

# Judicially Activated: Electoral Response to Same-sex Marriage in Iowa

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## Abstract

This paper employs difference-in-differences analyses to estimate the effect of the Iowa Supreme Court's legalization of same-sex marriage in *Varnum v. Brien* on Iowa's 2010 and 2012 state supreme court retention elections. The findings show that *Varnum* did lead to the justices defeat, and that it increased participation in the 2010 **and** 2012 supreme court elections. This paper makes an important contribution to our understanding of voter participation in uncontested nonpartisan judicial elections, which are usually low interest events. The findings show that, counter to conventional wisdom, voters can and do hold judges accountable in retention elections, when they feel that judicial behavior warrants checking. Voters' judicial monitoring may extend beyond the immediate aftermath of a salient decision, suggesting that the effects of these decisions may not be short lived.

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## Introduction

In 2009 the Iowa Supreme Court legalized same-sex marriage with its *Varnum v. Brien* decision, holding that the limitation of marriage to opposite-sex couples is a violation of the state Constitution's equal protection clause (Cain 2009). In 2010 three of the justices involved in the unanimous decision ran in the uncontested nonpartisan statewide judicial retention election, and Iowans did not retain any of them. This was the first time Iowa voters had voted against the retention of a state supreme court justice,<sup>1</sup> and only the sixth time (since 1964) voters in any state with a similarly appointed and retained supreme court had failed to retain at least one of their justices (Aspin 2007, n. 12). Did *Varnum* affect Iowans' participation in the 2010 election, and by how much? Did the decision, in fact, lead to the justices' defeat? And, what can *Varnum* and Iowa's 2010 judicial retention election teach us about judicial accountability?

At least as early as Dahl's observation that politics amounts to little more than "a side show in the great circus of life" (Dahl 1961, pp. 305), political scientists have documented the low levels of attention to politics among U.S. citizens (Franklin 1996; Verba, Schlozman and Brady 1995; Teixeira 1992; Converse 1964). Voters remain "rationally ignorant" (Downs 1957, pp. 1), and this is even more apparent in low salience, nonpartisan elections (Gerber et al. 2001; Donovan, Bowler and McCuan 2001; Jacob 2001; Donovan, Bowler and McCuan 2001; Cronin, Carver and Fernie 1989; Everson 1981). Competition and campaigning prompt participation in nonpartisan and partisan judicial elections (Hall 2014; Bonneau and Hall 2009), but participation in uncontested state supreme court judicial retention elections remains low and fairly stable over time

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<sup>1</sup>Since adopting merit selection in 1962 and prior to the results of the 2010 state supreme court retention election, only four lower-court judges had failed to receive enough votes for retention in Iowa (Clopton and Peters 2013, p. 321).

within the states that have adopted this judicial selection method for their court of last resort.

Scholars generally accept that retention elections do not mobilize voter participation in the selection of judges at the same levels as partisan and non partisan elections, and that they may even discourage turnout in judicial races (Bonneau and Hall 2009; Dubois 2014; Hall 2001). Judges in states that follow the Missouri Plan are appointed once, run in a retention election within roughly one year of appointment, and then must run in a retention election at the end of each term (term lengths vary from six to twelve years). High levels of ballot roll-off in these races and low instances of negative votes, essentially means that many of these judges are appointed for life and free from effective accountability measures on the part of the appointer or the voters (Bonneau and Hall 2009).

However, perhaps in the absence of competition among judicial candidates, voters pay attention to judicial retention elections in those rare instances when courts diverge from voter preferences and voters are aware of that divergence. In other words, judges elected in this type of system are not as unaccountable to voters as they are generally thought to be. Rather, voters hold them accountable when “necessary.” The Iowa Supreme Court’s 2009 decision legalizing same-sex marriage represents a sharp divergence from public opinion in the state at the time. I argue that Iowans’ response to *Varnum* is an example of the sort of selective accountability that voters impose on the judiciary, and my analyses represent an investigation into how exogenous shocks can transform low salience elections and expose the judiciary to increased monitoring from citizens through their votes.

In addition to the state supreme court retention election, Iowa’s 2010 election consisted of other contentious races, including the gubernatorial election, and intense

campaigning all around. Then Iowa Secretary of State, Michael Mauro, commented that Iowa had “the highest number of total voters participating in a midterm election in state history” (Clayworth 2010*b*). The Des Moines Register and Sioux City Journal referenced Iowa’s record high turnout that year (Clayworth 2010*b*; 2010 is Record for Voter Turnout in Iowa 2010). One Des Moines Register article even stated that “state officials from both parties” credited the state supreme court retention election as “a key factor behind the boost in turnout, especially benefiting Republicans” (Clayworth 2010*a*).

General election turnout (participation in the top ballot race) increased from 48.1 percent in 2006 (the previous midterm election) to 49.9 percent in 2010 (McDonald 2014). Even if this increase in turnout is significant, we cannot automatically attribute it to the *Varnum* decision. There are countless crucial factors in any election, which makes it difficult to identify the specific effect of a judicial retention election on overall turnout, if one does exist. However, the legalization of same-sex marriage was highly controversial and the removal of three Iowa Supreme Court justices was unprecedented. It is at least worth exploring whether the 2010 judicial retention election increased overall general election turnout.

It is more likely however, that *Varnum* prompted Iowans to hold the judges accountable for their decision, and that the decision’s effects— including three judges’ failure to achieve retention— are identifiable in the outcome of the 2010 supreme court judicial retention election. This is what scholars would expect and what most media sources suggested following the election. Newspapers referred to the judges’ removal as voters successfully sending a “signal” to the bench, targeting judicial overreach, and essentially holding judges accountable for their actions even though the election’s outcome could not change the *Varnum* decision (Sulzberger 2010*b*; *a*).

The short list of state supreme court justices facing nonpartisan retention elections

who failed to be retained<sup>2</sup> includes: one Alaska justice (1964), three California justices (1986), one Wyoming justice (1992), one Tennessee justice (1996), and one Nebraska justice (1996). Legal scholars have linked these retention losses to voters' reactions to justices' decisions on criminal justice law issues, including death penalty rulings and the definition of second degree murder; in many cases scholars credit special interest groups' efforts for mobilizing voters (Clopton and Peters 2013; Latzer 1996). However, this research is often either descriptive or concerned with understanding which voters shaped the electoral outcome rather than estimating the outcome itself.

Given the circumstances surrounding previous failed state supreme court retention bids, it is easy to imagine that a decision about an issue so divisive as same-sex marriage was at the time might have substantial electoral consequences. A key distinction between *Varnum* and previous rulings presumed to have prevented state supreme court justice retention, is that *Varnum* was a constitutional rather than criminal decision. Prior to *Varnum*, public opinion polling showed that 25 percent of Iowans supported same sex marriage (Kreitzer, Hamilton and Tolbert 2014), which leaves three quarters of the population that could potentially seek revenge in the subsequent judicial retention election. Nor did all state legislators support the decision, as evidenced by the legislative battle over the constitution that followed (Clopton and Peters 2013).

The legalization of same-sex marriage in Iowa provides a unique opportunity to analyze voters' participatory responses to salient court decisions, and to establish more than anecdotal evidence of this response.<sup>3</sup> It is incredibly difficult to isolate the effect of one factor on an election when there are so many to consider. To establish an effect, we

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<sup>2</sup>Since 1964.

<sup>3</sup>Clopton and Peters (2013) make a significant contribution to this goal with a county-level analysis of the 2010 Iowa Supreme Court retention election identifying the county-level population characteristics that were most influential in removing the three justices from their seats.

would have to compare the election's actual outcome to the outcome we would observe had the event not occurred. The analyses included here attempt to do just that by using a series of difference-in-differences analyses to investigate the outcome of the 2010 Iowa election. I find that contrary to some media reports and state officials' speculation, 2010 general election turnout in Iowa was not higher than should have been expected. Turnout in the judicial retention election, on the other hand, was especially high, and I provide convincing evidence that *Varnum* led to a 13 percentage point increase in retention election participation; this increased participation persisted in the 2012 election.<sup>4</sup> Rather than increasing turnout overall, *Varnum* caused voters to vote further down the ballot. There was also a 25 percentage point increase in retention election voters voting against retention in 2010 that I attribute to *Varnum*.<sup>5</sup>

Because participation in retention elections is typically lower than that in both partisan and nonpartisan competitive judicial elections, scholars argue that they lack the potential for judicial accountability (Bonneau and Hall 2009; Hall 2007; Schaffner, Streb and Wright 2001). This argument is generally true, but we can learn much about retention elections specifically and judicial elections more broadly from cases like Iowa in 2010. This paper tackles issues at the heart of the accountability versus independence conundrum in judicial politics and the findings make an important contribution to scholars' understanding of this conundrum, especially in states that have adopted the Missouri Plan. First, the findings show that citizens will participate in retention elections and hold judges accountable when they feel that judicial behavior warrants checking. Second, the findings suggest that increased efforts to hold the judiciary accountable through voter participation may persist for at least some time after a very salient decision while voters

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<sup>4</sup>There is also evidence that suggests that *Varnum's* effect may have extended to Iowa's court of appeals as well.

<sup>5</sup>This finding is in line with other media reports on the election's results (Sulzberger 2010a).

continue to monitor the courts, potentially warning judges against future divergences from voter preferences. Finally, this paper highlights some of the circumstances under which the methods applied can be successfully used to explain voters' behavior in state supreme court retention elections.

In the section that follows, I briefly review the scholarship to which this project contributes. Next, I present the data and evaluate evaluate media claims of record high turnout in Iowa in 2010. I then turn to analyses of the changes in "no" votes and voter participation in the supreme court judicial retention races from 2008 to 2010 when compared to average and weighted values in a group of similar states during the same period. I conclude with a discussion of the findings and suggestions for future research.

## Review of Relevant Literature

The analyses presented in this paper investigate the electoral consequences of voter perceived judicial overreach, especially in the nonpartisan uncontested retention election context. The findings shed light on whether and to what extent voters in Missouri Plan states can and do hold supreme court judges accountable for their behavior. Carmines and Stimson's argument that the regional- and race-motivated changes that the Democratic and Republican parties experienced in the mid 20th century gave race a long-lasting primary position among national political issues lends support to the concept that *Varnum* could have had a significant mobilizing capacity in 2010 (Carmines and Stimson 1989). We see a similar trajectory for same-sex marriage as Carmines and Stimson (1989) charted for race. Legalized same-sex marriage spread across the United States throughout the 2000s receiving regular attention from the media, President, and Congress; it firmly cemented its place on the national agenda prior to the Supreme Court establishing its

national legality in 2015.

In addition to piquing voter interest through issue salience, *Varnum* is also an important example of a court decision straying from public opinion. It appears to reflect judicial independence rather than the Constrained Court view and suggests that the Iowa justices decided to improve democracy through the granting of rights, despite public opinion (Epp 1998; Rosenberg 2008); and is especially interesting since, as Canes-Wrone, Clark and Park (2012) have argued, justices who are subject to nonpartisan retention elections experience pressure to cater to public opinion on “hot button issues.” Only 25 percent of Iowans were in favor of same-sex marriage prior to *Varnum*, leaving a large portion of the population that was presumably displeased with the justices’ unanimous decision on election day in 2010.<sup>6</sup>

A state supreme court electoral outcome like the one in Iowa’s 2010 election grabs our attention for two reasons: the general lack of knowledge about and interest in the courts among U.S. citizens and the understanding that Missouri Plan state judges operate under weaker accountability structures than their peers who are appointed or elected in competitive races (Bonneau and Hall 2009). State judicial elections have historically been low-visibility races (Caldeira and McGuire 2005, p. 266), but this has been changing since Supreme Court decisions in 2002 and 2005 that made it legal for judicial candidates to make policy pronouncements, introducing a “new style” of much more visible judicial campaigns (Gibson 2008). Despite the changes to permissible campaigning in judicial elections, scholars have identified the suppressive forces of nonpartisan and retention styles of election on participation when compared with traditional competitive elections (e.g. Hall 2007; Schaffner, Streb and Wright 2001), meaning that large increases in uncontested retention election turnout or votes against judges up for retention remain rare

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<sup>6</sup>According to The Hawkeye Poll (see Kreitzer, Hamilton and Tolbert 2014).



and fascinating events.

Most of the factors driving participation in judicial races are associated with partisan and competitive elections, and it is through their votes that citizens can exert accountability over state supreme court justices in these types of elections (Bonneau and Hall 2009). Most appointed judges, on the other hand, are accountable to the executive or legislative branch for reappointment (Bonneau and Hall 2009).<sup>7</sup> In states that follow the Missouri plan, after an initial appointment, judges keep their seats by getting more “yes” than “no” votes in retention elections after their first year and then at the end of each term. Rolloff in retention elections is the highest of all types of judicial elections and the proportion of positive votes is among the highest of all types of elections, with relatively little variation (Bonneau and Hall 2009; Hall 2007; Schaffner, Streb and Wright 2001). As Bonneau and Hall (2009) point out, following their initial appointment, these judges are independent from the nominating branch, and low-levels of voter participation in retention elections insulates them from the level of voter monitoring their counterparts who must participate in competitive elections face.

This paper paints a slightly different picture of state supreme court justice dependence on the electorate in Missouri Plan states. Iowa in 2010 and the other few instances of justices losing retention elections are the starkest examples of voters holding judges accountable in retention elections. The analyses included in this paper show that Iowans cast their ballots in response to judicial behavior in the preceding year, similar to voters in California and Wyoming in the 1980s and 1990s. These electoral outcomes suggest that the substance of judicial rulings is a driver of increased participation and negative votes in retention elections rather than competition and party affiliation. Of course campaigns for or against judges in Missouri Plan states are never devoid of partisan cues

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<sup>7</sup>Only Massachusetts, New Jersey, and Rhode Island appoint supreme court justices for life.

(these were present in Iowa), but voters cannot use party affiliation as a guide in the ballot box. State supreme court justice removal in retention elections is not the norm, but the analyses conducted for this paper suggest that voter monitoring of supreme court judges in Missouri Plan states occurs when voters feel that judicial behavior deviates from an acceptable equilibrium. In the following sections I discuss the post-*Varnum* electoral climate, present the data and analyses, and discuss my findings.

## ***Varnum's* Aftermath**

After the decision, a battle between Republicans and Democrats in both legislative bodies over amending the state's constitution to limit marriage to one man and one woman drew additional attention to the decision (Buller 2011; Clopton and Peters 2013). However, Iowa's justices' pre-election behavior in 2010 was not much different than previous election years. They did increase their appearances as the election became more contentious, but, as usual, they declined to raise money for the race (Clopton and Peters 2013, p. 323), and none of the justices received direct donations to support their retention (Bonica 2013).

Bob Vander Plaats, in a bid to win the 2010 Republican gubernatorial nomination, made overturning *Varnum* "the centerpiece of his campaign," and though he did not win the nomination, he launched a campaign against the justices founding the organization, Iowa for Freedom (Clopton and Peters 2013, p.322). Presidential candidates, too, shared their opinions on same-sex marriage nationally and in Iowa, increasing the visibility of the issue (Clopton and Peters 2013). And, for the first time ever, Iowans saw television ads about the supreme court retention election. American Family Action, Inc. and the National Organization for Marriage each spent over one hundred thousand dollars for 319 ad spots targeting the *Varnum* decision and in support of conservative and traditional

family values (Skaggs and da Silva 2011). In total, groups and individuals opposing same-sex marriage and the justices' retention spent close to one million dollars (Clopton and Peters 2013; Aspin 2010).

Iowans seemed to receive the elite-messaging described above and link *Varnum* to their evaluations of the justices prior to the 2010 election. In June of that year, the Des Moines Register reported that 50 percent of those likely to vote in the Republican Primary felt that the justices should lose their seats "because of their decision on gay marriage" (Beaumont 2010; Buller 2011). A content analysis of letters to the editor mentioning the state supreme court retention election from Iowa's 25 most highly circulated daily newspapers in the three months preceding the 2010 election found that a majority of those letters made at least some mention of *Varnum* or same-sex marriage. Additionally, the author shows that most of those explicit mentions are "unfavorable" or occur in anti-retention letters (Buller 2011). The decision seemed to be firmly on Iowans' issue agenda ahead of the supreme court retention election in 2010.

## Data and Analyses

In the following subsections I present the data and analyses of Iowans' participation in the 2010 election in order to identify the electoral response attributable to the Iowa supreme court's unanimous decision to legalize same-sex marriage in the state. After a description of the data, I analyze three different electoral outcomes. First, I evaluate the claim that there was record-level turnout in the 2010 general election, and find that turnout was no higher than should have been expected that year. Next, I turn to outcomes related specifically to the judicial retention election. If the legalization of same-sex marriage did elicit an electoral response, and lead to failed retention bids for three justices, the effects

should be visible in voters' participation in the judicial retention election specifically, rather than the election in general. These analyses confirm the popular and well-informed assumption that *Varnum* did lead to the justices' defeat, but they also show the interesting effects that the decision had on participation in Iowa's judicial retention election. The state supreme court's legalization of same-sex marriage led to an increase in judicial retention election turnout in 2010, which persisted in the 2012 election, suggesting that *Varnum* caused more than just an immediate backlash but a more persistent monitoring of judicial behavior.

Iowa's 2010 election results show higher than usual participation and negative votes in the judicial retention election; however, this information alone is not enough to conclude that *Varnum* was the cause. To provide convincing support for the hypotheses that the court decision increased negative votes and participation and to show that the decision had no effect on general election turnout overall, I estimate the electoral outcomes that we would have expected in the absence of *Varnum* and compare them to the observed outcomes using ordinary least squares and non-parametric difference-in-differences approaches.<sup>8</sup> Traditional difference-in-differences analysis uses linear panel data to model processes over time, incorporating state-level fixed effects. *Varnum's* effect is estimated by taking the difference in the differences between the unit under analysis (Iowa in this case) and the comparison units in the period preceding the decision and the period following the decision (2009).

Non-parametric difference-in-differences, on the other hand, assigns varying weights to the individual comparison units to create a synthetic control (synthetic Iowa) that matches Iowa on the outcome variable in the pre-*Varnum* period. This method also

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<sup>8</sup>Fowler (2013) shows the usefulness of these methods for estimating the impact of unit-level effects on electoral outcomes.

allows the “effects of unobserved variables on the outcome to vary with time” (Abadie, Diamond and Hainmueller 2010, p.494).<sup>9</sup> I use voter turnout and state-level demographic data from the 12 other states with appointed state supreme court justices that are subject to end of term statewide nonpartisan uncontested retention elections for the years 1984 through 2010 to estimate the difference between Iowa and a counterfactual Iowa without legalized same-sex marriage in 2010.<sup>10</sup> The following subsections include a discussion of the data and presentation of the analyses.

## Data

The data<sup>11</sup> for the analyses in this paper consist of state-level election results and predictors of voter turnout from 1984 through 2010 (through 2014 for the analysis of turnout in the judicial retention election) for Iowa and the 12 other states that follow the Missouri Plan for the selection and retention of state supreme court justices, and where the entire state (rather than individual districts) votes on each justice’s retention.<sup>12</sup> Therefore, the states to which I compare Iowa, have populations with the same opportunities to retain or remove supreme court justices during general elections.

In the following subsections, I estimate *Varnum’s* effect on three different outcome variables: general election voter turnout, supreme court judicial retention election “no” votes, and retention election participation. General election voter turnout in Iowa and the comparison states in the sample follows the typical peak and valley trend of being higher

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<sup>9</sup>For more on non-parametric difference-in-differences and the Synth statistical package see Abadie, Diamond and Hainmueller (2010; 2011).

<sup>10</sup>Comparison states: Alaska, Arizona, California, Colorado, Florida, Indiana, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming

<sup>11</sup>Data and sources described in detail in the supplemental materials. All calculations use the votes for the first listed state supreme court judicial retention candidate on the ballot. Average mid-term or average presidential election pre-treatment retention election votes used in years when there is no retention election in one or more of the states in the sample.

<sup>12</sup>See American Bar Association (2015) for information on judicial selection methods in the states.

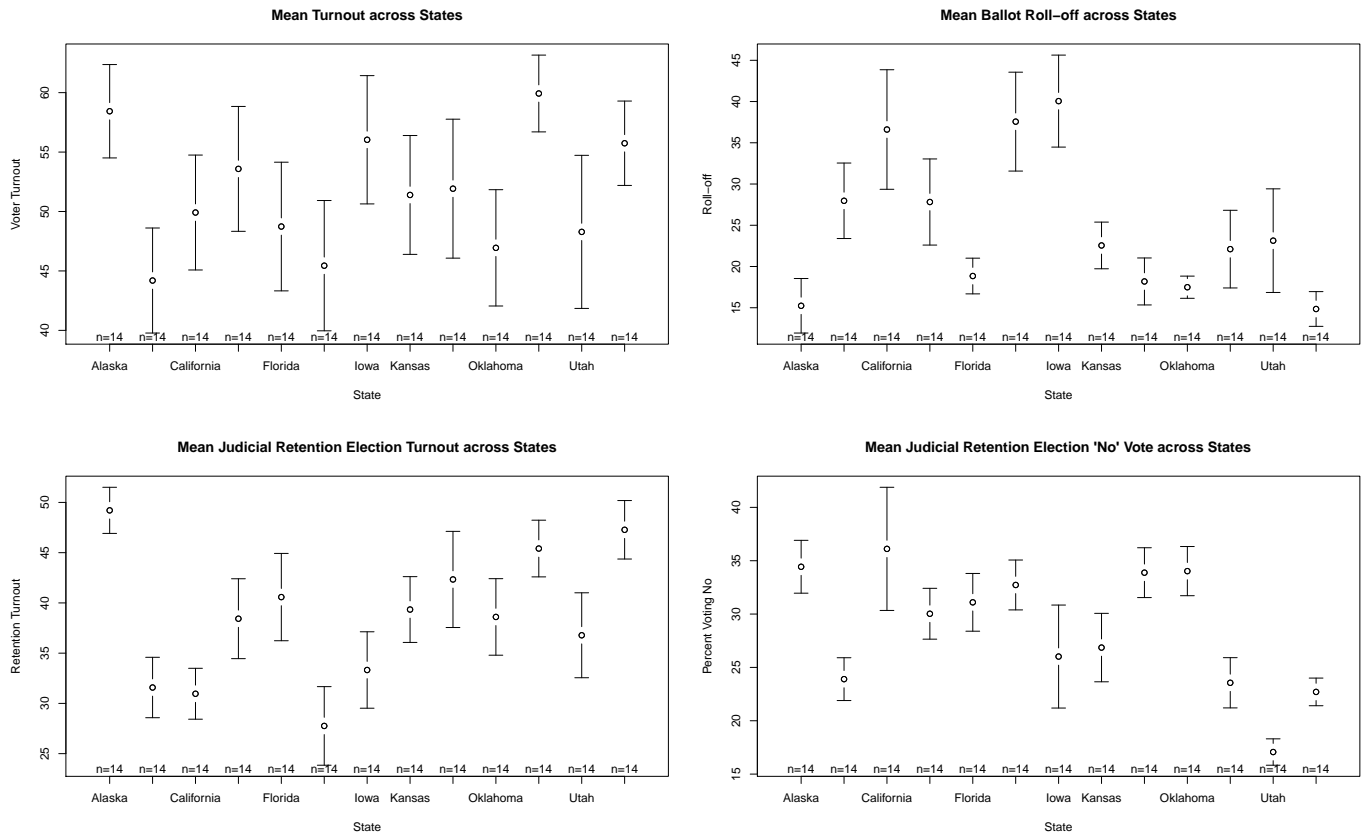


Figure 1: Heterogeneity of Outcomes across States

*These graphs present the mean levels of each outcome (general election turnout, ballot roll-off, retention election turnout, and retention election “no” votes) for each state in the sample for the period 1984 through 2010, which covers 14 general elections.*

in presidential election years than it is in midterm election years. As the top left panel of Figure 1 shows, Iowa experiences relatively high turnout, with the third highest mean turnout in the group of states for the period under study. On the other hand, turnout in Iowa’s state supreme court judicial retention elections is especially low. As the top left and bottom right panels of Figure 1 indicate, Iowans do not show much interest in state supreme court judicial retention elections. Iowa has the fourth lowest mean retention election turnout in the period, and the highest mean ballot-rolloff.

Ballot roll-off— the percentage of people who vote in the top election but not the

judicial retention election— is a useful way to think about participation in supreme court judicial retention elections. High levels of ballot roll-off are more common in Iowa than the comparison states in all years except for 2010, when there is a large increase in retention election participation. Ballot roll-off in Iowa is roughly 20-25 percentage points higher than the mean for all 12 comparison states throughout the entire pre-*Varnum* period. In 2010 however, ballot roll-off for Iowa’s supreme court judicial retention election was 11.82 percent,<sup>13</sup> about ten percentage points lower than the comparison state mean that year.

Although this seems to be changing with the “new style” of judicial campaigns (Gibson 2008), judicial elections, especially uncontested retention elections, have historically been low interest uncontentious events. This is reflected in the data for “no” votes (shown in the bottom right panel of Figure 1). There is less variation in this outcome than the others, votes against justices up for retention averages between about 25 and 35 percent for most states, save for a couple of outliers that have experienced even less opposition to their supreme court justices. Similar to participation in the race, there is a big change in the percentage of “no” votes in Iowa’s 2010 retention election, with opposition to justices in Iowa almost 20 percentage points higher than the mean percentage of “no” votes for all 12 comparison states that year.

The analyses below include predictors of voter turnout. In the traditional difference-in-differences analyses, these indicators improve the precision of the estimates. In the analyses using a synthetic control, synthetic Iowa is a convex combination of the comparison states that best matches Iowa in the pre-*Varnum* period with respect to the values of its voter turnout predictor variables (Abadie, Diamond and Hainmueller 2010, p. 499). These predictors include state-level measures for those socioeconomic factors that schol-

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<sup>13</sup>The mean ballot roll-off in Iowa is about 40 percent for the state’s supreme court judicial retention elections.

ars have proven to be important for the estimation of voter participation. I also include demographic data that capture differences among the states that could be important for voter participation and responses to the legalization of same-sex marriage.<sup>14</sup>

## Turnout in Iowa’s 2010 Election

General election turnout increased from 48.1 percent in the 2006 midterm election to what some reports claimed was record high at 49.9 percent in 2010. It is possible for small changes to be significant and the result of real phenomena rather than randomness, so it is impossible to rule out the possibility that *Varnum* increased general election turnout without more analysis. Because we know the factors that generally predict turnout (socioeconomic and demographic characteristics), and because general election turnout in Iowa, though on the higher end, is not an extreme outlier among the comparison states, comparing it to turnout in a synthetic control is a useful way to identify whether claims of exceptionally high turnout were correct.

Turnout in synthetic Iowa appears to be a fairly good match for that in Iowa pre-*Varnum*, and they both follow the same overall trend with higher levels in presidential election years (see Figure 2). Turnout in Iowa is slightly higher than in the synthetic control for most of this period, which is not surprising since average turnout in Iowa is among the highest in the comparison state pool. The vertical line at 2009 marks the *Varnum* decision, and turnout in synthetic Iowa is essentially a perfect match for

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<sup>14</sup>Ideally the analyses in this paper would have included measures for voter mobilization, such as campaign spending and the number of advertisements aired. If such measures were included and produced significant coefficients or received weights in the synthetic control analyses, the findings that follow would have been even stronger evidence in support of the hypotheses. However, such data do not exist over time for Iowa, as the 2010 election marked the first televised advertisements about a supreme court election and none of the justices spent money on a campaign making it difficult to link spending directly to any of the justices up for retention. Candidates for other officers and interest groups did spend money on and raise awareness about the election (see Clopton and Peters 2013; Bonica 2013).



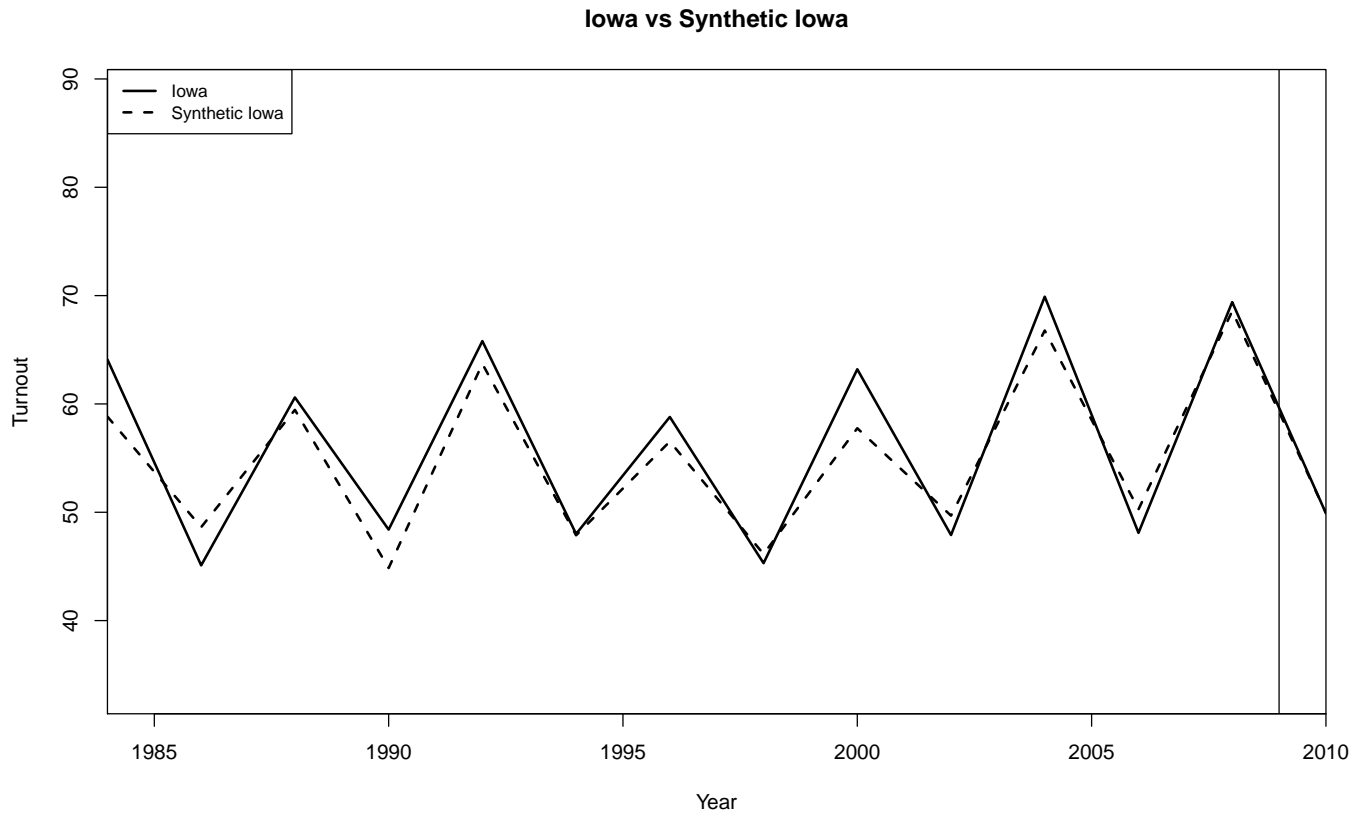


Figure 2: Turnout in Iowa v. Synthetic Iowa: 1984– 2010  
*Note: Vertical line at 2009 for Varnum decision.*

real Iowa after that, suggesting that participation in the 2010 election was not different than we might have otherwise expected.<sup>15</sup> This finding provides evidence that neither *Varnum* nor other factors related to the 2010 election had any significant impact on voter turnout.<sup>16</sup>

Typically with this kind of analysis, scholars conduct a series of placebo tests where they run the analysis setting each of the comparison units as the treated unit. They then

<sup>15</sup>Turnout had increased slightly between the previous two mid-term elections, and this year does not appear to be any different.

<sup>16</sup>Results of the OLS difference-in-differences analysis of turnout (included in the supplemental materials) also failed to show a significant change in voter turnout after the legalization of same-sex marriage.

identify whether the size of the gap between the outcome for the actual treated unit and its synthetic counterpart is larger than they would have observed if any of the other units were chosen at random as the treated unit. In the case of turnout in Iowa’s 2010 election, it is inappropriate to take such an approach to inference, since there is no gap between Iowa and its synthetic counterpart. In this analysis, synthetic Iowa is a combination of Colorado, Missouri, South Dakota, and Wyoming, which received weights of 0.573, 0.134, 0.223, and 0.070 respectively.<sup>17</sup> The state-level voter turnout predictors that are most important for the generation of synthetic Iowa are the Republican vote share in an election, poverty rate, and the Catholic adherence rate.<sup>18</sup>

While this synthetic control is a reasonable match for turnout in Iowa pre-*Varnum*, there is no difference between the two after the decision. Even if the analysis generated a visible and significant gap in turnout post-*Varnum*, we could not conclude that the decision was the cause. It would be very difficult to identify the effect of a court case in general election turnout, which is either measured as participation in the top-ballot race or participation in the race with the most votes cast.<sup>19</sup> If the analysis conducted here were to present a finding, it would be challenging to distinguish whether it were the result of the the legalization of same-sex marriage or another event that occurred before the 2010 election like a contentious gubernatorial campaign, for example.

If *Varnum* did have an electoral effect, general election turnout is the wrong outcome in which to locate it, especially if Iowans have the opportunity to respond directly to the state supreme court and its justices in the judicial retention election. In fact, the politicians that referenced the decision in their campaigns, and the interest group adver-

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<sup>17</sup>A more detailed description of the composition of synthetic Iowa and its characteristics are included in the supplemental materials.

<sup>18</sup>The method generates weights for control units and predictor variables.

<sup>19</sup>In this study it is measured as participation in the top-ballot race (McDonald 2014)

tisements that ran in support of traditional and conservative family values all encouraged Iowans to remove the justices from office with their votes in the 2010 *judicial retention* election (Clopton and Peters 2013; Skaggs and da Silva 2011). Therefore, the remaining analyses in this paper turn to more appropriate outcomes related to the state supreme court judicial retention election itself.

## **“No” Votes in the Supreme Court Judicial Retention Election**

In order for justices to lose their seats in a retention election, citizens have to cast votes in that race, and there have to be more “no” votes than “yes” votes. This rarely happens in judicial retention elections, and it had never happened in an Iowa supreme court election prior to 2010. This is why so many people, including legal scholars and members of the media, were fascinated with the outcome of the election and what it said about voters holding judges accountable.

In a judicial retention election in any state voters typically face a question similar to the following: “Shall the following judges be retained in office?”<sup>20</sup> Then, they can select “yes” or “no” for each justice or judge up for retention that year. Typically about 23 to 25 percent of Iowans participating in the supreme court judicial retention election vote “no”.<sup>21</sup> In 2010 however, 54 percent of the votes in the supreme court election were “no” votes. Again, we cannot assume this was anything more than a random increase in participation, especially since the proportion of “no” votes was a bit higher than usual in 2008 at 27.6 percent.

Constructing a synthetic control is very useful in this case. “No” votes in synthetic Iowa are a good match for those in real Iowa prior to the 2010 election, which allows for the

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<sup>20</sup>This is how the question appeared in the Winfield Township ballot in 2010. Winfield Township is located in Scott County, Iowa.

<sup>21</sup>21.5 and 18.5 percent of retention election participants voted “no” in 1984 and 1988 respectively.

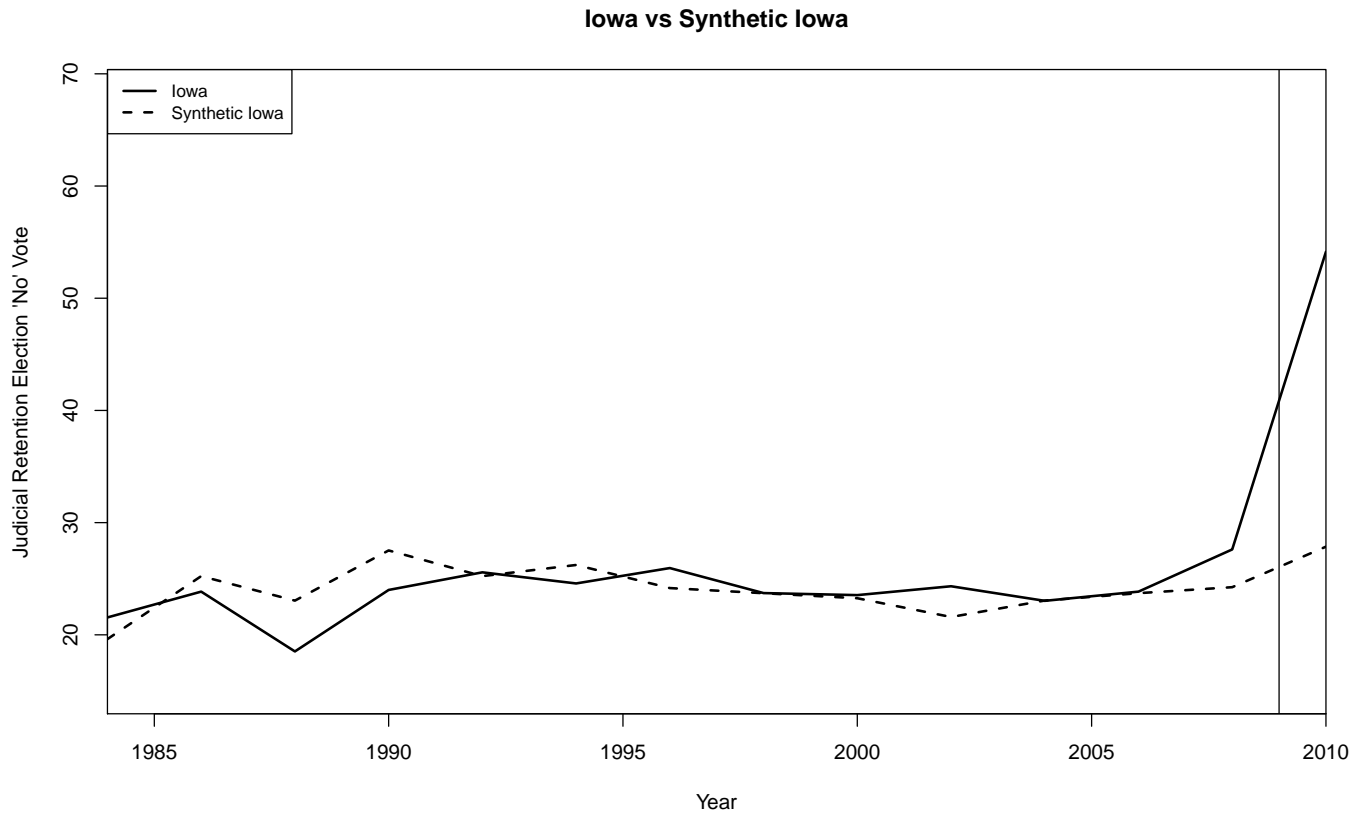


Figure 3: Judicial Retention Election “No” Votes in Iowa v. Synthetic Iowa: 1984– 2010  
*Note: Vertical line at 2009 for Varnum decision.*

the ability to accurately estimate the difference between the two in the 2010 election and make an inference about *Varnum*'s effect. “No” votes in Iowa’s supreme court retention elections do not fluctuate much over time, so it is more important that synthetic Iowa match the levels, which it does (see Figure 3) than any perceived trends.<sup>22</sup> With respect to the percent of people voting against state supreme court justices, synthetic Iowa is a combination of Kansas, South Dakota, and Wyoming, and these states receive weights of 0.322, 0.152, and 0.525 respectively. The most important predictors for generating a

<sup>22</sup>Details on the composition of synthetic Iowa in the “no” vote analysis are available the supplemental materials.

synthetic Iowa in this case are the state poverty rate, whether there is a state supreme court judicial retention election in a given year, the Catholic adherence rate, and the percent of the population that is White. The vertical line separating the pre- and post-*Varnum* periods in this and the other synthetic control figures in this paper and the supplemental materials marks the year 2009, the year the Iowa Supreme Court rendered its decision legalizing same-sex marriage. However, the analyses only include data for election years, which is why “no” votes in real and synthetic Iowa appear to diverge before the decision in 2008, the last year prior to *Varnum* for which data exist.<sup>23</sup>

Iowa is not an outlier with respect to retention election “no” votes when compared with the other states in the sample. The bottom right panel of Figure 1 shows that Iowa is on the lower end of average when it comes to its citizens voting against supreme court justices in elections. Its lack of extremity means that it is possible to recreate it with some combination of the comparison states in the period prior to the legalization of same-sex marriage. The synthetic control does such a good job here that the gaps between real and synthetic Iowa with respect to “no” votes in this period are relatively small, especially when compared with the gap between the two post-*Varnum*.<sup>24</sup> Placebo tests<sup>25</sup> also suggest that this result is not the product of chance.<sup>26</sup> The results of this analysis confirm that *Varnum* did lead to the three justices’ 2010 retention election loss. The next subsection analyzes *Varnum*’s fascinating effects on judicial retention election turnout and considers the implications for judicial accountability in states with these types of elections.

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<sup>23</sup>The same holds for all other synthetic control figures and those depicting the gaps between the treated and control units in the supplemental materials.

<sup>24</sup>A graph of the gaps between Iowa and synthetic Iowa for the entire period is included in the supplemental materials.

<sup>25</sup>No placebo tests (included in the supplemental materials) yield gaps as large as the one observed for Iowa.

<sup>26</sup>OLS difference-in-differences analysis (included in supplemental materials) supports this result.

## Participation in the Supreme Court Judicial Retention Election

In Iowa’s 2010 election voters paid attention to a ballot item they often skip—the state supreme court judicial retention election. To provide some context as to how *Varnum* changed voters’ behavior in 2010, the top right panel of Figure 1 shows that Iowa has the highest mean ballot roll-off of all states in the sample for the entire period under analysis. Ballot roll-off in Iowa is also higher than the mean ballot-rolloff of the comparison states for the all elections from 1984 through 2008. However, in 2010, Iowa’s roll-off decreased so much that it was almost ten percentage points lower than the mean for all comparison states.<sup>27</sup>

Constructing a synthetic control for ballot-rolloff in Iowa would be inappropriate,<sup>28</sup> because it is so high compared to the other states in the sample. No combination of the comparison states could generate a synthetic Iowa that would match the levels of roll-off in real Iowa pre-*Varnum*. Additionally, roll-off is a response to institutional arrangements and political context (Bonneau and Hall 2009; Hall 2007; Streb, Frederick and LaFrance 2009), and many of the variables that are most important for explaining this outcome do not vary across the states in this analysis. Hall (2007) and Streb, Frederick and LaFrance (2009), for example, show that such factors as whether a race is contested and whether it is a partisan election are significant factors for explaining roll-off. For this reason, I analyze participation in the judicial retention election measured as the percent of the VEP casting a vote in the race. The results below indicate that *Varnum* had a significant impact on voting that persisted in the 2012 election.<sup>29</sup>

A synthetic control can better replicate pre-*Varnum* participation measured in

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<sup>27</sup>This figure is included in the supplemental materials.

<sup>28</sup>I did conduct this analysis, and results are available in the supplemental materials.

<sup>29</sup>Iowa did not have a supreme court judicial retention election in 2014.

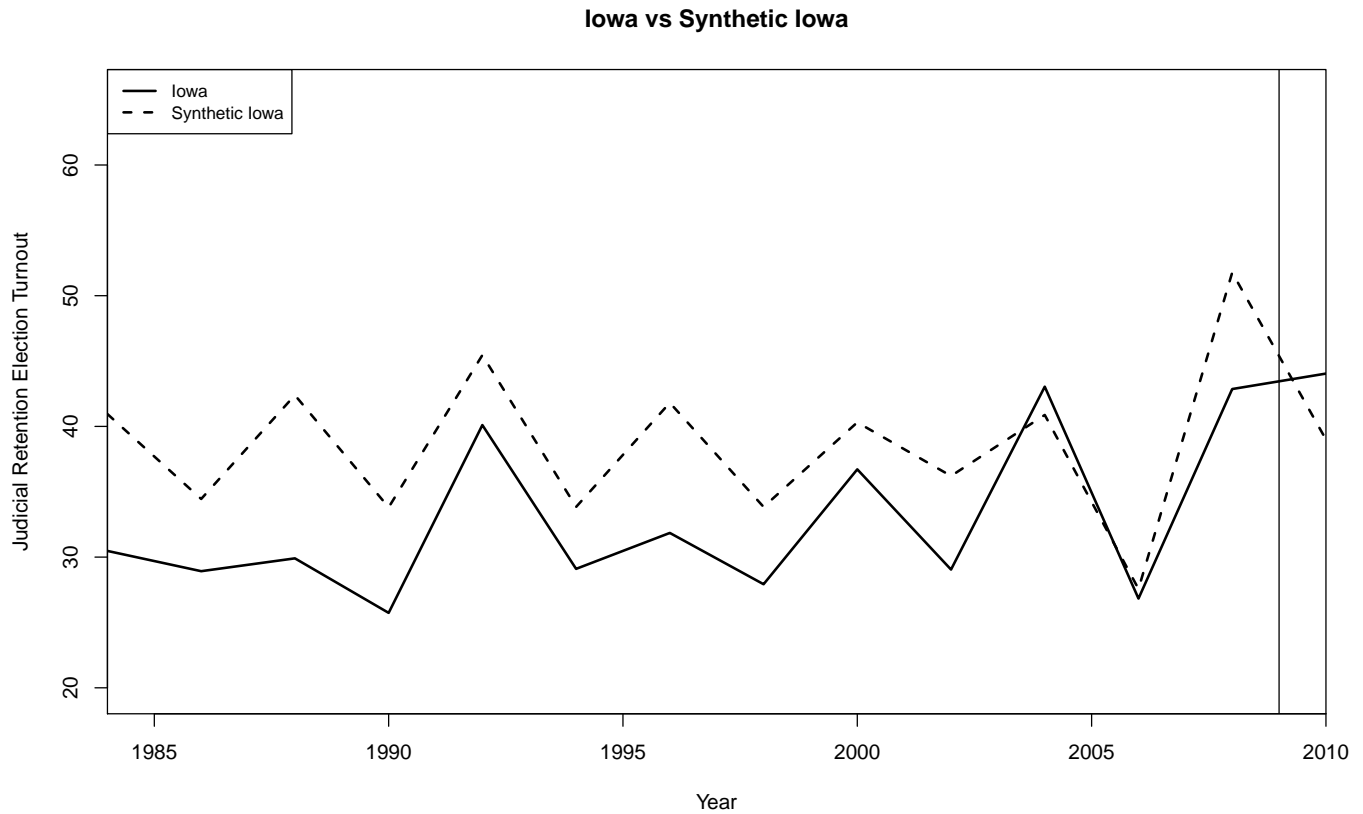


Figure 4: Judicial Retention Election Turnout in Iowa v. Synthetic Iowa: 1984–2010  
*Note: Vertical line at 2009 for Varnum decision.*

this way than as ballot roll-off, because it is more accurately estimated using traditional turnout predictors and the demographic and state context variables included in this dataset. Figure 4 shows that the trend in retention election turnout in synthetic Iowa almost perfectly matches that in real Iowa prior to *Varnum*. Except for the 2004 and 2006 elections, retention election turnout in Iowa is typically about five to ten percentage points less than it is in synthetic Iowa. This result is not surprising, because Iowa experiences low participation in its supreme court elections compared to the other states in the sample (see Figure 1).

The analysis does show a post-treatment gap between retention election turnout

in Iowa and synthetic Iowa, which is good evidence in support of the hypothesis that *Varnum* increased participation in the judicial retention election. The results show that 2010 retention election turnout in Iowa is higher than that in synthetic Iowa even though the synthetic control over-predicts the outcome in most of the pre-*Varnum* period. This is very likely a significant finding, especially since Iowa and synthetic Iowa cross after 2009 indicating a big change; but, given the size of the gaps between the treated and synthetic unit prior to the 2010 election, inference from a series of placebo tests is unlikely to accurately determine the significance of this result.

An OLS difference-in-differences analysis using these panel data and incorporating state fixed effects provides a better sense of the significance of the change in Iowa’s retention election turnout from 2008 to 2010 when compared to the change in the comparison states. The results of this analysis are presented in Table 1. The difference-in-differences estimate for participation in Iowa’s 2010 judicial retention election is the coefficient for the interaction of the Iowa indicator variable and the post-2009 variable— a dummy variable indicating that the year is greater than 2009 (the year of the *Varnum* decision, which for the purposes of this analysis represents the 2010 election). This estimate is robust to various model specifications, remaining substantively and statistically significant at the  $p < 0.001$  level.<sup>30</sup> These results suggest that the legalization of same-sex marriage was responsible for an increase in judicial retention election participation of roughly 13 percentage points.<sup>31</sup> Other factors that are important for estimating state supreme court judicial retention election turnout are generally in line with what we might expect and include: whether there is a judicial retention election on a state’s ballot in a given

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<sup>30</sup>Clustering the standard errors has minimal effect on the standard error of the explanatory variable.

<sup>31</sup>Placebo tests did not yield significant results, providing further support for the findings presented here. Placebo tests included identifying a treated year other than 2009 as well as identifying other states as the treated unit.



Table 1: Retention Election Turnout D-in-D OLS Model

	<i>Dependent variable: Judicial Retention Election Turnout</i>		
	(1)	(2)	(3)
Post-2009	-5.640 (1.804)	-5.544 (2.004)	-1.390 (2.103)
IAXPost-2009 (D-in-D)	17.180 (6.504)	14.020 (5.240)	13.351 (3.896)
Jud. Retention Election			1.998 (0.744)
Top Ballot Race		-4.058 (0.441)	0.370 (0.567)
Turnout			0.600 (0.058)
Population (in thousands)		0.001 (0.001)	0.001 (0.0004)
Percent White		-0.035 (0.356)	0.219 (0.286)
Percent Black		2.198 (1.445)	1.427 (1.128)
Percent Hispanic		-0.623 (0.452)	-0.266 (0.354)
Poverty Rate		0.164 (0.228)	-0.045 (0.193)
Homeownership Rate		-0.211 (0.201)	-0.369 (0.150)
Percent Urban		-0.322 (0.390)	-0.343 (0.304)
Percent over 25 w/ Bachelor's		0.442 (0.423)	0.281 (0.316)
Median Income (in thousands)		-0.014 (0.098)	0.020 (0.076)
Unemployment Rate			-0.302 (0.293)
Catholic Adherence Rate			-0.005 (0.031)
Mormon Adherence Rate			0.079 (0.044)
Adherence Rate		-0.542 (0.174)	-0.406 (0.156)
Republican Vote Share		-0.084 (0.038)	-0.012 (0.030)
State Fixed Effects	X	X	X
Observations	182	182	182
R <sup>2</sup>	0.073	0.470	0.718
Adjusted R <sup>2</sup>	0.067	0.400	0.592
F Statistic	6.593 (df = 2; 167)	9.809 (df = 14; 155)	20.086 (df = 19; 150)

*Note: Model includes state fixed effects.*

NA

year, overall general election turnout, the size of a state's population, and its religious adherence rate.<sup>32</sup>

The results of the analyses presented in this subsection provide convincing evidence that the unanimous *Varnum* decision in 2009 led voters to participate in the 2010 judicial retention election at extraordinarily high levels. There is also evidence suggesting that voters' response to *Varnum* may have extended into the 2012 election and also into the lower-level court of appeals. Iowa Supreme Court Justice David Wiggins, who was part of the unanimous 2009 same-sex marriage decision, ran for retention in 2012. He, unlike his former colleagues, was retained. Participation in the 2012 judicial retention election was higher than in any other presidential election year, and this is true whether you measure participation in the race using the number of Iowans who voted for or against Wiggins or the number who voted on the retention of the justices listed first on the ballot— as I do in this analysis in an attempt to identify *Varnum's* effect on participation in the supreme court judicial retention election in general rather than just the retention outcomes of those justices involved in the decision.

Just over 50 percent of Iowa's VEP cast a vote for or against Justice Edward Mansfield's retention, more than any previous presidential election. A non-parametric difference-in-differences analysis would not be helpful here; synthetic Iowa's inability to replicate judicial retention election turnout in Iowa in the pre-*Varnum* period, as shown in Figure 4, would make it even more difficult to identify any persisting effect in 2012. The logic behind the concept of difference-in-differences remains useful when comparing participation in the judicial retention election in 2012 to participation in previous presidential election years. Figure 5 illustrates this nicely; Iowans' participation changes a great deal after the 2009 decision. Additionally, OLS difference-in-differences analyses

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<sup>32</sup>Analysis of ballot roll-off yielded similar results.

that include the data through 2012 generate results similar to those above. *Varnum's* impact remains both substantively and statistically significant.

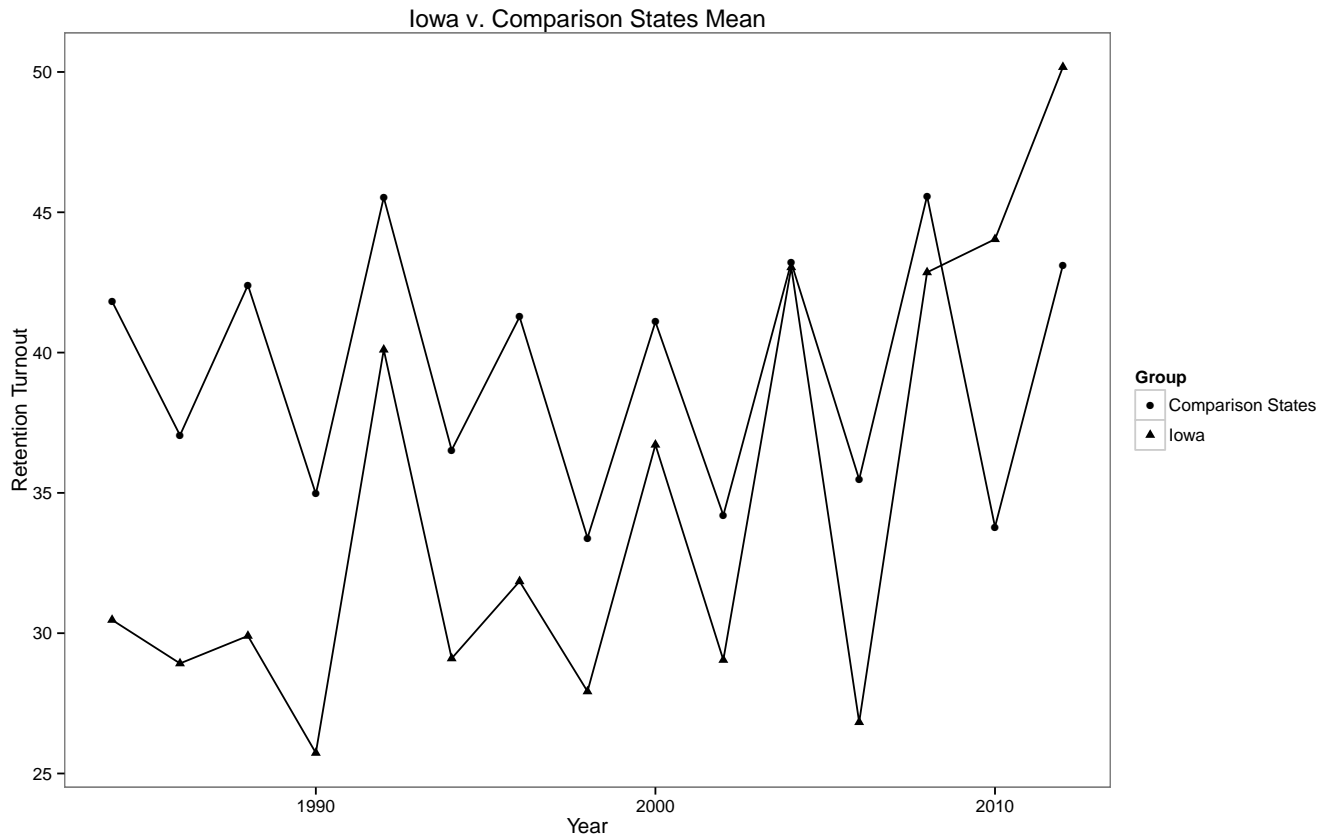


Figure 5: Judicial Retention Election Turnout in Iowa Compared to Comparison States Mean: 1984– 2012

The results of the analyses in this section show that *Varnum* prompted Iowans to exert their influence over the judiciary in the subsequent election. They also provide evidence indicating that voters' desire to hold the judiciary accountable persisted through 2012 election. Finally, while I do not conduct an in-depth analyses of these data, difference in means tests of Iowa's 2010 and 2012 election results suggest that *Varnum's effect* may have extended to Iowa's court of appeals. The aftermath of the Iowa Supreme Court's

legalization of same-sex marriage is an illustrative example of voter response to a salient and controversial judicial decision and voter's ability to hold judges accountable in a Missouri Plan state. This example also shows that a decision's effects may last longer than the most immediate election, resulting in even more voter attempts to hold judges accountable. The following section discusses the implications of these results as well as directions for future research.

## Discussion

The results of the analyses in the previous sections do three things. First, they help to disprove state and media claims of record high turnout in Iowa's 2010 general election. Second, they provide very strong evidence that *Varnum* was, in fact, the cause behind the involved justices' failure to earn retention that year. Third, and most importantly, the findings show that the legalization of same-sex marriage caused voters to participate in that year's supreme court judicial retention election at higher levels than we would otherwise expect. Additional analyses indicate that this increased participation was also present in the 2012 retention election. These findings suggest that judges in Missouri Plan states might not be as independent from voters as we generally expect.

It is challenging to provide convincing support for causal hypotheses with observational data since the findings can only ever be suggestive of the existence of the posited relationship. A strength of the findings presented in this paper is their robustness to various model specifications. Building upon knowledge that scholars have developed in the field of judicial elections, these analyses improve our understanding of the effect of salient court decisions on low information judicial retention elections and judicial accountability. The analyses in this paper convincingly identify *Varnum's* effect on the

subsequent supreme court judicial retention elections, but— as is the case with many social science studies— they cannot show the mechanism by which the decision elicited the unusually high level of participation and unprecedented outcome in the race (Green, Ha and Bullock 2010). The likely mechanism, in this case, is the elite-led mobilization that followed the decision. It is also important to remember that identifying the year 2009 (or the election following 2009) as a “treatment” is not the same as identifying the *Varnum* decision itself. These analyses require the assumption that any observed effect is actually in response to the legalization of same-sex marriage and not something else that happened in Iowa between the 2008 and 2010 elections. Identifying the proper outcomes to analyze however, increases confidence in the results as does understanding the political climate, which made *Varnum* the focal point of the 2010 judicial retention election.

It is very rare for voters not to retain state supreme court justices. In the handful of times this has happened, voters appear to be responding directly to judicial behavior and elite representations of that behavior. Perhaps in the absence of partisan labels and competitors, voters in Missouri Plan states hold judges accountable based on the substance of their behavior, when it is out of line with voter preferences. Post-*Varnum* Iowa and the other Missouri Plan states where supreme court justices were not retained, are great examples of this type of accountability at work. However, it is very rare for a state supreme court justice not to be retained.

Participation in Iowa’s 2012 election suggests that the effects of these salient events might last longer than the subsequent election, which has important implications for the analysis of judicial accountability in retention elections. Future research might investigate whether there were any lasting electoral effects from previous events that led to supreme court justice removal in a retention election. The persistence of *Varnum*’s effect should also prompt scholars to consider the conditions under which we might expect

an electoral response, identify past instances, and investigate whether voters did change their behavior. Even if a justice does not lose her seat, participation or “no” votes in a retention election may change in response to judicial behavior, as was the case in Iowa’s 2012 election. A better understanding of judicial accountability in nonpartisan, uncontested retention elections can improve our understanding of judicial accountability more broadly and our evaluations of this particular style of judicial selection method.

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