60 Drake L. Rev. 1133

Drake Law Review
Summer 2012

Iowa Constitution Lecture Series

A PIONEER'S CONSTITUTION: HOW IOWA'S CONSTITUTIONAL HISTORY UNIQUELY SHAPES OUR PIONEERING TRADITION IN RECOGNIZING CIVIL RIGHTS AND CIVIL LIBERTIES

Iowa Constitution Lecture Series: March 8, 2012

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It is an honor for me to present the inaugural Drake Law School Iowa Constitution Lecture. It is an honor equal to that given to me three years ago to author Iowa's marriage equality case on behalf of the Iowa Supreme Court. I suspect the honor given to me then is responsible for this honor given to me today, and I can assure you that I embrace both of them equally, with the hope that they will both, one day, find a small place in the mosaic of our state history to help lead to a better future based on a better understanding.

At the same time, it is comforting for me today to know that, as the first lecturer in this series, I have no giants to follow. A bar has not yet been set for me to face, and I have no illusions that my remarks today will cause the next lecturer to feel any differently than I do today. But, in many ways, the bar has already been set quite high by the document we honor today--a document drafted during the constitutional convention in Iowa City in the winter of 1857 and signed by its thirty-six delegates 155 years ago, almost to the day, on March 5, 1857, eighty-one years following our independence as a country of united states. [1] From that time onward, our constitution has endured, with only forty-seven amendments, [2] to give ***1134** Iowans a rich, proud history for the most part and a future of much hope and promise.

It is fitting that this great institution of legal education--Drake Law School--should honor this state's great legal document. It is also fitting that this honor should consist of a public lecture. As with our United States Constitution, the Iowa Constitution was drafted to be understood by the public. While the constitution was never intended to provide quick and ready answers to our problems we encounter over time, it was intended to stake out the public's basic belief system so it could be carried into each generation of new knowledge and understanding to give better shape and meaning of those beliefs for our children and their children.

As the first lecturer, my main goal is to establish a foundation for future lecturers to build upon, much like the lives of Iowans have been built on the foundation of our constitution. I will largely examine the landscape of Iowa at the time our constitution was written and the understanding we had and the vision we shared as a people in preparing to build our state. I will also reflect on the richness this great document has given to us. But, I do this to suggest that this understanding and this richness reveals our approach to interpreting this great document--an approach that has made all the difference to who we are. I will leave for future lecturers to build on this foundation and bring greater clarity to this extraordinary document.

Iowa became a territory in 1838. [3] While we professed an early collective belief in equality at the time, as we did as a nation, our march towards that goal was far from a straight line. At the time, we were experiencing rapid population growth in Iowa, as men, women, and children began to settle in groups near streams and timber, creating small social and political units. [4] Historical documents reveal we were people who were industrious with respect for order, public justice, and private rights. [5]

Early documents also reveal we maintained the pioneer sense of justice, democracy, and equality.[6] Moreover, the frontier we were ***1135** developing showed we were incredibly self-reliant and could endure the harshest of conditions.[7] As such, our political and social ideals were not so much a product of tradition and ideology, but practicality. On Iowa's frontier, everyone was equal--the conditions of life made everyone plain, common, and genuine.[8] Governor Kirkwood described this frontier at the time in this way: "'We are [all] rearing . . . the man of grit, the man of nerve, the man of broad and liberal views, the man of tolerance of opinion . . . ."[9]

As a territory, we were loosely governed by many of the basic rights and common law shared by our developing nation around us.[10] Yet, like ***1136** the broad, wide open plains of Iowa prairie life, these concepts took on a more expansive meaning, and the idea of personal liberty and equality took on a uniquely Iowa flavor. This was exhibited in Iowa's first supreme court case, In re Ralph, decided on Independence Day in 1839.[11] In that first case, the Iowa Supreme Court declared equality for all people, regardless of skin color, in a very powerful way.[12] Yet, the territorial legislature was not so understanding and, beneath the surface, maintained views that would be described as discriminatory today. It promptly codified these views and devised a set of laws designed to protect Iowa from the fear of a large migration of free blacks into the state. It passed a series of laws known as the "black code," which limited public education to white citizens,[13] granted suffrage to only free white males,[14] required only white males to register for the militia,[15] and prohibited blacks from being a witness in a case against a white person.[16] These laws also prohibited interracial marriage.[17]

This legislation stirred responses from abolitionists in southeastern Iowa, but this opposition found no legislative support to speak of.[18] Iowa's first two constitutional conventions in 1844 and 1846 also failed to produce support.[19] Yet, the ultraconservative Jacksonian democratic delegates at ***1137** these conventions ultimately pushed too far by demanding an exclusionary law to prevent the settlement of any blacks or mulattos within the borders of Iowa.[20] Their position was so harsh and extreme that it ultimately forced moderate lawmakers to define themselves as anti-exclusionists and ultimately united the minority Whig party and divided the Jacksonian Democrats in a way that breathed life into the new Republican Party that emerged.[21] This shift started a more moderate tone and approach to governing, which had taken hold for the most part by the time our constitutional delegates gathered in Iowa City in 1857 to author a constitution following statehood.[22] Yet, the vestige of discrimination remained as the twenty-one Republican delegates and fifteen Democratic delegates commenced their important work.[23]

The concept of a bill of rights in our constitution took a prominent position at the convention. The five-person committee responsible to draft a bill of rights understood its importance to the people and the future of the people of Iowa.[24] The principle of equality was its prominent beginning ***1138** point. The delegates embraced equality as a broad principle, but struggled when they attempted to use that principle to address more concrete and specific meanings of equality. The committee's original report declared in article I, section 1 that "[a]ll men are, by nature, free and independent."[25] Thirty days into the convention, however, it sought to replace the word "independent" with "equal," largely for the purpose of creating an avenue to put blacks on equal footing with whites in giving testimony in court.[26] The amendment to declare all men to be "equal" passed on a strict party line vote, but the committee's further efforts to enact a specific constitutional provision that would preclude the disqualification of any witness because of race failed.[27] Instead, the delegates settled on a clause that gave a party to a case the right to use any person as a witness.[28]

Another example of the struggle to find common ground in the application of the principle of equality was in the area of the integration of schools. The delegates rejected a proposal to restrict schooling to white children,[29] but also stopped short of adopting a provision that would require all schools to be "equally open to all."[30] While not specifically prohibiting segregated

schools, the delegates eventually agreed to a constitutional provision that provided for the education of all children through a system of common schools. [31]

Perhaps the most pressing issue of equality faced at the convention was the right of suffrage for blacks. The clash between opponents and ***1139** proponents of equal suffrage was substantial and resulted in a decision to submit the issue to the people in the form of a referendum. [32] The delegates were simply unable to decide and passed the question to the people.

The new constitution narrowly passed by a public vote of 40,811 in favor and 38,267 opposed. [33] However, only 8,479 people favored the equal suffrage referendum, while 49,267 opposed it. [34] This result was three percentage points short of the "worst civil rights referendum defeat on record" in the history of the nation. [35] The constitution that was approved contained many racially discriminatory provisions, including the exclusion of blacks from suffrage, census enumeration, senate appointments, house appointments, and militia service. [36] Nevertheless, the broad principle of equality emerged, not only in article I, section 1, but also in the mandate of equal applications of laws found in article I, section 6. [37] The core belief of equality was proclaimed, but its understanding was incomplete.

Three events followed that breathed life into this state's constitution that were as important then as they are today. The first was our nation's civil war. Among the 76,000 Iowans who served the Union in the war were 287 black soldiers who began as volunteers and were later organized as the 60th U.S. Colored Infantry Regiment. [38] This group of men literally saved the day at the Battle of Wallace's Ferry in eastern Arkansas, along with the lives of hundreds of Union soldiers. [39] These soldiers were recognized for their bravery and courage following the Civil War, and strong support for ***1140** various forms of racial equality quickly followed. In his 1866 inaugural address, Governor Stone asked, "Have we that degree of moral courage which will enable us to recognize the services of these black veterans and do them justice?" [40] Our legislature promptly answered the question by proposing five amendments to the constitution to remove the word "white" from the suffrage clause, the census enumerations, senate appointments, house appointments, and military service. [41] In 1868, the public responded to the proposed amendments in a dramatically different way than the referendum eleven years earlier. It overwhelmingly approved the equal rights amendment with 57% of the vote. [42] That vote began Iowa's march forward toward a more perfect and egalitarian constitution with the spirit of equality firmly embedded as its fundamental precept.

The second event was in 1867 when Susan Clark was denied admission to a neighborhood grammar school in Muscatine because she was black. [43] The school board of Muscatine claimed it was empowered under the constitution and a statute to require her to attend a segregated school. [44] The school board's position was aligned with the understanding of the authors of the constitution, which rejected integration as a right, and only allowed integrated schools at the discretion of local authorities. [45] Notwithstanding, the Iowa Supreme Court saw the claim of equality as something different than originally intended, holding that government had no discretion to interfere with school equality. [46] Although the constitutional convention had rejected a provision that would require all schools to be "equally open to all," [47] the Iowa Supreme Court relied on the broader constitutional principle of equality and the meaning of that concept that had come into focus by 1868. [48]

***1141** The third event was five years later in 1873 when Emma Coger was denied dining accommodations on a steamboat in Keokuk because she was black. [49] It was the custom of the day for blacks to eat in a pantry area separate from the whites-only dining room, although Coger had paid for a ticket that included meals. [50] The Iowa Supreme Court held that the constitutional principle of equality required black passengers to be given the same rights as white passengers, and that inferior dining accommodations did not satisfy the principle of equality written into the Iowa Constitution in article I, section 1. [51]

These three events are important for Iowa today as we increasingly hear the clamor of the larger debate over the proper approach for courts to follow in interpreting the text of the Iowa Constitution today, particularly when those interpretations involve the core principle of equality. Generally, two main views of constitutional interpretation exist today, not only in the arena occupied by judges, lawyers, and academia, but also in the public debate and discourse over constitutional rights. The increasing scope of the discourse is important to contemplate because the interpretive model used to interpret a constitution has a dramatic impact not only on the shape and timing of individual rights, but also on the degree of public respect and confidence given to the courts. Thus, a discussion of constitutional interpretation must be shared by all and must be carefully considered by all as we continue to discover the role of our Iowa Constitution.

One theory of constitutional interpretation is that the constitution should be treated as a living document, so to speak. [52] This approach ***1142** maintains the constitution was designed as a foundation for a society to grow within its established belief system in a manner consistent with the increasing knowledge and understanding of the world. [53] In this way, constitutional interpretation reflects the reality of our understanding today-- not merely the scope of its meaning limited by our understanding of the world at the time the constitution was written. This approach examines how the powerful and iconic general constitutional principles, such as equality, should be applied today to preserve their importance in our lives today in light of the evolving circumstances, understanding, and knowledge of our day. [54] As declared in Olmstead v. United States, the constitutional text must be construed to have the "capacity of adaptation to a changing world." [55] Otherwise, "'[r]ights declared in words might be lost in reality.'" [56] Or, as Louis Brandeis prophetically observed years earlier, "'time works changes, [and] brings into existence new conditions and purposes.'" [57]

The other view of constitutional interpretation is that the text of a constitution should be interpreted as it was originally understood at the time it was drafted and ratified. [58] This view essentially recognizes the constitution as law that has a fixed and determinative meaning, as with statutes, and must be interpreted in that manner by courts. [59] Thus, the theory of originalism naturally flows from the way courts have functioned in interpreting law in general. This approach necessarily limits judges to interpreting constitutional provisions according to their original meaning, and requires changes to that original understanding sought by later generations to come by the formal democratic process of amending the constitution, not by judicial decisions. [60]

The modern originalist movement began in the 1970s, following a decade of the expansion of constitutional rights by the Warren Court, took hold in the 1980s, and is now fully entrenched in society today. [61] It is ***1143** embraced by many in the legal profession, many law students seeking entrance into the profession, and is actively supported by a growing segment of the public in general. [62] It seeks to uphold respect for the constitution as fixed law, reflecting the will of the people when it was written, and to restrain judges from recognizing rights under the constitution today inconsistent with the understanding behind the text of the constitution at the time it was written. [63] Aside from its structural support in the law, the original-intent approach serves to curtail the fear responsible for its creation--that unelected judges could otherwise create constitutional rights based on their own views under the disguise of constitutional interpretation. [64]

In considering the interpretive debate today in Iowa, our Iowa Constitution and our constitutional history reveals it was resolved a century and a half ago. This Iowa history undercuts both the structural foundation of originalism and its main rationale. At the same time, it affirms the concept of a living constitution in Iowa.

The premise that originalism naturally flows from the role of courts and the function of judges in interpreting law is simply inconsistent with the approach Iowa embraced a century and a half ago and has consistently followed throughout history. Originalism has not been Iowa's way. Consider the Clark case. [65] The framing and ratification history of our constitution revealed without dispute that our forefathers rejected efforts to make integrated schools a constitutional right. [66] It was not our original intent. Our Iowa Supreme Court, however, found the right was present in the more general proclamation of equality

and a changing sentiment reflected by various statutory pronouncements. [67] The court did not follow an original-understanding analysis, but engaged in analysis that considered the meaning of equality that was taking shape at the time in Iowa--a meaning that was perhaps aided by a greater understanding and acceptance of blacks that developed after the watershed event at Wallace's Ferry. [68]

***1144** Consider, as well, the Coger case. [69] Nothing in our constitutional history reveals our forefathers intended for the concept of equality to include equal public accommodations for blacks and whites. Instead, our constitutional history reveals a discussion of racial equality limited to the pressing issues at the time of courtroom testimony, consensus counting, education, voting, military service, elective office, and the like, but not public accommodations. [70] As in the Clark case, however, the Coger court did not mechanically reject the constitutional claim of racial equality in public accommodations because it was not understood to exist at the time the constitution was written. [71] Instead, sixteen years after the constitution was written, the Coger court found the right existed in the fundamental, comprehensive constitutional principle of equality, and the understanding recognized by the court that equality was not satisfied if one kind of accommodation was given to one group of people, but not another. [72] The court drew this understanding of equality, in part, by acknowledging the enactment of the Civil Rights Act of 1866, which granted blacks the same right to contract as whites, including the right to contract for transportation with a carrier. [73] Society at the time was changing its understanding of blacks, and so too did the constitutional principle of equality.

Other such cases follow Clark and Coger, which reveal the constitutional interpretation approach in this state has always considered the principle of equality in the context of its contemporary understanding, not its original intent. Our Iowa Constitution has always been a living constitution.

Of course, a long history of a particular practice does not alone justify its future, and our Iowa history of interpretation does not mean we should not consider any change. However, the adoption of originalism today would tend to minimize the role of courts in recognizing constitutional rights in Iowa and, in turn, would significantly reduce the role of Iowa's constitution in the lives of Iowans. Originalism was not our founders' intent. It would also undermine the history of Iowa's contemporary interpretation approach as followed from the beginning. Originalism is simply contrary to what our Iowa forefathers set out to accomplish, and Iowa's history bears this out.

***1145** Our Iowa Constitution, like other state constitutions, was designed to be the primary defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection, especially considering the latter applied only to actions by the federal government for most of our country's history. [74] Iowa's forefathers wanted a constitution that would be alive and vibrant, not constrained to the past. George Ells, chairman of the bill of rights committee of the Iowa Constitutional Convention said in 1857 that the committee desired to “enlarge, not curtail” rights under the Iowa Constitution and that their goal was to have the best bill of rights in the nation. [75] This constitutional history revealed our forefathers' understanding of the inherent difficulty of transforming constitutional text into specific constitutional rights at a given point in time. Our forefathers all agreed on the greater concept of equality, but struggled mightily in its specific application to grant new rights sought by some. They knew people's understanding was constantly changing, but rarely in unison. They knew change could only be produced by an acceptance of a new understanding that would be found in the years to come. They knew public acceptance was necessary, and they then stepped back after writing the constitution to witness this acceptance through events like the Battle at Wallace's Ferry, and then in one event after the other in the life of Iowans, which unfolded in court and produced a court decision. Our forefathers saw this constitution begin to work, and they must have approved what they saw. For sure, there was no thought in these early days of our history that the Iowa Supreme Court should not sort through the growing understanding to give greater meaning to equality over time, and there was no understanding that the Iowa Supreme Court should only view equality as frozen in time. [76] As Chief Justice Hughes said in Home Building Loan Ass'n v. Blaisdell, originalism “carries its own refutation.” [77]

Equally important, the fear that gave rise to the original-intent theory--unaccountable judges creating constitutional rights derived from their own views under the disguise of constitutional interpretation [78] --has ***1146** never come to pass in Iowa. The public in Iowa has never rejected a constitutional decision of the Iowa Supreme Court over the last 155 years through the constitutional process of amendment. After the Iowa Supreme Court decided Clark, [79] a very controversial case at the time, there was no constitutional amendment proposed to authorize the particular discrimination viewed by the court to violate the principle of equality, even though the original intent was to maintain the discrimination. After the Iowa Supreme Court decided Coger, [80] a very controversial case at the time, there was no public response to amend the constitution to authorize the discrimination found to be unconstitutional by the court. Never in the history of our Iowa Constitution has the public responded to an Iowa Supreme Court decision that recognized the existence of a specific individual right under the constitutional umbrella of equality by adopting a constitutional amendment to remove the right. Iowa's history is also consistent with the history of our nation. [81] The Iowa Supreme Court has never led the public down a path of individual rights that it refused to go.

Even when the Iowa Supreme Court recognized same-sex marriage as a constitutional right in 2009, [82] the voters promptly rejected a referendum proposal in the 2010 election for a constitutional convention that would have allowed for a constitutional ban against same-sex marriage to be put before the voters. [83] Similarly, public opinion polls today show that 56% of Iowans now oppose any constitutional amendment to ban same-sex marriage. [84] Even when a new principle of equality has been applied in a ***1147** way that was greeted by the public with displeasure or surprise, Iowans have chosen the contemplative approach--an approach specifically identified by our Iowa Constitution, to make sure that amendments would be a product of serious reflection, not a reactive response. This history validates Iowa's belief in a living, breathing constitution and eliminates the underlying rationale for the theory of original intent. This history also shows the constitutional views expressed by the Iowa Supreme Court in recognizing rights since 1857 have been the views derived from the better understanding of the world achieved by society over time, and have been properly found by judges only after the understanding has been subjected to the scrutiny of a courtroom designed to allow the truth to be revealed. This process of constitutional interpretation does not rely on views of judges, but from facts identified by judges from the contemporary truth brought forth by individual Iowans.

But, as our forefathers discovered at the constitutional convention in 1857, the court's view of civil rights at a particular time will not always be compatible with the public view at the time. Likewise, the process does not mean the Iowa Supreme Court will always take the lead in the advancement of rights under its interpretive model. Nevertheless, the advancement necessarily continues.

In 1910, the Iowa Supreme Court held in a case that a statute prohibiting female pharmacists from dispensing alcoholic products did not violate the constitutional principle of equality, based on what it saw as an undeniable fact that there were simply some activities in life that men were better suited to do than women. [85] While the public did not react to the decision with a constitutional amendment, the statutory provision was subsequently repealed by the legislature after it was able to acquire a better understanding of equality and saw what the Iowa Supreme Court could not see or did not want to see. [86] Ironically, originalism is not only ***1148** contrary to the constitutional role of Iowa courts, it is contrary to the role of the legislature when it considers the constitutionality of its actions.

Importantly, the courts lay no exclusive jurisdiction over the interpretation of the constitution, but have always been a participant in the process-- sometimes the most important participant. In retrospect, the courts have performed their role in a way that, in the clear of the day, has always led to the discovery of the common will of the people.

I have focused on three events this afternoon from Iowa's history of our process of constitutional interpretation. These events, and many, many more, have allowed Iowa's constitution to endure and shape our lives today, even though it was written at a time when society could have had little understanding of life today. The interpretive model followed has allowed our constitution to simply be more precise today, something that was not possible when it was written because the understanding to give it

precision was absent, just as future generations will be able to make that claim about us, even as much as we might think that we are enlightened today. The truth is that this generation will too be eclipsed by the generation of tomorrow.

But, our history shows our forefathers in 1857 never intended the Iowa Constitution to have an immediate answer to our problems. As Chief Justice Marshall said, ours is "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." [87]

In the end, what our history tells us in a very clear way is that the interpretive authority of the court not only emanates from the tripartite structure of our constitutional government, but also from the acceptance of the public of the role of the courts throughout our history, even in those times when the courts' decisions have evoked controversy. Ultimately, the ***1149** court's power does not rest just in the constitution, but also with the public's acceptance of the courts to carefully and accurately sort through each controversy to draw out the true will of the people. Our history, every step of the way, shows the interpretive model used by the Iowa Supreme Court has accomplished this task, as the aftermath of Varnum [88] is now beginning to show us again today. It shows us as well that, in Iowa, we have a living constitution. Our Iowa constitutional process has not only opened the door to the public's increased understanding of marriage equality, it has opened the door to an understanding of how courts in Iowa assist in opening that door.

As the public's understanding of equality continues to grow in Iowa and across the nation, so too will the needed confidence and respect for the role of our courts and the interpretive approach used to allow the Iowa Constitution to breathe in today's understanding and advance the frontier of equality. This is the constitutional way of life in Iowa, and it has made all the difference, not only to who we are, but who we will become.

Footnotes

a1 Chief Justice, Iowa Supreme Court. J.D., Drake University Law School, 1978. Chief Justice Cady would like to thank his Judicial Law Clerk, Renner Walker, and his former Judicial Extern, Corey Longhurst, for their assistance in the preparation of these remarks.

1 Iowa Const. of 1857, available at http:// publications.iowa.gov/9996/1/iowa_constitution_1857002.pdf.

2 See Iowa Sec'y of State, Amendments to the Constitution of Iowa, Iowa Official Reg. (2000), available at http:// publications.iowa.gov/135/1/history/7-8.html (listing the first forty-six amendments to the Iowa Constitution). The forty-seventh amendment was added in 2008. See Iowa Const. art. II, § 5.

3 See An Act to Divide the Territory of Wisconsin and to Establish the Territorial Government of Iowa, ch. 96, 5 Stat. 235 (1838).

4 Benjamin F. Shambaugh, History of the Constitutions of Iowa 15, 17 (1902) [hereinafter Shambaugh, History].

5 See id. at 20-22.

6 See, e.g., Constitution and Records of the Claim Association of Johnson County (Iowa), art. III, § 10 (adopted Mar. 9, 1839), reprinted in Benjamin F. Shambaugh, Claim Association of Johnson County, Iowa 11 (1894) [[hereinafter Shambaugh, Claim Association] ("All trials or disputed cases shall be brought before the judicial Court ...."); id. at art. III, § 2, reprinted in Shambaugh, Claim Association, supra, at 9 (providing "[a]ny law or article of the constitution of this association may be altered at the semiannual meetings and at no other meetings provided however[,] that three fifths of the members [[present] who are resident citizens of the county and actual claim holders shall be in favour of such change or [amendment]"); Constitution of the Citizens of the North Fork of the Maquoketa, art. 11 (adopted Feb. 17, 1838), reprinted in The Constitution of the Citizens of the North Fork of Maquoketa, Iowa News (Mar. 28, 1838) ("When complaints shall be made to the [President] he shall immediately notify the sitting committee of three .... Then if said committee be satisfied that the opposing party has been timely notified, shall then proceed to investigate and try the case in dispute, receive evidence, and give their decision according to justice and equity.... That either party ... shall have a right to appeal to the Grand Committee, together with the President."); Manuscript Records of the Claim Club of Fort Dodge, Resolution

13th (adopted July 22, 1854), reprinted in Shambaugh, History, supra note 4, at 55 ("[A]ny or all of the [bylaws] may be altered or abolished by a majority vote at a regular meeting.").

7 See Bruce Kempkes, The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight, 42 Drake L. Rev. 593, 610-11 (1993) (describing early Iowans as prairie pioneers struggling to communicate, dealing with hostile American Indians and thieves, and adjusting to adverse environmental conditions).

8 See Shambaugh, History, supra note 4, at 26.

9 Id. at 27.

10 See An Act to Divide the Territory of Wisconsin and to Establish the Territorial Government of Iowa, ch. 96, § 12, 5 Stat. 235, 239 (1838). The text of the Organic Act of 1838 only provided, "[t]hat the inhabitants of the said Territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants." Id. The inhabitants of Wisconsin were similarly entitled to

the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the articles of the compact contained in the ordinance for the government of the said Territory, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven.

An Act Establishing the Territorial Government of Wisconsin, ch. 54, § 12, 5 Stat. 10, 15 (1836). Thus, the people of Iowa were given the political rights as secured in the Northwest Ordinance of 1787. See An Ordinance For the Government of the Territory of the United States Northwest of the River Ohio, art. 2 (1787) (including rights of habeas corpus, judicial proceedings according to the common law, and the right not to be deprived of liberty or property without the judgment of one's peers).

11 In re Ralph, 1 Iowa 1, 1 (1839).

12 Id. at 9-10 ("[I]t is proper that the laws, which should extend equal protection to men of all colors and conditions, should exert their remedial interposition."); see also Robert R. Dykstra, Bright Radical Star: Black Freedom and White Supremacy on the Hawkeye Frontier 9 (1993).

13 The Statute Laws of the Territory of Iowa: Enacted at the First Session of the Legislative Assembly of Said Territory, Held at Burlington, A. D. 1838-39, at 191 (The Historical Dep't of Iowa 1900) (1839) [hereinafter Statute Laws, 1838-39].

14 Id. at 199.

15 Id. at 352.

16 Id. at 404.

17 Laws of the Territory of Iowa, Enacted at the Session of the Legislature Commencing on the First Monday of November, A. D. 1839, at 42 (The Historical Dep't of Iowa 1902) (1840) [hereinafter Laws, 1839].

18 . See Dykstra, supra note 12, at 33-35.

19 At the 1844 Constitutional Convention of Iowa, the state narrowly escaped becoming the only free state to have a black exclusionary law when it rejected a provision "'to prevent the settlement of Blacks and Mulattoes in the state.'" Dykstra, supra note 12, at 59-61; see also Fragments of the Debates of the Iowa Constitutional Conventions of 1844 and 1846, at 66, 155-56 (Benjamin F. Shambaugh ed., 1900) [hereinafter Fragments of the Debates]. The constitution approved at the convention only allowed white men to vote, be members of the assembly, or be required to serve in the militia. See Iowa Const. of 1844, available at http://publications.iowa.gov/13339/1/1844ConstitutionIA.pdf. It also did not disrupt earlier legislation limiting public education to white citizens, prohibiting interracial marriage, and prohibiting blacks from witnessing in court. See id.; Statute Laws 1838-39, supra note 13, at 191 (limiting education); Statute Laws 1838-39, supra note 13, at 199 (restricting the vote); Statute Laws 1838-39, supra note 13, at 352 (restricting the militia); Statute Laws 1838-39, supra note 13, at 404 (prohibiting black persons from serving as witnesses); Laws, 1839, supra note 17, at 42 (prohibiting interracial marriage).

20 See Fragments of the Debates, supra note 19, at 66. The amendment to exclude blacks from the state was introduced at the 1844 convention by Edward Langworthy. Id. The delegates initially approved the amendment, but later rejected it. Id. at 66, 155-56.

21 See Dykstra, supra note 12, at 64-66, tbls.3.1 & 3.2. While Democrats favored "ordinary" laws restricting liberties of African Americans, the issue of exclusion split moderate Democrats from the racial conservatives who mounted exclusion legislation. Id. at 64-65. The majority of legislators who opposed exclusion joined the new Republican Party after 1856, while the majority of those who favored exclusion remained Democrats. Id. at 66, tbl.3.3.

22 See id. at 67.

23 . Dykstra, supra note 12, at 153.

24 George Ells, Chairman of the Committee on the Preamble and Bill of Rights, remarked that the committee wanted provisions in the Bill of Rights that "would enlarge, and not curtail the rights of the people," and wanted to "put upon record every guarantee that could be legitimately placed there in order that Iowa ... might ... have the best and most clearly defined Bill of Rights." 1 The Debates of the Constitutional Convention of the State of Iowa, Assembled at Iowa City, Monday, January 19, 1857, at 100 (Davenport, Iowa, Luse, Lane & Co. 1857) [hereinafter 1 The Debates].

25 . Id. at 101 (statement of George Ells, Chairman of the Committee of the Preamble and Bills of Rights).

26 2 The Debates of the Constitutional Convention of the State of Iowa, Assembled at Iowa City, Monday, January 19, 1857, at 653 (Davenport, Iowa, Luse, Lane & Co. 1857) [hereinafter 2 The Debates].

27 Id. at 734; see also Dykstra, supra note 12, at 155.

28 . See 2 The Debates, supra note 26, at 735.

29 Id. at 832-37.

30 . Id. at 825-29.

31 Id. Following the 1846 Iowa Constitutional Convention, the Iowa General Assembly had passed a law providing that the "school shall be open and free alike to all white persons in the district between the ages of five and twenty-one years." Act of Jan. 24, 1847, ch. 99, § 6, 1846 Iowa Acts 110-11.

32 See 2 The Debates, supra note 26, at 912-13.

33 Dykstra, supra note 12, at 178, tbl.9.1.

34 Id.

35 Id. at 229.

36 See Iowa Const. art. II, § 1 (restricting franchise to white males); id. at art. III, § 4 (restricting the ability to be a legislator to include only white males); id. at art. III, §§ 33-35 (restricting those counted for the state census and state senate and house apportionment to white inhabitants); id. at art. VI, § 3 (restricting the ability to serve in the military to include only white males).

37 See id. at art. I, § 1 ("All men are, by nature, free and equal, and have certain inalienable rights--among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."); id. at art. I, § 6 ("All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.").

38 . Dykstra, supra note 12, at 197; James I. Robertson, Jr., Iowa in the Civil War: A Reference Guide (1961).

39 . Dykstra, supra note 12, at 197-98.

40 3 Messages and Proclamations of the Governors of Iowa 80-87 (Benjamin F. Shambaugh ed., 1903); see also Dykstra, supra note 12, at 218-19.

41 . Dykstra, supra note 12, at 240-41.

42 . Id . at 241 tbl.12.1.

43 See Clark v. Bd. of Dirs., 24 Iowa 266, 268 (1868).

44 Id.

45 Id. at 277. In adopting the public school provision, the delegates to the Iowa Constitutional Convention seemed to understand that it would allow colored children to be educated in the same schools as white students only "where the whites are willing that the colored children should be educated in the same schools." 2 The Debates, supra note 26, at 836.

46 Clark, 24 Iowa at 273.

47 2 The Debates, supra note 26, at 825-37.

48 Clark, 24 Iowa at 269, 276-77. The court declared that it was "the principle of equal rights to all, upon which our government is founded." Id. at 269. On that principle, the court rejected the idea that children could be separated because of their skin color, nationality, or religion--"all the youths are equal before the law, and there is no discretion ... to interfere with or disturb that equality." Id. at 277. Segregation was not equal for the court because it would be a "plain violation of the spirit of our laws" and would "perpetuate the ... differences of our people and stimulate a constant strife." Id. at 276. The court reasoned that government was to organize people into a common humanity instead of separating them into a segregated humanity: "[I]t is the tendency of our institutions and policy of the government to organize into one harmonious people, with a common country and stimulated with the common purpose to perpetuate and spread our free institutions for the development, elevation, and happiness of mankind." Id.

49 Coger v. N. W. Union Packet Co., 37 Iowa 145, 147-48 (1873).

50 Id.

51 Id. at 153.

52 . Goodwin Liu et al., Keeping Faith with the Constitution 25-26 (2010).

53 See id.

54 See id.

55 Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

56 Id. at 473 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

57 Id. (quoting Weems, 217 U.S. at 373).

58 . Liu et al., supra note 52, at 25.

59 See id.

60 See id.

61 Thomas B. Colby & Peter J. Smith, Living Originalism, 59 Duke L.J. 239, 247-48 (2009).

62 See generally id. at 247-62 (discussing the development of originalism in American jurisprudence).

63 See id. at 243.

64 See id.

65 Clark v. Bd. of Dirs., 24 Iowa 266 (1868).

66 See 2 The Debates, supra note 26, at 825-37.

67 See Clark, 24 Iowa at 269, 274-77.

68 See id.; Dykstra, supra note 12, at 197-98.

69 Coger v. N. W. Union Packet Co., 37 Iowa 145 (1873).

70 See, e.g., 1 The Debates, supra note 24, at 1-644; 2 The Debates, supra note 26, at 645-1096.

71 See Coger, 37 Iowa, at 152-53.

72 Id. at 153.

73 Id.

74 See Richard B. Sanders, Battles for the State Constitution: A Dissenter's View, 37 Gonz. L. Rev. 1, 3 (2001-2002).

75 . 1 The Debates, supra note 24, at 100.

76 See Allen W. Vestal, To Soften Their Obdurate Hearts: The Southern Baptist Convention and Marriage Equality, 21 Tul. J.L. & Sexuality 49, 115-16 (2012).

77 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934).

78 See Colby & Smith, supra note 61, at 243.

79 Clark v. Bd. of Dirs., 24 Iowa 266 (1868).

80 Coger v. N. W. Union Packet Co., 37 Iowa 145 (1873).

81 Only four U.S. Supreme Court decisions have been overturned by a constitutional amendment. Robert A. Carp et al., Judicial Process in America 383 (8th ed. 2011). The Eleventh Amendment overturned Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (concerning suits against a state in federal court); the Thirteenth Amendment overturned Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (concerning the legality of slavery); the Sixteenth Amendment overturned Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (concerning the constitutionality of income tax); and the Twenty-Sixth Amendment overturned Oregon v. Mitchell, 400 U.S. 112 (1970) (granting eighteen-year-olds the right to vote in state elections).

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

83 See Iowa Sec'y of State, Official Results Report: Constitutional Amendment and Constitutional Convention Question (2010), available at http:// sos.iowa.gov/elections/pdf/2010/ballotquestionsorr.pdf.

84 William Petroski, Iowa Poll: Majority Opposes Ban on Same-Sex Marriage, Des Moines Reg. (Feb. 26, 2012, 11:08 PM), http:// www.desmoinesregister.com/article/20120227/NEWS09/302270022/Iowa-Poll-Majority-opposes-ban-same-sex-marriage.

85 See In re Carragher, 128 N.W. 352, 353-54 (Iowa 1910). Because the statute at issue in Carragher "'prohibit[ed] any person except a qualified elector from engaging in the sale of intoxicating liquors at retail,"' the case turned on the definition of "qualified elector." Id. at 352-53 (quoting 1909 Iowa Acts 140). Accordingly, the Carragher court relied on an interpretation of article II, section 1 of the Iowa Constitution limiting the right to vote to males, and a 1908 case that held the legislature could not alter the requirements to be an elector absent a constitutional amendment. See id. at 353-54 (citing Coggeshall v. Des Moines, 117 N.W. 309 (Iowa 1908)).

86 Overruling Carragher and Coggeshall proved difficult. In 1913, the Iowa General Assembly passed joint resolutions authorizing an amendment to the Iowa Constitution granting women the right to vote. See 1913 Iowa Acts 426, 431. The general assembly passed similar acts in 1915. See 1915 Iowa Acts 41-42, 254. The Iowa Constitution required that the amendment be submitted to a popular vote, however, where it failed 172,990 votes to 162,849 votes in 1916. Iowa Const. art. X, § 1; Iowa Official Register 1917-1918, at 481.

Undeterred, the Iowa General Assembly returned to action in 1917 and the senate passed another joint resolution, which again authorized an amendment to the Iowa Constitution granting women the right to vote. 1917 Iowa Acts 171-72. In 1919, the senate passed another joint resolution. 1919 Iowa Acts 116-17. Sensing the pendency of the Nineteenth Amendment, however, the Iowa General Assembly then simply amended Iowa's election statute to grant women the right to vote in all elections. See 1919 Iowa Acts 459-60 (codified at Iowa Code § 1173 (1921)) (granting women the right to vote in all elections).

87 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

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

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