

RETENTION REDUX: IOWA 2012

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I. INTRODUCTION

On April 3, 2009, the Iowa Supreme Court's seven members ruled unanimously in *Varnum v. Brien*¹ that the state's statutory ban on same-sex marriage violated the equality clause of the Iowa Constitution. Nineteen months later, three of those justices—Chief Justice Marsha Ternus, Justice Michael Streit, and Justice David Baker—lost their jobs when Iowa voters denied their bids for retention.² It was a remarkable victory for social conservatives and their leaders, including Iowa for Freedom (an anti-retention organization founded by Iowa businessman Bob Vander Plaats, who had recently suffered his third defeat in a Republican gubernatorial primary),³ the

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1. 763 N.W.2d 862, 872 (Iowa 2009) (“[W]e hold the Iowa marriage statute violates the equal protection clause of the Iowa Constitution.”); 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.”).

2. See Grant Schulte, *Iowans Dismiss Three Justices*, Des Moines Reg. A1 (Nov. 3, 2010). In Iowa, justices are appointed by the governor from a list of names supplied by the state's judicial nominating commission, but then are required to stand for a retention vote after a short initial period of service and every eight years thereafter. See Iowa Const. art. V, §§ 15–17 (adopted 1962). Prior to 1962, Iowa used an election-driven method of choosing justices. See *id.* § 3 (repealed 1962) (“The Judges of the Supreme Court shall be elected by the qualified electors of the State.”); see also *id.* at amend. 21 (adding language providing for the nomination-and-selection process).

3. See Thomas Beaumont, *Vander Plaats Supporters Weigh a Push at Convention for No. 2 Role*, Des Moines Reg. A1 (June 23, 2010) (reporting that Terry Branstad had defeated Vander Plaats in the gubernatorial primary by ten percentage points); Sandhya Somashekhar, *Iowa Foes of Same-Sex Marriage Seek to Oust Judges Who Legalized It*, Wash. Post A6 (Aug. 27, 2010) (reporting the founding of Iowa for Freedom).

Mississippi-based American Family Association, and the New Jersey-based National Organization for Marriage, among others.⁴ It was a staggering defeat for the three ousted justices and for those who believed it was inappropriate to use the retention election as an opportunity to express disapproval of *Varnum*.

Things played out differently when a fourth member of the Varnum court—Justice David Wiggins—stood for retention in November 2012. Fifty-five percent of those casting ballots voted to retain Justice Wiggins, roughly the same percentage that voted to remove his three former colleagues two years earlier.⁵ What accounts for that difference in the *Varnum* justices' political fortunes? I offer answers to that question here.

II. THE 2010 BATTLE AND ITS AFTERMATH

In 2010, Chief Justice Ternus, Justice Streit, and Justice Baker faced daunting obstacles in their bids to keep their seats on the Iowa Supreme Court.⁶ Conservatives nationally were energized by the opportunity to make their voices heard in the first midterm elections of the Obama Administration, conservatives in Iowa were doubly energized by the opportunity to remove a politically vulnerable Democratic governor from office, and social conservatives in Iowa were triply energized by the opportunity to express their disapproval of the Iowa Supreme Court's role in legalizing same-sex marriage. Out-of-state organizations poured a substantial amount of money into

4. See *Iowa Independent*, Andy Kopsa, *National Anti-Gay Groups Unite to Target Iowa Judges*, <http://iowaindependent.com/45701/national-anti-gay-groups-unite-to-target-iowa-judges> (listing out-of-state participants in the anti-retention campaign) (Oct. 21, 2010) (accessed Aug. 2, 2013; copy on file with Journal of Appellate Practice and Process).

5. Approximately 680,000 ballots were cast in favor of Justice Wiggins's retention and 567,000 were cast against it. Iowa Secretary of State, *Official Results Report*, <http://electionresults.sos.iowa.gov/resultsSW.aspx?type=JUD&map=CTY&IValue=Supreme%20Court&gValue=Supreme%20Court> (Nov. 6, 2012) [hereinafter *2012 Official Results Report*]. In 2010, roughly 450,000 ballots were cast in favor of the three targeted justices' retention and 535,000 were cast against it. Iowa Secretary of State, *Official Results Report*, <http://sos.iowa.gov/elections/pdf/2010/judicialorr.pdf> (Nov. 29, 2010) (accessed Aug. 2, 2013; copy on file with Journal of Appellate Practice and Process).

6. I have previously written at greater length about the 2010 retention battle, and so will provide only a brief account of it here. See Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. Kan. L. Rev. 715 (2011).

the campaign against the three targeted justices, far outstripping the sum spent on those justices' behalf.⁷ In their television advertisements and elsewhere, the leaders of the anti-retention campaign accused the justices of being elitist judicial "activists," whose "radical" ruling in *Varnum* portended a judicial threat to a host of valued freedoms.⁸ National politicians echoed those themes in an effort to advance their own political aspirations. When campaigning in Iowa for the Republican presidential nomination, for example, Newt Gingrich urged Iowans to vote against the justices' retention in order to send the nation a signal that a "citizen revolt" was underway against "dictatorial" judges.⁹

The two entities leading the charge on the pro-retention side (Justice Not Politics and Iowans for Fair and Impartial Courts) were poorly funded by comparison and, as 501(c) organizations, were barred by federal law from squarely taking a public position on whether Iowans should vote for or against the justices' retention.¹⁰ Rather than speak directly to the three justices' merits, these two organizations tried to persuade voters that it would be dangerous to inject politics into the selection and retention of Iowa's justices.¹¹ A better-funded 527 organization (Fair Courts for Us) arrived on the scene just three weeks before Election Day, likely too late to make much of a difference.¹² The Iowa State Bar Association similarly did not enter the fray until the final month, having felt obliged to hold off until the association's members were given a formal opportunity in late September to express their views about all of the judges and justices standing for retention that November.¹³ Apart from a small number of appearances by Chief Justice

7. See *id.* at 728.

8. See *id.* at 729 (quoting a representative television advertisement).

9. See Jason Hancock, *2012 Hopefuls Support Campaign to Oust Justices*, Iowa Indep., <http://iowaindependent.com/41151/2012-hopefuls-support-campaign-to-oust-judges> (Aug. 13, 2010) (accessed Aug. 5, 2013; copy on file with Journal of Appellate Practice and Process).

10. See Pettys, *supra* n. 6, at 729–30.

11. See *id.* at 730–31. For a skeptical account of the pro-retention campaign's message, see Todd E. Pettys, *Judicial Retention Elections, the Rule of Law, and the Rhetorical Weaknesses of Consequentialism*, 60 *Buff. L. Rev.* 69 (2012).

12. See Pettys, *supra* n. 6, at 731.

13. See *id.* at 730–31 (discussing the timing of the ISBA's 2010 plebiscite).

Ternus in the days just prior to the election, the three justices themselves refused to campaign or speak publicly in their own defense.¹⁴ Those who did campaign on the three justices' behalf said little about the *Varnum* ruling itself, and even conceded in a radio advertisement that the justices were akin to good referees who had made one bad call.¹⁵

Given all of those dynamics, one perhaps should not have been surprised when a majority of Iowans casting ballots on the retention issue voted to remove the three justices from office. Probably the best reason for surprise was the ouster's historical novelty. Between 1962 (when Iowa shifted to a merit-selection and retention system) and 2010, no Iowa Supreme Court justice had ever failed to survive a retention vote.¹⁶ In the nearly seventy-five years since California became the first state to hold a judicial retention election, voters in judicial-retention elections nationwide had removed only eight other state supreme-court justices from office.¹⁷

In the weeks following the 2010 election, some of the three justices' opponents tried unsuccessfully to broaden the scope of their victory. With his national political stock soaring as a result of the role he played in the anti-retention campaign,¹⁸ Bob Vander Plaats urged the four remaining *Varnum* justices to resign, arguing that if their names had appeared on the 2010 ballot, voters would have removed them from office, too.¹⁹ The justices did not oblige him.

14. One week before the election, for example, the three justices backed out of an appearance at the University of Iowa College of Law when they learned that it had been advertised as part of a "Vote Yes on Retention" event. *See id.* at 732–33.

15. *See id.* at 731–32 (providing the transcript of a radio advertisement sponsored by Fair Courts for Us).

16. *See* Schulte, *supra* n. 2.

17. *See* Grant Schulte, *Remaining Four Justices Could Face Ouster Efforts*, Des Moines Reg. A1 (Nov. 6, 2010).

18. In June 2011, for example, *The Hill's* Michael O'Brien listed Vander Plaats among the ten individuals nationally whose endorsements were most coveted by Republican presidential candidates. *See* Michael O'Brien, *10 Coveted Endorsements for Republicans Running for President*, *The Hill*, <http://thehill.com/homenews/campaign/168393-10-coveted-endorsements-for-republican-presidential-candidates> (June 25, 2011, 8:30 a.m. EDT) (accessed Aug. 5, 2013; copy on file with Journal of Appellate Practice and Process).

19. *See* Jennifer Jacobs, DesMoinesRegister.com: Iowa Politics, *Vander Plaats Compares Justices to Teens Fleeing a Beer Party*, <http://blogs.desmoinesregister.com/dmr/index.php/2010/12/23/vander-plaats-compares-iowa-justices-to-teens-who-flee-a-beer-party> (Dec. 24, 2010, 11:54 a.m. CST) (accessed July 30, 2013; copy on file with Journal

In April 2011, five members of the Republican-controlled Iowa House of Representatives filed impeachment resolutions against the four remaining *Varnum* justices, arguing that they had violated their oaths by “unconstitutionally exercising functions properly belonging to the legislative and executive departments.”²⁰ But the impeachment effort was doomed even before it began. Under the Iowa Constitution, Supreme Court justices are subject “to impeachment for any misdemeanor or malfeasance in office.”²¹ When the impeachment possibility rumbled through the state shortly after the 2010 elections concluded,²² Republican Governor-elect Terry Branstad declared that, while he disagreed with the *Varnum* ruling, he did not believe the justices had committed “malfeasance.”²³ Republican House Speaker Kraig Paulsen and House Majority Leader Linda Upmeyer similarly made it clear that they opposed impeachment.²⁴ For their part, House Democrats threatened to bring the chamber’s activities to a halt if the impeachment resolutions ever reached the House floor.²⁵ Rich Anderson, the Republican chair of the House Judiciary Committee (through which the impeachment resolutions would have to travel), also opposed impeachment and predicted that any effort to pursue

of Appellate Practice and Process); Jason Clayworth, DesMoinesRegister.com, *Vander Plaats Says Four Remaining Iowa Supreme Court Justices Should Resign*, <http://www.desmoinesregister.com/article/20101208/NEWS09/12080353/1001/> (Dec. 7, 2010) (accessed July 30, 2013; copy on file with Journal of Appellate Practice and Process). At a book signing in West Des Moines two weeks after the election, Gingrich made the same argument. See Thomas Beaumont, *Newt Gingrich: I’m Working to Clear Path for 2012 Presidential Run*, Des Moines Reg. B1 (Nov. 17, 2010).

20. Iowa Republican, *Five Republican Representatives File Impeachment Resolutions*, <http://theiowarepublican.com/2011/five-republican-representatives-file-impeachment-resolutions/> (Apr. 21, 2011) (quoting one of the matching resolutions); see also Jens Manuel Krogstad & Jason Clayworth, *Removal of Four Justices Sought*, Des Moines Reg. B1 (Apr. 22, 2011).

21. Iowa Const. art. III, § 20.

22. See e.g. Jason Clayworth, *3 Seek to Impeach Remaining High Court Justices*, Des Moines Reg. B1 (Dec. 18, 2010).

23. See Jennifer Jacobs, *Democrats on Impeaching Justices: No Way*, Des Moines Reg. A1 (Jan. 8, 2011).

24. See *id.*

25. See Krogstad & Clayworth, *supra* n. 20.

that extraordinary remedy would die in his committee.²⁶ His prediction proved accurate.²⁷

Republicans rallied more cohesively around the possibility of amending the Iowa Constitution to ban same-sex marriage.²⁸ The amendment process in Iowa is arduous, however, and so opponents of same-sex marriage lacked a quick route to victory. The state constitution gives voters an opportunity every ten years to decide whether to hold a constitutional convention,²⁹ but no one in 2010 mounted a serious pro-convention campaign. Voters declined the convention invitation by a two-to-one margin.³⁰ The only other way to amend the constitution involves a series of three steps over a period of years: 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 the proposed amendment must then be submitted to the citizenry for final approval.³¹

Iowans seeking a constitutional ban on same-sex marriage have never made it past the first step. During his 2010 campaign, Governor-elect Branstad—who signed the now-invalid statutory ban on same-sex marriage into law during an earlier stint as governor—vowed to push the legislature to propose an amendment banning same-sex marriage and thereby give citizens a chance to vote on the issue.³² He renewed that

26. See Jason Clayworth, *Bid to Impeach Seen Stalling*, Des Moines Reg. B1 (Jan. 13, 2011) (quoting Rep. Anderson).

27. See William Petroski, *Paulsen's Words Kill Effort to Impeach Justices*, Des Moines Reg. A1 (Apr. 23, 2011).

28. Calls for a constitutional amendment had erupted on the day that the *Varnum* opinion came down. See Elizabeth Ahlin, *Same-Sex Couples Rejoice*, Omaha World-Herald A1 (Apr. 3, 2009) (reporting calls for a constitutional amendment by several Republicans in the state legislature and by leaders of the Iowa Family Policy Center). Democrats in the legislature had thwarted those efforts. See Mary Rae Bragg, *Same-Sex Marriage Issue Roils Republican Leaders*, Telegraph Herald (Dubuque, Iowa) A14 (May 3, 2009) (discussing end-of-session reports issued by Republican legislators who favored constitutional amendment).

29. See Iowa Const. art. X, § 3.

30. See Dan Piller, *Iowans Vote Against Constitutional Convention*, Des Moines Reg. A8 (Nov. 3, 2010).

31. Iowa Const. art. X, § 1.

32. See Robynn Tysver, *Branstad Says He's All About Future*, Omaha World Herald, <http://www.omaha.com/article/20101017/NEWS01/710179877> (Oct. 17, 2010) (accessed Aug. 6, 2013; copy on file with Journal of Appellate Practice and Process).

call a day after voters returned him to the governorship.³³ Pushing back just as forcefully, however, was Senate Majority Leader Michael Gronstal, a Democrat. Gronstal's party narrowly retained control of the Iowa Senate in 2010,³⁴ giving Gronstal the ability to decide which measures would come before the full Senate for a vote. Gronstal had blocked debate on the amendment proposal in 2009, and he vowed to block debate on the measure again when the legislature reconvened in 2011.³⁵ In January 2011, the House Judiciary Committee voted to approve the amendment³⁶ and the full House added its approval the following month.³⁷ But Gronstal held true to his vow and the proposed amendment did not proceed any further during that legislative session.³⁸ Opponents of same-sex marriage targeted Gronstal for removal in the 2012 elections,³⁹ but Gronstal prevailed and Democrats retained control of the Senate.⁴⁰ Gronstal promptly reiterated his refusal to allow an amendment banning same-sex marriage to reach the Senate floor,⁴¹ and that

33. Jennifer Jacobs & Jason Clayworth, DesMoinesRegister.com, *Democratic Leader in Iowa Senate Vows He'll Block Vote on Gay Marriage*, <http://www.desmoinesregister.com/article/20101104/NEWS09/11040352/Democratic-leader-iowa-senate-vows-he-ll-block-vote-gay-marriage> (Nov. 3, 2010) (accessed July 30, 2013; copy on file with Journal of Appellate Practice and Process).

34. See Lynda Waddington, *Democrats Maintain Slim Majority in Iowa Senate*, Iowa Indep., <http://iowaindependent.com/47292/democrats-maintain-slim-majority-in-iowa-senate> (Nov. 9, 2010) (accessed Aug. 6, 2013; copy on file with Journal of Appellate Practice and Process).

35. See Jacobs & Clayworth, *supra* n. 33.

36. See Jason Clayworth, *Proposed Amendment to Ban Same-Sex Marriage Gets First OK in House*, Des Moines Reg. A1 (Jan. 25, 2011).

37. See Jason Hancock, *Iowa House Passes Constitutional Ban on Same-Sex Marriage*, Iowa Indep., <http://iowaindependent.com/51790/iowa-house-passes-constitutional-ban-on-same-sex-marriage> (Feb. 1, 2011) (accessed July 30, 2013; copy on file with Journal of Appellate Practice and Process).

38. See e.g. Jennifer Jacobs, *2 Senate Democrats Say Loyalty to Gronstal Trumps Support for Marriage Amendment*, Des Moines Reg. A1 (Feb. 2, 2011).

39. See e.g. Meghan Malloy, *Gronstal: Vander Plaats Will Not Be Terribly Effective*, Iowa Indep., <http://iowaindependent.com/58309/gronstal-vander-plaats-will-not-be-terribly-effective> (July 13, 2011) (accessed Aug. 6, 2013; copy on file with Journal of Appellate Practice and Process).

40. See Jeff Eckhoff, *Marriage Status Firm for Now*, Des Moines Register A7 (Nov. 8, 2012).

41. *Id.*

is where the proposed amendment remains blocked at the time of this writing.⁴²

Before turning to the 2012 battle over Justice David Wiggins's retention, one other facet of the 2010 election's aftermath merits mention—a facet involving Justice Wiggins himself. Under Iowa's merit-selection system, the governor must select new justices from a slate of nominees provided by the state's judicial nominating commission (“the Commission”).⁴³ The Iowa Constitution states that the Commission must be chaired by “[t]he judge of the supreme court who is senior in length of service on said court, other than the chief justice.”⁴⁴ By law, therefore, the Commission was to be chaired by Justice Wiggins.

The Commission did its work in early 2011 under unusual scrutiny. On the political front, Governor Branstad made it known that he was not a fan of the Commission-based system, preferring instead a system of executive appointment and senate confirmation akin to the method used by the federal government.⁴⁵ On the legal front, a group of Iowa citizens (represented by James Bopp, Jr., a nationally prominent attorney often associated with politically conservative clients and causes) filed a federal equal-protection lawsuit seeking to prevent the Bar-selected members of the Commission from voting on the slates of names from which the governor would choose. (Chief Judge Robert Pratt, of the Southern District of Iowa, dismissed the lawsuit in late January 2011,⁴⁶ and the Eighth Circuit

42. See e.g. Mike Malloy, *Marriage Proposals Doomed in Legislature*, Tribune (Ames, IA) (Mar. 6, 2013) (accessed Aug. 6, 2013; copy on file with Journal of Appellate Practice and Process).

43. 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.”). If the governor fails to make a timely selection, the task of filling the vacancy shifts to the chief justice. *Id.*

44. *Id.* § 16.

45. See e.g. Jens Manuel Krogstad & Tom Witosky, *Branstad Taps Three for Supreme Court: “The Ones I Chose Were the Best,”* Des Moines Reg. A1 (Feb. 24, 2011). Vander Plaats favors the same system, but with retention elections added to the mix. See Rod Boshart, *Could Gov. Branstad Appoint an Entire Supreme Court? Maybe*, Muscatine J. (Muscatine, Iowa) (Oct. 29, 2012) (accessed Aug. 6, 2013; copy on file with Journal of Appellate Practice and Process).

46. See *Carlson v. Wiggins*, 760 F. Supp. 2d 811 (S.D. Iowa 2011), *aff’d*, 675 F.3d 1134 (8th Cir.).

affirmed the following year.⁴⁷) And, of course, there was great interest in knowing who the Court's three newest members would be.

Sixty individuals filed applications for the Court's three vacancies.⁴⁸ As part of an effort to build public confidence in the merit-selection system, Justice Wiggins and his fellow commissioners opted to interview those applicants publicly (streaming the interviews live over the Internet), marking the first time in decades that the Commission had allowed members of the public to watch the interviews for themselves.⁴⁹ The Commission's decision to open its proceedings was widely praised, though it also provided an opportunity for some to watch Justice Wiggins in action and to have mixed responses to what they saw. Governor Branstad believed, for example, that Justice Wiggins displayed a "lack of temperament in the way he interviewed the candidates," and former Lieutenant Governor Sally Pederson—a staunch defender of the *Varnum* justices—conceded that Justice Wiggins appeared "frustrated" at times, but said that such frustration was understandable.⁵⁰ Former Governor Tom Vilsack (who appointed Justice Wiggins to Iowa's high court in 2003) said that Justice Wiggins had shown himself to be a "tough and aggressive questioner," qualities Vilsack said were desirable in a judge.⁵¹

The Commission ultimately assembled a slate of nine names (three for each vacancy), and Governor Branstad made his selections: Edward Mansfield (formerly of the Iowa Court of Appeals), Thomas Waterman (formerly in private practice and the great-grandson of a former Iowa Supreme Court justice), and Bruce Zager (formerly of the Iowa District Court).⁵² The press

47. See *Carlson v. Wiggins*, 675 F.3d 1134 (8th Cir. 2012).

48. See Grant Schulte & Jens Manuel Krogstad, *Five Judges, Three Lawyers Among Slate of Nine Finalists*, Des Moines Reg. A1 (Jan. 28, 2011).

49. See *id.*

50. See Jennifer Jacobs, DesMoinesRegister.com: Iowa Politics, *Iowa Supreme Court Justice David Wiggins Will See Effort to Oust Him, Branstad Says*, <http://blogs.desmoinesregister.com/dmr/index.php/2011/04/15/iowa-supreme-court-justice-david-wiggins-will-face-branstad-says/article> (Apr. 15, 2011, 12:35 p.m. CDT) (accessed July 30, 2013; copy on file with Journal of Appellate Practice and Process).

51. Associated Press, *Vilsack Defends Iowa Supreme Court Justice* (Apr. 21, 2011).

52. See Krogstad & Witosky, *supra* n. 45. Professor Onwuachi-Willig was the sole woman on the list of nine nominees. The exclusion of all other female applicants exposed the Commission to the charge that it either was biased against women or hoped to force

noted that all three of the governor's choices were registered Republicans, but the three selected men enjoyed strong bipartisan support and so their party registrations quickly faded to the background.⁵³

III. THE BATTLE IN 2012

Varnum's opponents waged an energetic campaign against Justice Wiggins in 2012, much as they had against Chief Justice Ternus, Justice Streit, and Justice Baker in 2010. But the 2010 and 2012 elections differed in several ways. Those differences likely explain why Justice Wiggins remains a member of the Iowa Supreme Court today and Chief Justice Ternus, Justice Streit, and Justice Baker do not.

A. The Campaign against Justice Wiggins

Bob Vander Plaats, whose efforts to unseat three of the *Varnum* justices were so successful in 2010,⁵⁴ was slow to commit to a leadership role in the effort to remove Justice Wiggins. Although he made it clear early on that he would participate in that undertaking, he frequently said that he was not sure whether he and The Family Leader—a conservative political-advocacy organization that he created in November

Governor Branstad to appoint a supporter of the *Varnum* ruling. See Bleeding Heartland, *Branstad Names Mansfield, Waterman and Zager to Iowa Supreme Court*, <http://www.bleedingheartland.com/diary/4591/branstad-names-mansfield-waterman-and-zager-to-iowa-supreme-court> (Feb. 23, 2011, 5:05 p.m. CST) (stating that the Commission's actions were susceptible to these interpretations) (accessed Aug. 6, 2013; copy on file with Journal of Appellate Practice and Process). Professor Onwuachi-Willig had joined an amicus brief on behalf of the same-sex couples in *Varnum*. See Bleeding Heartland, *Commission Sends Iowa Supreme Court Short List to Branstad*, <http://www.bleedingheartland.com/diary/4548/commission-sends-iowa-supreme-court-short-list-to-branstad> (Jan. 28, 2011, 8:40 a.m. CST) (stating that Professor Onwuachi-Willig had no realistic chance of being appointed, given her participation in the *Varnum* amicus brief) (accessed Aug. 6, 2013; copy on file with Journal of Appellate Practice and Process).

53. See Krogstad & Witosky, *supra* n. 45. Indeed, the only criticism cited in Krogstad and Witosky's coverage for the *Des Moines Register* was from a conservative activist who feared that the three nominees would not show appropriate judicial restraint. See *id.*

54. See Pettys, *supra* n. 6, at 724–29; see also *supra* nn. 3, 7–9 and accompanying text.

2010⁵⁵—would lead the charge.⁵⁶ The first prominent call for Justice Wiggins’s ouster was instead made by the chairman of the Republican Party of Iowa, who issued a statement on August 1, 2012, urging Iowans to vote against Justice Wiggins and thereby show him that “‘his arrogance and disregard for the law does [sic] indeed have consequences.’”⁵⁷

At their Family Leadership Summit ten days later, Vander Plaats and The Family Leader announced that Vander Plaats would head a new group called Iowans for Freedom to lead the campaign against Justice Wiggins.⁵⁸ At the same event, the National Organization for Marriage (which played a significant role in 2010) stated that it would match up to \$100,000.00 in contributions for the anti-retention campaign.⁵⁹ Several days later, Vander Plaats and Iowans for Freedom released a four-and-a-half-minute online video that outlines Vander Plaats’s case against *Varnum* and the justices who issued it.⁶⁰ Hitting most of the themes to which anti-retention forces would return throughout the following three months, the video repeated the charges made against the *Varnum* justices in 2010, and also sought to get political mileage from a remark that Justice Wiggins made while chairing the state’s judicial nominating

55. See Thomas Beaumont, *Vander Plaats to Lead Coalition of Conservatives*, Des Moines Reg. B1 (Nov. 16, 2010); see also Pettys, *supra* n. 6, at 736 (briefly describing The Family Leader’s inaugural meeting).

56. See e.g. Jeff Eckhoff, *GOP Leader Calls for Justice’s Ouster*, Des Moines Reg. A1 (Aug. 2, 2012) (quoting Vander Plaats); Mike Wisner, *Patterns Emerging in Top Iowa Court Rulings*, Gazette (Cedar Rapids, Iowa) A1 (July 15, 2012); Steve Gravelle, *Same-Sex Couple Faces Hurdles*, Hawk Eye (Burlington, Iowa) A7 (Feb. 13, 2012); Malloy, *supra* n. 39.

57. Eckhoff, *supra* n. 56 (quoting A.J. Spiker). For the full text of Spiker’s statement, see Jennifer Jacobs, DesMoinesRegister.com: Iowa Politics, *Iowa GOP Chairman Calls for Ouster of Another Supreme Court Justice*, <http://blogs.desmoinesregister.com/dmr/index.php/2012/08/01/iowa-gop-chairman-asks-voters-to-oust-another-supreme-court-justice> (Aug. 1, 2012, 9:50 a.m. CDT) (accessed Aug. 6, 2013; copy on file with Journal of Appellate Practice and Process).

58. See Jason Noble, DesMoinesRegister.com: Iowa Politics, *Updated: Conservative Group Kicks Off Renewed Effort to Boot Iowa Supreme Court Justice*, <http://blogs.desmoinesregister.com/dmr/index.php/2012/08/11/conservative-group-kicks-off-renewed-effort-to-boot-iowa-supreme-court-justice> (Aug. 11, 2012, 3:53 p.m. CDT) (accessed July 30, 2013; copy on file with Journal of Appellate Practice and Process).

59. *Id.*

60. See YouTube, *Vote “NO Wiggins” on Nov. 6*, <http://www.youtube.com/watch?v=N Ct-UnjTlk> (Aug. 16, 2012) (accessed Aug. 6, 2013; copy of first frame on file with Journal of Appellate Practice and Process).

commission in early 2011.⁶¹ One of the sixty applicants (my colleague, Professor Angela Onwuachi-Willig) had not been admitted to the Iowa Bar when she applied, and the Iowa Constitution states that “[j]udges of the supreme court . . . shall be members of the bar of the state.”⁶² During Professor Onwuachi-Willig’s interview before the Commission, Justice Wiggins skeptically asked her how she reconciled her candidacy with that constitutional requirement. He culminated his question about the matter with this sentence: “So tell me, in your best way, how we can get around the Iowa Constitution.”⁶³ In context, it is clear that Justice Wiggins was not genuinely looking for ways to circumvent the constitution; rather, he was placing an edge on a problem that Professor Onwuachi-Willig’s candidacy appeared to face.⁶⁴ (Those who want to make their own judgment in that regard may watch Justice Wiggins ask the question, in context, on YouTube.⁶⁵) Taken in isolation, however, the videotaped remark provided campaign material for those opposing his retention, and they put it to prominent use in their online video and elsewhere.

The most widely publicized component of Iowans for Freedom’s campaign came in the form of a seventeen-stop bus tour of the state, with the joint sponsorship of CitizenLink,⁶⁶ the

61. See *supra* nn. 43–51 and accompanying text (noting Justice Wiggins’s service in that capacity).

62. Iowa Const. art. V, § 18.

63. See *Vote “NO Wiggins,” supra* n. 60. Professor Onwuachi-Willig responded by saying that she was confident her admission to the Bar would soon be complete, well in advance of an appointment to the bench. See Todd Dorman, *Gazette.com, On the Bus, but Out of Context*, <http://thegazette.com/2012/09/26/on-the-bus-but-out-of-context> (Sept. 26, 2012, 1:38 p.m. CDT) (accessed Aug. 6, 2013; copy on file with Journal of Appellate Practice and Process).

64. See Dorman, *supra* n. 63 (“[T]he notion that Wiggins is really, genuinely looking for a way to circumvent the state constitution . . . is ridiculous.”).

65. See YouTube, *Justice Wiggins, “How Can We Get Around the Iowa Constitution,”* http://www.youtube.com/watch?v=28Hf_C8ECms (Feb. 18, 2011) (accessed Aug. 6, 2013; copy of first frame on file with Journal of Appellate Practice and Process).

66. CitizenLink is a conservative Christian organization affiliated with Focus on the Family. See CitizenLink, *About Us*, <http://www.citizenlink.com/about-us> (characterizing CitizenLink as “a Focus on the Family affiliate,” and describing its mission as providing “resources that equip citizens to make their voices heard on critical social policy issues involving the sanctity of human life, the preservation of religious liberties and the well-being of the family as the building block of society”) (accessed Aug. 7, 2013; copy on file with Journal of Appellate Practice and Process).

National Organization for Marriage, and CatholicVote.org.⁶⁷ Running over a period of several days in late September, the tour featured appearances by former Pennsylvania Senator Rick Santorum (who had narrowly defeated Mitt Romney in Iowa's Republican presidential caucuses earlier that year) and Louisiana Governor Bobby Jindal, among others.⁶⁸

The anti-Wiggins campaign had other visible components, too. In early October 2012, Iowans for Freedom and the National Organization for Marriage unveiled a thirty-second television advertisement, urging voters to remove Justice Wiggins from the bench and thereby continue the work they began in 2010.⁶⁹ Also, as they had in 2010, some church leaders urged their parishioners to vote against Justice Wiggins, notwithstanding the trouble in which such political advocacy could land those churches with the Internal Revenue Service.⁷⁰

Those seeking Justice Wiggins's removal did not collectively spend as much money on the campaign as they and others had spent two years earlier. In 2010, anti-retention forces spent approximately \$800,000.00 on their effort.⁷¹ In 2012, the two leading anti-retention spenders—Iowans for Freedom and the National Organization for Marriage—spent a total of approximately \$470,000.00 (roughly \$320,000.00 and

67. See Sara Sleyster, DesMoinesRegister.com: Iowa Politics, *Iowans for Freedom Announces Statewide "NO Wiggins" Bus Tour*, <http://blogs.desmoinesregister.com/dmr/index.php/2012/09/06/iowans-for-freedom-announces-statewide-no-wiggins-bus-tour/article> (Sept. 6, 2012, 5:18 p.m. CDT) (accessed Aug. 7, 2012; copy on file with Journal of Appellate Practice and Process).

68. See Rod Boshart, *Santorum, Jindal Join Efforts to Oust Iowa Supreme Court Justice*, Quad-City Times (Davenport, Iowa) (Sept. 19, 2012), http://qctimes.com/news/local/santorum-jindal-join-efforts-to-oust-iowa-judge/article_5f1123c6-01f2-11e2-a261-001a4bcf887a.html (accessed Aug. 8, 2013; copy on file with Journal of Appellate Practice and Process); see also Editorial, *Politics, Principle and an Attack on the Courts*, 161 N.Y. Times A22 (Sept. 24, 2012) (noting Santorum and Jindal's participation).

69. See YouTube, *Hold Wiggins Accountable* (Television Advertisement) (posted Oct. 4, 2012) (available at <http://www.youtube.com/watch?v=zBHzxC3AKG8>) (accessed Aug. 7, 2013; copy of first frame on file with Journal of Appellate Practice and Process).

70. See e.g. Christina Crippes, *Heritage Baptist Church Pastor Challenges IRS*, Hawk Eye (Burlington, Iowa) A1 (Oct. 17, 2012) (noting that "[t]hose who violate the law can lose their tax-exempt status"); MacKenzie Elmer, *City Church Pastor Gets Death Threats*, Hawk Eye (Burlington, Iowa) A1 (Oct. 17, 2012) (discussing "a sermon . . . that allegedly violated a tax-exemption law prohibiting church leaders from making political endorsements").

71. See Pettys, *supra* n. 6, at 728.

\$150,000.00, respectively).⁷² That reduction in expenditures may have been due to competition for scarce resources in a busy election season across the country.⁷³ It may also have been due to a confident sense among some of Justice Wiggins's opponents that, having already made their pitch to Iowans so effectively in 2010, they could succeed in 2012 with fewer resources. Chuck Laudner, one of the key architects of the 2010 anti-retention campaign and an advisor for that campaign's 2012 successor, believed that anti-retention advertising "should cost a fraction of what it did two years ago just because everybody is fully aware."⁷⁴

In an editorial appearing in the *Des Moines Register* three days before the election, Vander Plaats made his closing argument:

Iowans are savvy enough to recognize fear and intimidation by the legal elites and liberals who are telling them to vote "yes" to retain Judge David Wiggins. They are accusing us of politicizing the system when Iowans are simply utilizing a retention system put in place 50 years ago.

...

Judge David Wiggins should be held accountable and removed from the Iowa Supreme Court. It's a simple open and shut case.

1) Wiggins & Co. made law from the bench.

...

2) Wiggins is the worst-rated Supreme Court justice in a 50-year retention history.

...

72. See Justice at Stake, News Release, *Judicial Election TV Spending Sets New Record, Yet Voters Reject Campaigns to Politicize the Judiciary*, http://www.justiceatstake.org/newsroom/press-releases-16824/?judicial_election_tv_spending_sets_new_record_voters_reject_campaigns_to_politicize_judiciary&show=news&newsID=15337 (Nov. 7, 2012) (accessed Aug. 7, 2013; copy on file with Journal of Appellate Practice and Process).

73. Vander Plaats had indicated in early August 2012 that The Family Leader was facing many demands for its resources. See Eckhoff, *supra* n. 56.

74. Patrick Caldwell, *In Iowa, a Big To-Do Over "I Do,"* Am. Prospect, <http://prospect.org/article/iowa-gop-tries-pry-gay-marriage-supporting-bench> (Aug. 16, 2012) (quoting Laudner).

3) Wiggins broke the Iowa Judicial Code of Conduct.

...

4) It's "We the People," not we the courts.

...

5) If [justices] will do this to marriage, then they won't even blink an eye when they take away private property rights, religious liberty, freedom of speech or how parents choose to educate their children.

...

6) Don't allow the liberal elites to sacrifice the Constitution in order to protect their own institution.⁷⁵

The anti-*Varnum* arguments carried the day in 2010, but the outcome in 2012 was different: Justice Wiggins retained his seat. Many more Iowans took the time to vote on the retention question in 2012 than in 2010, and nearly all of that growth in voter attention worked to Justice Wiggins' benefit. The number of Iowa voters who turned out in opposition to the *Varnum* justices grew only modestly from 2010 to 2012, from roughly 535,000 to 567,000.⁷⁶ But the number of Iowans turning out on Election Day *in support* of the *Varnum* justices grew by more than fifty percent, from roughly 450,000 in 2010 to about 680,000 in 2012.⁷⁷ What accounts for that remarkable increase and for Justice Wiggins's corresponding victory?

75. Bob Vander Plaats, Editorial, *It's an Open and Shut Case Against Wiggins*, Des Moines Reg. (Nov. 3, 2012). With respect to the claim that Justice Wiggins was "the worst rated Supreme Court justice in a 50-year retention history," see *infra* nn. 97–102 and accompanying text (discussing ratings assembled by the Iowa State Bar Association). To substantiate the claim that Justice Wiggins violated the Iowa Judicial Code of Conduct, Vander Plaats counterpoised a passage in *Varnum* with a provision of the code. See *Varnum*, 763 N.W.2d at 899 ("Plaintiffs presented an abundance of evidence and research, *confirmed by our independent research*, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents.") (emphasis added); Iowa Code Jud. Conduct R. 51:2.9(C) ("A Judge *shall not investigate facts in a matter independently*, and shall consider only the evidence presented and any facts that may properly be judicially noticed.") (emphasis added).

76. See *supra* n. 5.

77. *Id.*

B. Contextual Differences

Wholly apart from any campaign efforts waged specifically for or against his retention, Justice Wiggins enjoyed contextual advantages in 2012 that his three former colleagues lacked. Consistent with larger national trends, polls in Iowa indicated increasing acceptance of same-sex marriage as Election Day 2012 approached. The *Des Moines Register's* September 2009 "Iowa Poll" indicated that forty-one percent of the state's citizens favored a constitutional ban on same-sex marriage and forty percent opposed it (a near-even split that fell well within the margin of error).⁷⁸ The same poll showed that twenty-six percent of Iowans favored the Iowa Supreme Court's ruling in *Varnum*, while forty-three percent opposed it.⁷⁹ The *Register's* February 2011 Iowa Poll revealed minor softening on the amendment issue (finding that thirty-five percent favored the constitutional ban while thirty-eight percent opposed it), and found that the public's perception of *Varnum* had correspondingly begun to shift: The percentage of Iowans favoring the ruling had risen to thirty-two, while the percentage opposing it had fallen to thirty-seven.⁸⁰ In February 2012, the Iowa Poll found that although Iowans' appraisal of *Varnum* had not appreciably changed,⁸¹ Iowans were swinging sharply against the proposed constitutional ban on same-sex marriage: thirty-eight percent said that they favored it, but fifty-six percent were opposed.⁸²

78. See Jason Clayworth & Thomas Beaumont, *Iowa Poll: Iowans Evenly Divided on Gay Marriage Ban*, *Des Moines Reg.* A1 (Sept. 21, 2009).

79. See *id.*

80. See Reid Forgrave, *DesMoinesRegister.com, New Iowa Poll: State Splits 3 Ways on Same-Sex Marriage*, <http://www.desmoinesregister.com/article/20110227/NEWS/102270339/New-Iowa-Poll-State-splits-3-ways-same-sex-marriage> (Feb. 26, 2011) (accessed July 31, 2013; copy on file with Journal of Appellate Practice and Process).

81. See William Petroski, *Iowa Poll: Majority Opposes Ban on Same-Sex Marriage*, *Des Moines Reg.* (Feb. 27, 2012) (reporting that thirty percent of respondents said they favored the ruling and thirty-six percent said they were opposed).

82. See *id.* Later that fall, proponents of same-sex marriage would win significant national victories. See Adam B. Sullivan, *Shifting Attitudes?* *Iowa City Press-Citizen* (Nov. 17, 2012) ("Voters in Maine, Maryland, Washington and Minnesota either voted in favor of gay marriage or against banning it. After more than 30 attempts across the country, those ballot items marked the first time voters—rather than lawmakers or judges—had shown support for gay marriage.").

Another contextual difference lay in the fact that, unlike his three former colleagues (who came up for retention in 2010, when Republicans were energized by numerous political opportunities), Justice Wiggins came up for retention in the same year that President Obama sought reelection—a year in which one might thus expect Democrats to turn out in greater numbers. Exit polls indicate that Democrats likely did make up a greater percentage of those casting ballots in 2012. In 2010, CBS News’s exit polls found that thirty-one percent of voters in Iowa identified themselves as Democrats, thirty-five percent identified themselves as Republicans, and thirty-four percent identified themselves as independents or something else.⁸³ The same news organization’s exit polls in 2012 suggested a small shift, with thirty-three percent of Iowa voters identifying themselves as Democrats, thirty-three percent identifying themselves as Republicans, and the balance again identifying themselves as independents or something else.⁸⁴

Justice Wiggins enjoyed one other contextual advantage that Chief Justice Ternus, Justice Streit, and Justice Baker lacked: His three former colleagues’ ouster made judicial retention elections far more salient for those who assumed—incorrectly—that *Varnum*’s opponents would never be able to mount a successful anti-retention campaign. The rust of complacency that beset portions of the 2010 pro-retention effort had been shorn off by the time Justice Wiggins came before the voters in 2012.

C. The Work of the Iowa State Bar Association

The Iowa State Bar Association was caught flat-footed in 2010. It did not meaningfully join that year’s pro-retention campaign until very late in the game, and its efforts were thin

83. See CBSNews.com, Campaign 2010, *Iowa Exit Poll for Governor Race*, <http://www.cbsnews.com/election2010/exit.shtml?state=IA&race=G&jurisdiction=0> (n.d.) (accessed Aug. 12, 2013; copy on file with Journal of Appellate Practice and Process).

84. See CBSNews.com, Campaign 2012, *Iowa Exit Poll for Presidential Race*, <http://www.cbsnews.com/election-results-2012/exit.shtml?state=IA&race=P&jurisdiction=0&party=G&tag=dataDisplay;2914> (accessed Aug. 12, 2013; copy on file with Journal of Appellate Practice and Process).

and ineffectual.⁸⁵ Its leaders were plainly determined to exert a more powerful influence in 2012.

The ISBA's contributions to the 2012 campaign were not primarily financial in nature. It revealed in March of that year that it did not intend to raise money specifically for Justice Wiggins or any other individual judge or justice standing for retention,⁸⁶ and it announced later that fall that it was planning to spend only about \$20,000.00 on its broadly focused pro-retention campaign⁸⁷ (although in the end it reportedly put in about twice that sum⁸⁸). The lion's share of the pro-retention spending came from Justice Not Politics Action—a 527 organization formed two months prior to the election⁸⁹—which put in more than \$300,000.00 for voter-awareness and -turnout efforts on behalf of all judges and justices standing for retention that November.⁹⁰

Rather than try to match their opponents' spending, the ISBA took other steps aimed at helping Justice Wiggins (and others) fend off anti-retention attacks. In the fall of 2011, a newly created ISBA committee declared that its mission was "maintaining Iowa's fair and impartial courts through its support of Iowa's judicial merit selection system, advocacy for adequate funding for the judicial branch, and development and promotion

85. See generally Pettys, *supra* n. 6, at 742–43 (laying some of the responsibility for the three justices' defeat in 2010 at the feet of the ISBA, and drawing a comparison to the ouster of three members of the California Supreme Court in 1986).

86. See Bob Waterman, *Reflecting on Issues Impacting Our Association*, 72 Iowa Law. 4, 5 (Mar. 2012). Waterman, then the president of the ISBA, is the brother of Justice Thomas Waterman, one of the three new justices appointed by Governor Branstad in early 2011.

87. See Cynthia Moser, *Making the Case for Defending Our Courts*, 72 Iowa Law. 4, 6 (Sept. 2012). Moser succeeded Waterman as president of the ISBA.

88. See Justice at Stake News Release, *supra* n. 72 (reporting that the ISBA spent \$37,000.00).

89. See Jeff Eckhoff, *Nonprofit Takes Charge of Effort to Retain Justice*, Des Moines Reg. B2 (Sept. 14, 2012). As a 527 organization, Justice Not Politics Action was permitted to engage in heavy and direct political advocacy. See *id.* The organization kicked off its pro-retention campaign with an event in Iowa City featuring "Zach Wahls, the Iowan whose personal testimony to the Iowa Legislature in support of marriage equality went viral [the prior] year." Rod Boshart, *Gazette.com, New Group Launches "Yes on Retention" Campaign for Iowa Judges*, <http://thegazette.com/2012/09/13/new-group-launches-yes-on-retention-campaign-for-iowa-judges/> (Sept. 13, 2012) (accessed Aug. 12, 2013; copy on file with Journal of Appellate Practice and Process).

90. See Justice at Stake News Release, *supra* n. 72.

of civics education programs.”⁹¹ The committee went to work on a number of fronts, one of which was to monitor and respond to attacks on judges and justices seeking retention.⁹² (When the chairman of the Republican Party of Iowa prominently called for Justice Wiggins’s removal,⁹³ for example, the ISBA denounced his remarks later that same day.⁹⁴) An ISBA website provided a host of retention-related videos, news releases, and other materials, including a video made by cast members from NBC’s *The West Wing* aimed at encouraging citizens nationwide to pay more attention to judicial-retention elections.⁹⁵

One of the ISBA’s most significant steps was to move up the date on which it formally solicited the views of its members regarding judges and justices slated to appear on voters’ retention ballots. In 2010, the ISBA did not poll its members until little more than a month remained until Election Day; the ISBA’s leaders thus did not believe they could take an advocacy position on behalf of their members until the campaign’s final few weeks.⁹⁶ Determined not to remain on the sidelines for so long again, the ISBA moved its newly renamed Judicial Performance Review up to June.⁹⁷ From its booth at the Iowa State Fair, the ISBA revealed the results of the performance review in early August and promptly began to urge Iowans to vote favorably on Justice Wiggins and all other judges and justices standing for retention.⁹⁸

Attorneys’ assessment of Justice Wiggins in the Judicial Performance Review was indeed sufficiently favorable to enable the ISBA to throw its support behind him, but that assessment also provided his opponents with an opening. Of the more than

91. *Fair and Impartial Courts Committee Outlines Its Mission, Action Plan to Support Iowa’s Judiciary*, 71 Iowa Law. 8 (Nov. 2011).

92. *See id.* at 9.

93. *See supra* n. 57 and accompanying text.

94. *See Eckhoff, supra* n. 56 (“The Iowa State Bar Association issued a statement chastising Striker and denouncing statements that ‘show a fundamentally flawed view of the function of the courts and a clear lack of understanding of basic civics.’”).

95. *See* Iowa State Bar Association, *Turn the Ballot Over and Vote “Yes” for Our Iowa Judges*, <http://iowabar.org/displaycommon.cfm?an=1&subarticlenbr=768> (accessed Aug. 12, 2013; copy of initial screen on file with Journal of Appellate Practice and Process).

96. *See supra* n. 13 and accompanying text.

97. *See* Bob Waterman, *The Time Has Come to Say Adieu*, 72 Iowa Law. 4, 6 (June 2012).

98. *See Moser, supra* n. 87, at 6.

1,400 attorneys who participated in the survey, sixty-three percent expressed a favorable view of Justice Wiggins—the second-lowest approval rating of any judge in the survey, far below the ninety-percent average approval rating of the more than seventy judges whom ISBA members were asked to evaluate.⁹⁹ Some of the negativity expressed about Justice Wiggins likely came from attorneys who disagreed with *Varnum*, though there is reason to believe it came from other quarters too. In 2010, when the public debate about *Varnum* was at or near its zenith, Chief Justice Ternus, Justice Streit, and Justice Baker all received notably higher ratings from the state’s attorneys (with favorability ratings of seventy-two percent, eighty-four percent, and eighty-three percent, respectively).¹⁰⁰ Justice Wiggins’s opponents seized on the sixty-three-percent figure, saying that it was equivalent to a D minus.¹⁰¹ Cynthia Moser, then serving as president of the ISBA, replied that an approval rating of sixty-three percent was one that most politicians would dearly love to have.¹⁰²

The ISBA’s most visible intervention in the 2012 battle came in late September. Three days before Iowans for Freedom’s “No Wiggins” bus tour was scheduled to begin,¹⁰³ Bar officials announced that they intended to shadow that tour with a bus tour of their own.¹⁰⁴ At its first stop, ISBA leaders

99. See Jeff Eckhoff, *Survey Shows Iowa Lawyers Support Retention of Judges*, Des Moines Reg. B2 (Aug. 10, 2012).

100. See Pettys, *supra* n. 6, at 727 n. 75.

101. See e.g. David Bartholomew, IowaStateDaily.com, *Conservative Groups Ramp-up Effort to Oust Justice Wiggins*, http://www.iowastatedaily.com/news/article_07c3d12a-efc0-11e1-a51b-001a4bcf887a.html (Aug. 27, 2012, 10:00 a.m. CST) (“Wiggins is seen as arrogant, lazy, and controversial by his colleagues Anyone with a rating of a D- is not worthy of serving on the Iowa Supreme Court.”) (quoting Vander Plaats) (internal quotation marks omitted) (accessed Aug. 13, 2013; copy on file with Journal of Appellate Practice and Process); James Q. Lynch, *Different Takes on 63 Percent Rating*, Gazette (Cedar Rapids, Iowa) A5 (Oct. 9, 2012) (quoting a representative of Iowans for Freedom as stating that the ISBA was “encouraging Iowa voters to settle for mediocrity by retaining the worst Supreme Court judge in the past 50 years”).

102. See Lynch, *supra* n. 101.

103. See *supra* nn. 66–68 and accompanying text (discussing the anti-retention bus tour).

104. See Jeff Eckhoff, DesMoinesRegister.com, *Iowa Bar Association, in Defense of Supreme Court Justice, Plans to Shadow “No Wiggins” Bus Tour*, <http://blogs.desmoinesregister.com/dmr/index.php/2012/09/21/iowa-bar-association-in-defense-of-supreme-court-justice-plans-to-shadow-nowiggins-bus-tour> (Sept. 21, 2012, 9:16 a.m. CDT) (accessed Aug. 1, 2013; copy on file with Journal of Appellate Practice and Process).

took jabs at Senator Santorum and Governor Jindal (who, again, were participating in the anti-retention campaign), pointing out that Iowa's courts received high rankings from the U.S. Chamber of Commerce, while the courts in Santorum's home state of Pennsylvania and Jindal's home state of Louisiana were ranked quite low.¹⁰⁵ Christine Branstad, the governor's niece, took the podium and challenged Vander Plaats's claim that he was leading a grassroots movement, pointing out that much of Vander Plaats's financial support came from out of state,¹⁰⁶ and said that Justice Wiggins's sixty-three-percent favorability rating among ISBA members was higher than the approval ratings of her uncle and other prominent elected officials.¹⁰⁷ Taking a shot at Vander Plaats at a subsequent stop on the tour, one of the ISBA's speakers said that Vander Plaats would have been "thrilled" to win sixty-three percent of the vote during his three failed outings in Republican gubernatorial primaries.¹⁰⁸

Turnout at some of the dueling bus tours' stops was remarkably small. In Burlington, Iowa, for example, the press reported that only thirty people turned out to hear the anti-retention speakers, and only three people gathered to hear the pro-retention speakers a short time later.¹⁰⁹ Even for the stops that were sparsely attended, however, the ISBA's shadow tour was significant because it added balance that might otherwise have been lacking from much of the press coverage.¹¹⁰ Looking

105. See Steve Woodhouse, *Bus Tours Offer Different Views on Retention*, Knoxville J. Express (Sept. 24, 2012).

106. See *id.*

107. See Mike Ferguson, *Wiggins Supporters Have a Flip Message*, Muscatine J. (Muscatine, Iowa) (Sept. 24, 2012).

108. See Mike Brownlee, *Opposing Sides Square Off About Supreme Court Justice David Wiggins*, Daily Nonpareil (Council Bluffs, Iowa) (Sept. 28, 2012).

109. See Mackenzie Elmer & Christinia Crippes, *Dueling Buses Seek Support*, Hawk Eye (Burlington, Iowa) (Sept. 25, 2012).

110. The opening paragraph of a story prominently appearing in the *Des Moines Register* was typical of the press accounts' balanced content. See Jeff Eckhoff, "No Wiggins" Tour Rolls Out Its Message; As Push to Oust Justice Kicks Off, Counter-Rally Travels Close Behind, *Des Moines Reg.* B1 (Sept. 25, 2012) ("Dueling rallies Monday at the Iowa Capitol that were centered on whether to kick an Iowa Supreme Court justice out of office also kicked off an unprecedented week of judicial campaigning."). For a sample of televised media's coverage of the two bus tours, see YouTube, KCCI.com, *Groups Battle Over Judge's Retention Vote*, <http://www.youtube.com/watch?v=0LppoyLCJsc> (Sept. 24, 2012) (accessed Aug. 14, 2013; copy of initial screen on file with Journal of Appellate Practice and Process).

back on its efforts shortly after bringing its tour to a close, the ISBA happily reported that “[a]n estimated three dozen media outlets—newspaper, radio and television—wrote articles or filed reports about the tour.”¹¹¹

D. *The Work of the Iowa Supreme Court*

On January 12, 2011—two months after voters removed three of his colleagues from the bench—Chief Justice Mark Cady delivered his annual State of the Judiciary address to the Iowa legislature.¹¹² In the same spirit in which Justice Wiggins and others on the state’s judicial nominating commission would open their interviews to the public just a couple of weeks later,¹¹³ Chief Justice Cady announced that he and his colleagues hoped to increase the public transparency with which they did their work, such as by holding oral arguments at venues around the state.¹¹⁴ “In the end,” Chief Justice Cady said, “we all need to get to know each other better.”¹¹⁵ Coming publicly to *Varnum*’s defense (something that the court’s members had largely declined to do prior to the 2010 elections), Chief Justice Cady also spoke about the virtues of judicial review and the separation of powers, and he explicitly cited *Varnum* as an illustration of the court’s duty to strike down legislation that violates the Iowa Constitution.¹¹⁶

111. *Bus Tour Criss-Crosses State to Give Iowans Truth about Judicial System and Judges and Justices*, 72 Iowa Law. 29 (Oct. 2012).

112. See e.g. Grant Schulte, *Cady Says Judges Serve Law, Not Political Interests*, Des Moines Reg. A1 (Jan. 13, 2011).

113. See *supra* n. 49 and accompanying text.

114. See *State of Judiciary Address—Chief Justice Cady Lays Out Case for Judicial Funding, Why Courts Must Remain as Independent Third Branch of Government*, Iowa Law. 12, 13 (Feb. 2011) [hereinafter *State of Judiciary Address*]; see also Schulte, *supra* n. 112 (reporting Chief Justice Cady’s promise of “a new push for openness”). The previous month, a political consultant had advised a closed-door gathering of Iowa judges to get out into their communities more frequently. See Marc Hansen, DesMoinesRegister.com, *Judges Call Expert Witness in Bid to Keep Jobs*, <http://www.desmoinesregister.com/article/20101207/NEWS03/12070335/Hansen-Judges-call-expert-witness-bid-keep-jobs> (Dec. 7, 2010). The members of the Iowa Supreme Court almost certainly did not need any prodding to move in that direction.

115. *State of Judiciary Address*, *supra* n. 114 (quoting Chief Justice Cady).

116. See Schulte, *supra* n. 112; *State of Judiciary Address*, *supra* n. 114 (reporting on the address); IowaDemocrats.org, *Full Text of Chief Justice Mark Cady’s “State of the Judiciary” Speech*, <http://www.iowademocrats.org/2011/01/full-text-of-chief-justice-mark->

The pro-retention advocacy group Justice Not Politics had helped to place more than 120 supporters in the public gallery for Chief Justice Cady's address, in part to send the assembled legislators the message that the then-brewing impeachment idea was a poor one.¹¹⁷ Chief Justice Cady waved to those seated in the gallery after delivering his remarks, a moment captured by a photographer and placed on the front page of the following day's *Des Moines Register*.¹¹⁸ Some Republican legislators reacted negatively to Chief Justice Cady's wave and to his defense of *Varnum*, saying that the chief justice had behaved too politically.¹¹⁹ Chief Justice Cady was offering no apologies, however, and a new era of public engagement by the court's members began.

In an interview taped for Iowa Public Television two days after delivering his State of the Judiciary address, Chief Justice Cady said that he had "absolutely" no regrets about *Varnum* and that judges needed to do a better job of explaining to the public that their rulings are grounded in law rather than their own personal views.¹²⁰ The chief justice gave additional public presentations around the state in the following months, frequently defending *Varnum* and the state's merit-selection system and warning of the dangers he perceived in politicizing judicial retention elections.¹²¹

The Iowa Supreme Court's seven justices collectively reached out to the public, as well. In May 2011, for example, the court celebrated Law Day by holding an open house. The

cadys-state-of-the-judiciary-speech (Jan. 12, 2011) (accessed Aug. 14, 2013; copy on file with Journal of Appellate Practice and Process).

117. See Clayworth, *supra* n. 26; see also *supra* nn. 20–27 and accompanying text (discussing the ill-fated impeachment initiative).

118. See Schulte, *supra* n. 112.

119. See *id.*

120. See Grant Schulte, *Cady: Law Guided Ruling on Marriage*, *Des Moines Reg.* B1 (Jan. 15, 2011).

121. See e.g. Mike Malloy, *Chief Justice Worries About Politics' Effect on Court*, *Tribune* (Ames, Iowa) (Mar. 23, 2012) (reporting on Chief Justice Cady's remarks to the Ames League of Women Voters); Josh Nelson, *Chief Justice Warns of Political Influence*, *Waterloo Courier* (Sept. 17, 2011) (reporting on Chief Justice Cady's Constitution Day presentation at Wartburg College). As the keynote speaker at a gathering of Midwest social-studies teachers, Chief Justice Cady also called for a stepped-up effort to teach schoolchildren about the work of the courts. See Jeff Eckhoff, *Cady: Knowledge of Courts Crucial*, *Des Moines Reg.* B1 (Oct. 3, 2012).

justices personally led the festivities by hosting a radio program at the courthouse, giving public tours of the courtroom and the justices' chambers, chatting with members of the public who wandered in, and inviting visitors to have a little fun by sitting at the head of the courtroom in the justices' chairs.¹²²

As the Chief Justice had forecasted in his State of the Judiciary address, the Iowa Supreme Court also began to hold oral arguments at locations around the state.¹²³ In an April 2012 article, the *Chicago Tribune* reported that, for the fifth time in the past year, the Iowa Supreme Court had held oral arguments at a venue far from its usual courtroom—this time before a crowd of nearly 300 people at a high-school auditorium in Bettendorf, Iowa.¹²⁴ When making those visits to Iowa communities, the justices frequently took the opportunity to speak to, and field questions from, schoolchildren, the press, and others at local public gatherings.¹²⁵ In September 2012, Chief Justice Cady estimated that the justices had “met thousands of Iowans” and spoken “at forty or more high schools.”¹²⁶ Taken together, all of these efforts surely inured to Justice Wiggins’s benefit.

E. Prominent Contributions from Individuals

Any effort to summarize the forces responsible for a given election result is bound to omit factors that some voters found

122. See Marc Hansen, *Judges' Outreach Poses Risk; So Does Alternative*, Des Moines Reg. B1 (May 5, 2011) (reporting on the activities); William Petroski, *State's Justices to Take to the Radio Airwaves*, Des Moines Reg. B1 (Mar. 15, 2011) (announcing the planned event and noting that the radio station that conducted the broadcast “is known for conservative talk programs,” and that “some of its hosts have criticized the Iowa Supreme Court’s April 2009 ruling supporting gay marriage”).

123. See e.g. Matt Milner, *Iowa Supreme Court Reaches Out; Tour an Effort to Help Public Understand How the State's Courts Work*, Ottumwa Courier (Sept. 20, 2012) (reporting on the oral arguments held at Indian Hills Community College).

124. See Kurt Ullrich, *Iowa Takes the Bench on the Road*, Chi. Trib. A17 (Apr. 12, 2012).

125. See John Mangalanzo, *Courting Awareness*, Hawk Eye (Burlington, Iowa) (Sept. 28, 2011) (reporting on an interview of newly appointed Justice Thomas Waterman and on Justice Waterman’s presentation “to a packed house . . . at Southeastern Community College”); Jermaine Pigeo, *Constitution Day Spurs Discussion*, Hawk Eye (Burlington, Iowa) A3 (Sept. 19, 2012) (reporting on Justice Waterman’s 2012 return to Southeastern Community College).

126. Milner, *supra* n. 123.

significant. Surely the same is true of Justice Wiggins's victory in 2012. In their own individual ways, a good number of people undoubtedly persuaded at least a handful of Iowans to turn out on Election Day in support of Justice Wiggins. Following are three especially prominent examples.

About a month before the election, Christopher Rants—a Republican and a former Speaker of the Iowa House—came to Justice Wiggins's defense, and did so in a manner that came at the expense of Chuck Hurley, vice president of the Vander Plaats-led Family Leader. In a widely reprinted editorial, Rants reminded readers that he had opposed same-sex marriage while serving in the Iowa House, and then he recounted a conversation he had at the time with Hurley about the need to secure a constitutional amendment banning same-sex marriage, given the likelihood that the courts would find the statutory ban unconstitutional.¹²⁷ Coming to Justice Wiggins's defense, Rants said that he wasn't pleased by the court's subsequent ruling in *Varnum*, but that he "wasn't surprised by it" and that Hurley—now one of the leaders of the anti-retention campaign—had been among those who feared the statutory ban "wouldn't stand up to constitutional scrutiny."¹²⁸ Opponents of same-sex marriage should be directing their ire at the state legislature for failing to successfully propose a constitutional ban, Rants argued, rather than at Justice Wiggins and the other members of the *Varnum* court. (The ISBA subsequently featured Rants in a pro-retention ad.¹²⁹) Hurley responded with an editorial of his own, insisting that the *Varnum* justices had overstepped their constitutional bounds and condemning Rants for downplaying the threat that Justice Wiggins and his colleagues posed to Iowans' freedoms.¹³⁰ The exchange may have persuaded some voters to support Justice Wiggins.

127. See Christopher Rants, Editorial, *Outrage Over Court's Gay Marriage Decision Rings Hollow*, *Sioux City J.* (Sept. 30, 2012). The piece subsequently appeared in several other publications. See e.g. Christopher Rants, Editorial, *Blame the Legislature*, *Des Moines Reg.* A7 (Oct. 2, 2012) (reprinting September 30 editorial).

128. *Id.*

129. See YouTube, Iowa State Bar Association, *Yes to Iowa's Judges*, <http://www.youtube.com/watch?v=TOzUoiRZ7zY> (Oct. 25, 2012) (accessed Aug. 14, 2013; copy of initial screen on file with *Journal of Appellate Practice and Process*).

130. See Chuck Hurley, *Retention Election Is About More than Gay Marriage*, *Des Moines Reg.* A9 (Oct. 6, 2012).

For a pro-retention contribution of an altogether different sort, some readers might enjoy spending a few minutes watching Iowa filmmaker Scott Siepker's off-color but undeniably humorous "Justice Nice" video, in which he trumpets Iowa's historical leadership on numerous civil-rights fronts and condemns the politicization of judicial-retention elections.¹³¹ Two weeks after the video was posted, it already had been viewed more than 40,000 times.¹³² Particularly for some of Iowa's younger voters, the video likely helped to galvanize interest in an election that otherwise would have failed to ignite their passions.

Chief Justice Ternus, Justice Streit, and Justice Baker—the three justices ousted in 2010—might also have swayed some Iowa voters when they jointly authored an editorial just a few weeks before Election Day. In their piece, they defended *Varnum*, judicial independence, and Justice Wiggins himself. They wrote, in part,

The justices did not decide the *Varnum* case as politicians, turning to public opinion polls and party platforms for direction. Nor did the justices decide the case as theologians. Our decision was based on the rule of law, nothing more and nothing less.

...

Justice David Wiggins is an intelligent, hardworking, and fair jurist and deserves to be retained on the Iowa Supreme Court.¹³³

F. Justice Wiggins's Own Contributions

The Iowa Code of Judicial Conduct permitted Justice Wiggins to create a campaign committee and launch a formal

131. See YouTube, ProgressIowa, *Justice Nice*, http://www.youtube.com/watch?v=Pciu3_t11TU (Oct. 9, 2012) (accessed Aug. 14, 2013; copy of initial screen on file with Journal of Appellate Practice and Process).

132. Ryan Foley, *In Iowa Justice Vote, Backers Focus on Equality*, Associated Press (Oct. 22, 2012).

133. Marsha Ternus et al., Editorial, *Iowa Constitution Is Not Subject to Public Opinion*, Quad-City Times (Davenport, Iowa) (Oct. 16, 2012).

campaign to retain his seat on the court.¹³⁴ Some felt certain he would take that step,¹³⁵ but Justice Wiggins was reluctant to do so. When a reporter asked him in August 2012 about his campaign plans, he said simply that he intended to “respond to misinformation concerning the role of the judicial branch, merit selection and my work on the court.”¹³⁶

On September 26, 2012—during the week when the dueling bus tours were crisscrossing the state¹³⁷—Justice Wiggins explained in a letter to a newspaper why he ultimately decided not to launch a formal campaign.¹³⁸ “Judges should be beholden only to the constitution and the law,” he wrote, and by opening a campaign he feared that he would be paving the way to make Iowa “like states with highly partisan courts,” and Iowa, he noted, “is better than that.”¹³⁹ After talking briefly about his personal background, he closed with the following paragraph:

I want to keep my job, believe me, but I will not jeopardize the integrity of the Iowa Supreme Court in the process. I hope you will vote “yes” for me on the back of your ballot. . . . More importantly, I hope Iowa Supreme Court Justices never have to raise money from political donors to ask for your vote.¹⁴⁰

Although he refrained from forming a campaign, Justice Wiggins was far from publicly disengaged. When the chairman of the Republican Party of Iowa called for his removal in early August 2012, Justice Wiggins himself was among those who immediately objected, stating that he had ““always viewed the role of the judiciary as limited”” and that he was ““proud of [his] work in writing opinions and helping resolve the issues that are brought before the court.””¹⁴¹

134. See Iowa Code Jud. Conduct R. 51:4.4 & cmt. 4.

135. See e.g. Caldwell, *supra* n. 74 (“I think [Justice Wiggins] has to launch a campaign for retention. I have no doubt that that will happen.”) (quoting Donna Red Wing, the executive director of One Iowa, a pro-LGBT organization).

136. See e.g. Mike Wiser, *Iowa Judge Likely to Avoid Politics Despite Pressure; Two Groups Rallying to Unseat Wiggins*, Quad-City Times (Davenport, Iowa) (Aug. 19, 2012) (quoting a statement released by Wiggins in response to an interview request).

137. See *supra* nn. 66–68, 103–11 and accompanying text.

138. See David Wiggins, Letter to the Editor, *Keep Politics Out of Courts*, Iowa City Press-Citizen (Sept. 26, 2012).

139. *Id.*

140. *Id.*

141. Eckhoff, *supra* n. 56 (quoting Wiggins).

Justice Wiggins also frequently spoke with members of the public.¹⁴² In a February 2012 visit to the Mason City Noon Lions Club, for example, he defended his and his colleagues' commitment to an independent judiciary, he argued that it was inappropriate to vote against a judge simply because one disagrees with a particular ruling, and he invited his listeners to pay the court and its justices a personal visit in Des Moines.¹⁴³ Later that fall, while visiting the city of Waterloo for a round of oral arguments, Justice Wiggins met with students at a local high school, where he spoke about a long line of celebrated civil-rights rulings handed down by the Iowa Supreme Court.¹⁴⁴ Days before voters went to the polls, Justice Wiggins spoke at a Cedar Rapids church about the role of the judiciary and about his and his colleagues' determination to decide cases based upon their understanding of the law, rather than upon their personal preferences.¹⁴⁵ He gave other public talks, as well.

Justice Wiggins's public appearances did not always yield favorable publicity. After a visit to the Des Moines Rotary Club, for example, one pro-retention attendee blogging for the *Des Moines Register* said that, on this occasion, Justice Wiggins had been "a lousy public speaker," that he had "adopted a condescending tone" akin to that of "a grandfather talking to a child," that he seemed impatient to leave, and that, in short, he "missed an opportunity to connect with a few hundred Iowans."¹⁴⁶ Those observations came against the backdrop of more broadly based perceptions that, during his time on the court, Justice Wiggins sometimes rubbed people the wrong way. In an article about the retention battle, a reporter for the *Washington Post* wrote that "Wiggins hasn't always won friends

142. See e.g. Deb Nicklay, *Justice: Iowa Court Has Always Been First in Protection of Constitutional Rights*, *Globe Gazette* (Mason City, Iowa) (Oct. 14, 2012) (reporting on Justice Wiggins's presentation at a Mason City church on the role of the judiciary).

143. See Kristin Buehner, *State Justice Says Iowans Misunderstand Supreme Court's Role*, *Globe Gazette* (Mason City, Iowa) (Feb. 1, 2012).

144. See Jeff Reinitz, *Wiggins Gives Civil Rights Talk at Columbus*, *Waterloo-Cedar Falls Courier* (Waterloo, Iowa) (Oct. 14, 2012).

145. See Hayley Bruce, *Targeted Justice: Judges Aren't Spurred by Political Agendas*, *Gazette A2* (Cedar Rapids, Iowa) (Oct. 29, 2012).

146. DesMoinesRegister.com, Graham Gillette, *Justice Wiggins' Biggest Obstacle to Winning Retention Vote, Himself*, <http://blogs.desmoinesregister.com/dmr/index.php/2012/08/22/wiggins> (Aug. 22, 2012, 9:52 a.m. CDT) (accessed Aug. 1, 2013; copy on file with Journal of Appellate Practice and Process).

with his blunt, sometimes abrasive presence,” and the reporter quoted a prominent defender of the *Varnum* justices for the observation that Justice Wiggins ““doesn’t go out of his way to please people.””¹⁴⁷ Yet despite the occasional negative review, Justice Wiggins did not retreat from public view.

A few days before the election, Justice Wiggins presented his closing argument in a newspaper editorial.¹⁴⁸ In his lead paragraph, he prominently quoted the equality clause of the Iowa Constitution, on the basis of which he and his colleagues in *Varnum* had struck down the state’s ban on same-sex marriage. He then described some of his work in private practice for clients with disabilities, expressed pride in the Iowa Supreme Court’s strong national reputation, and remarked upon his and his family’s feeling of indebtedness to the people of Iowa. He closed with the following words:

I understand that some people thought I should run for retention like a candidate running for Congress or the Legislature. I decided against that approach, not because I’m afraid of the work, but because I was afraid it would change the way we think about judges in Iowa. The integrity of our system is more important to me than raising money, campaigning, and politicizing the judicial branch.

I hope you will turn your ballot over and vote “Yes” for me next week. Serving this state on the Iowa Supreme Court is the greatest honor of my career, and I think I do it well. With your help, I will continue to work hard and protect our state’s constitution.¹⁴⁹

IV. CONCLUSION: REVISITING *VARNUM*

After more than three years of conversation about *Varnum* and more than two years of retention-election battles, Iowa voters went to the polls in November 2012 and gave Justice

147. Bill Turque, *A High-Profile Election for Iowa’s High Court*, Wash. Post A9 (Oct. 9, 2012) (quoting Guy Cook, who was chairing the ISBA’s newly created committee to help defend the Iowa Supreme Court and its justices from political attacks).

148. See David Wiggins, *A Matter of Fundamental Fairness*, Daily Nonpareil (Council Bluffs, Iowa) (Nov. 1, 2012).

149. *Id.*

Wiggins a second eight-year term.¹⁵⁰ He will not be required to appear on the ballot again until 2020. The *Varnum* justices who have not yet formally stood before the voters—Chief Justice Cady (*Varnum*'s author), Justice Brent Appel, and Justice Daryl Hecht, all of whom are slated to appear on retention ballots in 2016—might now see the future of their careers on the court a little more brightly than they did before Election Day 2012.¹⁵¹

That is not to say, however, that Iowans have put the debate about *Varnum* behind them, or even that the members of the newly reshuffled Iowa Supreme Court are united in their commitment to that landmark ruling. The suggestion that there might now be differences of opinion about *Varnum* within the court itself came in May 2013, when the court handed down *Gartner v. Iowa Department of Public Health*,¹⁵² its first major post-*Varnum* decision on the rights of same-sex couples.

Melissa and Heather Gartner married in Iowa in the summer of 2009, shortly after *Varnum* came down. Heather Gartner was pregnant at the time (having conceived through an anonymous sperm donor), and gave birth to a daughter, Mackenzie Gartner, later that September. On their application for Mackenzie's birth certificate, Melissa and Heather indicated that they were married and were the child's parents. When the Iowa Department of Public Health issued the birth certificate, however, it listed only Heather as a parent. The couple asked the Department to add Melissa's name, but the Department refused, taking the position that Melissa would have to adopt Mackenzie if she wanted her name to appear on the birth certificate.¹⁵³ Heather and Melissa filed suit, citing (among other things) the same clause of the Iowa Constitution on which the *Varnum* court had relied.

The legislation at the heart of the dispute was Iowa's presumption-of-parentage statute, which provides that

150. See *supra* n. 5 and accompanying text (describing the election results); see also Iowa Const. art. V, § 17 (setting forth Iowa's system of eight-year terms for members of the Iowa Supreme Court).

151. Cf. Rod Boshart, *Court Official: Iowa Supreme Court Weathered the "Perfect Storm,"* Muscatine J. (Jan. 16, 2013) (quoting State Court Administrator David Boyd's observation that there is now "a lot less angst" at the Iowa Supreme Court).

152. 830 N.W.2d 335 (Iowa 2013).

153. See Iowa Code § 144.23(1) (2013) (directing the state registrar to issue an Iowa child a new birth certificate upon receipt of specified adoption papers).

[i]f the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered by the department.¹⁵⁴

In the trial court's view, it was appropriate to read that statute as requiring the Department to list a non-birthing lesbian spouse as a parent when issuing a child's birth certificate.¹⁵⁵ On appeal, however, the Iowa Supreme Court rejected that reading of the statute. With Justice Wiggins writing for the majority, the court pointed out that, when speaking about a child's non-birthing parent, the legislature had used the masculine terms "father" and "husband."¹⁵⁶ To read that language as denoting a woman, Justice Wiggins wrote, "would destroy the legislature's intent to *unambiguously* differentiate between the roles assigned to the two sexes."¹⁵⁷

Turning to the question of whether the statute violated the Gartners' constitutional rights, the court perceived an equality problem. When a married woman conceived using artificial insemination, the statute directed the Department to list the non-birthing spouse as a parent on the child's birth certificate if the non-birthing spouse was a man but not if that spouse was a woman.¹⁵⁸ To evaluate this difference in treatment, the court determined that intermediate scrutiny was required under *Varnum*.¹⁵⁹ Having thus framed the constitutional inquiry, the court considered and rejected the Department's rationales for

154. Iowa Code § 144.13(2) (2013).

155. *Gartner*, 830 N.W.2d at 348.

156. *See* Iowa Code § 144.13(2) (2013).

157. *Gartner*, 830 N.W.2d at 349 (emphasis original).

158. *Id.* at 352.

159. *Id.* (characterizing the applicable rule as a "heightened-level-of-scrutiny standard"). As the *Gartner* court recognized, *see id.*, the *Varnum* court ruled that intermediate scrutiny is appropriate for classifications based upon sexual orientation. *Varnum*, 763 N.W.2d at 885–96.

refusing to add Melissa's name to Mackenzie's birth certificate.¹⁶⁰

The case presented Iowans with their first opportunity to see how the court's three newest members—Justices Mansfield, Waterman, and Zager—would respond when asked to rely upon *Varnum* as precedent. Justice Zager recused himself from participating in the ruling. The court does not explain the justices' recusals, and so the reasons for Justice Zager's decision not to participate are not publicly known with certainty. But Justice Zager routinely recuses himself from cases involving the firm where his daughter works as an attorney,¹⁶¹ and that firm represented the Gartners.

Justices Mansfield and Waterman did participate, but they concurred only in the judgment. Justice Mansfield's opinion for them both was only one paragraph in length, quoted here in its entirety:

The Iowa Department of Public Health accepts the decision in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), for purposes of this appeal. I agree that if *Varnum* is the law, then Iowa Code section 144.13(2) cannot be constitutionally applied to deny Melissa Gartner's request to be listed as parent on the birth certificate of the child delivered by her same-sex spouse. Accordingly, I concur in the judgment in this case.¹⁶²

Is the court's ruling in *Varnum* indeed "the law"? Strictly speaking, of course, it is until either the Iowa Supreme Court says otherwise or Iowans amend their constitution. One thus presumes that, in his second sentence's opening clause, Justice Mansfield intended to make clear that he was taking *Varnum* as a premise but was stopping short of revealing whether he believed the case was rightly decided. Why would Justices Mansfield and Waterman take that approach?

One might initially suppose that, in an exercise of judicial restraint, Justices Mansfield and Waterman were simply

160. *Gartner*, 830 N.W.2d at 354. The Department had cited "an interest in the accuracy of birth certificates, the efficiency and effectiveness of government administration, and the determination of paternity." *Id.* at 352.

161. See DavisBrown, Attorneys, Tara Z. Hall, <http://www.davisbrownlaw.com/Tara-Z-Hall> (accessed Aug. 16, 2013; copy on file with Journal of Appellate Practice and Process).

162. *Gartner*, 830 N.W.2d at 355 (Mansfield & Waterman, JJ., concurring in the judgment).

declining to unnecessarily address a constitutional question that they personally had not previously confronted in their capacities as justices of Iowa's high court. But that explanation is implausible. During their time on the court, Justices Mansfield and Waterman have been (and will continue to be) presented with many Iowa Supreme Court precedents that they did not personally participate in producing and that the litigants appearing before them do not challenge. The two justices have not routinely qualified (and undoubtedly will not routinely qualify) their reliance upon those rulings. To do so would stand in sharp tension with the principle of *stare decisis* and with what it means to be members of a court.

Eagerness to avoid the political fallout of embracing *Varnum* also seems an unlikely explanation of the tack that Justices Mansfield and Waterman took. Allowing political concerns to prod them to distance themselves from *Varnum* would be contrary to the principle of judicial independence that they and the court's other members have recently worked so hard to reinforce with the public. Besides, Justices Mansfield and Waterman will not again appear on voters' retention ballots until 2020,¹⁶³ when *Varnum*'s political volatility will likely be even more diminished than it was in 2012.

Why, then, would they pointedly refuse to join the court's opinion? It appears quite possible that, with the ouster of three of the *Varnum* justices in 2010 and with Governor Branstad's appointment of three replacements in 2011, the Iowa Supreme Court is no longer of one mind about whether the *Varnum* Court was right to hold that the Iowa Constitution grants same-sex couples the right to marry.



163. Pursuant to the Iowa Constitution, Justices Mansfield, Waterman, and Zager all appeared on the 2012 ballot. See Iowa Const. art. V, § 17 ("Judges shall serve for one year after appointment and until the first day of January following the next judicial election after the expiration of such year. They shall at such judicial election stand for retention in office on a separate ballot which shall submit the question of whether such judge shall be retained in office for the tenure prescribed for such office."). All three justices were approved by more than 74 percent of those casting ballots on the retention question. See *2012 Official Results Report*, *supra* n. 5.