

## What Happened in Iowa:

# Background and Analysis of the Judicial Retention Election

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

Led by American Family Association, the antigay groups included the Family Research Council, the Alliance Defense Fund, the Faith and Freedom Coalition and the National Organization for Marriage. Together they poured more than \$1 million into a campaign, culminating in a 20-city bus tour, urging Iowa voters to kick the justices off the Court. Supporters of the justices amassed only a small fraction of that sum. The justices themselves declined to fund raise or campaign on their own behalf, deeming it unseemly for sitting judges to create an appearance of pandering for votes.

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

### EXTREMIST GROUPS COULDN'T CHANGE THE LAW, SO THEY ATTACKED THE COURTS.

Antigay groups' decision to target Iowa's justices was a spiteful gesture designed to intimidate judges in Iowa and across the nation, and to bully lesbian and gay people into being fearful of bringing discrimination claims to court. However, the loss of the justices on November 2 had no impact on Iowa's substantive law, including the right to marry for gay and lesbian couples. The Court's ruling in *Varnum* is still the law of the land, and the right to marry remains enshrined in the Iowa Constitution. Thousands of same-sex couples have already married in Iowa, and more couples marry every day.

Opponents of equality for gay and lesbian couples chose to attack Iowa's justices precisely because they knew that they were unlikely ever to be able to roll back marriage equality. When the unanimous high court decision in *Varnum* came down in April, 2009, the Iowa Senate Majority Leader, Mike Gronstal, and House Speaker Pat Murphy vowed to oppose calls to amend Iowa's constitution to preclude gay and lesbian couples from marrying. Gronstal and Murphy issued a joint statement heralding the decision as a victory for civil rights and stating

that "When all is said and done, we believe the only lasting question about today's events will be why it took us so long." Governor Chet Culver also opposed amending Iowa's constitution. More than one public opinion poll in Iowa conducted since the decision demonstrates that a majority of Iowans do not want a constitutional amendment, and a [recent poll](#) now demonstrates majority support for lesbian and gay couples' right to marry.

While the election results have diminished the number of political officeholders who support equality, a constitutional amendment still appears unlikely. Amending the Iowa Constitution requires a vote in both chambers of the legislature in two consecutive two-year general assemblies. The earliest this could happen is 2011 and 2013. Then the amendment could go to the public for a vote. However, although incoming Governor Terry Branstad, who assumes the governorship early next year after a 12-year hiatus, supports an amendment, and Pat Murphy has lost his majority in the Iowa House, Mike Gronstal remains the senate majority leader, and in recent days he has stated in no uncertain terms that his commitment to prevent a constitutional amendment remains firm, no matter the pressure.

"The easy political thing for me to do years ago would have been to say, 'Oh, let's let this thing go. It's just too political and too messy,'" [Gronstal said](#). "What's ugly is giving up what you believe in, that everybody has the same rights. Giving up on that? That's ugly."

However, even though the retention vote failed to change the law, the vote nevertheless was "a body blow to the principle of an independent judiciary insulated from popular sentiment," as Iowa's largest newspaper, the *Des Moines Register*, [editorialized on November 4](#). An Iowa judge stands for retention every eight years. Retention elections are usually unremarkable, and intended not to provide a referendum on individual court decisions but to allow voters a say about the overall competence of judges or specific instances of corruption, neither of which was even an issue in this election. Since 1962, when the current system was adopted, no Iowa Supreme Court justice ever has lost a retention election. Attacking justices for participation in one decision, no matter how unpopular, reflects a fundamental misunderstanding of the role of the courts, and constitutes a misuse of the retention process. As the Iowa Courts website [states](#):

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

## THE IOWA SUPREME COURT HAS A HISTORY OF CIVIL RIGHTS LEADERSHIP.

Iowa's judiciary has a long proud history of independence and rectitude. As the *New York Times* [recently noted](#), “From [its first decision in 1839](#), the Iowa Supreme Court demonstrated a willingness to push ahead of public opinion on matters of minority rights, ruling against slavery, school segregation and discrimination decades before the national mood shifted toward racial equality.”

In 1839, when the Iowa Supreme Court comprised only three members, Chief Justice Charles Mason authored the Court's first published opinion in *In re Ralph*, Morris 1 (Iowa Terr. July 1839). A Missouri slave owner had sued for the return of Ralph, a man whom the Missourian had permitted to come to Iowa to work toward the purchase of his freedom. When Ralph failed to come up with sufficient money, the Missourian sent bounty hunters to collect him and sued in Iowa court for his return. Twenty-six years before ratification of the Thirteenth Amendment, the Iowa court rejected the Missourian's claim. Chief Justice Mason wrote, “no man in this territory can be reduced to slavery.” The decision stands in sharp contrast to the infamous *Dred Scott* decision 18 years later, in which the U.S. Supreme Court ruled that even in free states, slaves had no legal claim to freedom.

Thirty years after *In re Ralph*, and nearly a century before *Brown v. Board of Education*, Iowa Justice Chester Cole authored a decision desegregating Iowa's schools, rejecting a “separate but equal” system of public education for African American children. In *Clark v. Board of Directors*, 24 Iowa 266, 1868 WL 145 (1868), Susan B. Clark, a 12-year-old African American girl, brought suit after a public school denied her admission because of her race. Justice Cole acknowledged that “public sentiment” opposed “the intermingling of white and colored children.” Nevertheless, he held that a local school board had no authority to deny African American children the right to equal education on that ground. To bend to discriminatory majoritarian impulses in such a way would “sanction a plain violation of the spirit of our laws,” he stated.

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

The Iowa Supreme Court's protection of minorities extended to religious groups as well. In one of the most important cases decided by the Court in the early years of the 20th century, the Court fought back against state government's attack on the corporate existence of the Amana Society, a religious settlement whose members believed in the communal ownership of property. The Court held that the state's corporate laws were restrained by the Society's members' right to religious freedom: “Each individual must determine for himself what limit he shall place upon his aspirations . . . . Under the blessings of free government, every citizen should be permitted to pursue that mode of life which is dictated by his own conscience.” *State v. Amana Society*, 132 Iowa 304, 319, 109 N.W. 894, 899 (1906).

## IN VARNUM V. BRIEN, THE IOWA SUPREME COURT JUSTICES LIVED UP TO THE COURT'S HISTORY OF COURAGE AND INDEPENDENCE.

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

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

Iowa became the third state, after Massachusetts and Connecticut, in which same-sex couples could marry, followed quickly thereafter by Vermont, New Hampshire, and the District of Columbia. (More than 18,000 couples had validly married in California, as well, before the enactment of Proposition

8 prevented further couples from marrying in that state, and Maine briefly enacted marriage equality through legislation before a referendum prevented it from going into effect.) The decision was the first unanimous high court opinion on marriage for same-sex couples. The Court spoke in plain language, explaining that the six Iowa couples and their children had been denied basic freedoms and security guaranteed to all Iowans on equal terms.

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

“Our responsibility... is to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time.” —Iowa Supreme Court Justice Cady, *Varnum v. Brien*.

### THE THREE UNSEATED IOWA JUSTICES WERE A BIPARTISAN GROUP UNFAIRLY CHARACTERIZED AS “ACTIVIST.”

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

Chief Justice Ternus grew up on a farm in northern Iowa, attending Drake and the University of Iowa. Governor Branstad appointed her to Iowa's Supreme Court in 1993, and her fellow members of the Court elected her as chief justice in 2006. She is the first woman to serve as chief justice of Iowa's highest court. As chief, she made her highest priority the improvement of court oversight for children caught in the court system, chairing the State Childrens' Justice Council. In 2009, Chief Justice of the United States Supreme Court, John Roberts appointed her to the national Judicial Conference Committee on Federal-State

Jurisdiction. Married with three children, she and her family attend St. Francis of Assisi Parish in West Des Moines.

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

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

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

### THE LOSS OF THE IOWA JUSTICES WAS A WAKE-UP CALL TO LGBT AND FAIR-MINDED VOTERS, WHICH CAN NEVER ALLOW SUCH AN ATTACK ON OUR COURTS TO GO UNCHALLENGED.

The retention elections shine light on antigay extremist organizations' agenda to undermine the system of checks and balances that has served us well for over 200 years. Since the election, opponents of equality for gay and lesbian couples have exulted in the ouster of the three justices. “Taking on the judicial class,” Newt Gingrich [reportedly said](#) to supporters, and telling judges that “we are not going to tolerate enforced secularization of our country,” is “one of the most important things we can engage in.” David Barton, a Texas antigay activist, crowed, “This is what we call hanging a bloody scalp on the gallery rail.” The National Organization for Marriage has already said that it intends to target Iowa retention elections in 2012 and 2016.

The targeting of the Iowa justices was not just an attack on three skilled jurists, or on the outcome of one case—it was an attack on the constitutional equality guarantee itself. If the right to equal protection means anything, it means that courts are empowered to strike down a piece of legislation—regardless of whether it enjoys majority support—when that legislation

targets a minority for unequal treatment. Indeed, it is the absolute obligation of a court to do so.

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

As retired United States Supreme Court Justice Sandra Day O'Connor has noted, "a judge who is forced to weigh what is popular rather than focusing solely on what the law demands" loses "independence and impartiality." If an embattled judiciary were to lose its ability to protect our laws and constitution with impartiality, that would be a tragic loss for our country.

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

Nevertheless, we have reason to be hopeful. Numerous Iowans expressed shock and heartbreak upon learning of the justices' defeat. The *Des Moines Register's* editorial board [condemned the retention vote](#) as a "black mark on Iowa history." Many equality advocates had been complacent about the justices' retention prospects and underestimated the impact of a million dollar campaign waged from out of state. (In a previous election in 2006, when Iowa antigay activists had targeted a trial judge up for retention in a conservative county because the judge had granted two lesbian women's request for a dissolution from their civil union, the judge had survived with little difficulty.) *Cedar Rapids Gazette* columnist Todd Dorman [wrote](#) on November 3 that history may "recall this as the moment when fair-minded Iowans who support equality for all under the law finally realized that they've got a fight on their hands. And they decided to do something about it." He also cautioned against underestimating

the level of support in Iowa for marriage rights for same-sex couples, as voters' personal investment in three judges keeping their jobs cannot be equated with voters' commitment to the continued right to marry for same-sex couples and the guarantee of equality precious to all Iowans. As the *Dubuque Telegraph Herald* [noted](#), "the number of Iowans who actually wanted the three justices removed because of the same-sex marriage ruling might be somewhat overstated [by the results of the retention election]. In a normal year when judges and justices are on the ballot, some 30 percent typically vote 'no,' even when there are no apparent issues."

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

Here at Lambda Legal, it continues to be our responsibility to make our case for equality, not just before judges, but in the court of public opinion. We cannot allow bullies to intimidate us. We must continue to bring cases on behalf of people who have been wronged, and we have faith that the courts remain a refuge for lesbian, gay, bisexual, transgender people, and people with HIV who have suffered discrimination and been deprived basic freedoms. But we must do more than win in court; we must win hearts and minds and educate the public on how our constitutional democracy is supposed to work. The members of the *Varnum* Court took an oath to defend the Iowa Constitution and earned their place in history when they lived up to it with integrity. It's up to the rest of us to vindicate them by creating a world in which equality is so embraced and celebrated that the portraits of Chief Justice Ternus, Justice Streit, and Justice Baker hang proudly next to Justice Mason's and Justice Cole's in the Court's rotunda—in a pantheon of Iowa heroes who did the right thing before much of the rest of the country was ready. We have some work to do to get to that day. But we firmly believe we'll see it.

*Show your appreciation for the Iowa Supreme Court justices and all judges who stand up for equality. [Go to lambdalegal.org](http://lambdalegal.org) and [sign our pledge to support fair judges and fair courts.](#)*