partner benefits in 1999. In 2002, however, California voters approved Proposition 22, the California Defense of Marriage Act, or California "DOMA." Proposition 22 amended California's family law statute to clarify that "[o]nly marriage between a man and a woman is valid or recognized in California."¹⁸

In February 2004, the mayor of San Francisco directed officials to issue marriage licenses to same-sex couples. Within a month, the California Supreme Court declared that San Francisco did not have the power to issue marriage licenses that were not authorized by state statute.¹⁹ The court did not, however, address the issue of whether the statute prohibiting same-sex marriage (i.e. the law established by Proposition 22) violated the state's constitution. San Francisco and other parties then initiated state court actions challenging California's exclusion of same-sex couples from marriage. These state constitutional challenges were consolidated for trial.

In 2005, the trial court held that excluding same-sex couples from marriage violated California's equal protection guarantees.²⁰ The California legislature also

¹⁷ The Human Rights Campaign (HRC) website contains extensive information about the current status of LGBT equality in marriage and other forms of relationship recognition, adoption, employment and other areas of the law. See <http://www.hrc.org/resources/entry/maps-of-state-laws-policies>.

¹⁸ CAL. FAM. CODE § 308.5.

¹⁹ *Lockyer v. City & Cnty. of San Francisco*, 95 P.3d 459 (Cal. 2004).

²⁰ *In re Coordination Proceeding*, 2005 WL 583129, at *1, *2 (Cal. App. Dep't Super. Ct. March 14, 2005).

significantly expanded domestic partner rights for same-sex couples that year. A California intermediate appeals court then reversed the trial court in a 2-1 decision, again invalidating same-sex marriage.

In May 2008, the California Supreme Court reinstated the trial court's decision striking down California's Defense of Marriage Act, concluding in a 4-3 decision that same-sex marriage must be recognized under the state constitution.²¹ Approximately eighteen thousand same-sex couples then married in California.

Backlash to the California Supreme Court's decision was immediate and fierce. With significant monetary and other support from out-of-state backers, a referendum known as Proposition 8 was placed on California's November 2008 ballot. Its passage amended the California constitution to prohibit same-sex marriage.

The California Supreme Court rejected the writ of mandamus filed by Proposition 8 opponents who complained that the initiative process used to amend the constitution violated the state constitution.²² However, the court left intact the eighteen thousand same-sex marriages that occurred in California between the California Supreme Court's decision allowing same-sex marriage and the passage of Proposition 8 negating the right of same-sex couples to marry.

Proposition 8's amendment to California's constitution was then challenged in federal court by six same-sex couples who alleged that the state's denial of their right to marry violated their *federal* constitutional rights to equal protection and substantive due process guaranteed by the Fourteenth Amendment. A federal district court agreed with the plaintiffs and invalidated California's constitutional amendment in 2010.²³ That decision is currently being reviewed by the Ninth Circuit. The federal constitutional issues presented by this case are expected to ultimately be decided by the U.S. Supreme Court.

4. Same-Sex Marriage Prohibitions in Other States

A U.S. Supreme Court decision clarifying the impact of the federal constitution on state marriage laws would have far reaching impact, as twenty-eight states in addition to California have state constitutional provisions prohibiting same-sex marriage, and twelve additional states have legislation limiting marriage to one man and one woman.²⁴ Some of the state constitutional amendments prohibit much more than just same-sex marriage. The Ohio amendment is a case in point.

Ohio was one of twelve states that amended its constitution to prohibit same-sex marriage via a ballot initiative approved by voters in November 2004.²⁵ The Ohio

²¹ *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008), *reh'g denied* 2008 Cal. LEXIS 6807 (Cal. June 4, 2008). The court's 79-page opinion concluded that the California Constitution's guarantees of liberty and personal autonomy include the fundamental right to form a family relationship, that sexual orientation discrimination affects a suspect class requiring heightened scrutiny, and that denying marriage licenses to same sex couples violates their state constitutional equal protection rights.

²² *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

²³ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

²⁴ See Human Rights Campaign, *Maps of State Laws & Policies: Statewide Marriage Prohibition Laws* (2010), <http://www.hrc.org/resources/entry/maps-of-state-laws-policies.pdf>.

²⁵ Other states enacting constitutional same sex marriage bans in 2004 were Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota,

amendment was unnecessary, as state law already limited marriage to a man and a woman. In addition, there was zero probability that the conservative justices on the Supreme Court of Ohio would interpret the state constitution to invalidate that law. Nonetheless, voters overwhelmingly approved the addition of this language to Ohio's constitution:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.²⁶

The full impact of such broad bans is being litigated in state courts in Ohio and elsewhere. A number of pending federal cases also challenge the constitutionality of the federal Defense of Marriage Act (DOMA),²⁷ the legislation passed by Congress in 1996 to prohibit the federal government from recognizing same-sex marriages. DOMA also empowers states to refuse to recognize same-sex marriages deemed legal in their sister states. The role of the judiciary in advancing or limiting the movement towards LGBT equality has perhaps never been more obvious than in the courts' past and future considerations of federal constitutional challenges to state and federal DOMAs.

B. Judicial Independence Overview

There is no doubt that state and federal legislators and other elected government officials have played a major role in the advancement of LGBT equality. Recent examples include Congress's repeal of the military's "Don't Ask Don't Tell" policy to allow gay and lesbian service members to be open about their sexual orientation, the enactment by more than twenty-one state legislatures of laws prohibiting workplace discrimination based on sexual orientation, and the New York legislature's approval of same-sex marriage. Nonetheless, it is impossible to overstate the critical role that judges have played in both extending and in limiting legal rights and recognition to LGBT persons and their families.

The specific role that judicial independence—or perhaps the lack thereof—has played in these decisions remains unclear. Any assessment of the role of judicial independence in cases involving LGBT parties necessarily requires establishing a common understanding of the term "judicial independence."

1. Definition and Virtues of Judicial Independence

Vast literature on the subject offers many definitions, but all of them share this commonality: Judicial independence requires a judge to apply the established "rule of law" to the specific facts of the case in a neutral and unbiased manner. This produces a decision that is fair, just, largely predictable, and impartial.

More specifically, judicial independence demands that judicial decision-making be free from extraneous influences such as the judge's personal interests, political

Oklahoma, Oregon and Utah. Alaska, Hawaii, Nebraska and Nevada had already banned same-sex marriage. *Id.*

²⁶ OHIO CONST. art. XV, § 11.

²⁷ 1 U.S.C. § 7; 28 U.S.C. § 1738C.

ideology, religious beliefs, desire to please special interest groups and campaign donors, financial considerations, and fear of retaliation for unpopular decisions. The eradication of such extraneous forces results in judicial decisions that serve the best interests of the litigants and of society.

Judicial independence is especially important in a democracy where the will of the majority can suppress minority views and rights. In drafting his famous essays intended to convince New York and other colonies to adopt the federal Constitution, Alexander Hamilton extolled the virtue of lifetime appointments of federal judges as the most effective means of assuring judicial independence. Hamilton cited “complete independence of the courts of justice” as critical to protecting citizens’ Constitutional rights, especially when the majority that holds sway in Congress enacts legislation harming the rights of the minorities.²⁸

Of course judicial independence is not a uniquely American concept. It is a widely embraced tenet of international law. The Universal Declaration of Human Rights, for example, proclaims that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations”²⁹

2. The Formalism-Realism Debate

A clear definition and pervasive conviction of the virtue of judicial independence does not mean, however, that judicial independence is easily achieved, or even capable of measuring or monitoring. Indeed, one of the most frequently debated issues here and around the world is whether judicial independence is a desirable aspiration rather than an attainable objective. This debate has historically been framed by the “formalism” and “realism” schools of thought.

Formalists posit that judges are capable of applying the rule of law to any given set of facts in a somewhat detached and mechanical manner, thus rendering a truly independent—and of course just—decision.³⁰ Realists counter that judges are political actors whose decisions are universally and inevitably informed by extraneous considerations and biases.³¹ As is often the cases with opposing schools of thought, the truth probably lies somewhere in the middle.³²

Extensive empirical studies of judicial decisions conducted primarily by political scientists yields support for an “attitudinal” model of judicial decision making in which jurists’ individual characteristics and world views greatly influence case outcomes.³³ These studies tend to offer support for the realism rather than formalism

²⁸ THE FEDERALIST NO. 78, at 508-09 (Alexander Hamilton) (Edward Meade Earl ed., 1937).

²⁹ UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. X (1948).

³⁰ See JEROME FRANK, LAW AND THE MODERN MIND (1930) (describing formalist American thought). See also GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

³¹ See FRANK, *supra* note 30; Karl Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431 (1930).

³² The middle ground between formalism and realism is thoughtfully negotiated in BRIAN TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 3 (2010).

³³ See, e.g., CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWAKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 147 (2006).

theory. As is the case with all empirical studies, however, these data and conclusions drawn from them are subject to calculation error, researcher biases, and other fundamental flaws. In short, it is not entirely clear whether the judicial biases that researchers commonly find are grounded at least in part in the researchers' own biases.

C. Inherent Impediments to Judicial Independence

My review of the extensive literature on the topic of judicial independence, as well as my own experience as both an academic and practitioner, inform my view that there are at least five major impediments inherent in our justice system that thwart even the best intentioned judges' efforts to achieve true independence in their decision-making processes.

1. Choosing the Applicable Law

The first obstacle to independently applying the "rule of law" is that the applicable rule is not always obvious. Judges often must select the determinative legal authority from a universe of potential complementary and sometimes conflicting rules of law. Once the most appropriate rule is selected, the judge must interpret and apply that law in a manner that conforms as closely as possible to precedent. But "following precedent" is challenging, if not impossible, when the rule is invoked to resolve a novel situation.

This dilemma is a recurring issue in cases involving LGBT litigants, especially when those litigants seek extension of state or federal constitutional rights routinely afforded heterosexual citizens. What do intrinsically ill-defined constitutional terms such as "liberty," "due process," and "equal protection" encompass on an abstract basis? And how do constitutional guarantees grounded in this language apply to citizens whose group identity was nonexistent at the time the constitutions were drafted?³⁴

If judges decide that fundamental rights do not apply to LGBT persons, then their decisions empower state and federal governments to enact laws and policies that disenfranchise a discrete minority. This is precisely what Alexander Hamilton and other founders promised the constitution would *not* tolerate. If judges extend fundamental rights to LGBT litigants, they must endure the wrath of critics who claim that judges are rewriting state and federal constitutions instead of interpreting them. Clearly the decisions judges make extending or denying rights to LGBT people must be influenced by something other than the existing, ill-fitting and vague rules of law.

2. Intentional Vagueness of Legal Rules and Standards

The second obstacle is that even when the choice of applicable rule is clear, it may be intentionally vague. For example, judges whose dockets consist of child

³⁴ For a discussion of the development of the legal and social identity of LGBT persons, see Susan J. Becker, *Many are Chilled but Few are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER & LAW 177, 193-200 (2006); Larry Cata Backer, *Constructing a "Homosexual" For Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996).

custody, visitation, and adoption matters must render decisions that are “in the best interests of the child.”³⁵ This standard is borne of necessity, as judges must consider myriad factors and navigate often-conflicting factual and expert evidence to arrive at a decision that best protects the children’s health and general welfare.

Well into the 1980s, many state courts embraced a *per se* rule that exposure to a gay or lesbian parent harmed a child.³⁶ Courts have rejected this harsh rule, replacing it with the “best interest of the child” standard that had long applied to heterosexual parents.³⁷ This change has been heralded as a major victory for LGBT persons, and rightly so. But one must not lose sight of the fact that judges applying this “enlightened” standard still retain tremendous discretion to determine a child’s (and parent’s) fate.³⁸

Stated more bluntly, a judge who believes that homosexual parents pose a *per se* harm to their children can conceal that bias through a series of credibility and other evidentiary decisions required by the “best interest” rubric. In a classic “death by a thousand paper cuts” scenario, these rulings may unfairly demean the LGBT parent’s childrearing skills while greatly exaggerating the skills of the heterosexual parent or other relative seeking exclusive or primary parental rights to the child. Such beliefs may also blind a judge to the value of the relationship between a non-biological parent and a child that parent has raised with his or her same-sex partner for years. Such a result is legally defensible under the “best interest” standard despite its true grounding in the judge’s personal bias.

3. Necessity of Factual Resolution

Judges are rarely presented with litigants who agree on the critical facts of a case. To the contrary, disputes are often litigated *because* the litigants have drastically disparate conceptions of reality. And, of course, the identification of the relevant

³⁵ Monica K. Miller, *How Judges Decide Whether Social Parents Have Parental Rights: A Five-Factor Typology*, 49 FAM. CT. REV. 72, 77 (2011) (observing that courts typically “rely on a ‘best interest of the child’ standard when deciding cases including adoption, custody, and visitation”).

³⁶ Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Parents with Children: Implications of Social Science Research for Policy*, 52:3 J. SOC. ISSUES 29, 33-34 (1996).

³⁷ Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 472 (1990) (relating that child and visitation cases including those involving lesbian parents are decided under the “best interest of the child” standard). *See also* Miller, *supra* note 35, at 77; Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 337 (2008) (concluding that the ubiquitous best interest of the child doctrine “is heralded because it espouses the best and highest standard; . . . derided because it is necessarily subjective; and . . . relied upon because there is nothing better.”).

³⁸ Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 119-20 (2011) (noting the “inherently subjective nature of the test, which may lead to bias,” and further observing that the best interest standard “is purposefully broad and amorphous to ensure flexibility in application”) (citations omitted); Kohm, *supra* note 37, at 339 (stating that the best interest standard “has turned toward near pure judicial discretion in contemporary judging, causing litigators and advocates to have no rule of law to rely upon”).

facts of the case has a dramatic impact on both the identification of the legal authorities that apply, discussed immediately above, and the proper framing of the issue, discussed immediately below. Because family law cases are often tried to judges rather than juries, the inherent challenge in divining the facts to which the law applies is especially critical in cases involving recognition of familial relationships among LGBT persons and their children.³⁹

The challenge of determining who did (or did not do) something and when they did (or did not do) it is perhaps best illustrated by television broadcasts of U.S. football games. A wide receiver catches the ball and runs fifty yards down the sidelines to the end zone. Five or six television cameras are trained on the runner, recording every stride. The referee signals a touchdown. But wait . . . the opposing coach is challenging the call, arguing that the runner stepped out of bounds at the twenty-yard line, negating the touchdown.

Even with the aid of the multiple cameras recording reality as it unfolded, replay officials often determine that such video evidence is “inconclusive” as to whether the player was out of bounds. If reality cannot be ascertained despite multiple, simultaneous video recordings of an event, how likely is it that a judge can accurately reconstruct the facts of a case from the bits and pieces of evidence presented in motions, during hearings, and at trial?

Unlike a football referee, a judge does not have the luxury of finding that the evidence presented is “inconclusive.” The judge must evaluate each piece of evidence to assess its admissibility and credibility, with each individual decision providing a building block of the foundation on which the judge’s decision will ultimately rest.

Once again, the significant discretion vested in judges when evaluating the relative trustworthiness of witness testimony and other evidence allows the insidious bias of a judge to infiltrate the proceedings in a subtle and pervasive manner. As Supreme Court Justice Sonia Sotomayor has observed, “[p]ersonal experiences affect the facts that judges choose to see.”⁴⁰

And this phenomenon is not only a danger at the trial level. As Judge Richard Posner explained, “Appellate judges in our system often can conceal the role of personal preferences in their decisions by stating the facts selectively, so that the outcome seems to follow from them inevitably”⁴¹

4. Re-framing of Issues on Appeal

Any experienced litigator, and certainly those who routinely represent LGBT clients, has likely handled cases in which dispositive legal issues incurred significant reconstruction—or in the common vernacular, “morphed”—throughout the trial and appeals process. Such transformations are both necessary to judicial review and dangerous to judicial independence.

³⁹ See, e.g., *Hertzler v. Hertzler*, 908 P.2d 946 (Wyoming 1995) (presenting radically different factual conclusions by majority and dissenting judges resolving a child visitation dispute in which mother’s sexual orientation was at issue).

⁴⁰ Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002), reprinted in N.Y. TIMES, May 14, 2009, available at <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html>.

⁴¹ RICHARD A. POSNER, *HOW JUDGES THINK* 144 (Harv. Univ. Press 2008).

Appellate judges often exercise their prerogative to correct the manner in which litigants have framed the dispositive issues. In some instances judges must choose between competing versions of the issues presented by the litigants. This exercise is appropriate in situations where, for example, litigants misrepresent the standard of review applicable to the issues raised in the appeal. It is not uncommon, for example, for appellants to attempt to invoke heightened *de novo* review of the trial court's factual findings where the differential abuse of discretion standard is proper. It is equally common for appellants to frame challenges to the lower court's evidentiary rulings as being of constitutional magnitude when those decisions are also subject to the abuse of discretion standard.

No one seriously challenges the necessity of a judge's prerogative to reformulate the issues on appeal. But it must also be conceded that the judge's exercise of this prerogative allows a judge to inject his or her personal views on how the appeal should be resolved. Similar to Judge Posner's observation about judicial selectivity of facts, a judge's restructuring of legal issues creates the opportunity to dictate the inevitability of the outcome.

This phenomena of issue framing dictating the outcome of the appeal is perhaps best illustrated by two U.S. Supreme Court decisions rendered just seventeen years apart, a mere blink of an eye in the history of constitutional law: *Bowers v. Hardwick*, decided in 1983, and *Lawrence v. Texas*, decided in 2003. *Bowers* and *Lawrence* both presented the Court with whether a state law criminalizing consensual sexual conduct between two adults of the same sex violates the U.S. Constitution.

As framed in the preceding sentence, the issue presented by *Lawrence* and *Bowers* seems relatively narrow and straight-forward. The importance of the Court's answer to this question, however, extended well beyond the enforceability of the state "sodomy" statutes at the heart of these cases. In fact, prosecutions under sodomy statutes were quite rare by the time the Court agreed to hear *Bowers*, and the majority of states had repealed their sodomy laws by the time *Lawrence* was considered. But the very existence of these criminal laws in states that retained them proved highly detrimental to LGBT litigants in civil cases.

For example, in cases where a lesbian mother was fighting for custody or visitation with her children or a former employee was challenging termination from public employment based solely on his or her sexual orientation, courts routinely concluded that the "lifestyle" of the gay or lesbian litigant inevitably violated the state's criminal statutes forbidding sodomy. Courts had no trouble reaching these conclusions despite no evidence in the record as to past or present sexual activities—if any—in which the litigants engaged. This inevitable "criminal" behavior, in turn, justified the court's denial of a litigant's rights to her own children or not to be fired from a job.⁴² In short, the sodomy statutes at the center of the *Bowers* and *Lawrence*

⁴² See Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Parents with Children: Implications of Social Science Research for Policy*, 52:3 J. SOC. ISSUES 29, 33-34 (1996) (explaining courts' historic unfavorable view of lesbians parents); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1978-1979) (explaining disadvantageous legal position of LGBT persons in family law, employment law and other areas due to perception of homosexuals as immoral and socially deviant); Anne T. Payne, *The Law and the Problem Parent: Custody and Parental Rights of Homosexual, Mentally Retarded, Mentally Ill and Incarcerated Parents*, 16 J. FAM. L. 797, 818 (1977-1978) (reporting that courts often deemed homosexuals

appeals had implications for LGBT equality far beyond their facial boundaries. Removing those boundaries on LGBT people had far reaching societal as well as legal ramifications.

In framing the issues for each case, members of the Court's majority arguably telegraphed their personal biases related to the outcome. Justice White, writing for Chief Justice Burger and Associate Justices Powell, Rehnquist, and O'Connor, articulated the critical issue in *Bowers* as "whether the Federal Constitution confers a *fundamental right upon homosexuals to engage in sodomy* and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."⁴³

In sharp contrast, Justice Kennedy, writing for Associate Justices Stevens, Souter, Ginsburg, and Breyer,⁴⁴ declared that *Lawrence* "should be resolved by determining whether the petitioners were free as adults to engage in the private conduct *in the exercise of their liberty under the Due Process Clause* of the Fourteenth Amendment to the Constitution."⁴⁵

No one was surprised when the *Bowers* Court answered a resounding "no" to the issue it framed, thereby upholding state sodomy statutes, while the *Lawrence* Court answered "yes" to the issue it had framed, declaring such statutes unconstitutional.

5. Judges are Human

In 2001, then-Second Circuit Judge Sonia Sotomayor offered these observations about the many factors that influence judicial decision-making:

Whether born from experience or inherent physiological or cultural differences, . . . our gender and national origins may and will make a difference in our judging. . . . I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.⁴⁶

Adding fuel to the firestorm that would ignite during her 2009 Senate confirmation hearings for Associate Justice of the U.S. Supreme Court, Justice Sotomayor continued:

My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know

per se unfit parents and that even parents imprisoned for committing serious crimes were "treated to less spurious moralizing and discrimination" than were gay and lesbian parents).

⁴³ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (emphasis added). Justice Blackmun's dissent was joined by Justices Brennan, Marshall, and Stevens. *Id.* at 199.

⁴⁴ *Lawrence v. Texas*, 539 U.S. 558, 561 (2003). Justice Scalia's dissent was joined by Justices Thomas and Rehnquist. *Id.* at 586. Justice O'Connor filed an opinion concurring in the judgment, finding a Fourteenth Amendment Equal Protection violation because the Texas statute only criminalized certain conduct between same-sex but not opposite-sex partners. *Id.* at 579.

⁴⁵ *Id.* at 564 (emphasis added).

⁴⁶ Sotomayor, *supra* note 40, at 92.

exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.⁴⁷

While Justice Sotomayor's comments from 2001 remain controversial, no one seriously doubts the veracity of her statements. To the contrary, it is *because* those statements are true that the concept of judicial independence remains subject to debate. Every person on this planet perceives his environs through a lens formed by place and time of birth, cultural heritage, education and work experiences, and religious, social, and economic influences to which he or she was exposed—in short, by the many factors that simultaneously establish each person as an individual and connect them with communal identities. It is beyond folly to think that merely donning a black robe or picking up a gavel causes people to shed all the influences that make them who they are. The judges-are-humans conclusion is confirmed by empirical studies as well as common sense. Studies conducted over decades by political scientists consistently find significant links between judges' individual characteristics and the decisions they render. These data support what is known as the "attitudinal model" of decision-making.

One of the strongest correlations repeatedly identified is the link between the judges' political ideology, that is, his or her position along the conservative-to-liberal spectrum, and the decisions they render in cases with significant political and social overtones, such as cases involving LGBT rights. Exhibit A for this conclusion is the framing of the issues and accompanying issue resolution by the conservative judge majority in *Bowers* compared with the issue framing and resolution by the liberate and moderate justices in *Lawrence* as discussed above. Exhibit B is the significant statistical work done by attorney and social scientist Daniel Pinello.

Pinello conducted a detailed empirical study of 468 state and federal appellate court cases involving LGBT litigants during the 1980s and 1990s.⁴⁸ Interestingly, Pinello found support for and against the conclusion that judicial independence is alive and well in those cases. In support of judicial independence, Pinello found that precedent was well respected by trial and intermediate appellate courts.⁴⁹ In other words, these courts tended to follow the rule of law if one existed. Pinello also concluded that the courts paid close attention to the facts of each case.⁵⁰

In findings that affirm the attitudinal model of decision-making in cases involving LGBT rights, Pinello's findings include the following:

- Gender (female)⁵¹ and race (minority)⁵² produced significantly more decisions favoring LGBT litigants;

⁴⁷ *Id.*

⁴⁸ DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW 76-93* (Cambridge Univ. Press 2003).

⁴⁹ *Id.* at 79, 82, 150.

⁵⁰ *Id.* at 79. It is not clear whether Pinello's methodology specifically screened for the possible judicial selectivity of facts or issue selection, two common threats to judicial independence described above.

⁵¹ *Id.* at 88.

⁵² *Id.* at 87.

- Religion was statistically significant, with Jewish judges being the most favorable to LGBT litigants, Catholic judges least favorable, and Protestants in the middle;⁵³
- Age was important, as younger judges were more likely to render pro-equality decision; and⁵⁴
- Political ideology played a major role, as federal judges appointed by Democrats were significantly more receptive to the equality claims of LGBT litigants than those appointed by Republicans.⁵⁵

I have not been able to locate extensive empirical data on decisions involving LGBT litigant since 2000, but based on my familiarity with many federal and state court decisions rendered since then I would not predict any radical shifts in these findings.

D. Final Thoughts on Judicial Independence

A final critical issue that we address today is this: How does the public perceive this complicated concept of judicial independence, especially in controversial cases such as those involving LGBT rights? After months of reading and thinking about judicial independence, I humbly offer the following perspective.

Judicial independence is widely embraced as a fundamental aspect of our democracy. People who have never heard of the Federalist Papers (or maybe even of Alexander Hamilton) understand its import. But after the general consensus that judicial independence is a core value and must be protected, unanimity on the topic crumbles.

The breakdown occurs due in large part to the lack of metrics to accurately measure judicial independence in a given case. As a result, the public's perception of judicial independence has much in common with the U.S. Supreme Court's infamous definition of obscenity: "we know it when we see it," or at least we think we do.

So when we learn of a judicial decision with which we disagree, whether it is a landmark LGBT rights case, a decision that declares that corporations are "citizens," or a case that effectively decides who will be our next president, our first reaction is to impugn the integrity and motives of the judge or judges who rendered it. Any decision that offends our political sensibilities and sense of justice results in our attaching the dreaded "activist judge" label to its author(s).

Most people grumble about the decision for a few days and then go on about their lives. Law professors prefer to write scathing law review articles about decisions they disfavor, an expenditure of energy that likely has no influence whatsoever on the judiciary's decision-making process or the general public's view of it. But people who feel especially passionate about the decision may organize in a manner that takes the concept of "activism" to a fevered pitch.

Similar to the fate that befell Hester Prynne of Scarlet Letter fame, political strategists use modern media to symbolically attach a large red "A" on the "activist" judges' robes. They organize referendum campaigns to overturn judicial decisions—for example, the Proposition 8 referendum in California that reversed the California Supreme Court decision recognizing same-sex marriage. Political strategists

⁵³ *Id.* at 88-91.

⁵⁴ *Id.* at 91.

⁵⁵ *Id.* at 114-15, 151-52.

sometimes directly target the judges as well as their decisions. This, of course, is what happened in Iowa following that court's decision in *Varnum v. Brien* recognizing same-sex marriage.⁵⁶ And it is the reason we are here today. Is this political backlash democracy in action that should be encouraged, or does it undermine the very concept of judicial independence that it purports to protect?

I leave resolution of that question to our other speakers today. Ultimately, however, that question will be answered by each of you and by other members of the American public, as we individually and collectively decide whether or how to react to judicial decisions with which we disagree.

III. JUDICIAL INDEPENDENCE IN PERIL?

HON. MARSHA K. TERNUS

A. Introduction

Good afternoon. Thank you for asking me to participate in this discussion of judicial independence and the impact of the politicization of judicial elections on that core value of our society. These concepts,—judicial independence and the threat posed by politicized judicial elections,—may sound like abstract principles, but they are not abstract to me. I have lived them—or should I say, I have survived them.

As you now know, in the 2010 Iowa judicial retention election, voters removed three justices from the Iowa Supreme Court after an unprecedented campaign against them, funded by out-of-state special interest groups. The primary impetus for the campaign against the justices was the Iowa Supreme Court's unanimous decision nineteen months earlier in *Varnum v. Brien*, declaring Iowa's defense of marriage act violated the equality rights of same-sex couples under the Iowa Constitution.⁵⁷

B. Independent Judiciary

The events in Iowa provide a concrete context for our discussion of judicial independence and the peril posed by politicized judicial elections. So this afternoon, I would like to talk about the *Varnum* decision and its aftermath in the larger context of the critical role of an independent judiciary in our democracy. Alexander Hamilton said in the Federalist Papers that “[t]he complete independence of the courts of justice” was “essential” in a constitution that limited legislative authority.⁵⁸ Without the power of the courts to declare acts of the legislature contrary to the constitution, he suggested, the “rights and privileges [reserved to the people] would amount to nothing.”⁵⁹ Hamilton also recognized that an independent judiciary was necessary to guard the rights of individuals from the will of the majority, who may wish to oppress a minority group in a manner incompatible with a constitutional provision.⁶⁰

⁵⁶ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

⁵⁷ *Id.*

⁵⁸ THE FEDERALIST NO. 78, at 426 (Alexander Hamilton) (E.H. Scott ed., 2002).

⁵⁹ *Id.*

⁶⁰ *Id.* at 428-29.

These underpinnings of judicial independence were certainly tested in Iowa. The stated purpose of the campaign against the justices was to send a message “in Iowa and across the country” that judges ignore the will of the people at their peril,⁶¹—a message of retaliation and intimidation utterly inconsistent with the concept of a judiciary charged with the responsibility to uphold the constitutional rights of all citizens.

Before we can really understand how destructive such a message is to our democracy, it’s important to have a shared understanding of the foundation of our system of justice. So let’s start there.

C. Rule of Law

As I’m sure the people in this room know, America’s system of justice is based on the rule of law. The rule of law is a process of governing by laws that are applied fairly and uniformly to all persons. Because the same rules are applied in the same manner to everyone, the rule of law protects the civil, political, economic, and social rights of all citizens, not just the rights of the most vociferous, the most organized, the most popular, or the most powerful. Applying the rule of law is the sum and substance of the work of the courts. So when we speak of “judicial independence,” we are referring to a judiciary that is committed to the rule of law, independent of—free of—outside influence, including personal bias or preference.

Iowa, like other states, created a government under the rule of law when its citizens adopted a constitution that set forth the fundamental rules and principles that would apply to citizens and their government. In fact, the Iowa Constitution expressly states: “This constitution shall be the supreme law of the land,” and it goes on to say that “any law inconsistent therewith, shall be void.”⁶²

These constitutional provisions are given meaning by the courts because the judicial branch is responsible for resolving disputes between citizens and their government, including claims by citizens that the government has violated their constitutional rights. Of course, the duty of courts to determine the constitutionality of statutes does not mean the judicial power is superior to legislative power. Rather, when the legislature has enacted a statute inconsistent with the will of the people as expressed in their constitution, the courts must prefer the constitution over the statutes. Thus, regardless of whether a particular result will be popular, courts must, under all circumstances, protect the supremacy of the constitution by declaring an unconstitutional statute void. Only by protecting the supremacy of the constitution can citizens be assured that the freedoms and rights they included in their constitution will be preserved. In this way, judicial review serves as an important check on the legislative and executive branches, ensuring a proper balance of power not only among the three branches of government but also between the people and their government.

Of course, the people can always amend their constitution to ensure its content and meaning reflect current public opinion. As Alexander Hamilton pointed out in *The Federalist*, however, until the people have amended the constitution, “it is binding upon themselves collectively, as well as individually; and no presumption or

⁶¹ Bob Vander Plaats, *Lawless Judges Deserve to Lose Jobs* (August 26, 2010), available at http://bobvp.w3bg.com/news/lawless_judges_deserve_to_lose_jobs/.

⁶² Iowa Const. art. XII, § 1.

even knowledge of [the people's] sentiments, can warrant their representatives in a departure from it."⁶³

With this background in mind, let's turn to the Iowa Supreme Court's 2009 *Varnum* decision.

D. *Varnum Decision*

The events leading to this decision began when six same-sex couples applied for Iowa marriage licenses. At that time and currently, Iowa's marriage statute states: "Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts, except as herein otherwise provided."⁶⁴ One of the "except as herein otherwise provided" provisions is Iowa's version of the defense of marriage act. It provides: "Only a marriage between a male and a female is valid."⁶⁵ Based on this statute prohibiting civil contracts of marriage between persons of the same gender, the county recorder refused to issue marriage licenses to the six same-sex couples.

These twelve Iowans then filed a lawsuit asking that the court order the county recorder to issue the requested licenses.⁶⁶ They claimed the law limiting civil contracts of marriage to one man and one woman was unconstitutional and unenforceable.⁶⁷ The constitutional provision upon which the couples relied in *Varnum* was the equality clause Iowans included in their constitution when Iowa became a state. It provides in relevant part: "[T]he general assembly shall not grant to any citizen or class of citizens, privileges . . . which, upon the same terms shall not equally belong to all citizens."⁶⁸

The Iowa Supreme Court held the state law limiting civil contracts of marriage to one man and one woman violated the plaintiffs' constitutional rights. Specifically, the court determined the legislature's restriction of the numerous privileges that flow from civil marriage to a limited class of citizens violated the plaintiffs' equality rights under the Iowa Constitution.⁶⁹ Because the Iowa Constitution expressly states that any law inconsistent with the constitution is void, the supreme court declared the offending statute void and granted the plaintiffs the relief they sought: an order that the county recorder could not rely on the unconstitutional restriction on the persons who could enter into civil contracts of marriage and was, therefore, obligated to issue licenses to the six same-sex couples who brought the lawsuit.⁷⁰

E. *The Retention Election*

Of course, the story does not end there. The second chapter involves Iowa's retention elections. Iowa has a commission-based, merit selection process for

⁶³ THE FEDERALIST NO. 78, at 429 (Alexander Hamilton), *supra* note 58.

⁶⁴ IOWA CODE § 595.1A (2009).

⁶⁵ *Id.* § 595.2(1).

⁶⁶ *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

⁶⁷ *Id.*

⁶⁸ Iowa Const. art. I, § 6.

⁶⁹ *Varnum*, 763 N.W.2d at 906; *see also id.* at 902-03 n. 28.

⁷⁰ *Id.* at 906-07.

choosing judges known as the Missouri Plan. The process begins with a fifteen-member, nonpartisan commission that screens applicants for judicial office, reviewing extensive information about each applicant's background, education, professional skills, and experience.⁷¹ After interviewing the applicants, the commission submits the names of the three most highly qualified candidates to the governor who is then required to pick the new judge from the commission's nominees.⁷²

The other aspect of Iowa's merit-selection process is retention elections. In a retention election a judge runs unopposed and voters simply choose whether or not to retain a judge for another term.⁷³ Historically, politics had played no role in judicial retention elections, and Iowa justices had not found it necessary to form campaign committees, to engage in fundraising, or to campaign in any manner.

In the 2010 general election that followed the 2009 *Varnum* decision, three members of the Iowa Supreme Court were on the ballot for retention. The 2010 retention elections were very different from previous elections. Because of our participation in the *Varnum* decision, the justices on the ballot were targeted by a Mississippi-based group, AFA Action, Inc.⁷⁴ Persons supporting AFA's campaign against the justices claimed the Iowa Supreme Court had overstepped its constitutional role "by declaring Iowa to be a 'same-sex' marriage state."⁷⁵ This claim was not based on a critique of the court's legal analysis. Not once did I hear our opponents claim that we had misinterpreted the Iowa Constitution in finding the defense of marriage act violated the plaintiffs' equal protection rights. Rather, the court was criticized for ignoring the will of the people and for ruling contrary to God's law. This latter criticism was particularly troubling because the court had made an effort in the *Varnum* opinion to clarify the narrowness of its decision.

As I noted earlier, the law at issue in the *Varnum* case governed a legal contract, not the religious institution of marriage. The court pointed out this distinction in its opinion:

Our constitution does not permit any branch of government to resolve . . . religious debates and entrusts to courts the task of ensuring government avoids them. The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares: "Marriage is a civil contract" and then regulates that civil contract. Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licensing system

⁷¹ Iowa Const. art. V, § 16 (adopted 1962).

⁷² Iowa Const. art. V, § 15 (adopted 1962).

⁷³ Iowa Const. art. V, § 17 (adopted 1962).

⁷⁴ See Andy Kopsa, *National Anti-Gay Groups Unite to Target Iowa Judges*, IOWA INDEPENDENT (Oct. 21, 2010), available at <http://iowaindependent.com/45701/national-anti-gay-groups-unite-to-target-iowa-judges>; ADVISORY OP. NO. 2010-07, Iowa Ethics & Campaign Disclosure Board, available at http://www.iowa.gov/ethics/legal/adv_opn/2010/10fao07.htm.

⁷⁵ Bob Vander Plaats, *Guest Column: Lawless Judges Deserve to Lose Jobs*, DES MOINES REGISTER, Aug. 22, 2010.

that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.

As a result, civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.⁷⁶

After holding Iowa's constitution required that the state accord the same marital status and benefits to both opposite-sex and same-sex couples, the court pointed out that "religious doctrine and views contrary to this [holding] are unaffected," and "[a] religious denomination can still define marriage as a union between a man and a woman."⁷⁷

Notwithstanding the fact that the court's ruling did not affect religious beliefs or practices, substantial opposition to the justices' retention came from individuals and groups who believed the court had violated God's law or natural law.⁷⁸ For example, through an effort called Project Jeremiah, preachers were urged to use their pulpits to advocate for a no vote on retention of the justices, which many did.⁷⁹ In fact, one leader of the campaign against retention declared after the election, Iowa voters had done "God's will by standing up to the three judges who would try to redefine God's institution."⁸⁰ One has to wonder if the persons campaigning against us even read the decision because, as I have pointed out, the court expressly avoided redefining the religious institution of marriage.

But the campaign against the justices was about more than same-sex marriage. It became an assault on the power of the court itself. As I have already mentioned, the main leader of the campaign against the justices was a Mississippi group affiliated with the American Family Association. AFA called its Iowa program, Iowa For Freedom.⁸¹ This group's local spokesperson argued, "appointed judges [are] dictating from the bench which societal beliefs are acceptable and which ones are not."⁸² He claimed the retention election was not about gay marriage; it was about

⁷⁶ *Varnum v. Brien*, 763 N.W.2d 862, 905 (Iowa 2009).

⁷⁷ *Id.* at 906.

⁷⁸ See Andy Kopsa, *National Anti-Gay Groups Unite to Target Iowa Judges*, IOWA INDEPENDENT (Oct. 21, 2010), available at <http://iowaindependent.com/45701/national-anti-gay-groups-unite-to-target-iowa-judges>; see also www.iowapastors.com.

⁷⁹ Brett Hayworth, *Cary Gordon, Cornerstone Push to Oust Iowa Judges*, SIOUX CITY JOURNAL (Oct. 4, 2010), available at http://siouxcityjournal.com/blogs/politically_speaking/cary-gordon-cornerstone-push-to-oust-iowa-judges/article_e51c38df-64de-5a24-9bbf-c41e99856cb6.html.

⁸⁰ Jason Hancock, *Chuck Hurley: Ousting Iowa Supreme Court Justices was 'God's Will'*, IOWA INDEPENDENT (Nov. 3, 2010), available at <http://iowaindependent.com/46996/chuck-hurley-ousting-iowa-supreme-court-justices-was-gods-will>.

⁸¹ ADVISORY OP. NO. 2010-07, Iowa Ethics & Campaign Disclosure Board, available at http://www.iowa.gov/ethics/legal/adv_opn/2010/10fao07.htm.

⁸² Bob Vander Plaats, *Guest Column: Lawless Judges Deserve to Lose Jobs*, DES MOINES REGISTER, Aug. 22, 2010.

liberty.⁸³ Asserting the court “legislated from the bench,” he said, “If they will do this for marriage, all your liberties are up for grabs.”⁸⁴ In a television ad sponsored by Iowa for Freedom, the National Organization for Marriage, and the Campaign for Working Families, the narrator told viewers “If they can redefine marriage, none of the freedoms we hold dear are safe from judicial activism.”⁸⁵

I probably do not need to tell this audience that the Iowa Supreme Court took away no one’s liberties or freedoms in the *Varnum* decision. To the contrary, the civil rights of same-sex couples to the secular benefits that flow from the civil contract of marriage were upheld. Moreover, the views of individuals and religious institutions were unaffected by this decision and their religious freedom to define the religious institution of marriage as only between one man and one woman was expressly preserved.

You might be wondering: What was the response to these inaccurate and demonizing attacks on the judiciary? As for the justices themselves, we decided early on not to form campaign committees and not to engage in any fundraising. This decision reflected our collective view of our role as judges. Judges must be fair and impartial. They cannot be obligated to campaign contributors and just as importantly, they should not be perceived as beholden to campaign contributors. We strongly believed our role as fair and impartial members of the Iowa Supreme Court would have been forever tarnished had we engaged in fundraising and campaigning. We decided we would not contribute to the politicization of the judiciary in Iowa even though we knew this decision might cost us our jobs. Our hope was that the bar association and others would come to our aid. They did, but not with the vigor and money that was required to counteract the emotionally laden and factually inaccurate television ads that ran incessantly for the three months prior to the election.

F. Threat to an Independent Judiciary

Dealing with controversial issues has always been part of being a judge, and certainly, public debate about the merits of court decisions is a healthy aspect of a democratic society. But what message is sent when a retention election is used as a referendum on a particular court decision? What message is sent when it is used to intimidate judges who in the future will be called upon to make politically unpopular decisions?

Opponents of the *Varnum* decision argued judges must be held accountable to the people when the court makes a decision the people do not like. But the message they were really sending was that judges should rule in accordance with public opinion

⁸³ Rod Boshart, *Vander Plaats: Iowa Voters Likely Won’t Retain Justices Over Same-Sex Marriage Issue*, CEDAR RAPIDS GAZETTE (Sept. 10, 2010), available at <http://thegazette.com/2010/09/10/vander-plaats-iowa-voters-likely-wont-retain-justices-over-same-sex-marriage-issue>.

⁸⁴ Jason Hancock, *Vander Plaats: Fight to Oust Iowa Judges’ Most Important Election in Our Country*, IOWA INDEPENDENT (Aug. 6, 2010), available at <http://iowaindependent.com/40793/vander-plaats-fight-to-oust-judges-most-important-election-in-our-country>.

⁸⁵ Todd E. Pettys, “Letter From Iowa: Same-Sex Marriage and the Ouster of Three Justices,” 59 U. KAN. L. REV. 715, 728-29 (2011); see also Commercial: NOM: Iowans for Freedom Against Radical Judges: David A. Baker, Michael J. Streit, Marsha Ternus, available at http://www.youtube.com/watch?v=MIFnBBLX_OE.

even when that means ignoring the constitution. I read an article by a Minnesota judge who responded to similar contentions with this observation:

It might sound good to have judges “accountable to the people.” But which people? Should judges be accountable to those who shout the loudest or make the most threats? Should judges be accountable to the majority? If so, what happens to the rights of the minority? And what happens to a judge’s responsibility to uphold the law and the Constitution? When a judge starts to worry about who [the judge] will please or displease with a ruling, then we cease to be a government based on law.⁸⁶

Just consider the United States Supreme Court’s decision in *Brown v. Board of Education*.⁸⁷ If public opinion were the standard by which judges should make decisions, that case would probably have had a different outcome. The court’s decision in *Brown* was unpopular with many, many people at the time, yet that decision is now universally respected. As former Justice Sandra Day O’Connor has observed, the *Brown* decision was “an exercise in accountability to the Rule of Law over the popular will.”⁸⁸

I think the *Varnum* decision was as well. I can assure you the members of our court were very much aware when we issued our decision in *Varnum* that it would unleash a wave of criticism, and we knew we could possibly lose our jobs because of our vote in that case. Nonetheless, we remained true to our oath of office in which we promised to uphold the Iowa Constitution without fear, favor or hope of reward.⁸⁹

It should come as no surprise that judges are most at risk when they uphold the rights of politically unpopular minorities against the wishes of the majority. As Alexander Hamilton wrote in *The Federalist*, “It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”⁹⁰ The founding fathers recognized that an independent judiciary was of critical importance in safeguarding the rights of all parts of society. Hamilton made the realistic observation that, in such situations, “it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution.”⁹¹

The fortitude of many judges will be tested in the coming years. The groups who were successful in Iowa have vowed they will not stop with the removal of three justices from the Iowa Supreme Court.⁹² Moreover, the opposition to same-sex

⁸⁶ George Harrelson, *Marshall Independent* (July 8-9, 2006).

⁸⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁸⁸ Sandra Day O’Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U.L. REV. 1, 3 (2008).

⁸⁹ IOWA CODE § 63.6 (2009) (judicial oath of office).

⁹⁰ THE FEDERALIST NO. 51, at 288 (Alexander Hamilton).

⁹¹ THE FEDERALIST NO. 78, at 429 (Alexander Hamilton), *supra* note 58.

⁹² Jason Hancock, *Iowans Vote to Oust All Three Supreme Court Justices*, IOWA INDEPENDENT, Nov. 2, 2010, available at <http://iowaindependent.com/46917/iowans-vote-to-oust-all-three-supreme-court-justices>; Andy Kopsa, *Anti-Retention Leaders: Iowa Just the Start of National Gay Marriage Battle*, IOWA INDEPENDENT (Oct. 29, 2010), available at

marriage that drove the anti-retention efforts in Iowa is only one aspect of a larger movement to meld the religious views of evangelical Christians into the fabric of our government and our laws. In fact, earlier this year over 400 Iowa ministers attended an expense-paid, two-day Pastors' Policy Briefing in West Des Moines, Iowa where they heard from Newt Gingrich, Haley Barbour, Michele Bachmann, and Mike Huckabee, all possible 2012 presidential contenders at the time.⁹³ Huckabee told the crowd, "We face a spiritual war in this country."⁹⁴ According to a New York Times article, "[t]he audience heard how to push their flocks to register and vote along 'biblical principles.'"⁹⁵ This effort continues tomorrow night when five presidential candidates will appear at a presidential candidate forum in Des Moines sponsored by the Iowa Faith & Freedom Coalition, a conservative Christian group that opposes LGBT rights.⁹⁶

By using these examples, I don't mean to single out evangelical Christians. Groups interested in social issues are not the only ones that might benefit from a politicized judiciary. All one has to do is examine the facts culminating in the United States Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*⁹⁷ to realize that individuals and corporations contributing to judicial campaigns also hope to influence the candidate's judicial decision making. In that case, the president of Massey Coal Company contributed over \$3 million to elect Brent Benjamin to the West Virginia Supreme Court.⁹⁸ After his election, Justice Benjamin refused to recuse himself from an appeal that had been filed by the coal company.⁹⁹ So all five justices on the West Virginia Supreme Court participated in the appeal, and they reversed a fifty million dollar judgment against the coal company on a vote of 3-2.¹⁰⁰

I have no doubt that the groups that were active in the 2010 Iowa retention election as well as other special interest groups will be emboldened by the events in Iowa and seek to intimidate and influence judges by the threat of removal from office. My fear is that efforts to intimidate the judiciary will, over time, destroy the ability and willingness of judges to do their duty as faithful guardians of the Constitution or will result in the election or selection only of judges who agree to adhere to a certain agenda.

<http://iowaindependent.com/46519/anti-retention-leaders-iowa-just-the-start-of-gay-marriage-battle>.

⁹³ Erik Eckholm, *An Iowa Stop in a Broad Effort to Revitalize the Religious Right*, N.Y. TIMES (Apr. 2, 2011), available at <http://www.nytimes.com/2011/04/03/us/politics/03pastor.html?pagewanted=all>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 2011 Fall Presidential Forum, <http://ffciowamedia.com/events/2011-fall-presidential-forum>; Iowa Faith & Freedom Coalition Candidate Forum (Oct. 22, 2011), available at <http://www.c-spanvideo.org/program/302136-1>.

⁹⁷ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

⁹⁸ *Id.* at 873.

⁹⁹ *Id.* at 874.

¹⁰⁰ *Id.*

I hope we never reach the point in this country that judges become no more than politicians in robes, deciding cases in accordance with public opinion polls or based on what will satisfy their campaign contributors. And I greatly fear the current effort to transform judges into theologians in robes, ignoring the rule of law in favor of Biblical guidance. If the day comes that judges make decisions as politicians or theologians, this society and our democracy are in serious trouble. Only an independent judiciary can ensure that the minority is protected from the tyranny of the majority. Only an independent judiciary committed to the rule of law can safeguard every citizen's liberties and rights.

Politicized judicial elections undermine judicial independence, make no mistake about it. Over time this trend will result in a judiciary that is less and less likely to be fair and impartial. Why?

First, there is the real and perceived corrupting influence of campaign fundraising. Do we really believe that special interest groups and corporations who support a judicial candidate do not expect that person, once elected, to vote a certain way on certain issues? Of course, they do. And that expectation will not be lost on some judges. Second, aside from the fundraising aspect of politicized judicial elections, threats of retaliation and intimidation will be understood by sitting judges. Sadly, some judges will be discouraged from following the rule of law when to do so will lead to an unpopular outcome. As Justice O'Connor has said: "The law sometimes demands unpopular outcomes, and a judge who is forced to weigh what is popular rather than focusing solely on what the law demands has lost some . . . impartiality."¹⁰¹

Ironically, politicized judicial elections undermine our democracy even when judges elected or retained in such elections adhere to the rule of law. Even if judges have the courage to disappoint their campaign contributors or ignore the threats of special interest groups, fundraising and campaigning by judges blur the distinction between judges and politicians. When judges are viewed by citizens as politicians, as susceptible to influence, confidence in the courts is undermined, and the integrity and validity of court decisions become suspect.

I'm not being alarmist. I have seen first hand the impact of politicized elections on the court as an institution. Let me give you an example. I was on the Iowa Supreme Court for seventeen years, and I had never heard the integrity of our court or the motivation for our decisions questioned, directly or indirectly. But in the two months after the 2010 retention election that I served before my term expired, I witnessed two incidents that showed me the view of our court had been changed forever. In two different cases, attorneys challenged orders the Supreme Court had entered, claiming in very direct terms that our orders in those cases were politically motivated. Never had I seen such claims in pleadings or otherwise in seventeen years on the court, but I saw two in the two months I served after the election.

So whether we are talking about the actual corrupting influence of campaign contributions and judicial intimidation or simply the perception that the judiciary can be influenced, politicized judicial elections pose serious risks to our democracy. Our government can only function as it was intended to function if the checks and balances envisioned by our founding fathers are preserved. One of those checks and balances is the duty of courts to declare laws inconsistent with the constitution void.

¹⁰¹ Elaine E. Bucklo and Jeffrey Cole, *Thoughts on Safeguarding Judicial Independence: An Interview with Justice Sandra Day O'Connor*, 35 *LITIG.* 6, 7 (2009).

Clearly, the principles and rights enshrined in our federal and state constitutions will be preserved and given meaning only if they are supported and enforced by a fair, impartial and independent judiciary. But more is required. Court decisions find their legitimacy in the willingness of the other branches of government and our citizens to abide by those decisions. Can that legitimacy be sustained, however, if court decisions are perceived to have no integrity?

G. Conclusion

At the end of the day, the debate about controversial court decisions and the judges who make them boils down to a simple question: What kind of court system do Americans want? A court system that issues rulings based upon public opinion polls, campaign contributions, and political intimidation or a court system that issues impartial rulings based upon the rule of law? If we as Americans want our freedoms, liberties and rights protected by a fair and impartial judiciary, we must support the courts even when the rights they uphold are not our own, but those of a politically unpopular minority.

A former dean of the Yale Law School, Robert Maynard Hutchins, once warned:

The level of understanding, or rather lack of understanding, of basic civics is an actual threat to the future stability of the Republic. If our nation's populace does not understand the role of the three coequal branches of their government, then it will not be long before the future stability of the foundation for that government will be susceptible to becoming irrevocably compromised.¹⁰²

He continues with this forewarning, "It has been stated that the death of democracy is not likely to be an assassination from ambush. It will be a slow extinction from apathy, indifference, and undernourishment."¹⁰³ I agree with Dean Hutchins and think that what happened in Iowa is a sad step in that direction.

It's very easy to take what we have in America for granted, especially when we learn of the tyrannical regimes in other parts of the world. But Dean Hutchins' underlying message is correct: America is not immune from disintegration. There is no guarantee that our children and grandchildren will enjoy the fair and impartial justice we have enjoyed. Our children and grandchildren will only know true justice if we fight to preserve it. It is the responsibility of everyone in this room to support and advocate for a judiciary with integrity, one free from the political influence and intimidation of special interest groups and campaign contributors. Only if citizens have an unwavering commitment to an independent judiciary can we assure future generations that they too will enjoy a society governed by the rule of law and not by the tyranny of the majority.

Thank you so much for having me here today.

¹⁰² Robert M. Hutchins, *THE GREAT CONVERSATION* 80 (1952).

¹⁰³ Robert M. Hutchins, *THE GREAT CONVERSATION* 80 (1952).

IV. BULLYING THE BENCH

CAMILLA B. TAYLOR¹⁰⁴

In the last decade, the marriage equality movement has transformed itself from a wishful rallying cry of an oppressed few into a mainstream movement whose time has come. Indeed, for many young people, the struggle for the freedom to marry has become the civil rights struggle of a generation. A May 2011 Gallup poll for the first time documented majority public support for same-sex couples' freedom to marry.¹⁰⁵ Among eighteen to thirty-four year-olds, who will be the future majority-voting block, support for marriage equality is now at 70%.

These developments in public opinion reflect changes in positive law. As of October 2011, six states and the District of Columbia permit same-sex couples to marry. A federal trial court ruled that so-called "Proposition 8," a ballot measure that stripped the freedom to marry from Californians by a small voter margin in 2008, is unconstitutional. Marriage legislation is likely to move forward this year in several states. Eight states provide same-sex couples and their children access to a comprehensive lesser legal status for family recognition (such as "civil unions" or "domestic partnerships"), through which these states make available the majority of the state law protections, responsibilities, and benefits of marriage. Still, more states offer a more limited menu of protections to same-sex couples as well. Court challenges to the federal so-called "Defense of Marriage Act," which denies federal respect to marriages of same-sex couples, move forward in several federal circuits, and the Obama administration has determined that the law is indefensible and unconstitutional, leaving defense of the law up to Republican leadership in Congress.

However, these advances for lesbian and gay couples and their children have not come easily. Opponents of marriage equality have fought back with varying tactics and varying degrees of success. For example, antigay groups have used ballot measures to insert exclusionary provisions in the constitutions of twenty-nine states. Antigay groups also have fought to exempt their supporters from generally applicable laws requiring disclosure of donors and petition-signers, although these efforts have been unsuccessful to date.¹⁰⁶ Worse, they have attacked the impartiality of the courts, targeting individual jurists who have ruled that excluding same-sex couples and their children from marriage deprives these families of constitutional guarantees of liberty and equality. Time will tell, but this last tactic is the one that may have the most lasting and destructive impact on our system of justice, our societal understanding of the equality guarantee, and indeed, on our constitutional democracy itself.

¹⁰⁴ National Marriage Project Director and Senior Staff Attorney, Lambda Legal; lead counsel in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

¹⁰⁵ Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP POLITICS (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>.

¹⁰⁶ See, e.g., *Doe v. Reed*, 130 S. Ct. 2811 (2010).

A. Reaction to Varnum v. Brien

On November 2, 2010, the marriage equality movement suffered a blow. Well-funded antigay groups succeeded in ousting from office three well-respected Iowa Supreme Court justices who were up for what should have been routine retention elections. These groups targeted the justices because they had joined in a 2009 unanimous opinion in Lambda Legal's lawsuit, *Varnum v. Brien*,¹⁰⁷ which struck down Iowa's marriage ban and ordered marriage licenses issued to same-sex couples.

Led by American Family Association, the antigay groups included the Family Research Council, the Alliance Defense Fund, the Faith and Freedom Coalition and the National Organization for Marriage.¹⁰⁸ Together they poured more than one million dollars into a campaign, culminating in a twenty-city bus tour, urging Iowa voters to kick the justices off the Court.¹⁰⁹ Supporters of the justices amassed only a small fraction of that sum. The justices themselves declined to fund raise or campaign on their own behalf, deeming it unseemly for sitting judges to create an appearance of pandering for votes.¹¹⁰

The justices lost by a vote of 54 percent to 45 percent.

Antigay groups' decision to target Iowa's justices was designed to intimidate judges in Iowa and across the nation, and to bully lesbian and gay people into being fearful of bringing discrimination claims to court. However, the loss of these justices had no impact on Iowa's substantive law, including the right to marry for lesbian and gay couples. The Court's ruling in *Varnum* is still the law of the land, and the right to marry remains enshrined in the Iowa Constitution. Thousands of same-sex couples have already married in Iowa, and more couples marry every day.

Opponents of equality for gay and lesbian couples chose to attack Iowa's justices precisely because they knew that they were unlikely ever to be able to roll back marriage equality. When the unanimous high court decision in *Varnum* came down in April 2009, the Iowa Senate Majority Leader, Mike Gronstal, and then-House Speaker Pat Murphy vowed to oppose calls to amend Iowa's constitution to preclude gay and lesbian couples from marrying. Gronstal and Murphy issued a joint statement heralding the decision as a victory for civil rights, stating that "When all is said and done, we believe the only lasting question about today's events will be why it took us so long."¹¹¹ Then-governor Chet Culver also opposed amending Iowa's constitution. More than one public opinion poll in Iowa conducted since the

¹⁰⁷ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

¹⁰⁸ Patrick Caldwell, *Disorder in the Court*, THE AMERICAN PROSPECT, October 2011, at 44, available at <http://prospect.org/article/disorder-court>.

¹⁰⁹ Michelle Garcia, *Iowa Supreme Court Judges Booted*, ADVOCATE.COM (Nov. 3, 2010, 1:24 AM), http://www.advocate.com/News/Daily_News/2010/11/02/Iowa_Supreme_Court_Judges_Booted/

¹¹⁰ Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, ABA JOURNAL, Jan. 1, 2011, available at http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/; Matt Milner, *Targeted Chief Justice Speaks Out*, OTTUMWA COURIER (Ottumwa, Iowa), Oct. 26, 2010, available at <http://ottumwacourier.com/local/x1872731036/Targeted-chief-justice-speaks-out>.

¹¹¹ Editorial, *Iowa Decency*, N.Y. TIMES, Apr. 4, 2009.

decision demonstrates that a majority of Iowans do not want a constitutional amendment, and a recent poll now demonstrates majority support for lesbian and gay couples' right to marry.¹¹²

While the 2010 election results diminished the number of political officeholders who support equality, a constitutional amendment still appears unlikely. Amending the Iowa Constitution requires a vote in both chambers of the legislature in two consecutive two-year general assemblies. The earliest this could happen is 2014. Then the amendment could go to the public for a vote. However, although current Governor Terry Branstad, who assumed the governorship last year after a twelve-year hiatus, supports an amendment, and Pat Murphy has lost his majority in the Iowa House, Mike Gronstal remains the senate majority leader, and he continues to state in no uncertain terms that his commitment to prevent a constitutional amendment remains firm, no matter the pressure. "The easy political thing for me to do years ago would have been to say, 'Oh, let's let this thing go. It's just too political and too messy,'" Gronstal said. "What's ugly is giving up what you believe in, that everybody has the same rights. Giving up on that? That's ugly."¹¹³

However, even though the retention vote failed to change the law, the vote nevertheless was "a body blow to the principle of an independent judiciary insulated from popular sentiment," as Iowa's largest newspaper, the *Des Moines Register*, editorialized shortly after the election.¹¹⁴ An Iowa judge stands for retention every eight years. Retention elections are usually unremarkable, and intended not to provide a referendum on individual court decisions but to allow voters a say about the overall competence of judges or specific instances of corruption, neither of which was even an issue in this election. Since 1962, when the current system was adopted, no Iowa Supreme Court justice ever has lost a retention election.¹¹⁵ Attacking justices for participation in one decision, no matter how unpopular, reflects a fundamental misunderstanding of the role of the courts, and constitutes a misuse of the retention process. As the Iowa Courts website states:

Although it may be appropriate for politicians to consider public opinion and the views of special interest groups when drafting laws and regulations, it is never appropriate for judges to do so when deciding cases. Judges must remain impartial. In this respect, the judiciary is very different from the other two branches of government. Judges are accountable to the Constitution and the law—not political pressure.¹¹⁶

¹¹² *KCCI Poll: Iowans Back Same-Sex Marriage*, KCCI DES MOINES, June 3, 2010, available at <http://www.kcci.com/news/23788070/detail.html>.

¹¹³ Jennifer Jacobs & Jason Clayworth, *Democratic Leader in Iowa Senate Vows He'll Block Vote on Gay Marriage*, DES MOINES REGISTER, Nov. 3, 2010, <http://www.desmoinesregister.com/article/20101104/NEWS09/11040352/Democratic-leader-in-Iowa-Senate-vows-he-ll-block-vote-on-gay-marriage>.

¹¹⁴ *Everyone Lost in Judicial Retention Election*, DES MOINES REGISTER, Nov. 4, 2010, available at <http://www.justicenotpolitics.org/content/everyone-lost-judicial-retention-election>.

¹¹⁵ Caldwell, *supra* note 108.

¹¹⁶ *About Judges: Judicial Independence and Accountability*, IOWA JUDICIAL BRANCH, http://www.iowacourts.gov/public_information/about_judges/judicial_independence_and_accountability/index.asp?search=not+political+pressure#_1.

B. Civil Rights Decisions in Iowa

Iowa's judiciary has a long proud history of independence and leadership on civil rights issues. As the *New York Times* noted, "[f]rom its first decision in 1839, the Iowa Supreme Court demonstrated a willingness to push ahead of public opinion on matters of minority rights, ruling against slavery, school segregation and discrimination decades before the national mood shifted toward racial equality."¹¹⁷

In 1839, when the Iowa Supreme Court comprised only three members, Chief Justice Charles Mason authored the Court's first published opinion in *In re Ralph*.¹¹⁸ A Missouri slave owner had sued for the return of Ralph, a man whom the Missourian had permitted to come to Iowa to work toward the purchase of his freedom. When Ralph failed to come up with sufficient money, the Missourian sent bounty hunters to collect him and sued in Iowa court for his return. Twenty-six years before ratification of the Thirteenth Amendment, an Iowa court rejected the Missourian's claim. Chief Justice Mason wrote, "no man in this territory can be reduced to slavery."¹¹⁹ The decision stands in sharp contrast to the infamous *Dred Scott* decision eighteen years later, in which the U.S. Supreme Court ruled that even in free states, slaves had no legal claim to freedom.

Thirty years after *In re Ralph*, and nearly a century before *Brown v. Board of Education*, Iowa Justice Chester Cole authored a decision desegregating Iowa's schools, rejecting a "separate but equal" system of public education for African American children. In *Clark v. Board of Directors*,¹²⁰ Susan B. Clark, a twelve-year-old African American girl, brought suit after a public school denied her admission because of her race. Justice Cole acknowledged that "public sentiment" opposed "the intermingling of white and colored children."¹²¹ Nevertheless, he held that a local school board had no authority to deny African American children the right to equal education on that ground. To bend to discriminatory majoritarian impulses in such a way would "sanction a plain violation of the spirit of our laws," he stated.

In addition to trailblazing on racial justice issues, the Iowa Supreme Court led the way in numerous instances involving women's rights. Iowa courts were the first in the nation to admit a woman to the practice of law.¹²² In 1869, Arabella Mansfield became the first woman in the United States admitted to the bar in any state—three years before the U.S. Supreme Court determined that an Illinois woman had no right to practice law. The Iowa high court also was one of the first to establish that the Nineteenth Amendment, in extending to women the right to vote, made women eligible for jury service.

The Iowa Supreme Court's protection of minorities extended to religious groups as well. In the early years of the twentieth century, the Court fought back against state government's attack on the corporate existence of the Amana Society, a

¹¹⁷ A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/04/us/politics/04judges.html>.

¹¹⁸ *In re Ralph*, 1 Morris 1 (Iowa 1839).

¹¹⁹ *Id.* at 6.

¹²⁰ *Clark v. Bd. of Dirs.*, 24 Iowa 266 (Iowa 1868).

¹²¹ *Id.*

¹²² Tammy A. Sarver, Erin B. Kaheny & John J. Szmer, *The Attorney Gender Gap in U.S. Supreme Court Litigation*, 91 JUDICATURE 238 (2008).

religious settlement whose members believed in the communal ownership of property. The Court held that the state's corporate laws were restrained by the Society's members' right to religious freedom: "Each individual must determine for himself what limit he shall place upon his aspirations. . . . Under the blessings of free government, every citizen should be permitted to pursue that mode of life which is dictated by his own conscience"¹²³

C. Iowa Allows Same-Sex Marriage

Lambda Legal relied on the Iowa Supreme Court's extraordinary history of prescience and integrity when we filed our lawsuit on behalf of six same-sex couples seeking to marry in their home state of Iowa in December 2005. At the time that we filed, only one state in the country—Massachusetts—permitted same-sex couples to marry. Many commentators around the nation who were less familiar with Iowa's proud tradition of leadership on matters involving equality and liberty questioned why we would file a marriage equality lawsuit in the heartland when states on the coasts had not yet embraced it. However, we had faith that we would get a fair hearing.

We were right. A Polk County trial court struck down the marriage ban in August 2007. After Polk County appealed, the case went directly to the Iowa Supreme Court.

Iowa became the third state, after Massachusetts and Connecticut, in which same-sex couples could marry, followed quickly thereafter by Vermont, New Hampshire, New York, and the District of Columbia. (More than eighteen thousand couples had validly married in California, as well, before the enactment of Proposition 8 prevented further couples from marrying in that state, and Maine briefly enacted marriage equality through legislation before a referendum prevented it from going into effect.) The decision was the first unanimous high court opinion on marriage for same-sex couples. The Court spoke in plain language, explaining that the six Iowa couples and their children had been denied basic freedoms and security guaranteed to all Iowans on equal terms.

The *Varnum* justices were aware that their opinion might not enjoy majority support, but it was the only decision they could take; they had taken oaths to uphold the Iowa Constitution's promise of equality and it was up to them to breathe new life into it, as the Court had done so many times in generations past. At both oral argument and in the written opinion in the case the Court diligently explained the legal review process and the role of the Court to the public:

Our responsibility . . . is to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time.¹²⁴

¹²³ *State v. Amana Soc'y*, 109 N.W. 894, 899 (Iowa 1906).

¹²⁴ *Varnum v. Brien*, 763 N.W.2d 862, 876 (Iowa 2009).

D. The Justices of the Varnum Court

The three unseated Iowa justices were a bipartisan group unfairly characterized as “activist.” The *Varnum* Court comprised both Democratic and Republican appointees. Justice Mark Cady, who authored the opinion, is often described as one of the more conservative members of the Court, and was appointed by former (and incoming) Republican governor Terry Branstad. The three unseated justices—Chief Justice Marsha Ternus, Justice Michael Streit, and Justice David Baker—were skilled jurists and native Iowans known more for their long years of respected service on the bench than for adherence to any particular ideology.

Chief Justice Ternus grew up on a farm in northern Iowa, attending Drake and the University of Iowa. Republican governor Branstad appointed her to Iowa’s Supreme Court in 1993, and her fellow members of the Court elected her as chief justice in 2006. She is the first woman to serve as chief justice of Iowa’s highest court. As chief, she made her highest priority the improvement of court oversight for children caught in the court system, chairing the State Children’s Justice Council. In 2009, Chief Justice of the United States Supreme Court, John Roberts appointed her to the national Judicial Conference Committee on Federal-State Jurisdiction. Married with three children, she and her family attended a Catholic church in West Des Moines.

Justice Streit was born and raised in Sheldon, Iowa. Governor Branstad appointed him as a district court judge in 1983, and later to the Iowa Court of Appeals in 1996, before Streit was appointed to the high court in 2001. He chaired the Judges Association Education Committee and speaks frequently before Rotary Clubs, churches, Jaycees, Kiwanis, and Boy Scout groups.

Justice Baker, the most recent appointee to the Iowa Supreme Court in 2008 after serving both as a district court and appellate judge, was born in Muscatine, Iowa, grew up in Waterloo, and went to college and law school at the University of Iowa. He participated in writing Iowa’s Appellate Practice Manual and served on Iowa’s Ethics and Grievance Committee. Past president of the Cedar Rapids West Rotary Club and a board member of the United Way, he proudly noted in his web biography his participation in the creation of a local bike trail and duties as a volunteer swim coach at the YMCA.

Although profiles in courage, these justices hardly stood out as candidates for the label “activist.” However, the out-of-state extremist organizations that targeted them had no concern for truth. Their aim was to paint the justices as “robed masters and judicial activists imposing their will on the rest of us.”¹²⁵

E. Reaction

The retention elections shine light on antigay extremist organizations’ agenda to undermine the system of checks and balances that has served us well for over two hundred years. Since the election, opponents of equality for gay and lesbian couples have exulted in the ouster of the three justices. “Taking on the judicial class,” Newt Gingrich reportedly said to supporters, “and telling judges that ‘we are not going to tolerate enforced secularization of our country,’ is ‘one of the most important things

¹²⁵ Kyle Mantyla, *Targeting Iowa Judges To Send a Message To the Supreme Court*, RIGHT WING WATCH (Oct. 20, 2010, 4:06 PM), <http://www.rightwingwatch.org/content/targeting-iowa-judges-send-message-supreme-court>.

we can engage in.”¹²⁶ David Barton, a Texas antigay activist, crowed, “[t]his is what we call hanging a bloody scalp on the gallery rail.”¹²⁷ The National Organization for Marriage has already said that it intends to target Iowa retention elections in 2012 and 2016.

The targeting of the Iowa justices was not just an attack on three skilled jurists, or on the outcome of one case—it was an attack on the constitutional equality guarantee itself. The constitutional guarantee of equality is inherently a counter-majoritarian principle. If the right to equal protection means anything, it means that courts are empowered to strike down a piece of legislation—regardless of whether it enjoys majority support—when that legislation targets a minority for unequal treatment. Indeed, it is the absolute obligation of a court to do so. If a slim majority can unseat a court solely for upholding the rights of a minority against majority attack, then what is the point of a constitutional guarantee of equality at all?

Political attacks on the judiciary for courts’ commitment to equality are nothing new. In 1954, after the U.S. Supreme Court ruled in *Brown vs. Board of Education* that state-mandated segregation in public schools violated the U.S. Constitution, some cried that the Court had overstepped its role and usurped power from the legislature. Billboards to “Impeach Earl Warren” littered the South.¹²⁸ If Iowa Chief Justice Charles Mason had faced a retention vote after *In re Ralph* in 1839, or Justice Chester Cole had done so after *Clark v. Board of Education*, they likely would have had difficulty retaining their seats, too. Fortunately for these jurists, now widely admired as heroes, they were not subject to a politicized retention election process. The founders of our nation understood in structuring our federal judiciary that if courts are not insulated from voters who disagree with particular decisions, then majorities will have the power to strip fundamental rights away from minorities—and our cherished principles of liberty and freedom will disappear.

As retired United States Supreme Court Justice Sandra Day O’Connor has noted, our judicial system will fail to work if litigants become concerned that a

[J]udge is more accountable to a campaign contributor or an ideological group than to the law. In our system, the judiciary, unlike the legislative and the executive branches, is supposed to answer only to the law and the Constitution. Courts are supposed to be the one safe place where every citizen can receive a fair hearing.¹²⁹

A judge who is forced to weigh what is popular rather than focusing solely on what the law demands loses independence and impartiality. If an embattled judiciary were to lose its ability to protect our laws and constitution with impartiality, that would be a tragic loss for our country. “‘Judges have to be assured,’ Justice

¹²⁶ *Newt Gingrich Calls Ouster of Justices a Rejection of ‘Enforced Secularization’*, DES MOINES REG. (Nov. 4, 2010, 7:09 PM), <http://blogs.desmoinesregister.com/dmr/index.php/tag/iowa-judge-retention-vote/>.

¹²⁷ *Id.*

¹²⁸ *The Supreme Court: Earl Warren*, PBS, 2007, http://www.pbs.org/wnet/supremecourt/rights/robes_warren.html.

¹²⁹ Sandra Day O’Connor, *Take Justice Off the Ballot*, N.Y. TIMES, May 22, 2010, <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html>.

O'Connor said, that 'they're not going to be subject to political retaliation for their judicial acts.'"¹³⁰

Newly empowered antigay groups also will lobby heavily the Republican Iowa house and governor to insist upon passage of a constitutional amendment. Iowa Senate Majority Leader Mike Gronstal will face great pressure in the coming years from those who would put a constitutional amendment on the ballot.

Nevertheless, we have reason to be hopeful. Numerous Iowans expressed shock and heartbreak upon learning of the justices' defeat. The *Des Moines Register's* editorial board condemned the retention vote as a "black mark on Iowa history." Many equality advocates had been complacent about the justices' retention prospects and underestimated the impact of a million dollar campaign waged from out of state. (In a previous election in 2006, when Iowa antigay activists had targeted a trial judge up for retention in a conservative county because the judge had granted two lesbian women's request for a dissolution from their civil union, the judge had survived with little difficulty.) *Cedar Rapids Gazette* columnist Todd Dorman wrote on November 3 that history may "recall this as the moment when fair-minded Iowans who support equality for all under the law finally realized that they've got a fight on their hands. And they decided to do something about it."¹³¹ He also cautioned against underestimating the level of support in Iowa for marriage rights for same-sex couples, as voters' personal investment in three judges keeping their jobs cannot be equated with voters' commitment to the continued right to marry for same-sex couples and the guarantee of equality precious to all Iowans. As the *Dubuque Telegraph Herald* noted, "the number of Iowans who actually wanted the three justices removed because of the same-sex marriage ruling might be somewhat overstated [by the results of the retention election]. In a normal year when judges and justices are on the ballot, some 30 percent typically vote 'no,' even when there are no apparent issues."

Iowa's loss of three skilled and experienced jurists was a wake-up call for all of us. It is the responsibility of every voter to protect the system of checks and balances that defines our democracy. We must make sure that the next time extremists target jurists for deciding cases with integrity, we are more prepared to take on the fight.

Here at Lambda Legal, it continues to be our responsibility to make our case for equality, not just before judges, but in the court of public opinion. We cannot allow bullies to intimidate us. We must continue to bring cases on behalf of people who have been wronged, and we have faith that the courts remain a refuge for lesbian, gay, bisexual, transgender people, and people with HIV who have suffered discrimination and been deprived basic freedoms. But we must do more than win in court; we must win hearts and minds and educate the public on how our constitutional democracy is supposed to work. The members of the *Varnum* Court took an oath to defend the Iowa Constitution and earned their place in history when they lived up to it with integrity. It is up to the rest of us to vindicate them by creating a world in which equality is so embraced and celebrated that the portraits of

¹³⁰ Adam Liptak, *O'Connor Mildly Criticizes Court's Campaign Finance Decision*, CAUCUS BLOG, N.Y. TIMES (Jan. 26, 2010, 2:05 PM), <http://thecaucus.blogs.nytimes.com/2010/01/26/oconnor-mildly-criticizes-court-s-campaign-finance-decision/>.

¹³¹ Todd Dorman, *History is Made, But Not Finished*, THE GAZETTE (Cedar Rapids, Iowa), Nov. 3, 2010, <http://thegazette.com/2010/11/03/history-is-made-but-not-finished/>.

Chief Justice Ternus, Justice Streit, and Justice Baker hang proudly next to Justice Mason's and Justice Cole's in the Court's rotunda—in a pantheon of Iowa heroes who did the right thing before much of the rest of the country was ready. We have some work to do to get to that day. But we firmly believe we will see it.

V. A TOXIC BREW: JUDICIAL ELECTIONS IN THE AGE OF BIG-MONEY POLITICS

DANIEL P. TOKAJI*

A. Introduction

For those who care about judicial independence, Iowa's 2010 election is a major wake-up call. Three sitting justices of the state supreme court were denied retention by the statewide electorate as a direct result of their decision in *Varnum v. Brien*,¹³² upholding the right of same-sex couples to marry. There can be little doubt that this chain of events will make judges in controversial cases think twice before issuing decisions in support of an unpopular person or group. The events in Iowa will be in the back of their minds, if not in front. For those like me who think that one of the most important roles of our courts is to protect the rights of everyone, including those who are unpopular with the majority of the citizenry, this is a deeply troubling prospect. Even if we view the result in Iowa's retention election as an isolated incident, it is worrisome. Though I've never heard any judge admit that the imperative to attract votes or campaign money affects their decisionmaking, state judges cannot help but be aware of what happened in Iowa.

It would be bad enough that judicial independence is threatened by the prospect of state judges standing before an angry electorate to defend an unpopular decision. But it actually gets even worse. And it's this "worse" part that I am going to focus on in my remarks today. It is even worse because of the combined effect of two developments. The first is the high degree of political polarization that presently exists, a phenomenon exemplified in the campaign over judicial retention in Iowa. The second is the rise and intensification of big-money politics. These two elements have together created a toxic brew. These developments are not only harmful to judicial independence, but also threaten to move us even further toward a judicial system that caters to the interests of wealthy individuals and corporations, while ignoring the needs of ordinary citizens, especially those at the bottom of the socioeconomic ladder. In sum, we face the risk of a judicial system that even more closely resembles our current pay-to-play political system. They present reason to be concerned that what's happened in Iowa is a harbinger of things to come, portending serious problems for the majority of states that have judicial elections.

My remarks today proceed as follows. After very briefly reviewing the history of judicial elections, I discuss two megatrends: the polarization and monetization of politics. I then address the impact they can be expected to have—and may already be having—on state judiciaries. I conclude by talking about what might be done.

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¹³² *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

B. History

The best place to start is with the United States Constitution. Article III provides that judges both of the Supreme Court and inferior courts shall hold their offices during good behavior. This provides the federal judiciary with independence—insulation from the shifting winds of public opinion—and therefore the capacity to protect unpopular individuals and groups against the tyranny of the majority. The Framers recognized that the judiciary would serve an important counter-majoritarian function in our Republic by protecting minorities. They weren't thinking of gays and lesbians, but Article III was designed to ensure that federal judges wouldn't be swayed by negative public opinion when hearing the claims of unpopular or vulnerable groups.

States followed suit at the beginning of the Republic. Until 1845, every state that entered the union had an appointed judiciary.¹³³ But in a very short period of time, largely as result of Jacksonian democracy and the spirit that it brought with it, things changed. The states that were admitted in the twenty years after 1845 elected their judiciaries so that by 1865, twenty-four of the thirty-four states had judicial elections.¹³⁴

At the beginning of the twentieth century, some academics and lawyers raised questions about the system of electing judges.¹³⁵ There was concern much like that which we have heard today, about the politicization of the judiciary. As a result, starting in the early 1900s, states made some changes. A number of them, twelve by 1927, had switched to nonpartisan elections.¹³⁶ But many people realized that this step wasn't enough to protect the independence of state court judges, and so Missouri in 1940 adopted a system that is widely used still today: merit-based selection of judges followed by unopposed but regular retention elections.¹³⁷ In the decades that followed, a number of states moved to the Missouri plan which strikes something of a balance between on the one hand insuring independence, while on the other hand providing some degree of accountability.

While the above presents an exceedingly brief summary of a long and complicated history,¹³⁸ even this limited context should suffice to demonstrate that the current controversy over judicial elections is nothing new. And the central question has not much changed over the course of this history: Do we want greater independence or do we want greater accountability? In the remarks that follow, I argue that even if you are someone who falls more on the accountability side of the spectrum, there are reasons to be very worried about our current system, including not only the direct election of judges but also retention elections.

¹³³ Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 76 (2011).

¹³⁴ Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 631 (2009).

¹³⁵ *Id.* at 636.

¹³⁶ Kang & Shepherd, *supra* note 133, at 78.

¹³⁷ *Id.*

¹³⁸ For a more detailed account, see Shepherd, *supra* note 133.

Today, 89% of state judges must stand for election.¹³⁹ For state high courts, nine states elect judges through partisan elections, another thirteen through nonpartisan elections, while judges are appointed as an initial matter in the remaining twenty-eight states.¹⁴⁰ Twenty states have some form of retention elections for their state high court judges (six partisan and fourteen nonpartisan).¹⁴¹ In recent decades we have seen more contested elections. Between 1990 and 2000 the percentage of contested elections increased from 44% to 75%.¹⁴² We have also seen an increase in the rate at which incumbents as in Iowa are losing elections. The incumbent loss rate doubled going from 4% to 8% between 1980 and 2000.¹⁴³

C. Iowa

Most worrisome are the cases, uncommon though they may be, in which justices are not retained. The most notable recent example is the focal point of this conference. In 2010, three Iowa Supreme Court Justices, Michael Streit, David Baker, and Chief Justice Marsha Ternus, were ousted. There was just one issue behind their ouster—their decision in *Varnum* striking down the ban on same-sex marriage. The aspect of judicial elections on which I'll focus is the money spent in these elections.

Almost one million dollars was spent against the Iowa justices.¹⁴⁴ Over \$900,000 of that amount came from out-of-state groups that were ideologically opposed to the decision: the National Organization for Marriage based in Washington, D.C.; the American Family Association's AFA Action, Inc. of Tupelo, Mississippi; and the Campaign for Working Families PAC of Arlington, Virginia.¹⁴⁵ By comparison, just over \$424,000 was spent in support of the justices,¹⁴⁶ which means that opponents of retention outspent supporters by more than a two-to-one margin. Now one million dollars may sound like a lot, but it's significantly less than the average winner spent on U.S. House races in 2010.¹⁴⁷ But for reasons I explain below, this may be just the tip of the iceberg when it comes to spending to judicial elections.

At the same time, we shouldn't exaggerate the frequency with which this type of event occurs. The closest historical parallel to Iowa's 2010 retention election is something that happened in my home state of California twenty-five years ago. In

¹³⁹ Daniel Betts, *How High is Too High?: Judicial Elections and Recusal after Caperton*, 15 TEX. REV. L. & POL. 247, 255 (2010).

¹⁴⁰ Kang & Shepherd, *supra* note 133, at 79. The authors provide a state-by-state breakdown. *Id.* at 80-81.

¹⁴¹ *Id.* at 79.

¹⁴² *Id.* at 81.

¹⁴³ *Id.* at 82.

¹⁴⁴ See Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. REV. 118, 120-21 (2011).

¹⁴⁵ *Id.* at 121.

¹⁴⁶ *Id.*

¹⁴⁷ See Election Stats, 2010, OPEN SECRETS, http://www.opensecrets.org/bigpicture/elec_stats.php?cycle=2010 (last visited March 19, 2012) (average winner in U.S. House spent over \$1.4 million).

1986, three California Supreme Court Justices, Joseph Grodin, Cruz Reynoso, and Rose Bird, were ousted by voters. Again, a single issue that was at least mainly responsible for their ouster. Specifically, the issue that drove the ouster was that these justices overturned death sentences at a time when the death penalty was very popular in California.¹⁴⁸ There were other criminal justice issues on the table, but the death penalty was the issue on which the electorate was principally focused at the time. In that election, \$6.6 million was spent against the justices, much of it coming from agricultural and business interests.¹⁴⁹ By comparison \$4.1 million was spent in support of the justices.

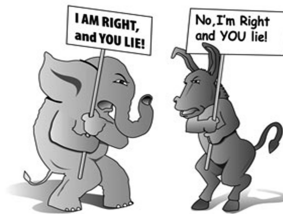
Even though the public focal point of the anti-retention campaign was the death penalty; this wasn't the real concern of the interest groups that were opposing these justices. They were more concerned about decisions by these liberal justices in favor of consumers and workers than they were about the death penalty. But these interest groups used the death penalty as the focal point of their campaign for ousting these justices. This is something we could see more of in the future: wealthy interests using an unpopular decision on a wedge social issue to campaign against justices, when their real agenda has to do with an entirely different set of issues.

Still, the ouster of California's Supreme Court justices took place a quarter-century ago. And we've not often seen judges ousted for high-profile decisions on divisive social issues in the years since then. Occasionally, as I have mentioned, justices of state high courts have been ousted but it has not been a frequent occurrence. So you may wonder whether this is something we really need to worry about. I think we do.

D. Megatrends

The reason we should worry about Iowa has to do with two megatrends: the polarization and monetization of American politics. While these megatrends are related to many aspects of our political system—including who can compete for office, how districts are drawn, how campaigns get funded, and how legislation gets passed—I'm going to focus on their impact on judicial elections in particular.

Let me start with polarization. They say a picture is worth a thousand words, and here's a political cartoon to prove it. The elephant is saying "I am Right and You Lie!" as the donkey (a symbol going back to the Jacksonian era) says "No. I'm Right and You Lie!"



¹⁴⁸ See Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2007 (1988); John T. Wold & John H. Culver, *The Defeat of the California Justices: the Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 349 (1987).

¹⁴⁹ Thompson, *supra* note 148, at 2038.

This image nicely captures something many Americans, think is wrong with contemporary politics. The parties have little interest and, it would seem, relatively little incentive to compromise. We live in an age of hyper-polarization, with approval of Congress at historically low levels. Well sure, you might say, we think our politics is polarized now, but don't people in every age think the same thing? It turns out we really are living in a hyper-polarized era. The best law review article on the subject is Rick Pildes' "Why The Center Does Not Hold,"¹⁵⁰ which documents the problem in meticulous detail and attempts to explain it. Professor Pildes concludes that we really are living in an era of "extreme political polarization," not seen since the late 19th Century, around the time of the Civil War. One commentator has put it this way: "Republicans and Democrats now line up against each other with regimented precision like soldiers going into battle."¹⁵¹

But it's not just politicians who are polarized. As Professor Pildes also documents, voters too increasingly line up in ideologically consistent ways.¹⁵² What I mean by "ideologically consistent" is that if I know where you stand on abortion, I can predict where you stand on taxes. If I know where you stand on gay marriage, I can predict where you stand on environmental regulation. There are, of course, always some people who have a liberal position on one issue and a conservative position on another. But across a range of issues, those who study public opinion find that people are increasingly lining up in very predictable ways. This is true even of nominally independent voters; those who pay attention to politics and regularly vote tend to align with one party or another. Split ticket voting has declined sharply in recent decades. Some people do fall in the middle of the political spectrum, but they tend to be nonvoters or occasional voters who are less attentive to politics—and less likely to vote.

What are the causes of extreme polarization in our politics these days? There's no definitive answer to this question, though Professor Pildes identifies several possible causes. Those explanations include polarizing personalities like Bill Clinton, George W. Bush, and Barack Obama; primary elections that are increasingly dominated by the liberal or conservative base, giving candidates little incentive to tack toward the center; polarization of the news media (think of Fox v. MSNBC replacing Walter Cronkite); and gerrymandered districts, which makes incumbent legislators more worried about challenges from the extreme of their own parties party (from the right for Republicans, the left for Democrats), than a more moderate challenger from the other party; and the ideological "purification" of the parties that followed Voting Rights Act, which caused conservative Southern Democrats to switch parties and may ultimately have led to the extinction of liberal and moderate Republicans.

I won't dwell on these possible explanations because, for present purposes, the causes of political polarization are less important than the effects. At the national

¹⁵⁰ Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011). Professor Pildes' article cites some of the voluminous evidence on political polarization. Because this paper is drawn from an oral presentation, I refer readers to that article rather than citing the literature here.

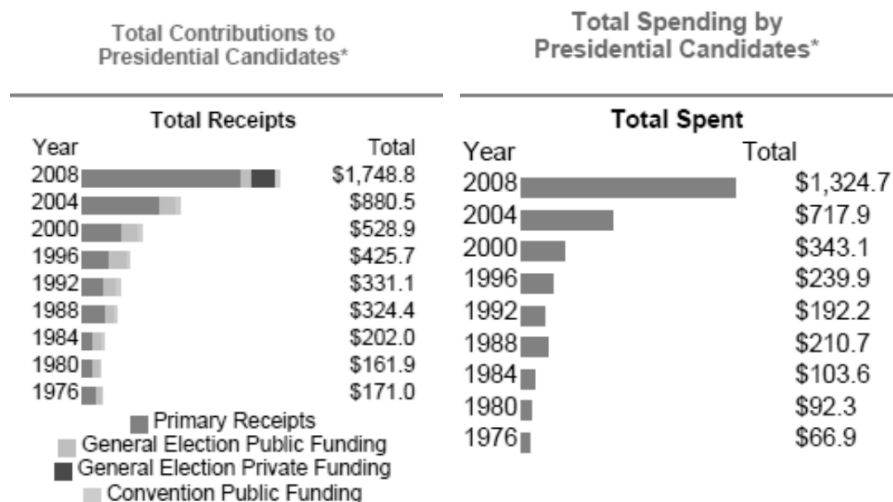
¹⁵¹ Ronald Brownstein, *A Reaganite or Jacksonian Wave?*, NATIONAL JOURNAL, Oct. 31, 2009, <http://www.nationaljournal.com/columns/political-connections/a-reaganite-or-jacksonian-wave—20091031>.

¹⁵² Pildes, *supra* note 150, at 274.

level, gridlock is the most obvious effect. Nowadays, with the increased use of the filibuster to block any legislation with which one party disagrees, it takes a supermajority of sixty in the Senate to get anything significant done. And when there's divided government, as has been the case for the past several years, there has to be agreement across the aisle for a bill to become law. The willingness to compromise, most glaringly evident in the recent debt ceiling impasse, has been one casualty of the hyper-polarization of our politics. The end result is a breakdown in governance, especially in circumstances of divided government. The bitterness and recrimination that surrounds our political process now threatens to spill over into judicial elections—indeed, it already has. Polarization is part of the explanation for what happened in Iowa and what could happen more and more often around the country.

The second megatrend is big money politics. This is something that has been going on for decades, but has received increasing attention—and deservedly so—in the wake of the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*¹⁵³ two years ago. We have seen in recent decades, a steep increase in the amount of money that is being spent in politics generally.

Both total contributions to and spending by presidential candidate have increased exponentially since 1976.



A similar dynamic has occurred in congressional races. The average U.S. House winner spent \$1.4 million in 2010 and the average winner in the U.S. Senate almost \$10 million. There is also a lot of outside money coming into these races, around half a million dollars for the average House race and almost \$2 million for the average Senate race. In 2010, the U.S. Chamber of Commerce spent \$32 million, the American Action Network spent \$26 million, American Crossroads spent \$21.5 million, and Crossroads GPS spent \$17 million. That's a lot of money being spent by outside groups trying to influence elections. As a matter of current U.S. constitutional law, starting with *Buckley v. Valeo* and proceeding through *Citizens United*, such independent campaign expenditures by individuals and corporations cannot be limited. We had an enormous influx of money from Super PAC's and

¹⁵³ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 867 (2010).

nonprofits in the last election cycle, which is sure to continue with a vengeance in the current election cycle and for the foreseeable future.

Although judicial elections have been something of a laggard, in terms of the amount of money that's spent influencing the outcome, the cost of becoming an elected judge has increased. As late as the 1960s, it was said that judicial elections were about "as exciting as a game of checkers . . . [p]layed by mail."¹⁵⁴ That has certainly changed. In the words of one commentator, judicial campaigns have become "nastier, nosier, and costlier."¹⁵⁵ Spending doubled between 1990 and 2004. One recent study found that, since 1993, winners in state supreme court races raised \$91 million compared to \$53 million raised by losers.¹⁵⁶ Another found that "judicial candidates for state high courts between 1999 and 2006 raised over \$157 million, more than twice the amount raised by candidates in the four election cycles prior combined."¹⁵⁷ The increased competitiveness of judicial elections has led to changes in how campaigns are conducted, including an added pressure to raise more funds.¹⁵⁸

E. Effects

Why is this a bad thing? A great quotation from a member of Ohio's state supreme court encapsulates the problem: "I never felt so much like a hooker down by the bus station . . . as I did in a judicial race. . . . Everyone interested in contributing has very specific interests. . . . They mean to be buying a vote."¹⁵⁹ Of course, this is just one state judge's perspective, but there's evidence to back up his subjective perception. The problem can be broken down into three parts: (1) the effect on campaigns and election results; (2) the effect on judicial decisionmaking; and (3) the effect on the legitimacy of state courts.

Contemporary judicial campaigns more closely resemble campaigns for other elected offices than used to be the case. Candidates solicit contributions, use attack ads, and make promises about what they'll do if elected.¹⁶⁰ It's hard to deny that

¹⁵⁴ William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Justice Race*, COM. APPEAL (Memphis), Oct. 29, 2000, at DS1.

¹⁵⁵ Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 670 (2002); see also Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

¹⁵⁶ Kang & Shepherd, *supra* note 133, at 82.

¹⁵⁷ Betts, *supra* note 139, at 257; see also Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1237 (2008).

¹⁵⁸ Kang & Shepherd, *supra* note 133, at 82. See also Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 59, 63 fig.4.1 (Matthew J. Streb ed., 2007); DEBORAH GOLDBERG & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002, at 15 (Bert Brandenburg ed., 2002), available at http://brennan.3cdn.net/3e06222f06bc229762_yom6bgubs.pdf.

¹⁵⁹ Adam Liptak & Janet Roberts, *Tilting the Scales?: The Ohio Experience; Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006.

¹⁶⁰ James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 LAW & SOC'Y REV. 899, 899 (2008).

money makes a difference in campaigns, allowing candidates to publicize their candidacies.¹⁶¹ What's less clear is how much the ability to raise money affects who can become or remain a state judge. Candidates certainly chase campaign money because they know, or at least think, it makes a difference. If you can't raise money, you can't expect to compete—and you'll probably choose not to run and perhaps not to seek retention. While it's difficult to pinpoint the precise effect of money on election results, it appears to be more important for challengers than for incumbents.¹⁶² This is probably because judicial candidates lacking name recognition depend more on advertising.¹⁶³ There's also some evidence, albeit indirect, that money from wealthy business interests helps. From 2000 to 2004, “voters elected 36 of 40 judges supported by the U.S. Chamber of Commerce,” which spent about \$100 million over this period of time.¹⁶⁴

Even more worrisome than the impact on election results is the effect on judicial decisionmaking. Campaign contributors often appeared in court before judges to whom they contributed.¹⁶⁵ Judges may favor those who have supported their campaigns, or whom they hope will do so in the future. Even if the particular litigant before them hasn't spent money on their campaign, appellate judges may be aware that the law they make will affect potential donors or spenders. This problem is equally severe for judges who face retention elections as it is for those who face a contested re-election campaign. Just how much does money affect judicial decisionmaking? It's hard to draw definitive conclusions from the empirical research,¹⁶⁶ but the best recent evidence provides convincing evidence that some judges do in fact adjust their decisions to attract votes and campaign money.¹⁶⁷ Professors Kang and Shepherd recently examined a dataset that included decisions by over four hundred state supreme court judges in more than twenty-one thousand cases over a four-year period.¹⁶⁸ They focused on the contributions from business

¹⁶¹ Chris W. Bonneau, *The Effects of Campaign Spending in State Supreme Court Elections*, 60 POL. RES. Q. 489, 490 (2007).

¹⁶² *Id.* at 497; see also Mary L. Volcansek, *Money or Name? A Sectional Analysis of Judicial Elections*, 8 JUST. SYS. J. 46, 50-55 (1983) (providing evidence that campaign spending is more important to judicial candidates who are not incumbents than it is to incumbents).

¹⁶³ Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 457 (1988).

¹⁶⁴ Kang & Shepherd, *supra* note 133, at 87; see also Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1502-03 (2005).

¹⁶⁵ See Mark Hansen, *The High Cost of Judging*, 77 A.B.A. J. 44, 44-47 (1991); see generally Philip L. Dubois, *Penny for Your Thoughts? Campaign Spending in California Trial Court Elections, 1976-1982*, 39 W. POL. Q. 265 (1986).

¹⁶⁶ Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 841-43 (1994) (“Determining the actual effect campaign contributions have on the outcome of cases is virtually impossible.”).

¹⁶⁷ Kang & Shepherd, *supra* note 133, at 105.

¹⁶⁸ *Id.* at 90.

groups, which accounted “for almost half of all donations to judicial campaigns.”¹⁶⁹ Judges who received campaign contributions from business groups were more likely to decide cases in favor of business interests.¹⁷⁰ They even made a rough attempt to quantify the relationship between money and decisionmaking, finding that a \$1,000 contribution increased the average probability that a judge would vote for a business litigant by 0.03%, while a \$1,000,000 contribution increased that probability by 30%.¹⁷¹

The third way in which money affects the judiciary is legitimacy. Should we trust a system in which judges depend on money from the very interests if not the very parties who are affected by their decisions? Many people think not, and with good reason. Seventy-six percent of voters think that campaign contributions affect judges’ decisions. The number is even higher here in the state of Ohio. Even judges themselves agree. While few judges would admit that they are biased, many do express concerns about the impact that campaign money has on judicial decisionmaking generally. A 2001 survey found that 50% agreed that campaign donations influenced courtroom decisions by some judges.¹⁷² Most state judges believed that the tone and conduct of judicial campaigns had gotten worse over the past five years, and most elected high court justices cited immense pressure to raise campaign money during their election years.¹⁷³ There is a conflict of interest between the judicial obligation to interpret and apply the law impartially, and their personal interest in seeking reelection or retention—an interest that, as a practical matter, requires them to take money from people and entities with a stake in their decisions. Such a system presents serious legitimacy concerns.¹⁷⁴

F. Conclusion

What can be done? This is a very difficult problem, and there are no easy answers. One possible solution is to require recusal of judges with conflicts. The U.S. Supreme Court required recusal a couple of years ago in the case of *Caperton v. A.T. Massey Coal Co., Inc.*,¹⁷⁵ but only because the conflict was so egregious. This ruling won’t solve the broader problems of money affecting who becomes or remains a judge, the decisions they make as judges, and ultimately the legitimacy of state’s judicial systems. Another possibility is to provide better information for voters. There may be room for improvement at the margins, but it doesn’t seem terribly likely that ordinary citizens will pay more attention to judicial elections than

¹⁶⁹ *Id.* at 71.

¹⁷⁰ *Id.* at 105.

¹⁷¹ *Id.* at 105-06.

¹⁷² Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 210 (2010); Memorandum from Stan Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research, and Linda A. DiVall, President, American Viewpoint, to Geri Palast, Executive Director, Justice at Stake Campaign (Feb. 14, 2002), available at http://www.justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf.

¹⁷³ *Id.*

¹⁷⁴ James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 LAW & SOC’Y REV. 899, 899 (2008).

¹⁷⁵ *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).

they currently do. And even if they do, it doesn't solve the independence problem—and might even exacerbate it, enhancing the prospect of judges being punished for ruling in favor of criminal defendants, gays and lesbians, religious minorities, or other unpopular groups. We could impose stricter limitations on campaign contributions and enhance disclosure rules. As a matter of First Amendment law, however, you can't limit independent expenditures by outside groups, including those funded with corporate money. We could try to raise the floor rather than lowering the ceiling through public funding for judicial elections. But in another recent decision, *Arizona Free Enterprise Club Freedom Club PAC v. Federal Election Commission*, the Supreme Court has severely hampered those efforts by preventing public funding from being targeted to those contests in which it's needed most. Finally, we could have life tenure for state judges, eliminating elections entirely, but this is likely to run into fierce public opposition. A possible fallback position is a fixed term of years with no possibility of reappointment. That would fix the real problem, the incentive for judges to cater either to an angry electorate or well-financed interest groups.

Iowa's 2010 election was a sad event, not only for gay and lesbian rights but also for those who care about judicial independence. But like any good crisis, Iowa presents us with a great opportunity to change things for the better. My personal preference would be for states to get rid of judicial elections altogether and move to the federal model, which offers much greater insulation from money and partisanship. It is not my purpose, however, to prescribe any particular solution. Movement to the federal model is not likely to be realistic in most places. And the best politically feasible solution will likely vary from state to state. What I do insist on is the idea that, as lawyers, we have a special obligation to call attention to the importance of judicial independence and the threat that exists from our current system of judicial elections. I commend Chief Justice Ternus for using her personal experience to call attention to this critical issue, and hope that all of you will be moved to action by this experience.