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# VINDICATION: *VARNUM V. BRIEN* AT TEN YEARS

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## ABSTRACT

*It has been 10 years since the Iowa Supreme Court decided *Varnum v. Brien*, the equal protection challenge to Iowa's statutory exclusion of same-sex civil marriage. With the unanimous decision, Iowa joined two other states in having marriage equality. *Varnum* was controversial at the time because of its result, if not its constitutional reasoning. The following year, three members of the court failed on a retention vote which was widely thought to be linked to the decision.*

*This Article revisits the *Varnum* decision and the electoral aftermath. It then considers how *Varnum* has fared over the last decade in terms of the court's legal reasoning, the acceptance of marriage equality, and the effect of the decision on the Iowa judiciary. On all three dimensions, the Article finds richly deserved vindication of the *Varnum* court and its marriage-equality decision.*

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## I. INTRODUCTION

On April 3, 2009, the Iowa Supreme Court announced its opinion in *Varnum v. Brien*, a state constitutional challenge to Iowa's statutory exclusion of same-sex civil marriage.<sup>1</sup> The Iowa court unanimously held the challenged statute void because it violated the equal protection clause of the Iowa constitution.<sup>2</sup>

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\* Professor, Drake University Law School. I would like to thank my research assistants, Josh Duden and Kyle Henry, for their creative and diligent assistance.

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

2. *Id.* at 906.

*Varnum* was a breathtaking decision. At the time, same-sex marriage was legal in only two states. Massachusetts opened the way for same-sex marriage in 2003.<sup>3</sup> Connecticut recognized marriage equality only six months before the Iowa court acted.<sup>4</sup> In addition, there had been reverses on the path toward marriage equality. A decade before, Hawai'i voters undid the progress made on same-sex marriage in that state's courts.<sup>5</sup> And only six months had passed since California voters eliminated marriage equality with the passage of Proposition 8.<sup>6</sup>

The *Varnum* decision was also important because the Iowa court was unequivocal in its decision:

We have a constitutional duty to ensure equal protection of the law. Faithfulness to that duty requires us to hold Iowa's marriage statute . . . violates the Iowa Constitution. To decide otherwise would be an abdication of our constitutional duty. If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection upon which the rule of law is founded. [The marriage statute] denies gay and lesbian people the equal protection of the law promised by the Iowa Constitution.<sup>7</sup>

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3. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

4. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411–12 (Conn. 2008).

5. In May of 1993, the Hawai'i Supreme Court strongly indicated that denying same-sex couples the right to marry violated the state's equal rights amendment. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The right of same-sex couples to marry in Hawai'i was upheld by a Hawai'i circuit court in December of 1996. *Baehr v. Miike*, No. 20371, 1999 WL 35643448, at \*1 (Haw. Dec. 9, 1999) (noting 1996 circuit court ruling). But in November of 1998, Hawai'i voters approved a constitutional amendment barring same-sex marriages. *Id.* at \*5. The Hawai'i Supreme Court confirmed in 1999 that the constitutional amendment precluded same-sex marriages. *Id.* at \*6–7.

6. The California Supreme Court struck down a same-sex marriage ban in May of 2008. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Hollingsworth v. Perry*, 570 U.S. 693 (2013). That fall, California voters banned same-sex marriages. *California Proposition 8, The "Eliminates Right of Same-Sex Couples to Marry" Initiative (2008)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_8,\\_the\\_%22Eliminates\\_Right\\_of\\_Same-Sex\\_Couples\\_to\\_Marry%22\\_Initiative\\_\(2008\)](https://ballotpedia.org/California_Proposition_8,_the_%22Eliminates_Right_of_Same-Sex_Couples_to_Marry%22_Initiative_(2008)) (last visited Feb. 25, 2019).

7. *Varnum*, 763 N.W.2d at 906.

The Iowa Supreme Court acted unanimously in *Varnum*, and it acted six years before a deeply divided United States Supreme Court established marriage equality across the nation with its ruling in *Obergefell v. Hodges*.<sup>8</sup>

The *Varnum* ruling occasioned passionate reaction both in favor and in opposition. Eighteen months after *Varnum*, in the 2010 general election, three justices of the Iowa Supreme Court who joined in the marriage-equality opinion were not retained.<sup>9</sup> This was the only time since the 1962 adoption of judicial merit selection and retention that any justice of the supreme court failed on a retention vote.<sup>10</sup> Opposition to the *Varnum* decision was widely credited for the retention outcome.<sup>11</sup>

Now, after 10 years, it is appropriate to revisit *Varnum* in order to gauge how subsequent events either vindicate or repudiate the decision and its authors. This discussion traces three aspects of the aftermath of *Varnum*: the reaction to the legal reasoning of the opinion, the acceptance of marriage equality, and the effect of the case on the judiciary.

## II. THE OPINION

The question in *Varnum* was, in one sense, quite simple. A 1998 Iowa statute provided, “Only a marriage between a male and a female is valid.”<sup>12</sup> The 12 plaintiffs were Iowa citizens in same-sex committed relationships who were denied marriage licenses by the Polk County Recorder, Timothy J. Brien.<sup>13</sup> Among other theories, the plaintiffs claimed the statutory exclusion of same-sex civil marriage violated the equal protection guarantee of the Iowa constitution.<sup>14</sup>

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8. *Obergefell*, 135 S. Ct. at 2604–05.

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

10. Eric Black, *Iowa Justices Who Struck Down Same-Sex Marriage Ban Voted Out*, MINNPOST (Nov. 4, 2010), <https://www.minnpost.com/eric-black-ink/2010/11/iowa-justices-who-struck-down-same-sex-marriage-ban-voted-out/>.

11. See Sulzberger, *supra* note 9.

12. IOWA CODE § 595.2(1) (2009), *declared unconstitutional by Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

13. *Varnum*, 763 N.W.2d at 872.

14. IOWA CONST. art. I, § 6 (“Laws uniform. 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.”).

The *Varnum* litigation was strategic, intelligently conceived, and carefully constructed by the proponents of marriage equality. Lambda Legal cooperated with local counsel, Dennis Johnson of the Des Moines office of the Dorsey & Whitney firm, to file the action.<sup>15</sup> As such, the courts had the benefit of a coherent legal theory, model plaintiffs, a good record, and strong expert testimony. The reader should not imagine, however, that the case was a set-up. Although the plaintiffs benefited from having chosen the location and substance of the litigation, the defendants joined the issue and presented as strong a case as their position allowed.

The matter was filed in December of 2005 in the Polk County District Court, sitting in Des Moines, and was heard by Judge Robert B. Hanson.<sup>16</sup> Cross motions for summary judgment were filed; the matter was briefed; and in May of 2007, Judge Hanson heard arguments.<sup>17</sup> The defendants offered five different justifications for the statutory exclusion of same-sex civil marriage.<sup>18</sup> The court heard expert testimony in support of,<sup>19</sup> and in opposition to,<sup>20</sup> the justifications offered for the statutory exclusion.

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15. Keith B. Richburg, *How Gays Won a Marriage Victory*, WASH. POST (Apr. 15, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/14/AR2009041403455.html>. The history of the litigation and a wealth of supporting documentation can be found on the Lambda Legal website. *Varnum v. Brien*, LAMBDA LEGAL, [hereinafter LAMBDA LEGAL] <http://www.lambdalegal.org/in-court/cases/varnum-v-brien.html> (last visited Feb. 5, 2019).

16. Monica Davey, *Iowa Permits Same-Sex Marriage, for 4 Hours, Anyway*, N.Y. TIMES (Sept. 1, 2007), <https://www.nytimes.com/2007/09/01/us/01iowa.html>; LAMBDA LEGAL, *supra* note 15.

17. *Varnum v. Brien*, No. CVCV005965, 2007 WL 2468667, at \*1 (Iowa Dist. Ct. Aug. 30, 2007), *aff'd*, 763 N.W.2d 862 (Iowa 2009).

18. *Varnum*, 763 N.W.2d at 873 (noting societal interests asserted by the defendant, which related to (1) the advancement of childrearing through “promoting procreation, promoting child rearing by a mother and a father within a marriage, and promoting stability in an opposite-sex relationship to raise and nurture children;” (2) “the conservation of state resources;” and (3) the promotion of “the concept and integrity of the traditional notion of marriage”).

19. *Id.* (“Much of the testimony presented by the County was in the form of opinions by various individuals that same-sex marriage would harm the institution of marriage and also harm children raised in same-sex marriages.”).

20. *Id.* at 873–74 (“The plaintiffs produced evidence to demonstrate sexual orientation and gender have no effect on children raised by same-sex couples, and same-sex couples can raise children as well as opposite-sex couples. They also submitted evidence to show that most scientific research has repudiated the commonly assumed notion that children need opposite-sex parents or biological parents to grow into well-adjusted adults.”).

In August of 2007, the district court granted plaintiffs' motion for summary judgment, holding the statutory exclusion of same-sex civil marriage unconstitutional under both the equal protection and due process clauses of the Iowa constitution.<sup>21</sup> As to a remedy, the district court ordered the Polk County Recorder to begin processing marriage licenses for same-sex couples but stayed its order pending appeal.<sup>22</sup>

The district court decision was appealed to the Iowa Supreme Court and extensively briefed.<sup>23</sup> The information available to the supreme court was augmented by broad amicus briefing.<sup>24</sup> Supreme court briefs were filed in March of 2008, and oral arguments were heard in December of 2008.<sup>25</sup>

On April 3, 2009, the Iowa Supreme Court announced its unanimous opinion as to whether the statutory exclusion of same-sex civil marriage violated the equal protection clause of the Iowa constitution.<sup>26</sup> The court first addressed the question of whether the plaintiffs were similarly situated to those opposite-sex couples advantaged under the Iowa marriage statute.<sup>27</sup> Having considered the purposes of the statute, the court concluded same-sex and heterosexual couples are similarly situated:

[W]ith respect to the subject and purposes of Iowa's marriage laws, we find that the plaintiffs are similarly situated compared to heterosexual persons. Plaintiffs are in committed and loving relationships, many raising families, just like heterosexual couples. Moreover, official recognition of their status provides an institutional basis for defining their fundamental relational rights and responsibilities, just as it does for heterosexual couples. Society benefits, for example, from providing same-sex couples a stable framework within which to raise their children and the power to make health care and end-of-life decisions for loved

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21. *Id.* at 874; *Varnum*, 2007 WL 2468667, at \*1.

22. Kay Henderson, *Ruling Briefly Allows Gay Marriage in Iowa*, REUTERS (Aug. 31, 2007), <http://www.reuters.com/article/idUSN3124032520070831>.

23. *Varnum*, 763 N.W.2d at 869–72.

24. *See id.*

25. James Heggen, *Iowa Supreme Court Hears Oral Argument for Legal Gay Marriage*, IOWA ST. DAILY (Dec. 9, 2008), [http://www.iowastatedaily.com/news/iowa-supreme-court-hears-oral-argument-for-legal-gay-marriage/article\\_c8270366-860f-505e-b1f0-ee0719c4c22e.html](http://www.iowastatedaily.com/news/iowa-supreme-court-hears-oral-argument-for-legal-gay-marriage/article_c8270366-860f-505e-b1f0-ee0719c4c22e.html); LAMBDA LEGAL, *supra* note 15.

26. *Varnum*, 763 N.W.2d at 862. The court did not reach the due process claim, upon which the plaintiffs had also prevailed in the trial court. *Id.* at 906 n.32.

27. *Id.* at 883–84.

ones, just as it does when that framework is provided for opposite-sex couples.<sup>28</sup>

The court then moved to the question of whether the marriage statute either classified Iowans on the basis of gender and sexual orientation, as the plaintiffs argued, or did not discriminate on either basis, as the defense claimed.<sup>29</sup> The court found that a ban on same-sex civil marriage classified on the basis of sexual orientation: “By purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex civil marriages differentiates implicitly on the basis of sexual orientation.”<sup>30</sup> This was the predicate for the court to analyze the constitutionality of the marriage statute on equal protection grounds based on sexual-orientation discrimination.

The court considered in depth the four traditional factors bearing on the level of scrutiny: the history of discrimination against gay and lesbian people,<sup>31</sup> the ability to contribute to society based on sexual orientation,<sup>32</sup> the immutability of sexual orientation,<sup>33</sup> and the political powerlessness of lesbian and gay people.<sup>34</sup> Having engaged in a rigorous analysis, the court found, “[L]egislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution.”<sup>35</sup>

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28. *Id.* at 883. The court rejected the argument that the parties could not be similarly situated precisely because of their differing sexual orientation:

In short, for purposes of Iowa’s marriage laws, which are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways, plaintiffs are similarly situated in every important respect, but for their sexual orientation. As indicated above, this distinction cannot defeat the application of equal protection analysis through the application of the similarly situated concept because, under this circular approach, all distinctions would evade equal protection review. Therefore, with respect to the government’s purpose of “providing an institutional basis for defining the fundamental relational rights and responsibilities of persons,” same-sex couples are similarly situated to opposite-sex couples.

*Id.* at 883–84.

29. *Id.* at 884.

30. *Id.* at 885.

31. *Id.* at 889–90.

32. *Id.* at 890–92.

33. *Id.* at 892–93.

34. *Id.* at 893–94.

35. *Id.* at 896. Because of its finding under an intermediate scrutiny standard, the

Applying heightened scrutiny, the court framed the question as “whether excluding gay and lesbian people from civil marriage is substantially related to any important governmental objective.”<sup>36</sup> Having evaluated each of the objectives proffered by the defendants, the court concluded, “[T]he sexual-orientation-based classification under the marriage statute does not substantially advance any of the objectives.”<sup>37</sup> The court’s conclusion was clear: “Our equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the statute.”<sup>38</sup>

As to a remedy, the court noted the Iowa constitution provision that “[t]his constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void”<sup>39</sup> and declared the statutory exclusion of same-sex civil marriages void.<sup>40</sup> The court noted the possibility of staying its ruling to give the legislature time to act, as courts in other states had done.<sup>41</sup> However, the court did not believe that any constitutionally sufficient justification had been offered for discriminating against same-sex couples: “[The Iowa marriage statute] is unconstitutional because the County has been unable to identify a constitutionally adequate justification for excluding plaintiffs from the institution of civil marriage.”<sup>42</sup> And, importantly, the court did not believe a sufficient justification could be offered:

A new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution. This record, our independent research, and the appropriate equal protection analysis do not suggest the existence of a justification for such a legislative classification that substantially furthers any governmental objective.<sup>43</sup>

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court did not decide whether classifications based on sexual orientation are subject to strict scrutiny or only intermediate scrutiny. *Id.*

36. *Id.* at 897.

37. *Id.* at 904. The court was not rejecting the objectives: “While the objectives asserted may be important (and many undoubtedly are important), none are furthered in a substantial way by the exclusion of same-sex couples from civil marriage.” *Id.*

38. *Id.*

39. IOWA CONST. art. XII, § 1.

40. *Varnum*, 763 N.W.2d at 875.

41. *See id.* at 906.

42. *Id.*

43. *Id.* at 906–07.

Having determined that a constitutionally sufficient justification for discrimination in marriage based on sexual orientation could not be found, the court declined to stay its ruling to give the legislature time in which to act.<sup>44</sup> The first same-sex marriage in Iowa, pursuant to *Varnum*, took place on April 27, 2009.<sup>45</sup>

### III. THE RETENTION VOTE

Not quite 19 months after the *Varnum* decision was announced, three of the justices who joined in the opinion were the subjects of general-election retention votes.<sup>46</sup>

In 1962, Iowa adopted a constitutional amendment which provided for merit selection and retention of judges.<sup>47</sup> Under that regime, each justice of the Iowa Supreme Court appears on the general election ballot every eight years with “the question of whether such judge shall be retained in office.”<sup>48</sup> The voting is nonpartisan, and traditionally such retention elections were not the subject of campaigns on either side.<sup>49</sup> Before 2010, the results were predictable. In the 50 times Iowa Supreme Court justices had been the subject of retention votes since the first votes in 1964, not one had failed to be retained.<sup>50</sup> The average favorable vote was over 80 percent; the highest was over 91 percent; and the *lowest* was almost 72 percent.<sup>51</sup>

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44. *Id.* at 907 (“Consequently, the language . . . limiting civil marriage to a man and a woman must be stricken . . . and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.”).

45. Associated Press, *Iowa Gay Couple First to Marry Legally in State*, L.A. DAILY NEWS (Apr. 27, 2009), <https://www.dailynews.com/2009/04/27/iowa-gay-couple-first-to-marry-legally-in-state/>.

46. Mallory Simon, *Iowa Voters Oust Justices Who Made Same-Sex Marriage Legal*, CNN (Nov. 3, 2010), <http://www.cnn.com/2010/POLITICS/11/03/iowa.judges/index.html>.

47. IOWA CONST. amend. XXI.

48. *Id.* § 17. Supreme court justices stand for retention at the first general election after they are appointed and, thereafter, every eight years. *Id.*

49. *Buying Time 2010: Iowa*, BRENNAN CTR. FOR JUST. (Sept. 14, 2010), <https://www.brennancenter.org/analysis/buying-time-2010-iowa> (“[T]hese [retention elections] have historically been quiet, low-spending races.”).

50. Simon, *supra* note 46.

51. See *Archived Election Results and Statistics*, IOWA SECRETARY OF STATE, <https://sos.iowa.gov/elections/results/archive.html#3> (last visited Mar. 1, 2019) (supplying access to Iowa election results archives from 1936 to 1999); *Election Results & Statistics*, IOWA SECRETARY OF STATE, <https://sos.iowa.gov/elections/results/#8> (last

All that changed dramatically in 2010, when three of the justices who joined in the *Varnum* decision—Chief Justice Marsha Ternus, Justice Michael Streit, and Justice David Baker—came before the electorate on routine retention votes. The justices were subjected to an unprecedented antiretention campaign.<sup>52</sup> The campaign, heavily funded by out-of-state groups, spent a reported \$800,000, a record amount,<sup>53</sup> to defeat the *Varnum* justices.<sup>54</sup> The three justices did not raise money or campaign themselves.<sup>55</sup> The effort in favor of retention has been criticized as delivering a message that was, at times, “patently feeble” and “less than rhetorically compelling.”<sup>56</sup> It has also been criticized for failing to defend the *Varnum* decision, instead focusing on the inappropriateness of using the retention vote to punish justices for an opinion.<sup>57</sup>

Regrettably, the antiretention campaign was successful. The three *Varnum* justices were denied retention with an average favorable vote of only 45.5 percent.<sup>58</sup>

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visited Mar. 1, 2019) (supplying access to Iowa election results from 2000 to 2018). From 1964 through 2008, the average percentage in favor of retention was 80.59 percent. The highest percentage was Justice Stuart’s 91.11 percent in 1964; the lowest was Justice Daryl Hecht’s 71.76 percent in 2008. *See* IOWA SECRETARY OF STATE, CANVASS OF THE VOTE: GENERAL ELECTION NOVEMBER 3, 1964, at 7 (1964) [hereinafter IOWA SECRETARY OF STATE, 1964], <https://sos.iowa.gov/elections/pdf/results/60s/1964gencanv.pdf>; OFFICE OF IOWA SECRETARY OF STATE MICHAEL A. MAURO, STATE OF IOWA OFFICIAL CANVASS SUMMARY: NOVEMBER 4, 2008 GENERAL ELECTION 78 (2008), <https://sos.iowa.gov/elections/pdf/2008/OfficialCanvass2008General.pdf>.

52. Sulzberger, *supra* note 9; *Buying Time 2010: Iowa*, *supra* note 49.

53. *Buying Time 2010: Iowa*, *supra* note 49 (“[T]he [2010] retention contests were the most expensive retention elections in state history.”).

54. Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715, 728 (2011) (symposium on State Constitutional Law Steps Out of the Shadows) (listing out-of-state groups and reporting that two groups—the Mississippi-based American Family Association and the New Jersey-based National Organization for Marriage—contributed nearly \$700,000 of the \$800,000 total spent to oppose retention).

55. *Iowa Judges Ousted After Legalizing Same-Sex Marriage to Receive Profiles in Courage Award*, CBS NEWS (May 7, 2012), <https://www.cbsnews.com/news/iowa-judges-ousted-after-legalizing-same-sex-marriage-to-receive-profiles-in-courage-award/> (“Conservative groups and other gay marriage foes spent about \$1 million on a political campaign to oust the judges, who chose not to raise money or campaign themselves to avoid dragging the judiciary into politics.”).

56. Pettys, *supra* note 54, at 731.

57. *Id.* at 731–32.

58. Chief Justice Marsha Ternus received 443,451 votes in favor, 541,565 votes in

IV. *VARNUM* AT TEN YEARS

It seems an appropriate time to reflect on how time has treated the *Varnum* decision, whether the legal reasoning of the decision, the concept of marriage equality, and the integrity of our courts have been vindicated.

A. *The Reaction to the Legal Reasoning of Varnum*

The initial measure of *Varnum* is how the legal reasoning of the opinion has fared over the past decade. Upon the announcement of the decision, it quickly became the subject of resistance on several levels. On the operational level, several county recorders, who issue marriage licenses in Iowa, questioned whether they would be required to comply with the ruling.<sup>59</sup> Operational opposition was stoked by a few irresponsible public officials.<sup>60</sup> Republican State Senator Merlin Bartz suggested legislation that “would have allowed county recorders to refuse to accommodate same-sex couples ‘as a matter of conscience.’”<sup>61</sup> The Democratic Senate Majority Leader responded:

Well, here’s the crazy part of it. For example, what if a county recorder is morally opposed to mix-race marriages? You know it used to be illegal under Iowa law for mixed race marriages. Well what if you were a county recorder at that time. Does Senator Bartz think they should be able to say “no” to a mixed race couple?

What about divorced Iowans? Some religions believe it should be “one man, one woman, one time.”? “And under the Bartz approach, your county recorder would be able to say “No, I’m Catholic and you don’t get to have a second marriage. You had your one.”

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opposition, for a 45.02 percent favorable vote; Justice David Baker received 451,359 votes in favor, 532,805 votes in opposition, for a 45.86 percent favorable vote; Justice Michael Streit received 448,758 votes in favor, 534,902 votes in opposition, for a 45.62 percent favorable vote. IOWA SECRETARY OF STATE’S OFFICE, OFFICIAL RESULTS REPORT 5, 10, 15 (2010), <https://sos.iowa.gov/elections/pdf/2010/judicialorr.pdf>. Judge Robert B. Hason, the trial court judge in *Varnum*, was subject to a retention vote in 2010 as well. He received 80,403 votes in favor, 40,593 votes in opposition, for a 66.45 percent favorable vote. *Id.* at 77.

59. desmoinesdem, *Catch-Up Thread on Gay Marriage in Iowa*, BLEEDING HEARTLAND (Apr. 20, 2009), [bleedingheartland.com/2009/04/20/catch-up-thread-on-gay-marriage-in-iowa](http://bleedingheartland.com/2009/04/20/catch-up-thread-on-gay-marriage-in-iowa).

60. *See id.*

61. *Id.* (quoting Republican State Senator Merlin Bartz).

Under the Bartz approach if your county recorder didn't think Catholics should marry Baptists, that would be the law in your county. That's just so wrong.

In Iowa, everyone is equal under the law. County recorders don't get to decide for themselves which laws they will follow and which they won't.<sup>62</sup>

Unlike some other states, in Iowa such resistance quickly dissipated. The county recorder for Sioux County, a very conservative county in far northwestern Iowa,<sup>63</sup> said, “[A]llowing gay and lesbian couples to marry goes against her religious beliefs.”<sup>64</sup> She asked the county attorney if she had to process marriage license applications from same-sex couples.<sup>65</sup> It is reported County Attorney Coleman McAllister declared, “Where I come from, we try to follow the law, even if we don't like it,” and told her “she would be removed from office if she refused.”<sup>66</sup> The recorder “said she plans to comply with the law.”<sup>67</sup>

The *Varnum* ruling has also been the subject of resistance on a more theoretical level. The decision was criticized as “activist gobbledygook.”<sup>68</sup> It was criticized as a “really bad example of judicial activism” by one commentator who explained: “The Iowa Supreme Court claimed that the Iowa Constitution dictated this decision. The justices were in essence saying that they view the Iowa Constitution as elastic, giving them a blank check to reinterpret its provisions according to their predilections.”<sup>69</sup>

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62. *Id.* (quoting Democratic Senate Majority Leader Mike Gronstal).

63. *Id.* In the 2010 judicial retention vote, Sioux County voted to not retain Justice Baker by a vote of 1,821 to 9,985, not to retain Justice Streit by a vote of 1,805 to 10,009, and not to retain Chief Justice Ternus by a vote of 1,770 to 10,092. In each case, this represented only a 15 percent vote to retain. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Ed Whelan, *This Day in Liberal Judicial Activism—April 3*, NAT'L REV. (Apr. 3, 2018), <https://www.nationalreview.com/bench-memos/this-day-in-liberal-judicial-activism-april-3/>.

69. *Seven Reasons Why the NY Times Is Wrong to Criticize Iowa Retention Vote on Justices Who Imposed Same-Sex “Marriage”*, ALLIANCE DEFENDING FREEDOM (Sept. 27, 2010), <http://www.adflegal.org/detailspages/blogdetails/allianceedge/2017/10/18/seven-reasons-why-the-ny-times-is-wrong-to-criticize-iowa-retention-vote-on-justices-who-imposed-same-sex-marriage->.

The suggestion that the reasoning of the *Varnum* decision was either unprecedented or extreme was in error. When the *Varnum* court acted, the highest courts of five states had already indicated that the exclusion of same-sex couples from civil marriage violated applicable equal protection guarantees. In 1993, the Hawai'i Supreme Court strongly indicated that denying same-sex couples the right to marry violated the equal protection guarantee of that state's equal rights amendment.<sup>70</sup> In 1999, a majority of the Vermont Supreme Court held that the denial of privileges and benefits to same-sex couples equivalent in the area of marriage to those of opposite-sex couples violated the Vermont constitution's common benefit clause, parallel to the equal protection guarantee in other jurisdictions.<sup>71</sup> In 2003, in an advisory opinion, the Supreme Judicial Court of Massachusetts found that the exclusion of same-sex couples from civil marriage was incompatible with equal protection:

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.<sup>72</sup>

In 2006, the New Jersey Supreme Court held that their statutory exclusion of same-sex marriage violated the equal protection guarantee of the New Jersey constitution.<sup>73</sup> In May of 2008, the California Supreme Court found that California's exclusion of same-sex couples from marriage violated

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70. *Baehr v. Lewin*, 852 P.2d 44, 69–70 (Haw. 1993) (Burns, J., concurring) (“If heterosexuality, homosexuality, bisexuality, and asexuality are ‘biologically fated[,]’ then . . . the Hawaii constitution probably bars the State from discriminating against the sexual orientation differences by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages.”), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The right of same-sex couples to marry in Hawai'i was upheld by a Hawai'i circuit court in December of 1996. *Baehr v. Miike*, No. 20371, 1999 WL 35643448, at \*1 (Haw. Dec. 9, 1999) (noting 1996 circuit court ruling).

71. *Baker v. State*, 744 A.2d 864, 867, 889 (Vt. 1999) (“The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.”).

72. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

73. *See Lewis v. Harris*, 908 A.2d 196, 223 (N.J. 2006).

equal protection.<sup>74</sup> Because California had a domestic partnership statute, the court had “only to determine whether the difference in the official names of the relationships violates the California Constitution.”<sup>75</sup> Nevertheless, the court found that the different treatment afforded same-sex couples under the California statutes violated that state’s equal protection guarantee.<sup>76</sup> Finally, in October of 2008, the Connecticut Supreme Court held their state statute excluding same-sex couples from civil marriage violated the equal protection guarantee of the Connecticut constitution: “[T]he state has failed to establish adequate reason to justify the statutory ban on same sex marriage. Accordingly, under the equal protection provisions of the state constitution, our statutory scheme governing marriage cannot stand insofar as it bars same sex couples from marrying.”<sup>77</sup>

After *Varnum*, the proposition that discrimination in marriage against same-sex couples violated equal protection gained very broad acceptance. Between *Varnum* in April of 2009 and *Obergefell* in June of 2015, courts made findings that denying same-sex couples the right to marry violated applicable equal protection guarantees as to Alaska,<sup>78</sup> Arizona,<sup>79</sup> Arkansas,<sup>80</sup>

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74. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

75. *Id.* at 399.

76. *Id.* at 401 (“[W]e conclude that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California’s current marriage statutes—the interest in retaining the traditional and well-established definition of marriage—cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest.”).

77. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008).

78. *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1073 (D. Alaska 2014).

79. Julie Westfall & James Queally, *Arizona and Wyoming Gay Marriage Bans Struck Down*, L.A. TIMES (Oct. 17, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-arizonas-gay-marriage-ban-struck-down-20141017-story.html>.

80. *Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1287 (E.D. Ark. 2014), *aff’d*, 796 F.3d 978 (8th Cir. 2015); Dale Carpenter, *Arkansas State Court Strikes Down Ban on Same-Sex Marriages*, WASH. POST (May 9, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/09/arkansas-state-court-strikes-down-ban-on-same-sex-marriages/?utm\\_term=.b53ce5f0cbcc](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/09/arkansas-state-court-strikes-down-ban-on-same-sex-marriages/?utm_term=.b53ce5f0cbcc).

Colorado,<sup>81</sup> Florida,<sup>82</sup> Idaho,<sup>83</sup> Illinois,<sup>84</sup> Indiana,<sup>85</sup> Kansas,<sup>86</sup> Kentucky,<sup>87</sup> Michigan,<sup>88</sup> Mississippi,<sup>89</sup> Missouri,<sup>90</sup> Montana,<sup>91</sup> New Mexico,<sup>92</sup> Oklahoma,<sup>93</sup> Oregon,<sup>94</sup> Pennsylvania,<sup>95</sup> South Carolina,<sup>96</sup> Texas,<sup>97</sup>

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81. *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834 (D. Colo. July 23, 2014).

82. Order Granting Plaintiffs' Motion for Summary Judgment at 2, *Pareto v. Ruvin*, No. 14-1661-CA-01 (Fla. Cir. Ct. July 25, 2014), <https://s3-us-west-2.amazonaws.com/ftm-assets/ftm/archive/files/images/ParetovRuvinsRuling.pdf>; Justin Snow, *Federal Judge Rules Florida Same-Sex Marriage Ban Unconstitutional*, METRO WEEKLY (Aug. 21, 2014), <https://www.metroweekly.com/2014/08/federal-judge-rules-florida-same-sex-marriage-ban-unconstitutional>.

83. Staff Reports, *Federal Court Strikes Down Idaho Ban on Same-Sex Marriage*, LGBTQ NATION (May 13, 2014), <https://www.lgbtqnation.com/2014/05/federal-court-strikes-down-idaho-ban-on-same-sex-marriage>.

84. *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680, at \*1 (N.D. Ill. Feb. 4, 2014).

85. *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1164–66 (S.D. Ind. 2014), *aff'd*, 766 F.3d 648 (7th Cir. 2014).

86. *Marie v. Mosier*, 122 F. Supp. 3d 1085, 1090 (D. Kan. 2015).

87. *Love v. Beshear*, 989 F. Supp. 2d 536, 539 (W.D. Ky. 2014).

88. Associated Press, *Federal Judge Strikes Down Michigan's Gay Marriage Ban*, FOX NEWS NETWORK (Mar. 21, 2014), <http://www.foxnews.com/politics/2014/03/21/federal-judge-strikes-down-michigan-gay-marriage-ban.html>.

89. Justin Snow, *Federal Judge Rules Mississippi Same-Sex Marriage Ban Unconstitutional*, METRO WEEKLY (Nov. 25, 2014), <https://www.metroweekly.com/2014/11/federal-judge-rules-mississippi-same-sex-marriage-ban-unconstitutional/>.

90. *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014).

91. *Rolando v. Fox*, 23 F. Supp. 3d 1227, 1235 (D. Mont. 2014).

92. *Griego v. Oliver*, 316 P.3d 865, 872 (N.M. 2013).

93. Chris Casteel, *Same-Sex Marriage Now Is Legal in Oklahoma*, NEWSOK (Oct. 6, 2014), <https://newsok.com/article/5349007/same-sex-marriage-now-is-legal-in-oklahoma>.

94. KGW Staff, *Meet Gay Couples Who Married After Ore. Ban Overturned*, KGW.COM (May 20, 2014), <https://web.archive.org/web/20140530080731/http://www.kgw.com/news/Oregon-gay-couples-line-up-for-potential-marriage-licenses-259815911.html>.

95. David DeKok, *Judge Strikes Down Pennsylvania Law Barring Gay Marriage*, REUTERS (May 20, 2014), <https://www.reuters.com/article/us-usa-gaymarriage-pennsylvania-ruling/judge-strikes-down-pennsylvania-law-barring-gay-marriage-idUSBREA4J0S820140520>.

96. *Condon v. Haley*, 21 F. Supp. 3d 572, 587 (D.S.C. 2014).

97. *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014).

Utah,<sup>98</sup> Virginia,<sup>99</sup> Wisconsin,<sup>100</sup> and Wyoming.<sup>101</sup>

The final vindication of the legal reasoning of *Varnum* came in June of 2015 with the United States Supreme Court opinion in *Obergefell*.<sup>102</sup> In that case, the Supreme Court held that the exclusion of same-sex couples from civil marriage violated the Equal Protection Clause with reasoning parallel to that of *Varnum*.<sup>103</sup>

### B. *The Acceptance of Marriage Equality Post-Varnum*

Another measure of *Varnum* is how the opinion relates to public perceptions of and support for marriage equality. To be clear, the public-perception question is not important because *Varnum* was, or should have been, the product of popular opinion. The holding in *Varnum*—that a marriage statute which discriminates against same-sex couples violates Iowa’s equal protection guarantee<sup>104</sup>—has always been true. It is undoubtedly the case that the framers of the original Iowa constitution in 1846, the framers of the current Iowa constitution in 1857, many of our parents 20 years ago, and some of our fellow citizens in 2009, thought—and that some of our fellow citizens today think—that state laws which discriminate against same-sex couples comport with equal protection. But such thinking has everything to do with their limitations and prejudices and nothing to do with what was and is true. As we gain enlightenment, as we shed our prejudices, the full measure of the equal protection guarantee simply becomes clearer to us. The *Varnum* opinion speaks to this evolution:

Our responsibility, however, is to protect constitutional rights of

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98. Joel Rosenblatt, *Utah Ban on Same-Sex Marriage Struck Down by U.S. Judge (2)*, BLOOMBERG BUSINESSWEEK (Dec. 20, 2013), <https://web.archive.org/web/20131224075934/http://www.businessweek.com/news/2013-12-20/utah-ban-on-same-sex-marriage-struck-down-by-u-dot-s-dot-judge>.

99. Justin Snow, *Federal Court Rules Virginia Same-Sex Marriage Ban Unconstitutional*, METRO WEEKLY (Feb. 13, 2014), <https://web.archive.org/web/20140222050815/http://www.metroweekly.com/poliglot/2014/02/federal-court-rules-virginia-same-sex-marriage-ban.html>.

100. *Wolf v. Walker*, 986 F. Supp. 2d 982, 986–87 (W.D. Wis. 2014), *aff’d sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

101. *Westfall & Queally*, *supra* note 79.

102. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

103. *Id.* at 2604; *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009). The Court also held such exclusion to violate the Due Process Clause. *Obergefell*, 135 S. Ct. at 2604.

104. *Varnum*, 763 N.W.2d at 907.

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individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time. The framers of the Iowa Constitution knew, as did the drafters of the United States Constitution, that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress,” and as our constitution “endures, persons in every generation can invoke its principles in their own search for greater freedom” and equality.<sup>105</sup>

Public perception is important because an opinion on a controversial subject can help explain the application of the law in a way that helps inform, and thus move, public opinion. To do so, an opinion must be written in a way that patiently explains the constitutional analysis, not merely announces it. It must inform the reader what is being done, why it is being done, and what the decision does not mean. Although characterized by a leading opponent as “mumbo jumbo,”<sup>106</sup> the opinion by then-Justice Mark Cady is well-written and cogent and was clearly designed to be accessible to a lay audience. As one commentator observed:

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.<sup>107</sup>

One example of such patience and clarity is the discussion of what the decision did *not* do—the explanation that the *Varnum* ruling on civil marriage was not an attack on religious marriage beliefs.<sup>108</sup> Having acknowledged those whose religious beliefs led them to oppose marriage equality and those whose religious beliefs brought them to the opposite conclusion, the *Varnum* court explained that its role was apart from the

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105. *Id.* at 876 (citing *Lawrence v. Texas*, 539 U.S. 558, 578–89 (2003); *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999)).

106. Herb Strentz, *Terry and Bob: Iowa’s Own “Butcher” and “Mullah”?*, CITYVIEW (Dec. 23, 2010), <http://www.dmcityview.com/2010/12/23/columns/guest.html> (“[Anti-marriage equality activist Bob] Vander Plaats is already on record as saying he views court decisions and, presumably, the Iowa constitution as just so much legal mumbo jumbo when it comes to advancing what to him is a Christ-driven agenda.”).

107. Pettys, *supra* note 54, at 718.

108. *Varnum*, 763 N.W.2d at 904–06.

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religious debate: “Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage . . . .”<sup>109</sup>

The court concluded its discussion of religious marriage by casting its decision in terms of respect for differing religious beliefs and practices: “In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage—religious or otherwise—by giving respect to our constitutional principles. These principles require that the state recognize both opposite-sex and same-sex civil marriage.”<sup>110</sup> But, the court continued, such civil recognition need not change religious faith or practice:

Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person’s religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past.<sup>111</sup>

The court ended the explanation with the underlying meaning of *Varnum*: “The only difference is *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires.”<sup>112</sup>

The *Varnum* opinion influenced the national discussion on marriage equality, both because it came early in our national legal evolution and because it came from a largely rural state in the middle of the nation.<sup>113</sup> In 2009, commentators across the country expressed surprise at the *Varnum* decision. One news program observed, “[T]he ruling carries extra significance coming from the country’s heartland,” and quoted one marriage equality advocate, “It’s a big win because, coming from Iowa, it represents

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109. *Id.* at 905.

110. *Id.* at 905–06.

111. *Id.* at 906.

112. *Id.*

113. *See generally id.*

the mainstreaming of gay marriage.”<sup>114</sup> Another saw the Iowa decision as a harbinger of broad acceptance of marriage equality:

Iowa’s status as a largely rural, Midwest state could enforce an argument that gay marriage is no longer a fringe issue. “When it was only California and Massachusetts, it could be perceived as extremism on the coasts and not related to core American values.” “But as it extends to states like Iowa, and as attitudes toward gay marriage have evidently changed, then people will look at it as an example of broad acceptance . . . .”<sup>115</sup>

Such analyses exhibited a profound—if understandable—lack of knowledge about the progressive history of Iowa and its supreme court.

In 1868, presidential candidate Ulysses S. Grant called Iowa the “bright radical star,” as he urged the state to be the first in the nation to extend voting rights to African American males.<sup>116</sup> Iowa responded by passing a constitutional amendment extending suffrage.<sup>117</sup> This progressive heritage was explicitly invoked in the public discussion following the *Obergefell* decision:

Once again, Iowa—that shining light of liberty—has shown the rest of the nation the way. . . . Often in its history, Iowa has been a pioneer in barring segregation and discrimination of women and minorities. The Iowa Supreme Court’s ruling in April 2009 allowing same-sex marriage followed that tradition. . . . Iowa isn’t so special any more, and that’s fine. The rest of the country is catching up.<sup>118</sup>

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114. PBS NewsHour, *Iowa Court Decision Legalizes Same-Sex Marriage*, PBS (Apr. 3, 2009), [https://www.pbs.org/newshour/arts/social\\_issues-jan-june09-iowasamesex\\_04-03](https://www.pbs.org/newshour/arts/social_issues-jan-june09-iowasamesex_04-03); see, e.g., Richburg, *supra* note 15 (“For most of the country, the unanimous decision this month by the Iowa Supreme Court to legalize same-sex marriage was an unexpected and seemingly random victory for a movement that has long drawn its deepest support from major cities in liberal coastal states.”).

115. Associated Press, *Iowa Supreme Court Legalizes Gay Marriage*, NBC NEWS (Apr. 3, 2009), [http://www.nbcnews.com/id/30027685/ns/politics-more\\_politics/t/iowa-supreme-court-legalizes-gay-marriage/#.W5wWQhIrKcI](http://www.nbcnews.com/id/30027685/ns/politics-more_politics/t/iowa-supreme-court-legalizes-gay-marriage/#.W5wWQhIrKcI).

116. Stephen E. Maizlish, *Bright Radical Star: Black Freedom and White Supremacy on the Hawkeye Frontier*, 53 ANNALS IOWA 159, 159 (1994).

117. *Id.*

118. Editorial, *‘Bright Radical Star’ Shines in Marriage Fight*, DES MOINES REG. (June 26, 2015), <https://www.desmoinesregister.com/story/opinion/editorials/2015/06/26/iowa-star-gay-marriage-supreme-court/29349051/>.

The Iowa Supreme Court has a long and distinguished history of support for civil rights, of which the court and the state are justly proud. The first case ever decided by the Iowa Supreme Court was *In re Ralph*,<sup>119</sup> a fugitive slave case decided in 1839, 17 years before the United States Supreme Court erred in deciding *Dred Scott*.<sup>120</sup> As the *Varnum* opinion noted, in the *In re Ralph* case “we refused to treat a human being as property to enforce a contract for slavery and held our laws must extend equal protection to persons of all races and conditions.”<sup>121</sup> The opinion also noted cases in which “we struck blows to the concept of segregation long before the United States Supreme Court’s decision in *Brown v. Board of Education*”<sup>122</sup> and cited the history of Iowa being the first state to admit women to the practice of law.<sup>123</sup>

The *Varnum* holding is fully consistent with the long and distinguished civil rights history of the Iowa Supreme Court: “In each of those instances, our state approached a fork in the road toward fulfillment of our constitution’s ideals and reaffirmed the ‘absolute equality of all’ persons before the law as ‘the very foundation principle of our government.’”<sup>124</sup> *Varnum* acknowledged that the record of the Iowa Supreme Court on civil rights has not been perfect<sup>125</sup> but gave due credit to the progressive history of the Iowa court:

These cases do, however, reflect this court has, for the most part, been at the forefront in recognizing individuals’ civil rights. The path we have taken as a state has not been by accident, but has been navigated with

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

120. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

121. *Varnum v. Brien*, 763 N.W.2d 862, 877 (Iowa 2009) (citing *In re Ralph*, Morris at 9).

122. *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Coger v. Nw. Union Packet Co.*, 37 Iowa 145 (1873); *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266 (1868)).

123. *Id.* Iowa admitted women in 1869. Ellen A. Martin, *Admission of Women to the Bar*, 1 CHI. L. TIMES 76, 76 (1887). The United States Supreme Court upheld exclusion of women from the practice of law in Illinois in 1872 (*Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872), *abrogated by Reed v. Reed*, 404 U.S. 71 (1971)) and in Virginia in 1894 (*Ex parte Lockwood*, 154 U.S. 116, 118 (1894), *abrogated by Reed v. Reed*, 404 U.S. 71 (1971)).

124. *Varnum*, 763 N.W.2d at 877 (citing *Coger*, 37 Iowa at 153).

125. *Id.* at 877 n.4 (“The cases we have cited are not meant to imply this court has been at the forefront in recognizing civil rights in all areas and at all times.”).

the compass of equality firmly in hand, constructed with a pointer balanced carefully on the pivot of equal protection.<sup>126</sup>

It is impossible to know the role the *Varnum* opinion, and the other opinions finding that a denial of marriage equality violates applicable equal protection guarantees, played in the evolution of public opinion on marriage equality. However, both nationally and in Iowa, the evolution of public opinion on marriage equality has been substantial.

Nationwide, the shift in attitudes on marriage equality has been clear. In 2009, only 37 percent of Americans supported same-sex marriage, while 54 percent opposed it.<sup>127</sup> The increase over the next decade in support for same-sex marriage nationally has been dramatic with such support reported at 62 percent in 2017<sup>128</sup> and 67 percent in 2018.<sup>129</sup>

In Iowa, the shift in attitudes on marriage equality has been equally striking. Thirteen years before *Varnum*, in April of 1996, only 9 percent of Iowans favored making same-sex marriage legal.<sup>130</sup> By 2003, six years before *Varnum*, support for same-sex marriage had risen to 23 percent of Iowans.<sup>131</sup> In 2008, a year before *Varnum*, support for same-sex marriage had risen to 32 percent of Iowans.<sup>132</sup> At the same time, 55 percent of Iowans favored civil unions for same-sex couples, and 48 percent favored amending the Iowa constitution to ban same-sex marriage.<sup>133</sup>

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126. *Id.*

127. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

128. *Id.* (reporting support for same-sex marriage at 62 percent in 2017).

129. *See* Justin McCarthy, *Two in Three Americans Support Same-Sex Marriage*, GALLUP (May 23, 2018) <https://news.gallup.com/poll/234866/two-three-americans-support-sex-marriage.aspx> (reporting support for same-sex marriage at 67 percent in 2018).

130. *Iowa Polls Show Shifting Attitudes on Same-Sex Marriage*, DES MOINES REG., (Apr. 28, 2015), <https://www.desmoinesregister.com/story/news/politics/iowa-poll/2015/04/28/gay-marriage-iowa-poll-supreme-court/26543751/>. In the same study, 41 percent said same-sex marriage should be “outlawed,” while 46 percent said same-sex marriage should be neither condoned nor condemned. *Id.*

131. *Id.* In the same study, 65 percent were opposed to legalization of same-sex marriage. *Id.*

132. *Id.* In the same study, 62 percent were opposed to allowing same-sex marriage. *Id.*

133. *Id.*

In September of 2009, five months after *Varnum*, while presumably still influenced by the passions the opinion occasioned, Iowans were essentially evenly divided on the question of same-sex marriage. It was reported that 41 percent supported a ban on same-sex marriage, while 40 percent opposed such a ban.<sup>134</sup> Notably after *Varnum*, Iowans appear to have decided to move on. Five months after the decision, 92 percent of Iowans reported that “gay marriage has brought no real change to their lives.”<sup>135</sup> A few months later, 62 percent of Iowans opposed the Iowa legislature taking up the issue of same-sex marriage.<sup>136</sup>

In 2011, in the immediate aftermath of the 2010 judicial retention vote, support for marriage equality among Iowans continued to be a minority: 48 percent believed same-sex marriage should be illegal, while only 41 percent believed same-sex marriage should be legal.<sup>137</sup> A February 2011 study suggested Iowans were pretty evenly divided on the *Varnum* ruling: 32 percent favored or strongly favored the decision; 30 percent did not care much; and 36 percent opposed or strongly opposed the decision.<sup>138</sup> Polls in August of 2011,<sup>139</sup> February of 2013,<sup>140</sup> and July of 2013<sup>141</sup> continued to show Iowans as being evenly divided on marriage equality.

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134. *Press Polling*, ONEIOWA, <https://oneiowa.org/press/polling> (last visited Feb. 7, 2019).

135. *Id.*

136. *Iowa Polls Show Shifting Attitudes on Same-Sex Marriage*, *supra* note 130. In the same study, 41 percent said same-sex marriage should be “outlawed,” while 46 percent said same-sex marriage should be neither condoned nor condemned. *Id.*

137. Tom Jensen, *Iowa Miscellany*, PUB. POL’Y POLLING (Apr. 29, 2015), <http://www.publicpolicypolling.com/main/2011/01/iowa-miscellany.html>.

138. *Iowa Polls Show Shifting Attitudes on Same-Sex Marriage*, *supra* note 130. The breakdown illustrated the polarization of the citizenry: 25 percent favored strongly, 6 percent favored, 30 percent did not care much, 6 percent opposed, and 31 percent opposed strongly. *Id.*

139. Tom Jensen, *Iowans Up on Gay Marriage and Branstad*, PUB. POL’Y POLLING (Aug. 26, 2011), <https://www.publicpolicypolling.com/polls/iowans-up-on-gay-marriage-and-branstad/> (showing 46 percent favoring same-sex marriage and 45 percent opposing).

140. Tom Jensen, *Branstad Leads for Re-Election*, PUB. POL’Y POLLING (Feb. 6, 2013), <https://www.publicpolicypolling.com/polls/branstad-leads-for-re-election/> (showing 46 percent favoring same-sex marriage and 43 percent opposing).

141. Tom Jensen, *Iowans Divided, but Power Unlikely to Change Hands*, PUB. POL’Y POLLING (July 10, 2013), <https://www.publicpolicypolling.com/polls/iowans-divided-but-power-unlikely-to-change-hands/> [hereinafter Jensen, *Iowans Divided*] (showing 47 percent favoring same-sex marriage and 44 percent opposing).

In an interesting poll in February of 2014, 28 percent of Iowans reported they were proud that Iowa allowed same-sex couples to marry; 34 percent said they were disappointed; and 36 percent said it did not matter much.<sup>142</sup> The state continued to be split along a partisan divide: while 81 percent of likely Democratic caucus-goers favored allowing same-sex marriage nationwide, only 25 percent of likely Republican caucus-goers favored allowing same-sex marriage nationally.<sup>143</sup> That same month, another poll showed slight movement with 47 percent favoring same-sex marriage and 44 percent opposed.<sup>144</sup> Other polls showed substantial movement. A 2014 poll reported that 57 percent of Iowans favored same-sex marriage with 37 percent opposed.<sup>145</sup> The same poll in 2015 reported that 56 percent of Iowans favored same-sex marriage with 35 percent opposed.<sup>146</sup>

Of course, the national discussion was reset at the end of June 2015 with the Supreme Court's opinion in *Obergefell v. Hodges*.<sup>147</sup> Another poll in July 2015 found that 51 percent of Iowans supported the same-sex marriage with 39 percent opposed.<sup>148</sup> A 2016 poll reported 59 percent of Iowans favored same-sex marriage with 31 percent opposed;<sup>149</sup> the same poll in 2017 reported that 59 percent of Iowans favored same-sex marriage with 33 percent opposed.<sup>150</sup>

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142. *Iowa Polls Show Shifting Attitudes on Same-Sex Marriage*, *supra* note 130.

143. *Id.*

144. Jensen, *Iowans Divided*, *supra* note 141.

145. *American Values Atlas*, PRRI, <http://ava.prii.org/> (last visited Feb. 27, 2019) (select "2014" from the "Year" dropdown menu; follow "LGBT" hyperlink; then select "Same-Sex Marriage" from the "Select Question" dropdown menu; then select "Iowa" from the geographic map).

146. *Id.* (select "2015" from the "Year" dropdown menu; follow "LGBT" hyperlink; then select "Same-Sex Marriage" from the "Select Question" dropdown menu; then select "Iowa" from the geographic map).

147. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

148. Nick E. Weig, *Poll: Most Iowans Support Same-Sex Rights*, CBS2/ Fox28 (July 23, 2015), <https://cbs2iowa.com/news/local/poll-most-iowans-support-same-sex-rights> (results of Quinnipiac Poll).

149. *American Values Atlas*, PRRI, <http://ava.prii.org/> (last visited Feb. 27, 2019) (select "2016" from the "Year" dropdown menu; follow "LGBT" hyperlink; then select "Same-Sex Marriage" from the "Select Question" dropdown menu; then select "Iowa" from the geographic map).

150. *Id.* (select "2017" from the "Year" dropdown menu; follow "LGBT" hyperlink; then select "Same-Sex Marriage" from the "Select Question" dropdown menu; then select "Iowa" from the geographic map).

Another way to judge the movement of public opinion is to look at the treatment of the issue by conservative politicians. Even during the 2010 campaign, there were some indications that Republicans in the legislature did not plan to make same-sex civil marriage a priority in the coming legislative session.<sup>151</sup> And while the issue of marriage equality remains in the Iowa Republican platform,<sup>152</sup> in 2018 the Republican Governor of the state, while running for election, adopted a very different posture: “Iowa Gov. Kim Reynolds says the issue of same-sex marriage is settled and she isn’t obligated to abide by proposals in her state party’s platform that favor limiting marriage to one man and one woman.”<sup>153</sup>

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151. Mike Glover, *GOP Says Jobs Are Legislative Priority*, DES MOINES REG., Nov. 27, 2010, at B1 (“Gay marriage was a key issue on the Nov. 2 ballot, but Republicans say state spending and jobs will be their focus in the upcoming legislative session. Many Republicans campaigned for a constitutional amendment outlawing gay marriage, and voters ousted three Iowa Supreme Court justices who joined a unanimous ruling that legalized same-sex marriage in the state. But GOP leaders said that issue likely will have a minor role in the session.”).

152. *Platform*, REPUBLICAN PARTY IOWA, <https://www.iowagop.org/about/platform/> (adopted June 16, 2018) (noting the 2018 Republican Party of Iowa Platform). The 2018 platform of the Iowa Republican Party refers to marriage equality in interesting ways. The Republican Party of Iowa speaks directly about marriage in the subsection on legislative priorities headed “Life,” not the one headed “Liberty;” the platform declares, “We believe that traditional, two parent (one male and one female), marriage based families are the foundation to a stable, enduring, and healthy civilization. Therefore, public policy must always be pro-family in nature, encouraging marital and family commitment, and supportive of the parental rights and responsibilities.” *Id.* To encourage marital commitment, the platform in the next section declares, “We encourage the repeal of any laws allowing any marriage that is not between one natural man and one natural woman.” *Id.* As *Varnum* and *Obergefell* were actions of courts, not legislatures, the statement as to “the repeal of . . . laws allowing any [same-sex] marriage” seems odd. But see the later platform declaration on the role of courts: “We acknowledge that judges and courts do not have law making authority or the powers to repeal or strike down existing laws. Only legislatures have this power. Judges and courts can only give opinion.” *Id.*

153. William Petroski, *Iowa Gov. Kim Reynolds Says Same-Sex Marriage Issue Settled; Doesn’t Have to Abide by GOP Platform*, DES MOINES REG. (June 12, 2018), <https://www.desmoinesregister.com/story/news/politics/2018/06/12/iowa-kim-reynolds-repeal-gay-same-sex-marriage-republican-party/694882002/>. An unscientific 2017 poll showed steep declines in support for a constitutional amendment defining marriage to exclude same-sex couples among Iowa Republicans (51.2 percent in support, down from 66.5 percent in 2014) and conservatives (62.6 percent in support, down from 81 percent in 2014). Shane Vander Hart, *Our Iowa GOP Poll Shows a Decline in Marriage Amendment Support*, CAFFEINATED THOUGHTS (Aug. 22, 2017), <https://caffeinatedthoughts.com/2017/08/iowa-gop-polls-shows-decline-marriage->

With support for marriage equality approaching two times the opposition, with conservative politicians eschewing the traditional marriage issue, and with all the same-sex marriages that have been performed in Iowa over the last decade, it appears public acceptance of *Varnum* has solidified.<sup>154</sup>

There remain discriminatory practices and references to be worked out to completely expunge the bigotry of marriage discrimination against same-sex couples. For example, four years after *Varnum*, the Iowa Supreme Court required the state to issue a birth certificate naming the married lesbian spouse because the statutory provision that allowed “for only ‘the name of the husband’ to appear on the birth certificate is unconstitutional as applied to a married lesbian couple who has a child born to them during their marriage.”<sup>155</sup> On the symbolic side, it is noted that 31 states—happily not including Iowa—still have state constitutional provisions defining marriage to exclude same-sex couples.<sup>156</sup> These provisions should be removed to complete the progress of *Obergefell*.

The vindication of *Varnum* in terms of the acceptance of marriage equality has come in the lives of everyday Iowans. In this respect, it is helpful to return to the court’s analysis of whether gay and lesbian citizens were similarly situated to straight citizens with respect to marriage. The court’s conclusion was clear:

Plaintiffs are in committed and loving relationships, many raising

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amendment-support/. The same poll reported that opposition to such a constitutional amendment among evangelicals had risen from 8.6 percent in 2014 to 21.8 percent in 2017 and that such an amendment was opposed in 2017 by majorities of mainline Protestants, Catholics, self-identified moderates, and those between 18 and 34. *Id.*

154. Interestingly, there is no official tally of same-sex marriages in Iowa because the official marriage license form makes the designation of both gender and status (“Bride,” “Groom,” and “Spouse”) optional. IOWA DEP’T OF PUB. HEALTH, APPLICATION FOR LICENSE TO MARRY IN IOWA 1 (2016), <https://www.polkcountyiowa.gov/media/322335/marriageappnewsept.pdf>. A 2018 study suggests that Iowa has a same-sex marriage rate of 0.33 percent, which would indicate that there were 1,979 same-sex marriages in Iowa in 2015 with 3,958 Iowans in same-sex marriages. ROBIN FISHER, GEOFF GEE & ADAM LOONEY, TAX POLICY CTR., URBAN INST. & BROOKINGS INST., SAME-SEX MARRIED TAX FILERS AFTER *WINDSOR* AND *OBERGEFELL* 14 (2018), [http://www.brookings.edu/wp-content/uploads/2018/02/es\\_20180228looneysamesexmarriage.pdf](http://www.brookings.edu/wp-content/uploads/2018/02/es_20180228looneysamesexmarriage.pdf). This 0.33 percent figure is comparable to the national figure of 0.48 percent. *Id.*

155. *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013).

156. Allan W. Vestal, *Removing State Constitution Badges of Inferiority*, 22 LEWIS & CLARK L. REV. 1151, 1161–62 (2018).

families, just like heterosexual couples. Moreover, official recognition of their status provides an institutional basis for defining their fundamental relational rights and responsibilities, just as it does for heterosexual couples. Society benefits, for example, from providing same-sex couples a stable framework within which to raise their children and the power to make health care and end-of-life decisions for loved ones, just as it does when that framework is provided for opposite-sex couples.<sup>157</sup>

Over the past decade, friends, colleagues, neighbors, and family members in same-sex marriages have led unremarkable lives, strengthened our communities, and, by doing so, have confirmed the *Varnum* opinion.

### C. *The Effect of Varnum on the Judiciary*

The final measure of *Varnum* is how the judiciary has fared since the 2010 retention vote. On this dimension, our experience over the last 10 years gives us reason to be optimistic but with a cautionary caveat.

There are some indications Iowans had second thoughts in the aftermath of the 2010 retention vote. In a January 2011 poll, taken just weeks after the 2010 judicial retention vote, 54 percent of Iowans opposed impeachment of the *Varnum* justices, while only 36 percent were in favor.<sup>158</sup>

Subsequently, the judicial retention situation started to return to a more normal state. While there have been some fairly ineffectual efforts to thwart retention of *Varnum* justices who have come up for retention since 2010, there has been nothing approaching the situation of 2010.<sup>159</sup> And the

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157. *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009).

158. Brian Wellner, *Mark Cady: Iowa Chief Justice Pledges Openness*, QUAD-CITY TIMES (Jan. 18, 2011), [https://qctimes.com/news/local/iowa-chief-justice-pledges-openness/article\\_aada133c-238a-11e0-ab48-001cc4c002e0.html](https://qctimes.com/news/local/iowa-chief-justice-pledges-openness/article_aada133c-238a-11e0-ab48-001cc4c002e0.html).

159. In 2012, *Varnum* Justice David Wiggins was up for a retention vote. James Q. Lynch, *Wiggins' Retention Rating Lowest in 50 Years for Iowa Supreme Court Justice*, GAZETTE (Oct. 9, 2012), <https://www.thegazette.com/2012/10/09/wiggins-retention-rating-lowest-in-50-years-for-iowa-supreme-court-justice>. Antiretention forces spent less money than that spent in 2010; the turnout was much higher; and the proretention campaign was quite different than it had been in 2010. Todd E. Pettys, *Retention Redux: Iowa 2012*, 14 J. APP. PRAC. & PROCESS 47, 59–60 (2013). In 2016, the antiretention campaign spent “a tiny fraction of the amount spent on similar efforts in past election years.” Grant Rodgers, *Spending on Supreme Court Retention Vote a Fraction of Years Past*, DES MOINES REG. (Oct. 26, 2016), <https://www.desmoinesregister.com/story/news/crime-and-courts/2016/10/26/spending-supreme-court-retention-vote-fraction-years-past/92676572/>. In 2016, one organization, which was prominent in the 2010 effort,

election results suggest a return to normalcy. In 2012, four justices were subject to retention votes. All were retained, although their vote totals can be seen as reflecting some continuing anti-*Varnum* backlash. Three of the justices who were the subject of retention votes in 2012 were the three who replaced the justices not retained in 2010.<sup>160</sup> These replacement justices were retained with an average vote of over 74 percent.<sup>161</sup> In contrast, the one *Varnum* justice up for retention in 2012 received just under 55 percent approval.<sup>162</sup> No justices were up for retention vote in 2014, but in 2016 the situation continued to recover toward normalcy.<sup>163</sup> Three *Varnum* justices were up for retention.<sup>164</sup> Although opponents of *Varnum* called for their nonretention,<sup>165</sup> all three were retained, and they garnered an average vote of almost 65 percent.<sup>166</sup> Among those retained was Mark Cady, by then the

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reported that it was “not devoting ‘extensive staff time and resources’ to this year’s retention election.” *Id.*

160. James Q. Lynch, *Poll: Iowa Justices Likely to Survive November Retention Vote*, SIOUX CITY J. (Sept. 12, 2012), [https://siouxcityjournal.com/news/state-and-regional/iowa/poll-iowa-justices-likely-to-survive-november-retention-vote/article\\_2c7f517d-d6d0-5e1c-9ed9-160b1deaebde.html](https://siouxcityjournal.com/news/state-and-regional/iowa/poll-iowa-justices-likely-to-survive-november-retention-vote/article_2c7f517d-d6d0-5e1c-9ed9-160b1deaebde.html).

161. Justice Edward Mansfield garnered a 74.28 percent favorable vote; Justice Thomas Waterman received 74.75 percent; and Justice Bruce Zager got 74.11 percent. See IOWA SECRETARY OF STATE, 2012 GENERAL ELECTION CANVASS SUMMARY 155, 164, 182 (2012) [hereinafter IOWA SECRETARY OF STATE, 2012], <https://sos.iowa.gov/elections/pdf/2012/general/canvsummary.pdf>.

162. Justice David Wiggins received a 54.54 percent favorable vote in 2012. *See id.* at 173.

163. *See* Grant Rodgers, *Iowa Supreme Court Justices Poised to Win Retention*, DES MOINES REG. (Nov. 8, 2016), <https://www.desmoinesregister.com/story/news/politics/2016/11/09/iowa-supreme-court-justices-poised-win-retention/93087808/>.

164. *Id.*

165. Bob Vander Plaats, Opinion, *Vander Plaats: Vote No on “Constitutionally Challenged” Judges*, DES MOINES REG. (Oct. 21, 2016), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2016/10/21/vander-plaats-vote-no-constitutionally-challenged-judges/92524396/>.

166. Trish Mehaffey, *All Iowa Justices, Judges Retained in Tuesday Voting*, GAZETTE (Nov. 9, 2016), <https://www.thegazette.com/subject/news/government/elections/all-iowa-justices-judges-retained-in-tuesday-voting-20161109>. Justice Brent Appel received a 64.36 percent favorable vote; Justice Daryl Hecht received a 64.08 percent favorable vote; and Chief Justice Mark Cady received a 65.30 percent favorable vote. IOWA SECRETARY OF STATE, 2016 GENERAL ELECTION CANVASS SUMMARY 173, 182, 191 (2016), [hereinafter IOWA SECRETARY OF STATE, 2016], <https://sos.iowa.gov/elections/pdf/2016/general/canvsummary.pdf>. Judge Robert B. Hason, the trial court judge in *Varnum*, was subject to a retention vote in 2016 as well. He received 103,688 votes in favor, 38,943 votes in opposition, for a 72.69 percent favorable vote. *Id.* at 263.

Chief Justice, who authored the opinion in *Varnum*.<sup>167</sup>

The cautionary note as to the retention elections of Iowa Supreme Court justices is not directly tied to *Varnum*. Comparing the average Iowa Supreme Court retention votes pre-2010, in 2010, and post-2010 presents a fairly concerning picture. The average retention vote percentage pre-2010 was 80.6 percent;<sup>168</sup> the average in 2010 was 45.5 percent;<sup>169</sup> and the average post-2010 has been 67.35 percent.<sup>170</sup> From those numbers, it might be thought that the judiciary has not recovered from the *Varnum*-based attack on the courts. But the situation is more nuanced than such a comparison would indicate. This can be seen by dividing the pre-2010 period in to four equivalent groupings. While the overall average favorable vote for the period of 1964 to 2008 was 80.60 percent, the breakdown shows a pattern of steady erosion in favorable votes during that period. From 1964 through 1974 the average for retention was 87.33 percent.<sup>171</sup> From 1976 through 1986 that average declined to 78.65 percent.<sup>172</sup> The period 1988 through 1998 saw

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167. Mehaffey, *supra* note 166; *see Varnum v. Brien*, 763 N.W.2d 862, 862 (Iowa 2009).

168. *See, e.g., Archived Election Results and Statistics, supra* note 51 (supplying access to Iowa election results archives from 1936 to 1999); *Election Results & Statistics, supra* note 51 (supplying access to Iowa election results from 2000 to 2018).

169. IOWA SECRETARY OF STATE'S OFFICE, OFFICIAL RESULTS REPORT, *supra* note 58, at 5, 10, 15.

170. *See, e.g., Election Results & Statistics, supra* note 51.

171. *See, e.g., IOWA SECRETARY OF STATE, 1964, supra* note 51; IOWA SECRETARY OF STATE, CANVASS OF THE VOTE: GENERAL ELECTION NOVEMBER 8, 1966 (1966), <https://sos.iowa.gov/elections/pdf/results/60s/1966gencanv.pdf>; IOWA SECRETARY OF STATE, CANVASS OF THE VOTE: GENERAL ELECTION NOVEMBER 5, 1968 (1968), <https://sos.iowa.gov/elections/pdf/results/60s/1968gencanv.pdf>; IOWA SECRETARY OF STATE, SUMMARY OF OFFICIAL CANVASS OF VOTES CAST IN IOWA GENERAL ELECTION NOVEMBER 3, 1970 (1970), <https://sos.iowa.gov/elections/pdf/results/70s/1970gencanv.pdf>; IOWA SECRETARY OF STATE, CANVASS OF THE VOTE: GENERAL ELECTION NOVEMBER 7, 1972 (1972), <https://sos.iowa.gov/elections/pdf/results/70s/1972gencanv.pdf>; IOWA SECRETARY OF STATE, SUMMARY OF OFFICIAL CANVASS OF VOTES CAST IN IOWA GENERAL ELECTION NOVEMBER 5, 1974 (1974), <https://sos.iowa.gov/elections/pdf/results/70s/1974gencanv.pdf>.

172. *See, e.g., IOWA SECRETARY OF STATE, CANVASS OF THE VOTE: GENERAL ELECTION NOVEMBER 2, 1976 (1976)*, <https://sos.iowa.gov/elections/pdf/results/70s/1976gencanv.pdf>; IOWA SECRETARY OF STATE, CANVASS OF THE VOTE: GENERAL ELECTION NOVEMBER 7, 1978 (1978), <https://sos.iowa.gov/elections/pdf/results/70s/1978gencanv.pdf>; IOWA SECRETARY OF STATE, CANVASS OF THE VOTE: GENERAL ELECTION NOVEMBER 4, 1980 (1980), <https://sos.iowa.gov/elections/pdf/results/80s/1980gencanv.pdf>; IOWA SECRETARY OF STATE, SUMMARY OF OFFICIAL CANVASS OF VOTES CAST IN IOWA GENERAL ELECTION NOV. 2, 1982 (1982), <https://sos.iowa.gov/>

a continuing decline to 77.50 percent.<sup>173</sup> From 2000 through 2008 the decline continued to 75.68 percent.<sup>174</sup> If one assumes that, even without *Varnum*, the favorable retention vote would have continued to decline from the 75.68 percent in 2000 through 2008, one might expect the favorable vote for 2012 through 2016 to be around 70 percent. The actual 67.35 percent seems reasonably close, especially if one credits the somewhat lower percentages of the four *Varnum* justices to lingering opposition to the decision.<sup>175</sup>

We should be cautious about the steady diminution in the favorable vote in the retention elections for supreme court justices. Such an erosion of the base favorable vote makes the members of the court increasingly vulnerable to an inappropriate, retaliatory antiretention campaign such as that following *Varnum*.

The vindication of *Varnum* in terms of the merit system for judicial

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elections/pdf/results/80s/1982gencanv.pdf; IOWA SECRETARY OF STATE, SUMMARY OF OFFICIAL CANVASS OF VOTES CAST IN IOWA GENERAL ELECTION NOVEMBER 6, 1984 (1984), <https://sos.iowa.gov/elections/pdf/results/80s/1984gencanv.pdf>; IOWA SECRETARY OF STATE, GENERAL ELECTION NOVEMBER 4, 1986: CANVASS SUMMARY (1986), <https://sos.iowa.gov/elections/pdf/results/80s/1986gencanv.pdf>.

173. See, e.g., IOWA SECRETARY OF STATE, GENERAL ELECTION NOVEMBER 8, 1988: OFFICIAL CANVASS SUMMARY (1988), <https://sos.iowa.gov/elections/pdf/results/80s/1988gencanv.pdf>; IOWA SECRETARY OF STATE, JUDICIAL CANVASS SUMMARY: 1990 GENERAL ELECTION (1990), <https://sos.iowa.gov/elections/pdf/results/90s/1990genjudcanv.pdf>; IOWA SECRETARY OF STATE, JUDICIAL CANVASS SUMMARY: 1992 GENERAL ELECTION (1992), <https://sos.iowa.gov/elections/pdf/results/90s/1992genjudcanv.pdf>; IOWA SECRETARY OF STATE, JUDICIAL CANVASS SUMMARY: 1994 GENERAL ELECTION (1994), <https://sos.iowa.gov/elections/pdf/results/90s/1994genjudcanv.pdf>; IOWA SECRETARY OF STATE, JUDICIAL CANVASS SUMMARY: 1996 GENERAL ELECTION (1996), <https://sos.iowa.gov/elections/pdf/results/90s/1996gensupctcanv.pdf>; IOWA SECRETARY OF STATE, IOWA GENERAL ELECTION NOVEMBER 3, 1998: CANVASS BY COUNTIES (1998), <https://sos.iowa.gov/elections/pdf/10-8.pdf>.

174. See, e.g., IOWA SECRETARY OF STATE, JUDICIAL CANVASS SUMMARY: 2000 GENERAL ELECTION (2000), <https://sos.iowa.gov/elections/pdf/results/2000s/2000judretention.pdf>; IOWA SECRETARY OF STATE, JUDICIAL CANVASS SUMMARY: 2002 GENERAL ELECTION (2002), <https://sos.iowa.gov/elections/pdf/2002/results/JudicialCanvassSummary.pdf>; IOWA SECRETARY OF STATE, JUDICIAL CANVASS SUMMARY: 2004 GENERAL ELECTION (2004), <https://sos.iowa.gov/elections/pdf/2004/general/JudicialCanvassSummary.pdf>.

175. These would be Wiggins's 54.54 percent in 2012, and Appel's, Cady's, and Hecht's 64.36 percent, 65.30 percent, and 64.08 percent in 2016, respectively. IOWA SECRETARY OF STATE, 2012, *supra* note 161, at 173; IOWA SECRETARY OF STATE, 2016, *supra* note 166, at 173, 191, 182.

appointment and retention has come in the form of a return to essentially normal results in that process. An appropriate symbolic vindication of the *Varnum* court in the retention context came a few years after the retention crisis. In 2012, Chief Justice Marsha Ternus, Justice Michael Streit, and Justice David Baker received John F. Kennedy Profile in Courage Awards for their actions in the retention election.<sup>176</sup> At the time, Ms. Caroline Kennedy Schlossberg observed, “The three judges are interesting and courageous on many levels . . . Like many of the people who get this award, they don’t consider that they are doing anything particularly courageous, they just feel they’re doing what’s right, they’re doing their job.”<sup>177</sup>

## V. CONCLUSION

Looking back after 10 years, the Iowa Supreme Court and the *Varnum* opinion have been vindicated on the dimensions of legal theory, popular opinion, and the effect on the judiciary. Vindication is seen in the *Obergefell* extension of marriage equality to the nation based on an equal protection rationale.<sup>178</sup> Vindication is seen in the increasing popular acceptance of the once-controversial proposition of marriage equality and in a return to normal judicial retention elections.

Such a process was foreseen over two centuries ago, as our federal Constitution was being debated, by Alexander Hamilton in Federalist 78:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.<sup>179</sup>

Following *Varnum*, ill humors and designing men were much in evidence; dangerous innovations in the government were proposed, which attacked judicial independence; and serious oppressions were threatened—all as Hamilton foresaw.

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176. *Iowa Judges Ousted After Legalizing Same-Sex Marriage to Receive Profiles in Courage Award*, *supra* note 55.

177. *Id.*

178. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

179. THE FEDERALIST NO. 78 (Alexander Hamilton).

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But Hamilton also predicted that such errors “speedily give place to better information, and more deliberate reflection.”<sup>180</sup> And that, too, seems to have happened. The political attacks on the courts based on the *Varnum* decision rapidly dissipated. Efforts to defeat *Varnum* justices on subsequent retention votes failed by increasingly large margins. And, although the Iowa Supreme Court continues to do its job and rule on difficult cases, none have occasioned the type of antiretention campaigns seen after that decision.

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Not long ago, I had a discussion about marriage equality with three of my law students. As it happened, all of them grew up in Iowa. Because of *Varnum*, marriage equality has been the reality for all their adult lives. Of course, they know on some level the history of official bigotry that ended with the decision of the Iowa Supreme Court, but only as a fairly distant historical abstraction. I wonder if they fully appreciate the human dimension of *Varnum*.

For many of my generation, who remember friends, colleagues, and family members for whom marriage equality was far too long delayed, *Varnum* seems only a moment ago. For us, the memories of the public celebration of *Varnum* are complemented by recollections of more private moments of grace. When I consider the legacy of *Varnum*, my thoughts go back to January of 2004, almost two years before the Iowa case was even filed, to a memorial service for my good friend Paul Van Booven. Paul was the general counsel of the University of Kentucky when I was the law dean and was one of the best lawyers with whom I have ever worked. Because he was gay, he could not marry his partner. At the memorial, Bob Lawson, a revered former Kentucky law dean, spoke. At the conclusion of his moving and humorous tribute to our friend, Bob recalled that Paul had been prevented from marrying his partner. Bob admitted he had not spoken out about that form of discrimination. He concluded by promising that he would never, ever, be silent about that form of bigotry again. It was an act of heartfelt commitment that deeply moved those in attendance. My sense is that as we approached the middle of the last decade, such moments were happening all across the nation. It is important, I think, that my students hear about such acts of individual resolve, as such episodes of personal courage help explain the meaning of *Varnum*.

When the seven justices of the Iowa Supreme Court issued the *Varnum* opinion in 2009, the nation was in a very different place as to the acceptance

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180. *Id.*

of marriage equality than it is today. We have come very far, very fast. But it should be remembered that 10 years ago it required genuine courage for the members of the court to make their declaration:

We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important government objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. There is no material fact, genuinely in dispute, that can affect this determination.<sup>181</sup>

That they did so, that they did their duty, is praiseworthy. The *Varnum* justices, and the Iowa Supreme Court as an institution, richly deserve the vindication that has come to them over the past decade.

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181. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).