

Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices

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I. INTRODUCTION

On November 2, 2010, voters in Iowa fired three of the Iowa Supreme Court's seven justices.¹ Under constitutional reforms that Iowans had adopted nearly half a century earlier, each of those justices had been appointed by the state's governor from a list of names supplied by the state's judicial nominating commission,² but then was required to stand for a retention vote after a short initial period of service and every eight years thereafter.³ Chief Justice Marsha Ternus had been appointed to the state's high court by Republican Governor Terry Branstad in 1993 and was on the November 2010 ballot seeking her third eight-year term; Justice Michael Streit had been appointed by Democratic Governor Tom Vilsack in 2001 and was seeking his second eight-year term; and Justice David Baker had been appointed by Democratic Governor Chet Culver in 2008 and was seeking his first eight-year term.⁴ Under ordinary circumstances, each of those justices would have been virtually guaranteed success on Election Day. Since Iowa moved from an

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1. See A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/03/us/politics/03judges.html>.

2. See IOWA CONST. art. V, §§ 15–16.

3. See *id.* § 17. After first being placed on the court, a justice “serve[s] for one year after appointment and until the first day of January following the next judicial election after the expiration of such year.” *Id.* The justice must then survive a retention vote if he or she wishes to serve a full eight-year term. See *id.* At the completion of that eight-year term, and every eight years thereafter, the justice may remain on the court so long as he or she survives his or her periodic retention votes. See *id.*

4. Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REG., Nov. 3, 2010, at A1. Provided they wish to continue to serve, Justice David Wiggins will be up for retention in 2012 and Justices Mark Cady, Daryl Hecht, and Brent Appel will be up for retention in 2016. *Id.*

election-driven method of choosing justices⁵ to a merit-selection and retention system in 1962, no Iowa Supreme Court justice had ever failed to survive a retention vote.⁶ Indeed, in the nearly seventy-five years since California became the first state to hold a judicial retention election, voters nationwide had refused to allow only eight other state supreme court justices to keep their seats.⁷

In 2010, however, the circumstances were far from ordinary. In *Varnum v. Brien*,⁸ decided in April 2009, Chief Justice Ternus, Justice Streit, and Justice Baker joined with their colleagues in unanimously holding that the state's ban on same-sex marriage violated the equality clause of the Iowa Constitution.⁹ Social conservatives in Iowa vowed to strike back by removing each of the three justices whose names were slated to appear on the November 2010 ballot.¹⁰ Buoyed by financial and political support from out-of-state opponents of same-sex marriage,¹¹ those efforts found their mark. In an election that drew the largest number of ballots cast in any midterm election in the state's history,¹²

5. See IOWA CONST. art. V, § 3 (repealed 1962) ("The Judges of the Supreme Court shall be elected by the qualified electors of the State . . .").

6. Schulte, *supra* note 4, at A1.

7. See Grant Schulte, *Remaining Four Justices Could Face Ouster Efforts*, DES MOINES REG., Nov. 6, 2010, at A1. For the story of five of those non-retained justices, see B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431–36 (2001) (describing events of non-retention in California, Tennessee, and Nebraska). A study of the period from 1964 to 1998 found that in the 4558 judicial retention elections held nationwide for state judges representing all levels of the judicial hierarchy, only fifty-two judges and justices had not been retained. Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, 83 JUDICATURE 79, 79 (1999). The study also found that during that same approximate period, the mean percentage vote in Iowa in support of retaining judges and justices ranged from 73.7 to 84.4 percent. *Id.* at 80.

8. 763 N.W.2d 862 (Iowa 2009).

9. *Id.* at 872 ("[W]e hold the Iowa marriage statute violates the equal protection clause of the Iowa Constitution."); see also IOWA CONST. art. I, § 6 ("All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."); IOWA CODE § 595.2(1) (2009) ("Only a marriage between a male and a female is valid."), *invalidated by Varnum*, 763 N.W.2d at 862. Iowa thereby became the fourth state in which a supreme court has struck down a ban on same-sex marriage on state constitutional grounds. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding Proposition 8 unconstitutional); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Courts in several other states have upheld their states' bans on same-sex marriage. See *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006); *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003).

10. See *infra* Part III.

11. See *infra* notes 81–84 and accompanying text.

12. See Jason Clayworth, *Midterm Vote Saw Record Turnout*, DES MOINES REG., Nov. 30, 2010, at B1 (reporting that 1,133,434 ballots were cast, exceeding the prior record by approximately

voters rejected the three justices' bids to remain on the court.¹³ One leader of the ouster campaign declared that Iowa's voters had done "God's will by standing up to the three judges who would try to redefine God's institution and say that marriage is anything other than one man and one woman."¹⁴ Another leader of the campaign joyously predicted that the election results would "send a message across the country that the power resides with the people."¹⁵ Supporters held signs declaring, "It's we the people, not we the courts."¹⁶

Judging from national press reports¹⁷ and from remarks made by academics and judges during casual conversations at this mid-November Kansas symposium, Iowa was indeed the epicenter of tremors felt across the country. Yet it is far from apparent precisely what those tremors portend. If the three ousted justices had plainly flouted judicial norms, the lesson for jurists in Iowa and elsewhere would be clear: when the legal issues are sufficiently salient, citizens will take advantage of an opportunity to punish judges who violate the norms of their profession. 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 the *Varnum* opinion will find that the court's reasoning fell well within the parameters of established methods of constitutional analysis. The three justices did not lose their jobs by violating widely embraced conventions of constitutional reasoning. Rather, they lost their jobs by reaching a conclusion that many citizens found morally and politically objectionable.

To help make sense of what happened in Iowa and of what it could mean for jurisdictions nationwide, this paper will describe the path from

62,000).

13. See IOWA SECRETARY OF STATE, OFFICIAL RESULTS REPORT (Nov. 29, 2010) [hereinafter OFFICIAL RESULTS REPORT], available at <http://www.sos.state.ia.us/pdfs/elections/2010/judicialorr.pdf> (reporting vote totals indicating that voters denied Justice Baker's and Justice Streit's bids for retention by a margin of fifty-four to forty-six and denied Chief Justice Ternus's bid for retention by a margin of fifty-five to forty-five).

14. Jason Hancock, *Chuck Hurley: Ousting Iowa Supreme Court Justices Was 'God's Will,'* IOWA INDEP., Nov. 3, 2010, available at <http://iowaindependent.com/46996/chuck-hurley-ousting-iowa-supreme-court-justices-was-gods-will> (quoting Chuck Hurley, president of the Iowa Family Policy Center).

15. Sulzberger, *supra* note 1 (quoting Bob Vander Plaats); see also *infra* Part III (discussing Vander Plaats' role in the non-retention campaign).

16. Sulzberger, *supra* note 1.

17. For examples of national press reports describing the debate surrounding the removal of three Iowa Supreme Court justices, see Ben Birbaum, *Setbacks in House, Optimism in States*, WASH. TIMES, Nov. 4, 2010, at A5; Adam Cohen, *Iowa Vote Shows the Injustice of Electing Judges*, TIME.COM, Nov. 10, 2010, <http://www.time.com/time/nation/article/0,8599,2030526,00.html>; Sulzberger, *supra* note 1.

Varnum to the three justices' ouster, and then suggest a number of important lessons that one can draw from the experience.

II. THE *VARNUM* OPINION

Varnum v. Brien involved an action brought by Katherine Varnum and eleven other members of same-sex couples who had applied for marriage licenses in Polk County, Iowa.¹⁸ Timothy Brien, in his capacity as the Polk County Recorder, had denied those applications pursuant to the state's ban on same-sex marriage.¹⁹ The Polk County District Court granted the plaintiffs' motion for summary judgment,²⁰ and the case moved directly to the Iowa Supreme Court on appeal.²¹

The Iowa Supreme Court's methodological approach to the constitutional question before it was far from novel—indeed, unanimity would have been difficult to achieve if one or more of the justices had insisted on deviating from interpretive norms. If anything is remarkable about the form of the opinion itself, it is the great patience and clarity with which the court explained its reasoning. Justice Mark Cady, the opinion's author, seemed to go out of his way to walk through the analysis in a manner that an educated lay reader could easily understand. Perhaps with that very objective in mind, the court opted not to depend in any way on the doctrine of substantive due process—a doctrine on which the trial court had partially relied,²² but also a doctrine that is famously controversial for its lack of clear textual grounding and that is difficult to explain even in law school classrooms. Instead, the Iowa Supreme Court relied entirely upon the equality clause of the Iowa Constitution, which reads: “All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”²³ In determining the import of that provision in the case at hand, the court asked a series of familiar questions—questions

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

19. *Id.* (citing IOWA CODE § 595.2(1) (2009)).

20. *See id.* at 872–74 (describing the district court proceedings).

21. *See* IOWA CODE § 602.4102(2) (permitting the supreme court to take a case directly from a district court and then decide whether to refer the case to the Iowa Court of Appeals).

22. *See Varnum*, 763 N.W.2d at 877 (“The district court concluded the statute was unconstitutional under the due process and equal protection clauses of the Iowa Constitution . . .”).

23. IOWA CONST. art. I, § 6; *see also id.* § 1 (“All men and women are, by nature, free and equal . . .”).

that, in state and federal jurisdictions across the country, rest at the heart of modern American equal-protection analysis.

The *Varnum* court began by asking whether the statute classified individuals on any discernable basis.²⁴ The statute's language was straightforward: "Only a marriage between a male and a female is valid."²⁵ Defenders of the statute argued that it did not classify individuals at all—everyone, they said, was equally free to marry a person of the opposite sex.²⁶ The justices acknowledged that the Iowa statute did not expressly mention sexual orientation, but nevertheless found a sexual-orientation classification lurking beneath the statute's text:

[T]he right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all. Under such a law, gay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant benefits granted by the statute. Instead, a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by neglecting the very trait that defines gay and lesbian people as a class—their sexual orientation.²⁷

The court then sought to determine the appropriate standard of review for sexual-orientation classifications.²⁸ Invoking the widely recognized criteria for making such determinations,²⁹ the court found that some form of heightened scrutiny, rather than rational-basis review, was appropriate. First, the court observed that "gay and lesbian people as a group have long been the victim of purposeful and invidious discrimination because of their sexual orientation."³⁰ Second, the court found that a person's sexual orientation bears no relationship to his or her "ability to contribute to society," and that classifications based on sexual orientation are thus likely to be "based on irrelevant stereotypes and

24. *Varnum*, 763 N.W.2d at 885.

25. IOWA CODE § 595.2(1).

26. *Varnum*, 763 N.W.2d at 884 (noting the argument that the statute did not classify individuals on the basis of gender or sexual orientation).

27. *Id.* at 885 (citing *In re Marriage Cases*, 183 P.3d 384, 441 (Cal. 2008)).

28. *Id.* at 880.

29. *See id.* at 885–89 (discussing the widespread recognition of these criteria).

30. *Id.* at 889 (pointing to laws criminalizing homosexual conduct, the dismissal of gays and lesbians from the military, and schoolyard bullying, among other forms of oppression).

prejudice.”³¹ Third, the court found that even if one’s sexual orientation is not an absolutely immutable trait, it is “highly resistant to change,” and thus “is not the type of human trait that allows courts to relax their standard of review because the barrier is temporary or susceptible to self-help.”³² Finally, the court determined that “gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation.”³³

The court then found that it need not yet choose between intermediate and strict scrutiny for sexual-orientation classifications because Iowa’s ban on same-sex marriage could not survive under the less stringent of those two standards.³⁴ Tracking the U.S. Supreme Court’s well-established description of intermediate scrutiny under the federal Equal Protection Clause,³⁵ the *Varnum* court stated that, to survive judicial review, Iowa’s ban on same-sex marriage “‘must be substantially related to an important governmental objective’”³⁶ and the state must have “‘exceedingly persuasive’ reasons for denying civil marriage to same-sex couples.”³⁷

The court determined that the statute failed to meet those demanding standards. Simply preserving the traditional concept of marriage was not a sufficiently persuasive governmental objective, the court said, because it would render the analysis entirely circular: it was the constitutional validity of the state’s effort to preserve the traditional concept of marriage that was itself in question.³⁸ Promoting the best interests of children is certainly an important governmental goal, the court observed,³⁹ but the ban on same-sex marriage was not substantially related to that objective. Even if one believes that children are better off when raised by opposite-sex parents than when raised by same-sex parents,⁴⁰ the court reasoned that the statute’s means of protecting

31. *Id.* at 890–91.

32. *Id.* at 893.

33. *Id.* at 895.

34. *Id.* at 896 (“Because we conclude Iowa’s same-sex marriage statute cannot withstand intermediate scrutiny, we need not decide whether classifications based on sexual orientation are subject to a higher level of scrutiny.”).

35. See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

36. *Varnum*, 763 N.W.2d at 896 (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

37. *Id.* at 897 (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996)).

38. See *id.* at 898–99.

39. See *id.* at 899.

40. The court observed that there is a substantial body of evidence suggesting that “the interests

children were under-inclusive insofar as the statute permitted “child abusers, sexual predators, parents neglecting to provide child support, and violent felons” to marry, even though they “are undeniably less than optimal parents.”⁴¹ The court further found that the statute’s means were over-inclusive insofar as many same-sex couples would never bear or raise children.⁴² Nor was the ban on same-sex marriage substantially related to the goal of promoting procreation—the court found no reason to believe that, finding themselves unable to marry persons of their own sex, gays and lesbians would opt to enter into heterosexual relationships and bear children.⁴³ Similarly, the court found that promoting the stability of heterosexual relationships is an important governmental objective, but that there was no apparent reason to believe that proscribing same-sex marriages helped to achieve that goal.⁴⁴

In the court’s judgment, the lack of a good fit between important government objectives and the ban on same-sex marriage demonstrated that the statute “is less about using marriage to achieve [important governmental ends] and more about merely precluding gay and lesbian people from civil marriage.”⁴⁵ Finding no “exceedingly persuasive” justification for refusing to recognize same-sex marriages, the justices declared the statute unconstitutional.⁴⁶

Iowa’s first same-sex marriage ceremonies were conducted within weeks of the ruling.⁴⁷ Over the course of the following year, more than

of children are served equally well by same-sex parents and opposite-sex parents,” but conceded “the existence of reasoned opinions that dual-gender parenting is the optimal environment for children.” *Id.*; see also *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) (“[A] consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.”); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (“Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.”).

41. *Varnum*, 763 N.W.2d at 900–01.

42. *Id.*

43. *Id.* at 901–02.

44. *Id.* at 902. The court also rejected the claim that the statute was justified by a desire to conserve the state’s financial resources. *Id.* at 902–03.

45. *Id.* at 901.

46. *Id.* at 904 (“Our equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the statute.”); *id.* at 906 (“Iowa Code section 595.2 is unconstitutional because the [governmental defendant] has been unable to identify a constitutionally adequate justification for excluding plaintiffs from the institution of civil marriage.”).

47. Amy Lorentzen, *In Iowa, Same-Sex Couples Rush to Tie the Knot*, WASH. POST, Apr. 28, 2009, at A4 (reporting Iowa’s first same-sex marriages).

two thousand same-sex couples exchanged vows in Iowa, with roughly sixty percent of those couples coming to Iowa from other states.⁴⁸

III. THE RETENTION BATTLE

It did not take long for social conservatives to denounce the court's ruling;⁴⁹ calls for a constitutional amendment to restore the ban on same-sex marriage erupted immediately after the *Varnum* opinion came down.⁵⁰ Yet the amendment process in Iowa is arduous.⁵¹ The state constitution gives voters an opportunity every ten years to decide whether to hold a constitutional convention.⁵² Yet voters have repeatedly declined that invitation,⁵³ and they declined it again in November 2010 by a two-to-one margin.⁵⁴ The only other way to amend the constitution involves a lengthy series of votes: a proposal to amend the constitution must first win the approval of a majority in the state legislature; after an intervening general election, the proposal must again win the backing of a majority in the state legislature; and then the proposed amendment must be submitted to the citizenry for final approval.⁵⁵ Democrats in the

48. Tony Leys, *Iowa's 2,000 Gay Marriages Mostly from Nonresidents*, DES MOINES REG., May 19, 2010, at B3.

49. Indeed, some conservatives were suspicious of other conservatives who said they wanted to take some time to reflect on the ruling before announcing their views about it. See, e.g., Jason Hancock, *Salier: Grassley Could Be Primaried*, IOWA INDEP., Apr. 10, 2009, <http://iowaindependent.com/13888/salier-grassley-could-be-primaried> (noting that some conservatives condemned Iowa's U.S. Senator Charles Grassley for failing to denounce the ruling immediately).

50. See Elizabeth Ahlin, *Same-Sex Couples Rejoice*, OMAHA WORLD-HERALD, Apr. 3, 2009, at A1 (reporting calls for a constitutional amendment by several Republicans in the state legislature and by leaders of the Iowa Family Policy Center); Andy Birkey, *Iowa State Senator: Religious Right Won't Win Iowa Marriage Debate*, MINN. INDEP., Apr. 3, 2009, <http://minnesotaindependent.com/31096/iowa-state-senator-religious-right-wont-win-iowa-marriage-debate> ("Religious right leaders immediately vowed to fight the decision with a constitutional amendment . . .").

51. Data available in 1991 revealed that Iowa then had the sixth-lowest annual rate of constitutional amendments in the nation. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 248–49 (Sanford Levinson ed., 1995).

52. IOWA CONST. art. X, § 3 (stating that every ten years, "the question, 'Shall there be a convention to revise the constitution, and propose amendment or amendments to same?' shall be decided by the electors qualified to vote for members of the general assembly").

53. The convention question has appeared on Iowa voters' ballots every ten years since 1870, and voters have answered it in the affirmative only once, in 1920. Dan Piller, *Iowans Vote Against Constitutional Convention*, DES MOINES REG., Nov. 3, 2010, at A8. Presented with that affirmative vote in 1920, the legislature failed to make the necessary arrangements and so the convention was never held. *Id.*

54. *Id.*

55. IOWA CONST. art. X, § 1.

state legislature thwarted early Republican efforts to start down that difficult path,⁵⁶ prompting social conservatives to look for other ways to express their disapproval of *Varnum*. The appearance of three of the Iowa Supreme Court's seven justices on the November 2010 ballot provided the opportunity that those citizens were seeking.

Using retention elections as an occasion to express disapproval of particular rulings was certainly not what those who first urged states to adopt merit-selection and retention systems originally had in mind. Albert Kales, co-founder of the American Judicature Society, proposed a merit-selection system for state judges in 1914, hoping to curb the perceived evils associated with judges who had to depend upon winning elections and remaining in good stead with politically powerful actors in order to win and keep their seats on the bench.⁵⁷ Kales and likeminded reformers added retention elections to their proposals not because they regarded those elections as an essential piece of the puzzle, but rather because they believed that including some sort of opportunity for voter input would be essential in order to make their proposals politically saleable among influential Progressives.⁵⁸ As Judge Duane Benton of the United States Court of Appeals for the Eighth Circuit recently observed, retention elections

were designed to allow qualified judges to serve long terms with only a modest amount of direct accountability. Indeed, those who developed the concept preferred life tenure, but they acquiesced to political realities and allowed the public an opportunity to remove judges in extreme circumstances. Clearly removal was perceived as the exception, not the rule.⁵⁹

56. See Mary Rae Bragg, *Same-Sex Marriage Issue Roils Republican Leaders*, TELEGRAPH HERALD (Dubuque, Iowa), May 3, 2009, at A14 (reporting some conservatives' frustration with Republicans' inability to surmount procedural obstacles that Democrats raised against GOP efforts to propose an amendment banning same-sex marriage); Jason Hancock, *Is Gay Marriage Complacency Creating Cracks in GOP Unity?*, IOWA INDEP., Apr. 27, 2009, <http://iowaindependent.com/14513/is-gay-marriage-complacency-creating-cracks-in-gop-unity> (same).

57. See G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 608–09 (2009).

58. See *id.* at 607–09; Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 853–57 (2002); William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 340–42 (1987). For a brief overview of the many different types of merit systems currently in place in the various states, see Bierman, *supra*, at 857–60.

59. Duane Benton, *Comments on the White, Caufield, and Tarr Articles*, 74 MO. L. REV. 667, 669 (2009) (quoting Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 233 (1980)).

Yet there is nothing to prevent a voter from casting a ballot against a judge's retention for any reason he or she likes. Indeed, many citizens reject the proposition that they ought to defer to judges in the face of rulings they find objectionable, finding that notion elitist and anti-democratic.⁶⁰ For better or worse, if voters are sufficiently angry about a particular ruling and are convinced that the justices reached the wrong conclusion—as were many in Iowa after the Iowa Supreme Court handed down its ruling in *Varnum*—judicial retention elections give them an opportunity to express their convictions.

The notion of removing three state supreme court justices in one fell swoop was audacious, but not entirely unprecedented—it had happened elsewhere once before. In November 1986, California voters removed Chief Justice Rose Bird, Justice Cruz Reynoso, and Justice Joseph Grodin from the California Supreme Court, primarily for their staunch opposition to the death penalty.⁶¹ If voter dissatisfaction had led to the ouster of three state supreme court justices once before in California, there was at least a slim chance that it could happen again in Iowa.

The non-retention campaign against Chief Justice Ternus, Justice Streit, and Justice Baker crystallized in the late summer of 2010 under the leadership of Bob Vander Plaats, a Sioux City businessman who was just coming off a defeat in the Republican gubernatorial primary.⁶²

60. Cf. Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 796 (2004) (stating that, while proponents of merit selection stress the importance of preserving “the integrity and independence of the judiciary . . . [o]pponents of merit selection have a much simpler and more populist retort to the advocates of merit selection, the essence of which is, ‘don’t let them take away your right to vote on judges’”); Tarr, *supra* note 57, at 609–10 (stating that “some critics complain that judges are frustrating popular government by reading their own ideological predilections into the law and that merit selection is ‘a masquerade to put political power in the hands of the organized bar and other members of the elite’” (quoting Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 106 (1998))).

61. See Robert Lindsey, *Defeated Justice Fearful of Attacks on Judiciary*, N.Y. TIMES, Nov. 8, 1986, at A7 (stating that Chief Justice Bird had “voted to overturn all 61 of the death sentences that came to the court for automatic review” and that “most of the most widely broadcast anti-Bird commercials were emotional appeals by parents and other [friends and relatives] of murder victims whose killers had escaped execution”); Mike Sprague, *Voters Must Decide on State Supreme Court, Court of Appeal Justices*, PASADENA STAR-NEWS, Oct. 29, 2010, available at http://www.pasadenastarnews.com/elections/ci_16472089 (recounting this history and stating that these are the only three California Supreme Court justices ever to be removed by voters after that state moved to a merit-selection and retention system in 1934). Chief Justice Bird was unpopular among many voters and political leaders for additional reasons. See Robert S. Thompson, *A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2022–32 (1988) (stating, for example, that Chief Justice Bird seemed “ill at ease in the company of anyone who was not a longtime intimate,” that she “was secretive and withdrawn,” and that in her rulings and administrative decisions she seemed plainly to favor the Democratic Party).

62. See Thomas Beaumont, *Vander Plaats Supporters Weigh a Push at Convention for No. 2*

Vander Plaats's chief opponent in that primary had been Terry Branstad, who ultimately would go on to defeat the Democratic incumbent, Chet Culver, in the general election later that fall.⁶³ The battle between Vander Plaats and Branstad had been a battle between "religious, social and tea party conservatives," who tended to favor Vander Plaats, and "business-oriented conservatives and centrists," who tended to favor Branstad.⁶⁴ As one reporter noted the day after Vander Plaats's defeat, Branstad had largely avoided the marriage debate, while Vander Plaats had placed his opposition to *Varnum* at the center of his primary campaign:

Branstad campaigned largely as a pragmatist, arguing he had the best shot of ousting Democratic Gov. Chet Culver. He focused on economic matters and glossed over emotional social issues, such as abortion and gay marriage. That prompted some conservatives, most notably leaders of the influential Iowa Family Policy Center, to threaten to sit out the general election if Branstad won the nomination. Vander Plaats tried to appeal to social and religious conservatives by concentrating on gay marriage, an issue that soared to prominence last year after the Iowa Supreme Court ruled that a ban on same-sex unions violated the state constitution.⁶⁵

During his unsuccessful primary bid, Vander Plaats had urged Iowans to vote against retaining each of the three justices who would appear on the November 2010 ballot.⁶⁶ Indeed, he even went so far as to pledge that, on his first day in office, he would issue an executive order thwarting *Varnum* by barring all same-sex marriages in the state.⁶⁷ There

Role, DES MOINES REG., June 23, 2010, at A1 (reporting that Branstad had defeated Vander Plaats in the Republican gubernatorial primary by ten percentage points). This was not Vander Plaats's first attempt to secure the Republican nomination—he had tried, and failed, in 2002. See Chris Clayton, *Vander Plaats Says His Background Would Give Him an Edge in Iowa Governor's Race*, OMAHA WORLD-HERALD, May 28, 2002, at A1. He made another unsuccessful bid for elective office—this time for the post of lieutenant governor—in 2006. See Thomas Beaumont, *Culver Coasts to Terrace Hill; Democrats Sweep Statehouse, Governorship*, DES MOINES REG., Nov. 8, 2006, at A1 (reporting Vander Plaats's loss in the general election).

63. See Thomas Beaumont, *Iowans Give Terry Branstad an Encore*, DES MOINES REG., Nov. 3, 2010, at A1 (reporting Branstad's victory over Culver).

64. Rod Boshart, *GOP Picks Branstad to Face Culver for Iowa Governor's Seat*, QUAD-CITY TIMES (Davenport, Iowa), June 8, 2010, available at http://qctimes.com/news/local/government-and-politics/elections/article_a349554e-7375-11df-9076-001cc4c002e0.html.

65. Mike Glover, *Branstad Wins GOP Nomination*, HAWK-EYE (Burlington, Iowa), June 9, 2010, available at <http://www.thehawkeye.com/print/Branstad-060910>.

66. See *id.*

67. Elizabeth Ahlin, *Vander Plaats Makes Third Bid to be Governor*, THE TRIBUNE (Ames, Iowa), Dec. 17, 2010, available at http://www.amestrib.com/articles/2010/06/07/ames_trib/news/

is nothing in the Iowa Constitution that would authorize a governor to confront the judiciary in this way, but Vander Plaats had insisted that it would be “absolutely negligent of me as governor if I don’t hold the court in check when I know they went out of bounds.”⁶⁸ Iowa’s constitution would make him the state’s “chief magistrate,” he argued, and this would give him the “authority to check judicial review.”⁶⁹

After mulling over the possibility of an independent bid for the governorship, Vander Plaats announced on August 6, 2010, that he would devote his energies instead to leading the effort to oust the three Iowa Supreme Court justices who were up for retention.⁷⁰ He created an organization called Iowa for Freedom to lead that campaign.⁷¹

Vander Plaats’s actions alarmed many attorneys, academics, and former judges in the state. They insisted that the non-retention initiative would threaten the Iowa judiciary’s independence by injecting a heightened measure of partisanship and politics into the selection and retention of Iowa’s judges, and that Vander Plaats’s campaign would diminish the number of qualified individuals who would be interested in taking seats on the state bench.⁷² The Institute for Legal Reform—an affiliate of the U.S. Chamber of Commerce—had recently released a study finding that Iowa’s judges ranked fourth in the nation for impartiality.⁷³ This finding confirmed what many in Iowa’s legal community already believed—and they feared that Vander Plaats’s campaign would place Iowa’s reputable judicial system at risk.⁷⁴ The Iowa State Bar Association released a poll of Iowa attorneys showing that the three targeted justices enjoyed strong support among members of

doc4c09d3dbdcedc887527658.txt; Glover, *supra* note 65 (stating that Vander Plaats had “repeatedly” made this pledge).

68. See Ahlin, *supra* note 67.

69. Matt Milner, *Vander Plaats Visit Ottumwa One Week Before Primary: GOP Candidate Receives Backing of Can-Do Conservatives*, OTTUMWA COURIER (Iowa), June 2, 2010, available at <http://www.allbusiness.com/government/elections-politics-campaigns-elections/14564782-1.html>.

70. See Rod Boshart, *Vander Plaats Targets Justices*, QUAD-CITY TIMES (Davenport, Iowa), Aug. 6, 2010, available at http://qctimes.com/news/state-and-regional/iowa/article_6b6df126-a1cd-11df-86bb-001cc4c002e0.html; Jason Clayworth, *Vander Plaats Seeks to Eject 3 Justices*, DES MOINES REG., Aug. 7, 2010, at A1.

71. See Sandhya Somashekhar, *Iowa Foes of Same-Sex Marriage Seek to Oust Judges Who Legalized It*, WASH. POST, Aug. 27, 2010, at A6.

72. See Boshart, *supra* note 70 (describing opposition to Vander Plaats’s campaign).

73. Institute for Legal Reform, *Lawsuit Climate 2010*, <http://www.instituteforlegalreform.com/lawsuit-climate.html#/2010>. The study used numerous criteria to evaluate each state’s legal climate. By rolling one’s cursor over each state in the graphic that appears on the website, one can see how that state ranked on each of those criteria.

74. See Sulzberger, *supra* note 1 (explaining that the legal community “rallied behind the justices”).

the Bar.⁷⁵ Former U.S. Supreme Court Justice Sandra Day O'Connor made a brief appearance in the state, praising Iowa's merit-based system for selecting justices and urging voters not to deny retention to justices based on isolated rulings.⁷⁶ Former Iowa Governor Robert Ray, a Republican, recalled the state of affairs prior to 1962 when aspiring judges had to run political campaigns to obtain and keep their seats on the bench, and he urged voters to retain the justices:

"I have a lot of respect for this system that we have. I practiced law when it was the other way and I'll tell you that wasn't much fun. . . . I think most people aren't going to want to throw them out because they did what they thought was the right thing to do."⁷⁷

Vander Plaats, however, did not have difficulty finding political allies. A coalition of Iowa pastors urged their congregations to vote against the justices' retention, for example, even while acknowledging that electoral advocacy could invite scrutiny of their organizations' tax-exempt status by the Internal Revenue Service.⁷⁸ The pastors said that the Texas-based Liberty Institute had agreed to provide free legal representation if the IRS did indeed bring actions against them.⁷⁹ A leader of the pastors' coalition almost pleaded with the IRS to come after him, saying that he often recited a short prayer: "Dear God, . . . please

75. Rod Boshart, *Attorneys Give Iowa Judges High Ratings*, SIOUX CITY JOURNAL Oct. 2, 2010, available at http://www.siouxcityjournal.com/news/state-and-regional/iowa/article_f964ae67-5bf2-5d22-8739-781554b83927.html (reporting that, among the more than 3400 attorneys who participated in the survey, 83.7% approved of Justice Streit's overall performance, 82.8% approved of Justice Baker's overall performance, and 72% approved of Chief Justice Ternus's overall performance).

76. Grant Schulte, *O'Connor: Iowa Selection Process Is Fair*, DES MOINES REG., Sept. 9, 2010, at B1.

77. Boshart, *supra* note 75. En route to victory in the gubernatorial race, Republican Terry Branstad refused to take a public position on the retention issue. See O. Kay Henderson, *Branstad, Vander Plaats Differ on Approach to Judicial Retention Election*, RADIO IOWA, Aug. 12, 2010, available at <http://www.radioiowa.com/2010/08/12/branstad-vander-plaats-differ-on-approach-to-judicial-retention-election>.

78. Grant Schulte, *Iowa Pastor: Churches Will Urge Voters to Remove 3 Justices*, DES MOINES REG., Oct. 11, 2010, at A1 (describing a coalition of "more than 100 churches," led by Cary Gordon, an associate pastor at Sioux City-based Cornerstone World Outreach). See generally 26 U.S.C. § 501(a) (2006) (declaring that certain kinds of organizations shall be exempt from taxation); *id.* § 501(c)(3) (providing that a religious organization is exempt from taxation so long as, *inter alia*, it "does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, *passim* (2007) (describing and evaluating the recent rise in churches' political activities).

79. Schulte, *supra* note 78.

allow the IRS to attack my church, so I can take them all the way to the U.S. Supreme Court.”⁸⁰

The non-retention campaign also won the backing of numerous out-of-state organizations, including the Alliance Defense Fund, based in Arizona; the American Family Association, based in Mississippi; the Campaign for Working Families, based in Washington, D.C.; Citizens United, based in Washington, D.C.; the Faith & Freedom Coalition, based in Georgia; the Family Research Council, based in Washington, D.C.; and the National Organization for Marriage, based in New Jersey.⁸¹ Tony Perkins, president of the Family Research Council, for example, participated in a bus tour of the state led by U.S. Representative Steve King, urging Iowans to denounce the justices’ ruling in *Varnum*.⁸² Two out-of-state organizations—the American Family Association and the National Organization for Marriage—played particularly influential roles, together pouring nearly \$700,000 into the campaign to unseat the justices.⁸³ This sum is all the more remarkable when one considers that, counting both in-state and out-of-state money, a total of approximately \$800,000 was reportedly spent on the effort to reject the justices’ bids for retention,⁸⁴ roughly double the amount spent on the effort to retain the justices.⁸⁵

Those non-retention dollars were used to wage a highly visible campaign. For example, in one television advertisement sponsored by

80. *Id.*

81. Andy Kopsa, *National Anti-Gay Groups Unite to Target Iowa Judges*, IOWA INDEP., Oct. 21, 2010, <http://iowaindependent.com/45701/national-anti-gay-groups-unite-to-target-iowa-judges> (listing out-of-state participants in the non-retention campaign); Trish Mehaffey, *What’s Next?—Ousted Justices Finish Year; Branstad Cautions Culver Not to Rush Replacements*, GAZETTE (Cedar Rapids, Iowa), Nov. 4, 2010, available at http://infoweb.newsbank.com/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=doc&p_docid=1334BB77AA6852C0&p_docnum=1&p_queryname=1 (same); see also CAMPAIGN FOR WORKING FAMILIES, <http://www.cwfpac.com/contact.php> (identifying the location of the organization’s headquarters); CITIZENS UNITED, <http://www.citizensunited.org/about.aspx> (same).

82. Andy Kopsa, *Anti-Retention Leaders: Iowa Just the Start of National Gay Marriage Battle*, IOWA INDEP., Oct. 29, 2010, <http://iowaindependent.com/46519/anti-retention-leaders-iowa-just-the-start-of-gay-marriage-battle> (reporting Perkins’ involvement); Schulte, *supra* note 7 (reporting King’s involvement).

83. See Press Release, Brennan Center for Justice, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), available at http://www.brennancenter.org/content/resource/2010_judicial_elections_increase_pressure_on_courts_reform_groups_say.

84. *Id.*

85. See *id.* (reporting that the group Fair Courts for Us spent approximately \$400,000 on its pro-retention campaign and that a combined total of approximately \$1.2 million was spent by anti- and pro-retention forces).

Iowa for Freedom, the National Organization for Marriage, and the Campaign for Working Families, the narrator told voters:

Some in the ruling class say it is wrong for voters to hold Supreme Court judges accountable for their decisions When activist judges on Iowa's Supreme Court imposed gay marriage, they were the only judges within 1200 miles to reach such a radical conclusion. If they can redefine marriage [said the narrator, over images of parents, Boy Scouts, hunters, and flag-saluting schoolchildren], none of the freedoms we hold dear are safe from judicial activism. To hold activist judges accountable, flip your ballot over and vote no on retention of Supreme Court justices.⁸⁶

An online video addressed to the state's religious leaders recited the justices' annual salaries and benefits; accused the justices of disregarding the will of the people and "160-years of Iowa law" when they overturned the ban on same-sex marriage; suggested that the justices might next disregard Iowans' rights in the areas of property, parenting, voting, and "teach[ing] the truths of God;" and urged pastors and congregants to "pray effectively and vote righteously."⁸⁷ Another online video played off of viewers' familiarity with eHarmony.com, the popular dating website: with the logo "e.Larmony.wrong" appearing at the bottom of the screen, a man and a woman discussed the history of their relationship and marriage, only to reveal at the end that they were brother and sister and that they were grateful to the Iowa Supreme Court for making their marriage possible.⁸⁸

The justices' defenders formed a variety of groups to fight back. In mid-August, one week after Vander Plaats formally announced his "Iowa for Freedom" campaign, a bipartisan group of individuals joined with the Iowa State Bar Association in launching an organization called Iowans for Fair and Impartial Courts (IFIC).⁸⁹ IFIC's core message was that

86. Nation For Marriage, *NOM: Iowans for Freedom Against Radical Judges*: David A. Baker, Michael J. Streit, Marsha Ternus, YOUTUBE (Oct. 19, 2010), http://www.youtube.com/watch?v=MIFnBBLX_OE. This advertisement has the dubious honor of appearing in Justice at Stake's six-minute montage of the "worst" television advertisements of the 2010 judicial election season. FairCourtsPage, *2010 State Supreme Court Ads*, YOUTUBE (Nov. 9, 2010), <http://www.youtube.com/watch?v=9HxaGFrViOE>.

87. iowapastors, *Iowa Supreme Court Justices*, YOUTUBE (Sept. 21, 2010), <http://www.youtube.com/watch?v=GVJxs-jkyDI>; see also iowapastors, *Iowa Pastors*, YOUTUBE (Sept. 22, 2010), <http://www.youtube.com/watch?v=1Dn4Y3ED6VU> (presenting the remarks of Jeff Mullen, pastor of Point of Grace Church, on the issues of same-sex marriage and judicial retention).

88. timhicks77, *Vote No on Judicial Retention*, YOUTUBE (Oct. 11, 2010), <http://www.youtube.com/watch?v=Mj2gOLUw5yk&NR=1>.

89. Jason Clayworth, *Group Aims to Show Importance of Keeping Politics Out of Court*, DES

“Iowa’s merit selection and retention process are [sic] key to maintaining [Iowa’s] fair and impartial courts.”⁹⁰ In late September, two former lieutenant governors (one Democrat and one Republican) created Justice Not Politics—a coalition of organizations that joined together in arguing that “Iowa’s merit selection and retention process keeps politics and campaign money out of our courts, safeguarding its fairness and impartiality.”⁹¹ But the creators of both IFIC and Justice Not Politics established themselves as tax-exempt 501(c)(3) organizations that could not overtly take a position on whether Iowans should vote for or against the justices’ retention.⁹² Many of Justice Not Politics’ coalition members were themselves 501(c)(3) organizations,⁹³ and could not have participated in the coalition if the group had expressly urged voters to retain the justices. As for IFIC, the Bar’s leaders had concluded that they were not authorized to engage in political advocacy on behalf of the Bar’s members until the Bar had completed its 2010 plebiscite, in which attorneys were asked to rate the performances of all of the justices and judges who were up for retention.⁹⁴ Because voting in the plebiscite was not scheduled to conclude until late September⁹⁵—more than a month after IFIC was formed—IFIC’s founders opted for 501(c)(3) status.⁹⁶ As a result, neither Justice Not Politics nor IFIC explicitly campaigned on the justices’ behalf; instead, both organizations focused their energies on

MOINES REG., Aug. 13, 2010, at B1 (announcing IFIC’s creation).

90. See IOWANS FOR FAIR & IMPARTIAL COURTS, <http://www.learnnowcourts.org> (last visited Mar. 21, 2011).

91. *Coalition Opposes Politicizing Judiciary*, DES MOINES REG., Sept. 28, 2010, at B2 (announcing Justice Not Politics’ creation); *About*, JUSTICENOTPOLITICS.ORG <http://www.justicenotpolitics.org/about> (last visited Mar. 21, 2011).

92. Rod Boshart, *Politics and Judicial Retention a Bad Mix, Group Says*, GLOBEGAZETTE.COM (Sept. 17, 2010), http://www.globegazette.com/news/local/article_0a059afc-c2a1-11df-beff-001cc4c03286.html (reporting IFIC’s tax-exempt status); Jennifer Jacobs, *Activists and Foes Agree: Vote on “Back of the Ballot” Issues*, DES MOINES REG., Oct. 29, 2010, at A1 (reporting Justice Not Politics’ tax-exempt status). See generally 26 U.S.C. § 501(c)(3) (2006) (limiting the political activities of certain kinds of tax-exempt entities).

93. See JUSTICENOTPOLITICS.ORG, *supra* note 91 (listing the coalition’s members, including churches and numerous other tax-exempt organizations).

94. Telephone Interview with Scott Brennan, Co-Founder, Iowans for Fair and Impartial Courts (Dec. 3, 2010).

95. *2010 Plebiscite Results*, IOWA STATE BAR ASSOCIATION, <http://www.iabar.net/display.common.cfm?an=1&subarticlenbr=375> (last visited Mar. 21, 2011) (stating that the voting period ran from Sept. 3 to Sept. 24).

96. Telephone Interview with Scott Brennan, *supra* note 94.

educating voters about the virtues of minimizing the role of politics in the selection and retention of the state's judges and justices.⁹⁷

Just three weeks before the election, a bipartisan pro-retention group called Fair Courts for Us—led in part by former Republican Governor Ray and by Dan Moore, a Republican who previously had served as the secretary and treasurer of Vander Plaats's gubernatorial campaign—arrived on the scene.⁹⁸ Fair Courts for Us had quickly raised nearly \$400,000 from, among others, the Iowa Trial Lawyers Association and the Iowa State Bar Association.⁹⁹ (By early October, the Bar's members had favorably rated each of the three targeted justices in the 2010 plebiscite,¹⁰⁰ and so the Bar's leaders believed they finally were authorized to take a position on the justices' retention.¹⁰¹) Fair Courts for Us explicitly urged Iowans to keep the state's judiciary "independent," "fair," and "non-partisan" by voting to retain the justices.¹⁰²

Two overarching observations can be made about the nature of the pro-retention campaign. First, none of the pro-retention efforts yielded the same visceral punch as the efforts of the non-retention forces. Perhaps nowhere was that more evident than in one well-intentioned but patently feeble series of privately sponsored online videos, in which a woman repeatedly licked salt off her wrist and drank large glasses of water, pledging to "retain water until we retain our justices."¹⁰³ IFIC, Justice Not Politics, and Fair Courts for Us certainly advanced more substantive and high-minded messages, but they did so in ways that were less than rhetorically compelling.

Second, in all of the organized pro-retention efforts, one message was conspicuously absent: proponents of retention focused persistently on their claim that Iowa's system for choosing and retaining judges

97. See JUSTICENOTPOLITICS.ORG, *supra* note 91 (stating the goals of Justice Not Politics and failing to take an overt position on how voters should cast their ballots); *About IFIC, IOWANS FOR FAIR & IMPARTIAL COURTS*, <http://www.learn-iowacourts.org/about.php> (last visited Mar. 21, 2011) (stating IFIC's core message and noting that "IFIC does not advocate a yes or no vote for any specific judge or justice").

98. See Jacobs, *supra* note 92; Tom Witosky, *Ray, Neu to Oppose Effort to Dump 3 Iowa Justices*, DES MOINES REG., Oct. 14, 2010, at B1 (announcing the group's formation).

99. Jacobs, *supra* note 92.

100. *2010 Judicial Plebiscite: Iowa Supreme Court*, IOWA STATE BAR ASSOCIATION (2010), <http://www.iabar.net/associations/4664/files/2010%20Plebiscite%20Results%20Supreme.pdf> (providing the results of the plebiscite for each of the three targeted justices).

101. Telephone Interview with Scott Brennan, *supra* note 94.

102. *About Fair Courts for Us*, FAIR COURTS FOR US, <http://www.faircourtsforum.com/about.asp> (last visited Mar. 21, 2011) (declaring the group's core message).

103. See, e.g., Kathy Landin, *Use Your Brain .Retain.—Day 1*, YOUTUBE (OCT. 24, 2010), <http://www.youtube.com/watch?v=4yNOQXnJQaI> (the first video in the series).

should not be heavily politicized, but they said hardly a word in defense of the *Varnum* ruling itself. On the issue of same-sex marriage—the issue at the center of the firestorm—the justices’ defenders almost entirely ceded the stage to *Varnum*’s critics. In fact, when the justices’ defenders *did* speak on the issue of *Varnum*, their comments were sometimes far from positive. In a radio advertisement sponsored by Fair Courts for Us, for example, former Governor Ray likened the targeted justices to good referees who had erred by making just one bad call.¹⁰⁴ The advertisement began with the voice of a football commentator saying: “And the flags are flying. Looks like a questionable call. I think we’re going to see some fans calling for these refs’ jobs.”¹⁰⁵ Ray’s voice then appeared, saying, “Listen, we’ll never agree with every call, but you shouldn’t fire the good referees over just one call. The same is true for the Iowa Supreme Court.”¹⁰⁶

The three justices themselves were reluctant to speak out on their own behalf and refused to raise money to run a retention campaign.¹⁰⁷ The week prior to the election, for example, the three justices were scheduled to appear at an Iowa City event organized by students at the University of Iowa College of Law—but the justices backed out when they learned that the event initially had been billed as a “Vote Yes on Retention” event, rather than an event aimed more generally at educating voters about the work of the courts.¹⁰⁸ Chief Justice Ternus began to speak out somewhat more aggressively in the days immediately prior to the election, telling voters in Fairfield, for example, that voting the justices out of office would lead to more heavily politicized retention

104. See Grant Schulte, *Pro-Retention Ad: Vote ‘Yes, Yes, and Yes’ to the Justices*, DESMOINESREGISTER.COM (Oct. 15, 2010), <http://blogs.desmoinesregister.com/dmr/index.php/2010/10/15/pro-retention-ad-vote-yes-yes-and-yes-to-the-justices> (containing both the text and the audio of the advertisement).

105. *Id.*

106. *Id.* Ray then praised the Iowa Supreme Court’s rulings in other areas. *Id.*

107. See Matt Milner, *Targeted Chief Justice Speaks Out*, OTTUMWA COURIER (Iowa), Oct. 26, 2010, available at <http://ottumwacourier.com/local/x1872731036/Targeted-chief-justice-speaks-out> (“Ternus and the other justices have said they will not engage in a campaign to retain their seats and they are not raising money to fund such a campaign.”).

108. My knowledge of these events is based in part upon the fact that the students had asked me to serve as the event’s moderator. Vander Plaats and his Iowa for Freedom organization tried to spin the cancelation as having been provoked by a “public outcry about their campaigning on the taxpayers’ dime.” See *Iowa for Freedom: Justices Suspend Campaign Efforts*, IOWA FOR FREEDOM (Oct. 26, 2010), http://iowaforfreedom.com/news/iowa_for_freedom_justices_suspend_campaign_efforts-1/. That claim was unsupported by the evidence and is denied by the event’s organizers within the College of Law.

battles and that judges make poorer decisions when they have to worry about the personal political consequences of their rulings.¹⁰⁹

When Election Day finally arrived, one player in the *Varnum* story received good news: Polk County District Judge Robert Hanson—the district judge who had struck down the ban on same-sex marriage at the trial level but who never was aggressively targeted in the non-retention campaign—was among the more than seventy state judges whom the voters opted to retain.¹¹⁰ The news for the three supreme court justices was more grim. Approximately 450,000 Iowans cast ballots favoring their retention, but more than 530,000 voted against them.¹¹¹ Polling conducted by the *Des Moines Register* just prior to the election indicated that the vote was heavily partisan, with roughly two-thirds of likely Republican voters—but only approximately one-fifth of likely Democratic voters—saying that they intended to vote against the justices.¹¹² In Iowa City—where the University of Iowa sits and where proponents of same-sex marriage are more easily found than in some other portions of the state—university students flocked to election stations in order to voice their opposition to a city ordinance that prevents individuals under twenty-one years of age from entering bars, but nearly sixty percent of them failed to cast any vote at all on the justices' retention.¹¹³

The day after the election, Chief Justice Ternus, Justice Streit, and Justice Baker issued a short joint statement:

It has been our great pleasure to serve the people of Iowa as justices on the Iowa Supreme Court. Throughout our judicial service, we have endeavored to fulfill our duty to Iowans by always adhering to the rule of law, making decisions fairly and impartially according to law, and faithfully upholding the constitution.

We thank all of the Iowans who voted to retain judges around the state for another term. Your support shows that many of our citizens value fair and impartial courts. We also want to acknowledge and thank all the Iowans, from across the political spectrum and from different walks of life, who worked tirelessly over the past few months to defend

109. See Milner, *supra* note 107.

110. See OFFICIAL RESULTS REPORT, *supra* note 13, at 77 (reporting vote totals indicating that Judge Hanson won retention by a 66–34 margin); Birbaum, *supra* note 17 (reporting that seventy-four Iowa judges had been up for retention on the November 2010 ballot).

111. See OFFICIAL RESULTS REPORT, *supra* note 13, at 5, 10, 15.

112. See Clayworth, *supra* note 12.

113. See Sam Lane, *Student Voters Stuck to 21-Only*, DAILY IOWAN, Nov. 11, 2010, at A1.

Iowa's high-caliber court system against an unprecedented attack funded by out-of-state special interest groups.

Finally, we hope Iowans will continue to support Iowa's merit selection system for appointing judges. This system helps ensure that judges base their decisions on the law and the Constitution and nothing else. Ultimately, however, the preservation of our state's fair and impartial courts will require more than the integrity and fortitude of individual judges, it will require the steadfast support of the people.¹¹⁴

At the time of this writing, the fifteen members of Iowa's judicial nominating commission are working to assemble the slate of names from which the governor will choose in order to fill the supreme court's three vacancies.¹¹⁵ Under Iowa law, the most senior member of the Iowa Supreme Court who is not the court's chief justice serves as the chair of the nominating commission.¹¹⁶ That post previously had been held by Justice Mark Cady, *Varnum's* author.¹¹⁷ But Justice Cady was chosen by his colleagues to serve as the court's new chief justice, replacing Chief Justice Ternus, so the new chair of the nominating commission will be Justice David Wiggins.¹¹⁸ Governor-elect Branstad, meanwhile, is arguing that the nominating commission—on which twelve Democrats,

114. *Statement of Three Supreme Court Justices on Retention Election Results*, IOWA JUDICIAL BRANCH (Nov. 3, 2010), http://www.iowacourts.gov/news_service/news_releases/NewsItem438/index.asp.

115. See IOWA CONST. art. V, § 15 ("Vacancies in the supreme court . . . shall be filled by appointment by the governor from lists of nominees submitted by the appropriate judicial nominating commission. Three nominees shall be submitted for each supreme court vacancy . . ."); *id.* § 16 (describing the composition of the committee); IOWA CODE §§ 46.12–15 (2009) (describing the commission's duties when confronted with a vacancy on the supreme court). At the time of this writing, there also is a debate brewing about how lame-duck Governor Culver should proceed if the commission presents him with a slate of names before he leaves office in mid-January: Should he fill one or more of the vacancies himself or should he defer to newly elected Governor Branstad? See Editorial, *It's Branstad's Call*, GAZETTE (Cedar Rapids, Iowa), Nov. 12, 2010, available at <http://thegazette.com/2010/11/12/it-s-branstad-s-call/> (urging Culver to let Branstad fill the vacancies); Mehaffey, *supra* note 81 (quoting Branstad as saying that "it would be inappropriate to have a governor that was just rejected by the voters try to rush through appointments to the court").

116. See IOWA CONST. art. V, § 16 ("The judge of the supreme court who is senior in length of service on said court, other than the chief justice, shall also be a member of such commission and shall be its chairman.").

117. See Mehaffey, *supra* note 81 (noting that Justice Cady was then the commission's chair).

118. See Grant Schulte, *Iowa Supreme Court Picks Cady as Chief Justice*, DES MOINES REG., Dec. 3, 2010, at B1. The justices have said that they intend to hold another vote to fill the chief justice's seat once the court's three new members have been named, so that those new members can participate in the choice. See *id.*; see generally IOWA CODE § 602.4103 ("The justices of the supreme court shall select one justice as chief justice, to serve during that justice's term of office.").

one Republican, and one non-affiliated individual currently sit with Justice Cady—needs more balanced political representation.¹¹⁹

Vander Plaats is urging Iowa's elected officials to find a way to quickly end same-sex marriage in the state. Reviving the idea he floated during his unsuccessful bid for the Republican gubernatorial nomination,¹²⁰ Vander Plaats is asking Branstad, the incoming Republican governor, to issue an executive order banning the enforcement of *Varnum*.¹²¹ Branstad regarded the proposal as unconstitutional during his primary bid and has said that he still remains opposed to the idea.¹²² Vander Plaats is also urging the state legislature—where Republicans control the house and where Democrats narrowly control the senate—to enact a new statute banning both same-sex marriage and judicial review of the statute's validity, thereby forcing a new confrontation with the Iowa Supreme Court.¹²³

As for the prospect of adopting a constitutional amendment barring same-sex marriage, the earliest the issue could be placed before Iowa voters is 2014.¹²⁴ Whether that occurs depends almost entirely, for now, upon whether Democrats are able and willing to block the amendment process with their slim majority in the state senate.¹²⁵ Michael Gronstal, the senate's Democratic majority leader, successfully blocked debate on the amendment proposal in 2009, and he has vowed to block debate on the measure again when the legislature reconvenes in 2011.¹²⁶ Branstad—who signed the ban on same-sex marriage into law during an earlier stint as governor and who resumes the governorship in January

119. See Grant Schulte, *Removal of Justices Complicates Court's Calendar*, DES MOINES REG., Nov. 4, 2010, at A1.

120. See *supra* note 67–69 and accompanying text.

121. See Rod Boshart, *What's Next for Same-Sex Marriage Opponents?*, QUAD-CITY TIMES (Davenport, Iowa), Nov. 4, 2010, at A5.

122. See *id.*

123. See *id.*

124. See *supra* notes 51–55 and accompanying text (describing the multi-stage amendment process).

125. See Boshart, *supra* note 121 (noting that Republicans in the house are likely to propose an amendment banning same-sex marriage, but that the “issue may stall in the Senate”); Todd Dorman, *History Is Made, but Not Finished*, GAZETTE (Cedar Rapids, Iowa), Nov. 3, 2010, available at <http://thegazette.com/2010/11/03/history-is-made-but-not-finished> (“The Democratic majority in the Senate, if it holds, is likely too narrow to halt a vote on a constitutional amendment banning marriage equity.”).

126. See Mike Glover, *Gronstal Vows to Block Vote on Gay Marriage*, TELEGRAPH HERALD, Nov. 13, 2010, at D7.

2011—has vowed to push the legislature to propose the amendment and give Iowa’s citizens an opportunity to vote on the issue.¹²⁷

Finally, the justices’ actions in *Varnum* have already begun to influence the 2012 presidential campaign. Vander Plaats has created a new political-advocacy organization called The Family Leader, and has said that it will closely scrutinize Republican candidates in Iowa’s 2012 presidential caucuses and then make an endorsement.¹²⁸ Former Arkansas Governor Mike Huckabee, who employed Vander Plaats as his Iowa campaign chairman during his 2008 bid for the Republican presidential nomination, spoke at The Family Leader’s inaugural meeting, where he praised Iowans’ removal of the three justices and made it clear that he is contemplating a run for the White House in 2012.¹²⁹ Former House Speaker Newt Gingrich, who has confirmed that he too is considering a bid for the 2012 Republican presidential nomination,¹³⁰ is similarly seeking political leverage from *Varnum*. Prior to the November 2010 election, Gingrich urged Iowans to vote against the justices’ retention in order to send the nation a signal that a “citizen revolt” is underway against “dictatorial” judges.¹³¹ At a book signing in West Des Moines two weeks after the November election, Gingrich declared that the four remaining justices on the Iowa Supreme Court ought to resign because voters had made it plain that those justices, too, would have lost their jobs if their names had appeared on the ballot.¹³² “[T]he governed have indicated they don’t agree with this court,” he said, “so I think if they have any sense of integrity about protecting the court, they’ll step down.”¹³³

IV. CONCLUSION: LESSONS FROM THE IOWA EXPERIENCE

It is too soon to tell whether the ouster of Chief Justice Ternus, Justice Streit, and Justice Baker will lead to a new era of heavily politicized retention votes in Iowa and to a new era of politically driven

127. See Robynn Tysver, *Branstad Says He’s All About Future*, OMAHA WORLD HERALD, Oct. 17, 2010, available at <http://www.omaha.com/article/20101017/NEWS01/710179877>.

128. See Thomas Beaumont, *Vander Plaats to Lead Coalition of Conservatives*, DES MOINES REG., Nov. 16, 2010, at B1.

129. See *Political Notebook*, HOUSTON CHRON., Nov. 22, 2010, at A4.

130. See Thomas Beaumont, *Newt Gingrich: I’m Working to Clear Path for 2012 Presidential Run*, DES MOINES REG., Nov. 17, 2010, at B1.

131. See Jason Hancock, *2012 Hopefuls Support Campaign to Oust Justices*, IOWA INDEP. (Aug. 13, 2010), <http://iowaindependent.com/41151/2012-hopefuls-support-campaign-to-oust-judges>.

132. See Beaumont, *supra* note 130.

133. *Id.*

behavior on the part of some of Iowa's judges and justices, as the justices' defenders warned that it would.¹³⁴ There certainly is a great deal of anxiety within the Iowa legal community that the state is now headed in precisely that direction.¹³⁵ For two principal reasons, my own expectations are more optimistic. First, it seems to me that the stars fell into a rare and powerful alignment in 2010, with a substantial influx of out-of-state money being used to run a relentless campaign against justices who had issued a high-profile ruling on one of the most controversial social issues of our time during a period marked by strong anti-incumbent and anti-government sentiment—and although the justices' defenders seemed caught almost entirely flat-footed by the non-retention campaign, forty-five to forty-six percent of the Iowa electorate still favored the justices' retention.¹³⁶ There is good reason to believe, therefore, that worries about the future of Iowa's courts are overblown. In the wake of California's 1986 retention election, for example, Chief Justice Bird predicted that her ouster would embolden ideologically driven forces to use retention elections to wield great control over the state's judiciary,¹³⁷ but those fears have not notably materialized.¹³⁸ Two years after the removal of Chief Justice Bird and two of her colleagues from the bench, a former California judge concluded that "the results of the 1986 election are not causes for serious concern. An extraordinary set of circumstances combined to cause them, so extraordinary that it is unlikely that a similar set will soon, or ever, arise again."¹³⁹ One hopes that a comparable story will be told about the Iowa election of 2010.

Second, although Vander Plaats and his allies believe they have sent a powerful message to Iowa's judges and justices, the three ousted justices have sent a powerful message of their own. Chief Justice Ternus, Justice Streit, and Justice Baker undoubtedly knew that the court's ruling in *Varnum* would be controversial and they knew that they would be up for retention in 2010, yet they nevertheless ruled in the way that they believed was most faithful to the state's constitutional principles. Vander Plaats believes that those three justices have now

134. See *supra* notes 72–75, 89–97 and accompanying text.

135. See *supra* notes 72–75, 89–97 and accompanying text.

136. See *supra* note 13 (describing the justices' margins of defeat). For his part, Vander Plaats has said that he is unlikely to lead non-retention campaigns against the remaining justices. See Schulte, *supra* note 7.

137. See Lindsey, *supra* note 61.

138. See Dann & Hansen, *supra* note 7, at 1432–33 (noting that "many analysts feared that California's judicial retention process was forever tainted," but finding that subsequent threats of non-retention never plainly materialized).

139. See Thompson, *supra* note 61, at 2063.

been held up as cautionary examples of badly behaving judges,¹⁴⁰ but those who continue to don the black robes in Iowa might reach precisely the opposite conclusion. Former Iowa Supreme Court Justice Mark McCormick has said, for example, that the only lesson he learned from the successful non-retention campaign in California when he was on the bench was ““that judges have got to have courage.””¹⁴¹ I count myself among those who believe that the overwhelming majority of Iowa’s judges and justices will draw from the 2010 experience no greater lesson than that. With respect to the Iowa Supreme Court in particular, each of the three new justices will be chosen from the short list of names supplied by the state’s judicial nominating commission, and I am confident that the commission will narrow the pool to the same kinds of qualified candidates from among whom Chief Justice Ternus, Justice Streit, and Justice Baker themselves were chosen.¹⁴²

140. Vander Plaats’s claim that the threat of non-retention can influence judges’ and justices’ behavior is not without support. Not long after losing his own battle to remain on the California Supreme Court in 1986, for example, Justice Joseph Grodin wrote:

The message which [elections like the California judicial election of 1986] sends to judges is that if they want to avoid negative votes, it is best to produce results with which the voters will agree. The risk that judges will receive and act upon that message, unconsciously if not consciously, is substantial.

Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988); see also Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 197 (2009) (concluding that supreme court justices who face retention votes in Republican-leaning states “tend to decide cases in accord with standard Republican policy,” and that the opposite is true for judges facing retention votes in Democratic-leaning states).

141. Schulte, *supra* note 7.

142. Writing about retention elections in general, Alan Tarr has made a comparable observation:

If a qualified judge is removed from office in a retention election and the merit-selection process is working well, then his or her replacement would likewise be a qualified judge. The effect would be great on the particular judge but not, presumably, on the quality of justice within the court system. Although voters can remove a judge with whose interpretations they disagree, they cannot guarantee that the judge’s replacement will share their understanding of the law.

Tarr, *supra* note 57, at 631. But negative retention votes surely do have consequences. After his 1986 ouster from the California Supreme Court, for example, Justice Grodin had the following reflection:

[W]hatever the effect of a pending election campaign might be upon judicial decisions, the public perception of effect is inevitable and unavoidable. For example, during the 1986 campaign the court filed an opinion affirming the imposition of the death penalty which I wrote and Justice Reynoso, who was also on the ballot, signed. The opposition group immediately called a press conference to charge that the two of us acted as we did only for political reasons. I know of no effective way to refute that kind of allegation.

Grodin, *supra* note 140, at 1980 (citation omitted). No matter how they rule in particular cases, the members of the Iowa Supreme Court undoubtedly will now have to tolerate comparable speculations about their motivations.

Settings aside the particulars of what might happen next in Iowa, there are a number of important lessons that academics, activists, and judges nationwide might learn from the Iowa experience. I offer several such lessons here, confident that others will add to the list.

A. *Money Matters*

The nation certainly did not need another lesson on the influential role of money in American politics. Iowa's recent retention election nevertheless reminds us yet again that, when one side in a political contest holds as much as a two-to-one financial advantage over the other,¹⁴³ outcomes are not terribly difficult to predict.¹⁴⁴

B. *Constitutionalism and Judicial Review Need Better Political Marketing*

The non-retention forces insisted that the justices in *Varnum* illegitimately trumped the sovereign people's will with their own.¹⁴⁵ Celebrating the justices' ouster on election night, Vander Plaats declared that the election would send a nationwide message that "power resides with the people," not with the courts.¹⁴⁶ The justices were depicted as over-paid, out-of-touch members of the "ruling class" who did not understand their proper role in our democratic system of government.¹⁴⁷ Yet the Iowa Constitution is the premier expression of the sovereign people's will in Iowa—like their counterparts in other jurisdictions, Iowans have declared that any statute that violates the constitution is invalid.¹⁴⁸ By seeking to vindicate the apparent demands of the Iowa Constitution's equality clause,¹⁴⁹ the justices in *Varnum* thus believed that it was precisely the constitutionally enshrined will of the people that they were honoring.¹⁵⁰ By focusing almost entirely on concerns about

143. See *supra* notes 83–85 and accompanying text (describing the disparity in funding).

144. In the California election of 1986, opponents of the three California Supreme Court justices held a comparable three-to-two fundraising advantage. Thompson, *supra* note 61, at 2038 (stating that the justices' opponents spent approximately \$6.6 million, while the justices' defenders spent approximately \$4.1 million).

145. See *supra* notes 14–15, 86–87 and accompanying text.

146. See *supra* note 15 and accompanying text.

147. See *supra* notes 86–88 and accompanying text.

148. IOWA CONST. art. XII, § 1 ("This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void.").

149. See *supra* Part II.

150. Cf. *Des Moines Joint Stock Land Bank v. Nordholm*, 253 N.W. 701, 722–23 (Iowa 1934)

judicial fairness and impartiality, and by failing to respond aggressively to the claim that the justices had ignored the will of the people, the justices' defenders thus failed to effectively join issue on one of the primary themes of the opposition. Crafting thirty-second television advertisements aimed at defending notions of constitutionalism and judicial review undoubtedly is not easy, but if one's arguments are to gain a powerful foothold in the hearts and minds of ordinary citizens, one must do better than rely upon bloodless abstractions about fairness and the rule of law.¹⁵¹

In that regard, one cannot help but draw comparisons to the 1986 retention election in California.¹⁵² In the face of highly emotional ads that charged three California justices with favoring killers over victims and their families, the justices themselves opted not to mount a vigorous defense of their rulings, choosing instead to "stress[] the traditional independence of the judiciary"—the one message that pollsters had determined "would *not* work."¹⁵³ As one former California judge observed, the justices and their defenders ran a campaign that "was frequently bland" and that failed to match the raw rhetorical power of the campaign run by their opponents.¹⁵⁴ With admiration for the motives of those who led the pro-retention campaign in Iowa, one finds that the same must be said of their efforts.

C. The Justices' Defenders Made a Mistake When They Opted Not to Defend Varnum on Its Merits

The California comparison suggests another way in which the pro-retention campaign in Iowa was ill-conceived. Hostility to same-sex marriage permeated the campaign against the justices, but leaders of the pro-retention campaign remained almost entirely silent on the subject.¹⁵⁵ That now seems clearly to have been a mistake. Without a vigorous

(Claussen, C.J., dissenting) (pointing out that Iowa's judges are obliged to honor the constitutionally enshrined will of the people of Iowa and that the people themselves have said that judges must invalidate statutes that violate the Iowa Constitution).

151. See *supra* notes 89–102 and accompanying text (describing the core themes of the pro-retention campaign).

152. See *supra* note 61 and accompanying text (briefly describing the 1986 California retention election).

153. 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, 350 (1987).

154. Thompson, *supra* note 61, at 2039.

155. See *supra* notes 86–109 and accompanying text (describing the core themes of the anti-retention and pro-retention campaigns and the virtual silence of the pro-retention campaign's leaders regarding *Varnum*).

defense of *Varnum*'s reasoning, some of the central claims of the justices' critics were left largely unanswered. The silence of the justices' defenders implicitly conveyed the message that Iowans should opt for the lesser of two evils: the supreme court might occasionally reach conclusions that we would prefer not to defend, the justices' defenders seemed to say, but that arrangement is preferable to one in which money and politics play prominent roles in the work of the courts. Indeed, the justices' defenders sometimes conveyed that message explicitly, as in the radio advertisement sponsored by Fair Courts for Us, in which the targeted justices were likened to good referees who had forgivably erred by making one bad call.¹⁵⁶ Voters who had a viscerally negative reaction to images of homosexuality or same-sex marriage thus were given little reason to reflect critically upon their own moral and religious convictions—instead, they were asked to subordinate those beliefs to beliefs about the need to preserve the integrity of Iowa's courts. Viewed from those voters' vantage point, rhetoric about fairness, impartiality, and judicial independence—stripped from any substantive defense of *Varnum* itself—was all but certain to fall flat.

D. Defenders of Same-Sex Marriage Must Speak to Their Opponents' Perceptions of Freedom

The justices' critics repeatedly claimed that *Varnum* signals a threat to a whole range of freedoms, in areas ranging from parenting, to property rights, to hunting, and to voting.¹⁵⁷ Indeed, the organization that Vander Plaats created to lead the non-retention effort was called "Iowa for Freedom,"¹⁵⁸ suggesting that freedom was the very thing that the justices in *Varnum* placed at risk. There are at least two different ways to construe the substantive beliefs that lay beneath that claim. The first possibility is simply that critics of *Varnum* feared that justices who disregarded the statutorily expressed will of the people on the issue of same-sex marriage might disregard the statutorily expressed will of the people in other areas, as well. There is little doubt that many hold that belief. But the link that social conservatives drew between *Varnum* and freedom also likely tells us something important about social conservatives' perceptions regarding the marriage issue itself. While defenders of same-sex marriage see *Varnum* as a ruling that plainly

156. See *supra* notes 104–06 and accompanying text.

157. See *supra* notes 86–87 and accompanying text.

158. See *supra* note 71 and accompanying text.

expanded citizens' freedoms by expanding the range of people who could take part in a valued civil institution, many of *Varnum's* critics see that ruling as *constricting* citizens' freedoms. They see same-sex marriage as an encroachment upon their territory—an encroachment that narrows their ability to attach their own preferred connotations to the institution of marriage. In a political battle of the sort waged in Iowa's 2010 retention election, that perception demands explicit acknowledgement, unpacking, and critiquing.

E. The Success of the Non-retention Campaign Lends Ironic Support to Varnum's Premises

The justices in *Varnum* reasoned that some form of heightened scrutiny is appropriate for sexual-orientation classifications because, among other things, gays and lesbians have often been the target of prejudice and lack the political power to respond to that prejudice effectively.¹⁵⁹ The success of the non-retention campaign provides at least a modicum of evidence that the court's observations were well founded. If the reasoning in *Varnum* needed added reinforcement in order to help persuade skeptical readers, some of *Varnum's* fiercest critics have helped to provide it.

F. Non-retention Campaigns Are More Likely to Succeed When the Leaders of the Bar Fail to Respond Quickly and Powerfully

About a week after Vander Plaats announced in early August 2010 that he intended to lead a non-retention campaign against the three justices, a group of individuals associated with the Iowa State Bar Association declared that they were launching IFIC in order to thwart Vander Plaats's ambitions.¹⁶⁰ As I have indicated, however, they chose to structure IFIC as a tax-exempt organization that could not engage in direct advocacy on the justices' behalf and thus would have to wage a more abstract campaign focused on the virtues of judicial impartiality and independence.¹⁶¹ But when justices targeted in a non-retention campaign do not themselves wish to raise funds and actively campaign to keep their seats, the burden of defending them surely falls most heavily on leaders of the Bar—attorneys who live and work in the state's judicial

159. See *supra* notes 28–33 and accompanying text.

160. See *supra* notes 89–90 and accompanying text.

161. See *supra* notes 93–97 and accompanying text.

system and who have an ongoing stake in the work of the state's courts. In Iowa, it was not until just three weeks before the November 2010 election that Fair Courts for Us arrived on the scene, structured in a manner that would permit it to advocate explicitly for the justices' retention and carrying cash from the Iowa State Bar Association and the Iowa Trial Lawyers Association.¹⁶² One does not have to be a professional campaign manager to know that three weeks is precious little time for a campaign to find traction with voters.

One is reminded again of the only other occasion in the nation's history when three justices in one state simultaneously lost their retention battles. In the California election of 1986, "the bar associations of San Francisco and Beverly Hills were the only sizeable organs of the bar . . . that spoke out in support [of the three targeted justices]," and "[t]he Los Angeles County Bar Association, the largest bar group in the state, was silent."¹⁶³ The circumstances in Iowa in 2010 certainly were not identical to those in California in 1986—leaders of the Iowa State Bar Association did campaign on behalf of the three justices.¹⁶⁴ But the leaders of the non-retention campaign in Iowa never had to squarely confront sustained and pointed opposition from the Bar.¹⁶⁵

G. There Might Be an Inverse Relationship Between the Ease with Which Activists Can Place a Proposed Constitutional Amendment Before the Voters and the Likelihood that Justices Will Be Targeted for Non-retention

From the point of view of constitutional system design, it bears noting that if Iowa's social conservatives had been able to place a proposed constitutional amendment on the ballot without first persuading voters to assume all of the risks associated with a constitutional convention and without securing the cooperation of the state legislature—such as by invoking an initiative process comparable to the process that conservatives in California used to place Proposition 8 on the 2008 ballot¹⁶⁶—the campaign against the Iowa justices might never

162. See *supra* notes 98–102 and accompanying text.

163. Thompson, *supra* note 61, at 2040.

164. See *supra* notes 99–102 and accompanying text.

165. See *supra* notes 89–106 and accompanying text.

166. See Lisa Leff, *Gay Marriage Opponents Ready to Submit Petitions*, ALAMEDA TIMES-STAR, Apr. 22, 2008 (reporting on efforts by opponents of same-sex marriage in California to gather the number of signatures necessary to place a proposed constitutional amendment on the ballot).

have taken off.¹⁶⁷ Once Democrats in the state legislature refused to launch the amendment process,¹⁶⁸ opposing the justices' retention was the only immediately available way for social conservatives to try to undermine the court's ruling in *Varnum*.¹⁶⁹ Had a citizen-driven route to amendment been available, social conservatives might well have channeled their energies in that direction. This is not to say that Iowa necessarily ought to permit constitutional amendments through the initiative process; it is simply to say that Iowa and other states ought to consider these trade-offs when evaluating their approaches to amending their constitutions and choosing and retaining their judges. Justice Grodin—one of the three California justices ousted in 1986—has provocatively taken this line of reasoning one step further, suggesting that when amending a state constitution is as comparatively easy as it is in California,¹⁷⁰ the case becomes stronger for abandoning judicial elections altogether.¹⁷¹

H. *Democratic Constitutionalism Demands Patience and Sustained Engagement*

In some of my recent writings, I have joined a handful of other scholars in describing and defending our system of democratic constitutionalism¹⁷²—a system in which (as Robert Post and Reva Siegel put it) “adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning.”¹⁷³ At both the state and federal levels, courts,

167. See *supra* notes 51–55 and accompanying text (describing the two methods by which the Iowa Constitution can be amended). For a good general discussion of issues relating to the various ways in which states permit their constitutions to be amended, see Lutz, *supra* note 51.

168. See *supra* note 56 and accompanying text.

169. See discussion *supra* notes 51–56 and accompanying text.

170. See CAL. CONST. art. XVIII, § 3 (“The electors may amend the Constitution by initiative.”).

171. See Grodin, *supra* note 140, at 1982. Yet the case for retention elections does not disappear entirely. When the validity of Proposition 8 (the initiative-driven constitutional amendment banning same-sex marriage) was before the California Supreme Court, for example, some observers speculated that the justices would trigger retention battles if they declared the proposition invalid. See Maura Dolan, *Court Is Feeling the Heat on Prop. 8*, L.A. TIMES, Nov. 19, 2008, at A1.

172. See, e.g., Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. (forthcoming early 2011); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313 (2008); Todd E. Pettys, *The Vitality of the American Sovereign*, 108 MICH. L. REV. 939 (2010) (reviewing CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008)).

173. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007).

politicians, and ordinary citizens engage with one another over time to slowly produce judicially endorsed doctrines that reflect the public's well-considered constitutional judgments. As Barry Friedman writes, "[j]udges do not decide finally on the meaning of the Constitution. Rather, it is through the dialogic process of 'judicial decision—popular response—judicial re-decision' that the Constitution takes on the meaning it has."¹⁷⁴ The road to constitutional change can thus demand great patience, as citizens and their leaders gradually work their way toward durable constitutional understandings. It has been nearly half a century since the U.S. Supreme Court decided *Roe v. Wade*,¹⁷⁵ for example, and the American people still hotly debate precisely where the constitutional lines ought to be drawn in the area of abortion.

In Iowa, the *Varnum* court powerfully articulated the constitutional case for same-sex marriage and for greater protection of gays and lesbians against majoritarian discrimination. Those who disagreed with the *Varnum* court's conclusions then sent the Iowa Supreme Court a powerful message of disapproval. Same-sex marriage remains constitutionally protected in Iowa at the moment, but neither side has yet spoken the last word. In settings ranging from retention elections to proposals to amend state constitutions, proponents and opponents of same-sex marriage nationwide will continue in their battle to propose the synthesis of constitutional values that ultimately wins the acceptance of the sovereign citizenry.¹⁷⁶ Toward that end in Iowa, those who are proud of the court's ruling in *Varnum* had better be prepared to fight far more wisely and far more effectively than they did in the election of 2010.

174. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 381–82 (2009).

175. 410 U.S. 113 (1973).

176. Cf. RICHARD J. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 18–19 (2001) (arguing that a proposition's constitutional validity ultimately turns upon its acceptance by the citizenry).