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AUSTRALIAN BAR REVIEW

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The Honourable Michael Kirby AC CMG

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ABSTRACT

Having access to independent and impartial tribunals is an essential attribute of universal human rights, necessary to the rule of law. In the United States of America varying systems are in place in State courts for election of judges and for retention/removal by popular ballot. In 2010, the Chief Justice and two other Justices of the Supreme Court of Iowa were denied retention following a campaign that attacked a unanimous decision of the State Supreme Court upholding marriage equality for same-sex couples. This paper examines the history of judicial ballots in the U.S., describes the 2010 campaign in Iowa and identifies challenges to judicial independence inherent in procedures that undermine tenure of appointment. The role of bar associations in supporting judicial independence is described, as are recent judicial decisions in Australia, Britain and Canada affecting judges with limited tenure. The need for vigilance to uphold judicial tenure is explained.

JUDICIAL INDEPENDENCE – A BASIC PRINCIPLE OF UNIVERSAL RIGHTS

Shortly before the adoption of the United States Constitution, one of the Founders, Alexander Hamilton, said there was a need for the "steady, upright and impartial administration of the laws" by a "judiciary of firmness and independence".[1] Since then, judicial independence has been a core constitutional and political principle of the United States of America.

More than two hundred years later, these words and others like them have found their way into the principles and law of the international community. Despite the differing political, social, cultural and economic conditions in the signatories to international instruments, and for the *Universal Declaration of Human Rights* (UDHR), each nation has committed itself to upholding the rule of law and to protecting human rights through an impartial and independent judiciary.[2]

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* Text for an address by the author to the conference of the International Bar Association (IBA) in Dublin, Ireland, on 1 October 2012. Following the conference, the IBA Human Rights Council, of which the author is a member, resolved to investigate the United States systems of electing and removing judges by popular ballot.

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[1] *The Federalist*, No 78.

[2] Judicial independence is guaranteed by: Article 10 of the *Universal Declaration of Human Rights*; Article 14.1 of the International Covenant on Civil and Political Rights; Article 6 of the *European Convention on Human Rights*, and Article 11 of the *Bangalore Principles of Judicial Conduct*, and Article 7 of the *African Charter on Human and Peoples'*

For the independence of judges to be observed in a meaningful way, however, support of the UDHR and the signing of treaties is but the first step – it must be implemented and protected in practice.[3] Perceptions of how this can and should be done have changed over time. At its most basic, it means that the judiciary must be, and must be seen to be, independent from the Executive and Legislative branches of government. However, today, the concept of judicial independence has evolved to a broader definition that includes freedom from any external influence that "might tend or be thought reasonably to tend to a want of impartiality in the decision making",[4] such as a judge deferring to any "other association, whether professional, commercial or personal".[5]

In the United States Supreme Court, Justice Frankfurter once said: "Public confidence in the Court must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by being absent from injecting itself…into political forces and settlements".[6] So judicial independence and neutrality constitute a two-way street.

This statement suggests that a judge has the responsibility to apply the law as he or she understands it, on the basis of his or her assessment of the facts and the relevant law, without fear or favour and without regard to how unpopular, or well received, the final decision may be.[7] Nevertheless, judges are part of the system of government in a broad, non-partisan sense. Necessarily, they are occasionally likely to interact with members of the other branches of government. Where their jurisdiction is properly invoked, they are required to inject themselves into political forces and to require the political players to conform to the law that they produce.

The fundamental responsibility of independence[8], so understood, was eroded in the United States, in 2010 by the dismissal of three Iowan Supreme Court judges following their ruling in favor of same-sex marriages, unpopular with some electors. Their effective removal from judicial office marked a disturbing turning point in the history of the independence of State judiciaries in the United States which the international legal community including in Australia, needs to note and to respond to.

THE HISTORY OF U.S .JUDICIAL ELECTIONS

To understand the full impact of the removal of the Iowan judges, regard must be had to the history and systems of judicial selection and recall in the United States.

Rights; Article 8 of the *American Convention on Human Rights*; and Article 3 of the *Inter-American Democratic Charter*.

[3] Michael Kirby, "Independence of the legal profession: Global and regional challenges" (2005) 26 *Australian Bar Review* 133, 136

[4] Sir Gerard Brennan, "Judicial Independence" The Australian Judicial Conference, 2 November 1996, Canberra, available from www.hcourt.gov.au; See also Article 11 of the *Bangalore Principles of Judicial Conduct*.

[5] Lord Bingham of Cornhill, "Judicial Independence", *Judicial Studies Board Annual Lecture 1996,* available from www.jsboard.co.k; Article 12 of the *Bangalore Principles of Judicial Conduct.*

[6] *Baker v Carr*, 369 US 186 (1962), Supreme Court of the United States of America; Article 13 of the *Bangalore Principles of Judicial Conduct.*

[7] Article 27 and Article 28 of the *Bangalore Principles of Judicial Conduct*.

[8] *R v Beauregard*, [1987] LRC (Const) 180 at 188, per Dickson CJ, Supreme Court of Canada; Article 22 of the *Bangalore Principles of Judicial Conduct.*

Of all common law jurisdictions, only the United States of America provides laws under which its judges may be appointed and removed through an election process. In the decades following the American Revolution of 1776, and the adoption of the Constitution of the United States, mistrust of the King's appointees extended to mistrust of judges. They were often seen as constituted by members of the aristocracy or favorites of those wielding official power. According to the *Declaration of Independence*, King George III had made colonial judges in the American settlements "dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries"[9]. This assertion was interpreted to mean that the judges tended to make decisions more agreeable to those in power, rather than according to the law.[10] Coupled with increased participation in politics by the early settlers in the United States, their ambivalence towards the English common law, and increasing reports of judicial corruption, thus paved the way for the adoption of procedures for judicial elections.[11]

From 1776 to 1830, both State and federal judges in the United States were appointed by the government, as in Britain. From the 1820's, Jacksonian democracy brought about a "wave of popularism".[12] Statewide judicial elections swept across the United States to replace the system of judicial appointment. The electoral option was adopted in response to the widespread opinion that governors and legislators had appointed judges on the basis of party loyalty rather than on legal ability and professional merit.[13] The tension between the democratic rule of the people and the Constitution's establishment of the rule of law became a tension between the values of judicial accountability and judicial independence.

In 1832, Mississippi became the first State of the United States to adopt judicial elections. The idea that all public officials should be elected took a strong hold on the new nation.[14] Judicial accountability became a paramount objective of governance in the American polity.

Elected judges were believed to be more accountable because they could be voted out of office. The people would then "have a say in the matter".[15] This meant that the public gained a direct voice in how judges should be selected as well as an indirect influence on how the courts should function.

By the 1860s, twenty-two of the then thirty-four States of the United States had introduced judicial elections.[16] The process, however, became highly politicized. By the early 1900s, it became evident that elected judiciaries were plagued with inconsistencies and larger

[9] The *Declaration of Independence of the United States of America* (1776).
[10] Russell Wheeler, (1988) *Judicial Administration: Its Relation to Judicial Independence* (National Center for State Courts), 8-9.
[11] Stephen P Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law" 62 *University of Chicago Law Review* 689, 716, (1995).
[12] Harvey Uhlenhopp, "Judicial Reorganization in Iowa" 44 *Iowa Law Review*, 6, 52 (1959).
[13] Ryan C Cicoski, "Judicial independence and the rule of law: A warning from Iowa" 29 *Delaware Law Review* 16 (2011).
[14] Croley, above n 11, 716.
[15] Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York 141-42 (Evening Atlas, 1846) ("New York Debates"), quoted in Croley, 717.
[16] Gabriel D Serbulea, "Due Process and judicial disqualification: The need for reform" 38 *Pepperdine University Law Review* 1109, 1113 (2011); Judicial elections still exist in many States: M.Curriden, "Judging the Judges", ABA *Journal*, January 2011, 56.

risks of corruption. Able judges were being replaced by incapable judges. In 1913, outspoken members of the American legal community such as Herbert Harley, Albert Kales, Roscoe Pound and John Wigmore established the American Judicature Society, aiming to pursue judicial reform, including in the matter of elections.

Albert Kales in particular, a member of the law faculty at Northwestern Law School in Chicago, devised the first judicial 'merit plan'. This aimed to replace judicial elections with judicial appointments based on a merit system. Now known as the "Missouri Plan", after the first State to adopt it in 1940, the merit system attempted to balance the competing interests of judicial independence and accountability to the people. Today, the majority of States in the United States use variations of the appointment system, partisan or non-partisan elections, and the Missouri Plan.[17]

The Missouri Plan, a merit-selection retention system, provides for the appointment of judges for a certain length of time before their retention is put to popular vote. This system has been regarded as beneficial in removing politics from the judicial selection process while still giving voters the ultimate ability to recall so-called 'bad' judges.[18] Under retention, judges with expiring terms need voter approval to remain on the bench. However, they do not face competition from alternative candidates for their positions.

Today, twenty-four States of the United States use some form of judicial merit selection. Still, none requires anything more than a simple majority to oust a judge.[19] From its inception in the 1930s to 2009, 637 State Supreme Court justices in sixteen States have faced retention votes. Only eight have lost retention.[20] Of the 1,772 State appellate judges who faced retention votes, only two have been ousted.[21] At least for 75 years, it therefore appeared that this system, was substantially achieving its objectives – to keep the politics out of judicial selection, to uphold independence of the courts, while still including some measure of accountability, in the sense that judges who engaged in real misconduct could be voted off the bench by the electors.

THE 2010 IOWA JUDICIAL RETENTION POLL

The merit selection and electoral retention system has, however, been brought under renewed scrutiny in the United States following the ousting of the three Supreme Court judges in Iowa in 2010. It is necessary, therefore, to explain some of the background to the situation that arose in Iowa.

In 1962, the electors of Iowa voted to adopt an amendment to the Iowan Constitution to replace the elective judicial system with an appointive merits retention system. For 48

[17] Serbulea, above n 16, 1116; see also Appendix below, for a table of judicial selection processes in the States.
[18] John Gibeaut, "Co-equal opportunity: Legislators are out to take over their state judiciary systems, while critics say it's an attack on separation of powers" 98 *American Bar Association Journal* 44, 46, (2012).
[19] Ian Bartrum, "Constitutional Rights and Judicial Independence: Lessons from Iowa" 88 *Washington University Law Review* 1047, 1051.
[20] These figures were compiled by Albert Klump, a research analyst at McDermott Will & Emery, who is regarded as one of the leading academic researchers in the United States on judicial retention. He is quoted in James Podgers, and Mark Curriden, "Judging the Judges: Landmark Iowa elections send a tremor through the judicial retention system" 97 *American Bar Association Journal* 56, 57, (2011).
[21] Ibid.

years, the system of judicial retention had remained undisturbed, until a controversial decision on marriage equality for same-sex couples was announced.

In 2005, Lambda Legal, a civil society organization, filed a lawsuit in Polk County, Iowa, on behalf of six same-sex couples who had been denied marriage licences by State officials. The couples claimed that Iowa's *Defense of Marriage Act* 1998 (DOMA), which prohibited marriage between same-sex couples, violated the liberty and equal protection clauses in the Iowan Constitution. Polk County District Judge Robert Hanson upheld Lambda Legal's submissions. He invalidated the law.[22] The State officials appealed to the Iowa Supreme Court, seeking reversal of this decision.

Before the appeal was heard, word of the District Judge's decision spread throughout Iowa. It occasioned action by civil and religious organizations such as Concerned Women for America of Iowa, Focus on the Family, the Iowa Christian Alliance, the Iowa Family Policy Center, and the Professional Educators of Iowa.[23] These groups formed an alliance "Iowans Concerned About Judges" (ICAJ). They sent questionnaires to all judges facing retention elections in 2006, asking whether the judges believed that the Iowa Constitution permitted same-sex marriages or civil unions.[24]

The questionnaire alarmed the then Chief Justice of the Iowa Supreme Court, Louis Lavorato. He responded by issuing an announcement warning that "the public should be wary of voting for a judge who promises to rule a specified way". He pointed out that citizens expected judges to rule according to the law regardless of their personal views. They also expected them to "make decisions free of political intimidation and influence".[25] This warning was to go unheeded.

In 2009, the Iowa Supreme Court heard the appeal in the same-sex marriage case. By that time a new Chief Justice, Marsha Ternus, had been appointed to that office. The Supreme Court unanimously affirmed the District Judge's decision. It upheld the ruling that the State DOMA legislation offended the equality provisions of the Iowa Constitution and accordingly was unlawful.[26] The decision was controversial. Three of the Court's seven Justices (including Chief Justice Ternus) were subject to retention elections in the following autumn.

Persons and organizations opposed to same-sex marriage took immediate action. Mr Bob Vander Plaats, a former Republican candidate for Governor of Iowa, organized an anti-retention movement called Iowa For Freedom (IFF). This was heavily financed by out-of-

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[22] *Varnum v Brien* 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30. 2007).

[23] Cicoski, above n 13, 20.

[24] Iowans Concerned about Judges, "2006 Judicial Voters' Guide Questionnaire for Judicial Candidates, Sponsored by Iowans Concerned About Judges" available at http://www.iowansconcernedaboutjudges.com/doc/Survey.pdf .

[25] Louis Lavorato, "Chief Justice Reacts to Judicial Questionnaire", Iowa Supreme Court, Aug 9 2006, http://www.judicial.state.ia.us/news_service/news_releases/NewsItem221/index.asp .

[26] *Varnum v Brien* 763 N.W. 2d 862 (Iowa 2009); where Cady J said "A statute inconsistent with the Iowa Constitution must be declared void, even though it may be supported by strong and deep-seated traditional beliefs and popular opinion" (at page 15); see also Cady J's comment that "The only difference is civil marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our Constitution requires." (at page 67).

State special interest groups such Mississippi's American Family Association and New Jersey's National Organization for Marriage.[27] The IFF group called for "an end to judicial tyranny". It publicly accused the Iowa Supreme Court of "legislating from the bench, even attempting to amend the Constitution from the bench" by recognizing same-sex marriages.[28]

Although no Iowa Supreme Court Justice had ever previously been defeated in a retention vote, the IFF and its associated special interest groups challenged the courts and the judges with an energy never before seen in the State. For the first time in Iowa's history, out-of-State interest groups spent more than in-State groups in the campaign against State judicial retentions. In total, they spent nearly double the amount that supporters of the judges spent. The out-of-State interest groups' spending against the Justices totaled more than $900,000.[29] They filled the media with accusations of "judicial tyranny".

Supporters of the judges spent nearly $400,000 in an effort to uphold the retention of the judges. The judges themselves declined to campaign or to raise funds.[30]

On election day, Chief Justice Marsha Ternus and Justices David Baker and Michael Streit were defeated in their retention votes. They were thereby removed from the bench. Buoyed up by this outcome, the IFF moved to amend the State Constitution to prohibit same-sex marriages,[31] and to impeach the remaining Supreme Court Justices who had taken part in the earlier unanimous decision.[32] Neither action succeeded. This may indicate that, when the fervour died down, and the question became whether or not the Supreme Court judges had actually engaged in misconduct sufficiently serious to warrant their removal from the bench, the public's answer to that question was in the negative. The majority of Iowan voters, including many of those who had voted against the three judges, were seemingly opposed to impeaching the remaining judges.[33]

EROSION OF INDEPENDENCE BY THE MERITS SYSTEM

If the public in Iowa did not by this stage accept the original allegations against the Supreme Court judges, this suggests that the vote did not truly represent the public's considered view. The result not only breached judicial independence; it also failed to ensure any real accountability. The outcome of this election made it clear that the initial

[27] Podgers, above n 20, 59.
[28] Cicoski, above n 13, 21.
[29] Roy A Schotland, "Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion? 46 *Connecticut Review* 68, 70-71,(2011); Note that the greatest in-State sum spent against the justices amounted to $10,178 only.
[30] Ibid.
[31] This was previously done in similar situations by California and Hawaii in the aftermaths of *Strauss v Horton*, 207 P.3d 48 (Cal. 2009) and *Baehr v Lewin* 852 P.2d 44, 67-68 (Haw. 1993).
[32] This initiative was led by Republican member, Tom Shaw, who reprimanded the remaining judges for breaching the Iowa Constitution but failed to explain how the court's decision in *Varnum* violated Article III – which forbids one branch of government from performing the duties of other branches. The majority of Iowa voters were against impeaching the justices, given the grounds of impeachment were for "misdemeanors and malfeasance" in office. See Cicoski, above n 13, 25.
[33] Des Moines Register, http:// blogs.desmoinesregister.com/dmr/index.php/2011/01/18/polls-iowa-voters-oppose-impeachment-for-supreme-court-justices/.

goal, behind retention elections, which was to uphold judicial elections while ensuring that judges were "insulated from politics and public appeals", was no longer being achieved, at least in Iowa.[34] The judges found themselves unwillingly in the very epicenter of partisan politics.

Where judges have the responsibility to uphold constitutional law and to protect the rights guaranteed both to the majority and the minority in society, the fact that the public can retaliate and unseat judges, purely for making a decision they do not agree with (rather than one that amounts to misconduct) militates against the fundamental principles of judicial independence and the rule of law. As Iowa's American Civil Liberties Union Director, Ben Stone, stated, "in a State that does not have an independent judiciary, all of the rights that are at stake in the State courts are up for grabs".[35]

What happened in Iowa in 2010 has led to a realisation that the retention system no longer protects the independence of a State judiciary. Instead, the retention system may erode this core principle of constitutionalism through increasing politicisation of the electoral process.

The main problems that have arisen are: inappropriate campaigning and overspending both by judges and special interest groups; altered judicial behavior in anticipation of a campaign; focusing on a single, controversial decision instead of the judge's overall professional ability to serve; retaining judges who are not fit or best-suited for the bench and ousting those who are; and encouragement of a poorly informed, or misinformed, voter-base.[36]

INAPPROPRIATE CAMPAIGNING AND OVERSPENDING

In a report issued by the Brennan Center of Justice, it was demonstrated that, between 2000 to 2009, the overall spending across the United States on judicial campaigns has doubled in the last decade. It now totals more than $206.9 million.[37] This substantial amount has serious implications for the judiciary's independence and for the public's perception of that independence in the United States.

Leading judges are also becoming increasingly outspoken on the issue. During her 2010 keynote speech to the Symposium on State Judicial Independence, former Supreme Court Justice Sandra Day O'Connor, herself a former State judge, emphasized the need for ethical campaigning from all participants and more informative provision of information to the general public, in order to "make [these] elections less nasty, expensive and

[34] Since *Republican Party of Minnesota v White*, 536 U.S. 765 (2002), 'merit selection' plans have been the favoured method for judicial election reform over non-partisan elections; see Justice O'Connor's concurring opinion and support for merit selection *ibid* at 789.
[35] Bartum, above n 20,1049.
[36] Hallie Sears, "A new approach to judicial retention: Where expertise meets democracy" 24 *Georgetown Journal of Legal Ethics* 871, 876 (2011).
[37] Brennan Justice Center's report on "The New Politics of Judicial Elections, 2000 – 2009: Decade of Change" http://brennan.3dn.net/d091dc911bd67ff73b_09m6yvpgv.pdf.

destructive".[38]

Additionally, a serious issue of bias arises where, after participating in election campaigns, judges may feel the need to 'pay back' their donors.[39] At the very least, this will often be the perception. To this end, State judges themselves have openly recognized the role of money and its influence on both elections and court decisions. In *Caperton v A.T. Massey Coal Co*,[40] where a State judge had not recused himself from hearing a matter in which the respondent had previously been a significant donor to his personal judicial campaign, by a five to four decision of the Justices, the United States Supreme Court concluded that he should have excused himself. The Supreme Court majority stated that:

> "There [wa]s a serious risk of actual bias based on objective and reasonable perceptions, when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds, or directing the judge's election campaign when the case was pending or imminent".[41]

Additionally, twenty-seven former chief justices and justices filed an *amicus* brief in the case, stating that "substantial financial support of a judicial candidate – whether contributions to the judge's campaign committee or independent expenditures— can influence a judge's future decision, both consciously and unconsciously".[42] At a national level, and by a general consensus of the judges concerned, it is clear that the influence of the donors on a judge's decision-making fosters a likelihood that the judge will make decisions in favour of donors rather than against them although the latter course may be required by the preferable understanding of the law.

Overspending on campaigns by unrelated but interested parties is also a serious and growing issue. The most notable example of this problem may be seen in the growing influence of United States corporations over the selection of the judiciary. The United States Chamber of Commerce has become a powerful force in judicial elections. From 2001 to 2004, the Chamber lobbied successfully to secure its chosen candidates in 21 of 24 contested elections to judicial office.[43]

Additionally, the United States Supreme Court's decision in *Citizens United v Federal Election Commission*[44] has made it clear that individuals, corporations and unions are free from limits on campaign spending.[45] Rather than placing limits to minimize the political

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[38] Justice Sandra Day O'Connor, "Symposium: State Judicial Independence – A National Concern" 33 *Seattle University Law Review* 559, 565 (2010).
[39] See *Republican Party of Minnesota v White*, 536 U.S. 765, at 790 (2002) which cited a study where funds raised by nine Texas Supreme Court Justices came from donors with close ties to cases or parties before the court.
[40] 129 S. Cth. 2252 (2009).
[41] *Caperton v A.T. Massey Coal Co* 129 S. Cth. 2252, 2263-64 (2009).
[42] Brief No. 08-22 in *Caperton v A.T. Massey Coal Co* 129 S. Cth. 2252 (2009).
[43] Billy Corriher, "Big Business Taking Over State Supreme Courts: How Campaign Contributions to Judges Tip the Scales Against Individuals" Legal Progress, Center for American Progress (2012). Note that in 2006, the Chamber spent more than $1 million to aid the campaigns of two Ohio Supreme Court judges.
[44] 130 S. Ct 876 (2010).
[45] *Citizens United v Federal Election Commission* 130 S. Ct 876 (2010).

aspect of judicial elections, the Supreme Court's decision indicates that the public in the United States can expect still more aggressive fundraising for judicial elections in the future, supported by big corporations with access to very large funds.

CHANGING JUDICIAL BEHAVIOR IN ANTICIPATION OF UNPOPULARITY

Another concern is that judges may change their behavior to court opinions, for fear of facing opposition in a retention election.[46] Possibly the most high-profile retention election before that in Iowa in 2010, occurred in 1986, when California's Chief Justice Rose Bird and two Associate Justices of the Supreme Court of California were voted off the State Supreme Court for overturning a death penalty sentence. Following the then Governor George Deukmejian's warning that "unless the [other Justices] voted to uphold more death sentences", he would oppose their retention, California's Supreme Court witnessed one of the highest rates of upholding sentences of death in the nation.[47] Judges, like most other people are risk averse where their occupations are affected.

FOCUSING ON A SINGLE CONTROVERSIAL DECISION

Closer inspection also shows that there are other, and earlier, instances of judges facing public opposition for making particular unpopular decisions. In 2010, Colorado's Justices Jolene Blair and Terence Gilmore faced retention opposition for their previous roles as prosecutors in a controversial murder trial. Both were ousted from judicial office, despite unanimous support for their retention by the State's judicial retention commission.[48]

In 2010, in Illinois, Justice Tom Kilbride faced opposition from the Illinois Civil Justice League, which advertised that he was 'soft on crime' for his 'poor' decision to reverse a law that capped damages in medical malpractice cases.[49] Although he won his retention vote, Justice Kilbride felt obliged to spend more than $2.6 million campaigning to defend his office.[50]

In 1996, Justice Penny White of Tennessee was unseated in a retention election that followed her overturning a death sentence.[51] These troubling events indicate the current and prolonged problems surrounding the retention system. They send a resonating message to State judges across the United States: Voters can remove judges where their judicial opinions are unpopular or can be made to appear so.[52]

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[46] G. Alan Tarr, "Do Retention Elections Work?" 74 *Missouri Law Review* 605, 614 (2009).
[47] Stephen B. Bright, and Patrick J Keenan, "Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases" 75 *Boston University Law Review* 759, 785 (1995).
[48] Sears, above n 36, 874
[49] , Daniel A Cotter, "2010 Elections suggest a revisiting of how we select judges" 24 *Chicago Bar Association* 20 (2010), 23
[50] Steve Stout, *Kilbride faces unprecedented opposition in judicial retention bid*, Times (Ottowa), 23 Oct. 1010, *http://mywebtimes.com/archives/ottowa/display.php?id=416402*
[51] Sears, above n 36, 874
[52] "Voters Moving to Oust Judges Over Decisions" A.G. Sulzberger, *The New York Times*, 24 Sept 2010, http://www.nytimes.com/2010/09/25/us/politics/25judges.html

As a matter of principle, the public's disagreement with a decision which was made following a judge's "honest interpretation of the facts and law" should not be a basis for removing them from their positions.[53] To do so would be to undermine the independence of the entire judiciary. It was not the original, or stated, reason for adopting the election and retention systems for judges in the United States.

RETAINING UNFIT JUDGES

There is the further problem of elections, once they are introduced, that results in retaining judges who are not fit for the bench whilst ousting those who are. In 2002, three Illinois circuit judges, Nicholas Byron, Edward Ferguson and Phillip Kardis were retained in office despite the Illinois Bar Association's strong recommendation against their retention, based on what the Bar judged to be their inappropriate decisions in asbestos class action cases.[54]

In 2007, Pennsylvania Judge Teresa Carr Deni was criticised by the Pennsylvania Bar Association for her "unforgivable miscarriage of justice" in a rape and armed assault case. However, she still won her retention election with 66 percent of the vote.[55]

These are just a few such instances amongst many more, where, in a context of removal laws, judges who were unfit to remain on the bench, campaigned successfully to retain their positions. The retention of judges based on popularity and campaigning skills and expenditure rather than merit goes to the heart of the problem. If a judiciary is subject to review by the public's opinion, how can State judges be seen to make fair and impartial decisions, still less actually do so?

POORLY INFORMED VOTER-BASE

Finally, there is also the issue of a poorly informed popular voter-base. In response to this widely-held criticism,[56] the American Bar Association and the American Judicature Society have sought to establish evaluation bodies in all States that would take an active role in gathering and distributing information in relation to retention elections, to help voters make more informed choices.[57] Despite these efforts, in light of more recent events (including the events in Iowa), the American Bar Association has withdrawn its support for judicial retention elections. It has called for judges to enjoy extended terms without retention votes because of the negative impact of such votes on judicial decision-making and the perception of judicial independence.[58]

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[53] Cotter, above n 49, 23
[54] Sears, above n 36, 874
[55] See *Chancellor Issues Statement on Judge Deni's Recent Ruling,* Phila B Rep Online (1 Nov 2007), http://www.best-lawyer.org/2007/11/phila-bar-slams-judge-in-rape-case.php; see also Pennsylvania Department of State, 2007 Judicial Retention Election Official Returns, http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=17&ElectionID=26&OfficeID=15.
[56] See Justice Sandra Day O'Connor, "Symposium: State Judicial Independence – A National Concern" 33 *Seattle University Law Review* 559, 565 (2010).
[57] Tarr, above n 46, 607.
[58] Sears, above n 36, 876.

THE POSITION OF US BAR ASSOCIATIONS

When the situation in Iowa unfolded, the expected and natural champion for the three judges, the Iowan State Bar Association (ISBA), was rather slow to respond. Initially, it stepped to the side, allowing internal divisions to 'water down' the Bar's support.[59] In the months leading to the retention vote, the ISBA stated that it would defend the Justices. This discouraged some would-be-supporters from taking action to support the judges. In the result, the support provided was a case of too little, too late.

The then President of the ISBA, Frank Carroll, said in a press release that the ISBA was "confident judges in [Iowa] will continue to focus on the law and not allow political influence and campaign money to impact the decisions they make in resolving disputes the people of Iowa may bring before them".[60]

The extent of the ISBA's support for the judges, however, was disappointing. Rather than forming a united front, the ISBA created a separate organization to tiptoe around those members who were in favor of unseating the judges, and to allow those who supported the judges to address the public through a different outlet. True the organization provided resources to help voters make informed decisions. However, it was silent on the central issue of whether or not any of the judges should be retained. This effort was inadequate. It showed the public that the legal community was weak and divided on the retention vote. The effect was that it afforded confidence to those who were campaigning against the judges. It sent the message that the ISBA, an organization whose duties included upholding and protecting the integrity and independence of the courts, could, and would, bend in the face of perceptions of transient public opinion.

Former Chief Justice Marsha Ternus later stated that "Bar Associations can play an important role, [where] members can speak in their local communities about the role of courts and the rule of law".[61] Had the ISBA taken a more active role during the 2010 retention votes, the outcome might have been different – it might have been based on the judges' professional merits, rather than emotional and sometimes irrational or immaterial public opinion.

On a national level, the American Bar Association (ABA) gave support to the three Justices. In a subsequent press release, the then Chair of the ABA's Standing Committee on Judicial Independence, William Weisenberg, stated after the vote that the result of the Iowan retention ballot "sets a very dangerous precedent for people who are angry about one single decision and are now able to go out of State to special interest groups to raise

[59] Marsha Ternus, 'The Politicization of Judicial Elections' (Speech delivered at the National Association of Bar Executives Meeting, Des Moines, Iowa, 9 November 2011).
[60] Martha Neil, 'Election Roundup: 3 Top Iowa Judges Defeated for Retention After Gay Marriage OK' American Bar Association Magazine (Washington), 3 November 2010.
[61] Marsha Ternus, 'The Politicization of Judicial Elections' (Speech delivered at the National Association of Bar Executives Meeting, Des Moines, Iowa, 9 November 2011).

large sums of money in an effort to influence decision-making back at home".[62]

He said, "We must take a closer look" at the system.[63] However that did not include any formal action or position taken by the ABA during or after the 2010 retention elections. In preparation for a further retention ballot in 2012 in Iowa, the ABA's efforts were enhanced to administer "Least Understood Branch" training to the ISBA leaders, concerning how to respond to questions about the role of the judiciary and attacks upon it.[64] The training was not specifically targeted to address retention elections. However the ABA Justice Center stated that it was "geared to help leaders talk about the critical issues impacting judicial independence".[65] Without a specific focus on how to mitigate, or prevent, similar situations reoccurring, the training neither targets the problem nor raises awareness in the proper context for the need for a fair and impartial judiciary.

Without the unanimous and vigorous support of the ISBA and the ABA, to defend the values of judicial integrity and independence, the result of the 2010 Iowan retention votes was unsurprising.

AUSTRALIAN, BRITISH AND INTERNATIONAL COURTS

Courts across the globe have long emphasized the importance of judicial independence in delivering justice. Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* states that "citizens have the right to have disputes decided by an independent and impartial tribunal".[66] This principle has been upheld and reiterated by the European Court of Human Rights in many cases including, *Findlay v United Kingdom*[67] and *V v United Kingdom.*[68] There are like provisions in the *Universal Declaration of Human Rights,*[69] and in the *International Covenant on Civil and Political Rights* (ICCPR)[70], the latter of which Australia has ratified.

In Australia, the cases of *Forge v Australian Securities and Investments Commissions*[71] and *North Australian Aboriginal Legal Aid Service v Bradley*[72] emphasize the important role that tenure plays in guaranteeing the integrity and independence of the courts and the judicial officers who serve in them.

In *Forge*, the issue was whether a State in Australia could appoint acting judges who did not enjoy permanent tenure. Although the majority of the High Court of Australia in *Forge* accepted that, realistically, in certain circumstances and with limited use, Australian States

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[62] Curriden, Mark, 'Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System' American Bar Association Magazine (Washington), 1 January 2011.
[63] Ibid.
[64] Soledad McGrath, Associate Director, Chief Counsel, ABA Justice Center.
[65] Soledad McGrath, Associate Director, Chief Counsel, ABA Justice Center.
[66] Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
[67] (1997) 24 EHRR 221.
[68] (1999) 30 EHRR 121.
[69] United Nations, General Assembly Resolution 217A (III) of 10 December 1948, art 10.
[70] United Nations, entered into force 23 March 1976: 999 UNTS 171 (1976), art 14.1.
[71] (2006) 228 CLR 45.
[72] (2004) 218 CLR 416.

could appoint acting judges, the legal standard of a "court" within the Australian judicature had to exhibit the essential requirements of independence and impartiality.[73] For that legal standard to be met, tenure was considered to be one of the "important aspects of the arrangement that supports the individual and personal aspects of judicial independence".[74]

Although State judges in Iowa are not "acting judges", pending retention vote, they nevertheless did not enjoy tenure in the normal sense if they were subject to retention elections after serving for a number of years. The issues that could arise from lack of tenure, as previously mentioned, are both the actual bias and the appearance of bias on the part of the affected judges in their decision making.

In *Forge*,[75] in joint reasons, Justices Gummow, Hayne and Crennan observed that the "the apprehension of bias principle is one which reveals the centrality of considerations of both the fact and the appearance of independence and impartiality in identifying whether particular legislative steps distort the character of the court concerned".[76] Their Honours considered whether an acting judge would be seen to be biased in his or her decision-making due to the lack of security of office. They emphasized the importance not only of judges *actually* acting without bias but also *appearing* to act without bias.[77]

I dissented in the *Forge* decision. In doing so I quoted Justice Stevens in the Supreme Court of the United States *Republican Party of Minnesota v White*.[78] He there commented on the importance of ensuring that judges are removed from any necessity, or inclination, to court the good opinion of the government of the day:[79]

> There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.[80]

In *Forge,* I favoured forbidding the States in Australia appointing acting judges. I did so on the basis that it was "inimical to true judicial independence and impartiality".[81] At about the same time, in the Scottish case of *Starrs v Ruxton*,[82] a court held that a court, presided over by a temporary sheriff, under the then arrangements applicable to the Scottish judiciary, did not constitute an "independent and impartial tribunal" in terms of Art 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

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[73] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [28] Gleeson CJ.
[74] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [36] Gleeson CJ.
[75] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45.
[76] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [68], Gummow, Hayne and Crennan JJ.
[77] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [78], Gummow, Hayne and Crennan JJ.
[78] 536 US 765 (2002).
[79] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [124], Kirby J.
[80] *Republican Party of Minnesota v White* 536 US 765 (2002) at 798.
[81] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [125], Kirby J.
[82] 2000 JC 208.

The decisions of the temporary sheriffs, and their orders, were therefore found to be flawed. That decision was accepted by in the United Kingdom. It was not challenged; nor were legislative steps attempted to circumvent or reverse it.

The United Nations Human Rights Committee has also emphasised the importance of judicial tenure as an essential prerequisite for an independent judiciary.[83] In its observations about judicial arrangements in different countries, the committee expressed its concern about instances of lack of tenure as an impediment to the independence of the judiciary.[84] The Committee, acting under the ICCPR, in ways similar to the European Court of Human Rights in upholding Art 6(1) of the *European Convention*, has drawn distinctions between:

- The standards applicable to administrative as distinct from judicial tribunals;[85]
- The standards stated in the legal text and the requisite appearance of independence and "objective impartiality" in practice;[86] and
- The instances of individual infraction and institutional defects,[87] the latter ordinarily being more serious because they are likely to repeat their consequences in many decisions made by the flawed institution.

The foregoing considerations led the High Court of Justiciary in Scotland to find that the institutional arrangements for temporary sheriffs should be declared incompatible with the right to trial by "an independent and impartial tribunal".[88] As Lord Reed stated,

> [T]he United Kingdom practice of appointing temporary judges appears to be unusual within a European context: it appears that, in almost all the other systems surveyed, the appointment of a temporary judge by the executive for a period of 1 year, renewable at the discretion of the executive, would be regarded as unconstitutional.[89]

In the *Forge* case in Australia, I sought to explain why Australian judges should exhibit an equal awareness of the international requirements of judicial independence and impartiality, including in respect of judicial tenure.[90]

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[83] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [211], Kirby J; see S Joseph, J Schultz and M Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary,* 2nd ed, Oxford University Press, 2004, pp 404-5 [14.30].

[84] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [211], Kirby J; see United Nations Human Rights Committee, Concluding Observations on Slovakia, UN Doc CCPR/C/79/Add.79, (1997) at [18].

[85] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [211], Kirby J; Cf *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165; A P Lester and D Pannick (eds), *Human Rights Law and Practice,* 2nd ed, LexisNexis, London, 2004, p 237 [4.6.55].

[86] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [211], Kirby J; see *Findlay v United Kingdom* (1997) 24 EHRR 221 at 244-5 [73]; *Stafford v United Kingdom* (2002) 35 EHRR 1121 at 1143 [78]; *Clark (Procurator Fiscal, Kirkcaldy) v Kelly* [2003] 1 All ER 1106.

[87] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [211], Kirby J *Valente; Beaumartin v France* (1994) 19 EHRR 485.

[88] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [213], Kirby J.

[89] *Starrs v Ruxton* 2000 JC 208 at 242-3.

[90] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [214], Kirby J.

> Each complaint of individual and institutional infractions must be judged on its own merits and in an Australian context. Considerations of practicality, economy and post-service desire for further judicial service may be given weight. Constitutional provisions, treaty obligations and institutional arrangements will inevitably vary as between different countries. However, the significance of the elaboration of international human rights standards in the context of acting and part-time judges is now clear. Increasingly, the defects of such appointments, when measured against the requirements of fundamental human rights, have been identified and given effect by courts and tribunals of high authority in many countries.[91]

To the extent that practising lawyers are temporarily appointed, subsequently or in between judicial tasks returning to their individual legal practices, the defects in manifest independence and impartiality are obvious.[92] On this point, Sir Gerard Brennan earlier observed:

> But what of the lawyer who would welcome a permanent appointment? What of the problem of such a lawyer faced with a decision which might be very upsetting to government, unpopular with the media or disturbing to some powerful body with influence? Anecdotal stories soon spread about the 'form' of acting judges which may harm their chances of permanent appointment in a way that is unjust. Such psychological pressures, however subtle, should not be imposed on decision-makers.[93]

At a time of increased media and other attacks on judges in Australia, an institutional change that shifts a significant cohort of the State judiciary from permanent tenured judges to part-time, temporary or provisional judges is seriously threatening to the independence and impartiality of that judiciary. The same can surely be said today for judges in Iowa and many other States in the United States, in the way in which election systems and retention votes are currently being undertaken.

Although during service, an acting judge might be immune from day-to-day executive interference, their desire for reappointment as an acting judge (or confirmation as a permanent judge) renders the temporary appointee dependent on a decision by the executive.[94] This is not a feature of the service or tenure of permanent judges.[95] State judges in the United States are subjected to the same problem, except that their reappointment is commonly dependent on a decision by the public rather than by the executive, which is arguably more unpredictable and less defined.

> To suggest that an acting judge, desirous of reappointment would be wholly

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[91] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [215], Kirby J.
[92] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [219], Kirby J.
[93] See F.G. Brennan, "The State of the Judicature", (1998) 72 *ALJ* 33 at 34; and M.D. Kirby, "Independence of the Judiciary – Basic Principle, New Challenges", address to the International Bar Association Conference, Hong Kong, 12 June 1998, p 12; M.D. Kirby, "Attacks on Judges – A Universal Phenomenon" (1998) 72 *ALJ* 599.
[94] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [220], Kirby J.
[95] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [220], Kirby J.

> uninfluenced, on the basis of a possible reappointment, by the risk of upsetting government with a decision, may be correct in the individual case. But it makes a considerable demand on human nature. Not all reasonable observers will be persuaded that it is so.[96]

To suggest also, that a State judge in the United States, subject to retention vote would be completely uninfluenced by public opinion in his or her judicial decision-making, having regard to the reality that he or she is dependent upon that same public opinion to retain his or her seat, makes a "considerable demand on human nature which not all reasonable observers would think proper".[97]

In *Porter v Magill*,[98] the House of Lords in the United Kingdom cited the statements of the European Court of Human Rights that, in considering whether a tribunal is independent, regard must be had to the manner of appointment of its members and their terms of office, and the existence of guarantees against outside pressures.[99] In all these factors, the court is not only required to be "truly independent and free from actual bias, proof of which is likely to be very difficult, but also that it must not appear, in the objective sense, to lack these essential qualities".[100]

Canadian courts have also raised concerns about the "procedure and criteria for the appointment of judges that may bear on the perception of judicial independence".[101] In *Valente v R*,[102] Le Dain J, in the Supreme Court of Canada, urged the "general adoption of the highest standards or safeguards, not only with respect to the traditional elements of judicial independence, but also with respect to other aspects now seen as having an important bearing on the reality and perception of judicial independence".[103]

In Australia in *Bradley*,[104] the High Court recognized that there are material differences between the judiciaries of different countries. No single model of judicial independence exists.[105] But it can be said that the judicial decisions in Australia the United Kingdom, Canada and the European Court of Human Rights all insist that impartiality and the appearance of impartiality are essential for the maintenance of public confidence in the judicial system.[106] These elements are undermined if judges are liable to be removed from office for faithfully discharging their judicial duties, as by a process of popular recall or vote for non retention.

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[96] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [223], Kirby J.
[97] *Forge v Australian Securities and Investments Commissions* (2006) 228 CLR 45 [223], Kirby J.
[98] [2002] 2 AC 357.
[99] *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 416 [3] per Gleeson CJ quoting Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 [88].
[100] *Porter v Magill* [2002] 2 AC 357 [80], Lord Hope of Craighead.
[101] *Valente v R* [1985] 2 SCR 673 [25], Le Dain J.
[102] [1985] 2 SCR 673.
[103] *Valente v R* [1985] 2 SCR 673 [25], Le Dain J.
[104] *Bradley*, [3], Gleeson CJ.
[105] *Bradley*, [14], Gleeson CJ.
[106] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [28], Gaudron J.

A SERIOUS DEPARTURE FROM JUDICIAL INDEPENDENCE

Both the public and members of the legal community in the United States appear to recognize the problems that retention elections and judicial elections bring for judicial independence. Yet very little has been done to address these problems and basically nothing since the removal of the Iowa Supreme Court judges in 2010. Whilst it is clear that there will not be a change to constitutional arrangements overnight, and that judicial elections will not be removed entirely, what is obvious is that the situation in the United States warrants the concerted efforts of all relevant players, including the Bar, to address the fundamental issues now identified.

Judges themselves bear a personal responsibility of discharging their judicial office independently, impartially and professionally. It is not a privilege for the judges, but a responsibility imposed on each judge to decide a matter that falls for judgment honestly and impartially, in accordance with the law.[107] It is the judiciary that upholds the rule of law, interprets the Constitution and the law and safeguards all of the people, while protecting unpopular minorities and individuals.

Justice Ben Overton of the Florida Supreme Court once said,

> "It was never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes".[108]

Yet that is now a possible outcome of the kind of action taken in Iowa. In refusing retention to the Chief Justice and other Justices, the fundamental principles of judicial independence include independence from all forms of immaterial outside influence. While today, citizens in the United States might say that their State judiciaries are free from interference by other branches of government, it is clear that the State judiciary in most States faces a far more dangerous and powerful challenge – the wrathful votes of an opinionated and sometimes ill-informed public. More must be done to spread awareness and to encourage reform on, this issue. It is the country's courts that stand for, and protect, the rights of the people. If the judiciary's independence can be so easily threatened by the rise and fall of popular sentiments, State judges cannot be, or be seen to be, independent and impartial in their decision-making. This feature of the State judicial service weakens and ultimately endangers the entire judiciary in the United States and the confidence of the people in the judicial office.

The best safeguard for judicial independence, impartiality and integrity has been found, by experience over the centuries, to be security of judicial tenure. In that way the judge, in making decisions, is not subject to dangers or fears or appearance of removal from office for offending powerful forces (governmental or private) by his or her decisions.

That is why election to judicial office and removal by electoral process are extremely rare, in the world. The system exists, substantially, only in State jurisdictions in the United States of America and in election to United Nations and regional courts and tribunals. In

[107] Article 22 of the *Bangalore Principles of Judicial Conduct*.
[108] Quoted in Stephen B Bright , "Political Attacks on the Judiciary" (1997) 80 *Judicature* 165, 166.

both of these instances serious deficiencies are observed. They result in significant proposals for reform, demanding abolition or modification of the electoral procedure.

The system involving appointment by the executive and parliamentary confirmation and removal does, it is true, involve some risks of the appointment of candidates to the judiciary otherwise than on professional merit and (more rarely) removal of some judges on political grounds[109]. There is also a risk that appointed judges, who manifest various deficiencies, will sometimes remain in office simply because of the great difficulty of achieving their removal. Essentially, this situation is tolerated because the *marginal utility* of easily removing such judges is outweighed by the *marginal cost* of thereby inviting external influences to bear upon the performance of judicial duties by *all* judges.

Human imperfections exist in all public and private institutions and amongst their personnel. The expected duties of judicial officers are such that a high measure of independence is essential to their discharge. If this means occasionally tolerating an unsuitable judge in office, this is a compromise that most societies have been willing to pay. They do so because of the more serious disadvantages of alternative systems involving selection and removal (renewal) of judges by means of elections.

In the post revolutionary context of the United States of America in the 1830s the historical origins of the United States systems of election and removal of State judges were perhaps understandable. The reforms that mollified the early electoral systems have certainly reduced the worst dangers deriving from superimposing on judges an alien mode of accountability through popular elections. This is inherently alien because prone to undesirable pressures, incompatible with judicial independence, impartiality and integrity.

Actual cases of abuse in the retention elections in the United States have been relatively rare, it is true. Nonetheless, the systems of election to office and recall or removal from office of judges are fundamentally inconsistent with the universal principles recognised by the United Nations treaties and the law and practice of most countries. Appreciating fully the great difficulty that would be involved in achieving the repeal of such long standing arrangements, as a matter of fundamental principle, the election systems in force in the United States should be repealed or substantially reformed. Bar Associations should support such repeal and reform. So should scholars and civil society organizations and political leaders. The States of the United States of America should substitute a system similar to that established for federal judges by the Constitution of the United States of America. That system has served the United States well for more than two centuries. It amalgamates appropriately both procedures for merit appointment and removal and engagement with democracy. It has produced federal courts of great talent and integrity. It should replace State systems that rely on electoral involvement.

The removal of the Chief Justice and two justices of the Supreme Court in Iowa in 2010 was a shock to judges and lawyers outside the United States. I do not doubt that many judges, lawyers and citizens in the United States were also shocked. Perhaps because of that shock, when a fresh effort was mounted at the election held on 6 November 2012, to

[109] Recent events in Hungary, Papua New Guinea and Sri Lanka spring to mind.

unseat Justice David Wiggins from the Supreme Court of Iowa, by denying him retention, the attempt failed. Justice Wiggins was narrowly retained at the vote, despite his having joined Chief Justice Ternus and her two other colleagues, removed in 2010, in deciding to uphold the primary judicial decision affirming marriage equality in the State. On this occasion, the Iowa Bar Association organized a much stronger campaign in favour of retention. It was joined by civil society bodies and public media. Justice Wiggins did not campaign, announcing that it would not be appropriate for him, as a serving judge, to campaign or raise money for an election[110]. The correct outcome was achieved. However, the 2010 precedent stands, the retention procedure is defective in principle. The wrong done to Chief Justice Termis and her colleagues has not been corrected. The same wrong can be repeated in the future.

Australian lawyers and judges, and their professional associations, have an interest in these events. We are part of the global community of common law and English-speaking jurisdictions. We share many of the same legal and judicial traditions. Universal human rights are just that – universal. Judicial independence and integrity are universal values.[111] Infractions of human rights are not just problems for poor, developing countries. They exist everywhere. They are of universal concern as the *Charter of the United Nations*, and the *Universal Declaration of Human Rights* – both profoundly influenced by their Anglo-American drafters – make clear. Wrongful removals of judges in the United States are as serious as those in Sri Lanka and Fiji. Australian lawyers should be equally concerned by both. And equally vigilant to analogous dangers at home.

[110] Lou Chibbaro Jr., "Iowa judge wins bid to stay in office", *Washington Blade*, 7 November 2012
[111] Judicial Integrity Group (UNDP), Commentary on the Bangalore Principles of Judicial Conduct (Vienna 2007) 39ff.

APPENDIX

TABLE 1: INITIAL SELECTION METHOD[112]

TABLE 1: INITIAL SELECTION METHOD			
Partisan Election (6)	Non-Partitsan Election (15)	Merit Plan (15)	Governor / Legislature (13)
Alabama	Arkansas	Alaska	California
Illinois	Georgia	Arizona	Connecticut
Louisiana	Idaho	Colorado	Delaware
Pennsylvania	Kentucky	Florida	Maine
Texas	Michigan	Hawaii	Massachusetts
West Virginia	Minnesota	Indiana	New Mexico
	Mississippi	Iowa	New Jersey
	Montana	Kansas	New York
	Nevada	Maryland	Rhode Island
	North Carolina	Missouri	South Carolina
	North Dakota	Nebraska	Tennessee
	Ohio	Oklahoma	Vermont
	Oregon	South Dakota	Virginia
	Washington	Utah	
	Wisconsin	Wyoming	

TABLE 2: RETENTION METHOD[113]

TABLE 2: RETENTION METHOD				
Partisan Election (4)	Non-Partitsan Election (15)	Retention Election (19)	Governor / Legislature (7)	Serve to Age 70 or Life (4)
Alabama	Arkansas	Alaska	Connecticut	Massachusetts
Louisiana	Georgia	Arizona	Delaware	New Hampshire
Texas	Idaho	California	Hawaii	New Jersey
West Virginia	Kentucky	Colorado	Maine	Rhode Island
	Michigan	Florida	Vermont	
	Minnesota	Illinois	South Carolina	
	Mississippi	Indiana	Virginia	
	Montana	Iowa		
	Nevada	Kansas		
	North Carolina	Marylad		
	North Dakota	Missouri		
	Ohio	Nebraska		
	Oregon	New Mexico		
	Washington	Oklahoma		
	Wisconsin	Pennsylvania		
		South Dakota		
		Tennessee		
		Utah		
		Wyoming		

[112] Devins, Neal and Mansker, Nicole, "The Judiciary and the Popular Will: Popular Opinion and State Supreme Courts" (2010) 13 *University of Pennsylvania Journal of Constitutional Law* 455, 456
[113] Ibid