Do Americans Still Value an Independent Judiciary?

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In the November 2010 retention elections in Iowa, out-of-state special interest groups funded a vigorous campaign to oust three justices of the Iowa Supreme Court who had joined in the court's unanimous decision declaring Iowa's defense of marriage act a violation of the equality clause of the Iowa Constitution. The avowed purpose of these groups was to send a message across the country that judges ignore the will of the people at their peril. Intimidation of judges and retaliation against judges who make politically unpopular decisions undermine our Founding Fathers' vision of a society governed by the rule of law. "Judicial independence is the vital mechanism that empowers judges to make decisions that may be unpopular but nonetheless correct. ... And it gives life to the promise that the Rule of Law safeguards the minority from the tyranny of the majority."[1]

Alexander Hamilton said in The Federalist No. 78 that, "[t]he complete independence of the courts of justice" was "essential" in a constitution that limited legislative authority.[2] Without the power of the courts to declare acts of the legislature contrary to the constitution, he suggested, the "rights [and] privileges [reserved to the people] would amount to nothing."[3] Hamilton also recognized that an independent judiciary was necessary to guard the rights of individuals from the will of the majority, who may wish to oppress a minority group in a manner incompatible with a constitutional provision.[4] As he expressed in The Federalist No. 51: "It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part."[5] "[I]t is easy to see," Hamilton observed, "that it would require an uncommon portion of fortitude in the Judges to do their duty as faithful guardians of the Constitution, where Legislative invasions of it have been instigated by the major voice of the community."[6]

These underpinnings of judicial independence were recently tested in Iowa. In April 2009, the Iowa Supreme Court issued a decision in *Varnum v. Brien* unanimously declaring Iowa's defense of marriage act violated the equality rights of same-sex couples under the Iowa Constitution.[7] In the next general election, opponents of this decision convinced Iowa voters not to retain three justices of the Iowa Supreme Court based on the justices' role in this decision. Since the election, members of the Iowa legislature have called for the impeachment of the remaining four justices, citing the justices' participation in the *Varnum* decision as the basis for their removal from the court.[8] The events in Iowa suggest Americans may not value the role an independent judiciary plays in protecting the constitutional rights of all citizens.[9]

The Iowa experience presents the opportunity to reflect on whether Americans still share our Founding Fathers' commitment to the values that shaped our national and state constitutions: The civil rights reserved to all members of our nation, as set forth in the constitution, must be protected from infringement by the government and by the majority, and the most reliable way to ensure these rights are preserved is to create and support an independent judiciary. Before this issue is addressed, it is helpful first to discuss the role of courts in protecting constitutional rights, the scope of the *Varnum* decision and this decision's catalytic effect on the 2010 retention elections in Iowa.

Role of the Courts

America's system of justice is based on the rule of law. The rule of law is a process of governing by laws that are applied fairly and uniformly to all people. Because the same rules are applied in the same manner to everyone, the rule of law protects the civil, political, economic and social rights of all citizens, not just the rights of the most vociferous, the most organized, the most popular or the most powerful. Applying the rule of law is the sum and substance of the work of the courts.

The people of Iowa created a government under the rule of law when they adopted the Iowa Constitution, which sets forth the fundamental rules

and principles that govern Iowans and their government. In fact, the Iowa Constitution expressly states: "This constitution shall be the supreme law of the land," and it goes on to say, "any law inconsistent therewith, shall be void."

When a person believes a law adopted by the legislature violates the person's constitutional rights, he or she may challenge the law in court. Upon being called upon to do so, the courts review the law and decide whether it complies with the constitution. Judicial review of the constitutionality of legislative acts is one of the checks and balances in our form of government and has existed in America for more than 200 years.[10]

The duty of courts to determine the constitutionality of statutes does not mean the judicial power is superior to legislative power. Rather, when the will of the legislature expressed in its statutes stands in opposition to the will of the people as expressed in their constitution, the courts must prefer the constitution over the statutes. Thus, regardless of whether a particular result will be popular, courts must, under all circumstances, protect the supremacy of the constitution by declaring an unconstitutional statute void. Only by protecting the supremacy of the constitution can the people be assured the freedoms and rights set out in the constitution will be preserved.

If the majority disagrees with a court ruling interpreting the constitution, there is a process for changing constitutional interpretations the people do not like. That process is to amend the constitution to override the court's decision. In this way, the people always have the last say about the content and meaning of the constitution. As Alexander Hamilton pointed out, however, until the people have amended the constitution, "it is binding upon themselves collectively, as well as individually; and no presumption or even knowledge of [the people's] sentiments, can warrant their representatives in a departure from it."[11]

The *Varnum* Decision

Courts exist to resolve disputes, including disputes between citizens and their government. In *Varnum*, the dispute was between six same-sex couples and a county recorder, the government official responsible for issuing licenses to marry. These couples applied for marriage licenses but were told by the county recorder that a state law prohibited him from issuing licenses to them. The state law upon which the county recorder relied provided that, "[o]nly a marriage between a male and a female is valid."[12] After the county recorder denied the marriage license applications of these couples, they filed a lawsuit asking that the court order the county recorder to issue the requested licenses. The couples claimed the law upon which the county recorder relied was unconstitutional and unenforceable.

The law at issue in the *Varnum* decision placed limitations on who was eligible to enter into a civil contract created by the legislature. The statute creating this contract provided: "Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts, except as herein otherwise provided."[13] Thus, the Iowa Supreme Court was asked to consider a law governing a legal contract, not the religious institution of marriage. The court pointed out this distinction in its opinion:

> "Our constitution does not permit any branch of government to resolve ... religious debates and entrusts to courts the task of ensuring government avoids them. The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares: 'Marriage is a civil contract' and then regulates that civil contract. 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 and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.
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> As a result, civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals."

The constitutional standard applied in *Varnum* was the equality clause Iowans included in their constitution when Iowa became a state. It provides in relevant part: "[T]he 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."[14] When the court determined the legislature's restriction of the privileges[15] that flow from civil marriage to a limited class of citizens violated the plaintiffs' equality rights, the court performed its constitutional duty by declaring the statute void. Then, as is customary when a party proves its claim, the court granted

the plaintiffs the relief they sought—an order that the county recorder could not rely on the unconstitutional restriction on the individuals who could obtain a marriage license and was, therefore, obligated to issue licenses to the six same-sex couples who brought the lawsuit.

The Retention Election

In the 2010 general election that followed the 2009 *Varnum* decision, three members of the Iowa Supreme Court were on the ballot for retention. In retention elections, a judge runs unopposed and voters simply choose whether to retain the judge for another term.[16] Politics had played no role in prior retention elections, and Iowa judges had not found it necessary to form campaign committees, to engage in fundraising or to campaign in any manner.

The 2010 retention elections were very different. Iowa For Freedom, a project of Mississippi-based AFA Action Inc., targeted the justices on the ballot. It claimed, "the Iowa Supreme Court clearly stepped out of its constitutional boundaries and imposed its will on the people of Iowa ... by declaring Iowa to be a 'same-sex' marriage state."[17] The avowed purpose of ousting the three justices was to send a message "in Iowa and across the country [that] [t]he ruling class ignores the people at its peril."[18] Iowa For Freedom and its campaign were heavily funded by out-of-state special interest groups, which together significantly outspent groups supporting the justices on the retention ballot.[19] In the end, the three justices were not retained because a majority of Iowans voting in the election were persuaded the court had exceeded its proper role.

Threat to an Independent Judiciary

An Iowa statute requires judges to take an oath before assuming their position. In this oath, judges promise to "support the Constitution of the United States and the Constitution of the State of Iowa," and, "without fear, favor, affection, or hope of reward, [and] to the best of their knowledge and ability, administer justice according to the law, equally to the rich and the poor."[20] Following this oath sometimes leads to unpopular decisions, as demonstrated by the *Varnum* decision and its aftermath.

Dealing with controversial issues has always been part of being a judge, and, certainly, public debate about the merits of court decisions is a healthy aspect of a democratic society. But what message is sent when a retention election is used as a referendum on a particular court decision? Clearly, as noted above, the message intended in Iowa was that courts should rule in accordance with public opinion.[21] In fact, opponents of the *Varnum* decision justified their attack on the judiciary by arguing justices must be held accountable to the people when the court makes a decision the people do not like. A Minnesota judge responded to similar contentions with this observation:

> "It might sound good to have judges 'accountable to the people.' But which people? Should judges be accountable to those who shout the loudest or make the most threats? Should judges be accountable to the majority? If so, what happens to the rights of the minority? And what happens to a judge's responsibility to uphold the law and the Constitution? When a judge starts to worry about who [the judge] will please or displease with a ruling, then we cease to be a government based on law."[22]

In view of what happened in Iowa, we must ask ourselves whether we still believe in the rule of law and an impartial judiciary. We will have neither if we expect judges to rule on the basis of public opinion or the views of special interest groups. Of course, applying the rule of law in a fair and impartial manner does not mean everyone will agree with court decisions or that courts are immune from error. But it does mean courts are accountable to the law and, above all else, accountable to the people's constitution, and in this way, courts are always accountable to the people.

Conclusion

At the end of the day, the debate about controversial court decisions and the judges who make them boils down to a simple question: What kind of court system do Americans want? A court system that issues rulings based upon public opinion polls, campaign contributions and political intimidation, or a court system that issues impartial rulings based upon the rule of law?

If we as Americans value the rule of law and reject a society controlled by the tyranny of the majority, we must act as if we do. Efforts to intimidate the judiciary and to turn judges into politicians in robes undermine fair and impartial justice and will, over time, destroy the ability and willingness of judges "to do their duty as faithful guardians of the Constitution." Only through an unwavering commitment to an independent judiciary can we assure future generations that they too will enjoy a society governed by the rule of law.

Notes

[1] Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 Denv. U. L. Rev. 1, 1 (2008), available at *http://law.du.edu/documents/denver-university-law-review/v86_i1_oconnor.pdf*.

[2] The Federalist No. 78, at 426 (Alexander Hamilton) (E.H. Scott ed., 2002).

[3] *Ibid*.

[4] *Ibid*. at 428–29.

[5] The Federalist No. 51 (Alexander Hamilton), *supra* note 2, at 288.

[6] The Federalist No. 78 (Alexander Hamilton), *supra* note 2, at 429.

[7] *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) ("Iowa Code section 595.2 denies gay and lesbian people the equal protection of the law promised by the Iowa Constitution."), available at *http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20090403/07-1499.pdf*.

[8] Jason Clayworth, Blog, "Judges Did Commit Malfeasance and Should Be Impeached, Rep Says," *Des Moines Register*, Jan. 17, 2011, available at *http://blogs.desmoinesregister.com/dmr/index.php/2011/01/17/state-rep-judges-did-commit-malfeasance-and-should-be-impeached/*.

[9] This suggestion is not limited to the Iowans who voted in the 2010 retention election. As noted later in this article, nearly all the funding for the anti-retention effort came from outside of Iowa. In addition, several national politicians visited Iowa in the months leading up to the election and expressed their support for the campaign to oust the Iowa justices for the justices' role in the *Varnum* decision.

[10] "Checks and balances" is a "[s]ystem of overlapping the powers of the Legislative, Executive, and Judicial branches to permit each branch to check the actions of the others." Vocabulary for *Marbury v. Madison*, at 1, *http://www.uscourts.gov/EducationalResources/ConstitutionResources/LegalLandmarks/VocabularyForMarburyVMadison.aspx*. The United States Supreme Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803), established that the Supreme Court has the power to determine the constitutionality of the acts of the other two branches of government.

[11] The Federalist No. 78 (Alexander Hamilton), *supra* note 2, at 429.

[12] Iowa Code § 595.2(1) (2009).

[13] Iowa Code § 595.1A (2009).

[14] Iowa Const. art. I, § 6.

[15] See *Varnum*, 763 N.W.2d at 902-03 n.28 (noting the plaintiffs identified over two hundred Iowa statutes creating rights or privileges affected by civil-marriage status).

[16] Iowa Const. art. V, § 17 (adopted 1962). Depending on the year of appointment, there may be one or more justices on the ballot at any general election; some years there are none.

[17] Bob Vander Plaats, *All Power is Inherent in the People* (October 20, 2010), *http://iowaforfreedom.com/news/all_power_is_inherent_in_the_people-1/*. Mr. Vander Plaats was the state chair of Iowa For Freedom.

[18] Bob Vander Plaats, *Lawless Judges Deserve to Lose Jobs* (August 26, 2010), *http://iowaforfreedom.com/news/lawless_judges_deserve_to_lose_jobs_/*; see also Andy Kopsa, "Anti-Retention Leaders: Iowa Just the Start of National Gay Marriage Battle," *Iowa Independent* (Oct. 29, 2010), *http://iowaindependent.com/46519/anti-retention-leaders-iowa-just-the-start-of-gay-marriage-battle*.

[19] See Andy Kopsa, "National Anti-Gay Groups Unite to Target Iowa Judges," *Iowa Independent* (Oct. 21, 2010) (listing Mississippi-based American Family Association, Washington, D.C.-based Family Research Council, Arizona-based Alliance Defense Fund, Georgia-based Faith & Freedom Coalition and New Jersey-based National Organization for Marriage as providing "direct funding or in-kind legal and promotional support … to oust the justices"),*http://iowaindependent.com/45701/national-anti-gay-groups-unite-to-target-iowa-judges*; see also Iowa Ethics and Campaign Disclosure Board Web Reporting System, available at *https://webapp.iecdb.iowa.gov/PublicView/?d=IndepExpend%2f2010*.

[20] Iowa Code § 63.6 (2009). Similarly, Iowa's rules governing judges' conduct state: "A judge shall not be swayed by public clamor or fear of criticism." Iowa Code of Judicial Conduct r. 51:2.4(A).

[21] Of course, if public opinion were the standard by which judges should make decisions, the United States Supreme Court's 1954 decision in *Brown v. Board of Education* would probably have had a different outcome. See *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (declaring segregation in public schools unconstitutional). Retired United States Supreme Court Justice Sandra Day O'Connor has observed that this "unpopular decision" "provoked a firestorm of criticism in much of the country." O'Connor, *supra* note 1, at 3. She has also called the *Brown* decision "an exercise of accountability to the Rule of Law over the popular will." *Id*.

[22] George Harrelson, *Marshall Independent* (July 8–9, 2006). Justice O'Connor has expressed a similar opinion: "The law sometimes demands unpopular outcomes, and a judge who is forced to weigh what is popular rather than focusing solely on what the law demands has lost some independence and impartiality." Elaine E. Bucklo and Jeffrey Cole, *Thoughts on Safeguarding Judicial Independence: An Interview with Justice Sandra Day O'Connor*, 35 Litig. 6, 7 (2009).

About the Author

Marsha K. Ternus was appointed from private law practice to the Iowa Supreme Court in 1993 and was selected by her peers to serve as the court's first woman chief justice in 2006. After serving more than seventeen years on the court, her term expired on December 31, 2010, after voters failed to retain her and two of her colleagues in the 2010 retention election. Chief Justice Ternus has returned to the private practice of law.